THE DEAD HAND AND FROZEN LIVES: EMBRYONIC PERSONHOOD AND THE DISRUPTION OF PROPERTY INTERESTS

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Advances in assisted reproductive technology and the expansion of fetal personhood laws are colliding with a body of property doctrine built on assumptions about reproduction that no longer hold. In LePage v. Center for Reproductive Medicine, P.C.*, the Supreme Court of Alabama held that extrauterine embryos—fertilized and frozen in a laboratory—are "children" under the state's Wrongful Death of a Minor Act.* LePage *represents a dramatic extension of fetal personhood.*

This shift carries profound consequences for trusts and estates. If frozen embryos are treated as legal persons, they may qualify as heirs under intestacy statutes and as beneficiaries of wills, require the appointment of guardians ad litem to manage property on their behalf, and destabilize the rule against perpetuities (RAP). These outcomes threaten the core aims of property law—predictability and administrability.

With dozens of states adopting fetal personhood statutes or canons of construction that require courts to interpret laws in favor of "unborn life," the interpretive move in LePage *could soon migrate into probate codes, perpetuities statutes, and the construction of wills. The result would be a nationwide doctrinal shift binding estates to embryos that may never be born.*

To prevent this outcome, this Note proposes a doctrinal reframing of the centuries-old en ventre sa mère rule. Rather than treating a child born alive as alive since conception, property law should treat such a child as alive ten days before implantation in the womb. This biologically grounded reform restores the doctrine's original temporal limit, prevents the extension of legal life into decades-long cryopreservation, and preserves the function of inheritance law and the RAP. Coupled with standardized postmortem conception statutes and clearer consent requirements for the use of stored embryos, this approach protects the stability of property doctrine while acknowledging realities of modern reproduction.

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INTRODUCTION 2335

I. THE EVOLUTION OF FETAL PERSONHOOD MOVEMENTS AND PROPERTY LAW DOCTRINE 2337

A. Understanding Reproduction: Biology, Technology, and Law 2337

1. Reproductive Biology and Assisted Reproductive Technologies 2338

2. The Fetal Personhood Movement and Reproductive Law 2339

B. An Overview of Property Law Doctrine 2341

1. Property Rights and the Administration of Estates 2342

2. The Rule Against Perpetuities 2343

C. The Intersection of Property Law and Reproductive Law and Technology 2344

II. REPRODUCTIVE TECHNOLOGY AND PROPERTY LAW CLASH IN ALABAMA 2346

A. LePage v. Center for Reproductive Medicine 2347

B. LePage*'s Potential to Distort Property Law* 2348

1. Inheritance 2348

a. Advantages of Appointing a Guardian Ad Litem 2351

b. Drawbacks of Appointing a Guardian Ad Litem 2352

2. The Rule Against Perpetuities 2353

a. Risks to the RAP Even Without Recognizing Embryos as Lives in Being 2354

b. If Extrauterine Embryos Are Lives in Being, the RAP Collapses, Letting the Dead Hand Grip Forever 2358

III. REFRAMING THE RAP TO LIMIT THE REACH OF THE FETAL PERSONHOOD MOVEMENT 2361

A. The Present Legal Landscape Makes This Conflict All but Inevitable 2362

B. The En Ventre Sa Mère Doctrine Must Be Redefined 2365

1. Fetal Personhood Must Be Kept Out of Property and Trusts and Estates Law 2367

a. Extrauterine Embryos Should Not Be Entitled to Inherit 2368

b. Extrauterine Embryos Should Not Be Deemed Lives in Being 2371

2. Reforming and Standardizing Postmortem Conception Statutes 2372
CONCLUSION 2376

INTRODUCTION

On a quiet night in December 2020, a patient at an Alabama hospital slipped unnoticed into a neighboring fertility clinic.[1] Through a door meant to be secure, the patient entered the clinic's cryopreservation room, where thousands of frozen embryos (none of which belonged to the patient) were stored.[2] The patient opened one of the storage tanks, reached inside, and dropped vials of embryos to the floor, shattering them.[3] In an instant, the patient had destroyed years of careful planning and reproductive possibility.[4]

For the couples who had entrusted the clinic with their embryos, the loss was devastating.[5] For three of those couples—the LePages, Aysennes, and Fondes—their loss prompted them to sue the fertility clinic under Alabama's Wrongful Death of a Minor Act[6] (the "Act"), raising profound questions about how the law recognizes embryos in storage.[7]

The case turned on a remarkable question: should frozen embryos be considered "children" under Alabama's wrongful death statute?[8] When the dispute reached the Supreme Court of Alabama, the justices answered with sweeping clarity: the Wrongful Death of a Minor Act "applies to all unborn children, regardless of their location."[9]

Although the Alabama decision has obvious implications for reproductive rights, its ripple effects extend well beyond that domain.[10] Recognizing extrauterine embryos—embryos stored outside the womb—as legal persons unsettles foundational doctrines in property and trusts and estates law.[11] Property law traditionally relies on the lifespans of people alive at the time a gift or transfer is made to determine when and how future rights take effect.[12]

1. *See* Joshua Sharfstein, *The Alabama Supreme Court's Ruling on Frozen Embryos*, JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH (Feb. 27, 2024), https://publichealth.jhu.edu/2024/the-alabama-supreme-courts-ruling-on-frozen-embryos (on file with the *Fordham Law Review*).
2. *See id.*
3. *See id.*
4. *See id.*
5. *See id.*
6. ALA. CODE § 6-5-391 (2026).
7. *See generally* LePage v. Ctr. for Reprod. Med., P.C., 408 So. 3d 678 (Ala. 2024) (holding that embryos in storage are "children" for purposes of Alabama's Wrongful Death of a Minor Act).
8. *See id.* at 680.
9. *Id.*
10. *See infra* Part II.B.
11. *See infra* Part II.B.
12. *See* JESSE DUKEMINIER, JAMES E. KRIER, GREGORY S. ALEXANDER, MICHAEL S. SCHILL & LIOR JACOB STRAHILEVITZ, PROPERTY 379–80 (10th ed. 2022).

However, advances in reproductive technology and movements to expand legal recognition of the unborn[13] now create uncertainty about who is alive.[14]

For trusts and estates attorneys, *LePage v. Center for Reproductive Medicine, P.C.*[15] introduces a novel and unsettling challenge. If frozen embryos are treated as legal persons, practitioners must determine how these "lives" fit within frameworks governing inheritance and the rule against perpetuities (RAP). What begins as a doctrinal question quickly becomes one of justice: recognizing embryos as persons could disrupt donor and beneficiary expectations, unsettle estate plans, and generate new heirs whose claims compete with those of living family members.[16] These shifts raise questions about equitable distribution and threaten the predictability and fairness that property law intends to safeguard.[17]

Although Alabama provides a compelling case study as one state that has gone so far as to extend rights to extrauterine embryos, the concerns raised in this Note extend beyond the state.[18] The *LePage* decision did not arise in a vacuum; rather, it represents the culmination of a steady "creep" toward recognizing embryos and fetuses as legal persons in other states and in other legal contexts.[19] Several other states have enacted statutes formally recognizing embryonic personhood.[20] *Dobbs v. Jackson Women's Health Organization*[21] reinforced this movement at the federal level, inviting states to recognize protections for unborn life.[22]

This Note proceeds in three parts. Part I begins with an overview of reproductive biology and assisted reproductive technologies (ART). It then traces the evolution of the fetal personhood movement through pertinent case law before turning to foundational property law principles.

Part II examines the *LePage* decision. It then analyzes the implications of recognizing embryonic personhood on inheritance and the RAP, drawing on

13. *See* Anna Louie Sussman, *Are Embryos Property? Human Life? Neither?*, N.Y. TIMES (Apr. 8, 2025), https://www.nytimes.com/interactive/2025/04/08/opinion/embryos-court-custody-property.html (on file with the *Fordham Law Review*).

14. This Note does not address modern debates over what constitutes death (e.g., brain death versus cardiac death). Although those disputes also blur the boundaries of what it means to be "alive," this Note focuses on the other end of life—conception and birth.

15. 408 So. 3d 678 (Ala. 2024).

16. *See infra* Part II.B.

17. *See infra* Part II.B.

18. *See infra* Part III.A.

19. *See* Odette Yousef, *How 'Fetal Personhood' in Alabama's IVF Ruling Evolved from Fringe to Mainstream*, NPR (Mar. 14, 2024, at 05:01 ET), https://www.npr.org/2024/03/14/1238102768/fetal-personhood-alabama-ivf [https://perma.cc/M4CD-253A].

20. *See, e.g.*, LA. STAT. ANN. § 9:123 (2025) (defining an in vitro fertilized human ovum as "a juridical person"); GA. CODE ANN. § 1-2-1(e)(1) (2020) (defining "natural person" as "any human being including an unborn child"); ARIZ. REV. STAT. ANN. § 25-318.03 (2018) (directing courts to award custody of frozen embryos "in a manner that provides the best chance for the in vitro human embryos to develop to birth" and treating embryos as entities with a legally protected interest in being born); MO. REV. STAT. § 1.205(1) (2025) (defining life as beginning "at conception" and explaining that unborn children have "protectable interests in life, health, and well-being").

21. 142 S. Ct. 2228 (2022).

22. *See id.* at 2305 (returning authority to the states to regulate abortion).

both emerging case examples and plausible hypotheticals to illustrate potential benefits and significant drawbacks.

Lastly, Part III proposes several solutions to address the disruptions that embryonic personhood laws and reproductive technologies have on inheritance and the RAP. This Note proposes reframing the traditional en ventre sa mère doctrine, which posits that "[a] class member who is conceived but not yet born . . . at the time for distribution of a class gift is treated like a child in being."[23] This Note suggests reanchoring the operative moment to ten days before implantation in the womb instead of conception. This more precise and biologically grounded definition promotes consistency across property doctrines while preserving the underlying policy rationale that those rules seek to advance. Part III proposes further reforms to postmortem conception (PMC) statutes to standardize language, time frames, and consent.

I. THE EVOLUTION OF FETAL PERSONHOOD MOVEMENTS AND PROPERTY LAW DOCTRINE

Reproductive law and property law have developed in parallel for centuries, with little interaction or mutual influence. In many instances, property law evolved on assumptions that were inconsistent with principles of reproductive law.[24] Understanding how these fields developed in isolation is essential to showing how their intersection today generates doctrinal uncertainty and unforeseen consequences.

A. Understanding Reproduction: Biology, Technology, and Law

A battle over reproductive rights is unfolding throughout the United States, with the fetal personhood movement ever growing.[25] Fetal personhood laws refer to a "category of laws that grant legal protection to unborn persons."[26] Part I.A lays the scientific and legal groundwork for this Note by outlining key concepts in reproductive biology and the development of ARTs.[27] It concludes by tracing the rise of the fetal personhood movement through key case law.[28]

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23. 34 M.L.P. 2D WILLS AND ESTATE ADMINISTRATION § 214 (2d ed. 2025); 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 129 (1765).

24. Specifically, at common law, property law adopted the principle that life begins at conception for limited purposes—namely, to protect the property interests of a child en ventre sa mère ("in its mother's womb"). *See* BLACKSTONE, *supra* note 23, at 125–26; *En Ventre Sa Mere*, L. DICTIONARY, https://thelawdictionary.org/en-ventre-sa-mere/ [https://perma.cc/E6ZZ-ZAKC] (last visited Feb. 28, 2026).

25. Yousef, *supra* note 19.

26. Johanna Hussain, *The Legal Consequences of the Fetal Personhood Movement*, CORN. J.L. & PUB. POL'Y (Mar. 4, 2025), https://publications.lawschool.cornell.edu/jlpp/2025/03/04/legal-consequences-of-the-fetal-personhood-movement/ [https://perma.cc/93KP-UWVM].

27. *See infra* Part I.A.1.

28. *See infra* Part I.A.2.

1. Reproductive Biology and Assisted Reproductive Technologies

Understanding fetal personhood requires a brief overview of embryonic and fetal development. The embryonic stage of development spans from week three[29] to week eight of pregnancy.[30] In this stage, the embryo does not resemble a human form and cannot survive on its own outside of the womb.[31] The period from the tenth week of pregnancy until birth is considered the fetal stage and is where the most development occurs.[32] At about twenty-four weeks, the fetus may survive on its own outside of the womb with the help of significant medical care.[33] This ability to survive outside of the womb is called viability.[34]

Although this developmental process occurs naturally for millions of people, modern technology permits the replication of reproduction through the use of ART.[35] ART is defined as any fertility-related treatment in which eggs or embryos are treated in a lab.[36] ART helps individuals become pregnant who have difficulty doing so naturally.[37] In vitro fertilization (IVF)—the process of fertilizing an egg outside of the body and then implanting the fertilized embryo into a uterus to develop[38]—is the most common form of ART.[39] Embryos that are fertilized through IVF but not implanted can be cryopreserved—stored in subfreezing temperatures to preserve their viability.[40] IVF, once rare, is now a routine method of reproduction.[41]

29. The first three weeks are known as the germinal stage, which begins at conception and is characterized by rapid cell division as the embryo forms. *See Fetal Development*, CLEV. CLINIC (Mar. 19, 2024), https://my.clevelandclinic.org/health/articles/7247-fetal-development-stages-of-growth [https://perma.cc/5C7H-YJJG].

30. *See id.*

31. *See* Laurie Ray, *What Is the Difference Between an Embryo, a Fetus, and a Baby?*, CLUE (Aug. 26, 2021), https://helloclue.com/articles/pregnancy-birth-and-postpartum/what-is-the-difference-between-an-embryo-a-fetus-and-a-baby [https://perma.cc/G24K-WTEA].

32. *See id.*

33. *See id.*

34. *See id.*

35. *See generally* MEAGHAN JAIN, ELISA FANG & MANVINDER SINGH, ASSISTED REPRODUCTIVE TECHNOLOGY (ART) TECHNIQUES (2025).

36. *See generally id.*

37. *See generally id.*

38. *See generally id.*

39. *See* Amanda M. Eskew & Emily S. Jungheim, *A History of Developments to Improve In Vitro Fertilization*, 114 MISS. MED. 156, 156 (2017).

40. *See generally* JAIN, FANG & SINGH, *supra* note 35.

41. *See History of IVF: Origin and Developments of the 20th Century*, PAC. FERTILITY CTR. L.A. (July 25, 2022), https://www.pfcla.com/blog/history-of-ivf [https://perma.cc/XCM5-PTW9].

