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Verdict

May 29, 2012

[Joanna L. Grossman](#)

The Supreme Court on the Social Security Rights of Posthumously Conceived Children: State Law Controls Family Status



Are children legally related to their biological father when they were conceived after his death? This is a question that has been considered by many federal courts and, now, by the U.S. Supreme Court, in *Astrue v. Capato* (<http://supreme.justia.com/cases/federal/us/566/11-159/>). The Court's answer? It depends, largely on state inheritance law. This ruling resolves a federal circuit split on the proper interpretation of the Social Security Act, and restores the focus on state law that is typical of federal laws that turn on family status.

The Facts of the Capato Case

There's a certain similarity to the small, but growing number of cases involving posthumously conceived children. The story of Karen and Robert Capato is typical. Shortly after they married in 1999, Robert was diagnosed with what would turn out to be terminal esophageal cancer. In anticipation of the effects of chemotherapy on his fertility, he and Karen decided to have his sperm frozen before he began treatment. Despite the treatment, however, Karen naturally conceived, and gave birth to, one child in 2001. By 2002, Robert's condition had deteriorated significantly, and he died in March of that year. Nine months later, Karen used Robert's frozen sperm to become pregnant, and she gave birth to a healthy set of twins in 2003.

She then applied, on the twins' behalf, for child-survivor benefits available under the Social Security Act. Such benefits are available for the "child" of a wage-earner who has worked a sufficient number of quarters to be insured by the Social Security system. There is no question that Robert was a "wage-earner," within the meaning of the Social Security Act. But were the twins his "children" for Social Security purposes?

Gametes and Parentage

If we define parentage only as a function of biology, then it is obvious that Karen's posthumously conceived twins are the children of her late husband Robert. After all, his sperm fertilized her eggs.

Legal parentage is sometimes just that simple. For example, as I wrote [in a previous column](#) (<http://verdict.justia.com/2012/04/03/flag-waving-gametes>), the State Department takes the position that a child born

abroad to American parents cannot derive citizenship under the usual rules of *jus sanguinis* (citizenship by descent) if the child was conceived using reproductive technology. For such a child to inherit citizenship from a “parent”, either the sperm or the egg donor—not the gestational mother or the intended parent(s)—must be an American citizen. Under these rules, parentage flows from gametes and gametes alone.

The State Department’s citizenship rules are unusual, however. While biology can be important, even determinative, in assigning the rights and responsibilities of parenthood, other factors are often relevant. Before the widespread use of reproductive technology and the changed demographics of the new family, parentage was determined by childbirth (for women) and marriage to the child’s mother (for men). Today, however, parentage law is more complicated.

For mothers, the act of giving birth typically gives rise to automatic legal maternity. In most cases, that rule coincides with biological motherhood—for, of course, women typically carry children conceived from their own gametes. But even when they do not—when, for example, a woman relies on an egg donor’s eggs, rather than her own—she is still usually deemed to be the legal mother of the child she carries. And sometimes, within an enforceable surrogacy arrangement, a woman is not the legal mother, despite her having provided the egg and/or the womb for a gestating child.

For men, legal parentage is even more complicated and less likely to rely on biology alone. In most states, legal fatherhood comes from biology plus some additional criteria—such as marriage to the mother, openly holding out the child as his own, or an adjudication or formal acknowledgment of paternity. DNA testing alone is rarely enough to create automatic paternity.

The question of legal parentage—that is, question of who is the legal parent of a child, with the many rights and obligations that arise from that status—can be important in many contexts, including those of child support, custody, adoption, wrongful death, inheritance, and so on. It is also important for the determination of certain governmental benefits such as, in *Astrue v. Capato*, child survivor’s benefits under the Social Security Act.

The Connection Between State Parentage Law and Federal Social Security Benefits

The Social Security Act of 1939 created a system to provide retirement benefits for wage-earners who had paid into the system long enough to be deemed “insured”. An insured wage-earner has the right to start collecting benefits at retirement age, or earlier in the event of disability. The system is also designed to protect dependent family members in the event of a wage-earner’s death. An insured wage-earner’s spouse has, among other rights, the right to collect on the wage-earner’s account when the wage-earner dies. Even the divorced spouse of a wage-earner can have this right as long as the marriage lasted at least ten years and the widowed spouse is not remarried. Minor children of a wage-earner also have survivorship rights, to a child-survivor’s benefit.

