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## Challenges and Inconsistencies Facing the Posthumously Conceived Child

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## NOTE

# Challenges and Inconsistencies Facing the Posthumously Conceived Child

*Astrue v. Capato ex rel. B.N.C.*, 132 S. Ct. 2021 (2012)

ANDREW T. PEEBLES\*

### I. INTRODUCTION

The use of artificial reproductive technology (ART) has increased sharply in recent decades<sup>1</sup> as families plan ahead in the face of such difficulties as disease and military service that raise doubts as to whether reproduction will be possible for an individual in the future. Posthumous conception of children is a widely used form of ART, and it allows families to expand, even after the death of one of the parents.<sup>2</sup> In vitro fertilization is the newest form of this technology.<sup>3</sup> But for the posthumously conceived child, the difficulties continue as most states bar these children from inheriting Social Security survivor's benefits from a deceased parent.<sup>4</sup> The Supreme Court of the United States case of *Astrue v. Capato ex rel. B.N.C.* has recently given authority to this inequality, holding that posthumously conceived children are eligible for such benefits if they qualify as a "child" under state intestacy law.<sup>5</sup> However, the Court's decision in this case has left several problems unresolved that will continue to plague courts in the future and will lead to further inconsistent decisions and disparities for children born through in vitro fertilization. Due to the rise in the use of this innovative technology, these issues affect an increasing portion of the population.

This Note will discuss the problems with the Supreme Court of the United States' decision, the inconsistencies that exist in state intestacy law, and the solutions that are necessary to remedy these challenges. Part II gives a brief background of the facts and circumstances surrounding *Astrue*. Part III discusses the history of the Social Security Administration and in vitro fertilization and points out the conflicting results from various jurisdictions that

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\* B.A., University of Missouri, 2011; J.D. Candidate, University of Missouri School of Law, 2015. I would like to thank Professor David English for his invaluable guidance and advice throughout the writing of this Note.

1. Benjamin C. Carpenter, A Chip off the Old Iceblock: How Cryopreservation Has Changed Estate Law, Why Attempts to Address the Issue Have Fallen Short, and How to Fix It, 21 CORNELL J.L. & PUB. POL'Y 347, 357-58 (2011).

2. *Id.* at 358-59.

3. *Id.* at 353.

4. *Id.* at 385-86, 401.

5. 132 S. Ct. 2021, 2033 (2012).

have dealt with this issue. Part IV delves into the Supreme Court's reasoning behind its decision in *Astrue*. Finally, Part V comments on the reasons *Astrue* was poorly decided, the difficulties that will result from the decision, and the methods to resolve these complications.

## II. FACTS AND HOLDING

Karen Capato married Robert Capato in May 1999.<sup>6</sup> Robert was diagnosed with esophageal cancer soon after the marriage and was told that the chemotherapy treatment he required could possibly render him sterile.<sup>7</sup> Because the Capatos wanted children, Robert had his semen deposited and frozen at a sperm bank before undergoing chemotherapy.<sup>8</sup> Despite Robert's treatment, Karen conceived naturally and gave birth to a son in August 2001.<sup>9</sup> Robert's health declined in 2001 and he died in Florida, where he and Karen then resided, in 2002.<sup>10</sup> In his will, which was executed in Florida, he named as beneficiaries the son born of his marriage to Karen and two children from a previous marriage.<sup>11</sup> "The will made no provision for children conceived after Robert's death."<sup>12</sup> Following the death of her husband, Karen began in vitro fertilization using Robert's frozen sperm.<sup>13</sup> In September 2003, eighteen months after Robert's death, she gave birth to twins.

Karen claimed survivor's insurance benefits on behalf of the twins but the Social Security Administration (SSA) denied her application.<sup>14</sup> The United States District Court for the District of New Jersey affirmed the agency's decision, determining "that the twins would qualify for benefits only if, as § 416(h)(2)(A) [of the Social Security Act (the Act)] specifies, they could inherit from the deceased wage earner under state intestacy law."<sup>15</sup> Capato was domiciled in Florida at the time of his death, and under Florida's law, "a child born posthumously may inherit through intestate succession only if conceived during the decedent's lifetime."<sup>16</sup>

The U.S. Court of Appeals for the Third Circuit reversed the district court's decision.<sup>17</sup> The court concluded that under section 416(e) of the Act "the undisputed biological children of a deceased wage earner and his wid-

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6. *Id.* at 2026.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*; see also Social Security Act, 42 U.S.C. § 416(h)(2)(A) (2006).

16. *Astrue*, 132 S. Ct. at 2026; see also FLA. STAT. ANN. § 732.106 (West, Westlaw through Ch. 272 (End) of the 2013 1st Reg. Sess. of the 23rd Legislature).

17. *Astrue*, 132 S. Ct. at 2027.

ow' qualify for survivor's benefits without regard to state intestacy law."<sup>18</sup> The court further held that section 416(h), which the SSA had relied upon, comes into play only when a claimant's status as the child of a deceased wage earner is in doubt.<sup>19</sup> Because the courts of appeals had split on the statutory interpretation question this case presented, the Supreme Court of the United States granted a writ of certiorari.<sup>20</sup>

The Supreme Court, in an opinion by Justice Ginsburg, examined the relationship between the Act's provisions to decide if the Capato twins were eligible for benefits under the Act's definition of "children."<sup>21</sup> The Court held that section 416(e)'s definition of "child," the section relied upon by Karen Capato, was a "definition of scant utility without aid from neighboring provisions."<sup>22</sup> The Court found assistance in the definitions of section 416(h)(2)(A), relied upon by the SSA, which completed the definition of "child" for purposes of the entirety of Subchapter II of the Act, which included section 416(e).<sup>23</sup> Section 416(h)(2)(A) requires that all child applicants qualify under state intestacy law in order to receive benefits, ensuring that benefits are given to those clearly within the legislature's contemplation.<sup>24</sup> The Court believed this reading of the Act's provisions was more adapted to its design to benefit primarily those supported by the deceased [breadwinner during] his or her lifetime.<sup>25</sup> Thus, under the SSA's interpretation of the relevant provisions of the Act, the Court held that a posthumously conceived child applicant must look to state law to determine if they are entitled to insurance benefits as a "child" of a deceased wage earner.<sup>26</sup>

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18. *Id.* at 2027 (quoting *Capato ex rel. B.N.C. v. Comm'r of Soc. Sec.*, 631 F.3d 626, 631-32 (2011)). Section 416(e) holds, "The term 'child' means (1) the child or legally adopted child of an individual." 42 U.S.C. § 416(e) (2006). The Third Circuit found that the undisputed biological child of the Capatos clearly fell within this definition. *Capato ex rel. B.N.C. v. Comm'r of Soc. Sec.*, 631 F.3d at 631-32.