2. The Fetal Personhood Movement and Reproductive Law

The fetal personhood movement is grounded in the ideology that embryos and fetuses are unborn persons.[42] Professors John Miklavcic and Paul Flaman identify two competing hypotheses about when life begins.[43] The first hypothesis is that "a human being has existed since fertilization," with personhood being inherent in a human at all stages of development.[44] The second hypothesis is that a developing zygote[45] becomes a human person at some point after fertilization.[46] Proponents of the fetal personhood movement subscribe to the first view, asserting that the unborn, at any stage of development, should be afforded the same rights and protections as born persons.[47]

The debate over fetal personhood was presented in front of the U.S. Supreme Court in the landmark decision *Roe v. Wade*.[48] In a challenge against a Texas statute criminalizing abortion, the Court rejected Texas's argument that a fetus is a "person" within the meaning of the Fourteenth Amendment and held that the abortion ban violated the Due Process Clause, which protects a woman's right to privacy.[49] This case broadly affirmed the right to an abortion and explicitly rejected the argument that fetuses are persons.[50]

However, *Roe* did not settle the debate; it arguably impassioned the fetal personhood movement.[51] Shortly after *Roe*, advocates attempted to amend the U.S. Constitution to add a "Human Life Amendment" conferring personhood from conception; these efforts failed.[52] In response to the federal failure, the fetal personhood movement shifted its focus to state law.[53] Over time, states adopted—and courts upheld—their own fetal personhood laws.[54]

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42. Hussain, *supra* note 26.

43. *See* John Janez Miklavcic & Paul Flaman, *Personhood Status of the Human Zygote, Embryo, Fetus*, 84 LINACRE Q. 130, 130 (2017).

44. *Id.*

45. A zygote is a fertilized egg cell. *See Zygote*, BRITANNICA, https://www.britannica.com/science/zygote [https://perma.cc/6HN9-8B8R] (last visited Feb. 21, 2026).

46. Miklavcic & Flaman, *supra* note 43, at 130–31.

47. Hussain, *supra* note 26.

48. 410 U.S. 113 (1973), *overruled by*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

49. *See id.* at 164.

50. *See id.*

51. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), *overruled by*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022), Justice Antonin Scalia pointed out in his dissent that *Roe* was a turning point in inflaming national politics on the issue and disrupting the possibility of compromise. *Id.* at 995–96 (Scalia, J., dissenting).

52. *See Legal Fetal Personhood Timeline*, LEGAL VOICE, https://legalvoice.org/legal-fetal-personhood-timeline/ [https://perma.cc/CA7W-8VXJ] (last visited Feb. 4, 2026).

53. *See id.*

54. Minnesota became the first state to enact a "fetal homicide" law, framed as providing additional protection for pregnant people. MINN. STAT. §§ 609.266–.268 (2025). North Dakota soon followed with a similar statute. N.D. CENT. CODE §§ 12.1-17.1-01 to 12.1-17.1-04 (2025). The Supreme Court of South Carolina held that pregnant people may be

By the 1980s, many states amended their constitutions[55] to declare policy in favor of unborn life.[56]

In 1992, the debate returned to the Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[57] There, the Court reaffirmed the central holding of *Roe*, defining viability as the point at which "there is a realistic possibility" of maintaining a life outside the womb.[58]

The turn of the millennium saw further legal expansions of personhood in criminal law. In 2004, Congress passed the Unborn Victims of Violence Act,[59] making it a federal crime to harm a fetus while inflicting violence against a pregnant person.[60] Meanwhile, states increased prosecutorial pressure: Tennessee criminalized narcotics use during pregnancy,[61] and courts in Alabama began prosecuting pregnant people under child endangerment laws by treating in utero embryos as children.[62]

Despite these movements in state criminal law, the status of abortion on the federal level had been settled for thirty years.[63] That all changed in 2022: in *Dobbs*, the Court overturned *Roe* and *Casey*.[64] The Court held that the Constitution does not confer a right to abortion and therefore states could regulate or ban it.[65] The decision also squarely recognized a fetus as an "unborn human being" and noted that "respect for and preservation of prenatal life at all stages of development" was a legitimate state interest.[66]

Post-*Dobbs*, fetal personhood laws have expanded rapidly across all areas of law.[67] Criminal law has historically recognized the fetus as a separate legal entity; thirty-eight states have feticide laws authorizing homicide

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prosecuted under criminal child abuse and endangerment laws for conduct during pregnancy. *See* Whitner v. State, 492 S.E.2d 777, 780–81 (S.C. 1997).

55. In 1988, Arkansas passed an amendment to its state constitution providing that it is the public policy of the state to "protect the life of every unborn child from conception until birth." ARK. CONST. amend. 68, § 2. Alabama, Arizona, Georgia, Kansas, Kentucky, Missouri, Montana, Pennsylvania, Tennessee, and Utah have since followed suit. *See* PREGNANCY JUST., WHEN FETUSES GAIN PERSONHOOD: UNDERSTANDING THE IMPACT ON IVF, CONTRACEPTION, MEDICAL TREATMENT, CRIMINAL LAW, CHILD SUPPORT, AND BEYOND 4 (2022).

56. LEGAL VOICE, *supra* note 52.

57. 505 U.S. 833 (1992), *overruled by*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

58. *Id.* at 870.

59. 18 U.S.C. § 1841.

60. *Id*.

61. LEGAL VOICE, *supra* note 52.

62. *See* Casey Hunter, Note, *When Prenatal Care Becomes a Crime*, 93 FORDHAM L. REV. 2273, 2284 (2025).

63. *See generally* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (affirming the right to abortion as established in *Roe*), *overruled by*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

64. *See generally* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (overruling *Roe* and *Casey* and holding that states have the right to restrict or ban abortion in any way they see fit given the legitimate interest in protecting fetal life).

65. *See id.* at 2243.

66. *Id.* at 2284.

67. Yousef, *supra* note 19.

charges for causing the loss of a pregnancy, for example.[68] But now, the movement has migrated into the civil context. Seven states now have statutes declaring that, as a general matter, "a child conceived, but not yet born, is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth."[69] The broadest personhood recognition exists in the eleven states[70] that have codified a general rule of construction for statutory interpretation, establishing a statewide policy for protecting unborn life.[71] According to Odette Yousef, the expansion of the fetal personhood movement into other areas of the law is a "sleeping threat that lingers" in these states.[72] The explosion of fetal personhood laws can be expected to continue across the country: lawmakers on both the state and federal levels have already proposed measures granting embryos or fetuses rights and protections typically ascribed to born persons,[73] ranging from income tax deductions[74] to retroactive claims for child support.[75]

B. An Overview of Property Law Doctrine

This Note explores the intersection of embryonic personhood with inheritance and the RAP, property law doctrines that govern who can inherit and how. Common-law property doctrine has developed a legal construction that a child born alive is treated as if they have been alive since conception for purposes of inheritance and the RAP.[76] It has developed in this way for the limited purpose of protecting the property interests of a child en ventre sa mère, meaning "in the mother's womb."[77] Under this rule, a legal personality

68. These states include Alabama, Alaska, Arizona, Arkansas, California, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. *See Legal Landscape*, PREGNANCY JUST., https://www.pregnancyjusticeus.org/legal-landscape/ [https://perma.cc/Z94J-2DDQ] (last visited Feb. 11, 2026).

69. PREGNANCY JUST., *supra* note 55, at 4.

70. *See supra* note 55 and accompanying text.

71. PREGNANCY JUST., *supra* note 55, at 4.

72. Yousef, *supra* note 19.

73. *See* Tonya Mosley, *Abortion Opponents Push for 'Fetal Personhood' Laws, Giving Rights to Embryos*, NPR (Apr. 4, 2024, at 15:12 ET), https://www.npr.org/2024/04/04/1242774406/abortion-opponents-push-for-fetal-personhood-laws-giving-rights-to-embryos [https://perma.cc/GN72-ADT6].

74. *See* Press Release, Blake Moore, Congressman, House of Reps., Congressman Blake Moore Introduces Legislation to Enhance the Child Tax Credit and Provide Tax Relief for Parents (Jan. 13, 2025), https://blakemoore.house.gov/media/press-releases/congressman-blake-moore-introduces-legislation-to-enhance-the-child-tax-credit-and-provide-tax-relief-for-parents [https://perma.cc/JGQ3-QWU6].

75. *See* Carter Sherman, *Kentucky Senate Passes Bill Granting Right to Collect Child Support for Fetuses*, GUARDIAN (Mar. 6, 2024, at 10:28 EST), https://www.theguardian.com/us-news/2024/mar/06/kentucky-senate-child-support-unborn-children [https://perma.cc/RTB5-2UEQ].

76. *See* BLACKSTONE, *supra* note 23, at 125–29; M.L.P. 2D WILLS AND ESTATE ADMINISTRATION, *supra* note 23, § 214; 42 AM. JUR. 2D *Infants* § 3 (2025) [hereinafter *Infants*].

77. L. DICTIONARY, *supra* note 24 (defining en ventre sa mère).

is imputed to an unborn child, but only insofar as it benefits the child after birth.[78] Courts reasoned that a child capable of stirring in the womb may "have a legacy, own an estate, and have a guardian appointed."[79] Part I.B proceeds in two parts: it first outlines the nature of property rights and the basics of inheritance before turning to the notoriously complex RAP.

1. Property Rights and the Administration of Estates

Property, although often thought of as a plot of land or physical item, is not a single, fixed thing—it is best understood as a bundle of rights.[80] Property rights entail a collection of legal entitlements in relation to a thing, such as the right to possess, the right to use, the right to exclude, and the right to transfer.[81]

One of the most fundamental rights in property law is the right to inherit.[82] When someone dies, one generally expects that a will governs how their property shall be distributed, or, if no will exists, that the law of intestacy determines where their estate will go.[83] Intestacy law, codified in state statutes, sets forth the rules that estate administrators must follow when distributing a decedent's property in the absence of a will.[84] Typically, the estate passes to the surviving spouse and, if there is none, to the decedent's living issue (i.e., children and grandchildren).[85]

If a will is in place, however, the administrator of the estate carries out its instructions.[86] For example, if the will says, "my house to my daughter, Kim," the administrator must transfer ownership of the house to Kim. But what happens when the named beneficiary cannot yet take possession of the property? Suppose instead that the will provided, "to my child, Charlie," and Charlie is only three years old at the time of the testator's death. Charlie cannot manage or physically take possession of the house.[87] Still, he retains the legal right to inherit—it is simply deferred until he reaches maturity, usually eighteen years of age.[88] In the meantime, the property interest would be safeguarded by a guardian or trustee acting on Charlie's behalf.[89] A trustee manages and distributes assets to the minor beneficiary in accordance

78. *See Infants*, *supra* note 76, § 3.
79. Tucker v. Howard L. Carmichael & Sons, Inc., 65 S.E.2d 909, 910 (Ga. 1951).
80. *See* DUKEMINIER ET AL., *supra* note 12, at 186.
81. *See id.*
82. *See id.*
83. *See id.*
84. *See id.*
85. *See id.*
86. *See id.*
87. "If a minor has a substantial amount of money or property, the court may appoint a financial guardian, or guardian of the estate, to manage and protect the minor's assets." *Guardianships of Minor, Elderly, and Incapacitated Persons Under the Law*, JUSTIA, https://www.justia.com/estate-planning/guardianships-conservatorships/ [https://perma.cc/K52B-AQ36] (last visited Feb. 21, 2026).
88. *See id.*
89. *See id.*

with an estate document's terms, and if the estate documents are silent, courts may appoint a guardian owing fiduciary duties to the minor beneficiary.[90]

2. The Rule Against Perpetuities

The RAP developed within the common law to achieve several goals, foremost among them, the orderly and timely administration of estates.[91] Even with careful planning, attempts to control wealth or property across generations are often undermined by unforeseen circumstances, including rapid technological and societal change.[92] The law recognizes this and thus disfavors excessive "dead hand" control—tying up wealth or property for long periods in ways that limit the freedom of future generations.[93] The law therefore limits the ability of one generation (i.e., the dead hand) to dictate the financial and property arrangements of those alive or not yet born.[94] One way the law does so is through the RAP.[95]

At common law, the RAP states that "no interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."[96] For an interest to vest, the right to specific real property must reach an individual within twenty-one years of a measuring life in being; otherwise, the RAP voids the interest upon creation.[97]

A life in being refers to an "individual[] who [is] alive at the time that a piece of real property is conveyed."[98] These lives can serve as the measuring lives for the grant, meaning that the RAP is satisfied so long as the interest vests within twenty-one years after the end of one of those lives—even if that person is not the recipient of the interest.[99] The RAP is a rule of "logical possibility"—if the people whose lives determine vesting are alive, the law assumes they can perform any act a living person could, such as having children at advanced ages or marrying individuals not yet born when the gift

90. *See id.* "When someone has a fiduciary duty to someone else, the person with the duty must act in a way that will benefit someone else financially." *Fiduciary Duty*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/fiduciary_duty [https://perma.cc/MQ84-Z4WD] (last visited Feb. 15, 2026).

91. *See* Sharona Hoffman & Andrew P. Morriss, *Birth After Death: Perpetuities and the New Reproductive Technologies*, 38 GA. L. REV. 575, 579–80 (2004).

92. "Wealth is unlikely to traverse succession to a third generation of wealth owner, with 70% of intergenerational wealth transfers failing." François Botha, *Approaching Wealth Transfer Need Not Be Risky Business*, FORBES (May 12, 2024), https://www.forbes.com/sites/francoisbotha/2024/05/12/approaching-wealth-transfer-need-not-be-risky-business/ (on file with the *Fordham Law Review*).

93. *See Deadhand Control*, LEGAL INFO. INST. (Feb. 2022), https://www.law.cornell.edu/wex/deadhand_control [https://perma.cc/YNF6-GFAU].

94. Hoffman & Morriss, *supra* note 91, at 581 n.33.

95. *See id.* at 581 n.34.

96. JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES 174 (4th ed. 1942).

97. *See Rule Against Perpetuities*, LEGAL INFO. INST. (Apr. 2024), https://www.law.cornell.edu/wex/rule_against_perpetuities [https://perma.cc/9DFQ-UND6].

98. *See Lives in Being*, LEGAL INFO. INST. (June 2023), https://www.law.cornell.edu/wex/lives_in_being [https://perma.cc/5N6E-87YK].

