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Recent Developments: Posthumously Conceived Children: Why States Should Update Their Intestacy Laws After *Astrue v. Capato*

Jennifer Matystik

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Recent Developments

Posthumously Conceived Children: *Why States Should Update Their Intestacy Laws After Astrue v. Capato*

Jennifer Matystik[†]

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PART I

Introduction

On May 21, 2012, a unanimous Supreme Court held in *Astrue v. Capato* that posthumously conceived and biological children are only entitled to social security survivor benefits “if they qualify for inheritance from the decedent under state intestacy law, or satisfy one of the statutory alternatives to that requirement.”¹ This decision gives the Social Security Administration its due deference under *Chevron*,² and also avoids the application of an outdated federal law to new assistive reproductive technologies, a fear voiced by some members of the Supreme Court during oral arguments.³ However, the decision also highlights the need for more uniform and updated state laws concerning the inheritance rights of posthumously conceived children. By allowing states to determine whether posthumously conceived children may receive social security survivor benefits, the Court’s decision may extend benefits to children not originally considered part of the core group of intended beneficiaries of the Social Security Act—those who were not technically dependent upon the deceased wage earner at the time of his or her death—but who are nonetheless deserving of such benefits. However, for that to happen, more states need to explore and adopt legislation that specifically addresses the status of posthumously conceived children. Indeed, many state laws are as outdated as the Social Security Act in the ways that they address assistive reproductive technology and posthumously conceived children. For application of state intestacy law to be truly a “workable substitute for burdensome case by case determinations,”⁴ states must move towards a more uniform approach that clearly and specifically addresses the legal status of posthumously conceived children.

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1. *Astrue v. Capato* ex rel. B.N.C., 132 S.Ct. 2021, 2026 (2012).
 2. *Chevron USA, Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). *Chevron* supplies the basic framework for evaluating an agency’s interpretation of a statute. In “*Chevron* Step One,” the court asks whether Congress has interpreted the precise issue in the statute. *Id.* If it has, then the statute is considered unambiguous, and Congress’ interpretation prevails. If the court finds the statute ambiguous, it proceeds to “*Chevron* Step Two,” in which it asks whether the agency’s interpretation of the ambiguous statute is reasonable, a highly deferential standard. *Id.* Subsequent cases have added steps to the *Chevron* analysis. See *Nat’l Cable & Telecomm. Assn. v. Brand X Internet Servs.*, 345 F.3d 1120 (9th Cir. 2005). Further, since *United States v. Mead Corp.*, 533 U.S. 218 (2001), before a court can get to *Chevron* Step Two, it must ask whether 1) Congress delegated to the agency the authority to act with the force of law, and 2) has the agency acted with that authority? If the answer to both questions is yes, then the agency will receive *Chevron* deference. If the answer to either or both of those questions is no, then the agency will receive a lower level of deference as outlined in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).
 3. Justice Breyer was concerned about this possibility during oral arguments when he noted: “[Y]ou want us to . . . apply[] this old law to new technology, [and] just overlook those complications.” See Transcript of Oral Argument at 44, *Astrue*, 132 S.Ct. 2021 (2012) (No. 11-159).
 4. *Astrue*, 132 S. Ct. at 2032.

This Recent Developments piece seeks to bring attention to the major uniform model acts concerning posthumously conceived children, the similarities and differences between them, as well as their relative strengths and weaknesses. Further, it underscores the importance of considering all stakeholders' interests in drafting model legislation, including the interests of the child, the decedent and the surviving partner, and the states. In balancing these interests, it is important to consider the policy concerns raised by this issue. For example, the goal of survivor benefits under the Social Security Act is to give benefits to a surviving child who was actually being supported by a wage earner before his or her death.⁵ By tying survivor benefits to state intestacy law, the end result may be that children who were not technically dependent upon the deceased wage earner at the time of his or her death will nonetheless receive survivor benefits. This Recent Developments piece will discuss how the Court grappled with that concern, and what the proposed uniform model acts do to address similar policy concerns, and to balance all the stakeholders' interests.

Background

Although assistive reproductive technology, including artificial insemination, became a "widely accepted, non-experimental medical procedure" as early as the mid-1980s, posthumous conception has not yet enjoyed the same widespread acceptance.⁶ Posthumous conception involves the "transfer of an embryo or gametes with the intent to produce a live birth after a gamete provider has died."⁷ This commonly occurs where a heterosexual couple wishes to have children, but freezes the male's sperm out of fear that he will become sterile in the future, usually due to aggressive cancer treatments.⁸ There are many reasons why a couple would prefer that the surviving partner conceive using the decedent's genetic material, including the possibility that any resulting child will be able to inherit from the decedent and receive Social Security survivor benefits.⁹

It was not until the early 1990s that courts throughout the United States began dealing with the issue of whether posthumously conceived children have

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5. *Id.* at 2025 ("[R]eliance on state intestacy law to determine who is a 'child' serves the Act's driving objective, which is to 'provide . . . dependent members of [a wage earner's] family with protection against the hardship occasioned by [the] loss of [the insured's] earnings.'" (citing *Califano v. Jobst*, 434 U.S. 47, 52 (1977))).
 6. Raymond C. O'Brien, *The Momentum of Posthumous Conception: A Model Act*, 25 J. CONTEMP. HEALTH L. & POL'Y 332, 339-41 (2009).
 7. MODEL ACT GOVERNING ASSISTED REPROD. TECH., §102 (2008) available at <http://apps.americanbar.org/family/committees/artmodelact.pdf>.
 8. See Benjamin C. Carpenter, *A Chip Off the Old Iceblock*, 21 CORNELL J.L. & PUB. POL'Y 347, 358-59 (2011).
 9. Other reasons people may chose posthumous conception include paying tribute to the decedent, preference for knowing the child's genetic origin, and that using the decedent's genetic materials is often less costly than obtaining gametes from a new donor. See *id.*

rights to inheritance and public benefits under state law.¹⁰ A common theme in the major U.S. cases concerning posthumous conception “is the request for legislative guidance in the conferral of inheritance and benefits rights for posthumously created children.”¹¹ Indeed, in an opinion concurring with the holding that that no posthumously conceived child could be considered “surviving issue” within the plain meaning of a New Hampshire statute, the former Chief Justice of the New Hampshire Supreme Court urged the state legislature “to examine, within the context of the state’s intestacy statute, the confluence of new, ever-expanding birth technologies and the seemingly arcane language and presumptions attendant to the settlement of decedents’ estates.”¹²

There are currently three major uniform acts that specifically address the issue of posthumous conception for parentage and probate purposes—the Uniform Probate Code (UPC),¹³ the Uniform Parentage Act (UPA),¹⁴ and the ABA Model Act Governing Assisted Reproductive Technology (“ABA Model Act”).¹⁵ The most recent Restatement of Property, Wills, and other Donative Transfers also briefly discusses the status of posthumously conceived children. Each differs in their approach and standards for determining the legal status of posthumously conceived children. At present, only nine states have adopted one of the model acts: seven have adopted the 2000 UPA, and two have adopted the 2008 UPC.¹⁶

The Road to the Supreme Court

Background: *Astrue v. Capato ex rel. B.N.C.*¹⁷

In 1999, Mr. and Mrs. Capato froze Mr. Capato’s sperm upon learning about his cancer diagnosis.¹⁸ Mr. Capato died in 2002, and in January 2003 Mrs. Capato conceived using her deceased husband’s genetic material.¹⁹ Mrs. Capato gave birth to twins on September 23, 2003, and applied for social security

10. O’Brien, *supra* note 6, at 340-41.

11. *Id.* at 356.

