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POSTHUMOUSLY CONCEIVED CHILDREN AND SOCIAL SECURITY SURVIVORS' BENEFITS

Kelsey Brown*

Imagine this scenario: a recently married couple learned that the husband has a serious form of cancer, and it is extremely likely he would be rendered sterile from chemotherapy. The couple, wishing to eventually have children, decided to deposit and freeze the husband's sperm before his aggressive treatment begins. Surprisingly, the couple was able to conceive a son naturally while the husband completed his chemotherapy. Unfortunately, the husband passed away before the couple could conceive any more children. After the husband's death, the wife decided to use the husband's frozen sperm to conceive another child, as they had always planned. The wife was able to conceive a set of twins through artificial insemination, and she applied for Social Security Survivors' Benefits for all three children. The wife's application for the twins was denied because the state where the husband was domiciled at the time of his death did not recognize posthumously conceived children under its intestacy statutes. This created a situation in which only one of the husband's three genetic children from his legal marriage was able to receive survivors' benefits. Is it fair that only one of a couple's three genetic children was recognized by the state as deserving to receive Social Security survivors' benefits?

The above scenario is based on the factual background of the recent Supreme Court case *Astrue v. Capato ex rel. B.N.C.*¹ Posthumously conceived children² raise a number of questions relating to paternity.³ The Supreme Court's decision created even more ambiguity when it granted deference to the Social Security Administration's ("the Agency") reliance on individual states' definition of "child".⁴ While the decision in *Astrue v. Capato ex rel. B.N.C.* is now controlling precedent, it creates an extremely

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¹ 132 S. Ct. 2021 (2012).

² Children conceived after the death of one parent. MERRIAM-WEBSTER COLLEGIATE DICTIONARY 970 (11th ed. 2003).

³ Kristine S. Knaplund, *Children of Assisted Reproduction*, 45 U. MICH. J.L. REFORM 899, 910 (2012).

⁴ *Capato*, 132 S.Ct. at 2026.

complicated policy issue with regard to how posthumously conceived children are defined for Social Security survivors' benefits.⁵

I. CASE LAW ON POSTHUMOUSLY CONCEIVED CHILDREN⁶

In order to fully appreciate the policy nightmare created by the *Capato* decision, we must first examine the case law regarding posthumously conceived children and survivors' benefits. To date, there is no consensus among the states as to how to classify posthumously conceived children, or how to determine legal paternity.⁷ Since there is a lack of consistency among the states, the eligibility of survivors' benefits varies from state to state, even though Social Security is a federal benefit.

Prior to the decision in *Astrue v. Capato*,⁸ the Ninth Circuit Court of Appeals in *Gillett-Netting v. Barnhart* used a different approach to determine the eligibility of posthumously conceived children.⁹ The *Gillett-Netting* court found that posthumously conceived children were eligible for survivors' benefits, if their biological paternity was not in dispute.¹⁰

Robert Netting was diagnosed with cancer in 1994 and was informed the chemotherapy treatments would likely render him sterile.¹¹ Robert decided to store and freeze his sperm, for his wife's later use, at the University of Arizona Health Science Center before he began the chemotherapy treatments.¹² Robert passed away in February 1995, but prior to his death, he confirmed that he wished his wife to have their child with the use of his frozen sperm.¹³ Through the process of in-vitro fertilization, Rhonda Gillett-Nettling was able to

⁵ *Id.*

⁶ See generally Gaia Bernstein, *Unintended Consequences: Prohibitions on Gamete Donor Anonymity and the Fragile Practice of Surrogacy*, 10 IND. HEALTH L. REV. 291 (2013) for a discussion on legal issues regarding surrogacy, which are beyond the scope of this article.

⁷ Knaplund, *supra* note 6, at 917–19. See also Jeffrey A. Parness, *Old-Fashioned Pregnancy, Newly-Fashioned Paternity*, 53 SYRACUSE L. REV. 57, 60–1 (2003) (defining the terms “legal paternity”).

⁸ 132 S. Ct. 2021 (2012).

⁹ *Gillett-Netting v. Barnhart*, 371 F.3d 593, 597 (9th Cir. 2004), *abrogated by* *Astrue v. Capato* ex rel. B.N.C., 132 S. Ct. 2021 (2012).

¹⁰ *Id.*

¹¹ *Id.* at 594.

¹² *Id.*

¹³ *Id.* at 594–95.

conceive and give birth to twins in August 1996.¹⁴ Rhonda applied for survivors' benefits on behalf of the twins based on Robert's earnings at the time of his death, but her application was denied by Social Security.¹⁵

The Ninth Circuit examined the case and determined that the twins were entitled to survivors' benefits.¹⁶ The court referred to 42 U.S.C. section 416(3) and stated that under the Act, every child that is a child of a claimant is entitled to benefits.¹⁷ The court found that since the biological paternity of the children was not in dispute, then they were dependents of Robert and were entitled to benefits.¹⁸ The court further stated that the provisions set forth in the Social Security Act about the different ways to define a child, were only relevant when the biological paternity of the child was disputed or when the parents were unmarried.¹⁹

The Ninth Circuit reaffirmed its analysis of the rights of posthumously conceived children to have survivors' benefits in *Vernoff v. Astrue*.²⁰ The court stated that for a claimant to receive benefits, the claimant must show that "(1) he or she is a 'child,' under the Act; and (2) he or she 'was dependent on the insured wage earner at the time of his death.'"²¹ The court also re-established its reading of the word "child" to include "the natural, or biological, child of the insured."²²

¹⁴ *Id.* at 595.

