

## NOTE

### The Uncertain Rights of the Unknown Child: Federal Uniformity to Social Security Survivors Benefits for the Posthumously Conceived Child After *Astrue v. Capato*

#### *I. Introduction*

In today's economy, possibly more than ever, the modern family is faced with the worry and need for financial security. That necessity is only intensified when a family starts to expand with the addition of children. In 2010, the United States Department of Agriculture calculated that the total expenditures spent raising a child from birth to age seventeen was \$226,920.<sup>1</sup> This represents a 22% increase from 1960, with children's health care expenses doubling as compared to other costs during the same time period.<sup>2</sup> Given the large costs associated with raising a child, it is understandable that parents and potential parents look to utilize all available means of income.

For some unfortunate families, the economic hardship of raising a child may be exacerbated by the death of one parent. Such a situation often leaves the surviving parent as the sole financial provider for the child. Some surviving parents, however, may find a potential source of income from the federal government through the Social Security Act (the Act).<sup>3</sup> The Act provides financial relief to qualified workers and their family members if they meet certain requirements. While there are many benefits for which a family member may qualify based on his or her relationship to a qualified worker,<sup>4</sup> this note specifically addresses the relationship status of a

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1. MARK LINO, CNPP, U.S. DEP'T OF AGRIC., EXPENDITURES ON CHILDREN BY FAMILIES, 2010, at 20-21 (Miscellaneous Pub. No. 1528-2010, 2011), *available at* <http://www.cnpp.usda.gov/Publications/CRC/crc2010.pdf> (calculating the "total family expenses on a child through age 17 . . . for households . . . in the middle [income group]" and adjusting costs to 2010 dollar values).

2. *Id.* at 23.

3. Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (codified as amended in scattered sections of 42 U.S.C.); *see also* SOC. SEC. ADMIN., SURVIVORS BENEFITS 4 (SSA Pub. No. 05-10084, 2012), *available at* <http://www.ssa.gov/pubs/10084.pdf> ("The loss of the family wage earner can be devastating . . . Social Security helps by providing income for the families of workers who die . . . 98 of every 100 children could get benefits if a working parent dies. And Social Security pays more benefits to children than any other federal program.").

4. *See* 42 U.S.C. §§ 402-416 (2012).

posthumously conceived child to a predeceased worker-parent and the right of such a child to claim social security child's insurance benefits.<sup>5</sup>

The posthumously conceived child's right to child's insurance under the Act has been a contentious issue in recent years. As a result, the circuit courts were continually called upon to answer the question of insurance availability.<sup>6</sup> The answers, however, failed to be consistent. More specifically, the circuit courts split on the child status question, reaching opposite conclusions on who qualified as a "child" under the provisions of the Act.<sup>7</sup>

As a result of the circuit courts' failure to reach consensus, the Supreme Court granted certiorari in *Astrue v. Capato ex rel. B.N.C.* to resolve the issue.<sup>8</sup> The Court, based on the language of the Act and the proper standard of review, correctly held that a posthumously conceived child does not automatically qualify for child's insurance benefits.<sup>9</sup> Instead, his or her "child" status must be determined based on applicable state intestacy statutes.<sup>10</sup> To hold otherwise would have contradicted the purpose and plain reading of the Act. As a result, the posthumously conceived child's right to claim child's insurance benefits under the Act rests solely on that child's ability to claim from his or her predeceased parent's estate through state intestacy law.<sup>11</sup>

Understanding this position to be correct requires knowledge of the history of the issue, which will permit fuller comparison and a more thorough analysis of the ultimate "child" status question. Part II of this note provides that history, discussing the standard used by courts to evaluate an agency's interpretation of a federal statute. The section also reveals the competing views that different jurisdictions took prior to *Capato* when considering the question of status for posthumously conceived and born

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5. See 42 U.S.C. § 402(d).

6. See, e.g., *Beeler v. Astrue*, 651 F.3d 954 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 2689 (2012); *Schafer v. Astrue*, 641 F.3d 49 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 2680 (2012); *Capato ex rel. B.N.C. v. Comm'r of Soc. Sec.*, 631 F.3d 626 (3d Cir. 2011), *rev'd sub nom. Astrue v. Capato ex rel. B.N.C.*, 132 S. Ct. 2021 (2012); *Gillett-Netting v. Barnhart*, 371 F.3d 593 (9th Cir. 2004), *abrogated by Capato*, 132 S. Ct. 2021.

7. Compare *Beeler*, 651 F.3d at 964-66 (holding that a posthumously conceived child is not a qualified child under the Act), and *Schafer*, 641 F.3d at 60-61 (same), with *Capato*, 631 F.3d at 632 (holding that a posthumously conceived child is a qualified child under the Act), and *Gillett-Netting*, 371 F.3d at 596-97 (same).

8. 132 S. Ct. 576 (2011) (granting petition for writ of certiorari).

9. *Capato*, 132 S. Ct. at 2033-34.

10. *Id.* at 2034.

11. *Id.* at 2032-34.

children. This framework sheds light on Part III's analysis of the *Capato* decision itself. Part IV assesses the present state of the law and considers how states like Oklahoma, a state with unclear intestacy laws regarding posthumously conceived children, may fit within the *Capato* paradigm. Given precedent from other jurisdictions, rights of the posthumously conceived child may or may not be protected under extant Oklahoma legislation and case law.

## *II. The Law Before Capato*

### *A. The Social Security Act*

The Act is “[t]he principal law governing the awarding of social security benefits.”<sup>12</sup> It provides individuals with financial support at a time when it is needed most. The Act is more than a welfare program. Rather, “the general purpose . . . of the [applicable] provisions of the statute is to protect workers and their dependents from the risk of loss of income due to the insured’s old age, death, or disability.”<sup>13</sup> The creators of the Act understood that “[a]ll peoples throughout . . . history have faced the uncertainties brought on by unemployment, illness, disability, death and old age.”<sup>14</sup> In an attempt to mitigate the harm such events cause, the Act was signed into law in 1935.<sup>15</sup> Upon signing the Act, President Franklin D. Roosevelt stated:

We can never insure one hundred percent of the population against one hundred percent of the hazards and vicissitudes of life, but we have tried to frame a law which will give some measure of protection to the average citizen and to his family against the loss of a job and against poverty-ridden old age.<sup>16</sup>

The Act is designed to provide workers with future retirement benefits drawn from a joint fund that workers contribute to over the course of their careers.<sup>17</sup> As payback for their work-life contributions, workers and their families are later entitled to the benefits created by the Act.<sup>18</sup> In other words:

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12. 1 SOCIAL SECURITY LAW & PRACTICE § 1:1 (2013).

