**Schafer v. Astrue: The 4th Circuit Weighs In On “Who Is A Decedent’s Child?”**

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In a decision with implications for estate planners, on April 12, 2011 the 4th Circuit issued *Schafer v. Astrue*, 2011 U.S. App. LEXIS 7456, regarding whether a child born seven years after a deceased wage earner’s death is eligible to inherit under state law and thus qualifies as his “child” to receive Social Security survivor’s benefits. This decision aligns the 4th Circuit with the Social Security Administration and a number of other U.S. courts in holding that the postmortem conception child must demonstrate that applicable state law entitles him to inherit in intestacy as the decedent’s child. Cases in the 9th Circuit and the 3rd Circuit have taken a contrary view, as has a federal district court in the 8th Circuit.

**Facts of Schafer v. Astrue**

The Schafers, Don and Janice, married in June 1992. Four months later, Don was diagnosed with cancer. Advised that his cancer treatments could render him sterile, Don deposited sperm samples in a long term storage facility in December 1992. He died of a heart attack in March 1993, when he was domiciled in Virginia. Six years later, Janice used Don’s stored sperm to conceive a child in April 1999; Janice gave birth to that child, W.M.S., in Texas in January 2000. A Texas court declared that Don was the father of W.M.S.

Janice’s 2004 application for surviving child benefits for W.M.S. was initially approved by an administrative law judge, but the Social Security Administration’s Appeals Council reversed on the grounds that W.M.S. could not inherit from Don under the state law of Virginia. (Virginia law applied because it was the wage earner’s domicile at death). Janice then sued in federal district court, which upheld the denial of benefits. Her appeal to the 4th Circuit followed; the 4th Circuit affirmed the denial of benefits.

**Legal Requirements for Social Security child’s insurance benefits**

Courts have outlined five requirements for an applicant to receive these benefits:
1) the wage earner was fully or currently insured at the time of his death  
2) the applicant qualifies as the wage earner’s child  
3) an application for benefits has been filed  
4) the applicant is unmarried and under 18 (or disabled) and  
5) the applicant was dependent on the wage earner at the time of the wage earner’s death.

With children conceived and born years after a wage earner’s death, litigation has arisen concerning two of these requirements: whether the applicant is the wage earner’s child (#2), and whether the applicant can prove dependency on the wage earner (#5). Although this is a federal benefit, the Social Security Administration (SSA) and the courts generally look to state law to determine the answers to these two questions.
Requirement 2: How Does SSA Determine Who Is the Wage Earner’s Child?
Congress has declared in the Social Security Act, 42 U.S.C. § 402(d)(1), that “Every child (as defined in § 416(e) of this title)... of an individual who dies a fully or currently insured individual... shall be entitled to a child’s insurance benefit.” § 416(e) states in part: “The term ‘child’ means (1) the child or legally adopted child of an individual.”

One way to define “child” is as the wage earner’s biological child, or one whose parentage has not been disputed. A case in the 9th Circuit adopted that approach in Gillett-Netting v. Barnhart in 2004. The SSA has acquiesced to this interpretation of “child” for that circuit only. Social Security Acquiescence Ruling 05-1(9), 70 Fed. Reg. 55,657 (Sept. 22, 2005). The reasoning in Gillett-Netting has been followed by a case in the Northern District of Iowa, Beeler v. Astrue in 2009, and by a case in the 3rd Circuit, Capato v. Astrue in 2011. In each of these cases, because the applicant was the undisputed biological child of the insured, the court found that requirement # 2 was satisfied. The 9th Circuit has also ruled in Vernoff v. Astrue that the biological connection is enough to qualify the applicant as the decedent’s child even when the sperm was harvested after the man’s death and without his consent.

In contrast, the court in Schafer required more than a DNA test to prove that W.M.S. was Don Schafer’s child. Schafer adopted the SSA’s interpretation that provisions other than § 416(e) must be examined. In the SSA’s view, the only way that a postmortem conception child can be eligible for benefits is to satisfy § 416(h), “Determination of family status,” which provides:
In determining whether an applicant is the child...of a fully or currently insured individual for purposes of this subchapter, the Secretary shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual ... was domiciled at the time of his death.

The majority in Schafer noted that the purpose of the statute is to provide benefits “primarily to those who unexpectedly lose a wage earner’s support.” Postmortem conception children are different from most applicants in two ways: “First, they necessarily could not have relied on the wage earner’s wages prior to his death. Second, they generally come into being after it is clear that one of the parents will not be able to support the child in the ordinary way during the child’s lifetime, meaning that the survivorship benefits would serve a purpose more akin to subsidizing the continuance of reproductive plans than to insuring against unexpected losses.”

Still, the majority in Schafer emphasized that Congress did not eliminate all postmortem conception children from these benefits. The current statute, supported by SSA’s interpretation of its requirements, allows “those posthumously conceived children whom state lawmakers conclude are similarly situated enough to more traditionally conceived children that they deserve a share in the decedent’s estate.” Even if the
court disagreed with SSA’s interpretation (which it did not), the court concluded that the SSA’s view was entitled to deference under Chevron and thus should be followed. The court went on to apply Virginia law, which requires a child to be born within ten months of the decedent’s death, and thus upheld the denial of benefits on the grounds that W.M.S. was not entitled to inherit as Don Schafer’s child in intestacy.