¹⁵ *Id.*

¹⁶ *Id.* at 596.

¹⁷ *Id.* (citing SOC. SEC. ACT § 216(e)).

¹⁸ *Id.* (holding that "Juliet and Piers are Netting's legitimate children . . . are considered to have been dependent under the Act and are entitled to benefits.").

¹⁹ *Id.* at 596–97. The Court noted that:

[t]hese sections were added to the Act to provide various ways in which children could be entitled to benefits even if their parents were not married or their parentage was in dispute. They have no relevance to the issue before us. As the Fourth Circuit explained "[a]n *illegitimate* claimant may establish that he is a 'child' for eligibility purposes under either of three critical provisions of the Act' in § 416(h).

Id. (quoting *McMillian by McMillian v. Heckler*, 759 F.2d 1147, 1150 (4th Cir. 1985) (emphasis added)).

²⁰ 568 F.3d 1102, 1110 (9th Cir. 2009) (citing *Gillett-Netting*, 371 F.3d at 597).

²¹ *Id.* at 1105 (citing *Gillett-Netting*, 371 F.3d at 596).

²² *Id.* (citing *Gillett-Netting*, 371 F.3d at 596).

The Fourth Circuit Court of Appeals split from the position taken by the Ninth Circuit in the case of *Schafer v. Astrue*.²³ Don and Janice Schafer married in 1992, and a few months later Don was diagnosed with cancer.²⁴ Don deposited and froze his sperm in December 1992 because his cancer treatments were likely to leave him sterile.²⁵ Janice Schafer used the frozen sperm, after her husband's death, to conceive a child, W.M.S., in 1999.²⁶ The court noted that while the child was born seven years after Don's death, there was very strong evidence that W.M.S. was Don's biological offspring.²⁷ The facts also stated that there was evidence that Don intended for Janice to have their child with his sperm, but this consent was not in writing nor did it refer to Don's intent to be the legal parent of the child.²⁸ In 2004, Janice applied for survivors' benefits on behalf of W.M.S. and was originally awarded the benefits by an Administrative Law Judge.²⁹ However, the Agency's Appeals Council reversed the Administrative Law Judge's decision and determined that W.M.S. was not Don's child within the Agency's definition and that the child was not eligible to inherit under Virginia intestacy laws.³⁰

The Fourth Circuit differed from the Ninth Circuit by determining that the Agency's reading of the Act should be granted *Chevron* deference.³¹ The Fourth Circuit noted that Congress set forth specific instructions for the Agency, which state, "the Secretary shall apply such law as would be applied in determining the devolution of intestate personal property" ³² The court analyzed Virginia

²³ 641 F.3d 49 (4th Cir. 2011).

²⁴ *Id.* at 51.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* ("There is also evidence that Don intended for Janice to use the stored semen to conceive a child after his anticipated death, though he never expressed consent in writing to be the legal father of a child resulting from post-humous in vitro fertilization.").

²⁹ *Schafer*, 641 F.3d at 51.

³⁰ *Id.*

³¹ *Id.* at 54. See explanation of Chevron Deference *infra* Part II.

³² *Id.* ("In so doing, they have overlooked Congress's plain and explicit instruction on how the determination of child status should be made: 'In determining whether an applicant is the child . . . of a fully or currently insured individual for purposes of this subchapter, the Secretary shall apply such law as would be applied in determining the devolution of intestate personal property' (citing 42 U.S.C. § 416(h)(2)(A)")).

intestacy laws to determine W.M.S.'s eligibility to inherit in the state.³³ Virginia laws state that a child must be born within ten months of the decedent's death to be eligible to inherit property from the estate.³⁴ Therefore, the Fourth Circuit held that the child was not eligible to receive Social Security survivors' benefits.³⁵

The case of *Woodward v. Commissioner of Social Security*³⁶ presented the issue of posthumously conceived children receiving benefits and inheriting to the Massachusetts courts for the first time.³⁷ Lauren Woodward appealed the denial of her application for survivors' benefits to the United States District Court for the District of Massachusetts on behalf of her twin daughters.³⁸ Lauren was married to Warren Woodward for approximately three years, when he was diagnosed with leukemia in 1993.³⁹ Warren had his semen medically removed and preserved because the treatment for his leukemia would likely leave him sterile.⁴⁰ In October of 1993, Warren passed away while domiciled in Massachusetts, and Lauren gave birth to twin girls through artificial insemination in October 1995.⁴¹

The United States District Court presented a certified question to the Supreme Judicial Court of Massachusetts regarding the interpretation of the state's law.⁴² The Supreme Judicial Court of Massachusetts was presented with the following certified question to determine in the case:

If a married man and woman arrange for sperm to be withdrawn from the husband for the purpose of artificially impregnating the wife, and the woman is impregnated with that sperm after the man, her husband, has died, will children resulting from such pregnancy enjoy the inheritance rights of

³³ *Id.* at 53.

³⁴ *Id.* ("But Virginia law does not recognize any 'child born more than ten months after the death of a parent' as that parent's child for intestacy purposes." (citing VA. CODE ANN. § 20-164 (amended 2012))).

³⁵ *Id.* at 63 (holding that "[w]hile modern medicine allowed Janice Schafer to partially fulfill some of those plans years later, Virginia intestacy law, as incorporated by the Act, does render survivorship benefits unavailable here").

³⁶ 760 N.E.2d 257 (Mass. 2002).

³⁷ *Id.* at 261.

