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NOTE

And Baby Makes Two: Posthumously Conceived Children and the Eighth Circuit's Denial of Survivors Benefits

Beeler v. Astrue, 651 F.3d 954 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 2679 (2012).

STEPHANIE LIU

I. INTRODUCTION

Amidst the ever-evolving definition of family, situations are becoming increasingly common in which the arrival of a newborn no longer solidifies a family of three (mom, dad, and baby) as expected. Rather, this baby, a successful result of assisted reproduction, makes two. Widows and single females alike are now able to become pregnant on their own, even after the death of the genetic father, as long as his sperm has been preserved and is available. Yet, such a revolutionary concept, referred to as posthumous conception, is not without controversy.

The Eighth Circuit case of *Beeler v. Astrue* is one in a line of cases that addresses the issue of whether posthumously conceived children may receive their deceased fathers' Social Security benefits. Unlike their traditionally conceived peers, posthumously conceived children face multiple obstacles to qualify for such financial award.

In light of the recent Supreme Court of the United States case of *Astrue v. Capato*,¹ which involved a similar issue, this Note will address the lack of uniformity and guidance among the respective appellate courts regarding the issue. Specifically, the emerging circuit split concerning posthumously conceived children and their rights to Social Security benefits based on the earning records of their deceased, genetic fathers will be examined. In order to do so, the facts and holding of *Beeler* are first discussed, followed by an explanation of Assisted Reproductive Technology. Next, the Social Security Act, along with relevant provisions and case law, will be explored. Lastly, this Note will analyze *Beeler* and its ramifications in Missouri, as well as its im-

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1. 132 S. Ct. 2021 (2012).

pact upon public policy. This Note ultimately concludes that the creation of a uniform federal standard, or at the very least state-specific statutes, for the children at issue is long overdue.

II. FACTS AND HOLDING

Following a five-month whirlwind romance, Bruce and Patti Beeler were engaged by February 2000 and planning for a spring wedding the next year.² Unfortunately, Bruce was diagnosed with acute leukemia, and because the couple's eventual desire to have children was threatened by the potential that chemotherapy treatments would render him sterile, Bruce banked his semen at an Iowa fertility clinic.³

Upon receiving grim news regarding Bruce's chances of survival, the couple married earlier than anticipated in December 2000.⁴ Two months later, Bruce bequeathed his semen to Patti, only to be used by her "in the event of his death," and signed a hospital form acknowledging "paternity and child support responsibility" for any future children.⁵ Following an unsuccessful bone marrow transplant, Bruce passed away in May 2001, comforted by the belief that "Patti would have his children after he died."⁶

Patti later underwent artificial insemination,⁷ and her posthumously conceived daughter B.E.B. was born in April 2003, with Bruce listed undisputedly as the biological father on the child's birth certificate.⁸ Two months later, Patti filed an application for B.E.B.'s child survivor insurance benefits under 42 U.S.C. § 402(d), the relevant provision of the Social Security Act (Act).⁹ This provision, which outlines the requirements for securing survivors insurance benefits, includes a specific segment regarding children of a deceased parent and their eligibility for such award.¹⁰ One requirement is that a minor applicant fit within the definition of a "child" per section 416(e) of the same title.¹¹

2. *Beeler v. Astrue*, 651 F.3d 954, 956 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 2679 (2012).

3. *Id.*

4. *Id.*

5. *Id.* at 956-57.

6. *Id.* at 957.

7. Artificial insemination, known more specifically as intrauterine insemination (IUI), is a fertility treatment in which sperm are surgically introduced to the woman's body. *Assisted Reproductive Technology (ART)*, CTR. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/art/index.htm> (last updated Apr. 19, 2012).

8. *Beeler*, 651 F.3d at 957.

9. *Id.*; see *infra* notes 51-53 and accompanying text; see also 42 U.S.C. § 402(d) (2006).

10. See *infra* notes 51-53 and accompanying text; see also 42 U.S.C. § 402(d).

11. See *infra* note 53 and accompanying text; see also 42 U.S.C. § 416(e).

The Social Security Administration (SSA) denied both B.E.B.'s application and Patti's subsequent request for reconsideration on behalf of her daughter.¹² At a March 2008 hearing before an administrative law judge, the case was directed to the SSA's Appeals Council with a recommendation that B.E.B. not receive benefits.¹³ The council made its final decision on December 22, 2008, ruling that B.E.B. was "not the child of the wage earner within the meaning of the Social Security Act" and thus not qualified for any financial awards.¹⁴

Believing her daughter was in fact entitled to benefits, Patti sued the SSA in an Iowa federal district court for further review of the denial.¹⁵ The district court reversed the agency's ruling and ordered B.E.B.'s benefits to be distributed.¹⁶ Upon the district court's refusal to address its motion to amend the judgment, the SSA filed a timely notice of appeal with the United States Court of Appeals for the Eighth Circuit.¹⁷

In reviewing the appeal, the Eighth Circuit examined 42 U.S.C. § 416(e), which defines the term "child" as required under section 402(d)(1).¹⁸ The relevant portion of section 416(e) broadly states, "the term 'child' means (1) the child or legally adopted child of an individual," (2) a stepchild of the insured person for at least nine months before the insured person died, or (3) a grandchild or stepgrandchild of the insured person in specific situations.¹⁹ Both the courts and the SSA have, however, interpreted "child" as referring exclusively to the *natural*, or genetic, offspring of the insured.²⁰ Section 416(h) provides further guidance for interpreting subsection (e), declaring that a child applicant is a natural child and thus entitled to survivor benefits if he or she would be privileged to take under "such [state] law as would be applied in determining the devolution of intestate personal property."²¹

Relying upon subsection (h) to construe subsection (e), the Eighth Circuit looked to Iowa intestacy law and decided that B.E.B. would be unable to inherit from Bruce Beeler because she was not "begotten," or created before his death, as required by state intestacy law.²² Therefore, the instant court

12. *Beeler*, 651 F.3d at 957.

13. *Id.*

14. *Id.* (emphasis omitted).

15. *See id.*

16. *Id.*

17. *Id.*

18. *Id.* at 958; *see also* 42 U.S.C. § 416(e) (2006).

19. 42 U.S.C. § 416(e).

20. *Beeler*, 651 F.3d at 958; *Gillett-Netting v. Barnhart*, 371 F.3d 593, 596 (9th Cir. 2004) (listing cases which have defined "child" as a natural child), *abrogated by Astrue v. Capato*, 132 S. Ct. 2021 (2012).

21. *Beeler*, 651 F.3d at 958 (emphasis omitted); *see also* 42 U.S.C. § 416(h).

22. *Beeler*, 651 F.3d at 965; *see infra* note 144 and accompanying text.

found that the original, authoritative interpretation by the SSA Appeals Council should be upheld.²³

In spite of Patti Beeler's contentions that B.E.B.'s "child" status could otherwise be satisfied, the court held that 42 U.S.C. § 416(h) was the "exclusive means" by which B.E.B., or any other posthumously conceived child within the jurisdiction of the Eighth Circuit, could establish natural child status as required by subsection (e).²⁴ Therefore, the judgment of the Iowa federal district court was reversed and remanded in favor of the SSA.²⁵ The Eighth Circuit, ultimately siding with the SSA, held that B.E.B. was not an eligible "child" as defined for survivors benefits.²⁶

Although the Eighth Circuit recognized the "profoundly sad" situation of the Beeler family, they emphasized upholding the SSA's goal of "primarily helping those children who lost support after the *unanticipated death* of a parent."²⁷ Adhering to 42 U.S.C. § 416(h)(2)(A), when a posthumously conceived child applies for Social Security survivors benefits in the Eighth Circuit, the matter of the child's eligibility must automatically defer to the respective state intestacy laws.²⁸

III. LEGAL BACKGROUND

In order to set the framework for analyzing the Eighth Circuit's decision in the instant decision, this section will first provide an overview of assisted reproduction. Next, the relevant portion of the Social Security Act will be examined, followed by the principal uniform laws, codes, and Restatement on point. For further examination of how the Act has been interpreted, recent case law from across the circuits concerning posthumously conceived children and SSA benefits will be presented. Lastly, Missouri intestate statutes will be introduced for later application.