Circuit Judge Davis dissented in Schafer, maintaining that W.M.S. was clearly Don Schafer’s biological child and thus met the requirements of the act, citing with approval the arguments in Gillett-Netting and Capato. In Judge Davis’ view, the SSA’s regulations are not entitled to Chevron deference because Congress has clearly stated that a “child” as defined in § 416(e) is entitled to benefits, with no need to look to state law of inheritance.

The majority in Schafer, in addition to affirming the SSA’s definition of “child,” has aligned with most courts that have examined whether a postmortem conception child is eligible for these benefits. In several earlier cases, the federal district court certified the question of state intestacy law to the state supreme court. For example, in Woodward v. Comm’r of Soc. Sec., the Supreme Judicial Court of Massachusetts answered the following question certified by the U.S. District Court for the District of Massachusetts: If a married man and woman arrange for sperm to be withdrawn from the husband for the purpose of artificially impregnating the wife, and the woman is impregnated with that sperm after the man, her husband, has died, will children resulting from such pregnancy enjoy the inheritance rights of natural children under Massachusetts’ law of intestate succession?

The Massachusetts Supreme Court responded that, in certain circumstances, the child would be entitled to inherit in intestacy if a genetic relationship between the child and the decedent was established, and there was proof that the decedent affirmatively consented to both the posthumous conception and to the support of any resulting child. Timeliness might be a factor if the child was born long after the decedent’s death, but was not an issue in this case.

Similar to the procedure in Woodward, the federal district court in Finley v. Astrue certified the following question to the Supreme Court of Arkansas: Does a child, who was created as an embryo though in vitro fertilization during his parents’ marriage, but implanted into his mother’s womb after the death of his father, inherit from the father under Arkansas intestacy law as a surviving child?

The Arkansas Supreme Court held that state law requires a posthumous child to be “conceived” before the decedent’s death, and thus the court ruled that the answer to the certified question was “no.” Finley v. Astrue, 270 S.W.3d 849, 850 (Ark. S.C. 2008). Despite a joint motion by SSA and Finley that “the determinative issue presented in this action is whether [the child] is entitled to inherit from [decedent] under Arkansas intestacy law,” Finley challenged the denial of benefits in federal district court, alleging
violation of equal protection rights and full faith and credit, all of which were rejected by the district court.  *Finley v. Astrue*, 601 F. Supp. 2d 1092 (E.D. Ark. 2009).

In a third case, the Supreme Court of New Hampshire in *Khabbaz v. Comm’r*, SSA answered the certified question from the U.S. District Court as to whether a postmortem conception child is eligible to inherit under New Hampshire law: “We respond in the negative.”  930 A.2d 1180 (2007).  Finally, in *Stephen v. Barnhart*, a federal district court applied Florida law without certifying the issue to the Florida Supreme Court, holding that the postmortem conception child could not inherit from the decedent under Florida law, which required such a child to be provided for in the decedent’s will.  386 F.Supp. 2d 1257 (M.D. Fla. 2005).  In all of these cases, the courts accepted the SSA’s interpretation that the key issue was inheritance under state law.

**Requirement 5: Can A Postmortem Conception Child Establish That S/he Was “Dependent” on the Wage Earner?**

The second factor that is frequently litigated when a postmortem conception child applies for these benefits is proof of “dependency”: the applicant must show that he or she was dependent on the wage earner at the time of his death (requirement #5 above).  There are at least 3 ways for an applicant to satisfy this requirement: 1) prove actual dependency on the insured; 2) establish that the insured is her “parent” under state law provisions and that she is, therefore, deemed both legitimate and dependent; or 3) establish that she may inherit from the insured under the state intestacy laws and therefore is deemed legitimate.  Because the child is born long after the wage earner’s death, the first avenue is never available for a postmortem conception child.  Instead, the child must demonstrate that a presumption of dependency applies via the second or third route.

The majority in *Schafer v. Astrue* did not reach the question of whether W.M.S. could satisfy the dependency requirement; “because we agree with the SSA that W.M.S. is not Don Schafer’s ‘child’ under the Act we need not resolve this issue.”  As in *Schafer*, the courts in *Finley, Khabbaz* and *Stephen*, having found that the applicant did not inherit under state law and so was not a “child,” also did not reach the dependency issue.

In contrast, if the postmortem conception child is entitled to inherit from the wage earner under state law, then the child is deemed to be dependent on him.  As a result, the decisions in *Woodward* and *Kolacy* did not separately address the “dependency” requirement, having found that the applicant was the wage earner’s child because s/he could inherit from him.