12. Khabbaz *ex rel. Eng v. Comm’r, Soc. Sec. Admin.*, 930 A.2d 1180, 1187 (N.H. 2007) (Broderick, C.J., concurring specially).

13. UNIF. PROBATE CODE (2010), *available at* <http://www.uniformlaws.org/shared/docs/probate%20code/upc%202010.pdf>.

14. UNIF. PARENTAGE ACT (2002), *available at* http://www.uniformlaws.org/shared/docs/parentage/upa_final_2002.pdf.

15. MODEL ACT GOVERNING ASSISTED REPROD. TECH. (2008), *available at* <http://apps.americanbar.org/family/committees/artmodelact.pdf>.

16. Alabama, Delaware, New Mexico, Texas, Utah, Washington, and Wyoming have adopted the 2000 UPA, and Colorado and North Dakota have adopted the 2008 UPC. *See* Carpenter, *supra* note 8, at 403.

17. *Astrue v. Capato*, 132 S. Ct. 2021 (2012).

18. *Capato ex rel. BNC v. Comm’r of Soc. Sec.*, 631 F.3d 626, 627 (3d Cir. 2011), *cert. granted*, 132 S. Ct. 576 (2011), *rev’d and remanded sub nom. Astrue v. Capato ex rel. B.N.C.*, 132 S. Ct. 2021 (2012).

19. *Id.* at 627-28.

survivor benefits on their behalf in October 2003.²⁰ Although Mr. and Mrs. Capato spoke about including a provision for unborn children in his will, it ultimately contained no such language.²¹

The Social Security Administration (the “Administration”) denied Mrs. Capato’s claim for survivor benefits, as did an Administrative Law Judge (ALJ) after a hearing in 2007.²² The District Court of New Jersey affirmed the decision of the ALJ in 2010.²³ The Administration, the ALJ, and the Federal District Court of New Jersey all agreed that because the twins were not considered Mr. Capato’s “children” and ultimately could not inherit his estate under Florida state intestacy law, that they were ineligible for social security survivor benefits.²⁴ The Third Circuit disagreed, finding that because the Capato twins are indisputably Mr. Capato’s genetic children, they qualify as such under the plain meaning of the statute. This Court of Appeals remanded the issue of whether the twins could be considered to have been “dependent” upon their deceased father to the District Court.²⁵ Therefore, the court held that the Administration did not need to look to Florida intestacy law to determine whether the twins were eligible for benefits.²⁶ The Administration appealed, and the Supreme Court granted certiorari and heard the case on March 19, 2012.

At issue in *Astrue v. Capato* was which provision in the Social Security Act (the “Act”) should govern in determining whether a posthumously conceived child is in fact a “child” of a decedent for the purposes of qualifying for social security survivor benefits. The debate centers on the relationship between sections 416(e) and 416(h) of the Act. Section 416(e) contains a sparse definition of a child, which includes that “the term ‘child’ means the child or legally adopted child of an individual,” whereas section 416(h)(2)(A) provides in part that: “[i]n 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 individuals’ domiciliary State].”²⁷ The issue was whether the Administration must look to section 416(h) at all in determining whether an applicant, who is the legitimate child of a decedent, is a “child” within the meaning of the Act, or if the fact that an applicant is the legitimate child of a decedent is enough to satisfy the plain meaning of the word “child” as set forth in section 416(e).²⁸ Because the debate in *Capato* was over what provision governs in determining whether the applicant is a “child,” the Capato twins’ dependency on the decedent was not at issue. However, the issues

20. *Id.* at 628.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 632.

26. *Id.* at 630.

27. *Astrue*, 132 S. Ct. at 2023-24.

28. *Id.* at 2024.

are closely related since the Administration presumes that children who qualify to inherit under state intestacy law, or are considered legitimate under state law, are presumed to be dependent upon the deceased wage earner.²⁹

The Social Security Administration has interpreted the Act to mean that a person seeking to establish eligibility for child survivor benefits must show that he or she was able to inherit personal property from the decedent under state intestacy law.³⁰ State intestacy law is, as the Administration asserted during oral arguments, “the body of law that defines the class of people who are likely to have a sufficiently close relationship to the insured person such that it would be appropriate to provide benefits to replace the loss of support that they would likely be getting during the person’s life.”³¹ Further, the Administration argued that state intestacy laws set out “clear, easy to apply rules for the distribution of estates.”³²

The Respondent argued, however, that the provision which required the Administration to look to state intestacy law only applies to situations in which biological parentage is in dispute.³³ In a situation such as Mrs. Capato’s, in which her twins are undisputedly the biological children of herself and her deceased husband, the Respondent argued that her children should qualify under the plain meaning of the word “child” as set forth in the Act.³⁴

The Petitioner and Respondent’s arguments in *Astrue* highlight the split among federal Courts of Appeal. The Respondent’s argument is consistent with the Ninth Circuit’s decision in *Gillett-Netting v. Barnhart*,³⁵ whereas the Administration’s view is shared by the Eighth Circuit in *Beeler v. Astrue*³⁶ and the Fourth Circuit in *Schafer v. Astrue*.³⁷ This Circuit split undoubtedly influenced the Supreme Court’s decision to grant certiorari.

Circuit Split

In *Gillett-Netting v. Barnhart*, the Ninth Circuit held that posthumously conceived children were indeed “children” within the meaning of section 416(e) of the Social Security Act.³⁸ There, Juliet Netting used her husband’s sperm to conceive a child ten months after her husband’s death.³⁹ The court reasoned that because Ms. Netting’s children were considered legitimate under state family law and that legitimate children enjoyed a presumption of dependency, the

29. *Id.* at 2023.

30. *See* Brief for Petitioner at 8, *Astrue*, 132 S. Ct. 2021 (No. 11-159).

31. Transcript of Oral Argument at 7-8, *Astrue*, 132 S. Ct. 2021 (No. 11-159).

32. *Id.* at 8.

33. Brief for the Respondent at 10, *Astrue*, 132 S. Ct. 2021 (No. 11-159)

34. *Id.* at 11.

35. 371 F.3d 593 (9th Cir. 2004).

36. 651 F.3d 954 (8th Cir. 2011).

37. 641 F.3d 49 (4th Cir. 2011).

38. *Gillett-Netting*, 371 F.3d at 597-98.

