Has Science Outsmarted Social Security?: Posthumously Conceived Children and Survivor’s Benefits

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INTRODUCTION

Though initially implemented as a social insurance program paying benefits to retired workers, in 1939, the then four year old Social Security Act (the “Act”) was amended to include, among other benefits, survivor’s benefits to widow(er)s and children. ¹ Prior to the adoption of this amendment, an Advisory Council for the Social Security Board recommended that benefits additionally be made available to children of fully-insured² wage earners³ who died before retirement. The council concluded that such a program “not only sustains the concept that a child is supported through the efforts of the parent, but affords a vital sense of security to the family unit.”⁴ This new benefit would take the place of the financial support a young child lost when one of his wage-earning parents died. ⁵

As it reads today, if the deceased individual was fully or currently insured under the Act, an applicant is entitled to survivorship benefits if: he is the insured’s child, was dependent on the

² Hereinafter the terms ‘wage-earner’, ‘insured’ and ‘decedent’ are used interchangeably to refer to the deceased biological parent whose Social Security benefits the applicant is attempting to receive survivor’s benefits under.
³ 42 U.S.C.A. § 414(a) (West) defines in relevant part, “fully insured individual” as a person having at least one-quarter of coverage for each calendar year elapsing after 1950 or the year he reached age 21 and before the year in which he died, if and only if he has at least 6 quarters of coverage; or has a total of 40 quarters of coverage. “Currently insured individual” is defined in 42 U.S.C.A. § 414(b) as any person who had not less than six quarters of coverage during the thirteen-quarter period ending with the quarter in which he died, or the quarter in which he became entitled to old-age insurance benefits.
⁴ Soc. Sec. Advisory Council of 1938. A dependent child of a currently insured individual upon the latter's death prior to age 65 should receive an orphan's benefit, and a widow of a currently insured individual, provided she has in her care one or more dependent children of the deceased husband, should receive a widow's benefit. (Report Recommendations and Conclusions, Sec. 6) http://www.ssa.gov/history/reports/38advise.html (last accessed April 16, 2011).
⁵ 20 C.F.R. § 404.360 (Westlaw current through March 10, 2011).
insured at the time of the insured’s death, and is under age eighteen. If they qualify, children with a deceased parent are entitled to seventy-five percent of the deceased parent’s earned benefit. According to the Social Security Administration, “about 3.8 million kids get 1.6 billion dollars a month in Social Security survivor’s benefits.”

In the intervening years since the 1939 amendment, the language of the Survivor Benefits section of the Act has been revised multiple times. As the makeup of society as a whole and the composition of families have evolved, so too have the categories of people who may receive survivors benefits evolved. In addition, because so many sections in the Act defer to state’s individual laws for interpretation, there is a broad spectrum in the backgrounds of families who may or may not receive benefits depending on their geographical location. The result has been a series of court and administrative opinions which offer often circular discussions of terms meant to have ordinary meaning more than seventy years ago.

The confusing and overbroad language of the child’s survivor benefit section of the Act has been tested in recent years as new technologies have changed the way we define families. The advent of assisted reproductive technologies is creating a class of children never contemplated by the Act—children posthumously conceived with the genetic materials of a parent they would never meet. While some state legislatures have managed to keep up and

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6 42 U.S.C.A. §402(d) (West). In addition, the individual must apply for benefits according to the procedures set forth by the Social Security Administration and cannot be married. If over the age of eighteen, a person may still qualify if he was a full-time elementary or secondary school student under age 19 or is under a disability which began before age 22. 42 U.S.C.A. § 402(d)(1)(A)-(B) (West).
9 Posthumous conception is a different concept from posthumous birth, wherein a mother is already pregnant at the time of the father’s death. In posthumous conception, one of the biological parents is deceased at the time his or her stored reproductive materials are combined with the surviving parent’s to achieve conception.
create laws addressing the rights of these children, many have not. The Social Security Administration and courts have thus struggled to fit the proverbial 'square peg into a round hole’, attempting to classify these children by one definition or another under the Act. The desire of some courts to ensure children are provided for has resulted in posthumously conceived children as a category being distorted to fall under one of several vague terms in the Act. These interpretations of the Act have obscured the true purposes of the Act.

This Note will discuss the varying results of some of the posthumously conceived child cases to emphasize the need for legislative change. It begins with a brief overview of the basics of relevant assisted reproductive technologies and likely future developments. The second Part delves into the language of the Act to provide the framework for how survivor’s benefits are generally awarded. The third Part discusses the various analyses with which courts have approached the Act when presented with posthumously conceived children seeking survivor benefits. The fourth part discusses proposed legislation which states might adopt to clarify the rights of posthumously conceived children at the state level. The final part discusses the need for Congress to amend the Act and prohibit posthumously conceived children from receiving survivor’s benefits in order to fulfill the purposes of the Act.

I. POSTHUMOUS CONCEPTION

Several of the cases involving posthumously conceived children to be discussed below resulted from situations where the father was diagnosed with a terminal illness before dying.

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10 To date, eleven states have laws addressing the inheritance rights of posthumously conceived children. David Shayne and Christine Quigley, *Defining ‘Descendants’: Science Outpaces Traditional Heirship*, 38 ESTPLN 14, 17 (April, 2011)

11 A detailed discussion of assisted reproductive technologies is beyond the scope of this Note. Instead, I will give a quick overview of the technologies that have come into play in the major cases of posthumously conceived children and social security benefits. For an in depth discussion of the technical procedures, see Monica Shah, *Modern*
Warned of the possibility of sterility after treatment, each father then visited fertility centers and had viable sperm cryogenically preserved for later use. Each wife later conceived following her husband’s death, via either a form of in-vitro fertilization or artificial insemination.