19. *Id.* at 631. The relevant language of § 416(h) states that,

In determining whether an applicant is the child or parent of a fully or currently insured individual for purposes of this subchapter, the Commissioner of Social Security shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual is domiciled at the time such applicant files application, or, if such insured individual is dead, by the courts of the State in which he was domiciled at the time of his death.

42 U.S.C. § 416(h)(2)(A).

20. *Astrue*, 132 S. Ct. at 2027.

21. *Id.* at 2027-28.

22. *Id.* at 2033; *see also* 42 U.S.C. § 416(e) (stating that "'child' means (1) the child . . . of an individual").

23. *Astrue*, 132 S. Ct. at 2030-31; *see also* 42 U.S.C. § 416(h)(2)(A).

24. *Astrue*, 132 S. Ct. at 2031.

25. *Id.* at 2026.

26. *See id.* at 2034.

## III. LEGAL BACKGROUND

## A. History of the SSA and In Vitro Fertilization

Congress enacted the Social Security Act in 1935, providing old age pensions, unemployment compensation, and aid to dependent children.<sup>27</sup> The Act was primarily introduced to combat the problems of economic security in a wage-based economy, especially during the Depression of the 1930s.<sup>28</sup> Title II of the Act provided retirement and disability benefits to insured wage earners, also known as “social security.”<sup>29</sup> An important feature of social security was that it provided a financial safety net and protection for workers from birth until death.<sup>30</sup>

Congress amended Title II in 1939 to offer benefits to the surviving family members of a deceased wage earner, including minor children, who relied on the wage earner during their lifetime.<sup>31</sup> This amendment created “a fundamental change in the Social Security program[,]” altering Social Security “from a retirement program for workers [only] into a family-based economic security program.”<sup>32</sup> As the Supreme Court noted in *Califano v. Jobst*, the amended statute was now “designed to provide the wage earner and the dependent members of his family with protection against the hardship occasioned by his loss of earnings; it is not simply a welfare program generally benefiting needy persons.”<sup>33</sup> Thus, children of deceased earners were entitled to survivorship benefits under the amended Act and received those benefits through the probate process of intestate succession.

The Model Probate Code (MPC) became the first uniform probate act in 1946 when it was created by the Probate Law Division of the American Bar Association (ABA).<sup>34</sup> The MPC contained a provision dealing with “after-born heirs . . . which codified the traditional [common law] rule that all heirs must be living or in gestation at the moment of the decedent’s death” to take

27. Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620-48.

28. Arianne Renan Barzilay, *You’re on Your Own, Baby: Reflections on Capato’s Legacy*, 46 IND. L. REV. 557, 570 (2013).

29. *Id.* at 571; see also Social Security Act of 1935, Pub. L. No. 74-271, 53 Stat. 1362 (1939) (codified at 42 U.S.C. §§ 401-434 (2006)).

30. Jill S. Quadagno, *Welfare Capitalism and the Social Security Act of 1935*, 49 AM. SOC. REV. 632, 634 (1984).

31. Barzilay, *supra* note 28, at 559; see also 42 U.S.C. § 402(d) (2006).

32. Barzilay, *supra* note 28, at 573 (alteration in original) (quoting Historical Background and Development of Social Security, U.S. SOC. SEC. ADMIN., <http://www.ssa.gov/history/briefhistory3.html> (last visited Aug. 6, 2013)) (internal quotation marks omitted).

33. 434 U.S. 47, 52 (1977) (citing *Califano v. Goldfarb*, 430 U.S. 199, 213-14 (1977)).

34. Carpenter, *supra* note 1, at 362.

from his estate through intestate succession.<sup>35</sup> Then, in 1969, the ABA created the Uniform Probate Code (UPC) to replace the MPC, incorporating the MPC's "after-born heirs" provision.<sup>36</sup> Despite some insignificant stylistic changes to the wording of the statute, the drafters maintained the requirement that a child be born or in gestation at the time of the decedent's death in order to be treated as an heir to the estate.<sup>37</sup> The concepts of child inheritance outlined in these codes "had existed unchanged for over [one] thousand years" and up to this time had not encountered any reason to change in any significant way.<sup>38</sup> Thus, under both the MPC and original UPC, posthumously conceived children, a concept unknown and undiscovered at the time, would not have been eligible to inherit from the estate.

In recent decades, the number of posthumous conceptions in the United States has increased sharply, indicative of a trend seen around the world.<sup>39</sup> The term "artificial reproductive technology" encapsulates several procedures, including artificial insemination, surrogacy arrangements, cryopreservation, and in vitro fertilization.<sup>40</sup> But it is this latter form of conception that has become the subject of a large amount of litigation, and the subject of this Note. In vitro fertilization involves the stimulation of multiple egg production by providing medicine to a woman, removing those eggs, combining them with sperm and fertilizing them in a laboratory for two to three days, and finally relocating one or more embryos to a woman's uterus.<sup>41</sup> Remarkably, researchers estimate that nearly 10,000 children are born through in vitro fertilization procedures each year.<sup>42</sup> This practice is expected to continue well into the future for a number of reasons, including increasing success rates for the process, a decreasing stigma associated with the practice, and increasing rates of infertility due to couples waiting longer to procreate.<sup>43</sup> Additionally, couples like the Capatos may not have any other choice but to pursue ART when debilitating disease or death are looming possibilities.

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35. Carpenter, *supra* note 1, at 362-63 (citing MODEL PROBATE CODE § 25 (1946)).

