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# Symposium: The Legal and Ethical Implications of Posthumous Reproduction

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# SYMPOSIUM: THE LEGAL AND ETHICAL IMPLICATIONS OF POSTHUMOUS REPRODUCTION

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I. INTRODUCTION .....	1
II. POSTHUMOUS REPRODUCTION.....	2
III. TITLE II OF THE SOCIAL SECURITY ACT .....	3
IV. ASTRUE V. CAPATO.....	4
V. OVERVIEW OF THE ARTICLES IN THIS SYMPOSIUM.....	8
A. <i>Professor Jessica Knouse</i> .....	8
B. <i>Professor Hilary Young</i> .....	8
C. <i>Professor Maya Sabatello</i> .....	8

## I. INTRODUCTION

On March 22, 2013, the *Journal of Law and Health* of Cleveland-Marshall College of Law hosted a symposium entitled the “Legal and Ethical Implications of Posthumous Reproduction” in response to the United States Supreme Court case *Astrue v Capato*. In *Astrue*, Karen Capato used Robert Capato’s sperm to successfully conceive twins by in vitro fertilization eighteen months after Robert Capato’s death.<sup>1</sup> Karen then applied for Social Security Survivorship Benefits on behalf of the twins, but to her dismay the Social Security Administration denied her application, prompting litigation on the twins’ behalf.<sup>2</sup>

Ms. Capato appealed her case to a federal district court where the court was asked to resolve whether her posthumously conceived children were eligible for Social Security Survivorship Benefits under Title II of the Social Security Act. Ms. Capato argued that the twins were eligible because they were the biological children of Robert Capato.<sup>3</sup> The Social Security Administration disagreed with Ms. Capato, arguing that the twins claim should be denied because they were ineligible under Florida’s intestacy law.<sup>4</sup> Florida’s intestacy law denies such benefits to

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<sup>1</sup> *Astrue v. Capato*, 132 S.Ct. 2021, 2025–26 (2012).

<sup>2</sup> *Id.* at 2025.

<sup>3</sup> *Id.* at 2029.

<sup>4</sup> *Id.*

posthumously conceived children and, therefore, the administration concluded, the twins were ineligible for the benefits.<sup>5</sup>

The Supreme Court held that the Social Security Administration's reading of Title II of the Social Security Act deserved deference regarding inheritance rights of posthumously conceived children.<sup>6</sup> Writing for the unanimous Court, Justice Ginsberg noted that the lower court's interpretation of "child" was correct and served the core purpose of the Act, which was to provide benefits for dependents of wage earners after their death.<sup>7</sup>

## II. POSTHUMOUS REPRODUCTION

Posthumous reproduction is the possibility of conceiving a child after the sperm or egg donor dies. One of the more important interests considered when debates concerning posthumous reproduction occur is an individual's right to reproduce and build a family. In 1942, Justice William Douglas stated that the right to procreate is one of the most basic civil rights of man when the Supreme Court struck down Oklahoma's plan to sterilize criminals in the state.<sup>8</sup> With the advent of new reproductive technologies—such as surrogacy, artificial insemination, and other forms of assisted technology—individuals now have the ability to procreate in ways not available in 1942 when Justice Douglas wrote the *Skinner* opinion.

The ability to conceive a child even after the death of the child's biological parent is a significant scientific achievement, but has complicated regulations that did not consider such technological advancements in reproductive capabilities. Intrauterine reproduction, or artificial insemination as it is commonly called, has been successfully used to conceive children since 1866.<sup>9</sup> However, only recently has technology developed a method in which gametes can be successfully preserved for long periods of time and used to conceive a child—long after the biological parent has been dead.<sup>10</sup> Such scientific capabilities in posthumous reproduction have caused courts to rethink traditional notions of parenthood and inheritance.<sup>11</sup>

The way in which inheritance rights are provided for posthumously born children is an ongoing debate in America, as many states deal with children born from the procedure differently.<sup>12</sup> The question of whether posthumously born children are eligible for the benefits provided under the Social Security Act has been one of the

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 2034.

<sup>7</sup> *Id.* at 2033.

<sup>8</sup> *Skinner v. State of Oklahoma*, 316 U.S. 535, 543 (1942) (holding that compulsory sterilization could not be imposed as a punishment for a crime).