99. *See id.*

was made.[100] Using human life as the measuring point creates a fixed horizon, ensuring that property and wealth are not tied up indefinitely.[101] The twenty-one-year period provides a concrete cutoff to balance flexibility and certainty.[102]

To better understand the RAP, consider this example: "to Alex for life, then to such of Alex's children that attain the age of twenty-one." Here, Alex is the measuring life. Because all of Alex's children must reach twenty-one within twenty-one years of Alex's death, the interest is certain to vest (or not vest), making the grant valid under the RAP.[103] Now change the language slightly: "to Alex for life, then to such of Alex's children that attain the age of twenty-five." This time, the gift may not vest within the required period. If Alex dies tomorrow, leaving behind a one-year-old child, that child will not reach twenty-*five* within twenty-*one* years of Alex's death. As a result, the gift violates the RAP and is void upon creation.[104]

Courts and legislatures have developed several methods to reform or avoid the harsh effects of the common-law RAP.[105] One such reform is the cy pres doctrine, which allows courts to immediately reform a transfer to avoid perpetuities violations.[106] A related but distinct approach is the "wait and see" doctrine.[107] Rather than invalidating an interest at the moment of creation based on what might happen, courts wait to see whether the contingent interest actually vests within the permissible vesting period.[108] The "wait and see" principle has been codified and expanded in over twenty-five jurisdictions[109] through the Uniform Statutory Rule Against Perpetuities[110] (USRAP), which adopts a flat ninety-year vesting period.[111] Finally, in about a quarter of U.S. states, legislatures have abolished the RAP entirely, allowing property to be tied up indefinitely.[112]

C. The Intersection of Property Law and Reproductive Law and Technology

The intersection of the fetal personhood movement and property law has already come to a head in the context of extrauterine embryos stored in fertility clinics. The legal status of extrauterine embryos remains unsettled

100. Hoffman & Morriss, *supra* note 91, at 578.
101. DUKEMINIER ET AL., *supra* note 12, at 355–56.
102. *See id.*
103. This simplified version of the RAP assumes that the parties will not have "after-born" children and that ART will not complicate the interest. *See infra* Part II.B.2.
104. DUKEMINIER ET AL., *supra* note 12, at 356.
105. *See id.* at 379–86.
106. *See id.* at 380–81.
107. *See id.* at 381.
108. *See id.*
109. *See* 10 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 75 (Michael Allan Wolf ed., 2000) (surveying current perpetuities law in the United States).
110. UNIF. STATUTORY RULE AGAINST PERPETUITIES (UNIF. L. COMM'N 1990).
111. DUKEMINIER ET AL., *supra* note 12, at 381–83.
112. *See id.* at 384–86.

at the federal level, and states have addressed the issue piecemeal.[113] This question most frequently arises in divorce and marital property disputes: are embryos property, to be treated like other marital assets, or are they legal persons?[114]

One of the earliest and most influential cases on this issue arose in Tennessee in 1992, when a divorcing couple disagreed over the fate of their remaining embryos.[115] The Tennessee Supreme Court concluded that embryos "are not, strictly speaking, either 'persons' or 'property,' but occupy an interim category that entitles them to special respect because of their potential for human life."[116] The court ultimately sided with the husband, who wished to destroy the frozen embryos.[117] Since then, most courts have held similarly, favoring the parent who does not wish to assume parenthood and allowing for the destruction of embryos.[118] However, this principle has been challenged: in 2018, Arizona passed legislation requiring judges to award disputed embryos to the spouse who intends to allow the embryos to develop to birth.[119]

This is one way in which property law becomes relevant to extrauterine embryos, but it is far from the only way.[120] Professor Bridget J. Crawford and her coauthors, Alexis C. Borders and Katherine Keating, identified a few of these issues.[121] With respect to inheritance, fetuses could inherit as if fully born, complicating the identification of heirs.[122] Extrauterine embryos could also impact trust administration and circumvent the RAP, allowing trusts to continue indefinitely.[123] When reproductive law and property law intersect, the potential for conflict grows.

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113. Sussman, *supra* note 13.

114. *See id.*

115. *See generally* Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992) (holding that the interest of one party in not becoming a parent outweighed the interest of the other who wished to donate the embryos to other persons).

116. *Id.* at 597; *cf.* Ela A. Leshem, *Law's Shifting Circles*, 144 GEO. L.J. (forthcoming 2026) (arguing that historical personhood debates support an intermediate legal status—"epipersonhood"—for entities such as fetuses); Ela A. Leshem, *Dead Bodies as Quasi-Persons*, 77 VAND. L. REV. 999, 1003–06 (2024) (arguing that U.S. law treats dead bodies as quasi-persons—entities between persons and property—possessing legally protected dignity interests).

117. *See Davis*, 842 S.W.2d at 598, 604–05.

118. *See* Sussman, *supra* note 13.

119. ARIZ. REV. STAT. ANN. § 25-318.03 (2025).

120. *See generally* Bridget J. Crawford, Alexis C. Borders & Katherine Keating, *Unintended Consequences of Fetal Personhood Statutes: Examples from Tax, Trusts, and Estates*, 25 GEO. J. GENDER & L. 1159 (2024) (interrogating how fetal personhood statutes have the potential to destabilize longstanding legal doctrines that otherwise create predictability and stability in the laws of taxation and succession).

121. *See generally id.* Although there is some overlap between Professor Crawford's article and this Note—particularly in recognizing that fetal personhood could affect property law—the article's analysis is broad and exploratory. The article raises important questions but does not delve into the emerging case law or offer concrete answers. As such, the article functions primarily as background, illustrating the potential implications of fetal personhood statutes post-*Dobbs*.

122. *See id.* at 1177–80.

123. *See id.* at 1181–82.

II. REPRODUCTIVE TECHNOLOGY AND PROPERTY LAW CLASH IN ALABAMA

The law has long grappled with the intersection of reproduction, technology, and property.[124] Statutes and judicial decisions dating back to the nineteenth century recognized the legal status of the unborn and sought to regulate it.[125] Yet these laws almost uniformly assumed a narrow biological context: a fetus in utero, expected to be born within months.[126] Doctrines such as the RAP and statutes creating guardianships for the unborn were written with that model in mind.[127] Prior legal frameworks reflected the technology of the past: short reproductive cycles, limited technological intervention, and predictable timelines.[128] Within those assumptions, property law's central policy goal—ensuring the timely and orderly administration of estates—remained workable.[129]

Two developments have upended that equilibrium. First, *LePage v. Center for Reproductive Medicine* extended legal protections traditionally reserved for in utero fetuses to extrauterine embryos.[130] By holding that embryos in storage are unborn children entitled to the same rights as fetuses, and even living children, *LePage* fundamentally redefined the scope of statutes dealing with inheritance, guardianships, and the RAP.[131]

Second, advances in ART have radically expanded the timeline of reproduction.[132] Cryopreservation techniques now allow embryos to be stored and used decades after fertilization.[133] In July 2025, a child was born from an embryo that was frozen for thirty years—the longest case on record.[134] What was once a hypothetical concern has become a reality: embryos created today may not be born for decades.[135]

Statutes governing the rights of unborn beneficiaries were not drafted with extrauterine embryos or decades-long reproductive timelines in mind.[136] As a result, doctrines once sufficient to ensure orderly estate administration may

124. *See supra* Parts I.A.2, I.B.
125. *See supra* Parts I.A.2, I.B.
126. *See supra* Parts I.A.2, I.B.
127. *See* 3 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 30.06 (Michael Allan Wolf ed., 2025) ("Under modern advances in medical technology, it is now possible to conceive children by means other than sexual intercourse, such as artificial insemination. Earlier sources of law, such as the first Restatement of Property did not address such issues.").
128. *See id.*
129. *See id.*
130. *See* LePage v. Ctr. for Reprod. Med., P.C., 408 So. 3d 678, 683–86 (Ala. 2024).
131. *See id.*
132. *See supra* Part I.A.1.
133. *See* Jessica Hamzelou, *Exclusive: A Record-Breaking Baby Has Been Born from an Embryo That's Over 30 Years Old*, MIT TECH. REV. (July 29, 2025), https://www.technologyreview.com/2025/07/29/1120769/exclusive-record-breaking-baby-born-embryo-over-30-years-old/ (on file with the *Fordham Law Review*).
134. *See id.*
135. *See id.*
136. *See supra* Part I.A.1.

no longer function as intended.[137] Left unreformed, these developments may undermine the orderly transfer of wealth across generations.[138]

Part II proceeds in two sections. Part II.A delves into the *LePage* case, and Part II.B examines the implications of *LePage* on property law. Specifically, Part II.B.1 considers the implications of interpreting intestacy statutes and wills to allow extrauterine embryos to inherit. Part II.B.2 then addresses whether embryos qualify as lives in being for purposes of the RAP and analyzes the consequences if they do (or do not).

A. LePage v. Center for Reproductive Medicine

In *LePage*, the plaintiffs—three sets of expecting parents—sued the Center for Reproductive Medicine, an IVF clinic in Alabama, for the destruction of their frozen embryos.[139] The Supreme Court of Alabama has long held that unborn children in utero are children for purposes of Alabama's Wrongful Death of a Minor Act.[140] In this case, the question before the court was whether the Act contains an exception to that rule for *extra*uterine embryos.[141] The court held that it does not: the Act applies to all unborn children regardless of location.[142]

To answer this question, the justices turned to statutory interpretation to determine what "child" meant, employing a textualist approach.[143] The Act itself does not define "child," so Justice Jay Mitchell, writing for the majority, turned to precedent.[144] In *Mack v. Carmack*,[145] the Supreme Court of Alabama ruled that an unborn child qualifies as a minor child under the Act regardless of viability.[146] The court posited that there is no difference between embryos outside the uterus and a fetus inside the uterus, citing *Dobbs* in recognizing the unborn embryo as a person with rights and interests.[147]

The court ruled that the text is clear and unambiguous but stated that, even if the word "child" was ambiguous, the Alabama Constitution necessitates the same outcome based on an entrenched canon of construction.[148] The "sanctity of unborn life"[149] provision in the Alabama Constitution requires

137. *See infra* Part II.B.
138. *See infra* Part II.B.
139. *See* LePage v. Ctr. for Reprod. Med., P.C., 408 So. 3d 678, 680 (Ala. 2024).
140. *See id.*
141. *See id.*
142. *See id.*
143. *See id.* at 683–84.
144. *See id.*
145. 79 So. 3d 597 (Ala. 2011).
146. *See id.* at 611 (holding that the Wrongful Death Act permits an action for the death of a previable in utero fetus). *See generally* Hamilton v. Scott, 97 So. 3d 728 (Ala. 2012).
147. *See LePage*, 408 So. 3d at 685 (citing Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022)).
148. *See id.* at 685.
149. ALA. CONST. art. I, § 36.06(a).

courts to construe ambiguous statutes to protect the rights of unborn and born children equally.[150]

The court next addressed the defendants' policy argument that recognizing extrauterine embryos as children for purposes of wrongful death liability would substantially increase the cost of IVF in Alabama.[151] The court declined to credit these concerns, explaining that such policy-driven arguments are properly directed to the legislature.[152] The court noted that it is not their role to create new limitations on public policy—particularly where, as here, the people of Alabama have amended their constitution to ensure the protection of "unborn life."[153]

The defendants' concerns about a detrimental effect on IVF services materialized immediately.[154] Because Alabama IVF providers now assumed potential liability for the "lives" of embryos in their care,[155] several clinics suspended operations and some ultimately closed permanently.[156] According to Professors Clare Ryan and Benjamin McMichael, "*LePage* 'imperil[ed]' IVF in Alabama."[157]

B. LePage*'s Potential to Distort Property Law*

This section considers how *LePage*'s holding applies to two foundational property law doctrines: inheritance and the RAP.

1. Inheritance

LePage turns on statutory interpretation—what does the word "child" mean in Alabama's wrongful death statute?[158] This section considers what would happen if the Alabama court interpreted an intestacy statute—or even a will—pursuant to *LePage*. Would they read the words "child," "issue," or "heir" to include an extrauterine embryo? And if they did, how would that affect the administration of the estate?

LePage's statutory interpretation logic may apply to the interpretation of intestacy statutes. Alabama's intestacy statute provides that when a decedent dies without a will, the portion of the estate not passing to a surviving spouse

150. *See LePage*, 408 So. 3d at 685.
151. *See id.* at 687–88.
152. *See id.*
153. *See id.*
154. *See* Clare Ryan & Benjamin J. McMichael, *The Future of Frozen Embryos*, 78 SMU L. REV. 789, 806–08 (2025).
155. *See id.* at 806.
156. *See id.*
157. *See id.* (alteration in original) (quoting Dan Rosenzweig-Ziff, *Alabama Supreme Court Rules Frozen Embryos Are Children, Imperiling IVF*, WASH. POST (Feb. 20, 2024), https://www.washingtonpost.com/politics/2024/02/19/alabama-supreme-court-embryos-children-ivf/ (on file with the *Fordham Law Review*)). In response, the Alabama legislature enacted a bill granting broad immunity to IVF providers, aiming to halt the surge of litigation against clinics. *See* S.B. 159, 2024 Leg., Reg. Sess. (Ala. 2024). Notably, this law did not overrule the *LePage* decision. *See* Ryan & McMichael, *supra* note 154, at 808.
158. *See supra* Part II.A.

passes "to the issue of the decedent."[159] Under Alabama's code, "issue" means all "lineal descendants of all generations."[160] The state defines "child" as including "any individual entitled to take as a child under this chapter by intestate succession."[161] This circular framework leaves unresolved whether the term could encompass unborn children, particularly in light of *LePage*, which emphasized that nothing "narrows that definition to unborn children who are physically 'in utero.'"[162] As Carole Bass and Cara Koss observe, the same reasoning may extend to the definition of "child" for purposes of Alabama's intestate succession laws.[163]

A child en ventre sa mère has long been entitled to inherit under the law.[164] The prevailing rule in American courts is well summarized in *In re Estate of Holthausen*,[165] where a New York court observed that "[i]t has been the uniform and unvarying decision of all common-law courts in respect of estate matters . . . that a child [en] ventre sa mère is 'born' and 'alive' for all purposes for his benefit."[166] Yet in these cases, where a lawsuit is filed on behalf of an unborn child asserting property rights that accrued during gestation, the child will almost always have been born by the time the case is adjudicated.[167] Thus, when the court renders its decision, the child is, in effect, before the court seeking relief.[168] This assumption, however, does not hold when dealing with extrauterine embryos.