In these cases, in-vitro fertilization involves using the frozen sperm and fertilizing eggs extracted from the mother, and then implanting the fertilized egg in the woman’s uterus. Artificial insemination involves inserting the preserved sperm into the woman’s uterus for natural fertilization to occur.\textsuperscript{12} In at least one case a couple had been already attempting to conceive using in-vitro at the time of the husband’s death.\textsuperscript{13} As a result, in that case several eggs were fertilized using the husband’s sperm and allowed to develop into embryos before being frozen for later attempts.\textsuperscript{14} The mother then had the already fertilized embryos implanted after her husband’s death.\textsuperscript{15} Though less successful than the aforementioned procedures, it is also possible for a woman’s egg to be frozen for later attempts at fertilization.\textsuperscript{16} None of the court cases relating to posthumously conceived children have yet dealt with facts involving a deceased mother and surviving father who had a child via surrogacy, but such a case is a possibility in the foreseeable future. Further, frozen embryos could certainly be later implanted into a surrogate.\textsuperscript{17} Though no such cases relating to the issue in this Note have yet arisen, it is thus possible for both biological parents to have reproductive materials frozen and have a child born after both of their deaths. Although the techniques used for posthumous conception have been available for

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\textsuperscript{12} Shah, \textit{supra} n. 11 at 549-550
\textsuperscript{13} Finley v. Astrue, 601 F. Supp. 2d 1092, 1096 (E.D. Ark. 2009)
\textsuperscript{14} Id.
\textsuperscript{15} Id.
\textsuperscript{16} Although success with in-vitro using cryopreserved eggs has been considered by the scientific community to be significantly more difficult than with preserved sperm, a recent study found that frozen donor eggs may work just as well as fresh ones. This study may indicate a turning point in the frequency with which women’s eggs are preserved for later use. Amy Norton, \textit{Frozen Donor Eggs May Work as Well as Fresh}. Reuters. New York. (April 7, 2011) http://www.reuters.com/article/2011/04/07/us-frozen-fresh-idUSTRE73673E20110407?pageNumber=1
\textsuperscript{17} Shah, \textit{supra} n. 11 at 549-551
decades\textsuperscript{18}, legislatures at both the state and federal level have been slow to adapt the law to account for this class of children.

II. POSTHUMOUSLY CONCEIVED CHILDREN AND THE LAW

A. The Social Security Act

The Social Security Act does not expressly address whether posthumously conceived children are entitled to survivor’s benefits. Instead, for each application the Social Security Administration must review whether the applicant is entitled to benefits under the general language of the statute. In order for a child to be entitled to survivor’s benefits there is a series of requirements that must be met. The first issue the Administration will consider is whether the applicant qualifies under the Act as a child.\textsuperscript{19} The Act points to §416(e) for the definition of ‘child’ in analyzing the right to survivor benefits.\textsuperscript{20} Title 42 U.S.C. §416(e)(1) offers the helpful definition “[t]he term ‘child’ means: the child or legally adopted child of an individual.” Later, §416(h) directs that in determining whether an applicant is a ‘child’, the Commissioner should look to the intestacy laws of the state where the insured was domiciled at the time of his death.\textsuperscript{21} If the applicant would be considered a child under the state’s intestacy law, he will be deemed as such for the purposes of the Act.\textsuperscript{22}

If the applicant is not considered a child under the state’s intestacy law, the Act provides an alternative route to qualify as a child within the language of the Act. Under §416(h)(3) an applicant might still be a ‘child’ under the Act if, before his or her death, the insured: acknowledged in writing that the applicant is his or her son or daughter, was decreed by a court

\begin{flushleft}
\textsuperscript{18} Id.
\textsuperscript{19} 42 U.S.C. § 402(d)(1) (West)
\textsuperscript{20} Id.
\textsuperscript{21} 42 U.S.C.A. §416(h)(2)(A) (West)
\textsuperscript{22} Id.
\end{flushleft}
to be the mother or father of the applicant, or was ordered by a court to contribute to the support of the applicant because the applicant was his or her son or daughter.\textsuperscript{23} If the applicant is able to provide evidence of any of the aforementioned, he is considered a child under the Act.

Lastly, an applicant who does not qualify as a child under any of the alternatives discussed above may be able to present evidence satisfactory to the Commissioner that the insured was the applicant’s parent, and that the insured was living with or contributing to the support of the applicant at the time insured died.\textsuperscript{24} If the applicant is unable to demonstrate he qualifies under any of these definitions, he will not be able to receive benefits. The issue of whether a posthumously conceived child can qualify under the Act as a child has itself been an issue that courts have wrestled with.\textsuperscript{25} These cases tend to focus on the first definition, depending on the state’s intestacy law, since the other alternatives within the Act would presumably be difficult for a posthumously conceived child to prove. Once the requirement that an applicant is a ‘child’ under the Act has been met, there is still the further requirement that the applicant must have been dependent on the insured.

If an applicant is a child under §416 of the Act, §402(d)(1) further requires that in order to receive benefits the child must have been dependent on the insured at the time of his death. What is required to meet the dependency requirement depends on the child’s relation to the insured.\textsuperscript{26} In 1965, the Act was amended to include a ‘deemed’ dependency provision for certain children.\textsuperscript{27} 42 U.C.S. § 402(d)(3) now reads:

\textsuperscript{24} 42 U.S.C.A. §416(h)(3)(C)(ii)(West)
\textsuperscript{25} See Gillett-Netting v. Barnhart, 371 F.3d 593, 596-598 (9th Cir. 2004) (holding that a legitimate child under state law is always deemed dependent); Vernoff v. Astrue, 568 F.3d 1102, 1106 (9th Cir. 2009)(holding that biological child is a child under the Act); Capato ex rel. B.N.C. v. Commr. of Soc. Sec., 631 F.3d 626,629-632 (3d Cir. 2011) (holding that child is meant to have ordinary meaning in the Act and thus biological child is child under the Act)
\textsuperscript{26} 20 C.F.R. §§404.360- §404.365
\textsuperscript{27} Mathews v. Lucas, 427 U.S. 495, 509 (1976)
A child shall be deemed dependent upon his father or adopting father or his mother or adopting mother at the time specified in paragraph (1)(C) of this subsection unless, at such time, such individual was not living with or contributing to the support of such child and--
(A) such child is neither the legitimate nor adopted child of such individual, or
(B) such child has been adopted by some other individual.