<sup>9</sup> See *Johnson v. Super Ct.*, 101 Cal. App. 4th 869, 881 (Cal. Ct. App. 2002).

<sup>10</sup> Charles P. Kindregan, Jr., *Dead Dads: Thawing an Heir From the Freezer*, 35 WM MITCHELL L. REV. 433, 434 (2009).

<sup>11</sup> See *Hecht v. Superior Court (Kane)*, 20 Cal. Rptr. 2d 275 (Cal. Ct. App. 1993) (finding that the act of posthumous reproduction is not against public policy and the court abused its discretion in ordering that a decedent's sperm be destroyed).

<sup>12</sup> See *Hecht v. Superior Court*, 59 Cal. Rptr. 2d 222 (1996). In *Hecht*, a deceased man's frozen sperm was awarded to his girlfriend pursuant to his will after a 6 year long battle with the decedent's children. See *id.*

most recent issues debated. Most states simply assume that someone cannot be the father of a child nine months after the death of that person.<sup>13</sup> In *Astrue*, the Supreme Court was asked to determine whether a pair of twins born a year after their father's death were eligible for Social Security benefits when those benefits were traditionally only afforded to dependents. Arguably, the twins were not dependent on their father because he died before they were even conceived.

### III. TITLE II OF THE SOCIAL SECURITY ACT

The Social Security Act was amended in 1939 to provide monthly benefit payments to surviving family members of deceased wage earners.<sup>14</sup> The purpose behind the act was to provide economic protections for dependent family members in the event an insured wage earner in the family would die. Providing benefits to surviving children of a deceased wage earner is one of the many categories of benefits offered. For children to be eligible for benefits under the section entitled "Child's Insurance Benefits," the applicant must be a "child" of the wage earner. The threshold determination of an applicant to receive benefits is that the child must be unmarried, below a specific age limit (which is usually 18 or 19), and dependent on the insured at the time of the insured's death.<sup>15</sup>

The task the Supreme Court had in *Astrue* was to determine whether the Capato twins were considered children of Robert Capato under the Act in order to receive the benefits. Section 402(d) of the Act provides that "[e]very child (as defined in section 416(e) of this title)" of a deceased insured individual "shall be entitled to a child's insurance benefit."<sup>16</sup> Section 416(e) subsequently states that "[t]he term child means (1) the child or legally adopted child of an individual, (2) a stepchild [under certain circumstances], and (3) . . . the grandchild or stepgrandchild of an individual or his spouse [who meets certain conditions]."<sup>17</sup> As the Supreme Court points out, § 416(e)(1) does nothing more than simply state that a child, under § 416(e)(1), is eligible for benefits if the applicant child is a "child or legally adopted child" of the deceased wage earner.<sup>18</sup> In *Astrue*, the twins were the biological children of Robert Capato and, under this section, seem to be eligible for benefits.

However, a subsequent section in the Act clarifies the intention of the lawmaker's preferred definition of child when drafting the Act. The section is entitled "Determination of Family Status" in § 416(h)(2)(A) of the Act states 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 individual's domiciliary State]."<sup>19</sup> This section plainly states that, to determine whether a particular applicant is a "child" for the

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<sup>13</sup> See, e.g., Fred H. Cate, *Posthumous Autonomy Revisited*, 69 IND. L.J. 1067 (1994); Karin Mika & Bonnie Hurst, *One Way to be Born? Legislative Inaction and the Posthumous Child*, 79 MARQ. L. REV. 993 (1996).

<sup>14</sup> See Social Security Act, 53 Stat. 1364, as amended, 42 U.S.C. § 402 (1939).

<sup>15</sup> *Id.* at § 402(d).

<sup>16</sup> *Astrue*, 132 S.Ct. at 2027.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 2028.

purposes of the statute, the applicant's state intestacy law should be used to determine whether they are a child. Therefore, under the Act, the law of the state where a posthumously born child is born determines whether that child is entitled to Social Security benefits.

The case revolved around a statutory construction issue. Section 416(e) provides that a child of a deceased wage earner is eligible for benefits while § 416(h) states that each state's intestacy law determines who is a child. The Astrue twins were undeniably the children of the wage earner, Robert Capato. Why then is the application of § 416(h) necessary? Some federal courts concluded that the application of § 416(h) was unnecessary when it was indisputable that the twins were Robert Capato's biological children. Others argued that the application of § 416(h) was necessary and that posthumously born children were only eligible for benefits under the Act if the state that they lived in recognized them as children for inheritance purposes.

