Casenote

A New Era of Dead-Beat Dads: Determining Social Security Survivor Benefits for Children Who Are Posthumously Conceived*

In *Gillett-Netting v. Barnhart*,[1] the United States Court of Appeals for the Ninth Circuit held that posthumously conceived children born to a married couple were dependent under the Social Security Act[2] ("Act") and entitled to child's survivor benefits.[3] The posthumously conceived children in *Gillett-Netting* were born as a result of an *in vitro* fertilization process conducted after the husband's death.[4] After the birth of her twins, the mother filed for benefits under the Act based on her late

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1. 371 F.3d 593 (9th Cir. 2004).
2. 42 U.S.C. § 301 (2000).
3. 42 U.S.C § 401 (2000).
4. *Gillett-Netting,* 371 F.3d at 594.

husband's The court ruled that because the twins were their father's legitimate children under Arizona law, they were to be considered his dependents under the Act and were entitled to child's insurance The case was one of first impression because neither federal law nor Arizona law dealt with legal issues created by posthumous conception, which is now possible through developing reproductive

I. FACTUAL BACKGROUND

Rhonda Gillett-Netting and Robert Netting were a married couple who had experienced infertility problems while trying to conceive a child.' Several months after their marriage, Gillett Netting and Netting began trying to conceive a child. Gillett-Netting's medical condition created fertility problems and caused her to suffer two miscarriages As a result Gillett-Netting began fertility treatments.'

In December of 1994, Netting was diagnosed with multiple myeloma cancer. The couple decided to continue with their reproductive efforts. Netting's physician recommended that he undergo chemotherapy treatment for the cancer. Because the chemotherapy treatments would have rendered him sterile, Netting delayed treatment so he could deposit his semen at the medical lab, where it was frozen and stored for later use in Gillett-Netting's fertility treatments. Netting was aware that his stored sperm could be used to impregnate his wife even after his death."

Throughout Netting's illness, Gillett-Netting continued with her fertility treatments. She maintained that Netting told her that he wanted her to try to conceive a child even if he died. On February 4, 1995, Netting passed away. After Netting's death, Gillett-Netting attempted the artificial insemination procedure several times without After these failed attempts, Gillett-Netting's doctor advised

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5. *Id.* at 595.
6. Id. at 593.
7. Id. at at 595-96.
8. Gillett-Netting v. Barnhart, 231 F. Supp.2d 961, 963 (D. Ariz. 2002). The couple was married in 1993. Id. at 963. Robert Netting was a professor of anthropology at the University of Arizona. Walter Sullivan, Robert Netting, 60, Who Showed Societies' Links to Enuironment, N.Y. TIMES, Feb. 9, 1995, at B10. Rhonda Gillett-Netting is also an anthropology professor at the University of Arizona. Mitra Taj, Prof Wins Benefits for Children Conceived After Spouse's Death, ARIZONA DAILY WILDCAT, June 23, 2004, at

9. Gillett-Netting, 231 F. Supp.2d at 963.
10. Id. at 963; Gillett-Netting, 371 F.3d at 594.
11. Gillett-Netting, 231 F. Supp.2d at 963.

her to try in *vitro* fertilization using Netting's frozen The in *vitro* fertilization of Gillett-Netting's eggs with Netting's sperm was successfully performed in December of 1995. The resulting embryos were transferred to Gillett-Netting and a positive pregnancy test was noted a couple of weeks later. In August of 1996, over a year after Netting's death, Gillett-Netting gave birth to twins, naming them Juliet and

Following his death, Netting's estate was distributed and Gillett-Netting filed an application for child's insurance benefits for Juliet and Piers based on Netting's past Gillett-Netting's claim for insurance benefits for Juliet and Piers was made pursuant to 402(d) of the Act. The Social Security Administration ("SSA") denied the Subsequently, Gillett-Netting filed a request for a hearing before an Administrative Law Judge ("ALJ"), who also denied her claim. The ALJ held that Juliet and Piers were not entitled to benefits because they were not dependent on Netting at the time of his death. According to the ALJ, children conceived after the wage earner's death cannot be deemed dependent on the wage earner. Gillett-Netting's request for review with the Social Security Appeals Council was

Thereafter, Gillett-Netting filed a complaint in the United States District Court for the District of Arizona, alleging that the ALJ's decision denying Juliet and Piers the insurance benefits was "not supported by substantial evidence, was not in accordance with the law, and denied them equal protection of the The district court granted summary judgment for the Commissioner, stating that "Juliet and Piers do not qualify for child's insurance benefits because they are not Netting's 'children' under the Act and they were not dependent on Netting at the time of his death[,]" and "that Juliet's and Piers's right to equal protection of the laws was not violated by applying the Act to