For purposes of this paragraph, a child deemed to be a child of a fully or currently insured individual pursuant to section 416(h)(2)(B) or section 416(h)(3) of this title shall be deemed to be the legitimate child of such individual.28

Applicants who meet this standard are entitled to benefits.

The effect of the deemed dependency section is that qualifying applicants are not required to show any proof of actual dependency on the deceased parent.29 Congress added this section to streamline the application process and reduce administrative costs.30 Congress concluded that requiring every applicant to show proof of actual dependency would put an increased burden on the Social Security Administration and create unnecessary delays in payments of benefits.31 Thus a broad category of children, the majority of whom actually were dependent on the deceased parent, could have claims processed quickly and with less difficulty.

This section, which presumes dependency in cases where Congress concluded that children would most likely be actually dependent,32 has been the primary focus for analysis when it comes to posthumously conceived child cases. The result of this part of the statute is that a broad category of children are not required to show any proof of support by the deceased parent.33 Without having to show actual dependency, many posthumously conceived children have been able to receive benefits in spite of having not existed at the time the parent died and thus clearly not receiving actual support from the parent34. As the Act stands today, posthumously conceived child survivor benefits have more or less turned not only on a state’s

28 42 U.S.C.A. § 402(h)(3) (West)
29 20 C.F.R. §404.361
30 Mathews, 427 U.S. at 509
31 Id.
32 Id.
33 Id.
34 Gillett-Netting, 371 F.3d at 593
intestacy laws but also on the individual court’s interpretation of the Act. Of significant note is that where a child qualifies for survivor’s benefits under the Act, the surviving parent may additionally receive benefits.\textsuperscript{35} Thus it is possible for a surviving spouse to have a child (or children) using the genetic material of their dead spouse, and subsequently receive seventy-five percent of the insured’s benefit for him or herself and for each child.\textsuperscript{36}

\textbf{B. Treatment by State Intestacy Laws}

Most of the cases that address Social Security survivor benefit application denials to posthumously conceived children have resulted in a court examining the state’s intestacy laws. Unfortunately, the majority of states have not expressly dealt with the issue of posthumously conceived children in their intestacy laws.\textsuperscript{37} Courts are therefore forced to look to the legislative intent at the time state intestacy statutes were created, and delve into in-depth analyses of the meaning of the words ‘child’, ‘natural’, ‘legitimate’, and ‘dependent’ both under the state’s laws and under the Act. The result is that posthumously conceived children either receive no benefits or receive benefits under a myriad of rationales depending on which state the biological parent died in. What follows is a discussion of the major cases on this issue, which demonstrate the profound uncertainty in outcomes of these claims due to the vague language of the Social Security Act. The first set of cases focus their analysis on whether the child in question was a ‘child’ under the Act. The second series completed the discussion of ‘child’ and move on to the second requirement, an analysis of whether a child under the Act was dependent on the deceased parent.

\begin{footnotesize}
\textsuperscript{35} 42 U.S.C.A. § 402(g)(1)(E) (West)
\textsuperscript{36} Id. at §402(e), (g)
\textsuperscript{37} Supra at n. 10
\end{footnotesize}
1. ‘Child’ under the Social Security Act
   
a. Hart v. Chater

   Hart v. Chater was the earliest case that considered the issue of posthumously conceived children. In 1991, Nancy Hart conceived a daughter using the sperm of her husband who had died three months earlier. The Louisiana intestacy law required that a child be alive or born within 300 days of the death of the decedent in order to be entitled to inherit. Hart, born more than a year after her father’s death, was not considered an heir to his estate. Further, Hart was also unable to prove paternity or that she was legitimate under the state’s laws. In spite of this, at the initial hearing Hart was awarded survivor’s benefits, based on the fact that she was the biological child of Mr. Hart. The hearing officer further considered evidence that Mr. Hart had acknowledged the possibility of posthumous conception by his wife and assigned the rights to his sperm to her. The officer concluded that this indicated an intent by Mr. Hart to support any posthumously conceived child and therefore awarded benefits.

   On appeal, the Social Security Appeals Council disagreed, and reversed the award because the hearing officer did not base the award of benefits on the relevant state law. The Council concluded that the child was not dependent on Mr. Hart, and therefore not entitled to survivor’s benefits. When the case was on further appeal to the District Court, the Social Security Administration again reversed its opinion and announced that Nancy Hart’s daughter would receive benefits. The Commissioner announced to the Court that the concerns raised by

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39 Id. at 253
40 Id.
41 Id. at 254
42 Id.
43 Id.
44 Id.
45 Id.
the issue should be decided by the executive and legislative branches and not the courts.\textsuperscript{46} The case was thus dismissed.\textsuperscript{47} In spite of the Commissioner’s plea for legislative action on the issue, in the coming years no changes were made.