³⁸ *Id.*

³⁹ *Id.* at 260.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 261.

natural children under Massachusetts' law of intestate succession?⁴³

The court noted that the state's intestacy laws were not specific to posthumously conceived children.⁴⁴ The Massachusetts laws regarding inheritance state that if a decedent "leaves issue," then such issue shall inherit the decedent's property.⁴⁵ The court ultimately determined that posthumously conceived children could inherit as issue under Massachusetts's intestacy law, but under limited circumstances.⁴⁶

The court determined that there were three main considerations to limit the circumstances under which a posthumously conceived child could inherit.⁴⁷ The genetic relationship between the decedent and the posthumously conceived child must be established.⁴⁸ It must also be established that the decedent both consented to conception of the child and intended to support the child.⁴⁹ The court also noted that there may be a time limitation that could prevent a posthumously conceived child from inheriting under the state's intestacy statutes.⁵⁰

Thus, states differ in how they handle posthumously conceived children and Social Security survivors' benefits. This patchwork of state laws and regulations potentially allows for posthumously conceived children to be denied benefits that they are entitled to as natural born children of a decedent. The Supreme Court's decision in

⁴³ *Id.* at 259.

⁴⁴ *Id.* at 264.

⁴⁵ *Id.* at 263 ("Section 1 of the intestacy statute directs that, if a decedent 'leaves issue,' such 'issue' will inherit a fixed portion of his real and personal property, subject to debts and expenses, the rights of the surviving spouse, and other statutory payments not relevant here.").

⁴⁶ *Id.* at 259 ("We answer the certified question as follows: In certain limited circumstances, a child resulting from posthumous reproduction may enjoy the inheritance rights of 'issue' under the Massachusetts intestacy statute.").

⁴⁷ *Id.*

⁴⁸ *Id.* ("[T]he surviving parent or the child's other legal representative demonstrates a genetic relationship between the child and the decedent.").

⁴⁹ *Id.* ("The survivor or representative must then establish both that the decedent affirmatively consented to posthumous conception and to the support of any resulting child.").

⁵⁰ *Id.* ("Even where such circumstances exist, time limitations may preclude commencing a claim for succession rights on behalf of a posthumously conceived child.").

Astrue v. Capato, did not remedy the disparities between the states' laws.

II. ASTRUE V. CAPATO

*Astrue v. Capato ex rel. B.N.C.*⁵¹ is a case involving a mother trying to obtain Social Security survivors' benefits for her twins.⁵² Karen and Robert Capato were married in May 1999.⁵³ Robert Capato was diagnosed with esophageal cancer and was informed that he might be rendered sterile from the chemotherapy treatments.⁵⁴ The couple wished to have children, so Robert deposited and froze his sperm before starting chemotherapy.⁵⁵ Karen was able to conceive a son naturally in August 2001, despite the chemotherapy.⁵⁶

In March 2002, Robert passed away from the cancer while living in Florida.⁵⁷ His will named his son with Karen and two children from a previous marriage as beneficiaries.⁵⁸ While the Capatos told their attorney they wished for future children "to be placed on a par with existing children,"⁵⁹ they made no provisions in their will for future offspring. In January 2003, Karen conceived with the frozen sperm through artificial insemination and gave birth to twins in September 2003.⁶⁰ The children were born eighteen months after Robert Capato's death.⁶¹

On behalf of her twins, Karen claimed Social Security survivors' benefits.⁶² Social Security survivors' benefits, including child's insurance benefits, are part of the protective family measures Congress added to the Social Security Act in a 1939 amendment.⁶³ The amendment provided a monthly benefit for a designated surviving

⁵¹ 132 S. Ct. 2021 (2012).

⁵² *Id.* at 2026.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Capato*, 132 S. Ct. at 2026.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Astrue v. Capato ex rel. B.N.C.*, 132 S. Ct. 2021, 2027 (2012); Social Security Act of 1939, ch. 666, 53 Stat. 1–2566. (codified as amended at 42 U.S.C § 402 (2006)).

family member of a deceased insured wage earner.⁶⁴ A child applicant is eligible for these benefits, if they fit into the act's definition of a "child" and meet other requirements regarding age, dependency, and marital status.⁶⁵

The Social Security Administration denied the application for the survivors' benefits.⁶⁶ The United States District Court for the District of New Jersey reviewed the denial and determined that the Agency decision was correct.⁶⁷ The court determined that under the Social Security Act, 42 U.S.C. section 416(h)(2)(A)⁶⁸, children could only receive survivors' benefits if they could inherit under the state intestacy laws.⁶⁹ Robert Capato was domiciled in Florida at the time of his death and his will was executed in Florida.⁷⁰ Florida intestacy laws state that children born posthumously can only inherit if they were conceived during the decedent's lifetime.⁷¹ Another Florida statute further states that posthumously conceived children are not eligible to inherit property unless there is a provision for them in the decedent's will.⁷² Therefore, the District Court determined that the denial of benefits was proper because the Capato twins could not inherit under Florida intestacy laws.⁷³

The Third Circuit Court of Appeals reversed the District Court's decision on the survivors' benefits.⁷⁴ The Court of Appeals based the reversal on its reading of Social Security Act section 416(e), and found that "the undisputed biological children of a deceased wage

⁶⁴ 53 Stat. 1363–65.

⁶⁵ *Id.* at 1364.

⁶⁶ *Capato v. Astrue*, No. 08–5405, 2010 WL 1076522, at *1 (D.N.J. Mar. 23, 2010).

⁶⁷ *Capato*, 2010 WL 1076522, at *9.

