

# IN VITRO FERTILIZATION: LEGAL ISSUES ABOUND

Lawrence R. Smith and Erin A. Johnson SmithAmundsen, LLC



In a recent Supreme Court decision, *Astrue v. Capato*,<sup>1</sup> the Court ruled that children born after the death of a parent *via in vitro fertilization* could be entitled to Social Security benefits, but only *if* the deceased's state allowed it. Social Security is a federal program that gives benefits to survivors of deceased individuals who have paid into the program. Children eligible to obtain benefits are generally described as those who are unmarried and under the age of eighteen.

Mr. Capato and his wife had his sperm frozen after he was diagnosed with cancer. His wife became pregnant naturally and the sperm was kept in a sperm bank. Capato later died of his cancer and his wife was inseminated nine months later, leading to the birth of twins eighteen months after Capato's death. When Mrs. Capato applied for Social Security benefits for her twins, Social Security looked to state law for the definition of "child." It was determined that the family was domiciled in Florida at the time of Mr. Capato's death and that Florida law governed whether or not posthumous children could obtain survivor benefits.

Florida law does not allow posthumously conceived children to qualify for inheritance if they were conceived after the death of the decedent and therefore, Capato's children did not qualify for Social Security benefits.

Social Security benefits to families of deceased employees were initially established to ensure that dependents were protected from hardship after the death of the wage earner. The Court in *Astrue* admitted that Social Security Administration deference to state law was reasonable and that the same deference would create different outcomes in different states and in different situations. This ruling means that if you live in a state, such as Massachusetts, that recognizes "children" born after the death of a parent, they are eligible to collect Social Security benefits. In other states, like Florida, that do not recognize posthumous children conceived after the death of a parent, such children would be ineligible for benefits. The Court often shows deference to an agency's statutory interpretation when that interpretation has been deemed rea-

sonable and when it is clear that Congress intended for the agency to make rules that should be followed as law. Therefore, the Court found that the Social Security Administration's decision to look to state laws for guidance was one reasonable interpretation of the statute and should not be disturbed.

Several questions about fairness arise from this case. Is it fair that children in some states get benefits, while children in other states are barred from collecting? While federalism is embedded into the fabric of American society, should a federal benefit be unequally distributed based upon a state's definition of "child"? If Congress decided to change the definition of "child" for the purpose of making Social Security benefits uniform, thereby including children conceived or implanted using *in vitro* fertilization after the death of one or both parents, the change could have unintended consequences. Such changes could affect abortion rights, inheritance rights and "family law" as we know it.

## ARE DIFFERENT RESULTS IN EACH STATE ACCEPTABLE?

One of the most important things to consider moving forward from the Astrue decision is whether it is good for a federal law to produce varying results based on which state's definition of child applies. To say that you will receive a federal benefit if you live in Illinois but will be denied that same federal benefit if you live in Florida looks fundamentally unfair. When it comes to federal programs, it seems that there should be one result: either all posthumous children receive benefits, or none do. Allowing for unequal results creates more cost to the system by forcing litigation to interpret ambiguous state statutes along with challenging which state a person is domiciled in at the time of their death or whether residency at time of death is the appropriate time frame for determining benefits. At a fundamental level, it is natural to think that a federal agency issuing benefits would operate from one set of rules that offer predictable outcomes in all states, no matter where a "father" or "mother" lives or dies.

## STATE LAW ISSUES

Worker's Compensation is a state-run program that functions similarly to Social Security. Each state has a unique set of laws governing the program, which invariably leads to different outcomes. Every state determines who can qualify as a beneficiary under Worker's Compensation in the event of an employee's death and what benefits children of the deceased are allowed. Variance by state could complicate claims for companies that operate in multiple states.

Illinois, Wisconsin, New York, and Florida have different definitions of "child", leading to varying outcomes for posthumous children attempting to collect Worker's Compensation benefits. In Illinois, "child" is defined as "a child whom the deceased employee left surviving, including a posthumous child, a legally adopted child, a child whom the deceased employee was legally obligated to support or a child to whom the deceased employee stood in loco parentis."<sup>2</sup> Illinois leaves open the possibility for implanted embryos to recover a Worker's Compensation death benefit.