The question, then, is whether this "uniform and unvarying"[169] rule will extend to extrauterine embryos in the wake of *LePage*. Professor Crawford and her coauthors suggest that it will.[170] If frozen embryos are deemed persons for nearly all purposes of state law—a result the fetal personhood movement actively seeks—then they could, for example, become entitled to distributions from a trust that mandates payments to a grantor's "descendants" while they remain cryogenically frozen.[171]

Wills operate under distinct rules yet may still permit extrauterine embryos to inherit.[172] When a provision is ambiguous and the executor cannot simply

159. ALA. CODE § 43-8-42 (2024).
160. *Id.* § 43-8-1(15).
161. *Id.* § 43-8-1(2).
162. *See* CAROLE BASS & CARA KOSS, LEPAGE V. MOBILE INFIRMARY ASSOCIATION: ALABAMA WRONGFUL DEATH OF A MINOR STATUTE APPLIES TO CRYOGENICALLY PRESERVED EMBRYOS 2 (2024) (citing LePage v. Ctr. for Reprod. Med., P.C., 408 So. 3d 678, 680 (Ala. 2024)).
163. *See id.*
164. *See* David W. Louisell, *Abortion, the Practice of Medicine and the Due Process of Law*, 16 UCLA L. REV. 233, 235–38 (1968).
165. 26 N.Y.S.2d 140 (Sur. Ct. 1941).
166. *Id.* at 143.
167. Louisell, *supra* note 164, at 236–37.
168. *See id.* at 237.
169. *In re Estate of Holthausen*, 26 N.Y.S.2d at 143.
170. *See* Crawford, Borders & Keating, *supra* note 120, at 1177–80.
171. *See id.* at 1179.
172. *See Will Construction and Interpretation Litigation & Legal Issues*, JUSTIA (Nov. 12, 2024), https://www.justia.com/probate/probate-litigation/will-construction-and-interpretation-litigation/ [https://perma.cc/P4C6-KVEK].

follow its apparent direction, courts will seek to determine the testator's intent and give effect to that intent.[173] There are two types of wills that could give rise to litigation in light of *LePage*: first, those that explicitly devise property "to my children whether born, in utero, or extrauterine embryos," and second, those that simply leave property "to my children" when the testator also leaves behind extrauterine embryos. Each raises complex questions about how a court may interpret the will.

"To my children, whether born, in utero, or extrauterine embryos" is clear; hence, courts will not have to extrapolate the testator's intent from extraneous evidence.[174] But is there any public policy reason for disallowing this grant?[175] Examining courts' and legislatures' treatment of "after-born" children (i.e., children who were conceived before the testator's death but born afterward) provides some insight into this unresolved question. Statutes and case law generally protect the rights of after-born children by granting them a share of the estate as if the testator had died intestate, unless the will explicitly disinherits them or provides for them in another manner.[176] These provisions reflect a policy favoring the inclusion of potential heirs and ensuring that children are not unintentionally excluded from inheritance.[177] The default is inclusion in the will.[178]

For grants that simply state, "to my children," a court must confront the ambiguities inherent in the term children and determine the testator's intent.[179] Determining intent is especially challenging in cases involving genetic material and family relationships.[180] If a state has expressed a policy favoring the protection of embryos' rights, the court may also consider that.[181] This dynamic risks placing testamentary intent in direct conflict with state constitutional mandates, forcing courts into an untenable position when extraneous evidence indicates that the testator did not intend to include frozen embryos, yet the state constitution requires equal protection and rights for those extrauterine embryos.[182] In such cases, courts are left to confront a fundamental question: which directive controls?

Furthermore, allowing an extrauterine embryo to inherit while it is cryopreserved requires appointing a guardian ad litem. If an intestacy statute

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173. *See id.*

174. *See id.*

175. Courts will consider the state's public policy when necessary to interpret and effectuate a will. *See* Orly Henry, Note, *If You Will It, It Is No Dream: Balancing Public Policy and Testamentary Freedom*, 6 NW. J.L. & SOC. POL'Y 215, 216 (2011).

176. *See* OKLA. STAT. tit. 84, § 131 (2025); MISS. CODE ANN. § 91-5-5 (2025).

177. *See* W. VA. CODE § 41-4-1 (2025).

178. *See* NEV. REV. STAT. § 133.160 (2025).

179. JUSTIA, *supra* note 172.

180. *See In re* Estate of Kievernagel, 83 Cal. Rptr. 3d 311, 313–18 (Ct. App. 2008).

181. Henry, *supra* note 175, 223–25.

182. Wills must comply with state and federal law to be valid, and legal limitations or policy may void an otherwise valid will. *See Wills*, JUSTIA EST. PLAN. LEGAL CTR., https://www.justia.com/estate-planning/wills/ [https://perma.cc/9BHT-JZZ9] (last visited Feb. 21, 2026) ("For example, some laws forbid decedents from disinheriting spouses or minor children."); *see also* Shelley v. Kraemer, 334 U.S. 1, 20–21 (1948) (holding that the enforcement of a racially restrictive covenant violates the Fourteenth Amendment).

or a will were interpreted to leave property to an extrauterine embryo, how would that transfer be carried out? There is a practical issue of awarding property to an extrauterine embryo: they cannot physically take possession of the property. Courts have already begun to grapple with how to handle this problem in cases where fetuses may be entitled to a property interest.[183] In Michigan, the law recognizes that if a person is not yet born but might one day inherit property or have some legal right to it, the court can appoint a guardian ad litem[184] to represent the unborn person's interests.[185] Almost every state authorizes the appointment of a guardian ad litem for fetuses in natural gestation.[186] The guardian ad litem acts as a trustee, accountable for keeping the property safe during the time when the taker is not yet born.[187]

If a guardian ad litem were appointed for an extrauterine embryo, the guardian would owe traditional fiduciary duties, including the duties of loyalty and impartiality, to the embryo.[188] Fulfilling the duty of loyalty could require the fiduciary to take action, ranging from using trust assets to continue cryogenic storage to taking more interventionist steps, such as using funds to hire a gestational carrier to bring the embryo to term.[189] If the estate also includes other embryos or even living children who are entitled to inherit, the guardian may have to weigh the embryo's interests against the rights of existing beneficiaries.[190] This could create a delicate and prolonged balancing act—potentially lasting decades—as long as the embryo remains frozen.[191]

a. Advantages of Appointing a Guardian Ad Litem

Appointing a guardian ad litem to represent the interests of extrauterine embryos could offer a measure of clarity and fairness in an area of law struggling to keep pace with technology.[192] Historically, courts have used guardians ad litem to protect the rights of unborn children.[193] Extending that

183. PREGNANCY JUST., *supra* note 55, at 12.

184. A guardian ad litem is a person appointed by the court to represent and safeguard the interests of someone who is unable to take care of themselves, typically a minor or someone deemed legally incompetent. *Guardian Ad Litem*, LEGAL INFO. INST. (Jan. 2023), https://www.law.cornell.edu/wex/guardian_ad_litem [https://perma.cc/R525-9LKG].

185. *See* MICH. COMP. LAWS § 600.2045 (2025).

186. *See* POWELL, *supra* note 127, § 22.04; *see also* Mark H. Bonner & Jennifer A. Sheriff, *A Child Needs a Champion: Guardian Ad Litem Representation for Prenatal Children*, 19 WM. & MARY J. RACE, GENDER & SOC. JUST. 511, 524 (2013) ("[N]early all state legislatures . . . have adopted a specific statutory provision permitting the appointment of guardians ad litem for prenatal children in trust or probate proceedings.").

187. POWELL, *supra* note 127, § 22.04.

188. *See* BASS & KOSS, *supra* note 162, at 2–3.

189. *See id.*

190. *See id.*

191. *See id.*

192. *See* Louisell, *supra* note 164, at 237–38.

193. POWELL, *supra* note 127, § 22.04.

doctrine to extrauterine embryos would build on long-standing equitable traditions.[194]

Such appointments could also provide pragmatic guidance to courts tasked with resolving questions of inheritance involving embryos.[195] The property system functions best when there is clarity about who the potential takers are and how their interests should be represented.[196] Establishing a mechanism for representation would provide a defined process for courts to follow, reducing inconsistent and ad hoc rulings.[197] Guardians ad litem could ensure that embryos with potential legal interests are properly accounted for in probate and trust proceedings, thereby preventing future litigation over whether those interests were overlooked.[198]

Moreover, judicial recognition of guardianships for embryos could reflect a broader sense of fairness and moral realism—the instinctive judicial desire not to exclude a potential heir merely because its birth is delayed by cryopreservation.[199] As Professor David W. Louisell suggests, decisions that extend rights to unborn children historically stem not from metaphysical theories of personhood but from a "pragmatic sense of fairness and realism."[200] Thus, extending guardianship protections to extrauterine embryos may be an equitable adaptation to new reproductive realities.

b. Drawbacks of Appointing a Guardian Ad Litem

Despite the appeal of protecting every conceivable interest, extending the guardian ad litem framework to extrauterine embryos raises substantial conceptual and practical problems. First, such recognition could severely complicate and delay estate administration, trust termination, and transfer of title.[201] Appointing guardians for embryos could multiply these delays exponentially, as embryos could remain frozen for decades without a clear endpoint for potential claims.[202]

Second, there are significant policy concerns about binding future generations.[203] Under current law, once a guardian ad litem has been properly appointed, "the interests of the unborn persons are bound by the result reached in the proceeding."[204] Extending this rule to extrauterine embryos risks imposing legal consequences on individuals who may never

194. *See id.*
195. *See* Louisell, *supra* note 164, at 235–38.
196. *See supra* Part I.B.
197. *See* Louisell, *supra* note 164, at 237–38.
198. *See id.*
199. *See id.*
200. *Id.* at 237.
201. *See* POWELL, *supra* note 127, § 29.01.
202. *See supra* Part I.A.1.
203. *See* POWELL, *supra* note 127, § 29.01.
204. *Id.* § 22.04.

be born—or may not exist for decades—contrary to the long-standing dead-hand policy against binding future generations.[205]

Third, treating embryos as legal persons for inheritance purposes would dramatically complicate estate administration.[206] As Professor Crawford and her coauthors explain, recognizing embryos as heirs would require personal representatives to determine whether certain family members were pregnant—or had embryos in storage—at the decedent's death.[207] This could lead to invasive inquiries and privacy violations.[208] It would also force fiduciaries to undertake burdensome investigations, effectively sending guardians on an open-ended search for potential embryos or pregnancies.[209]

Finally, as Professor Crawford notes, fiduciaries would face impossible questions: how to assess the "needs" of an embryo, whether to allocate trust income for its benefit, and whether a failure to do so could expose the fiduciary to breach-of-duty claims from living beneficiaries.[210] These practical and moral issues reveal the deep instability of extending fiduciary obligations to entities that lack personhood, consciousness, or the capacity to hold property.

Overall, if courts were compelled by personhood provisions or decisions like *LePage* to interpret "child" in intestacy statutes and wills to include embryos, several practical issues could arise. Some of these might be addressed by appointing a guardian ad litem. Although such an approach could advance a sense of fairness and equality, it also raises significant policy concerns that could undermine the foundations of property law and complicate the administration of estates.

2. The Rule Against Perpetuities

The RAP was designed to prevent property from being tied up indefinitely and to promote the orderly transfer of wealth.[211] The recognition of extrauterine embryos as persons poses a fundamental challenge to how the RAP operates.[212] The problem hinges on whether extrauterine embryos are considered lives in being.

At common law, an unborn child—specifically, an in utero fetus—is regarded as a life in being for purposes of the RAP.[213] Hence, under the common formulation of the RAP, the perpetuity period spans twenty-one years plus the period of gestation, which is typically nine to ten months.[214]

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205. *See id.*
206. *See* Crawford, Borders & Keating, *supra* note 120, at 1180–81.
207. *See id.* at 1177–79.
208. *See id.*
209. *See id.*
210. *See id.* at 1195–96.
211. *See* DUKEMINIER ET AL., *supra* note 12, at 355.
212. "[A] fetal personhood statute might disrupt trust law [] by upending typical limits on trust duration." Crawford, Borders & Keating, *supra* note 120, at 1181.
213. *See* Louisell, *supra* note 164, at 235.
214. *See* 61 AM. JUR. 2D *Perpetuities and Restraints on Alienation* § 18 (2d ed. 2025).

However, this formulation does not address whether extrauterine embryos can be considered lives in being. Under traditional doctrine, a measuring life must satisfy four conditions: it must (1) be human, (2) exist at the time the interest is created, (3) belong to a class that cannot increase after that date, and (4) be ascertainable at that time.[215] Even in light of *LePage*, it remains unclear whether an extrauterine embryo satisfies this definition. As to prongs one and two, extrauterine embryos are understood as human and are in existence, regardless of whether or not one considers them "people" or "alive."[216] The third and fourth prongs, however, present greater difficulty. Because additional embryos can be created at any time through the fertilization of stored gametes,[217] the potential class of embryos is capable of expansion after the creation of the interest, thereby undermining both the fixed class requirement and ascertainability.[218] Whether courts find that they are lives in being or not, the very existence of extrauterine embryos poses a RAP problem.

a. Risks to the RAP Even Without Recognizing Embryos as Lives in Being

Many of the issues this Note seeks to address exist independent of any personhood debate or ruling. This section demonstrates that even if personhood were not part of the equation, the mere existence of extrauterine embryos and the advancement of ART raise complex RAP-related questions. For instance, what are the implications for trusts and estates if embryos are *not* regarded as lives in being? In that case, the RAP becomes overinclusive, invalidating many ordinary grants—even under reformed versions of the rule.[219] This occurs for several reasons.

ART allows for postmortem conception—where a child is conceived after a parent's death—and that possibility threatens to invalidate nearly every future interest involving children or descendants governed by the RAP.[220] Take the case of Thaddeus Daniel Pierce, a baby born from a thirty-year-old frozen embryo.[221] Hypothetically, if his biological parent (who served as the measuring life) died immediately after donating genetic material, Pierce would reach the age of twenty-one more than fifty-one years after the

215. *See* Les A. McCrimmon, *Gametes, Embryos and the Life in Being: The Impact of Reproductive Technology on the Rule Against Perpetuities*, 34 REAL PROP. PROB. & TR. J. 697, 706 (2000).

216. "Human tissues or human cells, whether body cells or gametes, are indeed human—that is, genetically human—but are not whole human organisms." Robert P. George & Patrick Lee, *Embryonic Human Persons: Talking Point on Morality and Human Embryo Research*, 10 EMBO REPS. 301, 301 (2009).

217. *See In Vitro Fertilization (IVF)*, MAYO CLINIC (Sep. 1, 2023), https://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/about/pac-20384716 [https://perma.cc/YZT8-6X6W].

218. McCrimmon, *supra* note 215, at 706 n.81.

219. Hoffman & Morriss, *supra* note 91, at 577.

220. *See id.* at 592.