#### IV. ASTRUE V. CAPATO

In May 1999, Robert and Karen Capato were married.<sup>20</sup> Shortly after the marriage, Robert was diagnosed with esophageal cancer, which has a very poor prognosis.<sup>21</sup> The couple was told by Robert's treating physician that the chemotherapy for the treatment of Robert's cancer could possibly leave him sterile.<sup>22</sup> Since both Robert and Karen wanted children, Robert deposited sperm at a local sperm bank to be frozen, stored, and used for in vitro fertilization after his battle with cancer in the unfortunate event that the treatment did cause Robert to become sterile.<sup>23</sup>

After Robert's diagnosis and during his treatment, the Capatos successfully conceived a child by natural means.<sup>24</sup> Shortly after the birth of this child, Robert's condition rapidly worsened and his health deteriorated. In March of 2002, Robert Capato died of cancer.<sup>25</sup> In Robert's will that he executed three months before his death he named his son and children from a previous marriage as beneficiaries. In the will he never made mention of any future, unborn child.

Nine months after Robert's death, using his deposited sperm, Karen became pregnant via in vitro fertilization and nine months later successfully delivered a pair of twins. Shortly after the twins were born, Karen filed for survivorship benefits on behalf of the twins under Title II of the Social Security Act. To her dismay, the Social Security Administration denied her claim. Karen appealed that decision with the Social Security Administration and a federal court heard her case.

The federal U.S District Court for the District of New Jersey affirmed the agencies denial of benefits to the twins. The district court held that a biological child

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<sup>20</sup> *Astrue*, 132 S.Ct. at 2026.

<sup>21</sup> Peter C. Enzinger, M.D. & Robert J. Mayer, M.D., *Medical Progress: Esophageal Cancer*, NEW ENG. J. MED. 349:23, 2241 (2003) ("Worldwide, esophageal cancer is the sixth leading cause of death from cancer.").

<sup>22</sup> *Astrue*, 132 S.Ct. at 2026.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

of a deceased wage earner conceived through posthumous reproduction must establish that the child could inherit from the deceased under state law pursuant to § 416(h) of the Act.<sup>26</sup> Robert Capato was domiciled in Florida when he died and therefore, the court held, Florida intestacy law applied to the case.<sup>27</sup> Unfortunately for Karen, Florida law only allows for posthumously born children to inherit by express provision in a will, which Robert had in fact made without mentioning any biological children born subsequent to his death.

Karen Capato prevailed in her arguments at the next level. The Court of Appeals for the Third Circuit held that “the undisputed, biological child of a deceased wage earner and his widow” qualify for survivorship benefits and thus the biological child is considered a child under the Act; therefore, there is no need apply § 416(h) to determine whether the twins were eligible under Florida’s intestacy statute.<sup>28</sup> Like the Third Circuit, the Court of Appeals for the Ninth Circuit held in *Gillett-Netting v. Bardhart* that a biological but posthumously conceived child of an insured wage earner and his widow are entitled to Social Security benefits under Title II.<sup>29</sup> However, the Court of Appeals for the Eighth Circuit and the Fourth Circuit held that a posthumously born child’s eligibility for benefits under the act depends on the intestacy law of the state in which the child is domiciled.<sup>30</sup> The Supreme Court of the United States granted *certiorari* in the case to resolve the split in the lower federal courts about the proper standard to determine who is a child of a deceased wage earner under the Social Security Act.

When Karen Capato applied for social security benefits for the twins, the Social Security Administration determined that Florida’s intestacy law did not define the twins as children of Robert Capato. The Eighth Circuit Court of Appeals located in St. Louis agreed with the Social Security Administration and held that § 416(h) of the Act was the “exclusive means to which an applicant can establish ‘child’ status” to be eligible for benefits.<sup>31</sup> Therefore, in the view of the Eighth Circuit and the Social Security Administration, § 416(h) is the gateway to determine whether an applicant is considered a “child” under the Act.