A. Assisted Reproductive Technology

In situations where procreation by sexual intercourse has failed or is not an option, assisted reproduction provides an opportunity for sterile couples,

23. *Beeler*, 651 F.3d at 962, 966. The Eighth Circuit gave *Chevron* deference to the SSA Appeals Council. *Id.* at 962. Under *Chevron*, a court is prohibited from "[substituting] its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency" if Congress had "explicitly left a gap for the agency to fill." *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council*, 467 U.S. 837, 843-44 (1984).

24. *Beeler*, 651 F.3d at 960.

25. *Id.* at 966.

26. *Id.* at 958, 966.

27. *Id.* at 966 (quoting *Schafer v. Astrue*, 641 F.3d 49, 58 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 2680 (2012)).

28. *Id.*

same-sex partnerships, single parents, and widows alike to become pregnant. Assisted Reproductive Technology (ART), or “[a]ny technology that is employed to conceive a child by means other than sexual intercourse,”²⁹ helps a woman become pregnant by “surgically removing [her] eggs[,] . . . combining them with sperm in the laboratory, and returning them to the woman’s body or donating them to another woman.”³⁰ This process, available in the United States since 1981, has doubled in use over the past decade.³¹ Currently, over one percent of all infants born annually in the United States are conceived via ART, most commonly through in vitro fertilization.³²

A form of assisted reproduction specific to the instant decision is cryopreservation, the “process by which gametes or embryos are treated and then frozen for potential future use,” such as conception following the death of the male “gamete [provider].”³³ This harvesting of sperm for potential posthumous conception by a female partner is common among soldiers, men with terminal illnesses, and athletes involved in dangerous activities.³⁴ Postmortem gathering of a female’s eggs is also possible, although the process is increasingly more difficult and often “weighs against retrieval.”³⁵ Nor is “egg-freezing technology as advanced” as that available for male genetic material.³⁶ Generally though, the abundance of such cryopreserved gametes and embryos after death provides “ample resources for the posthumous conception of children.”³⁷ However, this postmortem process has been made illegal in Canada, France, Germany, and Sweden.³⁸

29. CHARLES P. KINDREGAN, JR. & MAUREEN MCBRIEN, *ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER’S GUIDE TO EMERGING LAW AND SCIENCE* 402 (2d ed. 2011).

30. *Assisted Reproductive Technology (ART)*, *supra* note 7.

31. *Id.*

32. *Id.* In vitro fertilization, or IVF, is a more invasive ART surgical procedure in comparison to intrauterine insemination (IUI). RESTATEMENT (THIRD) OF PROP.: WILLS & DONATIVE TRANSFERS § 2.5 reporter’s n.8 (1999); *see supra* note 7. IUI places stronger emphasis on the “use and consent associated with sperm,” while IVF focuses more on the sperm’s fertilization of the egg. Andrea Messmer, Note, *Assisted Reproductive Technology: A Lawyer’s Guide to Emerging Law and Science*, 3 J. HEALTH & BIOMEDICAL L. 203, 211 (2007).

33. KINDREGAN & MCBRIEN, *supra* note 29, at 403-04.

34. *Id.* at 252.

35. *Id.* at 257-58. For this procedure, a comatose female must be kept alive so that “ovulation can be induced prior to retrieval,” which may take several weeks. *Id.* at 257.

36. *Id.* at 258.

37. *Id.* at 552.

38. *Id.* at 265. In illegalizing cryopreservation, Canada, for example, has examined the “quagmire of legal, social and ethical issues” of the process. *Frozen Human Egg Buyers May Face Prosecution*, CBC NEWS (Apr. 23, 2012), <http://www.cbc.ca/news/health/story/2012/04/23/eggs-frozen-trade.html>. Health Canada, the country’s federal health department, has said that although cryopreserva-

ART is by no means a perfect solution to infertility. Medical risks include the increased necessity of Caesarean sections, premature deliveries, newborns with low-birth weights, and multiple births.³⁹ Women are often confined to bed rest or prolonged hospital stays to lower the risk of an early delivery, from which a premature infant could have “significant medical needs” or “lifelong handicaps.”⁴⁰ ART also demands a hefty financial commitment; only select jurisdictions require medical insurance plans to cover “at least some” of these particular procedures.⁴¹ Assisted reproduction procedures may require multiple, sometimes unsuccessful cycles, so strong emotional tolerance is essential.⁴² Additionally, great potential for legal harm exists in applying these reproductive methods. Not only is the scope of litigation “enormous” if the resulting child is deformed, but there are numerous possibilities of “negligence, false advertising, [and] failure to warn of dangers.”⁴³

In spite of the constitutional protection of procreation, the law has been hesitant to equate assisted reproduction with traditional notions of conception.⁴⁴ Such reluctance can perhaps be attributed to complications arising from the potential of an ART child having as many as eight parents,⁴⁵ or the

tion “requires confirmation of consent from the donor” and a document exchange, “there’s no watchdog that’s really out there and there are no solid rules [to] . . . rely on.” *Id.* (internal quotations omitted); *About Health Canada*, HEALTH CANADA, <http://www.hc-sc.gc.ca/ahc-asc/index-eng.php> (last visited Oct. 1, 2012).

A possible future, but controversial method of ART is human cloning. KINDREGAN & MCBRIEN, *supra* note 29, at 283. Human cloning requires human somatic cell nuclear transfer (SCNT), which is the creation of embryos without fertilization. *Id.* at 283. If implanted in a uterus to initiate a pregnancy, these embryos could “develop into a human with the same genetic makeup as the person from whose cell the nucleus was extracted.” *Id.* Although described as a “real potential . . . reproductive option,” multiple states have proactively banned such reproductive cloning in spite of any actual, successful results. *Id.* at 281-82. This “preemptive banning is the first of its kind” in comparison to the relatively uncontroversial evolution of all other ART methods “without hindrance” from state governments. *Id.* at 282. Regardless, it has been speculated that despite its “significant psychological, emotional [and] moral risk[s],” human cloning will eventually be a legally protected, “reproductive choice . . . under the [constitutional] right of privacy,” similar to all other ART options. *Id.* at 297.

39. Messmer, *supra* note 32, at 206.

40. *Id.* at 207.

41. KINDREGAN & MCBRIEN, *supra* note 29, at 29.

42. Messmer, *supra* note 32, at 207.

43. KINDREGAN & MCBRIEN, *supra* note 29, at 302.

44. Richard F. Storror, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 598 (2002).

45. *See id.* at 602. Potential parents for a child of assisted reproduction may include “the egg donor, the sperm donor, their spouses, the surrogate and her husband, and the intending mother and father.” *Id.*

reluctance may stem from the controversy of sex selection, in which a woman is essentially able to choose the gender of her baby.⁴⁶ The complete lack of any nationally recognized uniform law focused on ART also reflects the reluctance of state legislatures to “enact controlling statutes” to regulate this emerging sphere of non-traditional conception, in spite of assisted reproduction’s decades of success.⁴⁷

B. *The Social Security Act and Related Provisions*

Following the stock market crash and the Great Depression, President Roosevelt signed the Social Security Act into law on August 14, 1935.⁴⁸ Designed to provide for the general welfare of the country, one of the Act’s main provisions created a “social insurance program,” which paid retirement benefits to only “the primary worker [of the household] when he or she retired at age 65,” based upon that individual’s tax contributions.⁴⁹

The 1939 Amendments expanded the Act to include survivors benefits, which are distributed to “the family in the event of the premature death of a covered worker.”⁵⁰ Codified at 42 U.S.C. § 402(d), subchapter II of the Act specifically addresses the criteria a child must meet in order to be eligible for survivors insurance benefits.⁵¹ The minor applicant must:

- (1) [Be] a “child (as defined in section 416(e) of this title),”
- (2) of a fully insured individual,
- (3) who has filed an application for child’s insurance benefits,
- (4) is unmarried and under 18 years old, and

46. See Kristine S. Knaplund, *Synthetic Cells, Synthetic Life, and Inheritance*, 45 VAL. U. L. REV. 1361, 1365 (2011). Sex selection of a potential baby involves the sorting of male-producing sperm from female-producing sperm and then inseminating the woman with the “sorted sperm of the desired gender.” *Id.* at 1365. In spite of the ongoing disputes, however, this procedure “now rakes in revenues of at least \$100 million every year.” Jasmeet Sidhu, *How to Buy a Daughter*, SLATE (Sept. 14, 2012), http://www.slate.com/articles/health_and_science/medical_examiner/2012/09/sex_selection_in_babies_through_pg_d_american_are_paying_to_have_daughters_rather_than_sons_single.html#pagebreak_anchor_3. An “estimated 4,000 to 6,000” sex selection procedures are being performed each year, with reputable fertility clinics charging about \$18,000 per surgery. *Id.*

47. KINDREGAN & MCBRIEN, *supra* note 29, at xv-xvi.

48. Social Security Act, ch. 531, 49 Stat. 620 (1935).

49. *Historical Background and Development of Social Security*, SOC. SECURITY ADMIN. (May 16, 2012), <http://www.ssa.gov/history/briefhistory3.html>.

50. *Id.*

51. 42 U.S.C. § 402(d) (2006).

(5) was dependent upon the fully insured individual at the time of the insured individual's death.⁵²

Referring to the first requirement, section 416(e) sets out three classes of individuals who are considered a "child."⁵³ The applicable class of "child" to the instant decision defines the term as "the child . . . of an individual."⁵⁴ Along with the SSA, courts have understood this definition to refer exclusively to the "natural," or genetic, child of the insured.⁵⁵ As such, the SSA has adopted the narrow stance that posthumously conceived children can qualify as natural children only if they may inherit through their respective state intestacy codes.⁵⁶

The Act has been construed "liberally" in favor of surviving children to ensure their financial stability after a parent's death.⁵⁷ Thus, its purpose has shifted from a workers' retirement program to one centered upon the provision of economic security for families.⁵⁸ Various state law-related provisions concerning inheritance rights have been proposed to deal with the convergence of posthumously conceived children and survivors benefits.⁵⁹

First, drafted by the National Conference of Commissioners on Uniform State Laws, the Uniform Status of Children of Assisted Conception Act (USCACA) states that if an individual whose egg or sperm is harvested passes away before a child has been conceived by means other than sexual intercourse, then that individual is "not a parent of the resulting child."⁶⁰ This 1988 Act completely "eliminates the ability of all posthumously conceived children to be the legal child of a deceased parent" and thus denies any inheritance via intestate succession.⁶¹ Although this Act is still technically in existence

52. *Beeler v. Astrue*, 651 F.3d 954, 957 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 2679 (2012); *see also* 42 U.S.C. § 402(d).

53. 42 U.S.C. § 416(e).

54. *Id.*; *Beeler*, 651 F.3d at 958.

55. *Gillett-Netting v. Barnhart*, 371 F.3d 593, 596 (9th Cir. 2004). It should be noted that there are various codified definitions for a "child," but for the purposes of subchapter II of the Social Security Act, only section 416(e) applies. *Compare* 42 U.S.C. § 416(e), *with* 42 U.S.C. § 675(8)(A) (defining "child" differently than in the instant case for purposes of foster care and adoption services).

56. SSAR 05-1(9), 70 Fed. Reg. 55,656-01 (Sept. 22, 2005).

57. *Gillett-Netting*, 371 F.3d at 598; *see also* *Smith v. Heckler*, 820 F.2d 1093, 1095 (9th Cir. 1987); *Doran v. Schweiker*, 681 F.2d 605, 607 (9th Cir. 1982).

58. *Historical Background and Development of Social Security*, *supra* note 49.

59. *See infra* notes 60-74 and accompanying text.

60. UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 4(b), 9C U.L.A. 24 (2001).

61. Joseph H. Karlin, "Daddy, Can You Spare a Dime?": *Intestate Heir Rights of Posthumously Conceived Children*, 79 TEMP. L. REV. 1317, 1331 (2006).

tence,⁶² it has essentially been overruled by the enactment of more modern, flexible proposals as described below.

Second, the original version of the 1969 Uniform Probate Code (U.P.C.) section 2-108 supported the traditional proposition that only a child conceived prior to, but born after the decedent's death, could be an heir.⁶³ However, the updated U.P.C. section 2-120 now allows a deceased parent-posthumously conceived child relationship to be established by "proof that the [now-deceased] individual consented to assisted reproduction by the birth mother with intent to be treated as the other parent of the child."⁶⁴ Consent is most easily demonstrated if an individual "signed a record" agreeing to the above provision; in the absence of physical documentation, consent may also be established if "clear and convincing evidence" proves that the individual intended to be treated as the "other" parent, but "death, incapacity, or other circumstances prevented the individual from carrying out that intent."⁶⁵

Furthermore, these 2008 U.P.C. amendments provide that if the deceased spouse was married to the birth mother, no divorce proceeding was pending, and no evidence indicated to the contrary, then the deceased individual is presumed to have consented to assisted reproduction and any resulting parentage.⁶⁶ Another revision implements a time frame for when a posthumous child must be born in order to be able to inherit – the child must either be "in utero not later than 36 months after the individual's death" or "born not later than 45 months after the individual's death."⁶⁷ Subject to these conditions, as long as the decedent has shown some sort of consent, the U.P.C. is apt to treat a posthumously conceived child as if he or she had been born within the decedent's lifetime.⁶⁸

With regards to class gifts that provide for a "trust beneficiary's children," U.P.C. section 2-705 states that "a term of relationship to identify the class members includes a child of assisted reproduction . . . and their respec-

62. The USCACA has only been adopted in two states – North Dakota and Virginia. F. Barrett Faulkner, *Applying Old Law to New Births: Protecting the Interests of Children Born Through New Reproductive Technology*, 2 J. HIGH TECH. L. 27, 33 n.3 (2003).

63. UNIF. PROBATE CODE § 2-108, 8 U.L.A. 283 (1998).

64. UNIF. PROBATE CODE § 2-120 (amended 2008), cmt. subsec. (f), 8 U.L.A. 60 (Supp. 2011) (emphasis added). Although it may seem somewhat foolproof, courts have occasionally interpreted the requirement as consenting to a specific, in utero child – meaning the deceased parent must have known and acknowledged the fact that his spouse was already pregnant prior to his death. *See infra* notes 148-49.

65. UNIF. PROBATE CODE § 2-120 (amended 2008), cmt. subsec. (f), 8 U.L.A. 59 (Supp. 2011) (emphasis added).

66. *Id.* at cmt. subsec. (h).

67. *Id.* at cmt. subsec. (k).

68. Kimberly E. Naguit, Note, *The Inadequacies of Missouri Intestacy Law: Addressing the Rights of Posthumously Conceived Children*, 74 MO. L. REV. 889, 892 (2009).

tive descendants if appropriate to the class, in accordance with the rules for intestate succession regarding parent-child relationships.”⁶⁹ However, this is merely a rule of construction, subject to a contrary intent in the governing instrument.⁷⁰

Third, according to the 2000 Uniform Parentage Act, as long as a deceased individual consented on the record that if ART were to occur postmortem, he would be a parent of the child, the posthumously conceived child will have recognized inheritance rights.⁷¹ Similar to the U.P.C. amendments, the Uniform Parentage Act deters nonconsensual, postmortem use of another’s gametes or embryos and is “even more favorable” than the USCACA toward rights for children of assisted reproduction.⁷²

Last, section 2.5(1) of the Restatement (Third) of Property: Wills and Donative Transfers is the most flexible and explains that for the purposes of intestate succession, “[a]n individual is the child of his or her genetic parents, whether or not they are married to each other.”⁷³ Additionally, in order to inherit, a child of assisted reproduction “must be born within a reasonable time after the decedent’s death,” assuming the deceased parent would have approved.⁷⁴ Unlike the U.P.C. amendments, this Restatement has no definite time parameters for when the posthumously conceived child must be born. Based on the various proposals above and the burgeoning popularity of Assisted Reproductive Technology, legal reform will likely continue to emerge and adapt, attempting to keep pace with and reflect the decisions of the states.