221. *See* Hamzelou, *supra* note 133.

parent's death.[222] As a result, any grant to Pierce would be void under the RAP simply because his interest would not be guaranteed to vest within twenty-one years of his parent's death.[223]

This possibility is exacerbated by the current movements in support of fetal personhood and judicial decisions solidifying embryonic personhood. If extrauterine embryos continue to be recognized as persons for purposes of wrongful death statutes in other states, their destruction becomes morally—and perhaps legally—impermissible.[224] Consequently, clinics may preserve more embryos for longer periods of time.[225] This trend is already emerging: some clinics, such as the one that stored the "oldest baby ever born," were founded explicitly to protect and preserve embryos, rather than discard them, in the name of safeguarding unborn life.[226]

"From a perpetuities perspective, the length of the storage period of reproductive material is important."[227] If embryos are not treated as lives in being, many grants will be void at the moment they are created because they are not guaranteed to vest within twenty-one years.[228] Even under modern wait and see reforms—which extend the permissible period up to ninety years—such interests may still fail as technology advances and advocates push for even longer preservation periods.[229]

Because ART allows children to be conceived and born decades after a parent's death, it creates a possibility that "threatens to make void virtually every future interest involving children and other descendants subject to the [RAP]."[230] Legal scholars foresaw this problem as ART became more widely used; legislatures responded by enacting postmortem conception statutes to address short-term delays in conception following a parent's death and ultimately prevent the RAP from voiding all interests.[231]

Postmortem conception statutes allow children born after their parent's death to inherit.[232] The statutes require such a child to be treated as if "in gestation at the time the parent died," and therefore falling within the perpetuities period, so long as certain conditions are met.[233] PMC statutes generally require proof of consent by the parents to have PMC children and impose strict timelines for conception or birth, often drawing on the Uniform

222. *See id.*
223. Hoffman & Morriss, *supra* note 91, at 592.
224. Ryan & McMichael, *supra* note 154, at 814–21.
225. *See id.* ("Overnight, IVF clinics transformed from medical clinics providing medical services to something akin to daycares, with all the potential liability that comes with being responsible for children.").
226. "IVF treatments performed at the clinic are designed to create as few excess embryos as possible. The clinic . . . will accept any embryo, no matter how long it has been in storage." Hamzelou, *supra* note 133.
227. McCrimmon, *supra* note 215, at 700 (footnote omitted).
228. Hoffman & Morriss, *supra* note 91, at 578.
229. *See id.* (recognizing that ARTs now allow for embryo storage for decades).
230. *Id.*
231. *See* Kristine S. Knaplund, *Assisted Reproductive Technology: The Legal Issues*, 28 PROB. & PROP., no. 2, 2014, at 1, 5.
232. *See id.* at 5–7.
233. *Id.*

Parentage Act[234] (UPA) or the Uniform Probate Code[235] (UPC). The 2000 version of UPA section 707, for example, requires written consent by the decedent and has been adopted in Alabama, Colorado, Texas, and Utah.[236] The UPC's approach is somewhat more flexible: section 2-120 permits consent to be established by clear and convincing evidence rather than in writing, while also imposing bright-line time limits requiring that a child be in utero within thirty-six months of the decedent's death or born within forty-five months, a model followed in Colorado and North Dakota.[237] Other states have even stricter timelines.[238]

In jurisdictions without statutory guidance, courts have addressed the issue. Here, too, results vary.[239] Courts in New Jersey, Massachusetts, and New York allow PMC children to inherit.[240] Courts in New Hampshire, Arkansas, and Michigan, however, deny inheritance rights in such circumstances,[241] citing the absence of legislative authority and the practical difficulties that indefinite delays in probate might create.[242]

A fundamental policy debate underlies these divergent statutory and judicial approaches. On one side is the goal of protecting children's inheritance rights and honoring the reproductive autonomy of decedents who consented to parenthood after death.[243] On the other side is the imperative of maintaining efficient estate administration and avoiding the uncertainty

234. UNIF. PARENTAGE ACT § 707 (UNIF. L. COMM'N 2000).

235. UNIF. PROB. CODE § 2-120 (UNIF. L. COMM'N 1969); *see* Knaplund, *supra* note 231, at 2–5.

236. Knaplund, *supra* note 231, at 5.

237. UNIF. PROB. CODE § 2-705(e) (UNIF. L. COMM'N 1969); *see* Knaplund, *supra* note 231, at 3.

238. Connecticut requires that a child be in utero within one year of the decedent's death; Maryland requires that the child be born within two years; Virginia and Georgia effectively bar postmortem conception inheritance by requiring birth or conception to occur within ten months. *See* Knaplund, *supra* note 231, at 5–6.

239. It is important to note that these cases address both whether a PMC child can inherit under an intestacy statute and whether the PMC child can receive Social Security survivor benefits. *See infra* notes 240–41. In Massachusetts, New Hampshire, and Michigan, the issue concerns Social Security benefits, whereas in New Jersey, New York, and Arkansas, the focus is on inheritance. *See infra* notes 240–41. The key distinction is that Social Security benefits awarded to a PMC child do not reduce the benefits received by other children—the federal government simply pays additional benefits. *See* SOC. SEC. ADMIN., PUB. NO. 05-10084, SURVIVORS BENEFITS (2025) (detailing Social Security survivors' benefits). In contrast, inheritance involves a fixed asset pool, so each additional claimant necessarily diminishes the share available to others. *See* DUKEMINIER ET AL., *supra* note 12, at 275. These cases serve as illustrative examples of how courts approach PMC children in the absence of a PMC statute.

240. *See, e.g.*, *In re* Estate of Kolacy, 753 A.2d 1257, 1258–59 (N.J. Super. Ct. Ch. Div. 2000); Woodward v. Comm'r of Soc. Sec., 760 N.E.2d 257, 272 (Mass. 2002); *In re* Martin B., 841 N.Y.S.2d 207, 212 (Sur. Ct. 2007) (finding that PMC children are entitled to inherit or receive Social Security benefits).

241. *See, e.g.*, Khabbaz v. Comm'r of Soc. Sec., 930 A.2d 1180, 1182 (N.H. 2007); Finley v. Astrue, 270 S.W.3d 849, 850 (Ark. 2008); Mattison v. Comm'r of Soc. Sec., 825 N.W.2d 566, 567 (Mich. 2012) (finding that PMC children are not entitled to inherit or receive Social Security benefits).

242. *See Khabbaz*, 930 A.2d at 1184; *Astrue*, 270 S.W.3d at 854–55; *Mattison*, 825 N.W.2d at 571.

243. *See, e.g.*, *Woodward*, 760 N.E. 2d at 264–70.

that prolonged probate proceedings can create.[244] PMC statutes represent an effort to balance those values.[245]

The state-by-state development of PMC statutes has produced a patchwork regime.[246] Identical factual circumstances can yield drastically different inheritance outcomes depending solely on the jurisdiction.[247] As Professor Kristine S. Knaplund observes, the divergent statutory language across states has become increasingly consequential as ART has transformed the reproductive process.[248] Terms that once were widely understood to mean the same thing—"conceived," "in gestation," "in the womb," "begotten"—now map onto distinct stages of the ART cycle, each situated at a different temporal distance from birth.[249]

This linguistic instability reintroduced precisely the doctrinal uncertainty PMC statutes were meant to resolve.[250] Because embryos may remain cryopreserved indefinitely, and because statutory triggers hinge on ambiguous concepts of conception or gestation, it becomes unclear when, if ever, a contingent interest will vest.[251] As a result, the use of long-term embryo storage can stretch the vesting period beyond any predictable horizon, resurrecting the very problem the RAP was designed to mitigate.[252]

Therefore, a problem persists even if extrauterine embryos are not deemed lives in being. Under the common-law RAP, the validity of a grant turns on logical possibility, not on what actually occurs.[253] Therefore, the mere existence of extrauterine embryos threatens interests under the RAP.[254] The RAP assumes that "if individuals who affect vesting are alive, then they are assumed to be able to do any act logically possible for a living person."[255] Before the invention of IVF and other ARTs, there was no possibility that one could have children years or even decades after one's death. Therefore, the possibility of PMC children did not threaten grants.[256] Now, that possibility is no longer illogical; it is instead common for individuals to have frozen genetic material.[257] This logical possibility means that a grant could

244. *See id.* at 265 (framing the issue as a balance between the state's interest in the orderly administration of estates and the rights of children and parents to have their familial relationships legally recognized).

245. Knaplund, *supra* note 231, at 5.

246. *See id.*

247. *See id.*

248. *See* Kristine Knaplund, *Reimagining Postmortem Conception*, 37 GA. ST. U. L. REV. 905, 938–40 (2021).

249. *See id.*

250. *See id.* at 935–40.

251. *See id.*

252. *See id.*; Hoffman & Morriss, *supra* note 91, at 576–77.

253. DUKEMINIER ET AL., *supra* note 12, at 365.

254. *See* Peyton Soethout, *Your Property Nightmare Just Got Worse: Assisted Reproductive Technology and the Rule Against Perpetuities*, LAWSCI F. (Aug. 7, 2025), https://mjlst.lib.umn.edu/2025/08/07/your-property-nightmare-just-got-worse-assisted-reproductive-technology-and-the-rule-against-perpetuities/ [https://perma.cc/5TAV-XGNW].

255. *Id.*

256. *See id.*

257. In 2023, there were over 40,000 egg freezing cycles and over 430,000 IVF cycles in the United States. *See* Halle Tecco, *The State of Egg Freezing: 2025 Trends and Insights*,

be void simply because it is *possible* that a person has frozen embryos; it would not matter whether such embryos actually exist.[258]

b. If Extrauterine Embryos Are Lives in Being, the RAP Collapses, Letting the Dead Hand Grip Forever

Conversely, if extrauterine embryos *are* considered lives in being for purposes of the RAP, a different but equally complex set of problems emerges. Treating extrauterine embryos as lives in being would dramatically expand the class of lives capable of validating contingent interests.[259] Rather than overinclusively voiding every interest, treating extrauterine embryos in this way would stretch the perpetuities period so far that the rule would be effectively swallowed and lose its policy significance.[260] Because embryos can remain frozen for decades, a single disposition could be measured by the potential lifespan of every extrauterine embryo in existence at the time of the grant, rendering the RAP's vesting period limitless.[261] This section evaluates the advantages and drawbacks of recognizing extrauterine embryos as lives in being.

The principal argument supporting recognition of extrauterine embryos as lives in being is one of doctrinal consistency and administrability.[262] The common-law rule regarding the unborn holds that a baby born alive is treated, for purposes of inheritance and the RAP, as if it had been alive since conception—that is, while in gestation, it is considered a life in being.[263] Recognizing embryos as lives in being would maintain consistency across property law by ensuring that embryos are treated like fetuses en ventre sa mère.[264]

This approach also spares courts from making arguably arbitrary distinctions based on developmental stage or implantation status, which would require judges to undertake complex biological inquiries far beyond their expertise.[265] In an Australian case, *In re Estate of the Late K*,[266] Justice Pierre Slicer, writing for the majority, rejected the notion that the law should distinguish between a child en ventre sa mère and a genetically identical sibling preserved as a frozen embryo.[267] The court reasoned that if an in vitro embryo, once born, is in all biological respects identical to a child conceived

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COFERTILITY (June 13, 2025), https://www.cofertility.com/freeze-learn/state-of-egg-freezing-2025 [https://perma.cc/4VXR-XXHD].

258. Soethout, *supra* note 254.

259. Crawford, Borders & Keating, *supra* note 120, at 1180–82.

260. McCrimmon, *supra* note 215, at 713–14.

261. *See id.* at 715.

262. *See id.* at 710–12.

263. *See id.*

264. *See id.*

265. *See id.* at 710–11 (referencing Justice Pierre Slicer's attempts to parse through the distinctions between pre-embryo, embryo, and fetus in an Australian case).

266. (1996) 5 Tas R 365 (Austl.).

267. *See id.* at 373.

in utero, then the same legal principles should apply to both.[268] It further declined to differentiate between "pre-embryo," "embryo," and "fetus," concluding that these are meaningless distinctions.[269]

Proponents of fetal personhood also appeal to principles of fairness and equal treatment of potential offspring.[270] Professor Ralind Atherton argues that failing to recognize PMC children as the legal offspring of their parents would be a regression to the era when "illegitimate" children were denied inheritance rights.[271] Extending life-in-being status to embryos ensures equal treatment for all potential children, regardless of whether they were conceived naturally or through ART and whether they were implanted immediately or frozen.[272]

In contrast, the strongest arguments against recognizing embryos as lives in being stem from the RAP's fundamental policy purposes.[273] The RAP was historically designed to prevent dead-hand control, to promote the free alienation of property, and to prevent wealth from being tied up indefinitely.[274] Perpetuities were considered "odious in law" because they put a "stop to commerce, and prevent the circulation of the riches," a sentiment that continues to inform modern perpetuities doctrine.[275]

Extending the definition of a life in being to include cryogenically preserved embryos would frustrate these purposes.[276] It would allow donors to anchor contingent interests on entities whose potential for eventual birth could persist indefinitely, thereby prolonging the vesting period far beyond any reasonable horizon.[277] Additionally, it would erode the certainty and predictability that the RAP was designed to ensure.[278] The RAP's "remorseless logic,"[279] once valued for its ability to yield clear outcomes, would be replaced by a system plagued with uncertainty.[280] Such an extension risks rendering the RAP obsolete.[281] Additionally, the dead-hand rationale emphasizes maintaining equilibrium between the freedom of the present generation to control property and that of future generations to do the same.[282] If embryos are deemed lives in being, that balance collapses: a settlor could bind property for centuries, far beyond the lives of any identifiable being.[283]

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268. *See id.*
269. McCrimmon, *supra* note 215, at 711.
270. *Id.* at 710–12.
271. *See* Ralind Atherton, *En Ventre sa Frigidaire: Posthumous Children in the Succession Context*, 19 LEGAL STUDS. 139, 144 (1999).
272. McCrimmon, *supra* note 215, at 710–12.
273. *See id.* at 713.
274. *See* Ruth Deech, *Lives in Being Revived*, 97 L.Q. REV. 593, 593–94 (1981).
275. Duke of Norfolk v. Howard (1683) 23 Eng. Rep. 388, 389 (appeal taken from Eng.).
276. POWELL, *supra* note 127, § 22.04.
277. Crawford, Borders & Keating, *supra* note 120, at 1181–82.
278. *See id.*
279. PETER BUTT, LAND LAW 168 (3d ed. 1996).
280. McCrimmon, *supra* note 215, at 714–16.
281. *See id.*
282. *See id.* at 713–14.
283. *See id.*

Scholars have proposed a variety of approaches to address the challenges of ART and the RAP.[284] Some scholars advocate for legislative reform, focusing on two key objectives: "establishing certainty and limiting dead hand control."[285] To accomplish this, Professor Les A. McCrimmon suggests replacing the traditional life-in-being measure with a single 125-year perpetuity period to prevent reproductive technology from extending the RAP indefinitely.[286]

Recognizing the slow pace of legislative change, some scholars advocate for court-developed canons of construction.[287] One such canon would require courts to interpret testamentary grants according to the principle that an extrauterine embryo should not be considered a measuring life for perpetuities purposes.[288] This would avoid perpetual trusts.[289] A final and more radical approach is to completely abolish the RAP.[290]

Ultimately, the question of whether to recognize extrauterine embryos as lives in being is one of prioritization: should the law value internal consistency across doctrines and fairness to the unborn, or should it preserve the core policy rationale of the RAP? Courts and legislatures must decide whether it is preferable to "save the gift" by expanding the definition of a life in being or to protect the RAP's purpose by enforcing a stricter temporal boundary.