Whether an individual qualifies as a surviving spouse or ex-spouse of a wage-earner is determined, mostly, by reference to state law. Whether a marriage was validly established or validly dissolved is a function of the law of the state in which the marriage or divorce occurred. This is true, generally, even when the marriage’s validity is relevant to a federal law. Congress generally defers to state law on determinations of family status, such as the determination of whether a marriage is valid.

The main exception to this system of federal deferral to state family-status law is the Defense of Marriage Act (DOMA). Under this 1996 law, same-sex marriages cannot be treated as legal marriages for any federal law purpose, even if they were validly celebrated under state or foreign law. DOMA thus wreaks havoc on a system that otherwise defers to state law for determinations of family status, and relegates same-sex spouses to a substantively unfair and procedurally-burdensome regime. As I have written about in greater detail [here](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>) and [here](http://verdict.justia.com/2012/03/06/is-the-defense-of-marriage-act-doma-indefensible) (<http://verdict.justia.com/2012/03/06/is-the-defense-of-marriage-act-doma-indefensible>), these problems have made DOMA a likely candidate for repeal in the near future, as well as the subject of considerable litigation.

Who is a “Child” Under the Social Security Act?

Under the Social Security Act, “every child (as defined in section 416(e) of this title)” of an insured “shall be entitled to a child’s insurance benefit.”

A “child” is an applicant who meets the definition of “child,” who is either a minor or was disabled before age 22, who is unmarried, and who was dependent on the insured at the time of the insured’s death.

Who is a “child” of the insured? Section 416(e) provides simply that the “term ‘child’ means (1) the child or legally adopted child of an individual. . . .” That provision provides no further elaboration of the meaning of the word “child.”

However, another provision, section 416(h), with the heading “Determination of family status,” states that: “In determining whether an applicant is the child or parent of [an] insured individual for purposes of this subchapter, the Commissioner of Social Security shall apply [the intestacy law of the insured individual’s domiciliary state.]” (Intestacy law is the set of rules that govern distribution of a probate estate when a person dies without a valid will. Spouses and children are the first in line to take from the estate under the rules in most states, but the parentage law of the state will dictate who qualifies as a “child” of the decedent.)

That same subsection, 416(h), also provides alternative criteria for those who do not meet the intestacy-law test. An individual can be defined as a “child” if the insured and the other parent had a marriage that was later deemed invalid, or if a court had adjudicated the parentage of the insured, or upon proof that the insured was “the parent” and was living with the applicant at the time of the insured’s death.

The technical question in *Capato* is whether section 416(h) provides the exclusive means for proving “child” status under the Social Security laws. The Social Security Administration (SSA) says yes.

The SSA, the agency charged with implementation and enforcement of the Social Security Act, has adopted implementing regulations for these provisions. The regulations provide for proof of a parent-child relationship by reference to state intestacy law or via three alternative criteria. In the SSA’s view, 416(h) is the exclusive means to qualify as a child under 416(e).

The (biological and legal) mother of the twins in this case argued for a different interpretation of 416(e). Under her interpretation, the provisions in 416(h) only come into play when “family status” is in question – and in need of “determination.” For families in which married couples produce biological offspring, family status is not “in doubt.” Thus, she argued, her twins were clearly the children of her late husband because they were the biological offspring of a married couple, even though they were not conceived until after his death.

The U.S. Court of Appeals for the Third Circuit agreed with her reasoning, and therefore ruled that the twins were entitled to child’s insurance benefits on their father’s account. (I discuss the rulings from other federal circuits on this issue [here \(http://verdict.justia.com/2011/09/20/a-growing-debate-over-the-rights-of-posthumously-conceived-children-2\)](http://verdict.justia.com/2011/09/20/a-growing-debate-over-the-rights-of-posthumously-conceived-children-2), [here \(http://writ.news.findlaw.com/grossman/20080122.html\)](http://writ.news.findlaw.com/grossman/20080122.html) and [here \(http://writ.news.findlaw.com/grossman/20040810.html\)](http://writ.news.findlaw.com/grossman/20040810.html).) But the Supreme Court reversed the Third Circuit’s ruling and sided with the SSA. Thus, the final outcome in this case was that Robert Capato cannot be deemed the legal father, for Social Security purposes, of the twins who were conceived with his sperm after his death.