⁶⁸ 42 U.S.C. § 416(h)(2)(A) (2006) ("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, or, if such insured individual is or was not so domiciled in any State, by the courts of the District of Columbia. Applicants who according to such law would have the same status relative to taking intestate personal property as a child or parent shall be deemed such.")

⁶⁹ *Capato*, 2010 WL 1076522, at *5.

⁷⁰ *Id.* at *6.

⁷¹ *Id.*; FLA. STAT. ANN. § 732.106 (West 1997).

⁷² FLA. STAT. ANN. § 742.17(4) (West 1993); *Capato*, 2010 WL 1076522, at *5.

⁷³ *Capato*, 2010 WL 1076522, at *9.

⁷⁴ *Capato ex rel. B.N.C. v. Comm'r of Soc. Sec.*, 631 F.3d 626, 632 (3d Cir. 2011).

earner and his widow' qualify for survivors benefits without regard to state intestacy law."⁷⁵

The Supreme Court's analysis focused on how Congress had defined the word "child" within the Social Security Act.⁷⁶ The Court noted that Congress amended the Act in 1939 to allow for survivors' benefits, including "child's insurance benefits."⁷⁷ The Act has three categories for who is eligible to qualify as a "child" for insurance benefits: "The term 'child' means (1) the child or legally adopted child of an individual, (2) a stepchild [under certain circumstances], and (3) . . . the grandchild or stepgrandchild of an individual or his spouse [who meets certain conditions]."⁷⁸

In order to determine if the Capato twins qualified as children under the Act, the Court looked again to the statutory provisions of the Social Security Act for a more expansive definition of a child.⁷⁹ The Court interpreted the Agency's statutory reading of section 416(h) as governing the meaning of the term "child" in section 416(e).⁸⁰ The Court agreed with the Agency that section 416(h) requires that a child inherit under state intestacy laws to be eligible to receive survivors' benefits.⁸¹ The Court explained that the state intestacy laws serve as a "gateway" for children to obtain survivors' benefits.⁸²

The Court did note that the Social Security Act does have an alternative path for those children who do not qualify under state intestacy laws.⁸³ The Social Security Act provides four additional conditions for which a child could qualify for benefits as a "natural child."⁸⁴ The Supreme Court finally decided, after analyzing the

⁷⁵ *Astrue v. Capato ex rel. B.N.C.*, 132 S. Ct. 2021, 2027 (2012) (quoting *Capato*, 631 F.3d 626, 632 (2011)).

⁷⁶ *Capato*, 132 S. Ct. at 2027.

⁷⁷ *Id.*

⁷⁸ *Id.*; 42 U.S.C. § 416(e) (2006).

⁷⁹ *Capato*, 132 S. Ct. at 2028.

⁸⁰ *Id.* at 2029.

⁸¹ *Id.* at 2026.

⁸² *Id.* at 2029.

⁸³ *Id.* at 2028–29.

⁸⁴ *Id.* ("They state that an applicant may qualify for insurance benefits as a "natural child" by meeting any of four conditions: (1) the applicant 'could inherit the insured's personal property as his or her natural child under State inheritance laws'; (2) the applicant is 'the insured's natural child and [his or her parents] went through a ceremony which would have resulted in a valid marriage between them except for a legal impediment'; (3) before death, the insured acknowledged in writing his or her parentage of the applicant, was decreed by a court to be the applicant's parent, or

Agency's statutes, as well as the notes and comments process,⁸⁵ that the Agency's interpretation of the provisions was reasonable.⁸⁶ Since the interpretation was reasonable, the Court decided the Social Security's reading should be granted "*Chevron* deference."⁸⁷

Chevron deference requires that the meaning of the statute in question be ambiguous and that an agency's interpretation of the ambiguity be reasonable.⁸⁸ In this case, the term child was ambiguous in the statute, but the Court found that the Agency's reliance on the entire definition of a child in the Act and referring to state intestacy laws was a reasonable interpretation of the term child.⁸⁹ The Court held that the denial of the insurance benefits was correct and reversed the decision of the Appellate Court.⁹⁰

III. THE SUPREME COURT'S DECISION IN *ASTRUE V. CAPATO*

The Supreme Court's decision and its application of *Chevron* deference were legally correct. Yet sometimes the legally correct decision is nonetheless unsatisfactory. The *Chevron* deference test is used by courts to determine if deference should be granted to an agency's interpretation of its own statute.⁹¹ The court defers to the agency's interpretation when: (1) it determined that the statute is

was ordered by a court to contribute to the applicant's support; or (4) other evidence shows that the insured is the applicant's 'natural father or mother' and was either living with, or contributing to the support of, the applicant.").

⁸⁵ *Capato*, 132 S. Ct. at 2028.

⁸⁶ *Id.* at 2033.

⁸⁷ *Id.* at 2033–34. ("*Chevron* deference is appropriate 'when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.'").

⁸⁸ *Chevron U.S.A. v. Nat. Res. Def. Council, Inc.*, 104 S. Ct. 2778, 2781–82 (1984).

⁸⁹ *Capato*, 132 S. Ct. at 2026 ("[T]he SSA's reading is better attuned to the statute's text and its design to benefit primarily those supported by the deceased wage earner in his or her lifetime. And even if the SSA's longstanding interpretation is not the only reasonable one, it is at least a permissible construction that garners the Court's respect under [*Chevron*]); see also *Capato*, 132 S. Ct. at 2033 ("The SSA's interpretation of the relevant provisions, adhered to without deviation for many decades, is at least reasonable; the agency's reading is therefore entitled to this Court's deference under *Chevron*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694.").

⁹⁰ *Id.* at 2034.