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12. Id. BLACK'S LAW DICTIONARY defines "in vitro fertilization" as "[a] procedure by which an egg is fertilized outside a woman's body and then inserted into the womb for gestation." BLACK'S DICTIONARY 846 (8th ed. 2004). This should be distinguished from "artificial insemination," which is defined as "[a] process for achieving conception, whereby semen is inserted into a woman's vagina by some means other than intercourse." Id. at 121. See generally 5 TREATISE ON HEALTH CARE LAW 22.06[1], [2] (Alexander M. Capron & Irwin M. Birnbaum eds., 2004); RALPH C. BRASHIER, INHERITANCE LAW AND THE EVOLVING FAMILY (Temple University Press 2004) [hereinafter BRASHIER, INHERITANCE LAW].

13. Gillett-Netting, 231 F. Supp. 2d at 963; Gillett-Netting, 371 F.3d at 595.

14. Gillett-Netting, 231 F. Supp. 2d at 964.

15. Gillett-Netting, 371 F.3d at 595.

16. Id.

17. Id.

deny them child's insurance benefits."" Gillett-Netting then appealed the decision to the United States Court of Appeals for the Ninth Circuit.

II. LEGAL BACKGROUND

A. Modern Assisted Reproduction

In recent years scientists have made significant advancements in medical technologies to assist with reproduction. The first child conceived by artificial insemination was in 1978, and a child conceived by in vitro fertilization shortly followed." Current technology allows for the reproduction of a child using only one partner's genetic material. Technological advances also allow for reproduction of a child using a decedent's genetic materials.[21] According to one estimate, about 60,000 births occurred each year in the United States as a result of artificial insemination." Scientists speculate that the next step in reproductive technology of humans will be through The parents of children conceived by any of these means of artificial reproductive technology may be single or married, and the process may take place before or after the death of either one or both parents.

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18. Id. Gillett-Netting also argued that the ALJ's decision denying Juliet and Piers child's benefits denied their equal protection rights under the Fifth Amendment by (1) creating an "impenetrable barrier" to child's benefits based on the circumstances of the children's births, and (2) "relying on a classification that does not bear a substantial relationship to an important governmental objective." Gillett-Netting, 231 F. Supp. 2d at 969. The equal protection challenge was based on the Commissioner's incorporation of Arizona intestacy laws to determine eligibility for survivor's benefits, which Gillett-Netting argued had the affect of treating biological children differently than other children due to the circumstances of their birth. Id. at 969.

The district court rejected Gillett-Netting's equal protection challenge. Id. at 969-70. According to the trial court, the alleged discrimination was more appropriately characterized as one between biological children in existence at the time of the decedent's death and those not in existence. Id. at 970. The district court held that this classification did not involve a fundamental right or a suspect or quasi-suspect class. Id. Thus, relying on Romer v. Evans, 517 U.S. 620 (1996), and *Mathews* u. *Lucas*, 427 U.S. 495, 507 (1976), the district court found that SSA's conditioning entitlement to benefits upon dependency at the time of death and applying a state's intestacy laws to determine dependency is "entirely rational." *Id.* (citations omitted).

19. Gillett-Netting, 371 F.3d at 595.

20. BRASHIER, INHERITANCE LAW, supra note 12, at 168.

21. *Id.*

22. Id.

23. Id. In 1996 scientists successfully cloned Dolly the sheep. Id.

B. The Social Security Act

Amidst the Great Depression and the Industrial Revolution, the Act was signed into law by President Franklin D. Roosevelt on August 14, 1935. The Act contained several provisions for general welfare and created a social insurance program designed to pay retired workers a continuing income after retirement. The original Act provided only retirement benefits to the workers. In 1939 the Act was amended in a significant way by adding survivor benefits paid to the family of a covered worker in the event of his premature The modern purpose of the Act is to provide support for dependents of disabled or deceased The Act is remedial; therefore, it is to be liberally construed to effectuate its

C. Eligibility for Child's Benefits Under the Social Security Act

A child of an otherwise eligible insured worker may qualify for child's benefits on the earnings record of an insured worker if the applicant proves his status as a "child" of the worker and meets certain other Notably, the child must be or have been dependent upon the insured parent." The applicant's status as "child" of the insured is based on the child's relationship to the insured including: the insured's natural child, child with intestacy rights, illegitimate child, adopted child, stepchild, grandchild, or Generally, a legitimate child is presumed to be dependent upon his natural A child is automatically deemed dependent upon his natural father or adopting father or his natural mother or adopting mother

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24. Brief History of Social Security 20, 23-24, available at briefhistory3.html.