39. *Id.* at 594-95.

children should be awarded benefits.⁴⁰ The court rejected the Administrative Law Judge's determination that "the last possible time to determine dependents [sic] on the wage earner's account is the date of the death of the wage earner," and that therefore "children conceived after the wage earner's death cannot be deemed dependent on the wage earner."⁴¹ The court reasoned that it did not need to consider state intestacy law to determine parentage, because Ms. Netting's child was in fact a "child" of her husband under the plain meaning of section 416(e), and intestacy law only needs to be considered where parentage or dependency is in dispute.⁴² Further, in resolving the dependency issue, the court held that Ms. Netting's child was dependent because legitimate children were entitled to a presumption of dependence, and Ms. Netting's child was indisputably the legitimate child of her deceased husband.⁴³ The Administration expressly rejected the Ninth Circuit's holding through the issuance of an acquiescence ruling and a guidance document following the *Gillet-Netting* decision.⁴⁴

Conversely, in *Beeler*, the Eight Circuit held that a child conceived by means of artificial reproductive technology one year after her father's death was not a "child" within the meaning of the Act.⁴⁵ There, the father signed a consent form when he froze his sperm in which he agreed to the use of his sperm after his death and acknowledged his paternity for any resulting children.⁴⁶ The court ultimately deferred to the Administration's interpretation of the Act, holding that a natural child could only receive survivor benefits if that child would inherit under state intestacy law or if they satisfied other statutory requirements.⁴⁷

Similarly in *Schafer*, the Fourth Circuit upheld the Administration's denial of survivor benefits to a natural child born a number of years after his father's death because he could not inherit from his father under Virginia intestacy law.⁴⁸ As the court did in *Beeler*, the Fourth Circuit also looked to section 416(h) as a gateway to determining whether an applicant is indeed a "child" under the meaning of the Act, and rejected the plaintiff's view that section 416(h) does not apply where parentage is not in dispute.⁴⁹ The court found that the Administration's view was more consistent with the purpose, legislative history, and original statutory language of the Act.⁵⁰

40. *Id.* at 597-99.

41. *Id.* at 595.

42. *Id.* at 597.

43. *Id.* at 597-99.

44. Social Security Acquiescence Ruling 05-1(9), 70 Fed. Reg. 55, 656 (Sept. 22, 2005); *See Capato*, 631 F.3d at 630.

45. *Beeler*, 651 F.3d at 962.

46. *Id.* at 956-57.

47. *Id.* at 960 ("The regulations make clear that the SSA interprets the Act to mean that the provisions of section 416(h) are the exclusive means by which an applicant can establish "child" status under section 416(e) as a natural child.").

48. *Schafer*, 641 F.3d at 51.

49. *Id.* at 49.

50. *Id.* at 57-58.

Schafer best previews the Supreme Court's decision in *Astrue* in that it engages in a detailed discussion of the perceived differences between posthumously conceived children and the intended beneficiaries of the Act. There, the court noted that the Administration's interpretation, "by tying natural child status determinations to one of section 416(h)'s pathways, thus reflects the Act's basic aim of primarily helping those children who lost support after the unanticipated death of a parent."⁵¹ The court went on to write that posthumously conceived children fundamentally differ from the "members of the core beneficiary class in two ways."⁵² First, posthumously conceived children could not have relied on the wage earner's wages prior to his death, and second, posthumously conceived children "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."⁵³ The court concluded that granting posthumously conceived children survivor benefits would be antithetical to the goal of providing such benefits, which is to insure "against unexpected losses" after the unanticipated death of a parent.⁵⁴ The court added a caveat to its holding, noting that rather than categorically excluding posthumously conceived children from the scope of the Act, the Administration's interpretation "properly includes as children 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."⁵⁵ Moreover, the court notes that this serves a dual purpose of both "protecting the Act's chief intended aid recipients, and expanding child status to cover closely analogous cases."⁵⁶ Finally, the court went on to cite various state statutes that have heightened consent requirements and impose time limitations to "ensure that child status and inheritance rights go only to those whom the deceased parent intended to support as a child."⁵⁷

51. *Id.* at 58.

52. *Id.* at 58-59.

53. *Id.* at 59.

54. *Id.*

55. *Id.* at 59. (For example, the court here was focused on children who were dependent upon the deceased wage earner at the time of the wage earner's death. This includes proven biological children of the insured provided that the insured was living with or contributing to the child at the time of death. The court also noted that according to the Act, child status can be granted to those "whose parentage is acknowledged, decreed, or implicit in a contribution order" as it "suggests similar dependence on the wage earner because the acknowledgment or decree must occur prior to the insured's death and because such acknowledgment or decree is likely to be accompanied by financial outlays from the insured." The court wrote that "where state intestacy law provides that a child may take personal property from a father's estate, it may reasonably be thought that the child will more likely be dependent during the parent's life and at his death." *Id.* at 58 (citing *Mathews v. Lucas*, 427 U.S. 495, 514 (1976)).

56. *Id.* at 59.

57. *Id.*

The Supreme Court's Holding

Ultimately, the Supreme Court was persuaded by the Administration's reading of the Act, and in a decision that closely mirrors *Schafer*, the Court reasoned that the Administration's view is "better attuned to the statute's text and its design to benefit primarily those supported by the deceased wage earner in his or her lifetime."⁵⁸ After examining the statutory definition of a "child" as laid out in section 416(h), the court concluded that section 416(h) of the act governs the meaning of "child" in section 416(e)(1), meaning that section "416(h) is a gateway through which all applicants for insurance benefits as a 'child' must pass."⁵⁹

The Court looked to the Administration's interpretation of those provisions through its regulations, which state that an applicant may be entitled to benefits "as a natural child, legally adopted child, stepchild, grandchild, stepgrandchild, or equitably adopted child."⁶⁰ The regulations mirror § 416(h)(2) and (h)(3), stating in relevant part that an applicant may qualify for insurance benefits as a "natural child" by meeting any of four conditions: (1) the applicant "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..."⁶¹ In citing to *Beeler*, the Court held that "[t]he regulations make clear that the [Administration] interprets the Act to mean that the provisions of § 416(h) are the exclusive means by which an applicant can establish 'child' status under § 416(e) as a natural child."⁶²

According to the Court, this is a reasonable interpretation of the Act because "requiring all 'child' applicants to qualify under state intestacy law created a simple test, one that ensured benefits for persons plainly within the legislators' contemplation, while avoiding congressional entanglement in the traditional state-law realm of family relations."⁶³ Ultimately, the Court was not persuaded by Mrs. Capato's arguments that the word "child," as used in the Act, was meant to refer only to the children of married parents, or that biological parentage was intended to be a prerequisite to "child" status under section 416(e).⁶⁴ Further, the Court found it untenable that "biological child of married parents" would cover posthumously conceived children such as the Capato

58. *Astrue*, 132 S. Ct. at 2026.

59. *Id.* at 2029.

60. 20 C.F.R. § 404.354 (2012).

61. *Astrue*, 132 S. Ct. at 2028 (citing 20 CFR § 404.355(a)).

62. *Id.* at 2028-29.

63. *Id.* at 2031.

64. *Id.* at 2033-34.

twins.⁶⁵

Although not tasked with deciding the dependency issue, in its holding the Court acknowledges that posthumously conceived children are outside the Act's central concern, which is children who are dependent upon their parent at the time of death.⁶⁶ In its opinion, the Court reasoned that "because a child who may take from a [decendent's] estate is more likely to be dependent during the parent's life and at his death, "reliance on state intestacy law to determine who is a 'child' serves the Act's driving objective, which is to 'provide . . . dependent members of [a wage earner's] family with protection against the hardship occasioned by [the] loss of [the insured's] earnings.'"⁶⁷ This sentiment was repeated later in the decision when the Court wrote, "the paths to receipt of benefits laid out in the Act and regulations, we must not forget, proceed from Congress' perception of the core purpose of the legislation. The aim was not to create a program 'generally benefiting needy persons;' it was, more particularly, to 'provide . . . dependent members of [a wage earner's] family with protection against the hardship occasioned by [the] loss of [the insured's] earnings.' . . . Reliance on state intestacy law to determine who is a "child" thus serves the Act's driving objective."⁶⁸

In response to the obvious argument that leaving the decision up to the states may allow children who were not originally intended beneficiaries of the Act to receive survivor benefits, the Court writes:

true, the intestacy criterion yields benefits to some children outside the Act's central concern. [. . .] It was nonetheless Congress' prerogative to legislate for the generality of cases. It did so here by employing eligibility to inherit under state intestacy law as a workable substitute for burdensome case-by-case determinations whether the child was, in fact, dependent on her father's earnings.⁶⁹

Essentially, the Court here is approving of the extension of survivor benefits to children that would otherwise fall outside the scope of the Act. It seems likely that posthumously conceived children would almost always fail the "dependency" requirement if this were left up to a case-by-case determination. This is because the other factors the Administration looks to in order to determine dependency would not be possible—the deceased wage earner could not have been living with the child at the time of her death, or actively contributing to the child's support.

