A step too far - Posthumously conceived children and social security entitlements in Vernoff v Astrue

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This case note examines a recent decision of the Court of Appeals for the Ninth Circuit concerning the entitlements of posthumously conceived children under social security. In contrast to its earlier (expansionary) decision in Gillett-Netting, here the Court set out the limits to how far it is willing to push the interpretation of the (convoluted) legislation and refused to find a right to benefit where there was no evidence that the father had consented to (or even considered) having a child post-mortem. Part I sets out the background to the issue and the relevant law. Part II sets out the facts of the case involved. Part III looks at how the courts have applied the law in this case while Part IV concludes.

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1 Vernoff v Astrue, 568 F.3d 1102 (9th Cir. 2009). Citation in this note is to the version published on the court’s website at www.ca9.uscourts.gov

I. INTRODUCTION

A. Context

Medical technology has, in recent decades, developed much faster than the law’s capacity to respond to those changes. One area in which this is apparent is in relation to posthumously conceived children and the whole range of issues about their rights and entitlements and those of their parents. One small sub-set of this – which is, however, of significant interest for the light which it throws on broader issues – is the question of the entitlement of posthumously conceived children to federal social security benefits and State workers compensation payments. There have, to date, been a relatively small number of cases concerning this issue.\(^3\)

However, perhaps indicating its importance, there has already been a considerable volume of commentary on these cases and on the broader issues raised.\(^4\)

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\(^3\) In re Estate of Kolacy, 753 A.2d 1257, 1261 (N.J. Super. Ct. Ch. Div. 2000); Woodward v. Commissioner of Social Security 760 N.E.2d 257, 435 Mass. 536 (2002); Gillett-Netting v. Barnhart, 371 F.3d 593 (9th Cir. 2004); Stephen v. Commissioner of Social Security, 386 F.Supp.2d 1257 (M.D.Fla. 2005); Eng Khabbaz v. Commissioner of Social Security, 930 A.2d 1180 (N.H. 2007). As these cases have been discussed extensively in the literature, they are only discussed here insofar as they are directly relevant.

B. Law

The Social Security Act provides that a child is entitled to benefits if the claimant is the child (as defined in 42 U.S.C. § 416(e)) of an individual who dies fully or currently insured; the child or the child’s representative files an application for benefits; the child is unmarried and a minor (or meets disability requirements) at the time of application; and the child was dependent on the insured wage earner at the time of his death.\(^5\) Thus, to satisfy the definition, a posthumously conceived child must show both that he or she is the child of the insured person and that he or she “was dependent on the insured wage earner at the time of his death.”

1. Child

42 U.S.C. § 416(e) defines the term “child” as including the child or legally adopted child of an individual. However, § 416(h)(2)(A) – which relates to the determination of family status - goes on to provide that

In determining whether an applicant is the child or parent of a fully or currently insured individual for purposes of this title, 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 …. Applicants who

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according to such law would have the same status relative to taking intestate personal property as a child or parent shall be deemed such.

Views differ as to the purpose of this clause. The Social Security Administration (SSA), supported it would seem by many District Courts, takes the view that § 416(h)(2)(A) provides the analytical framework that must be followed for determining whether a child is the insured's child for the purposes of § 416(e). Thus in order to be considered a child for the purposes of the Act, this clause (or a number of alternatives which are not relevant to this case note) must be satisfied, i.e. the SSA view is that to meet the definition of “child” under the Act, a posthumously conceived child must be able to inherit under State law. However the Circuit Court of Appeals for the Ninth Circuit ruled in *Gillett-Netting* that

> These 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.

It held that they had no relevance to the issue as to whether a posthumously conceived child who was the biological child of the insured person (and who, therefore, satisfied § 416(e)) was a child for the purposes of the Act. The Court held that although the provisions (§ 416(h)(2)(A)) offer a means of determining whether an applicant is the child of an insured individual when parentage is disputed, “nothing in the statute suggests that a child must prove parentage under § 416(h) if it is not disputed”. The SSA has issued an acquiescence notice following this decision but this only applies to the Ninth Circuit.⁶

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⁶ Acquiescence Ruling 05-1(9) under which the SSA will determine that a biological child of an insured individual who was conceived by artificial means after the insured's death is the insured's "child" for purposes of the Act and
2. **Dependency**

