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# Verdict

September 20, 2011

Joanna L. Grossman

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



A surprising number of recent cases all ask the same question: Is a child legally related to her biological father if she was conceived after he died? This is a question that has been made possible by modern reproductive technology, advances in cryopreservation, and an evolving set of social norms that embraces (or at least tolerates) an amazing array of family forms.

In *Beeler v. Astrue* (<http://law.justia.com/cases/federal/appellate-courts/ca8/10-1092/101092p-2011-08-29.html>), a recent case that I discussed at length in **Part One of this series of columns** (<http://verdict.justia.com/2011/09/06/a-growing-debate-over-the-rights-of-posthumously-conceived-children>), the U.S. Court of Appeals for the Eighth Circuit ruled that a child known as B.E.B. was not the legal daughter of Bruce Beeler, whose sperm had been used to impregnate his widow about a year after he died.

The paternity issue arose because B.E.B.'s mother, Patti Beeler, had applied to the Social Security Administration on B.E.B.'s behalf for surviving-child benefits. The appellate court ruled that a survivor is a "child" of a wage-earning decedent only if intestacy law (that is, the law regarding the estates of persons who die without a will) in the state where the wage-earner was domiciled at death would treat her as such. Because Iowa law did not then recognize the parent-child relationship for posthumously conceived children, B.E.B. was not Bruce's "child" within the meaning of the Social Security Act.

But *Beeler* is just one of several judicial opinions answering this precise question, and courts have not provided a uniform answer to the parentage question raised by posthumously conceived children. State legislatures have also weighed in: Twelve of them have enacted new statutes to regulate the rights of these children with respect to their dead fathers' estates.

In this column, I will consider the patchwork legal landscape that exists today with respect to this issue, as well as the basic principles that ought to guide future regulation in this area.

### State Court Rulings on the Rights of Posthumously Conceived Children

There have been legal and ethical controversies over whether someone, usually a widow, has the right either to retrieve sperm from a dead man, or to use sperm he had deposited during his life to conceive a child after his death. But once a posthumous conception has actually occurred, these issues drop out of consideration, in favor of those issues that surround the legal and financial rights of the child.

The rights that most matter for posthumously conceived children are those that relate to inheritance or survivorship benefits under the Social Security program. Yet, there are relatively few states with clear statutory provisions on the rights of these children to inherit. The law has thus developed piecemeal, with claims by posthumously conceived children being analyzed on a case-by-case basis. Moreover, there has been a full spectrum of outcomes in such cases.

In 2002, early on in the arc of the history of posthumous conceptions, the Supreme Judicial Court of Massachusetts created a special rule to deal with the inheritance rights of posthumously conceived children in *Woodward v. Commissioner* (<http://supreme.justia.com/us/397/572/case.html>). The court required a minimum showing of a genetic tie, as well as proof of the now-deceased biological parent's affirmative consent to posthumous conception and to an obligation of support. The court demurred, however, on the question whether a future case might reveal a need for time limitations between death and conception, in order to avoid chaotic delays in the probate process. But in the *Woodward* case, Massachusetts' highest court did not force this issue.

Two years earlier, in 2000, a trial court in New Jersey had ruled in *Estate of Kolacy* ([http://scholar.google.com/scholar\\_case?case=4997409935030166549](http://scholar.google.com/scholar_case?case=4997409935030166549)) that a set of twins conceived a year after their biological father had died were his legal children and, therefore, his intestate heirs. The New Jersey court ruled that the existing statute did not prevent their heirship and that there was clear evidence of the decedent's intent that his sperm be used by his widow to conceive children after his death.

Then, in 2007, the highest court of New Hampshire resolved a similar situation in *Khabbaz v. Commissioner* (<http://law.justia.com/cases/new-hampshire/supreme-court/2007/khabb113.html>). But, there, the court ruled categorically against the inheritance rights of posthumously conceived children: The New Hampshire court reasoned that none could be considered "surviving issue" under the state's intestacy code because, by definition, they were not alive at the time of the father's death. Only the legislature could create rights for this emerging class of children, the New Hampshire court concluded.