25. See, *e.g.*, Jimenez v. Weinberger, 417 U.S. 628, 634 (1974) (Rehnquist, J., dissenting); Smith v. Heckler, 820 F.2d 1093, 1095 (9th Cir. 1987); Doran v. Schweiker, 681 F.2d 605, 607 (9th Cir. 1982).

26. Gillett-Netting v. Barnhart, 371 F.3d 593, 598 (9th Cir. 2004). See also Smith, 820 F.2d at 1095-97 (holding that the insured's child was eligible for survivor benefits by satisfying the Act's support test for determining dependency under 42 U.S.C. § (C)(ii) even though the support was provided to the mother in very early stages of her pregnancy without knowledge of the pregnancy because this was consistent with the purposes of the Act); Doran, 681 F.2d at 607-09 (helping unwed mother in first trimester of pregnancy move to cabin and repairing cabin roof constituted sufficient contributions to satisfy the support requirements for an unborn child under 42 U.S.C. § considering father's economic circumstances).

27. 42 U.S.C § 402 (2000); 20 C.F.R. 404.350– 368 (2004).

28. 42 U.S.C. § 402(d)(1).

29. See 42 U.S.C 416(e) (2000); 20 CFR 404.354– 365.

30. 42 U.S.C. § 416(e)(1); 42 U.S.C. 20 C.F.R. 404.361(a).

unless at the time of the insured's death or disability onset, the insured was not living with or contributing to the support of such child and (1) the "child is neither the legitimate nor adopted child of such individu- or (2) "the child had been adopted by some other

The status of legitimacy is determined by state law based on a determination of whether the child could inherit the insured's personal property as the insured's natural child under state inheritance Legitimate children born after the wage-earning parent's death or disability onset are entitled to benefits regardless of whether they lived with or were supported by the parent at the time of his death or disability Under a child of an insured deceased individual is entitled to child's insurance benefits if the child was dependent upon the insured at the time of the insured's

In the situation of children born or after the death of the father, the child may still be eligible for benefits under the Act if they were dependent upon the father at the time of the father's The Program Operations Manual System ("POMS"), the internal operating instructions used by SSA field employees when processing claims for Social Security benefits, sets out a policy for children conceived after the insured's The claim processors are instructed that "[a] child conceived by artificial means after the [insured's] death. . . can only be entitled [for benefits] if he or she has inheritance rights under applicable State intestacy SSA claim processors are further instructed to submit all cases to the Regional Chief Counsel for an opinion determining the child's Based on the Act, however, the dependency of posthumously conceived children is determined in the same manner as for other children. First, if the

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31. 42 U.S.C.
32. Id. §
33. Id. 20 C.F.R. 404.355.
34. 42 U.S.C. 402(d)(1), (3); Jimenez, 417 U.S. at 634-35.
35. Id. 402(d)(1)(C)(ii).
36. Id. See generally Catherine R. Lazuran, Posthumous Illegitimate Child's "Child Entitled to Survivor's Benefits Under § 216 of the Social Security Act (42 U.S.C.A. 416), 36 A.L.R. Fed. 166 (1994); KATHLEEN SHANNON GLANCY, SOCIAL SECURITY PRACTICE GUIDE 3.06 (Lori Wood ed., 2004).
37. 42 U.S.C. 402(d)(1)(C)(ii). See generally Lazuran, supra note 36; supra note 36.
38. SSA's Program Operations Manual System, "About P O M S at http://policy.ssa.gov/ SSA's Program Operations Manual System, GN 00306.001 "Determining Status as Child" at [hereinafter Determining Status as Child].
39. Determining Status as Child, supra note 38.
40. Id.

child is "legitimate" under state intestacy laws, then the child will be presumed dependent on his natural parents and consequently eligible for survivor Whether a posthumous child is legitimate is determined by reference to the state law where the decedent is domiciled at the time of his