It might seem difficult to show that a posthumously conceived child was dependent on his or her father at the time of the latter’s death. However, the Social Security Act provides that a legitimate child is deemed to be dependent on her father at the time of her death (unless the child has been adopted by some other individual).\(^7\) Arizona law provides that every child is the legitimate child of its natural parents.\(^8\) Accordingly, in *Gillett-Netting*, the Court of Appeal was able to hold that the posthumously conceived children were dependent on the father at the time of his death without having to prove legitimacy by one of the methods set out in the Social Security Act (as had been argued by the SSA). Again, however, it would appear that it is only as a result of this case and only in the Ninth Circuit that the SSA will accept that if a child is considered legitimate under State law, it is the insured's "legitimate" child and thus deemed dependent upon the insured for the purposes of § 402(d)(1).\(^9\)

Finally, a child will be considered dependent where he or she can show that the parent was living with or contributing to the support of such child.\(^10\) Again this might seem somewhat irrelevant in the case of a posthumously conceived child. However, in at least some circuits, the concept of “contribution to the support” has been construed in a rather broad manner to

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\(^7\) 42 U.S.C. § 402(d)(3).


\(^9\) Acquiescence Ruling 05-1(9).

include support to a pregnant mother (in the case of a posthumous birth)\textsuperscript{11} and it is arguable that a similar approach might be extended to cases of posthumous conception.\textsuperscript{12}

\section*{II. FACTS}

The facts in \textit{Vernoff} are rather straight-forward.\textsuperscript{13} Bruce Vernoff (the insured) married the plaintiff Gabriela in 1990. Bruce died of accidental causes in 1995 and his wife directed a physician to extract semen. The court noted that there was no evidence that he had consented to this procedure or contemplated having a child post-mortem. In June 1998, Gabriela underwent in vitro fertilization and her daughter Brandalynn was born in 1999. Her claim for child survivor benefits was denied.

\textsuperscript{11} Smith v Heckler, 820 F.2d 1093 (9th Circuit). See also Parsons v Health & Human Servs. 762 F.2d 1188 (4th Circuit, 1985). But see Orsini v. Sullivan, 903 F.2d 1393 (11th Cir. 1990) which held that some element of support is necessary even in the case of a posthumously born child conceived only one week prior to the father’s death who needed no support in that period.

\textsuperscript{12} See the discussion in \textit{Doroghazi} (fn. 4) at pp. 1610-12.

\textsuperscript{13} For a more detailed discussion of the facts and issues see M.F. Radford, Post-Mortem Sperm Retrieval and the Social Security Administration: How Modern Reproductive Technology Makes Strange Bedfellows, \textit{Georgia State University College of Law, Legal Studies Research Paper, 2009-09}.  

III. THE CASE

A. Child insurance benefits

In a very clearly structured judgment (authored by Judge Hall), the court first recalled that in *Gillett-Netting* it had interpreted the word ‘child’ as meaning the natural or biological child of the insured. This ruling required that Brandalynn Vernoff be considered the insured’s child under the Social Security Act because of her biological relationship to him.\(^\text{14}\) However, this still meant that the appellant had to show that Brandalynn was dependent upon the insured at the time of his death.

Given the facts of the case, she clearly could not show actual dependency\(^\text{15}\) and, therefore, had to show either that (i) the insured was her ‘parent’ under Californian law and that she was thereby deemed to be legitimate and dependent or (ii) to show that she could inherit from the insured under Californian intestacy law and was thereby deemed to be legitimate. In *Gillett-Netting* the court has been able to rely on Arizona law which recognized every child as the legitimate child of its natural parents. However, Californian adopted a different approach basing parent and child rights on the existence of a parent-child relationship rather than on the marital status of the parents.\(^\text{16}\) As summarized by Judge Hall, the relevant means for a Californian father to acquire rights as a natural parent under the California Family Code in this

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\(^{14}\) Vernoff v Astrue at 7185.

\(^{15}\) Even on the broad interpretation of ‘support’ adopted by some circuits, it would seem impossible to argue for actual dependency in this case. See above fn 11 and Doroghazi (fn. 4) at pp. 1610-12.