⁹¹ WILLIAM F. FUNK ET AL., *ADMINISTRATIVE PROCEDURE AND PRACTICE PROBLEMS AND CASES* 145 (4th ed. 2010).

ambiguous and Congress has not directly spoken on the issue, and (2) the court determined that the agency's interpretation of the statute is permissible or reasonable.⁹²

A. The Term "Child" is Actually Ambiguous in the Social Security Act

In *Astrue v. Capato*, the question for the Court was whether the twins qualified as "children" under the Social Security Act's definitional provisions.⁹³ In order to fully understand how the Act uses the term "child," it is important to first consider the original purpose of the Social Security Act and survivors' benefits. The Act was intended to prevent a larger number of Americans from becoming dependent on society because they lacked income resources. The Social Security Act was also designed to prevent a mass loss of purchasing power by the same group of Americans.⁹⁴ However, before the first retirement check was mailed, the Act experienced a fundamental change under the 1939 amendments.⁹⁵ The 1939 amendments are considered to be the "second start" to Social Security, by completely transforming the program.⁹⁶ Social Security was originally developed as a retirement plan for workers, but the 1939 amendments restructured the program into a protective "family-based" system.⁹⁷ The amendments added benefits for wives, widows, and dependent children.⁹⁸ The changes included the creation of dependents benefits, and a system of regular-monthly payments of survivors' benefits to replace the one-time death payment system.⁹⁹ The goal of the survivors' benefits was to help secure the family against a sudden loss in income due to the wage-earner's death.¹⁰⁰

⁹² *Id.* at 146.

⁹³ *Capato*, 132 S. Ct. at 2027.

⁹⁴ *Reasons for the 1939 Amendments to the Social Security Act, Legislative History, 1939 Amendments*, <http://www.ssa.gov/history/reports/1939no3.html> (last visited Nov. 14, 2013).

⁹⁵ DeWitt, Larry, *Development of Social Security in America*, SOCIAL SECURITY BULLETIN, Vol. 70, No. 3, 8 (2010).

⁹⁶ *Id.* at 9.

⁹⁷ *Id.*

⁹⁸ *Id.* at 8.

⁹⁹ *Id.*

¹⁰⁰ *Reasons for the 1939 Amendments to the Social Security Act, Legislative History, 1939 Amendments*, <http://www.ssa.gov/history/reports/1939no3.html> (last visited Nov. 14, 2013).

Under the definitional provisions of the Act, section 416, there are multiple paths to qualify as a child.¹⁰¹ The first statutory definition of a qualifying child is section 416(e), which states “[t]he term child means (1) the child or legally adopted child of an individual.”¹⁰² Another section of the Act states that a child must qualify under a state’s intestacy laws for the child to qualify for Social Security survivors’ benefits.¹⁰³ If a child does not qualify under section 416(h)(2)(A), he or she may qualify under (h)(3)(C) if the deceased wage-earner met the threshold requirements for acknowledging the child prior to the parent’s death.¹⁰⁴

The guidance for survivors’ benefits seems to set out multiple avenues to decide if a biological child¹⁰⁵ qualifies for benefits. In *Astrue v. Capato*, each side, and the different courts, interpreted the statutory term child differently in applying the requirements to the twins.¹⁰⁶ The Capato family and the Court of Appeals argued that section 416(e) was the proper interpretation of when a biological child qualified for survivors’ benefits.¹⁰⁷ The Court of Appeals held that section 416(e)(1) means a biological child of the deceased wage-earner “undisputedly” qualified for the benefits.¹⁰⁸ However, the Agency and the District Court found that section 416(h)(2)(A) was the

¹⁰¹ *Capato*, 132 S. Ct. at 2028–29.

¹⁰² 42 U.S.C. § 416(e)(1) (2006).

¹⁰³ 42 U.S.C. § 416(h)(2)(A) (2006).

¹⁰⁴ 42 U.S.C. § 416(h)(3)(C) (2006) (stating that “in the case of a deceased individual—

(i) such insured individual —

(I) had acknowledged in writing that the applicant is his or her son or daughter,

(II) had been decreed by a court to be the mother or father of the applicant, or

(III) had been ordered by a court to contribute to the support of the applicant because the applicant was his or her son or daughter, and such acknowledgment, court decree, or court order was made before the death of such insured individual, or

(ii) such insured individual is shown by evidence satisfactory to the Commissioner of Social Security to have been the mother or father of the applicant, and such insured individual was living with or contributing to the support of the applicant at the time such insured individual died.”).

¹⁰⁵ 42 U.S.C. § 416(k) (2006).

¹⁰⁶ *Capato*, 132 S. Ct. at 2026–27; *see nn.57–61 and accompanying text.*

¹⁰⁷ *Capato*, 132 S. Ct. at 2029.

