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Verdict

September 6, 2011

[Joanna L. Grossman](#)

A Growing Debate Over the Rights of Posthumously Conceived Children: Part One in a Two-Part Series of Columns



Is a child legally related to her biological father when she was conceived after he died? That is the question at the heart of *Beeler v. Astrue* (<http://law.justia.com/cases/federal/appellate-courts/ca8/10-1092/101092p-2011-08-29.html>), a recent ruling from the U.S. Court of Appeals for the Eighth Circuit that contributes to a growing difference of judicial opinion about the rights of posthumously conceived children. In this column, I'll explain the Beeler case and why the question it raises has caused a split among the judges who have considered it.

The Facts of the Beeler Case

Just before Bruce and Patti Beeler were planning to walk down the aisle, Bruce was diagnosed with acute leukemia. Still a young man, and one who wanted to have children, he deposited his semen at a local fertility clinic before undergoing chemotherapy. He then began chemotherapy, in November 2000, but it quickly became apparent that the treatment would not be successful. A bone-marrow transplant was his only chance to survive.

Bruce was released from the hospital in December of that year and briefly returned to work. He and Patti were married the same month. But in January 2001, Bruce was re-hospitalized with an infection, and, again he was told that a bone-marrow transplant was his only hope. Even with a transplant, however, his chances for long-term survival were only fifty percent. Thus, he began making plans for his possible death.

In February 2001, just two months after getting married, Bruce and Patti signed a form in the hospital bequeathing the banked sperm to Patti. The form also provided that only Patti could use the sperm in the event of Bruce's death. Bruce and Patti also filed an additional form, which provided that they desired "the female partner to be artificially inseminated or oocytes inseminated in vitro for the purpose of conceiving a child." The form further provided that the "[m]ale partner hereby agrees to accept and acknowledge paternity and child

support responsibility of any resulting child or children.”

Two days after signing the forms, Bruce finally underwent the bone-marrow transplant. Unfortunately, it was unsuccessful, and Bruce died in May 2001, at age 37. Both Patti and Bruce’s mother testified that Bruce wanted Patti to use his sperm to conceive a child after his death, and that the thought of a future child was a comfort to him in his last days.

Patti waited more than a year to attempt conception with Bruce’s sperm because she lost her job shortly after he died. In July 2002, though, she successfully conceived a child with Bruce’s sperm, via intrauterine insemination. Her daughter, B.E.B., was born in April 2003, with Bruce listed as the father on her birth certificate.

Some New Complications in the Law of Parentage

There is no doubt that Bruce is the biological father of B.E.B. But legal parentage in the age of the new family is often complicated and does not flow automatically from the genetic tie. And the absence of social parentage—for the late Bruce Beeler obviously did not have the chance to function as a father after B.E.B. was born, beyond being a beloved image on the family’s mantel—does not preclude it.

Why does it matter whether a man like Bruce Beeler is the legal father of a child who is conceived after his death with his sperm? The answer is that the existence of a legal father-child relationship may give rise to important rights such as inheritance and Social Security survivors’ benefits.

The law’s traditional conception of parentage was simple: Children born to married women had a legal mother (the woman who gave birth to them) and a legal father (the man who was married to that woman at that time, regardless of whether he actually sired the child). Children adopted by a married couple could also end up with two legal parents via the legal creation of a parent-child relationship.

Under the traditional model, children of unmarried parents had at most a legal mother (the treatment of legal motherhood in this situation evolved beginning in the late Nineteenth Century). The unwed father was not recognized as a father at all. But because the vast, vast majority of children were born to married parents, the traditional model worked well in most cases.

Several factors have combined to pose a dramatic challenge to the traditional model. First, a large and increasing number of children are born to unmarried parents—almost 41 percent of all American children; as many as 70 percent in some racial groups.

Second, reproductive technology has made it possible for children to be conceived without sex (through artificial insemination or in vitro fertilization (IVF)), and with the involvement of multiple adults (gamete donors and surrogates). The first birth resulting from IVF (resulting in a child who was known then as the first “test-tube” baby) did not occur until 1978, and the first birth from a frozen embryo did not occur until 1984. Thus, these changes are relatively new.

Third, an increasing number of children are born into planned gay or lesbian families, with intended parents of the same sex. A quarter of the 600,000 households anchored by a same-sex couple include children.

Among Many Reproductive Innovations, There Is the Special Case of Posthumous Children

The changes in reproduction that I described above force us to reconsider the basic question of legal parentage: When and under what circumstances is an adult the legal parent of a child?