13. *Id.*

14. *Historical Background and Development of Social Security*, U.S. SOC. SEC. ADMIN., <http://www.ssa.gov/history/briefhistory3.html> (last modified Jan. 10, 2013).

15. *Id.*

16. Presidential Statement upon Signing the Social Security Act, 4 PUB. PAPERS 324 (Aug. 14, 1935).

17. *See* SOCIAL SECURITY LAW & PRACTICE, *supra* note 12, § 1:1.

18. *See id.*

The “right” to social security benefits [by a worker or family member] is in a sense “earned,” for the entire scheme rests on the legislative judgment that those who in their productive years were functioning members of the economy may justly call upon that economy, in their later years, for protection from the rigors of poverty.<sup>19</sup>

The right to benefits is solely statutory.<sup>20</sup> Thus, “the law governing eligibility . . . is found exclusively in: (1) the Act; (2) the regulations promulgated by the SSA [Social Security Administration]; and (3) interpretations of the statute and regulations made by the SSA and federal and state courts.”<sup>21</sup>

Because the Act provides benefits to a worker’s family members, an initial, but not always simple, question must first be answered. Who is considered a family member? In the context of survivors child’s insurance there are primarily three sections that interplay to determine who can qualify for survivors child’s insurance: §§ 402(d), 416(e), and 416(h). Section 402(d) is the guiding regulation on awarding child’s insurance benefits.<sup>22</sup> It provides that “[e]very child (as defined in section 416(e) of [title 42]) . . . of an individual who dies a fully or currently insured individual” is entitled to insurance benefits if that child meets all of the listed requirements.<sup>23</sup> Section 402(d) specifically cross-references § 416(e) as providing the definition of “child.”<sup>24</sup> Consequently, in order to obtain “child” status, the child must meet the definition provided in § 416(e).

Section 416 provides for additional definitions that apply to insurance programs.<sup>25</sup> As such, § 416(e) provides the definition of a “child,” and in doing so lists a number of qualifying means:

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

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19. *Id.*

20. *Id.* § 1:3.

21. *Id.* (footnotes omitted).

22. *See* 42 U.S.C. § 402(d) (2012).

23. 42 U.S.C. § 402(d)(1) (emphasis added) (specifying that requirements include that the “child (A) has filed application for child’s insurance benefits, (B) at the time such application was filed was unmarried and (i) either had not attained the age of 18 or was a full-time elementary or secondary school student and had not attained the age of 19 . . . , and (C) was dependent upon such individual,” among other requirements).

24. *Id.*

25. *See id.* § 416.

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 . . . .<sup>26</sup>

The agency's general regulation regarding criteria to qualify as a "child" under § 416(e) is 20 C.F.R. § 404.354.<sup>27</sup> This section provides that an applicant "may be related to the insured person in one of several ways and be entitled to benefits as his or her child, i.e., as a natural child, legally adopted child, stepchild, grandchild, stepgrandchild, or equitably adopted child."<sup>28</sup>

Beyond the list in § 416(e) of qualifying relations, § 416(h) is an additional definition section.<sup>29</sup> Section 416(h) assists in determining family status:

[T]he Commissioner of Social Security shall apply such [state] 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 . . . or, if such insured individual is dead, by the courts of the State in which he was domiciled at the time of his death . . . . 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.<sup>30</sup>

In addition, § 416(h) indicates that its relevant terms apply to the entire subchapter.<sup>31</sup>

The broad language of the Act, with various chapters, subchapters, and sections, lends itself to several possible interpretations as to who qualifies for "child" status. As a result, courts have been called on for guidance and resolution. The circuits, however, failed to find consensus, primarily reaching two different results. One result was that the Act's language is clear that biologically related, posthumously conceived children meet the

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26. *Id.* § 416(e).

27. *Beeler v. Astrue*, 651 F.3d 954, 958 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 2689 (2012).

28. 20 C.F.R. § 404.354 (2012) (further referencing 20 C.F.R. §§ 404.355-.359 for determining the relationship of an applicant to an insured person).

29. *See* 42 U.S.C. § 416(h).

30. *Id.* § 416(h)(2)(A).

31. *See id.*

initial definition in § 416(e) and therefore qualify for “child” status despite objections from the Social Security Agency.<sup>32</sup> The other result, however, was that the Act’s language is unclear.<sup>33</sup> As such, the Social Security Agency’s interpretation of the Act, which requires application of state intestacy laws to determine “child” status, was entitled to *Chevron* deference and was controlling.<sup>34</sup>

*B. The Chevron Deference Standard of Review*

Interpreting the Act requires courts to review an administrative agency’s implementation of a federal statute. In *Chevron*, the Supreme Court established the standard for courts to use in evaluating how an administrative agency interprets and implements a statute for which it is responsible.<sup>35</sup> The Court held that when a court evaluates an agency’s construction of a statute it must first determine if Congress has directly addressed the issue in question.<sup>36</sup> If so, Congress’s intent controls.<sup>37</sup> On the other hand, if Congress has not directly addressed the issue, the reviewing court’s only question is whether the agency’s interpretation of the statute “is based on a permissible construction.”<sup>38</sup> The Court continued, stating “that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations.”<sup>39</sup> The Court concluded:

When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency’s policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a

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32. See *Capato ex rel. B.N.C. v. Comm’r of Soc. Sec.*, 631 F.3d 626, 631 (3d Cir. 2011), *rev’d sub nom. Astrue v. Capato ex rel. B.N.C.*, 132 S. Ct. 2021 (2012); *Gillett-Netting v. Barnhart*, 371 F.3d 593, 597 (9th Cir. 2004), *abrogated by Capato*, 132 S. Ct. 2021.

33. See *Beeler v. Astrue*, 651 F.3d 954, 959 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 2689 (2012); *Schafer v. Astrue*, 641 F.3d 49, 54, 63 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 2680 (2012).

34. *Beeler*, 651 F.3d at 962; *Schafer*, 641 F.3d at 54, 61.

35. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984).

36. *Id.* at 842.

37. *Id.* at 842-43.

38. *Id.* at 843.

39. *Id.* at 844 (footnote omitted).

duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: “Our Constitution vests such responsibilities in the political branches.”<sup>40</sup>

With this guidance, the courts have set out to determine who qualifies as a “child” under the Act.