A year later, in 2008, the Arkansas Supreme Court ruled against the inheritance rights of a posthumously conceived child, even though her mother's egg was fertilized by her father's sperm before he died. The mother in this case, *Finley v. Astrue* ([http://scholar.google.com/scholar\\_case?case=4871562516256438343](http://scholar.google.com/scholar_case?case=4871562516256438343)), had argued that the conception occurred before the father's death, when the embryo was created. The court did not make a definitive ruling on when "conception" occurred, for fear of treading in dangerous public policy territory. But it did rule that the legislature, in setting forth the law of trusts and estates, did not intend to bestow inheritance rights on a child resulting from a post-death implantation of an embryo. Posthumously conceived children, as a result, cannot be intestate heirs in Arkansas, any more than they can in New Hampshire.

## Federal Court Rulings on the Rights of Posthumously Conceived Children

In addition to the rulings from these four states courts, there have been several rulings from federal courts, also with a spectrum of outcomes. In *Netting v. Barnhart* (<http://law.justia.com/cases/federal/appellate-courts/F3/371/593/642163/>), the U.S. Court of Appeals for the Ninth Circuit ruled that Rhonda Netting's deceased husband was the legal father of her posthumously conceived twins. As the first federal appellate court ruling on the rights of posthumously conceived children, this decision was important, though ultimately its ruling was cabined to the Ninth Circuit alone.

The court in *Netting* ruled that because the twins were the biological children of the deceased wage-earner, they each counted as a "child" under the Social Security Act. In effect, the court held that the provision directing application of the state's intestacy law had no bearing on a case in which there was a clear biological relationship between the deceased parent and child. The court thus did not consult the inheritance laws of Arizona, the state where the decedent was domiciled at the time of his death, when ruling on the legal father-child relationship.

The Social Security Act also requires, however, that surviving children must be proven “dependent” on the wage-earner as a precondition for their receipt of benefits. Here, the court did consult Arizona law, which provides that children are presumed to be the legitimate children of their natural parents, regardless of the parents’ marital status. And children conceived after the death of one parent are “natural” as long as the parents were married at the time when one of them died. Moreover, legitimate children are presumed dependent. The court thus concluded that the twins were the legitimate, and therefore also the dependent, children of the decedent and thus, that the twins were entitled to surviving-child benefits under the Social Security Act.

While this ruling was very favorable for posthumously conceived children—making it much easier for them to establish the right to surviving-child benefits under the Social Security program—the Social Security Commissioner favors a different interpretation of the act, one which requires a child to qualify as an intestate heir under state law as a precondition to receiving benefits. (Readers may recall that this was also the approach taken in *Beeler v. Astrue*, the Eighth Circuit case with which I began this series, and this column.)

But the Social Security Administration (SSA) cannot unilaterally override the ruling of a federal court on the proper interpretation of the Social Security Act. (Congress could do that, but so far, it has not.) The SSA thus issued an “acquiescence ruling,” in which it explained that it would apply the *Netting* ruling to all similar claims arising in states within the Ninth Circuit. (Those states are Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, and Washington). Thus, in those states, state law is irrelevant to defining the legal term “child” if biological parentage is not in dispute. Section 216(h)—the clause that decided the *Beeler* case—will not be applied at all when answering this question. Biological, but posthumously conceived, children will thus be eligible for benefits in these states as long as all other requirements are met. (The child, for example, must be a minor and must be unmarried.)

Federal court rulings in other circuits have largely been unfavorable to posthumously conceived children. For instance, the U.S. Court of Appeals for the Fourth Circuit ruled, in *Schafer v. Astrue* ([http://scholar.google.com/scholar\\_case?case=595757857293342176](http://scholar.google.com/scholar_case?case=595757857293342176)) (2011), that posthumously conceived children are not eligible to collect Social Security benefits as a surviving child.