* * *

Although this Note focuses primarily on the interaction between ART, *LePage*, and the RAP, it is important to recognize a parallel problem in the roughly one-quarter of states that have abolished the RAP.[291] In those jurisdictions, the mere existence of extrauterine embryos capable of being stored for generations means that otherwise routine testamentary grants can suspend the vesting of interests for extraordinary lengths of time.[292] As states increasingly encourage or mandate long-term embryo storage for "sanctity of life" reasons, and as the number of stored embryos continues to grow, the likelihood that estates will remain perpetually unsettled correspondingly increases.[293] The result is a dramatic expansion of the dead hand, allowing decedents to exert control over wealth and property far beyond any historically contemplated temporal limit.[294]

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284. *Id.* at 717–19; Crawford, Borders & Keating, *supra* note 120, at 1184–88; Hoffman & Morriss, *supra* note 91, at 613–29.
285. McCrimmon, *supra* note 215, at 717.
286. *See id.*
287. Crawford, Borders & Keating, *supra* note 120, at 1185–88.
288. *See id.* at 1187.
289. *See id.*
290. Hoffman & Morriss, *supra* note 91, at 618.
291. DUKEMINIER ET AL., *supra* note 12, at 381–83.
292. Hoffman & Morriss, *supra* note 91, at 618–20.
293. *See id.*
294. *See id.*

III. REFRAMING THE RAP TO LIMIT THE REACH OF THE FETAL PERSONHOOD MOVEMENT

Part II of this Note explained the wide-ranging consequences—positive and negative—of treating extrauterine embryos as persons for purposes of inheritance and the RAP. It also described the doctrinal and practical challenges emerging from developments in ART.[295] Part III argues that extrauterine embryos should not be treated as persons for inheritance, intestacy, or the RAP. It proposes a doctrinal solution designed to curb the "creep"[296] of fetal personhood into property law. This solution seeks to preserve stability in doctrines that were meant to remain consistent and to keep inheritance law administrable.

For centuries, the en ventre sa mère doctrine balanced various values and motivations, ensuring that children born after the death of a parent were not unjustly excluded from inheriting by allowing RAP to tolerate this gestational window.[297] The doctrine balanced this protection with the need for timely estate administration by limiting it to the natural nine- to ten-month period of gestation.[298] But as discussed in Part II, the doctrine's language is now dangerously imprecise.[299] Conception today encompasses ART processes unimagined at common law.[300]

This Note therefore proposes a reframing of en ventre sa mère to reflect biological and technological realities. It should be reinterpreted to mean that a child born alive is treated, for purposes of inheritance and the RAP, as if they were alive ten days before implantation in the womb.

This reinterpretation preserves the original doctrine's function. Historically, treating a child as "alive since conception" was shorthand for "alive since it entered gestation in the womb" because conception and implantation were naturally inseparable.[301] Today, however, conception could refer to an embryo created in a laboratory thirty years before birth.[302] Extending legal life back to the moment of in vitro fertilization undermines the doctrine's purpose, producing absurdly long RAP periods and forcing estates to remain open for decades.

Reanchoring the doctrine to implantation restores its intended temporal limit, ties the doctrine to a biologically meaningful moment, and ensures that the legal system continues to accomplish the doctrine's original goals:

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295. *See supra* Part II.

296. Yousef, *supra* note 19.

297. Louisell, *supra* note 164, at 235–37.

298. *See id.* (explaining that cases regarding the rights of the unborn proceed "on the theory that property rights accrued to him while he is still in gestation" and that "almost inevitably that child will have proceeded to term and been successfully born . . . before the case").

299. *See supra* Part II.B.

300. *See generally* JAIN, FANG & SINGH, *supra* note 35 (describing the range of medical procedures used to address infertility and assist individuals in achieving pregnancy).

301. *See* BLACKSTONE, *supra* note 23, at 125–26; Hoffman & Morriss, *supra* note 91, at 592.

302. *See* Hamzelou, *supra* note 133.

predictable inheritance rules and timely estate administration. Because en ventre sa mère literally means "in the mother's womb,"[303] the doctrine should return to this meaning.

Part III proceeds in two sections. Part III.A explains why the hypotheticals raised in Part II are not speculative and why courts will soon face these questions without guidance.[304] Part III.B develops the proposed solution and shows how reframing en ventre sa mère resolves the problems identified in Part II.[305]

Specifically, Part III.B.1 addresses conflicts driven by personhood theories.[306] It argues that extrauterine embryos should not inherit while they remain outside the womb and should not be treated as lives in being for RAP purposes.[307] Part III.B.2 recognizes that some challenges arise independent of the personhood debate.[308] This section proposes a federal PMC statute which harmonizes statutory language, sets a standard time frame for implantation, and requires clear consent to PMC parenthood as a prerequisite to embryo storage.[309]

A. The Present Legal Landscape Makes This Conflict All but Inevitable

The questions posed in Part II are not thought experiments or distant hypotheticals; these scenarios could unfold within a few years in courts across the country. *LePage* is, at its core, a case of statutory interpretation,[310] so if one court can read "child" to mean extrauterine embryo, other courts could do the same, opening the door to a sweeping application of fetal personhood across statutory regimes. *LePage* carries implications not only for Alabama's property law but also for other states that, in the post-*Dobbs* landscape, are actively defining the scope of reproductive rights and fetal personhood.[311] This interpretive move has the potential to reshape broad swaths of state law.

Starting with the interpretative questions that arise from Part II.B.1 of this Note, two prerequisites are needed to read an intestacy statute or will to include extrauterine embryos. First, the court must find that the text unambiguously includes extrauterine embryos; this is made easier if legal precedent supports such a conclusion.[312] Second, if the statute's text is ambiguous or there is a lack of precedent, a canon of construction or state

303. BLACKSTONE, *supra* note 23, at 126.
304. *See infra* Part III.A.
305. *See infra* Part III.B.
306. *See infra* Part III.B.1.
307. *See infra* Part III.B.1.
308. *See infra* Part III.B.2.
309. *See infra* Part III.B.2.
310. *See generally* LePage v. Ctr. for Reprod. Med., P.C., 408 So. 3d 678 (Ala. 2024) (interpreting the word "child" in the Wrongful Death of a Minor Act to support its holding).
311. PREGNANCY JUST., *supra* note 55, at 1.
312. *See id.* at 4–5, 38.

policy like a "sanctity of unborn life" constitutional provision is helpful to support the interpretation in favor of extrauterine embryos.[313]

It is not necessarily the case that a constitutional "sanctity of life" provision automatically transforms every use of the word "person" or "child" throughout a state's code to include an extrauterine embryo.[314] However, the country may be moving toward a direction in which such a whole code application becomes plausible.[315] Alabama Chief Justice Tom Parker's concurrence in *LePage* explained how a state constitutional policy protecting unborn life should guide judicial interpretation.[316] He noted that ordinarily a statute's text controls, and constitutional policy is a last resort when the text is ambiguous.[317] But when the legislature has expressly directed the courts through a constitutional amendment to interpret text a certain way, judges are bound by that mandate.[318] Relying on this principle, Chief Justice Parker concluded that the constitutional provision "tilts the scales of the law in favor of protecting unborn life."[319] He wrote that if reasonable minds could differ as to whether a common-law rule, statute, or constitutional provision protects life, the amendment "instructs the Alabama government to construe the law in favor of protecting the unborn."[320] His position endorsed a whole code application of the "sanctity of unborn life" amendment.[321]

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313. *See id.*

314. These sort of broad, whole code applications of fetal personhood have historically been unsuccessful. *See* Michael Achterling & Amy Dalrymple, *Abortion, Reproductive Rights Bills Rejected in North Dakota House*, N.D. MONITOR (Feb. 12, 2025, at 16:38 ET), https://northdakotamonitor.com/2025/02/12/abortion-reproductive-rights-bills-rejected-in-north-dakota-house/ [https://perma.cc/PEA3-S2HV] (reporting that members of the North Dakota House voted against a bill that would have defined a human being to include an unborn child in state laws relating to murder, assault, and wrongful death); *North Dakota Measure 1, Right to Life of Humans at Any Stage of Development Amendment (2014)*, BALLOTPEDIA (Nov. 4, 2014), https://ballotpedia.org/North_Dakota_Measure_1,_Right_to_Life_of_Humans_at_Any_Stage_of_Development_Amendment_(2014) [https://perma.cc/EJ6N-H4B2]; *Anti-Abortion "Fetal Personhood" Bill Fails in Legislature*, ACLU (July 20, 2017, at 10:30 ET), https://www.aclu.org/press-releases/anti-abortion-fetal-personhood-bill-fails-legislature [https://perma.cc/3T7H-VP4B] (explaining how a fetal personhood bill in Maine that would have established a fetus as a distinct person was rejected in 2017); Jeff Amy, *Explainer: What's the Role of Personhood in Abortion Debate?*, AP (July 30, 2022, at 13:51 ET), https://apnews.com/article/abortion-us-supreme-court-health-government-and-politics-constitutions-93c27f3132ecc78e913120fe4d6c0977 [https://perma.cc/SP4J-U3W4] ("Voters in several other states have rejected state constitutional amendments granting personhood, including in Colorado in 2008, 2010 and 2014, Mississippi in 2011 and North Dakota in 2014.").

315. "Eleven states have the most radical and wide-ranging personhood provisions, which . . . purport to extend [personhood] to all laws of the state." PREGNANCY JUST., *supra* note 55, at 4.

316. *See* LePage v. Ctr. for Reprod. Med., P.C., 408 So. 3d 678, 695 (Ala. 2024) (Parker, J., concurring).

317. *See id.*

318. *See id.* (citing THE FEDERALIST NO. 78, at 525 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)).

319. *Id.*

320. *Id.*

321. *See id.*

Currently, most state courts extend personhood only within narrow statutory contexts.[322] But that hesitancy is changing across the country. Eleven states[323] now have fetal personhood laws that are intended to apply across the state's legal code.[324] Courts in these eleven jurisdictions may be compelled by statute to interpret intestacy laws, RAP provisions, and even wills in ways that protect and recognize the unborn—exactly as Chief Justice Parker suggested.

No state has specifically interpreted an intestacy statute to either include or exclude extrauterine embryos, but the Appeals Court of Massachusetts considered a related issue in *Harding v. DeAngelis*.[325] There, the court held that a stillborn child who never lived could not attain legal personhood and therefore could not inherit or have an estate.[326] The court emphasized that treating a fetus as an heir under intestacy law would produce absurd results.[327] However, imagine this case did not occur in Massachusetts in 1995, but rather took place in a state that either rejects the "absurd results" approach to textualism or views it as neither absurd nor unjust to include the unborn in an intestacy statute, especially in light of *Dobbs*. In such a state, recognizing inheritance rights for the unborn could be seen as consistent with the state's broader policy of protecting fetal interests.[328] In Georgia, for example, a law codifying an unborn child as a "natural person" with rights was passed in 2022.[329] This law recognizes the unborn child as a legal person in social services, civil, child support, and tax settings.[330] Outside the intestacy context, litigants continue to make novel arguments about fetal personhood before courts.[331]

Moreover, the U.S. Supreme Court observed that when a state adopts a preamble or canon of construction favoring the recognition and protection of unborn life, the interpretation and application of that language to other state statutes is a matter solely for the state courts to determine.[332]

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322. Forty states have amended or interpreted their wrongful death statutes to include fetuses. PREGNANCY JUST., *supra* note 55, at 16.

323. These states are Alabama, Arizona, Arkansas, Georgia, Kansas, Kentucky, Missouri, Montana, Pennsylvania, Tennessee, and Utah. *Id.* at 3.

324. *See id.*

325. 657 N.E.2d 758 (Mass. App. Ct. 1995).

326. *See id.* at 761–62.

327. *See id.* at 761 (citing Mone v. Greyhound Lines, Inc., 368 Mass. 355, 331 (1975)).

328. The tension highlights a key point about statutory interpretation: the so-called "absurd results" doctrine "turns on highly subjective, contested, and inconsistent assessments of how unreasonable an outcome must be." Jim Huang, *Rationalizing "Absurdity"*, 133 YALE L.J. 2381, 2383 (2024).

329. *See* Jill Nolin, *Court Rules Georgia's Strict Anti-Abortion Law with 'Personhood Clause' Is Now in Effect*, GA. RECORDER (July 20, 2022, at 16:44 ET), https://georgiarecorder.com/2022/07/20/court-rules-georgias-strict-anti-abortion-law-with-personhood-clause-is-now-in-effect/ [https://perma.cc/ASW3-ANMK].

330. Mosley, *supra* note 73.

331. For example, Missouri's existing personhood laws have even been cited in cases where defendants accused of statutory rape argued that their underage victims were effectively older because age is counted starting in utero, claiming the laws should not apply to them. *See id.*

332. *See* Webster v. Reprod. Health Servs., 492 U.S. 490, 506–07 (1989).

Although the Alabama legislature responded to *LePage* by passing legislation to protect IVF clinics, it did not overrule *LePage*, and the law does not affect the court's interpretive reasoning behind the definition of "child."[333] The immunity statute stanched the immediate harm caused by *LePage* to IVF clinics, but it leaves the door open for future courts to revisit similar questions.[334]

Once personhood is judicially extended through statutory construction, little prevents it from migrating into other areas of law. Intestacy statutes, statutory RAP provisions, probate codes, and even wills could be construed to require courts to treat any reference to a "child" as encompassing extrauterine embryos. Given current legal trends and strategic efforts of fetal personhood advocates, these issues will reach courts soon.

B. The En Ventre Sa Mère Doctrine Must Be Redefined

To preserve the principles that property law was designed to protect—and to avoid the doctrinal confusion outlined in this Note—property law must reexamine and modernize the assumptions underlying the en ventre sa mère doctrine. This Note proposes a general common law adaptation: updating a core maxim regarding reproduction so that it accurately reflects what the doctrine was originally trying to capture—an embryo or fetus developing in a womb. In short, property law should abandon the outdated, conception-based assumption and instead treat a child born alive as if they were alive ten days before implantation in the womb for purposes of inheritance and the RAP.