Although unanimous Supreme Court decisions are rare, the outcome of this case was predictable. While the Court somewhat sidesteps *Chevron* Step One, it

65. *Id.* at 2030.

66. *Id.* at 2032.

67. *Id.* at 2024-25 (citing *Califano v. Jobst*, 434 U.S. 47, 52 (1977)).

68. *Id.* at 2032.

69. *Id.* at 2032.

is clear that the Social Security Administration was given the authority to act with the force of law through engaging in notice and comment rulemaking, and that it indeed did exercise such authority in issuing regulations related to sections 416(e) and (h).⁷⁰ Further, that this was a longstanding interpretation influenced the Court's decision to hold that the Agency's interpretation was reasonable.⁷¹

This is perhaps a forward-thinking decision: those Justices concerned with issues of federalism and states' rights can be satisfied now that determinations of parentage and intestate succession are left up to the states, and that the Court has avoided "creating [. . .] a body of federal common law about parental status."⁷² Further, those Justices who recognize that there may be situations in which posthumously conceived children should be entitled to survivor benefits can be reassured that those children may receive such benefits without the application of a hard-to-administer dependency determination. Indeed, because it could take Congress a long time to amend the Act to include posthumously conceived children, states may be the best place to start extending benefits and updating the law to reflect new reproductive technologies.

PART II

Proposed Solutions

The main concern raised by the outcome in *Astrue v. Capato* is that state intestacy law is not always "clear" and easy to apply, as the Administration asserted during oral arguments. Moreover, a number of states are operating under outdated laws, which makes their application to posthumous conception uncertain.⁷³ Interestingly enough, this raises the same concern that Justice Breyer had about applying the Social Security Act to new assistive reproductive technologies. Leaving the decision of whether a posthumously conceived child may inherit, and therefore receive public benefits, to states that are ill-equipped legislatively to deal with that question currently produces inconsistent and poorly reasoned results. For application of state intestacy law to truly be a "workable substitute for burdensome case-by-case determinations,"⁷⁴ states must move towards a more uniform approach that clearly and specifically addresses the legal status of posthumously conceived children.

As Justice Breyer noted during oral arguments, "every state has a dozen different variations [on whether a posthumously conceived child can inherit under state intestacy law]. There are uniform acts. There are things you have to

70. See *Chevron* analysis, *supra* note 2.

71. *Astrue*, 132 S. Ct. at 2034.

72. Transcript of Oral Argument at 53:9-10, *Astrue*, 132 S. Ct. 2021 (No. 11-159).

73. *Carpenter*, *supra* note 8, at 362.

74. *Astrue*, 132 S. Ct. at 2023.

acknowledge in writing. It's a very complicated subject."⁷⁵ The best place to start unpacking the concerns raised by granting social security benefits to posthumously conceived children is with the model statutes that specifically address the inheritance rights of such children. First, however, it is important to consider whose interests should be weighed in evaluating these model acts. Part II of this Recent Developments piece will explore the need for a feasible model act, the policy considerations unique to the issue of posthumously conceived children—including whose interests are at stake in drafting model legislation—and finally, will propose which of the model acts is most likely to succeed in a majority of states.

The Need for A Feasible Model Act

In characterizing the process of looking to state intestacy law to determine eligibility for social security survivor benefits as a “workable substitute for burdensome case-by-case determinations,”⁷⁶ Justice Ginsburg fails to address the fact that very few states have laws specifically concerning posthumously conceived children and fails to note how few states have adopted the model acts to which she cites, including the Uniform Probate Code.

It was accepted by the Justices that Congress was not contemplating posthumously conceived children when it drafted the Social Security Act in 1939 since the technology did not yet exist.⁷⁷ As a result, courts have very little legislative guidance in this developing area of jurisprudence. Raymond O'Brien argues that “it is reasonable to question whether the federal benefits should be dependent upon state statutes when the result is to deny benefits to those most vulnerable children.”⁷⁸

O'Brien ignores the potential harm to the Social Security system by extending survivor benefits to children who may not have been dependent upon a wage earner at the time of his or her death. Further, in spite of O'Brien's criticism of tying survivor benefits to state intestacy law, doing so may actually do more to reach children who may not have been the originally intended beneficiaries of survivor benefits than Mrs. Capato's interpretation would have reached.⁷⁹ A model act that accounts for the interests of posthumously conceived children would not categorically deny posthumously conceived children benefits, but rather would simply place reasonable limitations on their ability to inherit under state law, and in turn to receive public benefits. Indeed, O'Brien's concern

75. Transcript of Oral Argument at 40:2-11, *Astrue*, 132 S. Ct. 2021 (No. 11-159).

76. *Astrue*, 132 S. Ct. at 2032.

77. Transcript of Oral Argument at 48:1-18, *Astrue*, 132 S. Ct. 2021 (No. 11-159).

78. O'Brien, *supra* note 6, at 378.

79. This is similar to the Court's reasoning in *Schafer*, where it stated that the Administration's interpretation of the Act “properly includes as children 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.” *Schafer*, 641 F.3d at 59.

highlights the need for a feasible model act so the Administration can actually look to “clear” and “easy to apply” laws in determining eligibility for survivor benefits.

Policy Considerations Relevant to Posthumously Conceived Children

As Christopher Scharman notes, “[r]esolving posthumous children’s capacity to claim a legal relationship with their deceased parents clears the way for taking further measures to protect the welfare of the posthumous child.”⁸⁰ The Court does not address Respondent’s argument that laws concerning the status of posthumously conceived children should be analyzed under heightened scrutiny in an equal protection analysis. Mrs. Capato argued that “under the government’s interpretation . . . posthumously conceived children are treated as an inferior subset of natural children who are ineligible for government benefits simply because of their date of birth and method of conception.”⁸¹ The Court found that posthumously conceived children do not “share the characteristic that prompted [the Court’s] skepticism of classifications disadvantaging children of unwed parents,” and therefore did not decide whether heightened scrutiny would be appropriate were that the case.⁸²

There are, nonetheless, social and emotional concerns raised by denying a child a legal right where a genetic connection already exists. By excluding posthumously conceived children from inheriting from the decedent, states run the risk of stigmatizing and isolating that child, especially if that child is born into a household of ante-mortem children.⁸³ In addition, many posthumously conceived children will grow up in a single-parent household where resources and funds are limited, which makes access to survivor benefits that much more important.⁸⁴

Balancing Competing Interests

Drafting and encouraging the adoption of a model act that specifically addresses the legal status of posthumously conceived children is complicated by the number of groups whose interests are at stake. Justice Breyer noted these complications during oral arguments when he said: “there are already [ante-mortem] children who are eating up all of the money [in the decedent’s estate]. And then some new [posthumously conceived] person shows up, and you have to take the money away from the other children in order to give it to this new

80. Christopher A. Scharman, *Not Without My Father: The Legal Status of the Posthumously Conceived Child*, 55 VAND. L. REV. 1001, 1050 (2002).