### C. The Court Decisions

The unfortunate circumstances that give rise to this status question generally follow similar fact patterns.<sup>41</sup> A husband and wife, who plan to start a family in the future, receive the devastating diagnosis that the husband has cancer.<sup>42</sup> In order to treat his condition, the husband must undergo chemotherapy.<sup>43</sup> After learning that chemotherapy often causes male sterility, the husband arranges to bank his sperm for future use.<sup>44</sup> Ultimately, the husband loses his battle with cancer.<sup>45</sup> Following his death, the wife uses reproductive technology and the husband’s banked sperm to conceive a child.<sup>46</sup> Once the child is born, the wife applies for child’s insurance benefits on behalf of the posthumously conceived child in relation to the predeceased father.<sup>47</sup> The Social Security Agency, in turn, looks to the child’s status under applicable state intestacy laws to determine

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40. *Id.* at 866 (quoting *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 195 (1978)).

41. *See, e.g., Beeler v. Astrue*, 651 F.3d 954 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 2689 (2012); *Schafer v. Astrue*, 641 F.3d 49 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 2680 (2012); *Capato ex rel. B.N.C. v. Comm’r of Soc. Sec.*, 631 F.3d 626 (3d Cir. 2011), *rev’d sub nom. Astrue v. Capato ex rel. B.N.C.*, 132 S. Ct. 2021 (2012); *Gillett-Netting v. Barnhart*, 371 F.3d 593 (9th Cir. 2004), *abrogated by Capato*, 132 S. Ct. 2021.

42. *See, e.g., Beeler*, 651 F.3d at 956; *Schafer*, 641 F.3d at 51; *Capato*, 631 F.3d at 627; *Gillett-Netting*, 371 F.3d at 594.

43. *See, e.g., Beeler*, 651 F.3d at 956; *Schafer*, 641 F.3d at 51; *Capato*, 631 F.3d at 627; *Gillett-Netting*, 371 F.3d at 594.

44. *See, e.g., Beeler*, 651 F.3d at 956; *Schafer*, 641 F.3d at 51; *Capato*, 631 F.3d at 627; *Gillett-Netting*, 371 F.3d at 594.

45. *See, e.g., Beeler*, 651 F.3d at 957; *Capato*, 631 F.3d at 627; *Gillett-Netting*, 371 F.3d at 594. The husband in *Schafer* died due to a heart attack, rather than as a direct result of cancer. *Schafer*, 641 F.3d at 51.

46. *See, e.g., Beeler*, 651 F.3d at 957; *Schafer*, 641 F.3d at 51; *Capato*, 631 F.3d at 628; *Gillett-Netting*, 371 F.3d at 595.

47. *See, e.g., Beeler*, 651 F.3d at 957; *Schafer*, 641 F.3d at 51; *Capato*, 631 F.3d at 628; *Gillett-Netting*, 371 F.3d at 595.

status under the Act.<sup>48</sup> Faced with similar facts and the same question, the federal circuits' treatment of the issue has varied.<sup>49</sup>

*1. The Initial Issue of "Child" Status Brought to State Courts*

As the issue of claiming benefits for a posthumously conceived child first arose, state courts were called upon to add insight and meaning to state intestacy laws.

*a) In re Estate of Kolacy: A Posthumously Conceived Right to Inherit Under New Jersey Law*

When the action, which sought a declaratory judgment that posthumously conceived children could inherit under state intestacy law, was brought before the New Jersey court, there was no court case dealing with the issue.<sup>50</sup> The court's analysis began with a look at basic estate law principles.<sup>51</sup> The court explained that "the identity of people who will take property from a decedent has traditionally been determined as of the date of the decedent's death."<sup>52</sup> That determination, however, has been subject to "exceptions . . . based on human experience."<sup>53</sup> The court recognized that there are times when a man "cause[s] a woman to become pregnant and then die[s] before the . . . child is born."<sup>54</sup> This routine human experience—that sometimes a child is born after the death of the father—has resulted in statutory law that "hold[s] the process of identifying takers from a decedent's estate open long enough" for the posthumously born child to inherit "from and through [the] father."<sup>55</sup> To answer the more complicated issue of whether a child *both* posthumously conceived *and* posthumously

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48. See, e.g., *Beeler*, 651 F.3d at 966 n.4; *Schafer*, 641 F.3d at 51; *Capato*, 631 F.3d at 628.

49. Compare *Beeler*, 651 F.3d at 966 (holding that "child's insurance benefits [are determined] by reference to state intestacy law"), and *Schafer*, 641 F.3d at 63 (holding that determining child's insurance eligibility by reference to state intestacy law was at least a reasonable interpretation entitled to *Chevron* deference), with *Capato*, 631 F.3d at 632 (holding that an undisputed biological relationship can determine "child" status), and *Gillett-Netting*, 371 F.3d at 597 (holding that § 416(h) "do[es] not come into play for the purposes of determining whether a claimant is the 'child' of a deceased wage earner unless parentage is disputed").

50. *In re Estate of Kolacy*, 753 A.2d 1257, 1260 (N.J. Super. Ct. Ch. Div. 2000).

51. See *id.* at 1260-61.

52. *Id.* at 1260.

53. *Id.*

54. *Id.* at 1261.

55. *Id.*



born could inherit through and from a deceased father, the court was required to look at existing state intestacy and parentage laws.<sup>56</sup>

First, the court looked at state intestacy law.<sup>57</sup> The court stressed that the ideal handling of this issue would take place at the legislative level.<sup>58</sup> However, the court recognized that even without a statutory provision directly on point, justice required the court to give present day meaning to existing law.<sup>59</sup> The court determined that the basic legislative intent was to allow a posthumously conceived child to inherit, and that “intent should prevail over a restrictive, literal reading of” the statute.<sup>60</sup>

In addition, the court considered the state’s parentage act.<sup>61</sup> As a whole, most of the parentage act’s provisions did not pertain to the present issue.<sup>62</sup> The court held, however, that the sensible reading of the relevant provisions and the basic human experience brought to light by reproductive technology allowed for these particular children, in this case, to inherit under state intestacy.<sup>63</sup>

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56. *Id.* at 1261-63.

57. *See id.* at 1260.

58. *Id.* at 1261.

59. *Id.* at 1261-62.

60. *Id.* at 1262. The court recognized that “[i]t would undoubtedly be both fair and constitutional for a Legislature” or court to put limits on the amount of time that could pass between a father’s death and the posthumously conceived child’s birth in certain circumstances. *Id.* However, it also recognized that the children’s right to inherit in this case did not present any administrative complications for the decedent’s estate and, therefore, no time limit was required. *Id.*

61. *See id.* at 1262-63.