\(^{16}\) At 7186. See Johnson v Calvert 5 Cal 4th 84 (1993) and Cal. Fam. Code § 7601.
case required that it be shown that the insured was married to the child’s mother and that the child was born during the marriage or within 300 days of the termination of the marriage by death.\textsuperscript{17} Clearly Brandalynn was born outside this time period and the court held that the appellant had failed to establish that the insured qualified as her natural father under any Californian Family Code provisions.\textsuperscript{18} The court, referring to Californian jurisprudence, pointed out that ‘an intent to create and a willingness to support the child’ are relied upon by the Californian courts in determining whether an alleged parent should be considered a natural parent and, in this case, there was no evidence of consent or willingness to support (unlike the position in \textit{Gillett-Netting}).\textsuperscript{19}

Turning to the alternative option of showing intestacy rights, the court cited the California Probate Code\textsuperscript{20} as providing that relatives of the deceased conceived before his death but born thereafter were to inherit as though they were both during his life time. However, this did not extent any rights to posthumously conceived children.\textsuperscript{21} Pointing out that the primary method of establishing a parent-child relationship for the California Probate Code was through the provisions (discussed above) of the California Family Code, the court ruled that the appellant had not been able to establish that Brandalynn was entitled to inherit under California intestacy

\textsuperscript{17} Cal. Fam. Code §7611(a).

\textsuperscript{18} At 7189.


\textsuperscript{20} Cal. Prob. Code §§ 6407, 6453 and 249.5.


"Posthumously conceived children and social security entitlements; or things (not) to do in Little Rock when you’re dead" Available at: http://works.bepress.com/mel_cousins/6
laws at the time of the insured’s death. The court noted that the current provisions of the Probate Code, although not controlling as adopted after the insured’s death, only provide intestacy rights to posthumously-conceived children where the deceased consented to the procedure and conception is timely.\textsuperscript{22}

Therefore, the court ruled that the appellant was unable, by any of the means set out in the Social Security Act, to show that Brandalynn was dependent on the insured at the time of his death and, therefore, affirmed the decision to deny benefits.

B. Constitutionality

The US superior courts had not previously considered the constitutionality of provisions which have the effect that posthumously conceived children do not qualify for child insurance benefits (or State workers compensation). A number of commentators have suggested that there might be constitutional difficulties with such an outcome.\textsuperscript{23} The Supreme Court’s jurisprudence in this area – which relates mainly to the treatment of illegitimate children – has not directly addressed the issue of posthumously conceived children.\textsuperscript{24}

\textsuperscript{22} At 7192-93.

\textsuperscript{23} Banks (fn. 4) at pp. 345-58; Knaplund (fn 4) at pp. 642-49.

\textsuperscript{24} The strongest case in support of such an argument would appear to be Handley v Schweiker 697 F.2d 999 (11\textsuperscript{th} Circuit, 1983) in which the Circuit Court of Appeals held that a (judge-made) Alabama law which required that paternity proceedings be brought during the father’s lifetime was in breach of the equal protection guarantee as applied to a child born several months after her father had fallen into a coma (see also Daniels v Sullivan 979 F.2d 1516 although this case did not involve a posthumous birth). However, in Orsini v Sullivan 903 F.2d 1393 (11\textsuperscript{th} Circuit, 1990) the same circuit, following Mathews v Lucas 427 US 495, held that the requirement to prove
The only court which had considered the issue to date – the District Court in *Gillett-Netting* – had shortly dismissed the argument.\(^{25}\) The District Court ruled that as no fundamental right or suspect (or quasi-suspect) class was involved, the rational basis test applied. The Court pointed out that the Supreme Court had held in *Mathews* that conditioning entitlement to benefits on dependency at the time of death and applying a State’s intestacy laws to determine dependency were not unconstitutional.\(^{26}\) Accordingly, the Court held that it was “entirely rational” and consistent with the purpose of the Act for the SSA to condition dependency on the intestacy laws of the applicable State.

The constitutionality issue has now been squarely addressed by the court of appeals in *Vernoff*.\(^{27}\) The appellant argued that the SSA’s interpretation and application of the Social Security Act so as to exclude some posthumously-conceived children was in breach of the Equal


\(^{26}\) *Matthews v Lucas* 427 US 495 (1976).

\(^{27}\) *Vernoff* at 7194-96.
Protection Clause of the Fifth Amendment. The court, however, shortly dismissed the argument holding that *Mathews v Lucas* was controlling.\(^{28}\)

In *Lucas*, the provisions of the Social Security Act were challenged because the SSA’s application of those provisions resulted in the extension of benefits only to certain classes of illegitimate children. The Supreme Court did not apply heightened scrutiny and upheld the provisions under rational basis review.\(^{29}\) The Supreme Court, in that case, held that rational basis review was appropriate because the provisions did not draw a line between legitimate and illegitimate children, but rather included some illegitimate children while excluding others. The Supreme Court accepted the SSA’s view of the purpose of the Act, which

was not a general welfare provision for legitimate or otherwise ‘approved’ children of deceased insured persons, but was intended just ‘to replace the support lost by a child when his father . . . dies . . .’.\(^{30}\)

The Supreme Court concluded that the statutory classifications were permissible as ‘they are reasonably related to the likelihood of dependency at death” and that the dependency presumptions were not impermissibly overinclusive, because they served the reasonable goal of “administrative convenience.”\(^{31}\)

In *Vernoff*, the court of appeals closely followed this approach pointing out that the SSA did not exclude all posthumously-conceived children but only those who did not meet the statutory


\(^{29}\) Ibid at 509.