The Third Circuit Court of Appeals and Ms. Capato disagreed with the federal circuit court and the Social Security Administration. The Third Circuit held that § 416(h) is irrelevant when § 416(e) alone is dispositive in determining whether an applicant is a “child.”<sup>32</sup> The Third Circuit reasoned that under § 416(e) “child” means “child of the deceased wage earner,” and the Capato twins were “undeniably the children of Robert Capato, the insured wage earner.”<sup>33</sup> How did the court come

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.* (Under that State’s (Florida’s) law, the court noted, a child born posthumously may inherit through intestate succession only if conceived during the decedent’s lifetime.)

<sup>28</sup> *Capato ex rel. BNC v. Com’r of Social Sec.*, 631 F.3d 626, 631 (3d Cir. 2011).

<sup>29</sup> *Gillett-Netting v. Barnhart*, 371 F.3d 593, 596–97 (9th Cir. 2004).

<sup>30</sup> *Beeler v. Astrue*, 651 F.3d 954, 960–64 (8th Cir. 2011); *Schafer v. Astrue*, 641 F.3d 49, 54–63 (3d Cir. 2011).

<sup>31</sup> *Beeler*, 651 F.3d at 960.

<sup>32</sup> *Capato ex rel. BNC*, 631 F.3d at 630.

<sup>33</sup> *Id.* at 630–31.

to this holding while simply ignoring § 416(h) which provides guidance in determining familial status? The Third Circuit was not ignorant of this section, but reasoned that the caption heading “Determination of Family Status” in § 416(h) was only to be used if the status of a child was in doubt.<sup>34</sup> Whenever the applicant child is the “biological child of a married couple,” as was the case here, there is no reason to determine the child’s family status reasoned the Third Circuit.<sup>35</sup> The court considered each section to control different situations. The Third Circuit interpreted § 416(e) as saying that if there is no family status to determine, there is no need to apply the “Determination of family status” analysis in § 416(h).

Karen Capato’s argument and the Third Circuit’s holding concerning the Capato twins meeting the definition of the word “child” was flawed for a variety of reasons. The Third Circuit’s ruling makes the assumption that it was the intent of Congress when drafting the Act to define the word “child” under § 416(e) to mean exclusively the genetic offspring of a married couple.<sup>36</sup> Dictionary definitions do not support this exclusive definition.<sup>37</sup> Besides, elsewhere in the Act Congress expressly limited certain categories of benefits to only biological children of married couples.<sup>38</sup> Congress would have no use for limitations like these throughout the Act if their intent was to define “child” as, simply, the offspring of a married couple.

Furthermore, nothing in the Act indicates that Congress expressly intended § 416(e)’s use of the word “child” to mean the biological child of a married couple.<sup>39</sup> A married couple raising a child is not conclusive proof that that child’s parentage is certain. For instance, a couple may agree that a child is theirs while the parentage of the child is actually not. Lastly, if Third Circuit’s reasoning was applied correctly to the facts in this case, the Capato twins would not have been born by a married couple because, “[u]nder Florida law, marriage ends upon the death of a spouse,” and therefore § 416(e) would have ceased to apply when Robert died before Karen was pregnant.<sup>40</sup>

In its opinion, the Supreme Court identifies a significant instruction contained in § 416(h)(2)(A): “[i]n determining whether an applicant is the child . . . of [an] insured individual for purposes of this subchapter,” the Commissioner shall apply state intestacy law.<sup>41</sup> “Subchapter” as used in this sentence identifies Subchapter II

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<sup>34</sup> *Id.* at 631.

<sup>35</sup> *Id.* at 630.

<sup>36</sup> *Astrue*, 132 S.Ct. at 2029.

<sup>37</sup> *Id.*; WEBSTER’S NEW INTERNATIONAL DICTIONARY 465 (2d ed.1934) (defining “child” as “[i]n Law, legitimate offspring; also, sometimes, esp. in wills, an adopted child, or an illegitimate offspring, or any direct descendant, as a grandchild, as the intention may appear”); MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 214 (11th ed. 2003) (“child” means “son or daughter,” or “descendant”); *see also* RESTATEMENT (THIRD) OF PROPERTY § 2.5(1) (1998) (“[a]n individual is the child of his or her genetic parents,” and that may be so “whether or not [the parents] are married to each other”). *Id.*

<sup>38</sup> *Id.* at 2029–30.

<sup>39</sup> *Id.* at 2030.

<sup>40</sup> *Price v. Price*, 153 So. 904, 905 (Fla. 1934).

<sup>41</sup> *Astrue*, 132 S.Ct. at 2031.

of the Social Security Act. Subchapter II spans all of §§ 401 through 434—which includes the definition of “child” as used in § 416(e) and § 416(h).