C. Recent Case Law Interpreting the Social Security Act

Due to ART advancements in the last decade, courts have seen a rapid increase in the number of cases concerning the inheritance rights of posthumously conceived children. Specifically, a federal circuit split is developing among those appellate courts that have addressed whether such children can qualify for survivors benefits.

Woodward v. Commissioner of Social Security was one of the earliest cases to address this issue.⁷⁵ Warren Woodward had banked his semen prior

69. UNIF. PROBATE CODE § 2-705 (amended 2008), 8 U.L.A. 141 (Supp. 2011).

70. Sheldon F. Kurtz & Lawrence W. Waggoner, *The UPC Addresses the Class-Gift and Intestacy Rights of Children of Assisted Reproduction Technologies*, 35 ACTEC J. 30, 31 (2009).

71. UNIF. PARENTAGE ACT § 707 (amended 2002), 9B U.L.A. 73 (Supp. 2011).

72. Karlin, *supra* note 61, at 1333.

73. RESTATEMENT (THIRD) OF PROP.: WILLS & DONATIVE TRANSFERS § 2.5(1) (1999).

74. *Id.* at illus. 8(1).

75. 760 N.E.2d 257 (Mass. 2002). Although not a circuit court case, this 2002 opinion was the result of a question of law certified to the Supreme Judicial Court of Massachusetts by the U.S. District Court of the District of Massachusetts for a federal advisory opinion. *Id.* at 259.

to undergoing treatment for leukemia; after his death, his wife Lauren conceived via artificial insemination with Warren's stored genetic material and gave birth to twin girls.⁷⁶

Following the denial of her daughters' child survivors benefits under 42 U.S.C. § 402(d) by both the SSA and an administrative law judge, the Appeals Council of the SSA affirmed.⁷⁷ They reasoned that the twins were not Warren's children "within the meaning of the Act" since they were "not entitled to inherit from [Warren] under the Massachusetts intestacy and paternity laws."⁷⁸ Lauren appealed to the United States District Court for the District of Massachusetts, which certified the inheritance question to the state's Supreme Judicial Court.⁷⁹ However, the district court judge did not order a determination of the facts specific to this case; thus, the Woodward twins' benefits were not decided.⁸⁰

In determining the inheritance rights for posthumously conceived children under Massachusetts intestacy law, the court found that "limited circumstances" exist in which posthumously conceived children may inherit.⁸¹ First, a wife must establish the children's genetic relationship with the decedent, and second, the decedent must have consented "both to reproduce posthumously and to support any resulting child."⁸² In reaching its conclusion, the Supreme Judicial Court first examined the posthumous children section of the state's intestacy law, which failed to provide for after-born heirs.⁸³

However, the Massachusetts court recognized the many decades of ART's success and decided to not "impute to the Legislature the inherently irrational conclusion that assistive reproductive technologies are to be encouraged while a class of children who are the fruit of that technology are to have fewer rights . . . than other children."⁸⁴ Thus, the state Supreme Judicial Court disagreed with the SSA's deference to the "historical context" of the state's posthumous children provision and recognized that ART had outpaced the state's intestacy statutes.⁸⁵ In doing so, they paved the way for posthu-

76. *Id.* at 260.

77. *Id.* at 261.

78. *Id.* at 260-61.

79. *Id.* at 261.

80. The district court judge did not ask the Supreme Judicial Court of Massachusetts to "determine whether the circumstances giving rise to succession rights for posthumously conceived children apply here." *Id.* at 259-60.

81. *Id.* at 272.

82. *Id.* at 270.

83. *Id.* at 264. Massachusetts law states, "Inheritance or succession by right of representation is the taking by the descendants of a deceased heir of the same share or right in the estate of another person as their parent would have taken if living. Posthumous children shall be considered as living at the death of their parent." MASS. GEN. LAWS ANN. ch. 190 § 8 (repealed 2008).

84. *Woodward*, 760 N.E.2d at 265.

85. *Id.* at 265-66.

mously conceived minors to potentially inherit and be eligible for benefits. In sum, the Supreme Judicial Court stated:

Posthumously conceived children may not come into the world the way the majority of children do. But they are children nonetheless. We may assume that the Legislature intended that such children be entitled, in so far as possible, to the same rights and protections of the law as children conceived before death.⁸⁶

In 2004, the United States Court of Appeals for the Ninth Circuit considered this issue for the first time in *Gillett-Netting v. Barnhart*.⁸⁷ On appeal from an Arizona district court, the circuit court ruled that Juliet and Piers Netting, the posthumously conceived twins of married parents Rhonda and the late Robert Netting, were in fact entitled to child survivors insurance benefits.⁸⁸ Having lost their father to cancer before they were born,⁸⁹ the twins were ultimately found to be Robert's natural, dependent children under Arizona law, thus satisfying the requirements of 42 U.S.C. § 402.⁹⁰

In examining the "child" element of section 402, the Ninth Circuit looked to 42 U.S.C. § 416(e) and decided Juliet and Piers qualified as "natural" children, simply because of their parents' valid marriage and their undisputed biological relationship to Robert.⁹¹ The court held that subsection (h), which refers to state intestacy law, was irrelevant; only if the children's parentage were disputed (i.e., the children were born out of wedlock) should this provision be examined.⁹² Additionally, an Arizona statute provided that "every child is the legitimate child of its natural parents" and that natural parents have a "legal obligation" to support their offspring.⁹³ Thus, as the Ninth Circuit reasoned, because the twins were Robert's natural, legitimate children, they were also automatically dependent upon him and therefore entitled to insurance benefits based on his earnings.⁹⁴ This decision standardized the Ninth Circuit's interpretation of the Act: a posthumously conceived child need only meet the standards of "natural" child status and dependency under state law to be awarded survivors benefits.⁹⁵

86. *Id.* (internal quotation marks omitted).

87. 371 F.3d 593 (9th Cir. 2004).

88. *Id.* at 599.

89. *See id.* at 594-95.

90. *Id.* at 599.

91. *Id.* at 596-97.

92. *Id.* at 597.

93. *Id.* at 598-99; *see also* ARIZ. REV. STAT. ANN. § 8-601, 25-501 (West, West-law through Second Regular Session of the Fiftieth Legislature).

94. *Gillett-Netting*, 371 F.3d at 599.

95. *Id.* at 598-99. Subsequently in September 2005, the SSA issued an Acquiescence Ruling to the *Gillett-Netting* decision. *Vernoff v. Astrue*, 568 F.3d 1102, 1105 (9th Cir. 2009). Such a ruling typically "explains how [the SSA] will apply a holding

However, not all states within the Ninth Circuit have similar “reliance” laws. In *Vernoff v. Astrue*, California followed and applied the Acquiescence Ruling⁹⁶ from *Gillett-Netting* but with opposite results.⁹⁷ Following Bruce Vernoff’s accidental death, posthumously conceived Brandalynn was denied child survivors benefits under the Act.⁹⁸ Although Brandalynn was determined to be the natural, biological child of her dad,⁹⁹ she failed to establish her dependence upon Bruce at the time of his death, which was required by California law.¹⁰⁰ Because Brandalynn’s parentage was disputed, California law deemed her an illegitimate child, therefore invoking the state intestacy law per subsection 416(h).¹⁰¹

Unlike Arizona, California requires more than a “mere biological relationship . . . to grant status as a natural parent”; rather, reliance is placed upon the “existence” of a parent-child relationship.¹⁰² Specifically, California Family Code validates such natural parent status for a father if his child is born during the marriage or “within 300 days after the marriage is terminated by [his] death.”¹⁰³ Because Brandalynn was not born within 300 days of Bruce’s death, she could not claim Bruce as her natural father nor any dependence upon him.¹⁰⁴

Additionally, the court interpreted California Probate Code as only providing for children who were “conceived before the decedent’s death but born thereafter.”¹⁰⁵ Brandalynn was conceived via in vitro fertilization nearly three years after her father’s death.¹⁰⁶ Although the Ninth Circuit applied the same pattern of analysis as in *Gillett-Netting*, because Brandalynn could not establish dependence under California law, she failed the intestacy test and was denied survivors benefits.¹⁰⁷

The issue of rights for posthumously conceived children reached the United States Court of Appeals for the Third Circuit in 2011 and resulted in

in a decision of a United States Court of Appeals that . . . conflicts with [their] interpretation of a provision of the Social Security Act.” SSAR 05-1(9), 70 Fed. Reg. 55,656-01 (Sept. 22, 2005).