\(^{30}\) Ibid at 507 quoted in *Vernoff* at 7195.

\(^{31}\) Mathews at 509.
requirements. Under Californian law, some posthumously-conceived children could be deemed legitimate and satisfy the dependency requirements thereby establishing entitlement to benefits. Because not all posthumously-conceived children were excluded the court followed *Lucas* and applied only rational basis review. It held that,

As in *Lucas*, the challenged classifications are reasonably related to the government’s twin interests in limiting benefits to those children who have lost a parent’s support, and in using reasonable presumptions to minimize the administrative burden of proving dependency on a case-by-case basis.

Despite the arguments which have been advanced as to possible unconstitutionality, it is difficult to argue with the court’s ruling in this case. It is not clear that any ‘suspect class’ is in issue and, while the level of ‘rationality’ required to satisfy ‘rational basis’ review is notoriously low in many instances, in this case, the outcome in *Vernoff* is not inconsistent with the apparent objectives of the Social Security Act.

### IV. Discussion

It is difficult to argue with the outcome in *Vernoff* (and the clarity of the judgment is very welcome). Given the apparent objective of the legislation (as accepted by the Supreme Court)

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32 See fn 23.

33 Indeed the outcome was predicted by M.F. Radford, Post-Mortem Sperm Retrieval and the Social Security Administration: How Modern Reproductive Technology Makes Strange Bedfellows, *Georgia State University College of Law, Legal Studies Research Paper, 2009-09.*
i.e. not being a general welfare provision for children of deceased insured persons, but rather
being intended just ‘to replace the support lost by a child’ when the insured parent dies, the
interpretation adopted by the court is clearly consistent with that objective.\footnote{Although the court of appeals in \textit{Gillett-Netting} (371 F.3d at 598) stated that “the Act is construed liberally to ensure that children are provided for financially after the death of a parent” there clearly must be some limits to the interpretation of the law as it currently stands. Whether the objective of the Act should be so narrowly confined to providing support where there is already actual (or expected) support is a broader question. Given that this is an insurance benefit, it would not be unreasonable to provide a benefit which insures a person (in part) against the risk of having to provide support for a child and, of course, from the point of view of the child and surviving spouse, it would be desirable that support should be provided rather than that they should lose out because of some ‘moral’ issues as to whether or not the father ‘consented’ to the birth of the child or intended to (or did) provide financial support.} The line which
the court was able to draw between a father who has consented to a conception and provided
indications that he was prepared to support the child in \textit{Gillett-Netting} and a situation in
\textit{Vernoff} where, for obvious reasons, there was no evidence of such consent or willingness to
support is consistent with the rationale of the legislation. However, there are two points which
one might make as to the outcome in this case (which relate to the underlying legislation rather
than the court’s approach). Firstly, the structure of the legislation drove the court to a decision
in which, while it recognized that Brandalynn was her father’s ‘child’ for the purposes of the
Social Security Act, he was not her ‘parent’ for the purposes of the same Act (via the California
Family Code). This situation is unlikely to lend itself to a clear public understanding of what is, after all, legislation of very wide public applicability.\textsuperscript{35}

More importantly, the outcome arrived at (the right to benefit depending on the distinction between consent and non-consent) was not a logical outcome of the Social Security Act but rather a somewhat fortuitous result of the particular combination of the federal and state laws in Arizona and California and indeed the interpretation of those laws by the Ninth Circuit.\textsuperscript{36} It is far from clear that this outcome would also be possible in other states (or possibly in other circuits).\textsuperscript{37}

\textsuperscript{35} Though a reading of the legislation would indicate that public understanding (or even intelligibility to anybody) was not one of the objectives of the legislature.

\textsuperscript{36} An interpretation which, as we have seen, is not fully shared by the SSA. It is not clear what view other circuits will take on this issue.