36. Carpenter, *supra* note 1, at 364.

37. Carpenter, *supra* note 1, at 364, (citing UNIF. PROBATE CODE § 2-108 (1969)).

38. Carpenter, *supra* note 1, at 363 (citing Kristine S. Knaplund, *Postmortem Conception and a Father's Last Will*, 46 ARIZ. L. REV. 91, 105-08 (2004) (tracing this approach back to the ancient Romans)).

39. *Id.* at 352-57.

40. *Id.* at 352.

41. *Id.* at 353; see also *In Vitro Fertilization: IVF*, AM. PREGNANCY ASS'N (May 2007), <http://americanpregnancy.org/infertility/ivf.html>.

42. Am. Soc'y for Reprod. Med. et al., *2011 Reproductive Technology Fertility Clinic Success Rates Report*, CENTER FOR DISEASE CONTROL & PREVENTION 24 (Aug. 2013), [http://www.cdc.gov/art/ART2011/PDFs/ART\\_2011\\_Clinic\\_Report-Full.pdf](http://www.cdc.gov/art/ART2011/PDFs/ART_2011_Clinic_Report-Full.pdf).

43. Carpenter, *supra* note 1, at 357.

### B. *Conflicting Decisions on a Novel Issue*

Many novel legal issues and questions have arisen as a result of this new reproductive technology.<sup>44</sup> Does a child conceived after a parent's death have the right to inherit from that parent?<sup>45</sup> If so, is there a time limit on such inheritance?<sup>46</sup> Are children eligible to receive social security survivor's benefits from the deceased parent?<sup>47</sup> These and several other inquiries have forced courts across the country to interpret statutes that were never intended to apply to these situations, and as a result, the decisions have been widely inconsistent.<sup>48</sup> In fact, the Supreme Court granted the Social Security Commissioner's petition for a writ of certiorari in this case solely to resolve the split that had arisen in federal circuit courts on this issue.<sup>49</sup> A review of model cases espousing both sides of the issue will help in understanding the interpretations creating the divide.

In 2002, the Supreme Judicial Court of Massachusetts became one of the first courts to confront the question of whether posthumous children could receive survivor's benefits in *Woodward v. Commissioner of Social Security*.<sup>50</sup> Before undergoing a bone marrow transplant to combat his leukemia, a procedure that threatened to leave him sterile, a Massachusetts man deposited his semen in a storage facility with the support of his wife of three years.<sup>51</sup> Unfortunately, the bone marrow transplant was unsuccessful, and the husband died.<sup>52</sup> Two years later, his wife gave birth to twin girls, conceived through the use of artificial insemination with her husband's semen.<sup>53</sup> Soon after, the wife applied for Social Security survivor's benefits for herself and her twin daughters.<sup>54</sup>

The SSA rejected the wife's claim for child benefits because she had not established that the twins were her husband's children within the meaning of section 416(e) of the Act.<sup>55</sup> Even after obtaining a judgment of paternity from the probate and family court concluding that her husband was the biological father of the twin girls, the SSA would still not allow the children to take survivor's benefits.<sup>56</sup> A United States administrative law judge concluded that the children did not qualify for benefits because Massachusetts state

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44. Carpenter, *supra* note 1, at 350.

45. Carpenter, *supra* note 1, at 350.

46. Carpenter, *supra* note 1, at 350.

47. Carpenter, *supra* note 1, at 350.

48. Carpenter, *supra* note 1, at 350.

49. *Astrue v. Capato ex rel. B.N.C.*, 132 S. Ct. 2021, 2027 (2012).

50. 760 N.E.2d 257, 259 (Mass. 2002).

51. *Id.* at 260.

52. *Id.*

53. *Id.*

54. *Id.* Child's benefits were applied for under 42 U.S.C. § 402(d)(1) while mother's benefits were applied for under § 402(g)(1). *Id.*

55. *Id.*

56. *Id.* at 260-61.

intestacy law would not entitle them to inherit such benefits.<sup>57</sup> Upon the wife's appeal to the United States District Court for the District of Massachusetts, the court certified the question of inheritance rights to the state's Supreme Judicial Court, finding that "no directly applicable Massachusetts precedent exist[ed]."<sup>58</sup>

The court began by examining Massachusetts's intestacy laws, citing one statute providing that "[p]osthumous children shall be considered as living at the death of their parent."<sup>59</sup> However, the court noted that these statutes had remained unchanged for 165 years, enacted in the early nineteenth century at a time when the drafters could not have foreseen the use of the modern reproductive technology involved in this case.<sup>60</sup> Instead, the court established a rule under which posthumously conceived children would be deemed "issue" under Massachusetts intestacy law.<sup>61</sup> The court determined that a child will be held to be the issue of the deceased parent and granted inheritance rights if "(1) time limitations do not bar the child's claim, and (2) the surviving parent . . . can establish three facts: (a) a genetic relationship exists between the child and the decedent, (b) the decedent consented to post-death conception, and (c) the decedent consented to support any resulting child."<sup>62</sup> Thus, under this test, Mrs. Woodward's twin girls would be able to inherit survivor's benefits from their deceased father.<sup>63</sup> The court believed that this test balanced the best interests of the children, the reproductive rights of the genetic parents, and the State's interests in the orderly and prompt administration of estates.<sup>64</sup>

In 2004, the United States Court of Appeals for the Ninth Circuit Court decided *Gillett-Netting v. Barnhart*, a case with facts strikingly similar to *Astrue v. Capato*.<sup>65</sup> A husband deposited sperm prior to undergoing chemotherapy treatments for cancer.<sup>66</sup> The treatments were unsuccessful, and the husband died, having agreed with his wife that his sperm should be used to have a child after his death.<sup>67</sup> Ten months after his death, the wife went through in vitro fertilization and gave birth to twins eight months later.<sup>68</sup> Her eventual application for social security survivor benefits for the twins was denied, and she appealed to the Ninth Circuit.<sup>69</sup>

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57. *Id.* at 261.

58. *Id.* (quoting the district court's opinion) (internal quotation marks omitted).

59. *Id.* at 264 (alteration in original) (quoting MASS. GEN. LAWS ch. 190, § 8 (repealed 2008)) (internal quotation marks omitted).

60. *Id.* at 264.

61. *Id.* at 272.

62. Carpenter, *supra* note 1, at 390 (citing *Woodward*, 760 N.E.2d at 272).

63. *See Woodward*, 760 N.E.2d at 272.