81. Brief for Respondent at 42–43 *Astrue v. Capato ex rel. B.N.C.*, 132 S.Ct. 2021 (2012) (No. 11-159).

82. *Astrue*, 132 S. Ct. at 2032.

83. Julie E. Goodwin, *Not All Children are Created Equal: A Proposal to Address Equal Protection Inheritance Rights of Posthumously Conceived Children*, 4 CONN. PUB. INT. L.J. 234, 283 (2005).

84. See Carpenter, *supra* note 8, at 384.

child. And all the time, you don't know if that's what the parent who is dead really wanted."⁸⁵

As Justice Breyer articulated, at stake in these cases are the interests of: 1) the posthumously conceived child, 2) the interests of the adults seeking to procreate, which includes a) the surviving partner, and b) the decedent; 3) the states, which have the conflicting responsibility not only to act in the best interest of a child, but also to efficiently and definitively distribute inheritance and public benefits; and 4) any ante-mortem children of the decedent who may be affected by the redistribution of the decedent's estate.⁸⁶ The goal in drafting a successful model act should be to balance the concerns of all interested parties.

A viable model act that addresses the interests of all of the above mentioned stakeholders should apply the following conditions: 1) the decedent's consent to the use of his or her genetic material, and the consent to support any resulting child, and 2) a limitation on the amount of time a surviving partner has to conceive using the decedent's genetic material. The drafters of the most recent Restatement of Property, Wills, and other Donative Transfers endorse the view that states should consider consent and time limitations. In expressing their support for the "reexamination . . . that a child who is conceived and born after the decedent's death cannot be an heir . . ."⁸⁷ they wrote that "were such a child permitted to inherit from the decedent, the child would have to be *born within a reasonable time after the decedent's death* in order not to delay distribution of the estate unduly. The child would also *need to be born in circumstances indicating that the decedent would have approved of the child's right to inherit.*"⁸⁸ The Restatement authors would have approved of the Capato twins' inheritance, as they assert that "[a] clear case for granting the right of inheritance would be that of a child produced by artificial insemination of the decedent's widow with his frozen sperm."⁸⁹

However, as Benjamin Carpenter notes, "legislatures should be more precise in their statutes to provide predictability"⁹⁰ than the authors of the Restatement have been. The Restatement does not explicitly elaborate on what should constitute a "reasonable amount of time" or exactly what "circumstances"

85. Transcript of Oral Argument at 44, *Astrue v. Capato* ex rel. B.N.C., 132 S.Ct. 2021 (2012) (No. 11-159).

86. See Morgan Kirkland Wood, *It Takes a Village: Considering the Other Interests at Stake When Extending Inheritance Rights to Posthumously Conceived Children*, 44 GA. L. REV. 873, 901-04 (2010).

87. Restatement (Third) of Prop.: Wills & Donative Transfers § 2.5 (1999).

88. *Id.* (emphasis added).

89. *Id.* The authors refer to a proposal for allowing a genetic child of the decedent to inherit who is produced by assisted reproductive technology within two years after the decedent's death plus 300 days, the presumed period of gestation. *Id.* (citing Ronald Chester, *Freezing the Heir Apparent: A Dialogue on Postmortem Conception, Parental Responsibility, and Inheritance*, 33 HOUS. L. REV. 967 (1996); Ronald Chester, *To Be, Be, Be . . . Not Just to Be: Legal and Social Implications of Cloning for Human Reproduction*, 49 FLA. L. REV. 303 (1997)).

90. Carpenter, *supra* note 8, at 376.

would indicate that the decedent would approve of the child's right to inherit. If model act drafters include more specific provisions addressing consent and finality concerns in posthumous conception cases, they will better satisfy all stakeholders' interests.

Requirements For a Feasible Model Act

Consent

As the court noted in *Schafer*, heightened requirements such as written consent would ensure that inheritance rights would only go to those children whom the deceased parent intended to support.⁹¹ For purposes of judicial economy, and in the interest of truly representing the best interests of the deceased, consent should be required. The question then becomes – consent to what, and what must it look like?⁹² All six legislatures that have granted status to posthumously conceived children require the decedent's consent to support a posthumously conceived child, and the Massachusetts Supreme Court also requires the decedent's consent to use his genetic material.⁹³ Similarly, the Massachusetts Supreme Court in deciding *Woodward v. Commissioner of Social Security* expressed the view that a “decedent's silence . . . ought not to be construed as consent”;⁹⁴ however, the court there did not require written consent.⁹⁵

Consent is most clearly important to the interests of the decedent. For example, without consent of the gamete provider to have his sperm used after his death, it would be difficult to know whether the deceased only intended his sperm to be used during his lifetime. However, consent requirements that are too strict—for example, only allowing for consent in a written record—could be overly exclusive. Some argue that this is particularly true, since a state will generally allow a non-posthumously conceived biological child to inherit when there is not a will. This means that the lack of written consent for a posthumously conceived child should not entirely preclude that child from inheriting under state law, and by extension receiving survivor benefits when there are other indications that the decedent expressed consent.⁹⁶

Carpenter discusses whether states should require merely the decedent's consent to the posthumous use of his genetic material, or additionally require

91. *Schafer v. Astrue*, 641 F.3d 49, 59 (4th Cir. 2011).

92. *See* Carpenter, *supra* note 8, at 418–19.

93. *Id.* at 418.

94. 760 N.E. 2d 257, 269 (Mass. 2002) (internal quotations omitted); *see also* O'Brien, *supra* note 6, at 371–72.

95. 760 N.E. 2d at 269.

96. *See generally* Alison Slater, *Inconceivable Consequences: Why The Recent UPC Amendments Were Correct to Reject A “Consent In a Record” Requirement*, 23 QUINNIPIAC PROB. L.J. 80 (2009) (arguing in favor of a rebuttable presumption of intent to conceive where a decedent voluntarily deposited genetic material for future use).

consent to support a posthumously conceived child.⁹⁷ California requires only consent to the use of the decedent's genetic material, whereas Massachusetts requires both.⁹⁸ Carpenter suggests an opt-out "irrebuttable presumption" approach to the intent to support.⁹⁹ He argues that it would be a rare situation in which an individual consented to the posthumous use of their genetic material by their spouse or partner, but did not intend to support the resulting child.¹⁰⁰ Carpenter states that for the minority of decedents who would not wish to support the child they consented to creating, "it would be their obligation to provide otherwise in a will."¹⁰¹ Carpenter's view, however, is not supported by empirical evidence and would only open up another grey area where many already exist.