62. *Id.*

63. *Id.* at 1262-64. The court looked at two relevant provisions in the state’s parentage act. *See id.* at 1262-63. The first provision provided that “[a] man is presumed to be the biological father of a child if: He and the child’s biological mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment or divorce.” *Id.* at 1262 (quoting N.J. STAT. ANN. § 9:17-43a(1) (West 1998)). While a plain reading of this provision would suggest that a child born more than 300 days after a man’s death would not be considered his “child,” the court determined that to find as such would create a presumption against parentage and that “such a . . . presumption of non-parentage would be somewhat strained because it is counterproductive to the purposes of the act.” *Id.* at 1263. The second provision provided, in part, that:

a. If under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. The husband’s consent shall be in writing and signed by him and his wife . . . .

b) *Woodward v. Commissioner of Social Security: A Federal Court Requests a "First Impression" Answer from a State Court*

The first time a federal court was called upon to answer the question of a posthumously conceived child's inheritance rights with respect to the Act was in *Woodward v. Commissioner of Social Security*.<sup>64</sup> To resolve the issue, the District of Massachusetts sent a certified question to the Massachusetts Supreme Judicial Court, asking whether children posthumously conceived using medical technology "enjoy[ed] the [same] inheritance rights of natural children under Massachusetts' law of intestate succession."<sup>65</sup>

The state court began its analysis by turning to the state's intestacy laws.<sup>66</sup> The statute regarding posthumous children provided that they "'shall be considered as living at the death of their parent.'"<sup>67</sup> The court noted, however, that the legislature had left both the modifier "posthumous" undefined and the provision unchanged for 165 years.<sup>68</sup> The court recognized that assisted reproductive technology, which made posthumous conception possible, had been available and widely known for decades, during which time the legislature failed to take any steps to narrow the scope of the state intestacy laws.<sup>69</sup> The court determined that "the Legislature's overriding purpose [was] to promote the welfare of all children," and that while "[p]osthumously conceived children may not come into the world the way the majority of children do[] . . . they are children nonetheless."<sup>70</sup> The court then sought to balance the interests of posthumously conceived children with three important state interests: (1)

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b. Unless the donor of semen and the woman have entered into a written contract to the contrary, the donor of semen provided to a licensed physician for use in the artificial insemination of a woman other than the donor's wife is treated in law as if he were not the father of a child thereby conceived and shall have no rights or duties stemming from the conception of a child.

*Id.* at 1263 (alteration in original) (quoting N.J. STAT. ANN. 9:17-44). The court accepted the mother's statement that the decedent-father expressly authorized the use of his sperm for conception after his death. *Id.* Based on these considerations, the court found that a posthumously conceived child could inherit from the predeceased father under state intestacy law. *Id.* at 1263-64.

64. See 760 N.E.2d 257 (Mass. 2002).

65. *Id.* at 259.

66. See *id.* at 262-70.

67. *Id.* at 264 (quoting MASS. GEN. LAWS ch. 190, § 8 (repealed 2008)).

68. *Id.*

69. *Id.* at 265.

70. *Id.* at 266.

protecting the rights “of children who are alive or conceived before the intestate parent’s death,” (2) “provid[ing] certainty to heirs and creditors,” and (3) “honor[ing] the reproductive choices of individuals.”<sup>71</sup> Ultimately, the court decided that a posthumously conceived child could inherit through intestate succession if there was a biological connection between the child and the deceased parent, and the deceased parent “affirmatively consented to posthumous conception and to the support of any resulting child.”<sup>72</sup> However, time restrictions could ultimately preclude inheritance.<sup>73</sup>

By recognizing the potential right of a posthumously conceived child to inherit through intestate succession, the court laid the foundation for such children to claim benefits under the Act. The actual receipt of benefits, however, has failed to be automatic or uniform.

2. *Gillett-Netting v. Barnhart: A Genetically Related Child Automatically Qualifies for Benefits*

In *Gillett-Netting v. Barnhart*, the Ninth Circuit became the first federal appeals court to address the status of posthumously conceived children under the Act.<sup>74</sup> The court first looked at the language of the Act and found that it “define[d] ‘child’ broadly to include any ‘child or legally adopted child of an individual.’”<sup>75</sup> The court recognized that § 416(h) provided the means for qualifying as a “child” under the Act by determining if that child would inherit from the parent through state intestacy.<sup>76</sup> The court, however, found that § 416(h) only came into play when parentage was in dispute, and that “nothing in the statute suggests that a child must prove parentage under § 416(h) if it is not disputed.”<sup>77</sup> Therefore, the court determined that because biological parentage was not disputed, § 416(h) of the Act was inapplicable, and the posthumously conceived child qualified as a “child” of the father for purposes of the Act.<sup>78</sup> Therefore, the child was entitled to survivors benefits.<sup>79</sup> Because the court found the Act’s language clearly provided for biologically related children to claim benefits, it did not address the issue of applying *Chevron* deference to the SSA’s

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71. *Id.* at 266, 268.

72. *Id.* at 272.

73. *Id.*

74. See 371 F.3d 593 (9th Cir. 2004), *abrogated by* *Astrue v. Capato ex rel. B.N.C.*, 132 S. Ct. 2021 (2012).

75. *Id.* at 596 (quoting 42 U.S.C. § 416(e) (2000)).

76. *Id.* at 597.

77. *Id.*

78. *Id.*

79. *Id.* at 599.

interpretation. The court's analysis provided the federal circuits with an initial framework for future cases. Seven years later, the issue was again raised in federal court with three cases in three different circuits—the Third, Fourth, and Eighth.<sup>80</sup>

*3. The Third Circuit's Treatment of Capato: Agreement That Biological Parentage Qualifies a Child for Benefits*

In *Capato ex rel. B.N.C. v. Commissioner of Social Security*, the Third Circuit followed an analytical mode similar to that used by the Ninth Circuit in *Gillett-Netting*.<sup>81</sup> The court determined that “[t]he plain language of §§ 402(d) and 416(e) provides a threshold basis for defining benefit eligibility.”<sup>82</sup> Section 416(h) was to be used to determine eligibility only where an applicant's relation to a deceased wage earner was in doubt: “Were it the case that such status had to be determined here, we would turn to the relevant provisions of § 416(h).”<sup>83</sup> The court held that because the children in this case were the undisputed biological children of the husband, they automatically qualified as “children” within the meaning of the Act.<sup>84</sup> The Third Circuit's agreement with the Ninth Circuit appeared to solidify the Act's status issue regarding posthumously conceived children. However, other circuits disagreed.