64. *Id.* at 264-65.

65. 371 F.3d 593 (9th Cir. 2004).

66. *Id.* at 594.

67. *Id.* at 594-95.

68. *Id.* at 595.

69. *Id.*

The court held that the posthumously conceived children met the requirements of the Act and that they were thus entitled to survivor benefits.<sup>70</sup> Under the Act, the determination of a child's eligibility turned on the definition of "child" and a finding of dependency.<sup>71</sup> The court noted that the Act defined "child" broadly under section 416(e) "to include any 'child or legally adopted child of an individual'" and that both the "[c]ourts and the SSA had interpreted the word . . . to mean the natural or biological child of the insured."<sup>72</sup> Further, the court held that section 416(h) of the Act, relied upon by the SSA, had no relevance to the issue because nothing in it suggested that a child must prove parentage if it is not disputed.<sup>73</sup> Therefore, the only remaining issue was whether the children met the dependency requirements of section 402(d) of the Act.<sup>74</sup> Section 402(d)(1)(C) entitles a child to the benefits of an insured parent if he was dependent upon such individual at the time a Social Security application was filed, at the insured individual's death, or at the beginning of the insured's period of disability entitling him to such benefits.<sup>75</sup> Applying this section of the Act, the court found that the dependency requirements had been met.<sup>76</sup> Thus, the Ninth Circuit became the first federal court of appeals to address this issue, ruling in favor of providing social security benefits to posthumously conceived children.<sup>77</sup>

In 2011, the United States Court of Appeals for the Fourth Circuit gave the opposing view of this controversial issue when it decided *Schafer v. Astrue*.<sup>78</sup> Don and Janice Schafer were married in 1992, but Don died the next year of a heart attack.<sup>79</sup> However, Don had deposited his sperm into a storage facility because he was undergoing chemotherapy treatment for cancer that might have rendered him sterile.<sup>80</sup> Through in vitro fertilization Janice gave birth to a son, Don's biological child, seven years after her hus-

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70. *Id.* at 599.

71. Karen Minor, Note, *Posthumously Conceived Children and Social Security Survivor's Benefits: Implications of the Ninth Circuit's Novel Approach for Determining Eligibility in Gillett-Netting v. Barnhart*, 35 GOLDEN GATE U.L. REV. 85, 86 (2005).

72. *Gillett-Netting*, 371 F.3d at 596 (quoting 42 U.S.C. § 416(e) (2006)).

73. *Id.* at 597.

74. *Id.* at 597-98.

75. 42 U.S.C. § 402(d)(1)(C) (2006).

76. *Gillett-Netting*, 371 F.3d at 597-99. The court noted the broad definition of dependency "under the Act, whereby . . . only completely unacknowledged, illegitimate children must prove actual dependency" in order to receive benefits. *Id.* at 598. In this case, both parents expressly acknowledged their children. *Id.* at 594-95. Additionally, under the law of Arizona, the state in which the father died, the status of illegitimacy had largely been eliminated. *Id.* at 598.

77. Minor, *supra* note 71, at 86.

78. 641 F.3d 49 (4th Cir. 2011).

79. *Id.* at 51.

80. *Id.*

band's death.<sup>81</sup> Janice applied for Social Security survivor's benefits on behalf of her son but was denied.<sup>82</sup> The SSA, again relying on section 416(h), held that natural children must be able to inherit from the decedent under state intestacy law or satisfy certain exceptions to qualify as "children" under the Act.<sup>83</sup> Mrs. Schafer argued that undisputed natural children such as hers plainly fell within section 416(e)'s basic definition of "child," thus making their state intestacy rights irrelevant.<sup>84</sup>

The Fourth Circuit affirmed the judgment, holding that posthumously conceived children were not entitled to benefits under the Act.<sup>85</sup> The court held that section 416(e)'s definition of "child" was not complete without the accompanying structure given to the term by section 416(h).<sup>86</sup> *Gillett-Netting* insisted that "child" refers to a "natural child," allowing section 416(e) to independently provide child status to children whose natural or biological parentage is undisputed.<sup>87</sup> But the Fourth Circuit believed that this reasoning "would attribute inconsistent views about child status to the Congress."<sup>88</sup> The court reasoned that if definite biological parentage was sufficient under section 416(e)(1), it would have made no sense for Congress to require those whose parentage was initially disputed but was then resolved to prove something in addition to biological parentage under section 416(h).<sup>89</sup> Thus, the court decided that the SSA's interpretation most accurately reflected the text and structure of the statute as well as its aim of providing benefits primarily to those who lose a wage earner's support unexpectedly.<sup>90</sup>

Finally, in 2011, the Eighth Circuit gave its view of the issues in *Beeler v. Astrue*.<sup>91</sup> After getting engaged in 2000, but before the marriage, Bruce and Patti Beeler discovered that Bruce had leukemia and needed to undergo chemotherapy.<sup>92</sup> Due to the possibility that the treatment would cause sterility in Bruce, the couple decided to deposit his semen in a sperm bank before treatment.<sup>93</sup> Bruce and Patti were finally married in December of 2000, but Bruce was told that his chances for long-term survival were fifty percent.<sup>94</sup>

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81. *Id.*

82. *Id.*

83. *Id.* at 50-51.

84. *Id.* at 51.

85. *Id.*

86. *Id.* at 55.

87. *Id.*

88. *Id.*

89. *Id.* Section 416(h)(3)(C)(ii) provides child status to a child who cannot inherit but who can prove both that the insured was the child's parent and that the insured was "living with or contributing to" the child at the time of death. 42 U.S.C. § 416(h)(3)(C)(ii) (2006).

90. *Schafer*, 641 F.3d at 51.

91. 651 F.3d 954 (8th Cir. 2011).

92. *Id.* at 956.