A better approach than an irrebuttable presumption would be to require written consent in some cases, but allow consent to be established through the actions of the decedent in others. As Kristine Knaplund writes, this "strikes an appropriate balance between strict legal requirements and reality."¹⁰² Requiring written consent runs the risk of denying a child financial support "just because the adults failed to comply with some legal formality."¹⁰³ In addition to the Massachusetts Supreme Judicial Court in *Woodward*, the Ninth Circuit has also held in *Gillet-Netting*, and affirmed again in *Vernoff v. Astrue*,¹⁰⁴ that a decedent can establish consent to be a parent of a posthumously conceived child absent a written record. Factors the Ninth Circuit considered in holding that a decedent intended to be treated as a parent of a posthumously conceived child included statements to the decedent's wife and others, as well as the fact that the decedent deposited sperm shortly before his death.¹⁰⁵

Time Limits

One of Justice Ginsburg's concerns was that "no time constraints attend the Third Circuit's ruling in this case under which the biological child of married parents is eligible for survivor benefits, no matter the length of time between the father's death and the child's conception at birth."¹⁰⁶ The same concern was raised during oral arguments when Justices Roberts and Sotomayor both asked the Respondent whether, under her interpretation of the statute, children could

97. Carpenter, *supra* note 8, at 418–19.

98. *Id.* at 418.

99. *Id.* at 420.

100. *Id.* at 420–21.

101. *Id.* at 421.

102. Kristine Knaplund, *Children of Assisted Reproduction*, 45 U. MICH. J.L. REFORM 899, 916 (Summer 2012).

103. *Id.* at 920 (quoting Courtney G. Joslin, *Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology*, 83 S. Cal. L. Rev. 1177, 1226 (2010)).

104. 568 F.3d 1102, 1106–08 (9th Cir. 2009); *see also id.* at 1108 n6.

105. *See* Knaplund, *supra* note 102, at 920 (citing *Gillet-Netting v. Barnhart*, 371 F.3d 593, 594–95 (9th Cir. 2004)).

106. *Astrue v. Capato*, 132 S. Ct. 2021, 2023 (2012).

receive social security survivor benefits if they were conceived many years after their parent's death.¹⁰⁷

It does seem problematic, if not absurd, to give benefits to a child conceived by a terminally ill father shortly before his death, but not if the child were conceived the day after his death, as the Cancer Legal Resource Center argues in its amicus brief.¹⁰⁸ However, there should be a limit on the amount of time a surviving partner has to conceive using the decedent's genetic material. Imposing such a limit serves a broader range of interests, including those of the surviving partner, the decedent, and any ante-mortem children.

A common criticism of placing too many restrictions on a posthumously conceived child's ability to inherit is that it may "have the effect of interfering with the timing and mechanics of a parent's decision to have children."¹⁰⁹ Such an effect would be problematic, as historically courts have treated one's right to procreate as fundamental.¹¹⁰ However, simply placing a time limit on when a posthumously conceived child will be eligible for inheritance avoids any unfair or unduly burdensome restrictions on the surviving partner's choice in conceiving (as categorically prohibiting posthumously conceived children from inheriting or receiving survivor benefits would), and also adequately addresses the states' interest in efficiency and finality in administering estates of the deceased.

As Julie Goodwin points out, not imposing such a time restriction could cause a deceased parent's estate to be held open indefinitely in anticipation of a possible posthumously conceived child, causing pre-existing children to wait longer to collect their inheritance.¹¹¹ Further, as the New Jersey Superior Court noted in *Kolacy*, heirs who are already ascertained at the time of death are entitled to receive their shares of the decedent's property reasonably quickly.¹¹² Even the Supreme Court has weighed in on this issue, emphasizing in *Lalli v. Lalli* the importance of states' interest in orderly and efficient estate administration.¹¹³

Carpenter suggests that time limitations should merely be a "procedural" requirement and should not affect a child's ability to inherit. He argues that the time limitation should only affect liability for the distribution of the estate, and that "[o]nce the time limitation has passed, a later born child, as an heir, should still be entitled to receive a share of any assets that remain in the estate at the time of that child's birth."¹¹⁴ This, however, would only serve the interests of the

107. Transcript of Oral Argument at 36, 48, *Astrue*, 132 S.Ct. 2021 (No. 11-159).

108. Brief for Cancer Legal Resource Center of the Disability Legal Resource Center as Amicus Curiae Supporting Respondents at 12, *Astrue v. Capato*, 132 S. Ct. 2021 (No. 11-159).

109. *Id.* at 15.

110. *See, e.g.*, *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

111. Goodwin, *supra* note 83, at 274.

112. *In re Estate of Kolacy*, 753 A.2d 1257, 1261-62 (N.J. Super. Ct. Ch. Div. 2000).

113. *Lalli v. Lalli*, 439 U.S. 259, 268-71 (1978).

114. Carpenter, *supra* note 8, at 425.

posthumously conceived child and the surviving parent, at the expense of other stakeholders. Carpenter's position would impose essentially meaningless time limits, and would fail to assuage the Court's concerns.

The overarching question here is how shortly after a parent's death must the child be born to be able to inherit under state law? State approaches to this vary, with some states requiring a child be born within two years after the decedent's death, others requiring the child must be "in utero" within a certain period of time, and still others that do not address a time limitation at all.¹¹⁵ Of all the possibilities, three years is the most reasonable amount of time. As will be discussed below, this is the amount of time the drafters of the Uniform Probate Code decided was appropriate—allowing a posthumously child to inherit if she was conceived within thirty-six months or born within forty-five months of the parent's death.¹¹⁶ The drafters of the UPC noted that a three-year time limit would allow the surviving partner enough time to grieve, and would also account for a reasonable number of attempts to conceive.¹¹⁷ Adopting this provision would therefore best serve the interests of the surviving partner.

Model Acts

Recognizing the need for legislative guidance, the National Conference of Commissioners on Uniform State Laws (NCCUSL), and the American Bar Association (ABA), have attempted to address the status of posthumously conceived children and the above-mentioned concerns. The remainder of this Recent Developments Piece will focus on the Uniform Parentage Act, the ABA Model Act, and the Uniform Probate Code. Finally, it will explore the arguments of critics who assess whether these acts solve the consent and timing issues explained above.

The Uniform Parentage Act

The NCCUSL promulgated the Uniform Parentage Act (UPA) in 2000, amending it in 2002. The 2002 version of the Act includes Article 7, which incorporates the Uniform Status of Children of Assisted Conception Act of 1988.¹¹⁸ Recognizing the need for uniform state law on the subject, the comment to Article 7 notes: "absent legislation there are no clear rules for determining the parentage of a child resulting from a pre-zygote implanted after divorce or after the death of the would-be father. Disposition of such pre-zygotes, or even issues of their ownership, create not only broad publicity, but also are problems on which courts need guidance."¹¹⁹

115. *See id.* at 424–25.