\textit{b. Woodward v. Commissioner}

In \textit{Woodward v. Commissioner}, the Massachusetts’s Supreme Court was faced with the following certified question:

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If a married man and woman arrange for sperm to be withdrawn from the husband for the purpose of artificially impregnating the wife, and the woman is impregnated with that sperm after the man, her husband, has died, will children resulting from such pregnancy enjoy the inheritance rights of natural children under Massachusetts’ law of intestate succession?\textsuperscript{48}
\end{quote}

The Court concluded that in limited circumstances, the answer was yes.\textsuperscript{49} The facts of this case are similar to those of many others. In 1993, Warren Woodward was diagnosed with leukemia, and informed that treatment for the disease would likely leave him sterile.\textsuperscript{50} Mr. Woodward and his wife elected to have his sperm extracted and frozen before beginning treatment for the disease.\textsuperscript{51} The treatment was ultimately unsuccessful, and Mr. Woodward died later the same year. Mrs. Woodward elected to undergo in-vitro fertilization after his death. In 1995, Mrs. Woodward gave birth to twins who had been conceived using her dead husband’s sperm.\textsuperscript{52}

Two months later, Mrs. Woodward applied for survivor’s benefits on behalf of the twins and widow’s benefits for herself as the parent of children qualifying for benefits.\textsuperscript{53} The claim was denied, based on a finding that she had not demonstrated that the girls qualified under the

\begin{footnotesize}
\textsuperscript{46} Id. at 255  \\
\textsuperscript{47} Id.  \\
\textsuperscript{48} Woodward v. Commr. of Soc. Sec., 760 N.E.2d 257, 259 (Mass. 2002)  \\
\textsuperscript{49} Id.  \\
\textsuperscript{50} Id at 259  \\
\textsuperscript{51} Id.  \\
\textsuperscript{52} Id.  \\
\textsuperscript{53} Id at 260
\end{footnotesize}
‘child’ requirement of the Act. Undeterred, Mrs. Woodward filed a complaint in Probate Court and had the girls’ birth certificates amended to list Mr. Woodward as their father. In doing so, she was attempting to have a court ordered declaration of paternity so that the girls would qualify as children. Although returning to the Social Security offices with the birth certificates, her claim was again denied. An Administrative Law Judge (‘ALJ’) found, and an Appeals Council later agreed, that the family was not entitled to benefits because the girls were not entitled to inherit under Massachusetts’s intestacy laws. Mrs. Woodward finally appealed to the United States District Court, which certified the question of whether the girls had inheritance rights under the intestacy law of the state to the state’s Supreme Court.

In reviewing the question, the State Court indicated that bright line rules were not favored where not required by statute. Rather than creating a bright-line rule, the Court emphasized that its analysis focused on the facts of the Woodward case. The Court delved into the state intestacy rule, examining it through a balancing test of “the best interests of children, the State’s interest in the orderly administration of estates, and the reproductive rights of the genetic parent.” In an often-quoted analysis, the Court concluded that the state was firmly dedicated to protecting the rights of all children, “regardless of the accidents of their birth.” Further, because the state legislature had not yet enacted any laws to the contrary, the Court found that the state legislature intended children of assisted reproductive technologies to have the same rights as naturally conceived children.
The Court next examined the state’s interest in the orderly administration of estates, and concluded that the posthumously conceived children were non-marital because conceived after the death of the father, and would thus need to obtain a judgment of paternity in order to inherit. As to the reproductive rights of the deceased parent, the court determined that the parent must not only consent to posthumous use of their reproductive material, but additionally must consent to the support of any resulting child. The test this Court announced is one that many courts have modeled their conclusions on where state intestacy laws do not address posthumously conceived children.

c. *Stephen v. Commissioner*

*Stephen v. Commissioner* was one of the cases that denied survivor’s benefits to a posthumously conceived child. In 1997, after her husband unexpectedly died of a heart-attack, Michelle Stephen had her husband’s sperm extracted and cryo-preserved. She later went through several rounds of in-vitro and gave birth to a son in 2001. She applied for survivor’s benefits with the Social Security Administration. After considering Florida’s intestacy laws, which required that a posthumously conceived child must be provided for in the decedent’s will in order to have a claim to any property of the estate, the ALJ denied survivor’s benefits. The ALJ concluded that because the boy could not inherit under Florida law, he was not a ‘child’ within the meaning of §402 of the Social Security Act. Following an initial appeal, the Commissioner affirmed, and Stephen appealed to the District Court.

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63 *Id* at 266-267. Because the Court was examining only the certified question, it did not analyze whether the paternity judgment obtained by Mrs. Woodward was sufficient under the state’s laws.
64 *Id* at 270-271
66 *Id* at 1259
67 *Id*.
68 *Id*.
69 *Id* at 1260
70 *Id*.
The Court agreed with the Commissioner, acknowledging that ‘child’ under the Social Security Act was not the equivalent of ‘child’ in the ordinary sense of the word”. The Court examined each alternative and found that Stephen was not a child as defined by the Act. Further, the Court stated that Stephen was not dependent as required by the Act, since he was born more than three years after his biological father’s death. Although the issue of whether Stephen was dependent or deemed dependent was primarily discussed in dicta since Stephen did not even meet the child criterion, it is of note that this Court took a common sense view of the issue that Stephen could not be dependent on a father that did not exist.

2. ‘Dependent’ ‘child’ under the Act

   a. Gillett-Netting v. Barnhart

      Decided in 2004, Gillett-Netting v. Barnett has had long-lasting effects on the Social Security Administration’s treatment of posthumously conceived children. The background facts of the case are similar to most of the previously discussed cases. Ten months after Rhoda Gillett-Netting’s husband died of cancer, she conceived twins using sperm he had preserved prior to beginning treatment. Before his death, he allegedly told his wife that he wanted her to continue attempting in-vitro using his sperm after his death. Gillett-Netting applied for survivors benefits for the twins with the Social Security Administration. After an appeal because her initial application was denied, an ALJ held that the children should not receive benefits because the last possible time to determine dependency was the date of death of the decedent. Mr. Netting died

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71 Id at 1264
72 Id.
73 Gillett-Netting, 371 F.3d at 594
74 Id at 595
75 Id.
in the early months of 1995.\textsuperscript{76} Because the twins were not conceived until nearly a year later, they could not be dependent on Mr. Netting.\textsuperscript{77}

Gillett-Netting appealed her case to the District Court. The Court examined the issue, and not only agreed that the children were not dependent on Mr. Netting, but also stated that the twins were additionally not ‘children’ under the meaning of the Act.\textsuperscript{78} On further appeal, the Ninth Circuit Court of Appeals reversed.\textsuperscript{79} The Court held that unless parentage was in dispute, the requirements of §416(h) need not be considered.\textsuperscript{80} Instead, the Court looked only to the definition of child under §416(e), and determined it would necessarily include a biological child.\textsuperscript{81} Because it was undisputed that the twins were the biological children of Mr. Netting, the Court felt that they qualified as children under the Act. The Court next moved to the issue of dependency.