93. *Id.*

94. *Id.*

In making plans for his death, Bruce bequeathed his deposited semen to his wife, stating that only she could use it in event of his death.<sup>95</sup> Additionally, the Beelers signed a form indicating both spouses' intent to use the semen for artificial insemination purposes through in vitro fertilization.<sup>96</sup> The form further stated that Bruce agreed "to accept and acknowledge paternity and child support responsibility of any resulting child or children."<sup>97</sup> Bruce Beeler died in Iowa in May 2001 and one year later Patti conceived a child who was born in 2003.<sup>98</sup> It was undisputed that the child was Bruce Beeler's biological daughter.<sup>99</sup>

Patti thereafter filed an application for child's insurance benefits but was denied by the SSA.<sup>100</sup> After a hearing before an administrative law judge, the agency's appeals council held that the Beeler's posthumously conceived child was "not the child of the wage earner *within the meaning of the Social Security Act* (Act) and is not entitled to benefits."<sup>101</sup> Beeler sued the Social Security Commissioner in 2009, seeking review of the SSA's denial of benefits.<sup>102</sup> The district court reversed the SSA's decision, and the Commissioner timely appealed.<sup>103</sup>

Iowa's afterborn-heirs provision was based on the MPC's language requiring a child to be "begotten before [the intestate's] death but born thereafter" if it was to be eligible for survivor's benefits.<sup>104</sup> The court held that because the child was not conceived until a year after Bruce Beeler's death, the child was not 'begotten' before his death, as required by the plain language of the Iowa statute.<sup>105</sup> Thus even though the Beelers had explicitly stated in writing that they intended to conceive the child posthumously, and even though there was no dispute that Bruce was the biological father, the court would not allow the child to receive survivor's benefits due to its reliance on state law.<sup>106</sup> Although the Iowa legislature amended its after-born heirs provision following this case to recognize posthumously conceived children, this case is still relevant for the states that continue to follow the MPC's language.<sup>107</sup>

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95. *Id.*

96. *Id.*

97. *Id.* at 957.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* (quoting the Appeals Council's opinion) (internal quotation marks omitted).

102. *Id.*

103. *Id.*

104. Carpenter, *supra* note 1, at 398 (quoting MODEL PROBATE CODE § 25 (1946)); *see also* IOWA CODE ANN. § 633.220 (West, Westlaw through immediately eff. legislation signed as of 3/14/2014 from the 2014 Reg. Sess.).

105. Carpenter, *supra* note 1, at 398-99 (citing *Beeler*, 651 F.3d at 965).

106. *Beeler*, 651 F.3d at 966.

107. Carpenter, *supra* note 1, at 399.

As is evidenced by these opposing cases, courts across the country have grappled with the difficult question of whether or not a child born posthumously may claim survivor's benefits under the SSA. Courts have interpreted the language of the Act's relevant sections, primarily focusing on sections 416(e) and (h), with differing views as to what they mean. The cases above involved nearly identical factual situations, yet the courts reached opposite conclusions, primarily due to the wide variations in states' inheritance statutes. The definition of "child" had long been an issue of relative ease. But with the advent of posthumous conception and the recent rise in its use, who is considered a "child" for inheritance purposes has taken on new difficulties. Not until the decision was handed down by the Supreme Court in *Astrue v. Capato* had there been an authority attempting to contribute consistency to these problems.

#### IV. INSTANT DECISION

In the instant case, the Supreme Court was asked to resolve an issue of first impression: whether a child conceived through in vitro fertilization is entitled to inherit Social Security survivor's benefits from a deceased parent.<sup>108</sup> Answering this question required the Court to interpret relevant sections of the Social Security Act to determine legislative intent and to decide if the Capato twins qualified as "children" under the Act's definitional provisions.<sup>109</sup> Thus, most of the Court's opinion was focused on settling conflicts between sections 402(e) and (h), the core issue in prior case law decisions that had arisen concerning this new technology.

The Court first rejected Capato's proposed definition and argument that because the twins are undeniably the "biological child[ren] of married parents," they are entitled to survivor's benefits.<sup>110</sup> It did this by pointing out that nothing in section 416(e)'s definition of "child" indicates that Congress interpreted the term to solely refer to the children of married parents.<sup>111</sup> Additionally, section 416(e) does not suggest that Congress intended biological parentage to be a precondition to achieving child status under that provision.<sup>112</sup> In fact it was pointed out that in 1939 when the Act was passed, "there was no such thing as a scientifically proven biological relationship between a child and [his] father," and as a result, the word "biological" does not appear anywhere in the Act.<sup>113</sup> Furthermore, the Court, citing various

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108. See *Astrue v. Capato ex rel. B.N.C.*, 132 S. Ct. 2021, 2027 (2012).

109. *Id.*

110. *Id.* at 2029-30.

111. *Id.* at 2029; see also 42 U.S.C. § 416(e) (2006) (defining "child" as "the child . . . of an [insured] individual").

112. *Astrue*, 132 S. Ct. at 2030.

113. *Id.*

statutes, noted that existing law does not necessarily recognize a biological parent as a child's legal parent.<sup>114</sup>

The Court then turned to interpret the relevant section of the Act.<sup>115</sup> It pointed out that section 416(h)(2)(A)'s opening statement provided a "textual clue": "In determining whether an applicant is the child . . . of [an] insured individual *for purposes of this subchapter*,' the Commissioner shall apply state intestacy law."<sup>116</sup> The subchapter to which this instruction refers is Subchapter II of the Act, spanning sections 401-434, which means that section 416(h) applies to and controls sections 402(d) and 416(e).<sup>117</sup> Section 416(h) requires turning to state law to determine a child's inheritance rights; on this point, the Court held that "the statute's text 'could hardly be more clear.'"<sup>118</sup> It was also noted that, on matters of family status, the Act frequently refers to state law, indicating that such a reference "is anything but anomalous."<sup>119</sup>

The Court then turned to Congress' intentions for the Act, holding that the "core purpose" of the legislation was to "provide . . . dependent members of [a wage earner's] family with protection against the hardship occasioned by [the] loss of [the insured's] earnings."<sup>120</sup> It was also stated that children would "more likely be dependent during the parent's life and at his death."<sup>121</sup> Thus, according to the Court's logic, a child never having depended on a parent's income will not have suffered any additional financial hardship at the death of that parent.<sup>122</sup> It was further stated that relying on state intestacy law to determine who qualifies as a "child" would serve the Act's driving objective.<sup>123</sup> The Court believed that determining eligibility under state intestacy law would be a feasible substitute for arduous case-by-case determinations whether the child was actually dependent on her father's earnings.<sup>124</sup>

Finally, the Court held that the SSA's interpretation and reading of the relevant statutes was reasonable and, therefore, entitled to the Court's deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*,

114. *Id.* (citing CAL. FAM. CODE § 7613(b) (West, Westlaw through Ch. 3 of 2014 Reg. Sess. and all propositions on the 6/3/2014 ballot); MASS. GEN. LAWS ANN. ch. 46, § 4B (West, Westlaw through Chapter 43 of the 2014 2nd Annual Session); UNIF. PROBATE CODE § 2-119(a) (amended 2010)).