116. UNIF. PROBATE CODE § 2-705(g)(2) (2008); Carpenter, *supra* note 8, at 373–74.

117. UNIF. PROBATE CODE § 2-120(k) cmt (2008); *see also* Carpenter, *supra* note 8, at 373–4.

118. O'Brien, *supra* note 6, at 364.

119. UNIF. PARENTAGE ACT § 707, cmt. (Dec. 2002).

In order to be considered a parent of a posthumously conceived child under the UPA, the decedent must have “consented in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child.”¹²⁰ As Julie Goodwin notes, this provides for an “opt-in” approach¹²¹ in which, rather than a presumption of parentage, a child can inherit if that parent gave consent in a document to be the parent of a posthumously conceived child.¹²²

Seven states have adopted the 2000 UPA, but do not expressly address posthumously conceived children in their probate code.¹²³ Furthermore, while the UPA requires written consent, it does not provide for a reasonable time limitation, as suggested by the Restatement. This means the UPA is both over- and under-inclusive. Making written consent the only way to “confer legal parentage on a decedent of a child conceived through postmortem conception”¹²⁴ could deprive otherwise deserving children of financial support. Knaplund expresses this concern in her discussion of *Gillett-Netting*. The husband in *Gillett-Netting* deposited sperm prior to receiving chemotherapy treatments that would render him sterile.¹²⁵ More importantly, “[h]e confirmed that he wanted [his wife] to have their child after his death using his frozen sperm.”¹²⁶ Under the UPA, Mrs. Gillett-Netting’s “children born using her husband’s frozen sperm would not be [her husband’s] legal children and thus would not be entitled to inherit in intestacy.”¹²⁷

The UPA would poorly serve the interests of any ante-mortem children because it strictly requires written consent. The UPA would also poorly serve the interests of the state because it fails to impose a reasonable time limitation and does not specifically address the legal status of posthumously conceived children for probate purposes. Therefore, the UPA as written is not an adequate model statute.

120. UNIF. PARENTAGE ACT § 707 (Dec. 2002): Parental Status of Deceased Individual.

121. Goodwin, *supra* note 83, at 255-56.

122. UNIF. PARENTAGE ACT § 707 (Dec. 2002): Parental Status of Deceased Individual. “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 consented in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child.*” (emphasis added). Comment to Section 707 notes that “absent consent in a record, the death of an individual whose genetic material is subsequently used either in conceiving an embryo or in implanting an already existing embryo into a womb *ends the potential legal parenthood of the deceased. This section is designed primarily to avoid the problems of intestate succession which could arise if the posthumous use of a person’s genetic material leads to the deceased being determined to be a parent.* Of course, an individual who wants to explicitly provide for such children in his or her will may do so.” (emphasis added).

123. See Carpenter, *supra* note 8, at 403, Table 1: Approaches to Posthumously Conceived Children for Probate Purposes by Jurisdiction.

124. Kristine Knaplund, *Symposium: The Uniform Probate Code: Remaking American Succession Law*, 45 U. MICH. J.L. REFORM 899, 910 (Summer 2012).

125. See *id.* at 920.

126. *Id.*

127. *Id.*

ABA Model Act

The ABA Proposed Model Act on Assisted Reproduction was approved in 2007, and no state has adopted it to date.¹²⁸ The language concerning posthumous conception in the Model Act is sparse. Section 501(3)(f) deals with parental status following the death of an intended parent. The drafters write that “an individual born as a result of embryo transfer after the death of an intended parent or gamete provider is not the child of that gamete provider or intended parent unless the deceased individual consented in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child.”¹²⁹ Section 607 echoes section 501(3)(f)’s written record consent requirement.

According to the drafters, the Model Act tries, where possible, to track the provisions of the UPA.¹³⁰ Like the UPA, the Model Act, insofar as it applies to the parental status of a deceased individual, does not make reference to a time for conception to take place in order for the child to be considered a child of the decedent. Rather, the Model Act allows the intended parent to specify the length of time for which the consent remains valid.¹³¹ Allowing the parent to specify the length of time for which the consent remains valid essentially allows the decedent’s interests to trump those of the state and ante-mortem children. For example, for the reasons outlined above, it is important to place reasonable time limits on when a surviving partner may use a decedent’s genetic material to conceive a child. Giving the intended parent free reign to specify the length of time for which consent remains valid may force the state to keep the decedent’s estate open for an unreasonable amount of time—frustrating not only the state’s interest in efficient administration of estates, but also any ante-mortem children’s interests in the finality of their inheritance. Therefore, although the ABA Model Act is a positive effort towards uniform legislation concerning posthumously conceived children, by failing to address both consent *and* timing issues, it is not a statute likely to be adopted by many states concerned with the efficient administration of estates. Moreover, it is too closely related to the UPA to be any sort of significant improvement upon the NCCUSL’s attempt at addressing the status of posthumously conceived children.

Uniform Probate Code

Unlike the UPA and the ABA Model Act, the UPC more clearly addresses

128. See Carpenter, *supra* note 8, at 375.

129. See MODEL ACT GOVERNING ASSISTED REPROD. TECH. (2008), available at <http://apps.americanbar.org/family/committees/artmodelact.pdf>.

130. Introduction, PROPOSED MODEL ACT GOVERNING ASSISTED REPROD. “The sections dealing with parentage are intended, as much as possible, to be consistent with and to track the corresponding provisions of the Uniform Parentage Act of 2000, as amended in 2002.”

131. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 202(1)(e) (2008), available at <http://apps.americanbar.org/family/committees/artmodelact.pdf>.

both timing and consent issues. The UPC provides that “an individual is a parent of a child of [artificial reproductive technology] who is conceived after the individual’s death and the child is treated as in gestation at the individual’s death for purpose of intestate succession if 1) the child is in utero not later than 36 months after the individual’s death, or 2) born not later than 45 months after the individual’s death [36 months plus 9 months for gestation].”¹³² Under the UPC the deceased parent must have intended to be “treated as a parent,” however, no definition of “treated as a parent” is provided.¹³³ Intent *can* be shown by a signed record that, considering all the facts and circumstances, evidence the individual’s consent.¹³⁴ The drafters even provide an example of what such a record should look like in a Legislative Note to section 2-120.¹³⁵ In order to promote efficiency, the drafters of the UPC encourage states to “enact a provision requiring genetic depositories to provide a consent form that would satisfy subsection (f)(1),”¹³⁶ and refer states to California Health and Safety Code section 1644.7 and .8 as a possible model for such a consent form.¹³⁷ In the absence of a record, consent can be satisfied under section 2-120 if the decedent “(A) functioned as a parent of the child no later than two years after the child’s birth; (B) intended to function as a parent of the child no later than two years after the child’s birth but was prevented from carrying out that intent by death, incapacity, or other circumstances; or (C) intended to be treated as a parent of a posthumously conceived child, if that intent is established by clear and convincing evidence.”

Critics of the consent-in-a-record requirement, including Alison Slater, are satisfied that the drafters of the UPC allow consent to be proven by clear and convincing evidence, absent a written record.¹³⁸ In suggesting what might count as “clear and convincing evidence,” Slater writes: “the decedent’s act of depositing and reserving gametic material should be treated as evidence of his intent to parent a child. He undertook the necessary steps to preserve this genetic material, in many cases while mindful of his own mortality.”¹³⁹

Despite being the most comprehensive of the model acts, presently only North Dakota and Colorado have adopted the revised 2008 Uniform Probate Code.¹⁴⁰ As Carpenter notes, a model act could better guide states by defining

132. UNIFORM PROBATE CODE § 2-705(g)(2) (2008); Carpenter, *supra* note 8, at 373-74.

133. Carpenter, *supra* note 8, at 372.

134. Section 2-120(f): “a parent-child relationship exists between a child of assisted reproduction and an individual other than the birth mother . . . if the individual . . . signed a record that, considering all the facts and circumstances, evidence the individual’s consent.” <http://www.uniformlaws.org/shared/docs/probate%20code/upc%202010.pdf>.

135. See Legislative Note to § 2-120, available at <http://www.uniformlaws.org/shared/docs/probate%20code/upc%202010.pdf>.