Wisconsin takes the opposite view. The Worker's Compensation statute defines a Wisconsin child as "a child by their marriage or domestic partnership...who is living at the time of the death of the employee and who is likewise wholly dependent on the deceased employee for support."<sup>3</sup> There is no room in the statute to allow for posthumous children to collect money from their deceased parent. In fact, the statute describing

what a "dependent" is ensures no posthumous child can receive benefits because it states that children must be living at the time of their parent's death.<sup>4</sup> This means that, in Wisconsin, a child born the day after the death of a parent would be unable to collect benefits because they were not "living" at the time of the parent's death.

The New York legislature has taken a similar approach to Illinois by defining "child" to include posthumous children outright, with no qualifiers. This would almost certainly allow any child, even those born years after their parent's death, to collect Worker's Compensation benefits from the state.

State definitions are important because they supposedly reflect the views of local residents. There is the potential for both federal law and state law to re-define their definitions of "child" to reflect advancements in science and fertility. State definitions of "child" are most important because they are what federal agencies defer to when benefits questions arise.

## IMPACT ON EMPLOYERS AND INSURERS

The Social Security Administration's deference to state law in order to decide which posthumous children get benefits could potentially leave it open to equal protection discrimination claims because posthumous children would be treated differently in each state than would other natural children. An employee's spouse could potentially say that an employer disagreed with their lifestyle and maliciously transferred the employee to a state that did not recognize posthumous children leading the Social Security Administration to unfairly deny benefits. Employers that operate in multiple states and have uniform benefits policies may subject employees and their families, in the rare event of a death on the job, to uncertainty because of the government's policy of state deference interacting with company benefit programs. A surviving spouse could conceivably sue the employer for a "discriminatory transfer."

For example, the child of a same sex couple who's DNA does not come from the deceased employee may not be able to collect Social Security Insurance because the state may not recognize posthumous children. Even if the state did recognize posthumous children, there could be challenges as to whether a posthumous child not sharing the DNA of the deceased could still be considered a descendent since the child had not yet been adopted by the deceased.

An unreasonable result could also be imagined if a male employee is transferred

from Illinois to Florida, his wife becomes pregnant and then he dies. Though the child was "contemplated" in Illinois, the child would be barred from collecting Social Security benefits in Florida. Had the employee not been transferred before his death, the posthumous child would have been entitled to benefits. A similarly unfair outcome could be imagined if a woman lives in one state, moves with her husband to another state and then is inseminated in a third state after the husband's death. The courts would need to decide what criteria should be used to determine where the deceased employee was domiciled or resided.

## CONCLUSION

The Social Security Administration's deference to state intestacy law is problematic. Congress needs to fix the uncertainty by legislating and the Social Security Administration needs to create its own set of guidelines detailing who is entitled to Social Security benefits when the death of a sperm donor or egg donor occurs before the birth of a child. Either all posthumous children should be afforded benefits or none should because varying results are unreasonable. Re-defining "child" will not be easy and will have ramifications on inheritance, abortion rights, insurance issues and health law. *In vitro fertilization* is a scientific marvel, but the legal questions that it has raised, and will continue to raise in the future, are numerous and complicated.

<sup>1</sup> 631 F.3d 626.

<sup>2</sup> 820 ILCS 305/7 (2012).

<sup>3</sup> Wis. Stat. § 102.49(1) (2011).

<sup>4</sup> Wis. Stat. § 102.51(1) (2011).



*Lawrence R. Smith, a founding partner of Smith Amundsen in Chicago, Illinois, focuses his practice on risk management consulting, case monitoring, mediation, arbitration, and implementing successful trial strategies. Having tried over 120 jury cases, his experience covers many areas including product liability, transportation, aviation, employment, insurance services, and commercial litigation.*



*Erin A. Johnson is a summer associate at Smith Amundsen, LLC and a 3rd-year-law student at the University of Wisconsin Law School.*