*4. Schafer v. Astrue: Where the Split Began*

The Ninth and Third Circuits found the plain language of the Act to be clear, which required no evaluation of the SSA's interpretation.<sup>85</sup> As the status issue continued to make its way to the federal circuit level, however, other circuits did not find the meaning so clear. As a result, circuits began to apply the *Chevron* deference standard of review.<sup>86</sup> Once the SSA's interpretation of the Act was given deference, the only way to qualify for “child” status was through state intestacy laws as required by § 416(h).<sup>87</sup>

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80. See *Beeler v. Astrue*, 651 F.3d 954 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 2689 (2012); *Schafer v. Astrue*, 641 F.3d 49 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 2680 (2012); *Capato ex rel. B.N.C. v. Comm'r of Soc. Sec.*, 631 F.3d 626 (3d Cir. 2011), *rev'd sub nom. Astrue v. Capato ex rel. B.N.C.*, 132 S. Ct. 2021 (2012).

81. Compare *Capato*, 631 F.3d at 628-32, with *Gillett-Netting*, 371 F.3d at 595-99.

82. *Capato*, 631 F.3d at 631.

83. *Id.*

84. See *id.* at 632.

85. See *Schafer*, 641 F.3d at 55.

86. See *Beeler v. Astrue*, 651 F.3d 954, 959-62 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 2689 (2012); *Schafer*, 641 F.3d at 54-62.

87. See *Beeler*, 651 F.3d at 966; *Schafer*, 641 F.3d at 62-63.

In *Shafer v. Astrue*, the Fourth Circuit took up the question previously considered by the Ninth and Third Circuits.<sup>88</sup> Like the previous circuit decisions, this court centered its focus on whether the posthumously conceived child met the statutory requirements of the Act by looking at the language of the Act itself.<sup>89</sup> The court noted, however, that under the principles established by the Supreme Court in *Chevron*,<sup>90</sup> an agency's interpretation may not be overruled unless it is "arbitrary or capricious in substance, or manifestly contrary to the statute."<sup>91</sup> The court determined that the SSA's interpretation of the Act, which requires a "child" to be eligible to inherit through state intestacy, pursuant to § 416(h), was reasonable and entitled to deference.<sup>92</sup> As a result, the court affirmed the district court's denial of benefits.<sup>93</sup>

5. *Beeler v. Astrue: Agreeing to Apply Chevron Deference to the Act's Interpretation*

Shortly after *Schafer*, the Eighth Circuit faced the same question.<sup>94</sup> The court maintained that the SSA's denial of benefits to a posthumously conceived child, who could not inherit under applicable state intestacy, "was supported by reasonable construction of the governing statutes and regulations."<sup>95</sup> Thus, the court reversed the decision of the lower court and remanded with instructions to enter judgment for the SSA.<sup>96</sup>

The court followed the Fourth Circuit's line of reasoning, focusing first on the interplay of the appropriate provisions of the Act, namely the similarities, references, and differences between §§ 402(d), 416(e), and 416(h).<sup>97</sup> The Eighth Circuit ultimately concluded, however, that this was "a question of statutory interpretation" left to the SSA.<sup>98</sup> The court recognized that "[w]hen Congress has delegated authority to an administrative agency to interpret and implement a federal statute, we give

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88. See 641 F.3d 49.

89. See *id.* at 51-52.

90. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

91. *Schafer*, 641 F.3d at 61 (quoting *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 711 (2011)).

92. *Id.* at 62-63.

93. *Id.* at 63.

94. See *Beeler v. Astrue*, 651 F.3d 954, 959 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 2689 (2012).

95. *Id.* at 966.

96. *Id.*

97. See *id.* at 957-59.

98. *Id.* at 959.

the agency's interpretation deference pursuant to *Chevron*.”<sup>99</sup> Indeed, “the agency's ‘view governs if it is a reasonable interpretation,’” regardless of whether there are other possible interpretations and even if it is not the *most* reasonable.<sup>100</sup> The court determined that the agency's interpretation of the Act represented authoritative construction and was entitled to *Chevron* deference.<sup>101</sup> Thus, in the Eighth Circuit, the agency's interpretation governed.<sup>102</sup>

*III. The Supreme Court Brings Federal Consistency to the Issue in Astrue v. Capato ex rel. B.N.C.*

*A. Facts of the Case*

In May 1999, the Capatos—Robert and Karen—were married.<sup>103</sup> Soon after their wedding, Mr. Capato was diagnosed with esophageal cancer.<sup>104</sup> He was told that the chemotherapy required to treat his cancer might leave him sterile.<sup>105</sup> Because the couple wanted to have children, Mr. Capato placed his semen in a sperm bank for storage prior to beginning his chemotherapy.<sup>106</sup> Despite the fact that Mr. Capato was undergoing intense treatment, Mrs. Capato conceived naturally, giving birth to their son.<sup>107</sup> But the couple still wanted another child.<sup>108</sup>

Unfortunately, Mr. Capato's health continued to deteriorate, and he died in March 2002 in Florida, where he resided with Mrs. Capato.<sup>109</sup> Mr. Capato's will, which was executed in Florida, named his three children as beneficiaries.<sup>110</sup> There were no provisions in the will that provided for any future children; however, the Capatos had previously indicated to their lawyer that they wanted all future children to receive the same benefits as Mr. Capato's then-existing children.<sup>111</sup> After Mr. Capato's death, Mrs.

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99. *Id.* (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

100. *Id.* (quoting *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009)).

101. *Id.* at 962.

102. *See id.* at 961-62.

103. *Astrue v. Capato ex rel. B.N.C.*, 132 S. Ct. 2021, 2026 (2012).

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

Capato underwent in vitro fertilization using her deceased husband's stored sperm.<sup>112</sup> She conceived and ultimately gave birth to twins eighteen months after Mr. Capato's death.<sup>113</sup>

### *B. Procedural History*

Following the birth of her children, Mrs. Capato filed a claim on behalf of the children for survivor child's insurance benefits.<sup>114</sup> The SSA denied her claim, contending that the twins could only qualify for benefits if they could inherit from their deceased father under applicable state intestacy laws.<sup>115</sup> The SSA's decision was affirmed by the federal district court, which found that Mr. Capato had died while domiciled in Florida and, under that state's intestacy law, a posthumously born child could only inherit if he or she was conceived *prior* to the decedent's death.<sup>116</sup>

Mrs. Capato appealed the decision to the Third Circuit Court of Appeals.<sup>117</sup> The circuit court reversed the decision of district court and held that, "[u]nder § 416(e), . . . 'the undisputed biological children of a deceased wage earner . . . ' qualify for survivors benefits without regard to state intestacy law."<sup>118</sup>

### *C. Decision of the Court*

In beginning its analysis, the Court recognized that the circuit courts were divided on the statutory interpretation issue presented by the case.<sup>119</sup> The Court looked first at the Act itself, stating that "Congress amended the Social Security Act in 1939 to provide a monthly benefit for designated surviving family members of a deceased insured wage earner. 'Child's insurance benefits' are among the Act's family-protective measures."<sup>120</sup> The Court then looked to the particular sections of the Act, namely §§ 402(d), 416(e), and 416(h), to determine who qualifies as a "child" under the Act, and how.<sup>121</sup>

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112. *Id.*

113. *Id.*

114. *Id.*

115. *See id.*

116. *Id.*

117. *See id.* at 2027.