This question arises in a wide range of situations, including those involving unwed fathers, sperm and egg donors, lesbian co-parents, and surrogate carriers, to take the most common examples. Posthumously conceived children are simply another category of children whose parentage cannot easily be determined using traditional concepts.

Obviously, the traditional law did not contemplate the existence of children conceived after the death of a parent,

since such children were, for many centuries, a scientific impossibility. By contrast, the law has always accounted for children conceived before a father's death, but born after his death; they have the same rights as children born during the father's lifetime.

But modern law has no such safe harbor. Modern technology has made posthumously conceived children possible. Indeed, such children may be very posthumously conceived. Experts are confident that a sperm sample that is deposited during a man's lifetime can now be preserved for ten years. And that number is likely to increase, given advances in cryopreservation and reproductive technology. A newspaper report in 2009 told of a child who was born from sperm deposited twenty-two years earlier by a man, who was then a teenager, with a cancer diagnosis.

Children could, in theory, be conceived after the deaths of their biological mothers as well, although there are no publicized cases of this sort. Eggs can be frozen, although not as reliably or for as long as sperm, for later in vitro fertilization; embryos can also be frozen (more reliably than eggs), for later implantation in another woman.

And even when a post-mortem conception is not planned to occur via a sperm deposit, it is often possible to harvest sperm from a dead man within a certain number of hours of his death. The problem in this situation is bioethics—who, if anyone, can consent to this type of post-mortem harvest?

The Key Parentage Question: Are Posthumously Conceived Children to Be Legally Deemed Related to Their Dead Fathers?

Regardless of when, where and how the sperm at issue is made available, we face the same question of parentage—are posthumously conceived children related to their dead fathers?

The legal rules most likely to be implicated by a posthumous conception are those relating to inheritance and survivor benefits, such as those available under the Social Security system. Custody and visitation are not an issue, for obvious reasons, but nor is child support, since most states' law does not permit a parent's estate to be subjected to child-support obligations. Indeed, nearly all the lawsuits that have been filed regarding posthumously conceived children involve either inheritance or Social Security benefits.

There are practical problems that plague the question of inheritance rights for posthumously conceived children. Estates are administered and closed within a relatively short period of time. Would they have to be held open in case children with inheritance rights were someday subsequently conceived? Would estate shares that had already been distributed be called back for reallocation if that, indeed, occurred? Would surviving spouses conceive more children simply in order to garner control over a greater share of the decedent spouse's estate?

Social Security benefits, in contrast, do not present the same complications. A "child" could claim benefits on a deceased parent's account many years later without ruffling the system's placid waters. Because Social Security benefits are not drawn from individualized accounts, no one else's money would be held hostage waiting for the possible claim by posthumously conceived children.

However, in practice, Social Security cases are not any easier to decide than inheritance cases. Social Security benefits are granted to a surviving child if and only if the child would be eligible to inherit under state intestacy law. (As readers may know, a person who dies "intestate" is one who leaves no will.) So the difficulties that related to intestate succession by posthumously conceived children will indirectly affect their attempts to collect Social Security benefits.

The Claim on Behalf of B.E.B.

With all the necessary background now set forth, let's return to the case of Bruce, the deceased father; Patti, his wife; and their daughter B.E.B., whom Patti conceived with Bruce's sperm after he had passed away.

Two months after B.E.B. was born, Patti filed an application for child's insurance benefits. The Social Security Act, the federal law that dictates all aspects of the Social Security system, provides that a child is entitled to "child's insurance benefits," if, at the time of a parent's death, he is a "child" of an individual who dies while

insured, and is “dependent” upon the insured at the time of the insured’s death. (An “insured” for Social Security purposes is simply a wage-earner who has paid sufficiently into the Social Security System to be eligible for benefits.)

Who qualifies as a “child”? That is the question here. The Social Security Act provides no definitive or uniform answer. Instead, the Act directs the Social Security Commissioner to apply the rules of intestate succession (that is the rules that dictate who inherits when a person dies without a valid will) that are in effect in the state in which the deceased individual lived. In other words, in this case, if a minor would be treated as the decedent’s child for inheritance purposes under Iowa law, then she will be treated as such for federal Social Security purposes.