96. The Acquiescence Ruling limited the application of *Gillett-Netting* to claims within the Ninth Circuit. SSAR 05-1(9), 70 Fed. Reg. 55,656-01 (Sept. 22, 2005).

97. 568 F.3d at 1105, 1111-12.

98. *Id.* at 1105.

99. *Id.* at 1109.

100. *Id.* at 1104.

101. *Id.* at 1105-07.

102. *Id.* at 1107-08.

103. *Id.* at 1107; *see also* CAL. FAM. CODE § 7611(a) (West, Westlaw through 2012 Reg. Sess.).

104. *Vernoff*, 568 F.3d at 1107-08.

105. *Id.* at 1110; CAL. PROB. CODE § 6407 (West, Westlaw through 2012 Reg. Sess.).

106. *Vernoff*, 568 F.3d at 1105.

107. *Id.* at 1112.

that circuit's adoption of the Ninth Circuit stance.¹⁰⁸ *Capato ex rel. B.N.C. v. Commissioner of Social Security* involved a Florida couple, Robert and Karen Capato, whose marriage came to a sudden end when Robert lost his battle to cancer.¹⁰⁹ After in vitro fertilization, Karen gave birth to twins, whose claims for survivors benefits were initially denied by a district court for failure to meet the Act's "child" requirement as determined by Florida intestacy law under 42 U.S.C. § 416(h).¹¹⁰

Upon review, the Third Circuit mirrored the Ninth Circuit's analysis by concluding that because the Capato twins satisfied 42 U.S.C. § 416(e)'s broad "child" definition, there was no family status matter to determine and thus section 416(h) need not even be addressed.¹¹¹ Furthermore, Florida inheritance laws were irrelevant because "all parties agree[d] that the applicants here [were] the [undisputed] biological offspring of the Capatos."¹¹² The court then vacated the order of the district court and remanded the case to determine whether the twins were "dependent" upon Robert at the time of his death.¹¹³

Four months later in April 2011, the United States Court of Appeals for the Fourth Circuit ruled on the exact same issue when deciding *Schafer v. Astrue*, a case from Virginia, but with very different results. Unable to even enjoy a year of marriage to Janice Schafer, Don Schafer was cancer-stricken and passed away after a heart attack.¹¹⁴ Six years later, Janice underwent in vitro fertilization and gave birth to W.M.S., whose child survivors benefits were denied on the grounds that W.M.S. would not have been permitted to inherit from his late father via Virginia intestacy statutes.¹¹⁵

The circuit court treated the SSA's "reasonable" interpretation of the Act with *Chevron* deference¹¹⁶ and sought to maintain the agency's "long-held position" of "requiring all natural children to pass through section 416(h) to claim child status."¹¹⁷ The Fourth Circuit reasoned that undisputed biological parentage was not enough to convey natural child standing because then "it would attribute inconsistent views about child status to . . . Congress."¹¹⁸ Nor would state inheritance law have been applicable to W.M.S., as Virginia intestacy law does not recognize "any child born more than ten

108. *Capato ex rel. B.N.C. v. Comm'r of Soc. Sec.*, 631 F.3d 626, 631 (3rd Cir. 2011), *rev'd*, 132 S. Ct. 2012 (2012).

109. *Id.* at 627.

110. *Id.* at 627-28.

111. *Id.* at 630.

112. *Id.* at 631.

113. *Id.* at 632.

114. *Schafer v. Astrue*, 641 F.3d 49, 51 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 2680 (2012).

115. *Id.*

116. *Id.* at 54; *see also supra* note 23.

117. *Schafer*, 641 F.3d at 54, 58, 62.

118. *Id.* at 55.

months after the death of a parent as that parent's child."¹¹⁹ The Fourth Circuit's deference to the SSA's interpretation of the Act and subsequent denial of W.M.S.' child survivors benefits established its stance as far more stringent than that of the Ninth and Third Circuits'.

A year later, however, the issue of Social Security benefits for posthumously conceived children reached the Supreme Court of the United States, which reversed the Third Circuit's judgment *Capato* ex rel. *B.N.C. v. Commissioner of Social Security*.¹²⁰ Instead, the Court held that per section 416(h), state intestacy law "is a gateway through which all applicants for insurance benefits as a 'child' must pass."¹²¹ Siding with the SSA, the Court found that "reference to state law to determine an applicant's status as a 'child' [was] anything but anomalous."¹²² In fact, the Court stated, requiring child applicants to pass through state intestacy law was a "simple test, one that ensured benefits for persons plainly within the legislators' contemplation, while avoiding congressional entanglement in the traditional state-law realm of family relations."¹²³

The Court also addressed the "conspicuous flaws" in the lower court's reasoning.¹²⁴ In particular, they examined subsection 416(e)'s "tautological definition" of a "child" and found, in contrast to the lower court's reliance the *Capato* twins as the undisputed biological offspring of Karen and Robert, no proof that Congress meant for "'biological' parentage to be [a] prerequisite to 'child' status."¹²⁵

Because the "SSA's reading [was] better attuned to" the text and purpose of subsection 416(h),¹²⁶ the Supreme Court reversed and remanded, thus clearly establishing precedent that child benefit applications must be resolved by "reference to state intestacy law."¹²⁷

D. Missouri Intestacy Law

Missouri courts have yet to define the inheritance rights of posthumously conceived children, although potentially relevant statutes exist.¹²⁸ According to section 474.010 of Missouri's general intestate succession statute, after the decedent's death, his property (or the remainder after distribu-

119. *Id.* at 53 (internal quotation marks omitted).

120. *Astrue v. Capato*, 132 S. Ct. 2021, 2034 (2012).

121. *Id.* at 2029 (citing *Beeler v. Astrue*, 651 F.3d 954, 960 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 2679 (2012)).

122. *Id.* at 2031.

123. *Id.*

124. *Id.* at 2029.

125. *Id.* at 2029-30; *see supra* note 118 and accompanying text.

126. *Id.* at 2026.

127. *Id.* at 2034.

128. Naguit, *supra* note 68, at 900.

tion to the surviving spouse), shall be distributed “to the decedent’s children, or their descendants, in equal parts.”¹²⁹

Missouri Revised Statutes section 474.060 concerns the establishment of parentage. An individual “born out of wedlock” is indisputably the mother’s offspring and may also be “a child of the father” if an “adjudication” prior to his death or “clear and convincing proof” establishes paternity.¹³⁰ Although inheritance is not mentioned, this statute could perhaps be interpreted to allow a posthumously conceived child to take if definitive evidence of paternity is provided.¹³¹

The closest Missouri law comes to addressing the instant issue is illustrated in Missouri Revised Statutes section 474.050.¹³² This provision briefly touches upon the subject of posthumous heirs (children who were conceived prior to but born after death, unlike *posthumously conceived* children who are both conceived and born after death) and describes how they may inherit “in like manner, as if born in the lifetime of the intestate.”¹³³ However, the Supreme Court of Missouri has interpreted this statute only in situations involving omitted heirs to a trust, in which it has been found exclusive to children conceived prior to the decedent’s death but born thereafter.¹³⁴ Consequently, posthumously conceived children are left unaccounted for.