Additionally, deferring to state law to determine whether an applicant is a child, wife, widow, husband, or widower is not uncommon.<sup>42</sup> The core purpose of the Act was to “provide dependent members of a wage earner’s family with protection against hardship occasioned by the loss of an insured’s earnings.”<sup>43</sup> The legislature recognized that a state’s intestacy statute would work much better in determining the eligible individuals (like the Capato twins) rather than a case-by-case basis approach, which would be unquestionably burdensome on the court system. Some states do recognize the right of posthumously born children to inherit under their intestacy statute; others provide separate protections and benefits for posthumously born children.<sup>44</sup> Regardless, the intent of the legislature to allow the states to define the definition of “child” for eligibility purposes was purposeful.

Lastly, the Social Security Administration’s reading of the statute, which is reasonable, deserves deference under *Chevron*.<sup>45</sup> When passing the Act, Congress gave the Social Security Administration the power to promulgate rules concerning benefits under the law. All the justices agreed that the Commissioner’s reading of the statute was appropriate: § 416(h)(2)(A) refers to state law to determine the status of a posthumously conceived child.<sup>46</sup>

For a biological posthumously born child to receive Social Security benefits under the Act, the state’s intestacy statute must provide that the applicant meet the definition of child.<sup>47</sup> Writing for the unanimous court, Justice Ginsburg noted that the circumstances were tragic but made it clear that the statute’s text “scarcely supports” the Supreme Court creating a uniform federal rule corning Social Security benefits for posthumously conceived children.<sup>48</sup> Therefore, for a biological posthumously born child to receive Social Security benefits under the Act, the state’s intestacy statute where the wage earner was domiciled must provide that the applicant meet the definition of “child.” Although this ruling does not create nationwide uniformity in terms of whether posthumously conceived children can claim Social Security benefits, it does provide uniformity in how courts deal with the issue in each state.

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<sup>42</sup> *Id.* (“Section § 416(h)(1)(A) directs that, “for purposes of this subchapter,” the law of the insured’s domicile determines whether “[the] applicant and [the] insured individual were validly married,” and if they were not, whether the applicant would nevertheless have “the same status” as a wife under the State’s intestacy law) (emphasis added). The Act similarly defines the terms “widow,” “husband,” and “widower.” See § 416(c), (f), (g), (h)(1)(A).” *Id.*

<sup>43</sup> *Id.* at 2032.

<sup>44</sup> *Id.*

<sup>45</sup> *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

<sup>46</sup> *Astrue*, 132 S.Ct. at 2034.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*



## V. OVERVIEW OF THE ARTICLES IN THIS SYMPOSIUM

The *Journal of Law and Health* invited four scholars to discuss the implications of the Supreme Court's holding in *Astrue*. Three of those scholars agreed to provide this publication with insightful articles in the wake of the *Astrue* opinion.

### A. Professor Jessica Knouse

Professor Jessica Knouse of the University of Toledo College of Law explores the constitutional rights implicated by posthumous conception. After considering the liberty rights of potential posthumous conceivers and the equality rights of posthumously conceived children, she advocates shifting the law's focus away from identifying "parents" and toward identifying "providers." She argues that such a shift, by allowing posthumously conceived children and their families to define their own relationships, would promote both liberty and equality.

### B. Professor Hilary Young

Professor Hilary Young, Assistant Professor in the Faculty of Law at University of New Brunswick (Canada), argues that consent to posthumous reproduction should sometimes be presumed. Professor Young considers the interests at stake, especially the interests of the living in their own future posthumous reproduction and the interests of people who would like to bear a deceased person's child. She concludes that where an embryo has been created for reproductive purposes consent to posthumous reproductive use of that embryo should be presumed. Professor Young further argues that the context of a committed romantic relationship, in which children were contemplated, may justify presuming consent to posthumous reproduction.

### C. Professor Maya Sabatello

Maya Sabatello, Post-doctoral Research Fellow at Columbia University and Professor at New York University's Center for Global Affairs, advocates that the protection of the interests and rights of the child should be the backdrop of courts' analysis regarding posthumously conceived children. She elaborates on this by incorporating children's perspectives on the central issues at stake: parentage acknowledgement, family structures, identity, and inheritance, and social benefits.