In beginning an analysis no court had previously taken, the Court focused on the fact that legitimate children are deemed dependent under the Act. The Court then looked to the state’s legitimacy law, which regarded biological children as legitimate children.\textsuperscript{82} As the biological children of Mr. Netting, the children were thus his legitimate children. The Court found it therefore unnecessary to look at the state’s intestacy laws to determine whether the children would inherit, and argued that “while § 416(h) provides alternative avenues for children to be deemed legitimate, nothing in the Act suggests that a child who is legitimate under state law

\textsuperscript{76} Id at 594.
\textsuperscript{77} Id.
\textsuperscript{78} Id.
\textsuperscript{79} Id
\textsuperscript{80} Id at 597
\textsuperscript{81} Id. at 596
\textsuperscript{82} Id.
separately must prove legitimacy under the Act." The Court reversed, and ordered that the District Court remand to the Commissioner in order for benefits to be awarded to the children.

The consequences of the Ninth Circuit’s opinion have had broad effects on the manner with which the Social Security Administration treats posthumously conceived child cases. In response, after the decision the Administration issued an Acquiescence Ruling to apply the Court’s method when considered any posthumously conceived child applications arising in states within the Ninth Circuit. The Social Security Practice handbook now reads:

In *Gillett-Netting* the [Ninth] Circuit court ruled that a child conceived by artificial means after the death of the insured is a “child” for purposes of child’s insurance benefits under section 202(d)(1) solely because he or she is the biological child of the insured. The court held that, if there was no dispute about the parentage, sections 216(h)(2) and 216(h)(3) of the Social Security Act (the Act) do not apply. Moreover, if such a child is considered legitimate under State law, we will consider the child to be the NH’s [number holder] “legitimate” child and thus dependent upon the insured for purposes of section 202(d) (3) of the Act.

This procedure is only taken by the Social Security Administration in the Ninth Circuit, in Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, the Northern Mariana Islands, Oregon, and Washington. In the remaining states, courts continue to examine these cases using different combinations of the tests in *Gillett-Netting*, *Woodward* and other cases. One commentator criticized the decision in *Gillett-Netting*, saying that the holding “may increase the

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83 *Id* at 599.
84 *Id*
87 The handbook further reads “while the court determined that State law is irrelevant for determining a biological child’s relationship to the NH under section 216(e) of the Act, it applied State law in making its legitimacy determination so it could deem dependency under section 202(d)(1)(C)(ii), (d)(3) of the Act. Similarly, if biological paternity is undisputed, we must still determine child status under State law, however, not for 216(e) of the Act purposes but for section 202(d)(1)(C)(ii), (d)(3) of the Act purposes.” *Id.*
88 *Id.*
uncertainty that is already inherent in the application of the Act.” This statement appears true, as the holdings in subsequent cases have demonstrated.

In Vernoff v. Astrue, a California woman conceived a child using her deceased husband’s sperm, which had been extracted and preserved immediately following his death. She applied for survivor’s benefits for the child, and her application was repeatedly denied. During the pendency of her eventual appeal to the Ninth Circuit, the Gillett-Netting decision was issued. Using the reasoning in Gillett-Netting and the newly proscribed method of the Social Security Acquiescence ruling, the Court concluded that Vernoff’s daughter was indeed a ‘child’ under the Act. Moving to the discussion of dependency, the Court concluded that Vernoff’s daughter was neither entitled to inherit under state law, nor legitimate under California law. Because Vernoff further was unable to demonstrate actual dependency, the Court denied benefits.

Recently the Third Circuit used the reasoning of the Ninth Circuit in Gillett-Netting to reverse the decision by a lower court that a posthumously conceived child was not a ‘child’ under the Act. This Court adopted the Ninth Circuit’s logic and concluded that because the twins were the biological children of a couple that had been married, they qualified as children.

89 568 F.3d at 1102.
90 Cases where sperm or eggs are removed from the deceased person following his or her death present various additional legal implications that are beyond the scope of this Note. However, in this case the fact that Vernoff’s husband was already deceased was relevant to the Court’s analysis to the extent that he could not consent to the donation.
91 Vernoff, 568 F.3d at 1105
92 Id at 1106
93 Id. Under the California law, legitimacy is based not merely on the biological relationship with a child but instead on the existence of a ‘parent-child’ relationship, which may be proved in one of several ways. Since her husband’s sperm was extracted after his death, there was no indication of a parent-child relationship. Id.
94 Id. at 1112
95 Capato, 631 F.3d
under § 416(e). The Court, like the Ninth Circuit, then concluded that therefore there was no reason to look to state intestacy laws under § 416(h). The Court has remanded the case for a decision of whether the children were dependent or deemed dependent under the Act. An even more recent decision by the Fourth Circuit has strongly criticized the reasoning used in Gillett-Netting. The Court in Schafer v. Astrue felt that the Ninth Circuit had disregarded the plain language of the statute, as well as Congressional intent, in its analysis of the term ‘child’.