Thus, it was only a matter of time before the Eighth Circuit expressed its view on the rights of posthumously conceived children. The appeal of *Beeler v. Astrue* to the instant court provided such opportunity and ultimately led to the Eighth Circuit’s adoption of the reasoning from the Fourth Circuit.

IV. INSTANT DECISION

For the very first time, the Eighth Circuit addressed the right of posthumously conceived children to receive SSA child survivors benefits in *Beeler*

129. MO. REV. STAT. § 474.010(2)(a) (2000).

130. MO. REV. STAT. § 474.060(1)-(2).

131. Naguit, *supra* note 68, at 900.

132. The statute states:

All posthumous children, or descendants, of the intestate shall inherit in like manner, as if born in the lifetime of the intestate; but no right of inheritance accrues to any person other than the children or descendants of the intestate, unless they are born and capable in law to take as heirs at the time of the intestate's death.

MO. REV. STAT. § 474.050.

133. *Id.*

134. *Vogel v. Mercantile Trust Co. Nat’l Assoc.*, 511 S.W.2d 784, 785, 789 (Mo. 1974).

v. Astrue. In reaching a decision, the instant opinion considered other circuit court rulings and Iowa intestacy law.¹³⁵

The court first addressed Patti Beeler's contention that her daughter B.E.B.'s natural child status could be determined by methods beyond the scope of section 416(h), such as by an "undisputed biological relationship."¹³⁶ The Eighth Circuit quickly rejected that argument, emphasizing that the SSA clearly interprets section 416(h) to be the "exclusive means" by which natural child status under section 416(e) could be achieved, as required by 42 U.S.C. § 402(d).¹³⁷ Furthermore, because the federal agency could not have possibly "intended to include a posthumously conceived child" within its originally drafted definition of a natural child, the SSA's above interpretation of relevant statutory provisions demanded *Chevron* deference.¹³⁸

Next, the court examined similar cases decided in the Third, Fourth, and Ninth Circuits.¹³⁹ In response to the Third and Ninth Circuits' disregard of section 416(h), the Eighth Circuit stated that the Ninth Circuit's opinion in the *Gillett-Netting* case "[misread] the legislative history."¹⁴⁰ Even prior to the 1939 Amendments, section 209(k),¹⁴¹ the predecessor to current section 402(d), ordered state intestacy law to be the sole means for determining child applicant status, thus supporting the Eighth Circuit's proposition that state inheritance requirements had "been a part of the . . . Act all along."¹⁴²

To determine whether B.E.B. qualified as a natural child under section 416(h), the court turned to the Iowa intestacy law in effect at the time of the final SSA decision.¹⁴³ The relevant statute stated:

Heirs of an intestate, *begotten before the intestate's death* but born thereafter, shall inherit as if they had been born in the lifetime of

135. *Beeler v. Astrue*, 651 F.3d 954, 956, 965 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 2679 (2012). The instant opinion was written by Judge Colloton. *Id.* at 956.

136. *Id.* at 960.

137. *Id.* at 960-61.

138. *Id.* at 961-62; *see also supra* note 23.

139. *Beeler*, 651 F.3d at 964.

140. *Id.*

141. Per section 209(k), the "term 'child' . . . means the child of an individual, and the stepchild of an individual . . . and a child legally adopted by an individual." *Id.*

142. *Id.*

143. *Id.* at 964-65. On March 31, 2011, while the Eighth Circuit was considering this appeal, Iowa legislature passed IOWA CODE § 633.220A, which provides intestate succession rights to posthumously conceived children "under certain circumstances." *Id.* at 966 n.4; *see also* IOWA CODE § 633.220A (West, Westlaw through 2012 Reg. Sess.). However, section 633.220A does not apply to the instant case because federal regulations instruct the SSA to consider any versions of state law up until the agency's *final* decision; the SSA's Appeals Council made its final decision on December 22, 2008. *Beeler*, 651 F.3d at 966 n.4. Thus, the new Iowa statute "does not indicate that it is retroactive to the time of Bruce Beeler's death." *Id.*

the intestate and had survived the intestate. With this exception, the intestate succession shall be determined by the *relationships existing at the time of the death of the intestate*.¹⁴⁴

Applying the state code to the instant case, the Eighth Circuit held that because B.E.B. was not “begotten,” or conceived before Bruce Beeler’s death, any possibility of her having an “existing relationship” with Bruce before his passing was precluded; thus, B.E.B. was denied inheritance rights under Iowa law.¹⁴⁵

Additionally, the circuit court held that an alternate Iowa state code,¹⁴⁶ providing inheritance rights for illegitimate, biological children who were “recognized” by their father as his children, was inapplicable to the instant case.¹⁴⁷ Because B.E.B. had not even been conceived at the time of Bruce’s death, it was impossible for Bruce to have “recognized” her as his offspring.¹⁴⁸ The court stated, “[i]t would stretch the statutory language too far to say that a child not yet in existence can be recognized by a man as his child.”¹⁴⁹

The instant court also supported the SSA conclusion that Bruce’s expressed desire for Patti to have his children, as well as his signature on the hospital form, was insufficient to satisfy section 416(h).¹⁵⁰ As the Eighth Circuit noted, Bruce’s signature did not directly acknowledge paternity of any *particular* child, as was required; thus, B.E.B. failed on all grounds to establish her natural child status.¹⁵¹

In the instant case, the court held that a posthumously conceived child’s eligibility for survivor benefits is ultimately dependent upon state intestacy laws.¹⁵² Therefore, the Eighth Circuit concluded that because Iowa law obviously barred Patti’s daughter from inheriting from Bruce, the prior judgment

144. *Beeler*, 651 F.3d at 965 (emphasis added) (quoting IOWA CODE § 633.220).

145. *Id.*

146. IOWA CODE § 633.222 (West, Westlaw through 2012 Reg. Sess.). Specifically:

Unless the child has been adopted, a biological child inherits from the child’s biological father if the evidence proving paternity is available during the father’s lifetime, or if the child has been recognized by the father as his child; but the recognition must have been general and notorious, or in writing. Under such circumstances, if the recognition has been mutual, and the child has not been adopted, the father may inherit from his biological child.

Id.

147. *Beeler*, 651 F.3d at 965.

148. *Id.*

149. *Id.* (internal quotation marks omitted).

150. *Id.*

151. *Id.*

152. *Id.* at 966.

of the district court awarding Social Security benefits to B.E.B. must be reversed and remanded in favor of the SSA.¹⁵³

V. COMMENT

In *Beeler v. Astrue*, the Eighth Circuit aligned with the Fourth Circuit to require posthumously conceived children to satisfy 42 U.S.C. § 416(h) in order to achieve child status and be eligible for survivors benefits.¹⁵⁴ This section first applies the instant decision to the state of Missouri and then broadens the discussion to address the developing circuit court split. Additionally, the reasoning behind the instant court's decision is evaluated, as well as its impact upon public policy.

A. Application to Posthumously Conceived Children in Missouri

In applying the instant decision to Missouri, child eligibility for Social Security benefits becomes synonymous with determining a child's right to inherit under state intestacy laws. This subgroup of children conceived and born after the death of one parent has not been exclusively provided for under Missouri law and therefore is presumed barred from inheriting.¹⁵⁵ Because they are unable to receive benefits via state inheritance statutes, such posthumously conceived children in Missouri will also be precluded from claiming Social Security benefits due to the Eighth Circuit's reliance upon section 416(h).¹⁵⁶

However, a credible argument may be made against the instant presumption. A person advocating for a posthumously conceived child to obtain benefits could argue that Missouri Revised Statutes section 474.010 should permit such a child to inherit because the intestate property is given to the "decendent's children."¹⁵⁷ In light of such a broad designation and absent any specification that the "children" must be alive during the decedent's lifetime, as long as the posthumously conceived child is found to be the deceased's genetic child, he or she should be able to inherit and thus be eligible for survivors benefits.