In *Schafer*, the child was born seven years after the biological father died. But even if the birth had been closer in time to the father’s death, the child still would not have been treated as an intestate heir under Virginia law (and thus would not have been considered a surviving child under the Social Security Act). A child cannot inherit if “born more than ten months after the death of a parent.”

### How Should the Law Treat Posthumously Conceived Children?

In both *Schafer* and *Beeler*, the courts deferred to the Social Security Commissioner’s interpretation of the applicable federal statute, which holds that Section 416(h)—which provides that a child qualifies as a “child” for benefits purposes if state law treats her as an heir—provides the exclusive means for establishing “child” status.

Unless Congress overrides this ruling, or courts other than the Ninth Circuit disavow it, it will continue to control the rights of posthumously conceived children.

What this means, however, is that state law controls the status of posthumously conceived children. This places a grave impetus on state legislatures across the country to clarify the rights of this new and somewhat unusual class of children. If the status of posthumously conceived children is ignored or left in limbo, these children may be unnecessarily impoverished or deprived of needed support. And even if such children are entitled to benefits, they may have to litigate each and every claim.

Most of the rulings on posthumously conceived children end with an exhortation to the relevant legislative body to pass laws to clarify the law governing such children’s inheritance rights. And a dozen or so states have accepted this invitation.

Among those states, only Ohio has specifically prohibited posthumously conceived children from inheriting from a deceased biological parent. The rest of the states that have decided to legislate in this area have provided for

inheritance at least in some circumstances. The statutes vary quite a bit, however. Some apply only to posthumously conceived offspring of married couples. Some require written proof of consent to the insemination prior to the parent's death. Some require special notices when a sperm deposit is made. Some impose time restrictions.

## Why Figuring Out the Right Approach to Estate Issues Involving Posthumously Conceived Children Remains Tricky

What is the best statutory approach? Congress could come up with a special definition of "child" that would apply to all claimants, regardless of where they live. That would resolve some of the current conflicts among the circuits, but would potentially create more confusion than it solves. As with questions relating to marriage—other than those questions relating to same-sex marriage that are misguidedly governed by the Defense of Marriage Act (DOMA)—the legal system revolves around federal deference to states' definitions of family relationships.

We are left, then, with a system that defines Social Security rights based on state inheritance rights. But inheritance questions are trickier. When a claimant collects Social Security benefits, that act has no effect on anyone else. For example, three divorced wives can all collect full benefits on the estate of a deceased wage earner, as long as each was married to him for 10 years. They do not have to split his benefits. So a posthumously conceived child, if ruled eligible to collect, would not be taking benefits away from a surviving spouse or other surviving children.

Inheritance questions, however, are trickier. While recognizing inheritance rights of a posthumously conceived child will not always disrupt the estate, sometimes it will. For example, if the surviving spouse indicates the intent to conceive a posthumous child in the future, an estate might have to be kept open—and some of the assets of other heirs held back—for ten years, or even longer. And that might deprive existing children of some needed resources, or deprive a surviving spouse of some earned or necessary support.

To give another example, in some adversarial estate situations, such a rule might also create perverse incentives to have posthumously conceived children. That is, a second husband or wife may conceive a child in order to gain a greater share of the estate—which might otherwise go to the decedent's children from a first marriage. But it's important to remember that the very same incentive existed when the decedent was alive. In this instance, the only difference is that the incentive to have more children, so that one's own children get a greater share of the estate, will simply continue on past the death of the man in question.

State legislatures, in devising statutory rules relating to posthumously conceived children, must take into account these various possibilities. Most of the existing state statutes are defensible—for they have struck a reasonable compromise that provides the possibility of protection for posthumously conceived offspring, while also narrowing that protection in order to avoid possible administrative and substantive problems.

Speaking generally, the legislatures that have already acted are less vulnerable to criticism than those that have so far abstained from legislating in this area. Although I favor the adoption by states of a rule that is inclusive and that takes into account the increasing scientific, social, and legal complexity of the new family, at this point in time, it is more important that legislatures adopt a rule to govern this situation than that they adopt any particular rule, so that both parents and children know what to expect, and how to plan for the future.



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