118. *Id.* (quoting *Capato ex rel. B.N.C. v. Comm'r of Soc. Sec.*, 631 F.3d 626, 631 (3d Cir. 2011)).

119. *Id.*

120. *Id.* (quoting 42 U.S.C. § 402(d) (2012)).

121. *See id.* at 2027-28.

The Court focused first on § 402(d), which provides that a child meets the definition of “child” if he or she is (1) unmarried, (2) “below [the statute’s] specified age limits (18 or 19) or is under a disability which began prior to age 22”, and (3) “was dependent on the insured at the time of the insured’s death.”<sup>122</sup> The Court turned next to § 416(e) and pointed out that “[t]he word ‘child’ . . . appears twice in § 416(e)’s opening sentence: initially in the prefatory phrase . . . and, immediately thereafter, in subsection (e)(1) (‘child or legally adopted child’).”<sup>123</sup> The Court noted, however, that the word “child” in § 416(e) “is a definition of scant utility without aid from neighboring provisions.”<sup>124</sup> Rather, the useful definition is provided by § 416(h).<sup>125</sup> Turning to those definitional provisions, the Court found that “[u]nder the heading ‘Determination of family status,’ § 416(h)(2)(A) provides: ‘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].’”<sup>126</sup>

The Court then found that the SSA had interpreted these provisions of the Act through notice-and-comment rulemaking.<sup>127</sup> The SSA determined:

[A]n applicant may qualify for insurance benefits as a “natural child” by meeting any of four conditions: (1) the applicant

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122. *Id.* at 2027 (citing 42 U.S.C. § 402(d)(1)).

123. *Id.* (quoting 42 U.S.C. § 416(e)).

124. *Id.* at 2033.

125. *See id.*

126. *Id.* at 2028 (second and third alterations in original) (quoting 42 U.S.C. § 416(h)(2)(A)). The Court also noted that:

An applicant for child benefits who does not meet § 416(h)(2)(A)’s intestacy-law criterion may nonetheless qualify for benefits under one of several other criteria the Act prescribes. First, an applicant who “is a son or daughter” of an insured individual, but is not determined to be a “child” under the intestacy-law provision, nevertheless ranks as a “child” if the insured and the other parent went through a marriage ceremony that would have been valid but for certain legal impediments. § 416(h)(2)(B). Further, an applicant is deemed a “child” if, before death, the insured acknowledged in writing that the applicant is his or her son or daughter, or if the insured had been decreed by a court to be the father or mother of the applicant, or had been ordered to pay child support. § 416(h)(3)(C)(i). In addition, an applicant may gain “child” status upon proof that the insured individual was the applicant’s parent and “was living with or contributing to the support of the applicant” when the insured individual died. § 416(h)(3)(C)(ii).

*Id.*

127. *Id.*



“could inherit the insured’s personal property as his or her natural child under State inheritance laws”; (2) the applicant is “the insured’s natural child and [his or her parents] went through a ceremony which would have resulted in a valid marriage between them except for a legal impediment”; (3) before death, the insured acknowledged in writing his or her parentage of the applicant, was decreed by a court to be the applicant’s parent, or was ordered by a court to contribute to the applicant’s support; or (4) other evidence shows that the insured is the applicant’s “natural father or mother” and was either living with, or contributing to the support of, the applicant.<sup>128</sup>

As such, the SSA interpreted the Act to mean that “42 U.S.C. § 416(h) governs the meaning of ‘child’ in § 416(e)(1). In other words, § 416(h) is a gateway through which all applicants for insurance benefits as a ‘child’ must pass.”<sup>129</sup> In finding such, the SSA believed § 416(h)(2)(A) to provide the definitional cue for its application of § 416(e) by providing “in [its] opening instruction: ‘In determining whether an applicant is the child . . . of [an] insured individual *for purposes of this subchapter*,’ the Commissioner shall apply state intestacy law.”<sup>130</sup> The subchapter that § 416(h) applies “is Subchapter II of the Act, which spans §§ 401 through 434.”<sup>131</sup> The Court concluded that Congress, “[h]aving explicitly complemented § 416(e) by the definitional provisions contained in § 416(h) . . . had no need to place a redundant cross-reference in § 416(e).”<sup>132</sup>

Following the recitation of the SSA’s interpretation of the Act, the Court had to determine what, if any, credence it should give to the interpretation. The Court held that “*Chevron* 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.’”<sup>133</sup> The Court determined that “the SSA’s longstanding interpretation is set forth in [published] regulations,”<sup>134</sup> that the regulations are consistent with authority given to the Commissioner by Congress, and that the “regulations are neither

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128. *Id.* at 2028-29 (second alteration in original) (quoting 20 C.F.R. § 404.355(a)).

129. *Id.* at 2029.

130. *Id.* at 2030-31 (second and third alterations in original) (quoting 42 U.S.C. § 416(h)(2)(A)).

131. *Id.* at 2031.

132. *Id.*

133. *Id.* at 2033-34 (quoting *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001)).

134. *Id.* at 2034.

‘arbitrary or capricious in substance, [n]or manifestly contrary to statute.’”<sup>135</sup> As a result, the Court applied *Chevron* deference and held that “the law Congress enacted calls for resolution of [this case] . . . by reference to state intestacy law.”<sup>136</sup> The Third Circuit’s previous ruling was, consequently, reversed.<sup>137</sup>

#### IV. Analysis

The Court’s decision finally brings consistency to the courts regarding posthumously conceived children and their right to claim survivor’s benefits under the Act.

##### A. The Court’s Decision

In *Capato*, the Court brought an end to the circuit split that had resulted from the Third, Fourth, Eighth, and Ninth Circuits’ holdings. The Third and Ninth Circuits had previously focused primarily on the biological relationship between the predeceased father and the child.<sup>138</sup> Those circuits determined that when the genetic relation of the child to the deceased parent was not disputed, the child automatically qualified as a “child” under § 416(e).<sup>139</sup>

The reasoning used by the Third and Ninth Circuits was rejected by the Supreme Court, which followed the same method of analysis as the Fourth and Eighth Circuits.<sup>140</sup> The Court determined that the SSA’s interpretation of the Act satisfied the *Chevron* deference standard.<sup>141</sup> Under *Chevron* deference, an administrative agency’s view regarding a statute “governs if it is a reasonable interpretation of the statute—not necessarily the only possible interpretation, nor even the interpretation deemed *most*

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135. *Id.* (alteration in original) (quoting *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 711 (2011)).