It has been suggested that whether a Missouri court would embrace such an interpretation depends upon the court's focus – either towards "the legislature's intent [and] the public policy of efficient distribution, or [to] the rights of posthumously conceived children."¹⁵⁸ However, in spite of this valid argument and its ideal result, it is most likely too much of a stretch of the stat-

153. *Id.* at 965-66.

154. *Id.*

155. See Naguit, *supra* note 68, at 901; see also *supra* Part III.D.

156. See *Beeler*, 651 F.3d at 960-61.

157. Naguit, *supra* note 68, at 904; see *supra* note 129 and accompanying text.

158. Naguit, *supra* note 68, at 904.

ute's plain meaning to incorporate posthumously conceived children when they are clearly absent from any statutory language.¹⁵⁹ In a way, the instant court's strict adherence to the SSA and its interpretation adds insult to injury – not only will a posthumously conceived child grow up without his or her biological father, but he or she will also be unable to accept the financial security benefits a father would have wanted the child to have in his absence.

B. Recognition and Evaluation of the Circuit Split

The decision of the Eighth Circuit in the instant decision only further splinters the divide among the circuits and their respective views towards posthumously conceived children.¹⁶⁰ The Third and Ninth Circuits' rulings reflect a more merciful standard, which seems to value parental intent over the SSA's adherence to strict interpretation. Requiring only reliance upon the deceased parent and an undisputed genetic relationship, these two appellate courts seem to respect the unfortunate familial situation, recognizing that a deceased male partner would still want to be "Dad" and be able to provide for a child even after his death. The Third and Ninth Circuits assume, perhaps somewhat ideally, that had the parent survived, he would have wholeheartedly taken full responsibility to care and provide for the child.¹⁶¹

The Fourth and Eighth Circuits essentially went one significant step further in relying upon the additional extremity of state intestacy.¹⁶² While this raises the standard for child eligibility, it also discourages uniformity among the individual states, as each state has its own intestacy laws. Thus, the potential arises for different results within the same circuit.¹⁶³

This circuit split may encourage a somewhat morbid form of forum shopping.¹⁶⁴ The state in which the decedent is domiciled at death determines the applicable state intestacy law.¹⁶⁵ Thus, if a couple discovers early enough that the husband will not survive to see his wife become pregnant, the couple may relocate to a more lenient circuit and select a state with intestate statutes that favor distribution to posthumously conceived children.

159. *Id.*

160. See Messmer, *supra* note 32, at 204; see also *supra* Part III.C.

161. See Capato *ex rel.* B.N.C. v. Comm'r of Soc. Sec., 631 F.3d 626, 631 (3rd Cir. 2011), *rev'd*, 132 S. Ct. 2012 (2012); Vernoff v. Astrue, 568 F.3d 1102, 1109 (9th Cir. 2009); Gillett-Netting v. Barnhart, 371 F.3d 593, 599 (9th Cir. 2004).

162. See *supra* Part III.C.

163. See *supra* Part III.C. Compare Gillett-Netting v. Barnhart, 371 F.3d 593 (9th Cir. 2004) (applying Arizona law and finding posthumously conceived children could take SSA benefits), with Vernoff v. Astrue, 568 F.3d 1102 (9th Cir. 2009) (applying California law and finding that posthumously conceived children were not entitled to SSA benefits).

164. See Karlin, *supra* note 61, at 1341.

165. *Id.*

C. Internal Logic of the Instant Decision and Suggestions

Examining the logic of the instant opinion, the Eighth Circuit deferred heavily to the SSA's interpretation and Congress's intent.¹⁶⁶ While there is merit in conceding to established authorities, it is unlikely that while drafting the 1939 Amendments, the SSA or Congress even considered the possibility that in the future, a woman could conceive and give birth to children after a male partner's death.¹⁶⁷ Yet, assisted reproduction is quickly advancing, and like the court in *Woodward*,¹⁶⁸ Congress and the SSA should re-examine their former interpretations in light of such scientific strides.¹⁶⁹ Instead of relying on state intestate statutes, the Eighth Circuit should have performed its own interpretation of the requirements for child eligibility. *Chevron* deference should not be such a reflexive default, and if more circuits continue to defer in spite of the changing times, the SSA will continue to be rattled by claims from posthumously conceived children.¹⁷⁰

In the instant decision, the Eighth Circuit held that allowing the Beeler child to receive child survivors benefits would not further the Social Security Act's basic purpose of providing for children "who lost support after the *unanticipated* death of a parent."¹⁷¹ However, the instant court's reasoning seems somewhat flawed. Although the death of a parent may be anticipated, granting Social Security benefits would still further SSA purposes by providing financial support to children.¹⁷² Perhaps the focus should instead shift to examine whether posthumously conceived children are really any different from their traditionally conceived peers in single parent households – when it comes down to the very basic purpose of providing for children, the two groups are indistinguishable. A child is no less in need of or less deserving of the support that an additional parent would have provided simply because that child's parent passed away before he or she was born.

166. See *Beeler v. Astrue*, 651 F.3d 954, 960-62 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 2679 (2012).

167. *Id.* at 966.

168. See *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257, 264-66 (Mass. 2002).

169. See Ann-Patton Nelson, Note, *A New Era of Dead-Beat Dads: Determining Social Security Survivor Benefits for Children who are Posthumously Conceived*, 56 MERCER L. REV. 759, 774 (2005).

170. See KINDREGAN & MCBRIEN, *supra* note 29, at 277.

171. *Beeler*, 651 F.3d at 966 (quoting *Schafer v. Astrue*, 641 F.3d 49, 58 (4th Cir.), *cert. denied*, 132 S. Ct. 2680 (2012)). B.E.B. was not alive in 2001 (or earlier) to anticipate Bruce Beeler's death, nor did she lose any support because she did not receive any to begin with (she did not exist during Bruce's lifetime to be a viable recipient). *Id.* at 965-66.

172. See *Capato ex rel B.N.C. v. Comm'r of Soc. Sec.*, 631 F.3d 626, 629 (3d Cir. 2011), *rev'd*, 132 S. Ct. 2021 (2012).

The Eighth Circuit should have expressed the need for a uniform policy approach for posthumously conceived children and their rights while also balancing the states' interest of an "orderly administration of estates," as did the Massachusetts Supreme Court.¹⁷³ Hopefully the recent Supreme Court of the United States decision in *Astrue v. Capato*¹⁷⁴ resolved this question and will begin to make "future cases more consistently decided across the country."¹⁷⁵ This would further validate and recognize the realities of ART.

Until then, perhaps the most logical and practical solution would be for each state to create specific guidelines for posthumously conceived children, instead of relying upon and drawing hazy inferences from traditional state intestacy statutes enacted by legislatures that likely did not contemplate or foresee the intersection of these laws and posthumously conceived children.¹⁷⁶ In a sense, the instant case prompted Iowa to do just that in its adoption of Iowa Code Annotated section 633.220A.¹⁷⁷ This statute provides exclusively for posthumously conceived offspring under Iowa intestate succession:

For the purposes of rules relating to intestate succession, a child of an intestate conceived and born after the intestate's death or born as the result of the implantation of an embryo after the death of the intestate is deemed a child of the intestate as if the child had been born during the lifetime of the intestate and had survived the intestate, if all of the following conditions are met:

- a. A genetic parent-child relationship between the child and the intestate is established.
- b. The intestate, in a signed writing, authorized the intestate's surviving spouse to use the deceased parent's genetic material to initiate the posthumous procedure that resulted in the child's birth.
- c. The child is born within two years of the death of the intestate.¹⁷⁸

While far from perfect, this state guideline is one step closer to recognizing the rights of posthumously conceived children for Social Security survivors benefits, just like their traditionally conceived peers. Creating specific guidelines for posthumously conceived children would not only eliminate state confusion in trying to apply traditional, centuries-old state intestacy law

173. *Woodward*, 760 N.E.2d at 265.

174. 132 S. Ct. 2021 (2012).

175. *See* Karlin, *supra* note 61, at 1352.