The only courts to address the “dependency” requirement in full are those that reject the SSA analysis on requirement 2: *Beeler, Gillett-Netting* and *Vernoff*.  § 402(d)(3) of the Social Security Act states that a child is deemed dependent on the
father at his death unless the child was not living with the father at that time and is not “legitimate.” The district court in *Beeler v. Astrue*, for example, found that under Iowa law, the postmortem conception child is legitimate if she was born of parents who, at any time prior or subsequent to the birth of such child, have entered into a civil or religious marriage ceremony. Similarly, in *Gillett-Netting*, a 9th Circuit case applying Arizona law, the court found that Arizona had eliminated the status of illegitimacy for all children, and so the children were presumed dependent on their father. In both *Beeler* and *Gillett-Netting*, benefits were awarded to the postmortem conception children.

Most interesting is the case of *Vernoff v. Astrue*, another 9th Circuit case, but one that involved California law rather than Arizona (as in *Gillett-Netting*). Relying on *Gillett-Netting* and the SSA Acquiescence Ruling, the court quickly concluded that the applicant (Brandalynn Vernoff) was Vernoff’s child: his sperm was used to conceive her 3 years after his death. Thus, the key issue was whether the applicant could prove dependency; the court concluded she could not, and thus denied her claim. The court first examined whether Brandalynn could establish a parent-child relationship under California law, which is primarily governed by California Family Code § 7611. That section presumes a father to be the child’s natural parent if he and the child’s mother are or have been married to each and the child is born during the marriage or within 300 days after the marriage is terminated by death. Because Brandalynn was born more than 300 days after the wage earner’s death, the court in *Vernoff* held that this presumption did not apply. Another provision of § 7613 allows a husband to be treated as the father if he consented to artificial insemination of his wife. In *Vernoff*, the sperm was extracted shortly after the wage earner’s death, without any indication of his consent to the procedure, and thus this avenue was rejected as well. The court noted that Brandalynn might have been able to use another section to establish paternity: that it was impossible for the father to hold out the child as his own and paternity is established by clear and convincing evidence. However, no such action had been filed, and the court stated that it was unclear whether such an action would be successful if it were to be filed. If Brandalynn were born today, she would be subject to the much stricter requirements of California Probate Code § 249.5, which requires clear and convincing evidence that the decedent specified in writing that his sperm could be used for postmortem conception, and also requires that the child be *in utero* within two years of his death.

**Concluding Thoughts for Estate Planners**

These cases have implications beyond eligibility for Social Security benefits. In determining the applicant’s status, the courts typically examine whether the child can inherit in intestacy under state law. Several courts have recognized that such a determination could affect the child’s future right to inherit through the parent, from a grandparent’s will or trust, for example. One of the earliest decisions regarding whether a postmortem conception child could qualify for Social Security benefits was a New Jersey case, *Estate of Kolacy*, 753 A.2d 1257 (2000). In ruling that the twins born more than eighteen months after their father’s death qualified as his intestate heirs, Judge
Stanton observed that “a determination that the children are the heirs of William Kolacy could be significant in terms of their rights to take from his parents or from his collateral relatives in the event that one or more of those persons were to die intestate. Their status as his heirs could also be significant in determining their rights under the wills of their father’s relatives.” One New York court has already adjudicated a case regarding whether postmortem conception children are beneficiaries of a trust created years before this technology was available. The trustees of Martin B’s 1969 trust asked the court for “advice and direction” on whether “the terms ‘issue’ and ‘descendants’ include children conceived by means of in vitro fertilization with the cryopreserved semen of the grantor’s son who had died several years prior to such conception.” Judge Roth in the case of In Re Martin B concluded that such children should be included “where the governing instrument is silent.”

The complicating factor is that less than half the states have statutes explicitly addressing whether a postmortem conception child inherits from a deceased parent. Several states have enacted legislation based on Uniform Parentage Act § 707, which provides “If a spouse dies before placement of eggs, sperm, or embryos, the deceased spouse is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased spouse would be a parent of the child.” Others have adopted a more recent version of the Act, substituting “an individual” for “spouse.” Finally, a few states have enacted the 2008 Uniform Probate Act § 2-120 regarding assisted reproduction, which requires consent of the decedent to postmortem conception but allows that consent to be demonstrated in writing or by clear and convincing evidence, and raises a presumption of consent if the decedent’s surviving spouse is the birth mother of the postmortem conception child. In these states, estate planners and courts have more guidance on whether a postmortem conception child is likely to be able to inherit in intestacy. However, because these statutes have been enacted in less than half of U.S. jurisdictions, that leaves many states in which the question of inheritance by postmortem conception children is unresolved.

List of Cases Involving Postmortem Conception Children and Issues of Inheritance


Capato v. Astrue, 631 F.3d 626 (3d Cir. 2011)


Gillett-Netting v. Barnhart, 371 F.3d 593 (9th Cir. 2004)


Khabbaz v. Comm’r, SSA 155 N.H. 798; 930 A.2d 1180 (2007)


Vernoff v. Astrue, 568 F. 2d 1102 (9th Cir. 2009) for children conceived before 2008; now apply Cal. Prob. Code § 249.5.