However, if the child is not deemed legitimate under state law, the illegitimate child may still be considered dependent if the child meets the other qualifying provisions in the Act. Under §§ and the child of an applicant whose parents went through a marriage ceremony resulting in a purported marriage between them that, but for a legal defect not known to the parents at the time of such ceremony, would have been a valid marriage is entitled to Also, under § an illegitimate child is deemed to be the child of the insured individual under the Act if the insured individual (1) acknowledged the child in writing, (2) obtained a court decree stating the insured is a parent of the child, or (3) obtained a court decree stating that the insured has been ordered by a court to contribute to the child's support because the child is the insured individual's son or Alternatively, under § an illegitimate child may prove dependency if the child can show that the insured individual "was living with or contributing to the support of the applicant at the time such insured individual If an illegitimate child is unable to meet any of these deemed dependency exceptions, the child is barred from receiving benefits under the

D. Constitutionality of Classifications Based on Legitimacy Under the Social Security Act

The classification of illegitimate children for purposes of receiving survivor's benefits under the Act has been upheld as In Mathews *v.* the United States Supreme Court held that

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41. 42 U.S.C §

42. Id. If the individual is not domiciled in any state at the time of his death, then the intestacy laws of the District of Columbia apply. Id.

43. 42 U.S.C.

44. Id.

45. Id.

46. See *Jimenez*, 417 U.S. at 631 n.2.

47. Id. at 637-38. Mathews v. Lucas, 427 U.S. 495 (1976). See generally Timothy G. Barrett, Note, Is Discrimination Against Illegitimate Children Worthy of Stricter Scrutiny Under the Constitution? — The Relationship Between State Intestate Succession Statutes and the Social Security Act In Claims for Child Benefits for Illegitimate Children, 33 U. LOUISVILLE J. FAM. L. 79 (1995).

48. 427 U.S. 495 (1976).

strict judicial scrutiny of the Act's classifications of illegitimate children is not In *Mathews* a wage earner's two illegitimate children were denied survivorship benefits under the Act because they were unable to prove actual dependency. The children were born out of wedlock to the wage earner. The decedent father's paternity of the applicants was not contested. The decedent father, however, did not live in the same household with the applicants at the time of his death, and there was no evidence that he contributed to their support. Consequently, the applicants were unable to prove actual dependency under the Act. The applicants appealed the denial of benefits as a violation of the equal protection provisions under the Fifth

The Supreme Court rejected the children's Fifth Amendment challenge to the classification of illegitimate children under the The Court held that the Act's discrimination of individuals based on their legitimacy by only requiring illegitimate children to prove actual dependency on the parent in order to be eligible for survivor benefits was not deserving of strict The Court reasoned that the classification of illegitimate children under the Act was not deserving of extra constitutional protection given to suspect Rather, strict judicial scrutiny would apply to suspect classes, defined as a group "'saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political Furthermore, the classifications of illegitimates for determining dependency under the Act served an administrative convenience because the dependency presumptions for legitimate children enabled Congress to avoid the burden and expense of case-by-case determinations of

E. Cases Involving the Status of Posthumously Conceived Children

Few cases address benefits under the Act for posthumously conceived However, there are statutes and cases addressing posthu-

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49. Id. at 504-08.
50. Id. at 497-503.
51. Id. at 504-11.
52. Id. at 504, 506.
53. Id. at 506.
54. Id. at 506 n.13 (quoting San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)).
55. Id. at 509. See Weinberger v. Salfi, 422 U.S. 749, 772 (1975).
56. In *Gillett-Netting* the court noted the scarcity of federal and state laws addressing the issues raised by developing reproductive technology: "Neither the Social Security Act nor the Arizona family law that is relevant to determining whether Juliet and Piers have a right to child's insurance benefits makes clear the rights of children conceived

mous children conceived before the insured's death. For instance, in Smith u. the Ninth Circuit Court of Appeals held that an illegitimate posthumous child conceived before the decedent's death was entitled to benefits under the Act based on 42 U.S.C.

In Smith the decedent father was the paramour of the child's mother. During their relationship the decedent lived with the child's mother and provided financial support for the mother's household expenses. The mother confirmed her pregnancy a day after the decedent's The court held that the child was an eligible dependent because the insured was the father of plaintiff and was contributing to the support of the child at the time of Under the support test of § 416(h)-(3)(C)(ii), "a child who does not fit into the statutory 'deemed dependency' presumptions can establish dependency by showing that the insured deceased parent is (1) the father of the claimant and (2) was living with or contributing to the support of the child at the time of Reasoning that the Act is to be construed liberally and its purpose is to provide support for dependents of deceased workers, the court concluded the support requirements were met even though the financial support given to the mother was not made with scienter of the fact that she was pregnant with his The court of appeals held that intent by the decedent to provide for the unborn child was not required because it was inconsistent with the purpose of the Act, especially so early in the