176. *See id.*; *see also* Nelson, *supra* note 170, at 773.

177. *Beeler v. Astrue*, 651 F.3d 954, 966 n.4 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 2679 (2012).

178. IOWA CODE § 633.220A(1) (West, Westlaw through 2012 Reg. Sess.).

to non-traditional children, but it would also prevent discrimination against children based solely on their conception and birth.¹⁷⁹

D. Public Policy Results and Ramifications

The effects of the Eighth Circuit's decision upon future law and policy are likely to be widespread. For example, if individual states decide to create specific guidelines for posthumously conceived children and intestate succession, their respective policies will likely reflect the dominant perceptions of their legislatures.¹⁸⁰ Additionally, states may refer to the relevant uniform laws for guidance in forming such statutes.¹⁸¹

Of the previously described uniform codes, one of the most broad and sensible is U.P.C. § 2-120.¹⁸² Predominant in this particular provision is the issue of consent, which, with the exception of consent in writing, has yet to be wholly defined. Could proof that a couple talked about having children before one partner's untimely death be enough to qualify as consent?¹⁸³ And who would be allowed to offer such proof? The couple's lack of contraception (or use thereof) may also be indicative of the decedent's consent (or objection) to postmortem conception.¹⁸⁴ Such consent analysis is further complicated by the potential that proponents of the evidence, via a substituted judgment standard, could have a conflict of interest.¹⁸⁵ For example, if a decedent's mother were to attempt to offer proof that her deceased son wanted to be a father, she could be motivated by the desire to have grandchildren or to potentially inherit a portion of a large estate.¹⁸⁶

There is also a possibility that children could be posthumously conceived even after the deaths of both genetic material providers. Although a third party's request to use the cryopreserved gametes is unlikely and would be highly scrutinized, the situation still calls for "ascertaining the consent of two persons rather than one."¹⁸⁷ Ultimately, in order to determine the boundaries of a decedent's consent, the evidence regarding his or her repro-

179. See Naguit, *supra* note 68, at 907.

180. See Karlin, *supra* note 61, at 1341.

181. See *supra* Part III.B.

182. See *supra* notes 64-65 and accompanying text.

183. According to the U.P.C. § 2-120 2008 amendments, a married couple need not even have talked about having a child in order to satisfy the consent issue. As long as the deceased spouse was married to the birth mother, no divorce proceeding was pending, and no evidence indicates to the contrary, then the deceased individual is presumed to have consented to parentage. There is no need to further investigate for the deceased's specific consent. UNIF. PROBATE CODE § 2-120 (amended 2008), cmt. subsec. (f), 8 U.L.A. 59 (Supp. 2011).

184. KINDREGAN & MCBRIEN, *supra* note 29, at 257.

185. *Id.*

186. *Id.*

187. *Id.* at 256.

ductive rights, as well as those of the surviving spouse and the inheritance rights of pre-existing family members, are likely to take center stage.¹⁸⁸

Showcasing further support of U.P.C. § 2-120, Iowa recently adopted a similar statute,¹⁸⁹ which mirrors the U.P.C. requirements a posthumously conceived child must meet in order to be deemed a child of the intestate (and therefore be eligible for SSA survivors benefits). Modeled after the “in utero” provision of section 2-120,¹⁹⁰ one requirement of the Iowa statute is that the child be born within two years after the intestate’s death.¹⁹¹

These parameters for when an unborn child may be brought into the world attempt to balance two interests – that of a timely settlement of the estate and the “humane interest” of providing time to the surviving partner to grieve before even considering ART.¹⁹² With respect to the latter interest, if states are to adopt such timeframes, they should consider the financial and emotional burdens of ART.¹⁹³ No matter the method, the surgical procedure is likely to be costly, and such expense would fall upon the recent widow, perhaps still struggling with hospital or funeral bills or even searching for a new job to support a future child. Additionally, ART is not always successful the first time, and if the widow is to carry to full term, setting a two-year limit would basically require the female to be impregnated within the first year after her husband’s death. Nurturing and raising a child as a single parent requires a significant amount of mental and emotional stability, and it is unfair to put a limit upon how quickly a surviving spouse must recover to make such a significant life choice and give birth.

However, the argument could be made that, with respect to administering the estate in a timely fashion, such a time limitation is “both fair and constitutional” as it recognizes the right of already existing heirs to “receive their distributions in a reasonably prompt time.”¹⁹⁴ Since an estate executor or personal representative should not be expected to keep the estate open for an indefinite period, the time restriction ensures an efficient settlement of the estate; without it, shares could be distributed to already-existing heirs, only later to be collected and re-distributed to include for after-born, posthumously conceived heirs. Perhaps the time limit should be modified to include a notice provision, in which the surviving partner alerts the estate administrator of her intent to conceive posthumously.¹⁹⁵ Thus, if no notice is given, the ad-

188. *Id.* at 253.

189. IOWA CODE § 633.220A(1) (West, Westlaw through 2012 Reg. Sess.).

190. UNIF. PROBATE CODE § 2-120 (amended 2008), cmt. subsec. (f), 8 U.L.A. 59 (Supp. 2011).

191. IOWA CODE § 633.220A(1).

192. Kurtz & Waggoner, *supra* note 70, at 36.

193. *See* Nelson, *supra* note 169, at 775.

194. KINDREGAN & MCBRIEN, *supra* note 29, at 275-76.

195. Kristine S. Knaplund, *The New Uniform Probate Code’s Surprising Gender Inequities*, 18 DUKE J. GENDER L. & POL’Y 335, 351 (2011).

ministrator is free to proceed “without worrying about the effect of a [posthumously conceived] child.”¹⁹⁶

One benefit of the Eighth Circuit’s otherwise unforgiving stance is that it will likely deter fraudulent acts. Although somewhat difficult to imagine, if widows were financially motivated to bear more children in order to collect greater survivors benefits, they would be sorely disappointed by the Eighth Circuit’s decision.¹⁹⁷ Adhering to state intestacy statutes as they stand, the Eighth Circuit attempts to maintain a systematic administration of estates within each state. With the exception of Iowa, there is simply one set of intestate statutes for each state to reference, whether dealing with a traditionally or posthumously conceived child.

With regard to the future, the current unfavorable treatment in select jurisdictions of posthumously conceived children may discourage the use of assisted reproduction. An already significant and often criticized decision, widows and same sex couples (who face even greater legal hurdles) will not only have to consider whether ART is appropriate for them, but also how, if something were to happen, a potential child would be cared for without the receipt of child survivors benefits. Such obstacles may very well lead to the decline of reproductive technology, as potential parents (and therefore ART clients) of all types are turned away from the idea before even trying. If the current rate of assisted reproduction stalls, attention on the community will wane, leading to the dwindling of financial and intellectual support, as well as precluding further advancements in the field.

While much in the sphere of rights for children conceived and born after an individual’s death remains uncertain, the Eighth Circuit’s decision in the instant decision makes one thing clear: in spite of any amount of intent from a deceased parent to support an unborn child, a posthumously conceived child in the Eighth Circuit’s jurisdiction will be at the mercy of state intestacy codes to determine his or her eligibility for Social Security survivors benefits.

VI. CONCLUSION

The Eighth Circuit’s decision in *Beeler v. Astrue* solidified its stance in the emerging circuit split. In framing posthumously conceived child eligibility for Social Security survivors benefits as synonymous with the ability to inherit under state intestacy, the Eighth Circuit sided with the Fourth Circuit, as opposed to the Third and Ninth Circuits, which require only an undisputed, dependent parent-child relationship. While the Supreme Court of the United States’ decision on the issue in an upcoming case will likely determine the fate of this issue, each state would be wise to adopt a provision to its intestacy laws that specifically addresses the rights of children conceived and born after the death of a parent. Doing so would not only clarify and standardize

196. *Id.*

197. See Karlin, *supra* note 61, at 1341.

the means for such children's Social Security benefits eligibility, but it would also ensure equal treatment for posthumously conceived children alongside their traditionally conceived peers.