¹⁰⁸ *Capato ex rel. B.N.C. v. Comm’r of Soc. Sec.*, 631 F.3d 626, 632 (3d Cir. 2011)..

proper definition of the term child.¹⁰⁹ Under section 416(h)(2)(A), the Capato twins were ineligible for benefits because they would not inherit under Florida’s intestacy laws.¹¹⁰ The Agency argued that the twins failed to meet the alternative statutory requirements under section 416(h)(3)(C) because the decedent did not acknowledge them prior to his death.¹¹¹ The various interpretations of the term child show that the statute was ambiguous, satisfying the first step of the *Chevron* analysis. The Court properly moved to the second step of the analysis.¹¹²

B. The Agency’s Interpretation of the Term “Child” was Legally Reasonable.

The second step of *Chevron* deference requires a court to determine if an agency’s interpretation of the ambiguity is reasonable.¹¹³ In *Astrue v. Capato*, the Supreme Court focused its analysis on 42 U.S.C. section 416(e) and section 416(h)(2)(A).¹¹⁴ Ultimately the Court determined that the Social Security’s interpretation was reasonable because 42 U.S.C. section 416(h)(2)(A) serves as a “gateway” for all children to qualify for benefits.¹¹⁵

The Social Security Act provides in section 402(d) that “[e]very child (as defined in section 416(e) of this title)’ of a deceased insured individual ‘shall be entitled to a child’s insurance benefit.’”¹¹⁶ The term child in section 416(e) provides for three categories of eligible children: “(1) the child or legally adopted child of an individual, (2) a stepchild [under certain circumstances], and (3) . . . the grandchild or stepgrandchild of an individual or his spouse [who meets certain conditions].”¹¹⁷ The Agency interpreted the categories of children in section 416(e) as being governed by section 416(h), which

¹⁰⁹ *Capato v. Astrue*, No. 08–5405, 2010 WL 1076522, at *5 (D.N.J. Mar. 23, 2010)

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Capato*, 132 S. Ct. at 2033.

¹¹³ Funk et al., *supra* note 94, at 146..

¹¹⁴ *Capato*, 132 S. Ct. at 2029–30.

¹¹⁵ *Id.* at 2029.

¹¹⁶ *Id.* at 2027; *see also* 42 U.S.C. § 402(d)(1) (2006).

¹¹⁷ *Capato*, 132 S. Ct. at 2027.

is a prerequisite that all eligible children need to meet to establish status as a “natural child.”¹¹⁸

The Agency’s interpretation relied heavily on the language of section 416(h)(2)(A) as an expansion of the definition of a child from section 416(e).¹¹⁹ The Agency argued that the language of the section provides clear instructions for determining the eligibility of a child: “In determining whether an applicant is the child . . . for the purposes of this subchapter, the Commissioner of Social Security shall apply such law[s] . . . if such insured individual is dead, by the courts of the State in which he was domiciled at the time of his death”¹²⁰ The Agency stated that the Act provides alternative paths for a child to qualify for benefits, if the child does not meet the intestacy prerequisite of section 416(h)(2)(A).¹²¹ Furthermore, the regulations provide that a natural child may qualify for benefits, if the child meets one of four conditions.¹²² The Agency found, based on its statutory interpretation of section 416(h)(2)(A) and the regulations, that a biological child must meet certain requirements to qualify for benefits.¹²³

The Supreme Court found the Agency’s interpretation reasonable based on statutory construction and the history of the Social Security Act.¹²⁴ The statutory construction of section 416(e), according to the Court, supports the interpretation that section 416(h)(2)(A) provides the definition of a qualifying child.¹²⁵ As previously stated, section 416(e) provides the three categories of children that qualify to receive survivors’ benefits.¹²⁶ However, the Court points out a distinction in the categories that is crucial to the Agency’s argument.¹²⁷ The statutory categories for stepchildren and grandchild specify that these children are eligible under certain

¹¹⁸ *Id.* at 2029 (“The regulations make clear that the SSA interprets the Act to mean that the provisions of § 416(h) are the exclusive means by which an applicant can establish ‘child’ status under § 416(e) as a natural child.”).

¹¹⁹ *Id.* at 2028.

¹²⁰ *Id.*; *see also* 42 U.S.C. § 416(h)(2)(A) (2006).

¹²¹ *Capato*, 132 S. Ct. at 2028; *see also* 42 U.S.C. § 416(h)(2)(B) (2006); § 416(h)(3)(C) (2006).

¹²² *Capato*, 132 S. Ct. at 2028.

¹²³ *Id.* at 2029.

¹²⁴ *Id.* at 2033.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 2027–28.

circumstances, while the category for natural children only states a “child . . . or legally adopted child”¹²⁸ The Court argued that section 416(e)(1) lacked specific conditions which means that it is not the complete definition and one must look to section 416(h)(2)(A) to complete the definition for a qualifying natural child.¹²⁹

The Court also looked to the history of the statute to determine if the Agency’s reading was reasonable. The original draft of section 416(h) stated that it applied, “for purposes of sections 401– 409 of this title, the Board shall apply [state intestacy law].”¹³⁰ The historical sections of 401–409, included the statutory predecessors of sections 402(d) and 416(e), which the Court noted as evidence that the modern section 416(h) was intended to be the definitional link to section 416(e).¹³¹ The Court further found that the Social Security Act refers to state law to determine family status throughout the Act.¹³²

The Supreme Court appropriately found, based on the statutory construction and the history of the Act, that the Agency’s reading of the term “child” was reasonable. However, even if it is the appropriate and correct legal interpretation, the Supreme Court’s finding is a problematic decision for posthumously conceived children.

IV. *ASTRUE V. CAPATO* IS A PROBLEMATIC DECISION FOR POSTHUMOUSLY CONCEIVED CHILDREN

The Supreme Court’s decision in *Capato*¹³³ created a complicated public policy nightmare. Instead of solving the problem, the Court just noted that denial of benefits was unfortunate.¹³⁴ The Supreme Court affirmation of the Agency’s interpretation is counterintuitive to the purpose of survivors’ benefits because it creates an underclass of children who are forced to depend on inconsistent state laws to determine if they are eligible for benefits.¹³⁵

¹²⁸ *Capato*, 132 S. Ct. at 2028–29.

¹²⁹ *Id.* at 2033.

¹³⁰ *Id.* at 2031; 42 U.S.C. § 409(m) (1940).