136. *Id.*

137. *Id.*

138. See *Capato ex rel. B.N.C. v. Comm’r of Soc. Sec.*, 631 F.3d 626, 631-32 (3d Cir. 2011), *rev’d sub nom. Astrue v. Capato ex rel. B.N.C.*, 132 S. Ct. 2021; *Gillett-Netting v. Barnhart*, 371 F.3d 593, 596-98 (9th Cir. 2004), *abrogated by Capato*, 132 S. Ct. 2021.

139. See *Capato*, 631 F.3d at 632 (holding that biological relationship determines “child” status); *Gillett-Netting*, 371 F.3d at 596 (recognizing that the courts and the SSA have interpreted “child” to include “the natural, or biological, child of the insured”).

140. Compare *Capato*, 132 S. Ct. at 2033-34, with *Beeler v. Astrue*, 651 F.3d 954, 960-66 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 2689 (2012), and *Schafer v. Astrue*, 641 F.3d 49, 54-62 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 2680 (2012).

141. *Capato*, 132 S. Ct. at 2033-34.

reasonable.”<sup>142</sup> The courts determined that the SSA’s interpretation of the Act, while not the only possible interpretation, was reasonable and entitled to deference.<sup>143</sup>

As such, the Supreme Court properly determined that the interpretation of the Act, and the one provided by the SSA, required application of all sections, namely §§ 402(d), 416(e), and 416(h).<sup>144</sup> The SSA’s interpretation holds that the only way to qualify as a “child” is to meet the criteria established in § 416(h).<sup>145</sup> While § 416(e) allows for a “natural child” to qualify for benefits, the SSA contends that the only way to qualify as a “natural child” under § 416(e) is to meet one of the criteria set out in § 416(h) (that is, to qualify as a “natural child,” a child must be able to inherit through state intestacy laws).<sup>146</sup> This reasoning is based on the stated application of § 416(h), which provides “that the Commissioner ‘shall’ use state intestacy law in determining whether an applicant is the ‘child’ of an insured individual ‘for purposes of this subchapter.’”<sup>147</sup> Sections 416(e) and 416(h) are part of the same subchapter.<sup>148</sup> Therefore, all sections of the subchapter must meet the criteria of § 416(h), including § 416(e).

The SSA’s interpretation also correlates with the legislative history of the Act and the evolution of applicable sections. As the Court recognized, Congress established child’s insurance benefits under the Act in 1939.<sup>149</sup> Under its original language, “§ 209(m)—the forerunner of the current 42 U.S.C. § 416(h)—provid[ed] that ‘[i]n determining whether an applicant is the wife, widow, [or] child . . . the [Social Security] Board shall apply such law as would be applied in determining the devolution of intestate personal property.’”<sup>150</sup> In 1965, when Congress codified the current language, “the

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142. *Beeler*, 651 F.3d at 959 (quoting *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009)); *see also Capato*, 132 S. Ct. at 2033-34 (reiterating that *Chevron* deference is appropriate when an administrative agency’s interpretation is neither arbitrary nor capricious in substance).

143. *See Capato*, 132 S. Ct. at 2026, 2033-34; *Beeler*, 651 F.3d at 956, 959; *Schafer*, 641 F.3d at 51.

144. *Capato*, 132 S. Ct. at 2027-28, 2030-31.

145. *See id.* at 2026; *Beeler*, 651 F.3d at 960.

146. *Beeler*, 651 F.3d at 962, 964.

147. *Id.* at 963 (quoting 42 U.S.C. § 416(h)(2)(A) (2006)).

148. *Capato*, 132 S. Ct. at 2031 (noting that the applicable subchapter includes 42 U.S.C. §§ 401-34).

149. *Id.* at 2027.

150. *Beeler*, 651 F.3d at 964 (second and fifth alterations in original) (quoting Social Security Act Amendments of 1939, ch. 666, § 209(m), 53 Stat. 1360, 1378 (1939) (current version at 42 U.S.C. § 416(h))).

relevant committee report explained that . . . “[u]nder present law, whether a child meets the definition of a child . . . depends on the laws applied in determining the devolution of interstate [sic] personal property.”<sup>151</sup> The committee found the existing law’s effects on illegitimate children too harsh because most illegitimate children were unable to qualify for intestate inheritance.<sup>152</sup> In an effort to remedy such a result, the language now found in § 416(h)(3) was added.<sup>153</sup> These additional protections, however, do not mean that “§ 416(h) applie[s] only to illegitimate children or to children whose parentage is disputed.”<sup>154</sup> On the contrary, “[t]he preexisting statutory framework already established that a natural child must show an ability to inherit under state law in order to receive . . . benefits under the Act.”<sup>155</sup>

By giving the SSA’s interpretation *Chevron* deference, the Court properly disposed of the issue. Under the *Chevron* deference standard, an agency’s interpretation of a statute is controlling if it is reasonable and neither arbitrary nor capricious to the statute.<sup>156</sup> Therefore, the SSA’s interpretation does not have to be the only interpretation, the most logical interpretation, or the “best” interpretation; it only has to be a reasonable interpretation.<sup>157</sup>

Based on the language of the Act and the legislative history, the SSA’s interpretation is reasonable. It is reasonable to read the sections of the Act that determine the status of a “child” as an inclusive group, rather than an exclusive independent group. Additionally, § 416(h) explicitly states that it relates to all parts of its subchapter.<sup>158</sup> Sections 416(e) and 416(h) are both parts of subchapter II.<sup>159</sup> Therefore, it is reasonable to apply the definitions established by § 416(h) to the “child” status created by § 416(e). The reasonableness of the SSA’s interpretation is further supported by the legislative history of the Act. When Congress first established child’s insurance benefits, it determined a “natural child’s” status by looking at the

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151. *Id.* (quoting S. REP. NO. 89-404, at 109 (1965), reprinted in 1965 U.S.C.C.A.N. 1943, 1958).

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Astrue v. Capato ex rel. B.N.C.*, 132 S. Ct. 2021, 2034 (2012).

157. *See Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 & n.11 (1984)).

158. *See* 42 U.S.C. § 416(h) (2012).

