A ‘simple test’: posthumously conceived children and social security entitlements in Astrue v Capato

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This case note examines a recent Supreme Court decision concerning the interpretation of the provisions of the Social Security Act concerning entitlement to survivor’s benefits in respect of children. The case involved the correct construction of the term ‘child’ in the Act but arose, more specifically, from a series of cases concerning posthumously conceived children. Courts of Appeal had come to different interpretations as to correct interpretation of the Act and the Supreme Court intervened to resolve the conflict. The Court accepted the Social Security Agency’s (SSA) interpretation of the legislation. However, although legally correct, this does little if anything to ensure any coherence in the application of the law to posthumously conceived children or to resolve the issue of when such children should be entitled to benefit. 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 Supreme Court interpreted the law in this case, while Part IV concludes with a discussion of the need for legislative reform.

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. Perhaps indicating the importance of the issue, there has already been a considerable volume of commentary on these cases and on the broader issues raised.2

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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.\(^3\) Thus, to satisfy the definition, a posthumously conceived child must show both that she is the child of the insured person and that she ‘was dependent on the insured wage earner at the time of his death.’

1. Child

42 U.S.C. § 416(e) provides that

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].

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

The Courts of Appeals have adopted different interpretations as to the purpose of this clause. The Social Security Administration (SSA), supported by a number of Courts,\(^4\) takes the view that § 416(h)(2)(A) provides the analytical framework that must be followed in 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. This view was set out by the SSA in regulations adopted through notice-and-comment rulemaking.

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However the Court of Appeals for the Ninth Circuit ruled in *Gillett-Netting* that

These sections [i.e. § 416(h)(2)(A)] 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.¹

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, on the court’s interpretation, satisfied § 416(e)) was a child for the purposes of the Act. The Court of Appeals 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’. This was the basic argument advanced by Ms. Capato in the current case.

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).² In addition, a child will be considered dependent where she can show that the parent was living with or contributing to the support of such child.³ 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 of’ has been construed in a rather broad manner to include support to a pregnant mother (in the case of a posthumous birth)⁴ and it is arguable that a similar approach might be extended to cases of posthumous conception.⁵

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² 42 U.S.C. § 402(d)(3). In addition, State law can be of assistance. For example, Arizona law provides that every child is the legitimate child of its natural parents. 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.


⁴ *Smith v Heckler*, 820 F.2d 1093 (1987) (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.

⁵ See the discussion in Doroghazi (*supra*.) at pp. 1610-12.
II. FACTS

The facts in *Capato* are rather straight-forward. Karen Capato married Robert Capato (the insured person) in May 1999. Shortly afterwards, Robert was diagnosed with cancer and was told that the chemotherapy treatment might render him sterile. Before undergoing chemotherapy, he deposited semen in a sperm bank, where it was frozen and stored. In the event, Karen conceived naturally and gave birth to a son in August 2001. Robert subsequently died in Florida, where he and Karen then resided, in March 2002. Shortly after his death, Karen began in vitro fertilization and she gave birth to twins in September 2003, 18 months after Robert’s death. Her application for social security survivors benefits was refused by the SSA on the basis that the children could not inherit from the Robert under Florida intestacy law and, therefore, were not children for the purposes of the Act. This decision was upheld by the district court but was reversed by the Court of Appeals holding that ‘the undisputed biological children of a deceased wage earner and his widow’ qualify for survivors benefits without regard to state intestacy law.

III. THE SUPREME COURT

A. Definition of ‘child’

The Supreme Court unanimously, and without great hesitation, disagreed with CA3 and upheld the approach of the SSA. It ruled that the SSA’s reading was 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. Even if the SSA’s longstanding interpretation was not the only reasonable one, it was at least a permissible construction entitled to *Chevron* deference. The Court first pointed out some ‘conspicuous flaws’ in the reasoning of CA3 and then explained why it preferred the SSA’s interpretation.

First, contrary to the argument that Congress had intended §416(e) to apply to the ‘biological child of married parents,’ the Court pointed out that nothing in §416(e)’s definition suggested that it understood the word ‘child’ to refer only to the children of married parents. Nor did §416(e) indicate that Congress intended ‘biological’ parentage to be prerequisite to ‘child’ status under that provision and, indeed, as in the case of adoption, a biological parent is not necessarily a child’s parent under law. Thirdly, the court noted that

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10 Under Florida law, a child born posthumously may inherit through intestate succession only if conceived during the decedent’s lifetime.
11 631 F. 3d 626, 631 (2011)
13 Of course, the biological children of married parents will, unlike many postumously conceived children, always be entitled to inherit under State laws.
marriage does not ever and always make the parentage of a child certain, nor does the absence of marriage necessarily mean that a child’s parentage is uncertain.14