This reformulation aligns the doctrine with biological reality and preserves the temporal boundaries essential to property law. It restores predictability in inheritance and the RAP without wading into moral or scientific debates about when life begins. As Dean Benjamin Carpenter notes, even though probate law tolerates some delay, thirty years exceeds even the most flexible expectations, and the law must allow for orderly administration rather than indefinite suspension.[335] Returning the operative moment from conception to implantation reinstates a manageable, grounded, nine-to-ten-month window, and harmonizes modern ART practices with the structure of inheritance law.

This Note does not propose abandoning centuries of precedent or denying the longstanding principle that a child en ventre sa mère may inherit. The problem is not the recognition of unborn life, per se, but the extension of that recognition far beyond gestation in ways that distort the doctrine's temporal boundaries. Thus, it would be misguided to propose a categorical rule declaring that all children conceived postmortem—or all children born more

333. Ryan & McMichael, *supra* note 154, at 807.

334. *See id.*

335. *See* Benjamin C. Carpenter, *A Chip off the Old Iceblock: How Cryopreservation Has Changed Estate Law, Why Attempts to Address the Issue Have Fallen Short, and How to Fix It*, 21 CORN. J.L. & PUB. POL'Y 347, 406–07 (2011).

than a set period after conception—are not children of their parents for inheritance purposes. Such an approach would risk reviving inequities reminiscent of primogeniture by discriminating among children based solely on birth timing.[336] Although this kind of rule might promote the orderly administration of estates, it would do so at the expense of fairness and doctrinal consistency.

This Note's proposed reformulation has numerous elements, each designed to accomplish a certain goal through a careful selection of language. First, the rule starts by saying "a child born alive." As at common law, inheritance and RAP issues arise only if the child is ultimately born alive.[337] Under this reformulation, extrauterine embryos cannot inherit while they remain frozen. If one is not born, one does not inherit—under either the common law or this updated framework.

Second, it states that that child is "treated as if they were alive." Neither the historical doctrine nor this reformulation makes any claim about fetal personhood or when life begins.[338] The rule operates only after birth for the limited purpose of determining how to treat the child within inheritance and the RAP. Property law has never grounded this maxim in metaphysical claims;[339] it has always been a doctrinal construct designed to facilitate transfer of property.

Next, the rule reformulates the operative moment from conception to "ten days before implantation in the womb." Conception can no longer serve as the operative moment because, as Part II demonstrated, the time between conception and birth can now span decades.[340] The point must return to a moment biologically tethered to gestation. Implantation achieves that because any child born alive must have undergone implantation, whether in a biological womb, a surrogate's womb, or (if technology advances) an artificial womb.[341] Implantation thus provides a stable, biologically grounded benchmark that ART cannot outpace.

The "ten days before" accounts for the natural lag between conception and implantation, present in both natural pregnancy and IVF.[342] This avoids arbitrary exclusion of children who are conceived but not yet implanted at the moment a parent dies and prevents courts from engaging in unnecessary factual inquiries. Consider, for example, a couple who engages in intercourse on Monday; fertilization occurs on Tuesday, constituting conception; the father dies on Wednesday; and the embryo is implanted in the uterus on Friday.

Finally, the rule specifies that this maxim is "for purposes of inheritance and the RAP." These proposed reforms are intentionally confined to property

336. *See* McCrimmon, *supra* note 215, at 710.
337. Louisell, *supra* note 164, at 236–37.
338. *See id.*
339. *See id.* at 237.
340. Hamzelou, *supra* note 133.
341. Knaplund, *supra* note 248, at 954.
342. *See Conception*, CLEV. CLINIC HEALTH LIBR. (Sep. 6, 2022), https://my.clevelandclinic.org/health/articles/11585-conception [https://perma.cc/UY8H-FPLD].

and trusts and estates law. Property law has always operated with its own objectives—clarity, predictability, and orderly administration—and has historically defined life differently than other legal fields.[343] For instance, property law continued to recognize life at conception, even during the *Roe* era when constitutional law denied prenatal personhood.[344] Courts recognize that different bodies of law may define life differently depending on policy goals. As the *LePage* court itself observed, "nothing in this Court's precedents requires one-to-one congruity between the classes of people protected by Alabama's criminal-homicide laws and our civil wrongful-death laws."[345] This same logic supports a divergence between reproductive law and property law in this context. Accordingly, the solutions proposed here are designed solely to serve the needs and policies of property law—not to make broader statements about unborn life in other areas of law.

These solutions aim to limit the reach of fetal personhood within the trusts and estates context and ensure that estates close predictably and in a reasonable amount of time. When forced to choose between doctrinal rigidity and property law's underlying policy goals, this Note prioritizes the latter.

1. Fetal Personhood Must Be Kept Out of Property and Trusts and Estates Law

Fetal personhood laws create two core risks. First, if a whole code application of personhood statutes requires courts to read intestacy laws and wills to allow extrauterine embryos to inherit, estates could become unmanageable.[346] Courts would be forced to treat a frozen embryo—one that may never be born—as an heir, requiring the appointment of a guardian tasked with determining that embryo's "best interests" relative to living beneficiaries.[347] Second, if personhood leads courts to treat extrauterine embryos as lives in being for RAP purposes, the perpetuities period could be stretched indefinitely, undermining the RAP's fundamental purpose of limiting dead-hand control.[348]

The goal of this Note's proposed solution is therefore to prevent personhood from migrating into property doctrine in ways that destabilize inheritance and the RAP. Extrauterine embryos should not be treated as living persons for trusts and estates purposes. To achieve this, legislatures and courts should adopt clear statutory provisions and interpretive canons specifying that extrauterine embryos cannot inherit, are not subject to guardianship, and are not lives in being.

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343. DUKEMINIER ET AL., *supra* note 12, at 355, 386.

344. *See generally* Roe v. Wade, 410 U.S. 113 (1973) (finding that unborn beings were not "persons" under the Fourteenth Amendment), *overruled by*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

345. LePage v. Ctr. for Reprod. Med., P.C., 408 So. 3d 678, 686 (Ala. 2024).

346. *See supra* Part II.B.1.b.

347. Crawford, Borders & Keating, *supra* note 120, at 1180–81.

348. Hoffman & Morriss, *supra* note 91, at 592.

a. Extrauterine Embryos Should Not Be Entitled to Inherit

Embryos, while frozen, cannot inherit property, and neither courts nor legislatures should adopt interpretations that would make such inheritance possible. To understand this Note's main proposal, it is helpful to begin by clarifying what this Note is *not* suggesting.

This Note does not suggest that children born through IVF or other forms of ART—who were once cryogenically preserved—cannot inherit once born. Nor does it posit that future child provisions in wills or trusts (e.g., "to all my children born within ten years of my death") become invalid simply because some potential children currently exist as frozen embryos. If, within the next ten years, any of those embryos are used and a child is born alive, that child can inherit. Likewise, this Note does not claim that a will devising property "to my children" is void merely because the testator has cryogenically preserved embryos. If the embryos later result in live births, those children fall squarely within the grant.

What this Note does posit is this: extrauterine embryos, while they remain frozen, cannot themselves be beneficiaries capable of receiving property. For property to vest in a child, the child must be born alive.[349] Once born alive, they will be treated, under the new formulation, as if they were alive ten days prior to implantation. Inheritance must be predictable, administrable, and timely. Treating extrauterine embryos as heirs would make that impossible. Consider a couple in Alabama who die intestate, leaving two adult children and five frozen embryos. If an intestacy statute were read under *LePage*-style logic to treat the embryos as equal issue, the estate would have to be divided into seven shares, with guardians appointed to hold five of those shares for embryos that may never be born.

This creates untenable problems. Guardians would have to decide whether it is in an embryo's best interest to remain frozen or be brought to term, living children would receive far less than they otherwise would, and estate administration would be prolonged, uncertain, and expensive. As embryos are used, destroyed, or left unused for decades, shares would shift unpredictably, undermining finality and fairness.

A more difficult question arises when a testator expressly states the intent to leave property to, for example, "my children, whether born, in utero, or extrauterine embryos." This is no longer a question of statutory interpretation but rather a question of whether a donor may, through clear testamentary intent, devise property to a frozen embryo. Even under conditions of unambiguous intent, the answer must be no.

At first glance, gifts to embryos might be analogized to testamentary gifts to corporations, universities, or charitable organizations—nonnatural

349. The en ventre sa mère doctrine applies only when implantation and gestation occur, and only when the child is later born alive. *See* BLACKSTONE, *supra* note 23, at 125–26.

persons whom no one doubts may take property under a will.[350] Courts routinely uphold such devises in the absence of a RAP problem.[351] But this analogy collapses on closer examination.

Corporations possess what embryos categorically lack—legal personality and immediate capacity to take title.[352] A corporation is a legal person created by statute, given the ability to lend and borrow, sue and be sued, enter contracts, and maintain a stable identity over time.[353] An extrauterine embryo, by contrast, has none of these attributes.

Moreover, corporate devisees provide the predictability and administrability on which inheritance law depends. A bequest "to Fordham Law School" vests immediately, is managed by an existing legal entity, and permits final settlement of the estate.[354] A devise to an embryo sitting in cryogenic storage does the opposite. It introduces indefinite delay, makes vesting contingent on the embryo's potential future birth, and threatens the core values of succession law.

A second comparison might be drawn to pet trusts. It is well settled that a testator may not leave property directly to a pet.[355] Nonetheless, many jurisdictions permit the creation of a trust for the care of an animal, administered by a human trustee who holds legal title.[356]

At first glance, one might ask: if a trust can be created for a dog, why not for an extrauterine embryo? The answer lies in the profound differences between the two scenarios. Pet trusts are justified because animals have actual, present welfare interests—they experience needs, suffering, and benefit from caretaking.[357] Frozen embryos do not. They have no present welfare interests, no experiential needs, and no capacity for benefit or harm while cryopreserved.[358]

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350. *See* John Finnis & Robert P. George, *Equal Protection and the Unborn Child: A* Dobbs *Brief*, 45 HARV. J.L. & PUB. POL'Y 927, 931 (2022) (drawing legal analogies between corporations and the unborn with respect to recognition under the Fourteenth Amendment).

351. *See* RESTATEMENT (THIRD) OF TRUSTS § 28 (A.L.I. 2003); 1 PRITCHARD ON THE LAW OF WILLS AND ADMINISTRATION OF ESTATES § 191 (7th ed. 2009).

352. *See Corporations*, LEGAL INFO. INST. (July 2022), https://www.law.cornell.edu/wex/corporations [https://perma.cc/25NV-P7FJ].

353. *See id.*

354. DUKEMINIER ET AL., *supra* note 12, at 272.

355. *See* UNIF. PROB. CODE § 2-907 (UNIF. L. COMM'N 1969); *see also In re* Estate of Russell, 444 P.2d 353, 363 (Cal. 1968) (discussing the validity of pet trusts).

356. *See* RESTATEMENT (THIRD) OF TRUSTS § 47 (A.L.I. 2003).

357. *See The Five Freedoms of Animals*, ANIMAL HUMANE SOC'Y, https://www.animalhumanesociety.org/health/five-freedoms-animals [https://perma.cc/U785-CQU5] (last visited Feb. 21, 2026).

358. Some fetal personhood advocates contend that embryos and fetuses—regardless of developmental stage—experience pain and have cognizable welfare interests. *See* Olga Khazan, *When Did Fetal Pain Become Pro-Life Strategy?*, ATLANTIC (Nov. 12, 2013), https://www.theatlantic.com/politics/archive/2013/11/when-did-fetal-pain-become-pro-life-strategy/281577/ (on file with the *Fordham Law Review*). This Note does not engage those moral or scientific debates. But if one were to accept that premise, it begs the question of why, then, fetal personhood proponents allow long-term freezing of these "people" with "welfare interests."

In addition, pet trusts are temporally bounded: they expire upon the animal's death and therefore do not impede estate administration or clash with perpetuities principles.[359] An embryo, however, may remain frozen indefinitely. A trust established for its care could tie up property for decades, complicating the vesting of interests and undermining the RAP.

Finally, a trustee of a pet trust performs a familiar fiduciary role—feeding, housing, and caring for a sentient creature. A trustee charged with acting in the best interests of an embryo, by contrast, would face the impossible task of determining whether the embryo should remain frozen, be implanted in a gestational carrier, be destroyed, or be donated for research.[360] Each of these decisions raises moral, medical, and legal questions far beyond traditional fiduciary administration and wholly alien to trusts and estates doctrine. Thus, even where testamentary intent is explicit, an extrauterine embryo—frozen, without legal personality, and without present interests—cannot be a valid beneficiary.

The question, then, is how to implement these principles in a durable way. Although this Note proposes reframing the common-law en ventre sa mère doctrine,[361] common law alone is insufficient. A lasting solution requires legislation. Legislatures, not courts, are the proper institutions to resolve policy questions of this magnitude.[362] Policy judgments belong to "the people's elected representatives"; the legislature, not the judiciary, is "institutionally equipped to assess the numerous trade-offs associated with a particular policy choice."[363] By codifying a precise implantation-based rule, legislatures could replace uncertain interpretive standards with clear statutory guidance. They could amend the UPC to explicitly adopt a modernized en ventre sa mère doctrine: only children born alive may inherit, and once born alive, they are treated as if they were alive ten days before implantation for purposes of inheritance and the RAP.

Professor Crawford and her coauthors similarly propose a legislative fix.[364] Their instinct is sound, but the proposals lack specificity. They suggest that legislatures "pass another statute limiting the reach of fetal personhood laws"[365] and clarify that fetal personhood should not apply to "any aspect of trusts or estates."[366] But this overcorrects. Fetal personhood—the idea that a fetus en ventre sa mère can inherit—has deep roots in property and inheritance law.[367] The goal is not to eliminate it but

359. Andrea Sinner, *Pet Trusts: A Primer*, A.B.A. (Feb. 5, 2025), https://www.americanbar.org/groups/gpsolo/resources/magazine/2025-jan-feb/pet-trusts-primer/ (on file with the *Fordham Law Review*) ("Some states limit the duration of pet trusts to 21 years, while most allow them to continue until the death of the last surviving animal benefiting from the trust.").

360. Crawford, Borders & Keating, *supra* note 120, at 1181.

361. *See supra* Part III.

362. David Dyzenhaus, *Are Legislatures Good at Morality?: Or Better at It Than the Courts?*, 7 INT'L J. CONST. L. 46, 47–48 (2009).

363. Devillers v. Auto Club Ins. Ass'n, 473 Mich. 562, 555 (2005).

364. Crawford, Borders & Keating, *supra* note 120, at 1184–85.

365. *Id.* at 1185.