The Supreme Court’s Ruling in *Astrue v. Capato*

In rejecting Karen Capato’s interpretation of the relevant Social Security law provisions, the Supreme Court relied on six main points, as follows:

First, the Supreme Court reasoned that Karen’s elevation of children of married parents to some special category where other criteria for parentage need not be applied is unwarranted under current law. The Court cited dictionaries, law treatises, and other statutory provisions to suggest that “child” can have different meanings, but many of those meanings, at least today, define “child” without regard to the marital status of the parents. Indeed, given a series of cases decided in the 1970s and 1980s holding that classifications on the basis of illegitimacy merit heightened judicial scrutiny under the Equal Protection Clause, it would be hard to argue that the SSA’s scheme built in a special safe harbor for legitimate children. Moreover, the Court questioned whether the twins

were indeed the children of married parents. After all, Robert died before they were conceived, and a marriage is legally over when the first spouse dies.

Second, the Court concluded that biology is not the sine qua non of legal parentage. When the Act was first passed into law, in 1939, there was no way to prove scientifically a biological relationship between parent and child. And adopted children are clearly covered by the child's-insurance benefit. Moreover, under state parentage law, as discussed above, biology is often, but not always, relevant to parentage, and biology is rarely dispositive of parentage. As the Court noted, "laws directly addressing use of today's assisted reproduction technology do not make biological parentage a universally determinative criterion."

Third, the statutory text is more amenable to the interpretation offered by the SSA. Section 416(h) refers to determinations as to whether an applicant is a "child . . . of [an] insured individual for purposes of this subchapter," which the Court takes to have only one plausible meaning—to elucidate the provisions in the subchapter, including section 416(e). The Court is probably correct in this reading, although Congress' wording in these provisions is unclear. It does seem implausible that Congress took the trouble to define the term "child," but did not bother to mention that certain categories of children automatically qualify, whether they meet the statutory definition or not.

Fourth, reading the Act to rely primarily on state law regarding family status is consistent with other portions of the statute, and with federal law generally. "[R]equiring all 'child' applicants to qualify under state intestacy law," the Court reasoned, "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."

Fifth, the SSA's interpretation is consistent with the statute's "core purpose" to protect dependent family members. Intestacy laws are designed to protect close relatives of a decedent, both because (1) such relatives were more likely to be dependent on the decedent than more distant relatives would be and more in need of support from the estate, and because (2) we presume that most decedents would have left their money to their spouses and/or children had they bothered to write a will. Because these provisions of the Social Security Act are designed to protect the families of wage-earners, intestacy law provides a good, bright-line basis for identifying the proper recipients of Social Security benefits.

Some states do explicitly provide for intestate inheritance by posthumously- conceived children (at least in some circumstances); others explicitly forbid it. Although the broader approach goes beyond Congress's purpose in protecting those who were dependent on the wage-earner for support, the Court held that it was "Congress' prerogative to legislate for the generality of cases," which it did "by employing eligibility 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."

Finally, the Court concluded that the SSA's interpretation of 416(e) was reasonable and therefore was entitled to deference under the Court's precedent in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (<http://supreme.justia.com/cases/federal/us/467/837/case.html>). The *Chevron* decision laid out the general standard for deference to administrative agencies. Deference is appropriate "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." (For further explanation of *Chevron* deference, see David Kemp's [post \(http://onward.justia.com/2012/05/21/chevron-deference-your-guide-to-understanding-two-of-todays-scotus-decisions/\)](http://onward.justia.com/2012/05/21/chevron-deference-your-guide-to-understanding-two-of-todays-scotus-decisions/) on Justia's *Onward*.) The SSA's interpretation, in the Court's view, meets those criteria.

The Future of Posthumously Conceived Children

Based on this ruling, biological parenthood is not an absolute trump card for determining parent-child relationships for Social Security purposes. Rather, the primary determinant is state inheritance law. State inheritance law is also relevant to the financial well-being of posthumously conceived children because it also determines whether a child can collect an actual inheritance from a predeceased parent who died intestate; and

whether he can qualify as a pretermitted (forgotten) child after one of his parents died with a will leaving him nothing at all.

The Court was right to leave the Social Security question of parentage to the states, but the burden is now clearly on the states to clarify the rules. Reproductive technology is well-developed enough at this point that states cannot simply ignore it. Instead, the states need to enact legislation that clarifies rules of parentage not only with respect to posthumously conceived children, who are likely to remain a relatively small group, but also with respect to those born via surrogacy or gamete donation, to parents of the same sex in a state that does not allow same-sex marriage, or in other contexts that give rise to parentage questions. Allowing these families to exist—and be created—in legal limbo does a service to no one and could be legally perilous for the families and their offspring later in life.



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