¹³¹ *Capato*, 132 S. Ct. at 2031; 42 U.S.C. § 402(c) (1940); 42 U.S.C. § 409(k) (1940).

¹³² *Capato*, 132 S. Ct. at 2031; *see* 42 U.S.C. § 416(b), (c), (f), (g), (h)(1)(A) (2006).

¹³³ *Capato*, 132 S. Ct. at 2021.

¹³⁴ *Id.* at 2034.

¹³⁵ *Id.* at 2026, 2028–29, 2033–34.

A. The Supreme Court's Decision Ignores the Intention and History of Survivors' Benefits.

Survivors' benefits were a part of an amendment to the Social Security Act in 1939 to provide insurance benefits to dependents and surviving spouses of a deceased wage earner with qualified earnings.¹³⁶ The goal of the amendment was to help families stay together after the death of the wage-earner by providing monthly benefits.¹³⁷ With regards to children, the benefits were intended to serve as a "family-protective measure,"¹³⁸ to supplement the loss of income from the wage-earner's death.¹³⁹ The history of the Act further shows that it has been amended to reflect societal changes.¹⁴⁰ Congress has even amended the Act to include other categories of children, such as grandchildren, stepchildren, and adopted children.¹⁴¹ However, the Court ignored the Act's intention and history by refusing to protect posthumously conceived children with these family-focused benefits.

The Court's decision perpetuates the creation of an underclass of children, who are discriminated against because of the timing of their conception. These children have no alternative path to secure benefits they are entitled to as the child of a deceased wage-earner.¹⁴² The Court has allowed the statute to remain underinclusive by excluding posthumously conceived children.¹⁴³ The idea that these children have a path through states' intestacy laws is also inconsistent with the goals of the Social Security Act because there is a wide variety among state law regarding posthumously conceived children and their rights to inherit.¹⁴⁴

¹³⁶ Gloria J. Banks, *Traditional Concepts and Nontraditional Conceptions: Social Security Survivor's Benefits for Posthumously Conceived Children*, 32 LOY. L.A. L. REV. 251, 305–06 (1999).

¹³⁷ *Id.* at 311.

¹³⁸ *Capato*, 132 S. Ct. at 2027.

¹³⁹ Banks, *supra* note 138, at 313.

¹⁴⁰ *Id.* at 305–06.

¹⁴¹ *Id.* at 320.

¹⁴² *Id.* at 346.

¹⁴³ *Id.*

¹⁴⁴ 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, 362 (2011) (stating three categories in which state statutes, in regard to posthumously conceived children, fall short: "(1) statutes based on model or uniform codes . . . (2) statutes not based on

V. AMENDING THE SOCIAL SECURITY ACT: A UNIFORM SOLUTION

The Supreme Court decision in *Astrue v. Capato*,¹⁴⁵ stated that the deference goes to the Agency's reading of the statutory provision.¹⁴⁶ This interpretation means that a posthumously conceived child can only receive survivors' benefits, if the child qualifies for inheritance under that state's intestacy laws.¹⁴⁷ The combination of the Supreme Court's decision, the Agency's reading, and the inconsistency among the states creates a non-uniform distribution system of Social Security survivors' benefits amongst posthumously conceived children. Posthumously conceived children do not appear any different from children conceived during the lives of their parents. There are no physical differences that would mark or signal a child as being posthumously conceived. However, the Social Security Administration, legislatures, and courts have decided to treat these children as a separate class that should not be granted the same rights as children conceived through traditional means.

The Agency's interpretation allows states to decide if a posthumously conceived child can receive a federal benefit. The lack of consistency among the states presents a problem, because in one state a posthumously conceived child may receive the benefits from Social Security, a federal agency, and yet in another state that same child may be denied the benefits.¹⁴⁸ This non-uniform distribution of benefits raises an important question: does applying the Social Security Act differently depending on whether a child is born before a parent died or after and in which state that child resides violate the equal protection rights of a class of individuals who cannot control

models or uniform codes and pre-date cryopreservation, and (3) statutes that expressly address posthumously conceived children”).

¹⁴⁵ *Capato*, 132 S. Ct. at 2021.

¹⁴⁶ *Id.* at 2033.

¹⁴⁷ *Id.* at 2029.

¹⁴⁸ Compare *Schafer v. Astrue*, 641 F.3d 49, 63 (4th Cir. 2011) (holding that survivors benefits were not available to the son within the meaning of the act) with *Gillett-Netting v. Barnhart*, 371 F.3d 593, 597 (9th Cir. 2004), *abrogated by Astrue v. Capato ex rel. B.N.C.*, 132 S. Ct. 2021 (2012) (finding that posthumously conceived children were eligible for survivors' benefits, if their biological paternity was not in dispute).

their status?¹⁴⁹ Posthumously conceived children do not choose when they are conceived, yet these children are frequently being punished solely because of the timing of their conception.

1. An Overhaul of the Current Legal Regime Determining the Rights of Posthumously Conceived Children to Receive Survivors' Benefits is Necessary

A new system is needed to appropriately handle the administration of Social Security survivors' benefits to posthumously conceived children. A Congressional amendment to the Social Security Act including posthumously conceived children in the definition of a child would likely be the most comprehensive and productive means of creating a new system to include posthumously conceived children. Such a provision would clarify the Congressional intent related to the issue.¹⁵⁰ It would also create a uniform system, in which all posthumously conceived children would be held to the same standards to qualify for survivors' benefits.