366. *Id.*

367. *See* BLACKSTONE, *supra* note 23, at 125–26.

to adapt it so that it reflects technological realities without collapsing under their weight.

Because legislative action is unlikely to be uniform or timely, courts must serve as a second line of defense. Judges interpreting intestacy, PMC, or RAP statutes must adopt a judicial canon reflecting the proposed reframed en ventre sa mère doctrine. Professor Crawford's judicial proposals are more developed.[368] The first suggested canon presumes that, absent explicit language, donors do not intend that a "zygote-embryo-fetus" may inherit, limiting beneficiaries to "persons who live outside the uterus."[369] Although this clarifies that extrauterine embryos should not inherit by default, it creates two problems.

First, it would abrogate the long-standing rule that a fetus en ventre sa mère may inherit.[370] That doctrine must remain intact. Under Professor Crawford's rule, a child born the day after a parent's death would be disqualified from inheriting—an outcome at odds with centuries of probate practice. Second, the phrasing is dangerously vague. Under *LePage*, some courts might interpret "persons who live outside the uterus" to include extrauterine embryos, thereby recreating the very problem Professor Crawford and her coauthors seek to avoid.

Legislation is the most effective and durable mechanism to prevent extrauterine embryos from being treated as heirs. But because legislative action will likely be uneven, courts should adopt a clear interpretive canon reflecting these principles to prevent absurd or destabilizing results in inheritance and the RAP.

b. Extrauterine Embryos Should Not Be Deemed Lives in Being

Extrauterine embryos should not be deemed lives in being for purposes of the RAP. Neither statutory nor common-law RAP should be interpreted to treat extrauterine embryos as permissible measuring lives. The RAP relies on living, ascertainable persons; extrauterine embryos are neither.[371]

The purpose of the RAP is to prevent excessive dead-hand control.[372] Treating frozen embryos as lives in being would directly undermine that purpose. If embryos were counted as measuring lives, and if they remain viable indefinitely in cryogenic storage, then the perpetuities period could extend indefinitely. This would freeze the dead hand and allow donors to control property for as long as embryos remain frozen.

One possible alternative is what Professors Sharona Hoffman and Andrew P. Morriss call the "Gestational Rule": treating all embryos as within the common-law gestational period, "regardless of whether they are progressing

368. Crawford, Borders & Keating, *supra* note 120, at 1185–88.
369. *Id.* at 1187.
370. POWELL, *supra* note 127, § 22.04.
371. McCrimmon, *supra* note 215, at 706, 713–14.
372. DUKEMINIER ET AL., *supra* note 12, at 355.

toward birth."[373] This approach is misguided. It would do precisely what the RAP was designed to prevent—extending the perpetuities period indefinitely. When embryos can be frozen for thirty years, expanding the vesting period in this way would undermine the RAP entirely.

For the RAP to remain valid and effective, lives in being cannot mean extrauterine embryos.[374] As is often the case, legislation offers the clearest path to that solution. Many states have codified versions of the RAP to include definitional sections; legislatures could insert a definition of life in being that reflects the reframed en ventre sa mère doctrine.

In the absence of legislative action, courts can adopt a judicial canon directing that extrauterine embryos should not be considered measuring lives for perpetuities purposes. On this point, Professor Crawford and her coauthors' second proposed rule concerning the RAP is persuasive.[375] Their article argues that in vitro embryos should not be considered lives in being unless and until they are implanted in utero.[376] This is consistent with this Note's proposed reframing of the en ventre sa mère doctrine, which grounds the perpetuities period in implantation. Such a canon would preserve the RAP's core function, prevent indefinite dead-hand control, and align property doctrine with biological reality.

2. Reforming and Standardizing Postmortem Conception Statutes

This Note addresses issues that arise independently of personhood—for example, the challenges posed when embryos are *not* treated as lives in being and complications from postmortem conception. The existence of ART and its continual advancement challenge these doctrines even absent a personhood debate.

This section focuses on PMC statutes, originally designed to address children conceived and born after a parent's death and the resulting effects on inheritance and the RAP.[377] PMC statutes alone, however, no longer fully solve the problem.[378] Modern cryopreservation has dramatically extended embryonic timelines. Whereas early storage often degraded embryos within a few years, current techniques allow embryos to remain viable for decades.[379] This shift means children can be conceived long after statutory windows have closed, rendering many PMC children ineligible to inherit, even with the decedent's clear consent.[380]

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373. Hoffman & Morriss, *supra* note 91, at 617–18.

374. *See* Nicole Pomerantz, *Embryos on Ice: Issues with Estate Law and Assisted Reproduction in a Post*-Dobbs *World*, 35 U. FLA. J.L. & PUB. POL'Y 303, 314 (2025).

375. *See* Crawford, Borders & Keating, *supra* note 120, at 1187.

376. *See id.*

377. *See generally* Knaplund, *supra* note 231 (analyzing issues of standing, inheritance in intestacy, and the meaning of "child" in a will or trust resulting from ARTs and PMCs).

378. *See id.* at 5–7.

379. Hamzelou, *supra* note 133.

380. *See* Pomerantz, *supra* note 374, at 317; Knaplund, *supra* note 231, at 5–7.

How do PMC statutes interact with the proposed and reframed en ventre sa mère doctrine? Consider, for example, if a parent dies leaving multiple frozen embryos and one is later implanted and born alive, the child would, under the reformulated doctrine, be treated as if they were alive ten days prior to implantation. But because implantation occurs after the parent's death, the child would technically not inherit absent statutory intervention. PMC statutes provide that extension: if the surviving parent implants the embryo within the statutory period and the decedent consented, the child is treated as if alive at the decedent's death. In effect, PMC statutes extend the common-law rule to account for time needed to implant embryos, allowing the PMC child to inherit.

The solutions proposed here aim to harmonize otherwise nonuniform applications of PMC statutes across jurisdictions and align statutory treatment with the reframed common-law doctrine. This can be achieved through a uniform PMC statute, specifying consistent language, time periods, and consent requirements.

This Note recognizes that some children conceived long after their embryos were created will inevitably be excluded. Choosing a time period is inherently arbitrary. The RAP relies on lives in being plus twenty-one years, reflecting the societal expectation that a person reaches adulthood by twenty-one.[381] PMC statutes have historically selected periods of thirty-six to forty-five months to account for grieving and time to undergo ART.[382] Although no period is perfectly socially meaningful in every case, selecting one provides necessary clarity. This approach balances fairness to PMC children with the need to close estates.[383]

PMC statutes must standardize their language and timelines. Many states have enacted PMC statutes to address the inheritance rights of children conceived after a parent's death, but these laws are far from uniform.[384] Some statutes allow a PMC child to inherit only if the decedent consented to parenthood, yet requirements for consent vary widely.[385] The statutes also prescribe varying temporal requirements ranging from none at all to only a few months.[386]

Despite intentions to facilitate postmortem inheritance, these statutes paradoxically complicate matters.[387] The main issue that this Note seeks to address is that few statutes define "conception" clearly.[388] The traditional definition—conception as fertilization—fails to account for cryopreserved embryos, leaving the number of intestate heirs uncertain indefinitely. Some

381. DUKEMINIER ET AL., *supra* note 12, at 358.
382. Knaplund, *supra* note 248, at 922, 925, 953.
383. *See id.* at 937.
384. *See id.* at 935–36.
385. *See id.* at 945–49.
386. Knaplund, *supra* note 231, at 5–7.
387. *See* Knaplund, *supra* note 248, at 905 (arguing that PMC statutes create a "bewildering array of standards," with different definitions of consent, variations in witness requirements, and hurdles imposed in one state but not another).
388. *See id.* at 938–40.

states have adopted UPC section 2-108, which refers to a child "in gestation" rather than "conceived," reflecting an attempt to address this ambiguity.[389] Others use the word "begotten."[390] This linguistic variation produces drastically different outcomes for IVF embryos.[391]

Language precision is therefore critical. Terms like "conceived," "begotten," and "in gestation" were historically interchangeable, but ART has decoupled conception from gestation, making statutory definitions determinative of inheritance rights.[392] Legislatures created much of this inconsistency and are best positioned to correct it. The preferred PMC statutes should adopt a clear, biologically grounded definition: a child is recognized as a PMC child only if implanted in utero within a defined period after the decedent's death. This aligns with the reformulated common-law doctrine, which treats a child implanted within the statutory window as en ventre sa mère and, once born, as if they were alive ten days prior to implantation for inheritance and the RAP.

To achieve this, this Note proposes a uniform federal PMC statute to eliminate forum shopping and statutory inconsistency. The statute should avoid terms like "conceived" or "begotten," instead defining a PMC child as one implanted in utero within a limited period after the parent's death. The federal statute should mirror Georgia's approach, which requires that the child be conceived before the parent's death.[393] This accommodates cryogenically preserved embryos created during the parent's lifetime but prevents embryos created from frozen genetic material after death from inheriting once born.[394] Because no new conception occurs postmortem under this framework, it would be misleading to label the law a "postmortem conception" statute. A more accurate name would be "postmortem inheritance" statute, emphasizing that the law governs inheritance for children born after a parent's death rather than leaving room for conception after death.

Limiting eligibility to embryos created before the parent's death ensures that parental intent is clear, avoids disputes over consent, and prevents inequitable shifts of inheritance to children conceived long after the decedent's passing. It also mitigates legal uncertainty that could arise from the postmortem use of embryos in ways not anticipated by the decedent. Thus, this approach preserves doctrinal consistency and administrative predictability in estate law.

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389. These states include Alaska, Arizona, Massachusetts, Michigan, Montana, New Jersey, and West Virginia. *See, e.g.*, UNIF. PROB. CODE § 2-108 (UNIF. L. COMM'N 2006); ALASKA STAT. § 13.12.108 (2024); ARIZ. REV. STAT. ANN. § 14-2108 (2026); MASS. GEN. LAWS ch. 190B, § 2-108 (2026); MICH. COMP. LAWS § 700.2108 (2026); MONT. CODE ANN. § 72-2-118 (2025); N.J. STAT. ANN. § 3B:5-8 (West 2025); W. VA. CODE § 42-1-3f (2026).

390. Knaplund, *supra* note 248, at 939.

391. *See id.*

392. *See id.*

393. Knaplund, *supra* note 231, at 6.

394. *See id.*

Further, a standardized implantation period is necessary. Forty-eight months is sufficient for grieving, arranging affairs, and completing IVF, but short enough to prevent indefinite estate administration.[395]

Fertility clinics must also require prospective patients to make their intentions regarding postmortem parenthood clear prior to using ARTs. Most PMC statutes require parental consent to be a PMC parent; yet in practice, such consent is often ambiguous and difficult to verify after the fact.[396] To address this, this Note's proposed federal statute would require evidence of intent to be based on formal, written, and standardized consent. Given the dramatic rise in ART and the increasing duration of embryo storage, additional regulation is necessary to address the growing likelihood of PMC births.[397]

Consent is essential because postmortem conception creates heirs with financial rights and because respecting reproductive autonomy is both a constitutional and ethical obligation. Yet most IVF clinics do not require explicit opt-ins for postmortem reproduction. Without explicit consent, clinics could inadvertently create heirs contrary to the decedent's intent.

This Note proposes a dual approach. First, legislatures should require IVF clinics to obtain clear, written directives from clients regarding the postmortem use of embryos at the time of contract formation. This approach is consistent with the legislative history of UPC section 2-120, which encourages states to mandate consent forms sufficient to establish a parent's intent regarding ART children.[398] Clinics should include a section in the ART contract where parents indicate their preferences regarding postmortem parenthood, providing clear contractual proof of intent. Additionally, clinics should ensure that the parent maintains a valid will specifying these preferences, as contracts alone cannot govern inheritance.

Second, courts interpreting wills, PMC statutes, or intestacy laws should treat the ART contract and will as conclusive evidence of the decedent's intent. By doing so, courts can avoid resource-intensive and often unreliable inquiries into extrinsic evidence. Clear written consent preserves judicial efficiency and ensures predictability in estate administration.

Nicole Pomerantz advocates an intent-based model for determining whether a PMC child should inherit, observing that following an intent model "would be extremely useful for estate experts and courts in a post-*Dobbs* world."[399] She emphasizes that courts should determine whether a decedent intended to establish inheritance rights for preserved embryos.[400] This Note agrees that intent is crucial but insists that it must be explicit and documented ex ante. Requiring formal, written consent eliminates ambiguity, respects reproductive autonomy, and maintains predictability in estate administration.

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395. Knaplund, *supra* note 248, at 937.
396. *See id.* at 945–49.
397. *See supra* Part I.A.1.
398. UNIF. PROB. CODE § 2-120 (UNIF. L. COMM'N 1969) ("Legislative Note: States are encouraged to enact a provision requiring genetic depositories to provide a consent form.").
399. Pomerantz, *supra* note 374, at 322.
400. *See id.* at 323.

CONCLUSION

The LePages' loss is irreversible, and the momentum of the fetal personhood movement will likely continue. Yet property law can respond to these technological and moral challenges to prevent further harm—protecting beneficiary expectations, ensuring inheritances are properly distributed, and avoiding prolonged estate closures. Property law can ensure that the dead hand does not stay frozen, gripping estates and the expectations of beneficiaries for generations.

Advances in ART and evolving reproductive jurisprudence have pushed inheritance law into terrain it was never designed to navigate. Treating extrauterine embryos as persons—or as lives in being for inheritance and RAP purposes—threatens the predictability, administrability, and fairness on which property law depends. These risks arise not only from personhood decisions like *LePage*, but from the fact that ART now stretches reproduction across decades, far beyond what the common law contemplated. The stakes are high: inheritance expectations and estate administration stand to be destabilized if these doctrines do not adapt.

This Note offers a two-part solution. First, core common-law principles should be reaffirmed and modernized by anchoring inheritance rights to birth and gestation—reframing the traditional rule so that a child born alive is treated as if they were alive ten days before implantation for purposes of inheritance and the RAP. This restores the en ventre sa mère doctrine to its original, administrable function and prevents frozen embryos from indefinitely destabilizing estates.

Second, Congress should enact a harmonized federal "postmortem inheritance" statute that requires (1) formal, written consent to postmortem parenthood; (2) an implantation-based definition of PMC children; and (3) a firm, uniform, and limited window for implantation. These requirements respond directly to the realities of ART. They prevent open-ended estate administration and ensure that reproductive autonomy is respected through unequivocal ex ante directives.

Taken together, these reforms preserve doctrinal coherence, safeguard the expectations that structure property law, and provide the clarity and stability that modern families require in the age of reproductive technology.