Finally, the Court noted that it was not obvious that the definition proposed by Ms Capato, i.e. ‘biological child of married parents’ would cover the Capato twins. Under Florida law, a marriage ends upon the death of a spouse and if that law applied, the Capato twins, conceived after the death of their father, would not qualify as ‘marital’ children.15

Turning to its reasons for preferring the SSA’s reading, the Court pointed out that, even though §416(e) was not internally cross-referenced to any other provision, this missing link was provided by §416(h)’s statement that it applied for purposes of this subchapter, i.e. Subchapter II of the Act, which spans §§401 through 434, including obviously §416(e).16 Arguably this point in itself was sufficient to decide the case. However, the Court buttressed its interpretation by pointing out that ‘reference to state law to determine an applicant’s status as a “child” is anything but anomalous’ and that the Act commonly refers to state law on matters of family status, including marriage.17

The Court took the view that the reliance on the intestacy statute ‘proceed[ed] from Congress’ perception of the core purpose of the legislation.’18 The aim of the legislation was not to create a program ‘generally benefiting needy persons’; it was, more particularly, to ‘provide . . . dependent members of [a wage earner’s] family with protection against the hardship occasioned by [the] loss of [the insured’s] earnings.’19

The Supreme Court had accepted that

where state intestacy law provides that a child may take personal property from a father’s estate, it may reasonably be thought that the child will more likely be dependent during the parent’s life and at his death.20

Thus, the Court believed that reliance on state intestacy law to determine who is a ‘child’ served the Act’s driving objective. Even if the intestacy criterion yielded benefits to some

14 At p. 9.
15 At p. 10. Though what relevance this has to the interpretation of the Social Security Act is not clear.
16 At p. 10-11. The original version of today’s §416(h) was similarly drafted.
17 At p. 11.
18 At p. 13.
20 Citing Mathews v. Lucas, 427 U. S. 495, 514 (1976). 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.
children outside the Act’s central concern, Congress’ was entitled to legislate for the generality of cases. 21 The Court concluded that

It did so here by employing eligibility to inherit under state intestacy law as a workable substitute for burdensome case-by-case determinations whether the child was, in fact, dependent on her father’s earnings. 22

B. Constitutionality

The Court also dismissed an argument as to the constitutionality of differential treatment of posthumously conceived children, an issue raised in the briefs but certainly not addressed in any detail in argument. 23 A number of commentators had suggested that there might be constitutional difficulties with such an outcome. 24 The Supreme Court’s jurisprudence in this area – which relates mainly to the treatment of illegitimate children – had not previously directly addressed the issue of posthumously conceived children. The constitutionality issue had been addressed by CA9 in Vernoff. 25 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 Protection Clause of the Fifth Amendment. The court, however, shortly dismissed the argument holding that Mathews v Lucas was controlling. 26

In Capato the Supreme Court noted that while it had applied an intermediate level of scrutiny to laws ‘burden[ing] illegitimate children for the sake of punishing the illicit relations of their parents’, 27 no showing has been made that posthumously conceived children shared the characteristics that prompted the Court’s heightened scrutiny of classifications disadvantaging children of unwed parents. Therefore, it was not necessary to decide whether heightened scrutiny would be appropriate. Under rational-basis review, the regime Congress adopted easily passed inspection. The Court agreed with CA9 in Vernoff that the regime was reasonably related to the government’s twin interests in [reserving] benefits [for] 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. 28

21 Intestacy laws in a number of States provide for inheritance by posthumously conceived children, and under federal law, a child conceived shortly before her father’s death may be eligible for benefits even though she never actually received her father’s support.

22 P. 13-14.

23 CA3 had dismissed the equal protection claim in a footnote.

24 Banks (supra.) at pp. 345-58; Knaplund (supra.) at pp. 642-49.


Despite the arguments which have been advanced as to possible unconstitutionality, it is difficult to argue with the Court’s ruling in this case given that it is not clear that any ‘suspect class’ is in issue and given that the level of ‘rationality’ required to satisfy ‘rational basis’ review is notoriously low. However, as discussed below, it is not clear that the outcome in *Capato* is consistent with the objectives of the Social Security Act.

IV. DISCUSSION

*The Court is correct as to statutory interpretation ...*

The Court appears to have come to the correct conclusion in terms of statutory interpretation. Indeed, it might simply have accepted that the SSA’s interpretation was correct without the need to refer to *Chevron* deference.\(^2^9\) This restores the position to that before the *Gillet-Nettings* case.