However, some have pointed out that there may be problems with such an amendment by Congress.¹⁵¹ One must take into consideration the current climate in Congress and the attitudes towards social legislation.¹⁵² In addition, the current financial state of the Agency may hinder Congress's motivation for creating such a provision, which would essentially grant survivor benefits to a larger population of children.¹⁵³ Such a provision would need some limitation for it to likely gain political approval. An amendment modeled after the Uniform Probate Code (UPC) would be sufficient to provided legislative regulation over the situation.

¹⁴⁹ *Astrue v. Capato ex rel. B.N.C.*, 132 S. Ct. 2021, 2033 (2012) (The Supreme Court found there was “no showing” that posthumously conceived children were classified in a manner to raise the level of constitutional scrutiny to be applied under the Equal Protection clause of the United States Constitution.)

¹⁵⁰ *Banks*, *supra* note 138, at 378 (stating that congressional intent “has shown that survivor’s benefits should replace the loss of support an orphaned child would have received but for the untimely death of a parent with a qualifying work history”).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

2. *The UPC is the Ideal Prototype for the Necessary Amendment*

The Uniform Probate Code provides a model for Congress to amend the Social Security Act, in favor of posthumously conceived children. Under the UPC, a child, by definition is entitled to take for the purposes of intestate succession when there is a parent-child relationship.¹⁵⁴ The UPC contains a provision to determine the parent-child relationship when artificial reproductive technology is used to conceive the child, including posthumously conceived children.¹⁵⁵ The provision allows for the parent, other than the birth mother, to be treated as the parent of child conceived through artificial reproduction, through consent to assist the birth mother in the conception and the intent to be a parent to the child.¹⁵⁶ A signed record can serve as evidence of consent and intent to be the parent.¹⁵⁷ In the absence of a written record, the UPC provides three other means to establish consent and intent.¹⁵⁸ In regard to posthumously conceived children, the parent-child relationship may be established by showing through clear and convincing evidence, that the decedent intended to be treated as a parent of a posthumously conceived child.¹⁵⁹

The UPC further provides for when a posthumously conceived child should be considered in gestation at the time of the decedent's death.¹⁶⁰ For the purposes of intestate succession, the UPC allows for unborn children in gestation at the time of the decedent's death to be considered as living at decedent's death, if certain criterion is met under UPC section 2-104(a)(2).¹⁶¹ The child in gestation will be considered living at the time of decedent's death, if the child survives 120 hours after birth.¹⁶² The UPC allows for posthumously conceived children to be considered living at the time of a decedent's death, for the purposes of section 2-104(a)(2), if they fit into two categories.¹⁶³ First, a posthumously conceived child must be "in utero no later than

¹⁵⁴ UNIF. PROBATE CODE § 1-201(5) (amended 2010) [hereinafter UPC (2010)].

¹⁵⁵ UPC § 2-120(f) (2010).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* (f)(1).

¹⁵⁸ *Id.* (f)(2).

¹⁵⁹ *Id.* at (f)(2)(C).

¹⁶⁰ UPC § 2-120(k) (2010).

¹⁶¹ UPC § 2-104(a)(2) (2010).

¹⁶² *Id.*

¹⁶³ UPC § 2-120(k) (2010).

36 months after the individual's death," to be considered living for intestate purposes.¹⁶⁴ A posthumously conceived child born within 45 months of the decedent's death will also be considered as living at the time of decedent's death for intestacy.¹⁶⁵ The expanded time limits for posthumously conceived children were designed to provide the grieving spouse/partner time to decide to use artificial reproduction, and an opportunity to have a successful pregnancy.¹⁶⁶ Furthermore, the 45-month period provides a safety net for cases in which the exact "in utero" time is not easily established.¹⁶⁷

The Uniform Probate Code provides guidelines for creating an amendment to the Social Security Act, which protects posthumously conceived children and also limits the expansion of the Act. While some might argue that the language of the UPC is too broad, it is a uniform set of laws and therefore, eliminates the disparities among the states in the treatment of posthumously conceived children.¹⁶⁸ Regardless of the language used, there needs to be a change to the current regime that denies Social Security survivors' benefits to deserving posthumously conceived children. As it stands, the Social Security Administration and many states seem behind the times in their current understanding of posthumously conceived children. As modern forms of conception continue to advance, it is essential that these administrative bodies advance with them. Otherwise, our country will have a large class of children who are discriminated against because of the timeline of their conception.

IV. CONCLUSION

Posthumously conceived children have suffered a significant setback with the decision in *Capato v. Astrue*. They may only receive Social Security survivors' benefits if they live in a state that recognizes posthumously conceived children under its intestacy laws. These children have no choice in the timeline of their conception. However, due to advancements in reproductive technology,

¹⁶⁴ *Id.* at (k)(1).

¹⁶⁵ *Id.* at (k)(2).

¹⁶⁶ UPC §2-120(k) (2010) (noting that the 36 month period provides "the surviving spouse or partner a period of grieving . . . and a reasonable allowance for unsuccessful attempts to achieve a pregnancy").

¹⁶⁷ *Id.*

¹⁶⁸ SUSAN N. GARY ET AL., CONTEMPORARY APPROACHES TO TRUSTS AND ESTATES, 50 (2011).

posthumously conceived children are a growing class in America. Congress must amend the Social Security Act to support them, consistent with the original purpose of the Act itself. Congress has even been handed a blueprint of a legislative amendment in the Uniform Probate Code, which includes provisions that create a balancing of the interests of posthumously conceived children with an efficient administration of inheritance law. It is important for Congressional leaders to act promptly to bring posthumously conceived children within the protective scope of the Social Security Act.