It is a common feature of federal laws that they defer to the states on the law of relationships. As I have discussed in a [previous column \(http://verdict.justia.com/2011/07/26/respect-or-defend-marriage-the-senate-considers-a-bill-to-repeal-the-defense-of-marriage-act-of-1996-doma/\)](http://verdict.justia.com/2011/07/26/respect-or-defend-marriage-the-senate-considers-a-bill-to-repeal-the-defense-of-marriage-act-of-1996-doma/), federal laws that depend on marital status generally defer to state law to determine the validity of any particular marriage—except when it comes to same-sex marriages, for which a special non-recognition rule was created by the Defense of Marriage Act (perhaps better known as DOMA).

Patti’s application, on B.E.B.’s behalf, for Social Security benefits was denied by the agency. Five years after she applied, Patti finally got a hearing before an administrative law judge (ALJ), who agreed with the agency that B.E.B. was not entitled to benefits. The Appeals Council, which reviews all Social Security rulings, then issued an opinion concluding that B.E.B. “is not the child of the wage earner within the meaning of the Social Security Act.”

Patti then sued the Commissioner of Social Security, claiming that the agency had erred in its denial of benefits for her daughter. She prevailed in the federal district court, but then lost again before the U.S. Court of Appeals for the Eighth Circuit, in the decision referenced above.

The Eighth Circuit’s Ruling in *Beeler v. Astrue*

Although the original Social Security Act, passed in 1935, did not provide for survivor’s benefits, it was amended four years later to allow benefits for family members of deceased wage earners. One of those benefits, codified at 42 U.S.C. § 402(d), provides for payment of “child’s insurance benefits” as described above. But the agency in the Beeler case ruled both that B.E.B. was not a “child” and that she was not “dependent” on the wage earner within the meaning of the Act, and thus, that she could not collect benefits. (The other requirements of the Act were clearly satisfied.)

On appeal, the parties disagree about whether B.E.B. is a “child” of Bruce Beeler. But they agree that if she qualifies as a “child,” she automatically satisfies the dependency requirement. So the case centers on the statutory definition of “child.”

The definition of “child” is contained in a different provision of the Act, § 416(d). This provision describes three categories of children, including “(1) the child or legally adopted child of an individual.”

Then, in yet another section, 416(h), the statute provides that:

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

If we were to follow the command of § 416(h), we would conclude that B.E.B. does not qualify as Bruce’s child because the law of Iowa—where Bruce was domiciled when he died—did not allow a posthumously conceived child to inherit as an intestate heir. Iowa allows after-born heirs to inherit only if they were “begotten before” the decedent’s death, but born after.

But there was a new twist: While the appeal in this case was pending, Iowa enacted a new law to provide intestate-succession rights for posthumously conceived children under some circumstances.

More specifically, under the new provision, Iowa Code § 633.220A, a child of a decedent conceived and born after his or her death is his legal child as long as (a) a genetic parent-child relationship is established; (b) the decedent, in a signed writing, authorized his surviving spouse to use the decedent's genetic material to initiate the posthumous conception; and (c) the child is born within two years of the decedent's death. This law, however, is not retroactive, and was not passed in time to be applicable to Patti Beeler's case.

Thus, because Iowa does not define B.E.B. as Bruce's child for intestacy purposes, she does not meet the definition of child set forth in § 416(h). Thus the real dispute in the case was about whether § 416(h) provides the exclusive definition of "child."

The Social Security Commissioner argues that an applicant can qualify as a "child" under § 416(e) only by satisfying one of the criteria in § 416(h).

Patti Beeler, on the other hand, argues that § 416(h) merely provides a "savings" clause to allow an individual who does not qualify as a natural child under § 416(e) to nonetheless qualify as a child based on inheritance law. And, under Patti's interpretation, a child who is the biological child of an insured automatically qualifies as a "child" without reference to § 416(h).

The Eighth Circuit agreed with the Social Security Commissioner. It allotted "*Chevron* deference" to the agency's interpretation of the statute, given that Congress had delegated to the agency the authority to make rules with the force of law and that the Eighth Circuit concluded that the agency's interpretation of the relevant provisions was done in the course of exercising that authority. The interpretation, in the court's view, was reasonable given the statutory language and one of the central purposes of the Social Security Act—which was to protect family members after the unanticipated death of a wage earner.

In Part Two of this two-part series of column, appearing on September 20, I will consider the general legal landscape for posthumously conceived children. In particular, I'll discuss the rulings from other courts that agree or disagree with the Eighth Circuit's ruling, and the statutes that now exist in twelve states to regulate the rights of posthumously conceived children.



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