115. *Id.* at 2030-33.

116. *Id.* at 2030-31 (quoting 42 U.S.C. § 416(h)(2)(A) (2006)).

117. *Id.* at 2031.

118. *Id.* (quoting *Schafer v. Astrue*, 641 F.3d 49, 54 (4th Cir. 2011)).

119. *Id.*

120. *Id.* at 2032 (alteration in original) (quoting *Califano v. Jobst*, 434 U.S. 47, 52 (1977)) (internal quotation marks omitted).

121. *Id.* (quoting *Mathews v. Lucas*, 427 U.S. 495, 514 (1976)) (internal quotation marks omitted).

122. *See id.*

123. *Id.*

124. *Id.*

*Inc.*<sup>125</sup> Under *Chevron*, deference to an agency's reading of its statute is appropriate "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that [its] interpretation . . . was promulgated in the exercise of that authority."<sup>126</sup> The Court noted that the SSA's longstanding interpretation of its Act was set forth in regulations published after notice and comment rulemaking.<sup>127</sup> Congress gave the Social Security Commissioner authority to promulgate rules necessary to carry out his functions and relevant statutory provisions.<sup>128</sup> Finally, the SSA's regulations are neither arbitrary or capricious in substance, nor contrary to the statute.<sup>129</sup> Thus, the agency's reading warranted the Court's deference, and the Court ultimately ruled in favor of the SSA, denying a child conceived in vitro the opportunity to inherit Social Security survivor's benefits from a deceased wage earner.

## V. COMMENT

The Court's decision in this case raises several problems that will wreak havoc on courts and cause additional litigation until properly resolved. First of all, *Capato*'s reliance on state law to determine the inheritance rights of a child conceived in vitro will result in inconsistent decisions on this issue in the future as courts apply fifty separate and distinct sets of laws to similar situations. Second, the Court applied a statute that was never intended to deal with ART and, thus, applied a statute that is out of date and in need of revision. Finally, the Court wrongfully distinguishes between children in very similar situations, barring posthumously conceived children from recovering survivor's benefits while still allowing children born out of wedlock to inherit such benefits. In response to these issues, it is necessary for states to reform their inheritance statutes to directly address posthumous children's inheritance rights, using the UPC as a reference. Congress would also be wise to amend the SSA, creating a uniform federal standard explicitly addressing the rights of posthumously conceived children.

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125. *Id.* at 2033 (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984) (requiring federal courts interpreting ambiguous statutes to defer to reasonable interpretations of such statutes by the agencies charged with their implementation)). In this case, the Act's relevant provisions are subject to several varying interpretations, thus, the Court deferred to the SSA's interpretation because it was charged with implementing the Act. *Id.* at 2034.

126. *Id.* at 2033-34 (quoting *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001)) (internal quotation marks omitted).

127. *Id.* at 2028-29 (citing 20 C.F.R. §§ 404.354-404.355 (2012)).

128. *Id.* at 2034.

129. *Id.* (quoting *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 711 (2011)).

### A. Inconsistent Results for Similar Cases

In basing its decision on section 416(h)(2)(A) of the SSA, the Supreme Court requires all courts to look to the intestacy law of the state in which the decedent was domiciled at death.<sup>130</sup> This results in the application of fifty separate and distinct sets of Social Security laws being applied to nearly identical cases, a situation which will inevitably result in inconsistent decisions. Although posthumous conception has existed for several decades, the majority of states have not yet addressed posthumously conceived children in their intestacy statutes.<sup>131</sup> Twenty-six states maintain probate codes based on one of the several model or uniform acts passed in the last seventy years.<sup>132</sup> Of these acts, only the 2008 revision of the Uniform Probate Code, followed in full by only two states,<sup>133</sup> directly addresses the inheritance rights of a posthumously conceived child.<sup>134</sup> The remainder of states address the rights of children *born* posthumously but do not provide for those *conceived* posthumously or explicitly bar inheritance in such situations.<sup>135</sup> As a result, “[a] child conceived posthumously could inherit intestate, and in turn qualify for survivors’ benefits, in one state, while a child conceived and born under the exact circumstances in a neighboring state would be denied both.”<sup>136</sup>

To show the arbitrary and inconsistent outcomes that result from conflicting state law, one need only compare the decisions of *In re Estate of Kolacy* and *Finley v. Astrue*.<sup>137</sup> In *Kolacy*, the New Jersey Superior Court held that its intestacy statute, mirroring the 1969 version of the UPC, did not apply to cases involving inheritance rights of children conceived posthumously, as the legislature could not have intended for it to cover such cases.<sup>138</sup> It instead allowed for such inheritance under its own test, holding that the legislature “manifested a general intent that the children of a decedent should be amply provided for with respect to property passing from him or through him as the result of a death.”<sup>139</sup> In *Finley*, the Arkansas Supreme Court construed statutory language almost identical to that in *Kolacy* but reached the opposite re-

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130. *Id.*; see also 42 U.S.C. § 416(h)(2)(A) (2006).

131. Courtney Hannon, Comment, *Astrue v. Capato: Forcing a Shoe That Doesn't Fit*, 16 J. HEALTH CARE L. & POL'Y 403, 426 (2013).

132. Carpenter, *supra* note 1, at 362.

133. COLO. REV. STAT. ANN. § 15-11-120 (West, Westlaw through laws effective May 17, 2014); N.D. CENT. CODE ANN. § 30.1-04-19 (West, Westlaw through 2013 Reg. Sess.).