The series of cases arising from the issue of posthumously conceived children and Social Security benefits highlight a twofold problem. First, many state intestacy laws fail to address the inheritance rights of posthumously conceived children. In addition to the probate problems which may arise in those states, the Social Security Administration is left to try to interpret each state’s approach to posthumously conceived children. Federal courts are then often faced with the problem of interpreting the intent of state legislatures and forced to certify the question to state supreme courts. The second issue is that even where states have addressed posthumously conceived children in their intestacy laws, the language of the Social Security Act can be misinterpreted to rely too heavily on those state intestacy laws. These issues, although obviously connected, should be resolved separately.

III. SOLUTIONS

A. States Must Take Action to Develop Clear Intestacy Laws to Apply to Posthumously Conceived Children

96 Id. at 3
97 Id.
98 Id. at 5
99 Schafer v. Astrue, 10-1500, 2011 WL 1378486 (4th Cir. 2011)
100 Id at 4, stating that the decisions of the Ninth and Third Circuits treated “Congress’s more comprehensive efforts as a mere afterthought.” Id.
The broader, long term solution to the problems posed by posthumous conception is for states to adapt their intestacy laws to evolving technology. This is necessary whether or not there are changes to the Act made to by the federal government. In so doing, states could eliminate much confusion on the part of the Administration and the courts. Perhaps the simplest solution would to expressly exclude posthumously conceived children from inheritance rights under intestacy laws. This option would leave individuals choosing to preserve reproductive material the responsibility of providing for any resulting children in their wills. In addition to this option, there have been several proposed model acts that state legislatures adopt to deal with this issue. States could also adopt rules similar to that proposed in Woodward, which requires express consent to posthumous conception. What follows is a brief discussion of four such model acts, the Uniform Status of Children of Assisted Conception Act, the Uniform Parentage Act, the Uniform Probate Code, and the Restatement (Third) of Property. These model acts provide frameworks which states should adopt to deal with posthumously conceived children at the state level.

1. Uniform Status of Children of Assisted Conception Act

One possible approach to posthumously conceived children which states might adopt is that proposed in the Uniform State of Children of Assisted Conception Act (USCAC). Under the USCAC, a person who dies before a child is conceived with that person’s sperm or embryo, “is not a parent of the resulting child.” The 2001 Editor’s comments to the Act indicate that

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101 This is the approach taken under Florida law. Laurence C. Nolan, *Critiquing Society's Response to the Needs of Posthumously Conceived Children*, 82 Or. L. Rev. 1067, 1078 (2003).
102 *Woodward*, 760 N.E.2d at 259
104 *Id.* at § 4(b)
the purpose of this section was to create a finality in situations where preserved sperm or eggs were used after the death of the individual who had supplied them. Adoption of this section of the USCAC in a state’s intestacy laws would effectively mark death as the line between legal parenthood and genetic parenthood.

2. Uniform Parentage Act

In 2000, the Uniform Law Commissioners combined parts of the UPC, the USCAC with the Parentage Act. Article 7 of the Uniform Parentage Act deals exclusively with children conceived through artificial means. Section 707 provides that the deceased parent must have consented in writing to be the parent of any child conceived using their genetic material after their death. Further, this Section only applies to couples who were married prior to the decedent’s death. Adoption of this section in a state’s intestacy laws would place a limit on the presumption that a biological child is also the legitimate or natural child. It also would provide an additional incentive to individuals using assisted reproductive technologies to consider the possible consequences of preserving their genetic material.


The 2008 proposed amendments to the Uniform Probate Code (UPC) provide yet another, possible treatment of the parent-child relationship between a deceased individual and a posthumously conceived child. Under the UPC a posthumously-conceived child is a child for

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105 Id. at Editor’s comments (Westlaw)
106 Id.
108 Id.
the purposes of intestate succession if there is a signed record from the decedent consenting to parenthood.\textsuperscript{110} Alternatively, he may be treated as a child for intestacy if able to demonstrate by clear and convincing evidence that the decedent intended to be treated “as the parent of the posthumously conceived child”\textsuperscript{111} These limitations are removed by the UPC’s later presumption that if the couple were married at the time of the decedent’s death, the intent requirement is met.\textsuperscript{112} This presumption only limits the posthumously conceived child/parent legal relationship where the biological parents were unmarried. Finally, the UPC creates a time limit such that children conceived after death of one of the parties will only be considered in gestation at the time of death if the conception occurs within 36 months of the death.\textsuperscript{113} Placing a time frame for conception might help to resolve some of the issues arising in terms of intestacy laws. However, because assisted reproductive technologies are not always successful, multiple attempts to achieve conception may be made over a long period of time before a child is actually born.\textsuperscript{114}

4. Restatement (Third) of Property

The Restatement (Third) of Property takes an even more liberal approach to posthumously conceived children. Section 2.5 states that an individual is the child of their genetic parents, whether or not the parents are married.\textsuperscript{115} Comment 1 to the chapter indicates that an individual should be permitted to inherit from a decedent even if conceived after the decedent’s death if born within a “reasonable time period” in “circumstances indicating that the decedent would have approved of the child’s right to inherit”.\textsuperscript{116} The circumstance indicating

\begin{footnotesize}
\begin{enumerate}
\item Id. at §2-120(f)(1)
\item Id. at § 2-120(f)(2)(C)
\item Id. at §2-120(h)
\item Id. at §2-120(k)(1)
\item Shah, supra n. 11 at 550
\item Restatement (Third) of Property (Wills & Don. Trans.) § 2.5 (1999)
\item Id.
\end{enumerate}
\end{footnotesize}
approval suggested by the Restatement is one in which a widow uses her deceased husband’s frozen sperm to conceive.\textsuperscript{117}

Adopting any of these proposals by those states that do not address posthumous conception would solve much of the confusion that arises about inheritance rights of these children. It would also effectively resolve many of the issues with the survivor’s benefit’s section of the Act by providing clear state rules for the Administration to look to. However, this proposal, which many commentators have championed as a solution to the confusion arising from the Act, is still flawed.\textsuperscript{118} Realistically, state legislatures are slow to keep up with technology, and while easy to propose that states should act, the action itself may take a great deal of time. In the meantime, the Administration will still be faced with the prospect of attempting to analyze states individual intestacy laws. State legislatures in general must act to address the rights of posthumously conceived children. Even if each state were to adopt comprehensive legislation dealing with posthumously conceived children, there remains an issue with the survivor’s benefits section of the Act itself.