136. This is the provision of the Act that requires consent in a record.

137. See Legislative Note to § 2-120, available at <http://www.uniformlaws.org/shared/docs/probate%20code/upc%202010.pdf>

138. Slater, *supra* note 96, at 94.

139. *Id.* at 96.

140. *Id.*

exactly what “treated as a parent” means.¹⁴¹ Despite this oversight, of the three model acts, the UPC best addresses the concerns of all stakeholders. It does so by allowing the decedent’s consent to be satisfied in a way that strikes a balance between legal formalities and reality, and in imposing a reasonable time limit on inheritance rights.

Some scholars have attempted to fill the gaps in the dominant model acts, and to elaborate on requirements such as time limitations. For example, Morgan Kirkland Wood proposes a model act that would impose different time limits depending upon the existence of other children. Wood suggests that states should have a less restrictive window of time if the decedent left only a partner, a more restrictive window if other children exist, and the most restrictive limit if the children are not related to the surviving partner.¹⁴² Wood fails to suggest what the specific time limitations should be and how states should decide the difference in time windows for each possible situation. While not particularly problematic on its face, any act which uses a sliding scale rather than a categorical rule can present administrability issues. Even if Wood had offered more specific time windows for different scenarios, it is unclear what, if any, time limits she could propose that would not seem arbitrary. Moreover, her rationale for imposing varying time restrictions is not convincing. For example, Wood reasons that imposing varying levels of restrictiveness balances the interests of both the surviving partner and existing children;¹⁴³ however, in calling for a more restrictive limit if other children exist than if the decedent left only a partner, Wood is merely prioritizing ante-mortem children’s interests over the state’s interest in finality and efficient administration of estates.

In addition, Julie Goodwin argues that although the UPC successfully balances important state concerns against the interest of the child, it can be further refined to allow posthumously conceived children to inherit under additional circumstances without sacrificing important state interests.¹⁴⁴ Goodwin, however, goes too far in proposing a presumption of consent—an “opt-out” approach that would put the burden on the party seeking to preclude the child’s inheritance to show the decedent did not intend to conceive after death.¹⁴⁵ Even restricting this presumption to married couples could be problematic because cases where consent is challenged would most likely require more discovery, and would delay the proceedings. In addition, to deter potential windfalls for plaintiffs, the burden of production and persuasion should be on the party seeking to claim benefits or inheritance rights on behalf of the

141. Carpenter, *supra* note 8, at 372.

142. Wood, *supra* note 86, at 909 (reasoning that since time limitations “affect both surviving partners [by restricting the time window in which they could conceive an heir of the decedent] and existing children [by providing a definite time after which the decedent’s estate is no longer vulnerable to challenge], states should set different time limitations depending on the existence of other children.”).

143. *See id.*

144. Goodwin, *supra* note 83, at 280.

145. *Id.*

decedent's children.

Although the UPC balances the interests of all stakeholders, and is more specific and comprehensive than the UPA and the ABA Model Code, it is not without its flaws. Some states may be hesitant to adopt the UPC because of the broad presumption of consent it creates to be a parent of a posthumously conceived child for a married person, and the fact that the presumption applies even in cases in which the decedent's gametes were retrieved after his or her death, or the decedent's gametes were not used at all to create the [posthumously conceived] child.¹⁴⁶ The argument is that this may encourage postmortem retrieval of sperm or ova.¹⁴⁷ In spite of the less stringent consent requirement, a state still may find the UPC more desirable than the UPA because of the UPC's time limits on posthumous conception, which allow probate to close.¹⁴⁸

Additionally, although the majority of posthumous conception cases involve situations in which a woman later uses her deceased husband's sperm to conceive a child, it is worth exploring other situations that may push the limits of the Court's and states' comfort in allowing posthumously conceived children to inherit, and in turn receive survivor benefits. For example, one can imagine a situation in which a woman dies after freezing her eggs, and leaves them with her husband, along with her permission for him to hire a surrogate gestator to give birth to her "child."

The UPC specifically addresses this type of a situation. As Kristine S. Knaplund wrote, "the UPC provides several ways to establish a parent-child relationship between a child and 'an individual whose sperm or eggs were used after the individual's death . . . to conceive a child under a gestational agreement entered into after the individual's death.'"¹⁴⁹ Similar to the requirements of UPC Section 2-120, Section 2-121(e) provides that an individual's consent to be treated as a parent of the child can be shown by: "(1) a record, signed by the individual that, considering all the facts and circumstances, evidences the individual's intent; or (2) other facts and circumstances establishing the individual's intent by clear and convincing evidence."¹⁵⁰ Further, "UPC Section 2-121 raises a presumption of consent to a gestational agreement after a spouse's death if three requirements are met. First, the decedent must have deposited his or her gametes (sperm or ova) before death at a time when the decedent was married to the intended second parent and no divorce proceedings were pending; second, the decedent's gametes must be used to conceive the child; and third, the decedent's surviving spouse must function as a parent of the child within two years of the child's birth"¹⁵¹ A state concerned with placing limits on posthumous conception therefore may prefer the stricter gestational agreement

146. See UNIF. PROBATE CODE §2-120(h)(2) (2008).

147. See Knaplund, *supra* note 102, at 910.

148. See *id.*

149. *Id.* at 912.

150. See *id.* at 913.

151. *Id.*

requirements of the UPA to the UPC.¹⁵²

Conclusion

Ultimately, the Supreme Court reached a sound and predictable decision in *Astrue v. Capato*. Given the high level of deference afforded to agencies under *Chevron*, it came as no surprise that the Court found the Administration's interpretation of the Act to be reasonable. Further, for those who advocate that posthumously conceived children should receive survivor benefits, the decision avoids a complicated dependency determination, and grants posthumously conceived children a presumption of dependence if they qualify to inherit under the applicable state intestacy law. This extends the reach of the Act while still keeping in mind its original intended beneficiaries. It also ensures greater administrability and efficiency in enforcing the Act. However, as discussed above, the outcome for posthumously conceived children now depends upon whether the state in which the deceased wage earner was domiciled has explicitly addressed the status of posthumously conceived children. That is why the time is now ripe for states to develop clear and easy to apply rules regarding the inheritance rights of posthumously conceived children.

As noted by Justice Breyer, many stakeholders' interests are present when determining whether a posthumously conceived child may inherit under state intestacy law, and in turn receive survivor benefits. A law which balances stakeholders' interests would require consent, written or otherwise, to the use of genetic materials after one's death, as well as intent to support any resulting child. Furthermore, such a law would also impose a reasonable time restriction during which the posthumously conceived child could inherit. This is a view endorsed both by the court in *Schafer* and by the Court in *Astrue v. Capato*.

One option for states, rather than choosing between model acts, is to adopt a "hybrid" model, utilizing the best aspects from each act. California and Louisiana have adopted a UPA-UPC hybrid, which utilizes the written consent requirement of the UPA, and the timetable requirement of the UPC.¹⁵³ Ultimately, while states will share the same general interests, each state may have different policy concerns, so there may be no "one size fits all" model act. Regardless, given the amount of judicial guidance now present, states have few excuses for not reconsidering their intestacy laws as they relate to posthumously conceived children.

152. UNIF. PROBATE CODE §809(a) states that a gestational agreement that is not judicially validated is not enforceable.

153. See Knaplund, *supra* note 102, at 918-19.