134. Carpenter, *supra* note 1, at 372, 374; see also UNIF. PROBATE CODE § 2-120(f) (amended 2010).

135. Carpenter, *supra* note 1, at 376-83.

136. Hannon, *supra* note 131, at 427.

137. Compare 753 A.2d 1257 (N.J. Super. Ct. Ch. Div. 2000), with 270 S.W.3d 849 (Ark. 2008).

138. *Kolacy*, 753 A.2d at 1261-62, 1264.

139. *Id.* at 1262.

sult.<sup>140</sup> The court decided that the Arkansas legislature when enacting its intestacy statute did not intend for a child conceived in vitro after the father's death to inherit, as the statutory language lacked language specifically addressing such a scenario.<sup>141</sup> Thus, as shown here, even states with almost identical statutory language interpret such words differently, leading to inconsistent results for similar cases.

The solution to this problem lies in the language of the 2008 amendment to the UPC. As previously discussed, the UPC is the only model code in existence that specifically addresses posthumously conceived children and provides a solution.<sup>142</sup> Under this code, a child may inherit for probate purposes if two conditions are met: the deceased parent must have intended to be treated as a parent of the child, and the child must have been in utero no later than thirty-six months after the parent's death or born no later than forty-five months after the parent's death.<sup>143</sup> Because this code is the only option actually addressing the difficult problem of posthumously conceived children's intestacy rights, it is the ideal model for states to design their intestacy statute around.<sup>144</sup> Thus far, only Colorado and North Dakota have adopted these particular provisions of the UPC.<sup>145</sup> However, if every state would adopt similar provisions focusing on the decedent's intent to be treated as the child's father, rather than relying on fifty varying sets of laws, the problem of inconsistent decisions would be resolved.

Consistency among the intestacy laws of all fifty states is preferable to the current state of things for several reasons. It is inequitable to allow a child in one state to inherit from a deceased parent when a child in the exact same situation is barred from doing so in another state. Both children are likely to grow up in a single parent household where resources and finances are restricted, making access to survivor's benefits vital. Both deceased parents are likely to have planned for the birth of the child and would want them to inherit their Social Security benefits to give the children the support the parents will no longer be able to give. Relying on differing interpretations of various state statutes rather than a single uniform law twists the intentions of parents employing ART and, in many cases, results in outcomes that are contradictory to the future they envisioned for their children. Consistency in

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140. *Compare id.* at 1260 (construing the following statutory language: "Relatives of the decedent conceived before his death but born thereafter inherit as if they had been born in the lifetime of the decedent"), with *Finley*, 270 S.W.3d at 853 (construing the following statutory language: "Posthumous descendants of the intestate conceived before his or her death but born thereafter shall inherit in the same manner as if born in the lifetime of the intestate").

141. *Finley*, 270 S.W.3d at 853.

142. Carpenter, *supra* note 1, at 372.

143. UNIF. PROBATE CODE § 2-120(f), (k) (amended 2010).

144. Carpenter, *supra* note 1, at 372.

145. COLO. REV. STAT. ANN. § 15-11-120 (West, Westlaw through laws effective May 17, 2014); N.D. CENT. CODE ANN. § 30.1-04-19 (West, Westlaw through 2013 Reg. Sess.).

states' intestacy statutes will provide equality to families forced to use ART and avoid these unpredictable results that are emotionally and financially draining to thousands of families nationwide.

### B. Social Security Act's Out of Date Provisions

Artificial reproductive technology, such as in vitro fertilization, did not become widely used until the 1950s.<sup>146</sup> The SSA was enacted in 1935 primarily for purposes of economic security.<sup>147</sup> It was not until 1939 that the Act was amended to provide benefits for a deceased wage earner's family.<sup>148</sup> Due to the decades between these events, the drafters of the Act could not have foreseen the rise of the reproductive technology that is now so widely used. Furthermore, they could not, and clearly did not, create provisions dealing with situations such as that found in *Capato*. The Act makes no mention of posthumously conceived children but focuses only on those children conceived before the death of the wage earner.

Therefore, courts have been applying a statute that was never intended to apply to questions of whether a child conceived after a father's death may inherit. As a result, the SSA does not conform to modern realities and "attempting to make [it] fit leads to unpredictability and injustice."<sup>149</sup> The provisions of the SSA are thus unfit to be used in determining these significant issues and are in need of amending. Congress needs to create a uniform and controlling standard for determining who may inherit survivor's benefits, rather than relying on conflicting and varied state law. Instead of fifty different Social Security regimes, a single, unified inheritance statute reflecting modern realities is necessary. Social Security benefits are federal benefits provided to citizens of every state. Consequently, there is a compelling need for a single federal statute creating uniformity in the administration of those benefits, eliminating the inconsistent decisions now plaguing intestacy law.

Such a statute should place emphasis on carrying out the decedent's actual intent to be treated as the child's father, an important principle in intestacy law. The 2008 amendments to the UPC allow a posthumously conceived child to inherit survivor's benefits from a deceased parent when, among other requirements, the decedent intended to be treated as the child's parent.<sup>150</sup> Thus, if the decedent consented to the use of his sperm for posthumous reproduction, it can be found to be clear and convincing evidence that he would have wanted the child to inherit. Creating such a statute would eliminate the inconsistent results that are found in situations where the decedent's clear

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146. Kristine S. Knaplund, *Legal Issues of Maternity and Inheritance for the Biotech Child of the 21st Century*, 43 REAL PROP. TR. & EST. L.J. 393, 395 (2008).

147. Barzilay, *supra* note 28, at 570.

148. *Id.* at 559.

149. Hannon, *supra* note 131, at 426.

150. UNIF. PROBATE CODE § 2-120(f) (amended 2010).

intent was for the child to inherit, but where courts disregard such intentions in favor of the application of fifty distinct state intestacy laws.

### C. *Wrongfully Distinguishing Children in Similar Situations*

The Court held that the primary purpose of the Act was to provide “dependent members of [a wage earner’s] family with protection against the hardship occasioned by [the] loss of [the insured’s] earnings.”<sup>151</sup> It was further reasoned that, when discussing a child’s inheritance under intestacy law, a child is thought to be more dependent during the parent’s life.<sup>152</sup> For this reason, the Court decided that children who were not conceived until after a parent’s death would not have been dependent on the wages earned by that parent.<sup>153</sup> However, in making this decision, the Court failed to explain why children born out of wedlock and children conceived days before the death of the father are still entitled to benefits from the parent. In all of these cases, the child cannot realistically be said to have relied on the father’s wages. However, only the child conceived in vitro is barred from inheriting under the Act, a result that is prejudicial and unbalanced.