The reproductive technologies that exist today would likely be inconceivable to the Congress that created the survivor’s benefits section of the Act. It is for precisely this reason that benefits should not be awarded to posthumously conceived children. The purpose behind the Act was to protect families from the devastating loss of not only a family member but also of a major source of the family’s support.\textsuperscript{119} In its Report to Congress, the 1965 Social Security Advisory Council recommended “[a] child should be paid benefits based on his father's earnings without

\textsuperscript{117} \textit{Id.}
\textsuperscript{119} 20 C.F.R. § 404.350 (Westlaw current through March 10, 2011)
regard to whether he has the status of a child under State inheritance laws if the father was supporting the child or had a legal obligation to do so.”\textsuperscript{120} The Advisory Council was concerned, not about state’s laws, but about ensuring that children who had lost a parent would receive benefits. Posthumously conceived children clearly are not the ones experiencing that loss. For this reason, Congress should add language to the Act which states that posthumously conceived children will not be presumed dependent regardless of state intestacy laws.

B. \textit{Congress Should Amend the Act to Reinforce the Intent of the Program}

One concern with excluding posthumously conceived children from survivor’s benefits is that such language would violate the Equal Protection Clause. An examination of the treatment of other classes of children by the Act makes it clear that the argument that posthumously conceived children should not receive survivor’s benefits is not a violation of the Equal Protection Clause. One of the major challenges that earlier courts faced with survivor’s benefits was whether illegitimate children should receive benefits. As previously discussed, a child is ‘presumed’ to have been dependent on the parent if he was legitimate (as defined by state law.)\textsuperscript{121} An illegitimate child may be entitled to benefits if he could inherit under state intestacy law.\textsuperscript{122} In situations where the child is not entitled to inherit under state law, the Act further provides that if the deceased parent was living with the child and contributing to his support at the time of death, the child was dependent and may receive benefits.\textsuperscript{123} The alternatives were added to the Act as an increasing number of cases involved illegitimate children who were often

\begin{footnotesize}
\textsuperscript{122} \textit{Id}
\textsuperscript{123} 42 U.S.C.A. §416(h)(3)(C)(ii)(West)
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excluded by state intestacy laws. These distinctions were challenged in *Mathews v. Lucas*, where the claimant argued that the Act effectively discriminated against certain classes of illegitimate children. In analyzing the issue, the Court concluded that Congress’ purpose of avoiding spurious claims and reducing administrative burdens was reasonably related to the application of the deemed dependency clause. Further, this presumption did not impermissibly discriminate on the basis of legitimacy. The rationale for this decision can just as readily be applied to concerns that specifically addressing posthumously conceived children in the Act may violate Equal Protection.

In spite of the Supreme Court’s acknowledgment that the deemed dependency clause may be over-inclusive in that it may include children not actually dependent, at least one early analysis suggested the Act should be amended to broaden the definition of dependency to include posthumously conceived children. A common theme of many proposals to amend the Act is discussion of the implications that changing the language of the Act may have in terms of the Equal Protection clause. If the Act were revised to exclude posthumously conceived children from the ‘deemed dependency’ clause, the revision might be subject to the intermediate level of scrutiny used by the Court in *Mathews*. Such a revision would pass judicial scrutiny, however, because a congressional conclusion that the vast majority of posthumously conceived children are not dependent on the deceased parent is rational. Excluding posthumously conceived children would reduce the administrative costs of litigating many of these cases. Further, it would be a

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124 *Mathews* 427 U.S. at 503
125 Id.
126 Id at 505-507
127 Id at 509
128 See Banks, *supra* n. 38 at 358-378 (discussing her proposal of an intent-based, prospective support category of dependency where biological parents who created a ‘Procreation Will’ of sorts would allow posthumously conceived children to be entitled to benefits.)
129 427 U.S.at 505-506. The Court deemed statutory classifications relating to illegitimate children permissible unless arbitrary or irrational. Id.
reasonable assumption on the part of Congress that posthumously conceived children will never fit into the category of children who have actually lost the support of a parent.

Many scholars have proposed that a Congressional amendment to the Act, while appropriate, should instead include a bright line, last resort test for posthumously conceived children. These proposals include a myriad of factors such as consent by the deceased parent, written acknowledgement of paternity/maternity, notice of intent by the surviving parent to attempt conception (to state probate courts or the Administration), and multiple time limits on conception. These suggestions simply reflect the need for states to address posthumous conception in intestacy laws, rather than proposing a solution tailored to the purpose of the Act.

One of the stated purposes of the Act is “[t]o give children the chance to grow up healthy and secure.” This purpose, interpreted broadly, certainly gives the impression that any child born, in any manner, to a fully insured wage earner should benefit from the Act. In fact, this statement implies an altruistic goal of protecting every child born to this country. While an admirable sentiment, and one which any nation should certainly undertake, the reality is that survivor’s benefits were not intended to give every child in the country financial support until age eighteen or later. The Act was not created to be a “general welfare provision for legitimate or otherwise ‘approved’ children of deceased insureds, but was intended just ‘to replace the support lost by a child when his father . . . dies . . . ’” The broad discretion and liberal construction which courts have been entitled to has had the result of expanding application of the Act far beyond its intended purpose.