The Massachusetts Supreme Judicial Court dealt with similar issues in Woodward u. Commissioner of Social In Woodward a married couple was informed that the husband had leukemia and that the necessary medical treatment would make him sterile. The husband had his sperm medically withdrawn and preserved for the purpose of their use to artificially inseminate his wife. Two years after the husband's death, the wife gave birth to twins as a result of the artificial

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posthumously." 371 F.3d at 595-96. The court also observed that no circuit court had previously dealt with the issue presented in Get ·Natg of survivor benefits for posthumously conceived children. Id. at 596 n.3.

57. 820 F.2d 1093 (1987).

58. Id. at 1095.

59. Id. at 1094.

60. Id. at 1096-97.

61. Id. at 1095.

62. Id. at 1095-97.

63. *Id.*

64. 760 N.E.2d 257 (Mass. 2002). This case was noted in Get ·Natg as a "well-reasoned opinion." 371 F.3d at 596 n.3.

insemination process. The wife's claims for Social Security survivor benefits under 42 U.S.C. § 402(d)(1) and mother's benefits under § 402(g)(1) were rejected by the SSA on the grounds that the wife had not established that the twins were the deceased husband's "children" within the meaning of the Act because they were not entitled to inheritance benefits under Massachusetts state The wife appealed the decision to the United States District Court for the District of Massachusetts, which certified the state law issue regarding inheritance rights to the Massachusetts Supreme

The Massachusetts Supreme Judicial Court acknowledged an absence of statutory directives addressing the issue and formulated a test for determining whether posthumously conceived genetic children would have inheritance rights in The court emphasized that neither Massachusetts courts nor the United States Supreme Court had addressed the question of posthumously conceived children's inheritance rights under state intestacy The court determined that, in order for a posthumously conceived child to enjoy the inheritance rights of a natural child under Massachusetts law, the surviving parent or the child's other legal representative must both (1) demonstrate a genetic relationship between the child and the decedent, and (2) prove that the decedent "affirmatively consented" to posthumous conception and to the support of any resulting Even when these requirements are met, the court acknowledged that time limitations could preclude a claim for inheritance rights for a posthumously conceived

The New Jersey Superior Court addressed similar issues in re Estate of In that case plaintiff's husband died of leukemia. Almost a year after his death, plaintiff used her deceased husband's stored sperm to have his children, twin girls, by artificial insemination. Plaintiff brought an action for a declaration by the Superior Court of New Jersey that her posthumously implanted twins were eligible as the deceased husband's heirs so that they would be entitled to children's

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65. Woodward, 760 N.E.2d at 259-61

66. Id. at 260-61.

67. Id. at 261 nn.8-9.

68. Id. at 261 n.9. The court noted two cases that addressed related issues: Hecht v. Super. Ct., 16 Cal. App. 4th 836, 847 (1993) (addressing whether a decedent's sperm was "property" that could be bequeathed to his girlfriend) and In Re Estate of Kolacy, 753 A.2d 1257 (2000) (see discussion supra Part II.E.).

69. Woodward, 760 N.E.2d at 272.

70. Id. The issue of time limitations was not within the scope of the issue certified by the district court. Id. at 267-68.

71. 753 A.2d 1257 (N.J. Super. Ct 2000)

benefits under the Because the father unequivocally expressed his desire that plaintiff use his sperm to conceive children after his death, the court held that the children were the legal heirs of the deceased father under state The court reasoned that holding otherwise would have an adverse impact on their legal and social The opinion did not address whether the children would be eligible for Social Security benefits but recognized that their status as heirs would impact their eligibility for benefits under the

F. Arizona Legitimacy and Child Support Laws

In Gillett-Netting the interpretation of the Act's definition of a child eligible for Social Security benefits depended on whether the child could inherit the insured's personal property as the insured's natural child under state inheritance While Arizona law does not specifically deal with the rights of posthumously conceived children, Arizona law provides that every Arizona child is the legitimate child of their natural Arizona law does not make legal distinctions based on Arizona's Child Support provide, in applicable part, that "every person has the duty to provide all reasonable support for that person's natural and adopted minor, unemancipated children."" Additionally, children born as the result of artificial insemination are entitled to support from their mother's spouse if the spouse is the children's biological father or if the spouse agreed in writing to the