*but the statute is neither simple ...*

However, it is rather worrying that the Court has attempted to buttress its decision by presenting it as a logical policy approach. In particular, the Court stated that

> requiring all ‘child’ applicants to qualify under state intestacy law installed a simple test, one that ensured benefits for persons plainly within the legislators’ contemplation, while avoiding congressional entanglement in the traditional state-law realm of family relations.\(^3^0\)

Now it is rather doubtful that people generally (and even many lawyers) would describe a reliance on state intestacy law (which in turns depends on the antiquated concept of ‘domicile’) as ‘simple’.\(^3^1\)

*nor logical*

Second, the Court’s justification for the use of the state intestacy law is flawed. As noted above, the Social Security Act imposes two relevant requirements for entitlement to survivor’s benefits. First, the person must be a child of the insured and, second, the child must have been dependent on the insured wage earner at the time of his death. Therefore, there is no reason to impose a dependency requirement into the definition of child. Rather the rationale for the

\(^{29}\) At p. 15-16.

\(^{30}\) At p. 12.

reliance on state intestacy law is presumably that outlined by the SSA itself when it explained that

Today, biological paternity can be proved scientifically, but historically, proof of paternity was difficult. In 1939, there was no such thing as a scientifically proven biological relationship between a child and a father, ... . Therefore, the Act relied on state intestacy law. The Court’s (rather specious) assumption in *Mathews v Lucas* (which did not, of course, involve posthumously conceived children) of a link between intestacy law and actual dependency (quoted above)\(^{32}\) should not be interpreted as the actual rationale for Congress’ approach in 1939.

*Current law does not meet the needs of posthumously conceived children* ...

It is, of course, obvious that Congress did not (and could not) have had such children in mind when it drafted the legislation. The Supreme Court’s decision will make it somewhat more difficult for such children to qualify for benefits. Leaving aside the financial issues, one might assume that it is rather hurtful for parents of posthumously conceived children to be told that the child of their deceased partner is not his child for the purposes of social security law. But even if the CA3 and CA9 interpretation had been upheld, many such children would not have qualified for benefits and whether they did or not would have depended on an arbitrary mixture of judicial interpretation and state law rather than any coherent policy approach.

*and requires amendment.*

A preliminary issue is whether posthumously conceived children fall within the scope of the legislation at all. Again it is rather worrying to find the Supreme Court appearing to suggest that they do not and referring to posthumously conceived children as ‘children outside the Act’s central concern’.\(^ {33}\) However, it is clear that in some cases, such children may currently qualify for benefits under the Act and, while one can see a justification for clarifying the scope of entitlement, posthumously conceived children are clearly ‘children’ within the intention (if not the wording) of the Act and might be considered dependent on the deceased parent.

Therefore, the question arises as to how the Act should be reformed. At present, any improvement in the status of posthumously conceived children depends on state-by-state reform of the intestacy laws. This is clearly one option. However, as Knaplund points out

Seventeen states have enacted laws on this issue: thirteen states allow postmortem conception children to inherit in intestacy, while four states do not. In another five states without specific statutes, courts have split on the issue: three have allowed

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\(^{32}\) Described by Stevens J (dissenting) as ‘nebulous inference upon inference’ (427 U.S. at 522).

\(^{33}\) At p. 13.
inheritance, while two have not. That leaves twenty-eight states in which the outcome is uncertain.  

An alternative, suggested by some commentators is to amend the Act specifically to deal with the issue of posthumously conceived children. 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 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.

On the other hand, the current provisions of the Social Security Act as they concern child insurance benefits are very convoluted (to be polite). This has been the result of adding on...

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36 The current version of 42 U.S.C. 416 (which is not the only relevant section) provides, in relevant part, that:

For the purposes of this title—

... Child

(e) The term ‘child’ means (1) the child or legally adopted child of an individual, (2) a stepchild who has been such stepchild for not less than one year immediately preceding the day on which application for child’s insurance benefits is filed or (if the insured individual is deceased) not less than nine months immediately preceding the day on which such individual died, and (3) a person who is the grandchild or stepgrandchild of an individual or his spouse, but only if (A) there was no natural or adoptive parent (other than such a parent who was under a disability, as defined in section 223(d)) of such person living at the time (i) such individual became entitled to old-age insurance benefits or disability insurance benefits or died, or (ii) if such individual had a period of disability which continued until such individual (became entitled to old-age insurance benefits or disability insurance benefits, or died, at the time such period of disability began, or (B) such person was legally adopted after the death of such individual by such individual’s surviving spouse in an adoption that was decreed by a court of competent jurisdiction within the United States and such person’s natural or adopting parent or stepparent was not living in such individual’s household and making regular contributions toward such person’s support at the time such individual died. For purposes of clause (1), a person shall be deemed, as of the date of death of an individual, to be the legally adopted child of such individual if such person was either living with or receiving at least one-half of his support from such individual at the time of such individual’s death and was legally adopted by such individual’s surviving spouse after such individual’s death but only if (A) proceedings for the adoption of the child had been instituted by such individual before his death, or (B) such child was adopted by such individual’s surviving spouse before the end of two years after (i) the day on which such individual died or (ii) the date of enactment of the Social Security Amendments of 1958[207]. For purposes of clause (2), a person who is not the stepchild of an individual shall be deemed the stepchild of such individual if such individual was not the mother or adopting mother or the father or
adopting father of such person and such individual and the mother or adopting mother, or the father or adopting father, as the case may be, of such person went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment described in the last sentence of subsection (h)(1)(B), would have been a valid marriage. For purposes of clause (2), a child shall be deemed to have been the stepchild of an individual for a period of one year throughout the month in which occurs the expiration of such one year. For purposes of clause (3), a person shall be deemed to have no natural or adoptive parent living (other than a parent who was under a disability) throughout the most recent month in which a natural or adoptive parent (not under a disability) dies.