\textsuperscript{37} See, for example, the Arkansas case of Finley v Astrue, 270 S.W.3d 849, 372 Ark. 103, 2008 WL 95775 (Ark. 2008) in which the Arkansas Supreme Court ruled that a child, who was created as an embryo through in vitro fertilization during his parents’ marriage, but implanted into his mother’s womb after the death of his father, would not inherit from the father under Arkansas intestacy law as a surviving child. In order to inherit as a posthumous heir under Arkansas law, the child must not only have been born after the decedent’s death, but must also have been conceived before the decedent’s death and the Supreme Court refused to hold that a child created as an embryo through in vitro fertilization during the child’s parents’ marriage, but implanted into the child’s mother’s womb after the death of the child’s father, was “conceived before” the latter’s death on the (rather dubious) basis that this could not have been the legislative intent as the procedure was not envisaged at the time of the legislation. In Eng Khabbaz v. Comm’r of Soc. Sec. Admin., 930 A.2d 1180 (N.H. 2007) the New Hampshire Supreme Court took an equally narrow approach to that of the Arkansas court in holding that the reference in State law to a “surviving issue” indicted that the “survivor” must have been alive at the time of death. The Eng...
As outlined in this case note, the result of the current law on child insurance benefits (as interpreted by the courts) as it applies to the entitlement of posthumously conceived children is that (a) there is a variation even between the federal circuits as to the interpretation of federal law and that (b) as with the general law on child benefits the importation of state intestacy law into (at least some aspects of) entitlement to federal benefits leads to further variations in outcome. This seems somewhat undesirable (not to say unnecessary) in the case of a federal benefit.

As we have seen, while the variation is, in part, attributable to different state laws as to intestacy, it is clear that it is as much (if not more) due to the approach which state (and federal) courts take to the interpretation of such laws as to the laws themselves. While the Supreme Court in *Lucas* has ruled that reliance on state intestacy laws is not unconstitutional, this does not, of course, require the use of such laws in assessing dependency.

The decisions do highlight the fact that courts have given a somewhat purposive interpretation of such provisions in relation to *in vivo* children. Courts are now being asked to make purposive interpretations in relation to these provisions as they apply to posthumously conceived children, with varied results. This again highlights the need for legislative intervention at federal level to avoid uncertainty and inconsistency as regards entitlement to benefits.

*Khabbaz* court also indicated its reluctance to become involved in (what it saw as) making rather than interpreting legislation. In contrast, in *Woodward v. Commissioner of Social Security* 760 N.E.2d 257, 435 Mass. 536 (2002) the Supreme Judicial Court of Massachusetts was able to construe a law originally enacted in 1836 to allow inheritance by a posthumously conceived child.

38 Obviously, this is also the case in relation to state benefits such as workers’ compensation but given that such laws vary greatly, one cannot expect consistency as regards treatment of posthumously conceived children.
A number of proposals for legislative reform have been advanced.\(^39\) Doroghazi, for example, has proposed that Congress should add a new section to the Social Security Act allowing posthumously conceived children to receive benefits. He proposes that if a genetic relationship is proven, a child shall be deemed dependent if the decedent consented to posthumous conception\(^40\) using his genetic material and (1) the decedent was married to the mother at the time of his death; (2) the decedent was living with or contributing to the mother’s support at the time of his death; or (3) the decedent provided for any posthumously conceived child, using his non-anonymously donated sperm, in his will. He further proposes that the law would require that the children be born within three years of the deceased’s death.\(^41\) In the Vernoff case, for example, such an amendment would not have led to entitlement to social security benefits for the child as there appears to have been no consent to the sperm extraction and the child was born more than three years after death. However, it would at least mean that the decisions were based on clearly established rules rather than on an unpredictable combination of federal and state laws and jurisprudence.

On the other hand, the current provisions of the Social Security Act as they concern child insurance benefits are very convoluted. This has been the result of adding on additional sections to deal with specific problems rather than introducing a more streamlined approach to

\(^39\) See the articles cited as fn 4. There is, of course, a much broader literature as to the law concerning posthumously conceived children more generally.

\(^40\) Though given the lack of clarity about when conception actually occurs, the law might wish either to define when conception does occur for such purposes or refer more specifically to implantation of the embryos occurring posthumously.

\(^41\) Doroghazi op. cit. fn 4 pp. 1617-18.
qualification for benefits. There is indeed an argument for a more radical reform and simplification of the existing provision to respond to changes in both society and reproductive technologies; to reflect and attempt to consolidate the case law which has built up; and to remove arguably unnecessary concepts such as state intestacy laws in assessing entitlement to federal benefits.

42 An obvious example of this is the different views taken by the SSA and the Ninth Circuit as to whether §416(h)(2)(A) is a general provision which much be applied in all cases or 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.