III. COURT'S RATIONALE

The Ninth Circuit Court of Appeals reversed the decision of the district court and held that the posthumously conceived children in Gillett-Netting *v.* were conclusively deemed dependent on their father under the Act, and entitled to child's survivor benefits based

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72. Id. at 1258-59.
73. Id. at 1263-64.
74. Id. at 1262.
75. Id. at 1259.
76. See 42 U.S.C. § 20 C.F.R. 404.355.
77. Gillett-Netting, 371 F.3d at 599 (citing ARIZ. REV. STAT. 8-601) (2004)).
78. Id. at 598 (citing State v. Mejia, 399 P.2d 116 (Ariz. 1965); citing REV. STAT. 8-601; citing Hurt v. Super. Ct., 601 P.2d 1329, 1331 (Ariz. 1979)).
79. ARIZ. REV. STAT. 25-501 (2004).
80. Id.
81. *Id.*
82. 371 F.3d 593 (9th Cir. 2004).

on his In reaching this result, the Ninth Circuit first addressed whether the children were entitled to child's insurance benefits under the To recover child's insurance benefits under the Act, the child must meet the requirements of 42 U.S.C. 402(d)-

Under § 402 every child of an insured individual who meets the definition of child under § 416(e) is entitled to benefits if the following requirements are met: (1) the claimant meets the definition of "child" under 416(e); (2) the child or the child's representative has filed an application for survivor benefits; (3) the child is unmarried and a minor at the time of application; and (4) the child was dependent on the insured at the time of the insured's

The court of appeals concluded that Juliet and Piers met these requirements because Netting was fully insured under the Act when he died, Juliet and Piers were his biological children and unmarried minors, and the application for their child's insurance benefits was filed by his widow, their Because the court of appeals determined that Juliet and Piers were the legitimate children of Netting under Arizona law, they were deemed dependent on him under the Act and consequent ly entitled to benefits."

Contrary to the district court's holding and the Commissioner's assertion, the court of appeals concluded that Juliet and Piers were Netting's "children" for purposes of the The court of appeals determined that the Act's definition of "child" was broad, including the insured person's stepchild, grandchild, or stepgrandchild in certain Additionally, courts and the SSA have interpreted the word "child," as used in the definition of child in the Act, to "mean the natural, or biological, child of the

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83. Id. at 593.
84. Id. at 596.
85. Id.; Smith v. Heckler, 820 F.2d 1093, 1094 (9th Cir. 1987).
86. Gillett-Netting, 371 F.3d at 596. See 42 U.S.C. 416(e) (defining child as "the child or legally adopted child of an individual").
87. Gillett-Netting, 371 F.3d at 596.
88. Id.
89. Id.
90. Id.
91. Id. See, *e.g.*, Weinberger v. Salfi, 422 U.S. 749, 781 n.12 (1975) (noting that a "natural or adopted child" of an insured was not required to satisfy the nine-month time requirement to which stepchildren are subject); Tsosie v. Califano, 630 F.2d 1328, 1333 (9th Cir. 1980) (holding that the term "child" under 42 U.S.C. 416(e) includes a person's natural children and his legally adopted children); 20 C.F.R. 404.354 (stating that a claimant may be "entitled to benefits as [an insured person's] child, i.e., as a natural child, legally adopted child, stepchild, grandchild, stepgrandchild, or equitably adopted child").

dependency requirement of § 416(e).[98] The court of appeals agreed with the district court that Juliet and Piers could not establish actual dependency on Netting because they were not in existence at the time of his death.[99] However, the court of appeals held that proof of actual dependency by Juliet and Piers on Netting was not required under the Act because all of the insured's legitimate children are automatically considered to be dependent on the insured, absent narrow circumstances not present in *Gillett-Netting*.[100]

The court reasoned that dependency is a broad concept under the Act, under which the vast majority of children are deemed dependent on their deceased parent.[101] Typically, only completely unacknowledged illegitimate children must prove actual dependency in order to receive child's insurance benefits.[102] Additionally, the Act is read liberally to make certain that children receive financial support after the death of a parent.[103]

Because Juliet and Piers were considered legitimate children according to Arizona state law, they were deemed dependent for purposes of the Act, and therefore, entitled to survivor benefits from Netting.[104] The court reasoned that if Netting were alive, Arizona law would treat him as the natural parent of Juliet and Piers, and he would have a legal obligation to provide for their support.[105] Because the court concluded that Juliet and Piers were entitled to benefits under the Act, the court of appeals did not reach Gillett-Netting's equal protection claim, regarding the preclusion of the award of child's insurance benefits to posthumously conceived children.[106]

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98. *Id.* at 597-98.