...  

Determination of Family Status

...

(h) (2)(A) 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 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.

(B) If an applicant is a son or daughter of a fully or currently insured individual but is not (and is not deemed to be) the child of such insured individual under subparagraph (A), such applicant shall nevertheless be deemed to be the child of such insured individual if such insured individual and the mother or father, as the case may be, went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment described in the last sentence of paragraph (1)(B), would have been a valid marriage.

(3) An applicant who is the son or daughter of a fully or currently insured individual, but who is not (and is not deemed to be) the child of such insured individual under paragraph (2), shall nevertheless be deemed to be the child of such insured individual if:

(A) in the case of an insured individual entitled to old-age insurance benefits (who was not, in the month preceding such entitlement, entitled to disability insurance benefits)—

(i) such insured individual—

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

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

(III) has been ordered by a court to contribute to the support of the applicant because the applicant is his or her son or daughter,

and such acknowledgment, court decree, or court order was made not less than one year before such insured individual became entitled to old-age insurance benefits or attained retirement age (as defined in subsection (l)), whichever is earlier; or

(ii) such insured individual is shown by evidence satisfactory to the Commissioner of Social Security to be the mother or father of the applicant and was living with or contributing to the support of the applicant at the time such applicant’s application for benefits was filed;

(B) in the case of an insured individual entitled to disability insurance benefits, or who was entitled to such benefits in the month preceding the first month for which he or she was entitled to old-age insurance benefits—
additional sections to deal with specific problems rather than introducing a more streamlined approach to qualification for benefits. Arguably it would be preferable to move to a federal definition of ‘child’ which acknowledges that, in 2012, it is indeed possible to determine biological parenthood (and to provide for those cases where biology is not determinative).

Such an approach would not raise any constitutional issues concerning federalism. While the Supreme Court noted that the Social Security Act commonly refers to state law on matters of family status, it also creates federal rules in some cases.  

The question of the scope of Congressional power to intervene in the area of family law has recently been considered by CA1 in one of the Defense of Marriage Act (DOMA) cases. In that case, the Court of Appeals accepted that

... DOMA intrudes extensively into a realm that has from the start of the nation been primarily confided to state regulation - domestic relations and the definition and

(i) such insured individual—
   (I) has acknowledged in writing that the applicant is his or her son or daughter,
   (II) has been decreed by a court to be the mother or father of the applicant, or
   (III) has been ordered by a court to contribute to the support of the applicant because the applicant is his or her son or daughter,

   and such acknowledgment, court decree, or court order was made before such insured individual’s most recent period of disability began; or

(ii) such insured individual is shown by evidence satisfactory to the Commissioner of Social Security to be the mother or father of the applicant and was living with or contributing to the support of that applicant at the time such applicant’s application for benefits was filed;

(C) 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.

For purposes of subparagraphs (A)(i) and (B)(i), an acknowledgement, court decree, or court order shall be deemed to have occurred on the first day of the month in which it actually occurred.

37 See, for example, 416(h)(3)(B) above.
38 Massachusetts v. Dep't of Health and Human Services, 10-2204 (CA1, 2012).
incidents of lawful marriage - which is a leading instance of the states' exercise of their broad police-power authority over morality and culture. 39

This is an area which the Supreme Court has specified ‘belongs to the laws of the States and not to the laws of the United States.' 40 Nonetheless, the court concluded that, even though no precedent existed for DOMA's sweeping general ‘federal’ definition of marriage for all federal statutes and programs, ‘Congress surely has an interest in who counts as married’. 41 The fact that Congress has traditionally looked to state law to determine the answer does not mean that the Tenth Amendment or Spending Clause require it to do so. 42

Equally Congress has an interest in who counts as a child for the purposes of survivor’s benefits and it is entitled, if it so wishes, to provide a federal definition. Whether many Member of Congress may wish to do so in the current climate of debates on federalism and state rights may be more open to question.

However, a failure to adopt a federal approach will lead to a continuation of the current complex and incoherent approach to entitlement, especially for posthumously conceived children. 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; and to remove arguably unnecessary concepts such as state intestacy laws in assessing entitlement to federal benefits.

39 Slip opinion, p. 20.


41 At p. 21.

42 Ibid.