With the exception of the 2008 amendments to the UPC, several model or uniform acts followed by a majority of states fail to even address the rights of posthumously conceived children, excluding them from inheritance obliquely.<sup>154</sup> The 1946 Model Probate Code, currently followed by four states,<sup>155</sup> includes an “after-born heirs” provision codifying “the traditional rule that all heirs must be living or in gestation at the moment of the decedent’s death.”<sup>156</sup> Thus, posthumously conceived children, who are not “begotten” before the decedent’s death, would be excluded from inheriting from a deceased father. The original versions of the UPC include similar language barring such children from inheritance rights in section 2-108.<sup>157</sup> The 1969 version of this section, still followed by three states,<sup>158</sup> held that “[r]elatives of the decedent conceived before his death but born thereafter inherit as if they had been born in the lifetime of the decedent.”<sup>159</sup> Under this language, a relative of the decedent conceived *after* his death cannot inherit. The 1990 amendment to section 2-108 states, “An individual in gestation at a particular time is treated as living at that time if the individual lives 120 hours or more

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151. *Astrue v. Capato ex rel. B.N.C.*, 132 S. Ct. 2021, 2032 (2012) (quoting *Califano v. Jobst*, 434 U.S. 47, 52 (1977)).

152. *Id.*

153. *Id.*

154. *Carpenter*, *supra* note 1, at 372-83.

155. *Id.* at 364. The four states are Indiana, Ohio, Maryland, and Pennsylvania. *Id.*

156. *Id.* at 362-63; *see also* MODEL PROBATE CODE § 25 (1946).

157. *See* UNIF. PROBATE CODE § 2-108 (1969).

158. *Carpenter*, *supra* note 1, at 365. Maine, Nebraska, and Tennessee still follow this language. *Id.*

159. *Id.* at 364.

after birth.”<sup>160</sup> Nine states still follow this version.<sup>161</sup> The Commissioners did not provide a comment to explain the intent of this change, but it is likely that posthumously conceived children were sought to be excluded.<sup>162</sup>

However, while prohibiting the posthumously conceived child from inheriting survivor’s benefits, these codes still allow children in similar situations to inherit, even though dependence on the deceased parent for support during their lifetimes is non-existent. For example, under section 2-114(a) of the older versions of the UPC, “[A]n individual is the child of his [or her] natural parents, *regardless of their marital status*.”<sup>163</sup> This means that a child could inherit Social Security benefits from a father who, after divorcing the child’s mother, had left the familial picture altogether. Additionally, the Uniform Parentage Act of 2000 states in section 204, “A man is presumed to be the father of a child if . . . the child is born within 300 days after the [parent’s] marriage is terminated by death, annulment, declaration of invalidity, or divorce.”<sup>164</sup> Thus, in certain circumstances under this Act, a child conceived days before the father had died and born after his death would be entitled to inherit benefits.

In such situations of divorce or death, the child would not have actually depended on the father during his lifetime, similar to a posthumously conceived child. But in sharp contrast, the children covered by these codes are eligible to receive survivor’s benefits under the SSA, while the posthumously conceived child, confusingly, is not. This inconsistency seems to have been overlooked by the Supreme Court in its *Astrue* decision. If the Court were genuinely concerned with providing “dependent members of [a wage earner’s] family with protection against the hardship occasioned by [the] loss of [the insured’s] earnings,”<sup>165</sup> it would not have disadvantaged the posthumously conceived child by arbitrarily applying this principle while still allowing other non-dependent children in similar circumstances to benefit.

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160. UNIF. PROBATE CODE § 2-108 (amended 1990). The 2008 amendments to the UPC moved the content of this section to section 2-104(a)(2). Carpenter, *supra* note 1, at 430.

161. Carpenter, *supra* note 1, at 366. The states are Alaska, Arizona, Hawaii, Michigan, Montana, New Jersey, Vermont, West Virginia, and Wisconsin. *Id.*

162. *Id.* at 365.

163. UNIF. PROBATE CODE § 2-114(a) (amended 1990) (emphasis added). This section was moved to section 2-117 after the 2008 amendments. See UNIF. PROBATE CODE § 2-117 (amended 2010).

164. UNIF. PARENTAGE ACT § 204 (amended 2000). The average pregnancy period for humans is forty weeks, or 280 days. *Baby Due Date*, BETTER HEALTH CHANNEL, [http://www.betterhealth.vic.gov.au/bhcv2/bhcarticles.nsf/pages/Baby\\_due\\_date](http://www.betterhealth.vic.gov.au/bhcv2/bhcarticles.nsf/pages/Baby_due_date) (last visited Mar 22, 2014).

165. *Astrue v. Capato ex rel. B.N.C.*, 132 S. Ct. 2021, 2032 (2012) (quoting *Califano v. Jobst*, 434 U.S. 47, 52 (1977)).

## VI. CONCLUSION

The Supreme Court's decision in *Astrue v. Capato* rests on unjust and flawed reasoning for three main reasons. Relying on state law to decide the status of a posthumously born child will only continue to result in varied decisions on nearly identical situations due to the many inconsistent and assorted intestacy statutes throughout the states. Additionally, applying the outdated Social Security Act to posthumous conception situations that were never contemplated at the statute's drafting results in inequitable results for such children. Finally, the Court's holding discriminates against posthumously conceived children who are just as entitled to survivor's benefits as are posthumously born children and those born out of wedlock, neither group of whom actually relied on the wage earner during their lifetimes. To rid our legal system of these inconsistencies, it is necessary to revise and update the Social Security Act to reflect modern society and its conception practices and directly address the intestacy rights of posthumously conceived children. Additionally, states should conform their intestacy statutes, many which are also out of date, to the modern UPC, which provides a workable solution to these issues. Finally, intestacy statutes should treat children in similar circumstances equally, instead of illogically disadvantaging a small group. Only then will we find consistency in judicial decisions regarding intestacy rights of children born through posthumous conception and finally provide fair results to the children themselves.