99. *Id.*

100. *Id.* at 598 (citing 42 U.S.C. § 402(d)(3); Mathews v. Lucas, 427 U.S. 495, 502 (1976) (noting that all legitimate children are entitled to survivorship benefits under the Act regardless of their actual dependency status); *Smith*, 820 F.2d at 1094-95 (noting the presumption of dependency for legitimate children unless the child is adopted by another); Doran v. Schweiker, 681 F.2d 605, 606 n.1 (9th Cir. 1982) (stating that the only requirement for establishing eligibility for survivor benefits for children born of a legitimate marriage is that such children demonstrate that the deceased parent was fully insured)).

101. *Id.* (citing *Smith*, 820 F.2d at 1095; *Doran*, 681 F.2d at 607).

102. *Id.*

103. *Id.* (citing *Smith*, 820 F.2d at 1095; *Doran*, 681 F.2d at 607). The court also noted that the purpose of the Act is to provide support for dependents of disabled or deceased workers. *Id.* (citing Jimenez v. Weinberger, 417 U.S. 628, 634 (1974)).

104. *Id.* at 599 (citing ARIZ. REV. STAT. § 25-501). *See infra* Part II.F.

105. *Id.*

106. *Id.* at 594 n.1 (9th Cir. 2004). *See supra* note 18.

In dicta the court of appeals indicated that a different result on the issue of legitimacy would have been reached had Netting and Gillett-Netting not been married.[107] The court asserted that their holding did not make survivorship benefits available to every posthumously conceived child in Arizona on the basis of the earnings of a deceased sperm donor.[108] The court posited that the father not married to the mother of a child born posthumously as a result of sperm donation and *in vitro* fertilization would not be obligated to support the child under Arizona's child support laws and would not be considered the child's "natural parent."[109] If the father is not considered the child's natural parent, the Act's presumption of dependency based on Arizona's child support laws would not apply. Such a child would only be eligible for survivor benefits if the Commissioner determined the child was dependent on the wage earner by meeting one of the qualifications under 42 U.S.C. § 416(h).[110]

IV. IMPLICATIONS

Births resulting from the various forms of assisted reproduction bring rise to a plethora of issues concerning parentage and inheritance rights.[111] Many state inheritance laws and federal statutes have not directly addressed the implications of modern reproductive technology.[112] The law is still catching up with the rapid growth in reproductive technology. Questions remain concerning the property rights of reproductive materials (i.e., frozen sperm), the legality of paid surrogacy, intestacy rights for posthumous children conceived or implanted after the genetic parent's death, and the determination of parentage and custody of such children.[113]

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107. *Id.* at 599 n.7.

108. *Id.*

109. *Id.* (citing ARIZ. REV. STAT. § 25-501).

110. *Id.*

111. BRASHIER, INHERITANCE LAW, *supra* note 12, at 168.

112. *See generally* BRASHIER, INHERITANCE LAW, *supra* note 12, at 168-98; JANET L. DOLGIN, DEFINING THE FAMILY: LAW, TECHNOLOGY, AND REPRODUCTION IN AN UNEASY AGE 198-207 (1997).

113. *See generally* BRASHIER, INHERITANCE LAW, *supra* note 12, at 168-98. In addition to problems defining dependency in the modern reproduction era, the legal definition of motherhood is in question. Sherry F. Colb, *Who Gets Custody When the Fertility Clinic Makes a Mistake?: The Hidden Sexism in Focusing on DNA,* Find Law's Writ, Sept. 22, 2004, *at* http://writ.corporate.findlaw.com/colb/20040922.html. In September 2004 Susan Buchweitz recovered a million dollar settlement from a fertility clinic that mistakenly gave her an embryo intended for another family. Buchweitz, a single Californian who decided to undergo artificial insemination to become a mother, gave birth to a child. Ten months after the child's birth, Buchweitz found out that the doctor at the fertility clinic implanted

Historically, state inheritance laws on intestate success usually require that a child be "in being" at the time of a parent's death to be considered an heir.[114] Case law and estate and property laws have long addressed situations when a man causes a woman to become pregnant and then dies before the child is born. They do not, however, address the problems posed in estate law by current reproductive technology by means of artificial insemination, traditional surrogacy, gestational carriers, cloning, and gene splicing. Because laws have not kept up with reproductive technology, the rights of posthumously conceived children vary from state to state.