130 See Banks, supra at n. 38, Nolan, supra at n.101
131 Id.
Both courts and commentators have focused on the “best interests of the child” standard and failed to acknowledge that posthumously conceived children simply do not qualify for benefits under the common sense meaning of the Act.\textsuperscript{134} Although the Act should be liberally construed for “marginal cases”\textsuperscript{135}, posthumously conceived child cases are not be marginal. In \textit{Woodward}, the Social Security Commissioner argued that neither the intent of the parents nor the best interests of the child should be part of the consideration for survivor’s benefits, given the structure and purpose of the Act.\textsuperscript{136} The reality remains that posthumously conceived children have no relationship with the deceased parent beyond the biological connection. The issue is not whether the deceased parent would have been obligated to support the child had he or she been alive.\textsuperscript{137} Rather, the death of an individual before the child is conceived is the core of the issue itself. For this reason, it may be that posthumously conceived children are more analogous to the biological child of a donor who remains anonymous. Often public opinion follows similar reasoning, and one columnist pointed out after the Woodward decision that “parenthood involves much more than DNA.”\textsuperscript{138} It is vastly true that children should never be punished because of the “accident of their birth.”\textsuperscript{139} However denying benefits or severely limiting the conditions under which posthumously conceived children may receive benefits is not a punishment. Instead, such Congressional action would reinforce the purpose behind the Act. A recent opinion from the

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\textsuperscript{134} \textit{Woodward,} 760 N.E.2d at 257; Nolan, \textit{supra} n. 101 at 1093
\textsuperscript{135} 20 C.F.R. § 404.360 “Purpose of sections of Social Security Act with respect to child benefits is to provide support to children who have lost either the actual support of an insured parent or the anticipated support which that parent would have been expected to give had his death not intervened, and thus terms of the Act requiring potential applicant to show dependency should not be construed in such a manner as to withhold benefits in marginal cases. Social Security Act.” See also \textit{Gillett-Netting}, 371 F.3d at 598 (discussing liberal construction of act so that children with dead parent receive benefits)
\textsuperscript{137} \textit{Gillett-Netting}, 371 F.3d at 599
\textsuperscript{139} \textit{Woodward,} 760 N.E.2d at 265
\end{flushright}
Fourth Circuit commented that awarding benefits to posthumously conceived children “would serve a purpose more akin to subsidizing the continuance of reproductive plans than to insuring against unexpected losses.” The Fourth Circuit has thus recognized that posthumously conceived children fall beyond the framework of the intended scope of the Social Security Act. The survivor benefits provision of the Act was added with the purpose of replacing something a family lost—the support of a spouse and parent.

The Act is worded so that the laws of the individual states are highly relevant to the analysis of entitlement to benefits. Many courts have pointed out that Congress intentionally left the language of the Act vague to afford courts broad discretion to distribute benefits to children. A criticism to the position that Congress should amend the Act to address posthumously conceived children is that in so doing Congress would undermine the states’ right to determine its own family and probate laws. However, it seems that the legislative history of the Act deferred to States as an administrative convenience at the time the Act was created. At its core, the Act was a nationwide insurance program which the states would share the burden of administering along with the Social Security Administration.

Further, history shows that Congress has amended the Social Security Act where applications have lead to different results in different states. As state laws began to diverge, Congress amended the Act in the hope that less reliance on state law definitions would result in a more uniform outcome for those attempting to receive benefits. In so doing, the Act provided an alternate means for children to receive survivor’s benefits in spite of whether or not they are

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140 Id at 9
141 20 C.F.R §404.360
142 Gillett-Netting, 371 F.3d at 598
143 “Actual management should be left to the States subject to standards established by the Federal Government.” President Franklin D. Roosevelt, Message to Congress on Social Security. (Jan. 17, 1935). Transcript available online at: http://www.ssa.gov/history/fdrstmts.html (last accessed April 16, 2011)
heirs to the parent’s estate under a state’s intestacy law. The Senate Report to the 1965 Social Security Amendment reads

“in a national program that is intended to pay benefits to replace the support lost by a child when his father retires, dies, or becomes disabled, whether a child gets benefits should not depend on whether he can inherit his father's intestate personal property under the laws of the state in which his father happens to live.”

The posthumously conceived child cases have had a similarly diverging result. As the Fourth Circuit has pointed out, these results “might have persuaded Congress to exclude most posthumously conceived children from child status under an updated version of the Act.” Although to date there have only been a handful of cases that have addressed survivorship benefits to posthumously conceived children, the issue is one that can only continue to gain momentum as technology evolves. The varied outcomes and rationales of the cases that have addressed the issue should prompt Congress to further limit the dependence on state intestacy laws. Congress must acknowledge that state intestacy laws which permit posthumously conceived children to inherit should not be relied upon when it comes to survivor’s benefits. Posthumously conceived children fall outside of the intended scope of the Act, and Congress should act to exclude them regardless of state intestacy laws.

CONCLUSION

Technology has advanced beyond the scope of the family relationships considered at the time the Social Security Act was written. Courts that have attempted to analyze the intent of the authors of the Act have been mired in analyses of how to apply the vague language of the Act to this new type of family, leading to differing results in different states. This uncertainty further increases the administrative burden on the Social Security Administration by posing a melee of

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146 Schafer, 2011 WL 1378486 at *9
interpretive rationales for benefits to be awarded. Technology will only continue to evolve, and a
decision must be reached as to how to address the problems posed by posthumous conception at
both the state and federal levels. Cases of posthumously conceived children will always involve
a child who is growing up without one or both of their biological parents. The surviving parent
will have reached a difficult decision after suffering the loss of a spouse or partner. However,
Social Security survivor’s benefits were not intended to provide for children who did not actually
lose the support of a parent. “If sad facts make hard cases, we cannot allow hard cases to make
bad law.”147 Congress must reaffirm the intended scope of the Act by excluding posthumously
conceived children from survivor’s benefits.

147 Schafer, 2011 WL 1378486 at *13