159. *See id.* § 416(e), (h).

right of the child to inherit through state intestacy statutes.<sup>160</sup> When Congress later amended the Act, the objective was not to change how a “natural child” was determined, but instead to provide additional ways for “illegitimate children,” who were largely excluded from state intestacy schemes, to gain “child” status for purposes of the Act.<sup>161</sup>

With the Court’s decision, the split that plagued the courts is settled. The rights under the Act of the unknown, posthumously conceived child, however, are still uncertain. The battlefield has shifted to state courts and the interpretation of state intestacy statutes.

*B. The Status of a Posthumously Conceived Child in Oklahoma*

Currently, the status question of a posthumously conceived child and his or her right to claim child’s insurance under the Act has not been raised in Oklahoma. As such, there are two possible outcomes a court could reach if, or more likely when, the issue reaches an Oklahoma state court. Oklahoma courts could determine either: (1) that current state intestacy laws allow for a posthumously conceived child to inherit from a predeceased parent, or (2) that they do not so allow.

Oklahoma intestacy law is unclear regarding the inheritance rights of a posthumously conceived child. The laws that govern descent and distribution do not address the posthumously born child, let alone a child that is posthumously conceived and then born.<sup>162</sup> Because posthumously conceived children are not specifically mentioned in the statute and Oklahoma case law is silent on the issue, the Oklahoma courts could look to see what other jurisdictions with similar statutes have done. By doing so, the courts may find a solution in the *Woodward* decision.<sup>163</sup> While Oklahoma’s descent and distribution laws do not address a posthumously born child, Oklahoma law regarding representation and posthumous children states that “[p]osthumous children are considered as living at the death of their parents.”<sup>164</sup> This is essentially the same language included in the Massachusetts representation statute that the Massachusetts Supreme Judicial Court referenced when determining that posthumously conceived

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160. *See Beeler*, 651 F.3d at 963-64.

161. *See id.* at 964.

162. *See* 84 OKLA. STAT. § 213(B) (2011).

163. *See Woodward v. Comm’r of Soc. Sec.*, 760 N.E.2d 257 (Mass. 2002).

164. 84 OKLA. STAT. § 228.

children could have intestate inheritance rights.<sup>165</sup> The Oklahoma statute, however, was enacted before the current realities of reproductive technology were known.<sup>166</sup> As a result, the courts may look at more recent Oklahoma legislation to determine the intent of the legislature with regard to inheritance rights and the posthumously conceived child.

Recent Oklahoma legislation suggests that the legislature may have intended to provide rights to posthumously conceived children. Oklahoma recently adopted aspects of the Uniform Parentage Act (UPA).<sup>167</sup> The UPA allows for a “mother of a child and a man claiming to be the genetic father of the child [to] sign an acknowledgement of paternity with intent to establish the man’s paternity.”<sup>168</sup> The father’s signed acknowledgment can establish the paternal relationship,<sup>169</sup> however, the unanswered question becomes whether such a signed acknowledgment can be made preconception and still establish paternity to a posthumously conceived child. Regarding posthumously born children, the Oklahoma legislature adopted the provision of the UPA that provides “[a] man is presumed to be the father of a child if . . . [h]e and the mother of the child were married to each other and the child is born within three hundred (300) days after the marriage is terminated by death.”<sup>170</sup> This provision recognizes the rights of a child conceived and posthumously born, but does not provide guidance regarding the posthumously conceived child.<sup>171</sup> While it does not discuss a posthumously conceived child, a similar provision was not found to bar such a child’s right to intestate inheritance by a New Jersey state court.<sup>172</sup>

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165. *Woodward*, 760 N.E.2d at 264 (“That section provides that ‘[p]osthumous children shall be considered as living at the death of their parent.’” (alteration in original) (quoting MASS. GEN. LAWS ch. 190, § 8 (repealed 2008))).

166. The language of the pertinent provision—title 84, section 228 of the Oklahoma Statutes—can be traced back to at least the 1890 laws of the Territory of Oklahoma. *See* 88 TERR. OKLA. STAT. § 18 (1890) (“Posthumous children are considered as living at the death of their parents.”).

167. *See* 10 OKLA. STAT. § 7700-101 to -902 (2011).

168. *Id.* § 7700-301.

169. *See id.* § 7700-301 to -302, -304 to -305.

170. *Id.* § 7700-204(A).

171. *See id.*

172. *See In re Estate of Kolacy*, 753 A.2d 1257, 1262 (N.J. Super. Ct. Ch. Div. 2000) (“One provision of the Parentage Act which is facially somewhat relevant to our case is N.J.S.A. 9:17-43a(1) which reads: ‘A man is presumed to be the biological father of a child if: He and the child’s biological mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment or divorce.’” (quoting N.J. STAT. ANN. § 9:17-43(a) (West 2000))).

On the other hand, the parts of the UPA that the Oklahoma legislature did not adopt may prove more telling to the legislature's actual intent. The Oklahoma legislature left out the entire article on "Child of Assisted Reproduction."<sup>173</sup> Specifically, the legislature did not adopt the provision of the act that states:

If an individual who consented in a record to be a parent by assisted reproduction dies before placement of eggs, sperm, or embryos, the deceased individual is not a parent of the resulting child unless the deceased spouse [sic] consented in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child.<sup>174</sup>

Adoption of this section would have provided a clear legal avenue for establishing posthumously conceived parentage. The failure of the Oklahoma legislature to adopt this provision suggests that it did not intend to give posthumously conceived children intestacy inheritance rights.

As such, if a posthumously conceived child, whose father was domiciled in Oklahoma at his time of death, applied for survivor benefits under the Act, the child's ability to claim such benefits is still uncertain. The determination would be the result of best-effort judicial interpretation of presumed legislative intent.

#### *V. Conclusion*

The Social Security Act was adopted to provide families with some economic protection against the hardships caused by old age, unemployment, and death. One protection provided is insurance benefits for survivors of deceased workers. Survivor insurance is available to the child of a deceased worker if the child meets the requirements set out by the Act. Sections 402(d), 416(e), and 416(h) all play a role in determining "child" status. All of these sections interrelate by reference or cross-reference. Therefore, it is reasonable to apply all three sections when determining if a "child" fulfills the status requirements. As a result, the SSA's interpretation was reasonable, and the Supreme Court correctly applied *Chevron* deference in *Capato*. The rights at the federal level are finally clear; the uncertainty that still exists, however, is the posthumously conceived child's

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173. See UNIF. PARENTAGE ACT (2000) §§ 701-707 (amended 2002), 9B U.L.A. 354-59 (2001 & Supp. 2013).

174. *Id.* § 707, 9B U.L.A. at 358.

status under various states intestacy laws. That is an issue that each state must determine itself.

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