In order to bring about more predictability for the parents and children affected by such assisted reproductive arrangements, state legislatures and the SSA need to adopt laws and regulations to recognize the realities of reproductive technologies. Various approaches are possible.

Some states have adopted the Uniform Parentage Act[115] ("UPA"), which was revised in 2000 and provides detailed rules for establishing paternity and takes into account modern reproductive technologies.[116] The UPA takes the approach that if a spouse dies before the placement of eggs, sperm, or embryos, and the materials result in a child, then the deceased spouse is not considered a parent of any resulting child.[117] The UPA provides an exception when the deceased spouse consents in a record that if assisted reproduction occurs after death, that the deceased spouse would be a parent of the child.[118] The UPA drafters recommended that any gestational agreements be reviewed by a court in a manner similar to the review of adoptions and that nonvalidated

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her with the wrong embryo. The embryo was intended for a married couple. Thus, unknown to Buchweitz, she was a surrogate for an embryo created from the married couple's sperm and egg. The intended recipients of the embryo have sued for custody of the child. Both Buchweitz and the married couple claim parental rights and a genetic connection to the child. The case raises questions of the meaning of "biological motherhood," which involves both egg donation and pregnancy. Colb criticizes the emphasis on DNA as a sole claim to biological motherhood, arguing that the rule of pregnancy should also play an integral part in defining parenthood. *Id.*

114. *In re* Estate of Kolacy, 753 A.2d 1257, 1260-61 (N.J. Super. Ct. 2000); BRASHIER, INHERITANCE LAW, *supra* note 12, at 186 (cautioning an abandonment of the "time-of-death" rule because it could open claims not only from the decedent's own children conceived posthumously but also from other relatives of the decedent born after the decedent's death). *See* Woodward v. Comm'r of Soc. Sec., 760 N.E.2d 257, 266 n.16 (Mass. 2002).

115. 2000 UNIF. PARENTAGE ACT, 9B U.L.A. 299 (2001).

116. *Id.* at § 707.

117. *Id.*

118. *Id.*

gestational agreements be unenforceable.[119] Furthermore, the drafters suggest that the validity of such gestational agreements determine the resulting child's eligibility for child support.[120]

In the case of frozen sperm or embryos, state laws should also address a timeline for determining how long the unborn child can be brought into existence and still be considered the child or heir of a decedent parent. For example, a statute could provide that a child conceived by artificial insemination after the death of one of the child's parents should nonetheless be the heir of that deceased parent so long as the child is born within a certain number of months following the parent's death. However, time limitations are problematic because they pose significant burdens on the surviving parent who may be in a mourning period. Furthermore, the attempts at artificial insemination are costly and often require multiple attempts before they are successful.[121] States should also consider the competing interests of people who are alive at the decedent's death and expect the prompt distribution of the decedent's estate.[122]

Because the court's decision granting survivor benefits to Juliet and Piers was based on state law, the national implications of survivor benefits for posthumously conceived children remain to be seen.[123] Until state laws are modernized to keep pace with these issues surrounding posthumously conceived children, the best advice for potential parents is to effectuate an attorney-supervised plan that protects the child's interest. The best advice for the courts is to read federal and state laws with flexibility to take the children of assisted reproduction into account. A suggestion for the Social Security Administration is to adopt guidelines addressing child's survivor benefits for posthumously conceived children, rather than relying on state inheritance laws that lead to inconsistent results and allow for

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119. *Id.* at art. 8 cmt.

120. *Id.* The Uniform Status of Children Assisted Conception Act takes a similar approach with the stated goal of providing finality for the determination of parenthood where genetic material is used in the procreation process after the death of the genetic material's owner. Unif. Status of Children of Assisted Conception Act § 4(b), cmt. (1988).

121. *See* BRASHIER, INHERITANCE LAW, *supra* note 12, at 194. *See Woodward*, 760 N.E.2d at 267-68 (refusing to adopt a statute of limitations for determining the inheritance rights of posthumously conceived children but recognizing the importance of the limitations question on the issue of the state intestacy statute's administrative goals).

122. *In re Estate of Kolacy*, 753 A.2d at 1262.

123. According to Hagit Elul, lead attorney in *Gillett Netting* and legal associate for the law firm, Hughes, Hubbard and Reeves, who represented the case with the Center for Reproductive Rights, the government has filed a motion for a rehearing. The motion is pending. Telephone Interview with Hagit M. Elul, Associate, Hughes, Hubbard & Reed, L.L.P. (November 11, 2004).

discrimination against children based on the circumstances of their birth.

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