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NOTE

POSTHUMOUSLY CONCEIVED CHILDREN AND SOCIAL SECURITY SURVIVOR'S BENEFITS:

IMPLICATIONS OF THE NINTH CIRCUIT'S NOVEL APPROACH FOR DETERMINING ELIGIBILITY IN *GILLETT-NETTING V. BARNHART*

INTRODUCTION

With the emergence of modern reproductive technology, freedom of choice does not guarantee freedom from legal confusion. One expression of this freedom is the availability of alternatives to the traditional means of conception. Medical technology allows parents to choose from several methods of assisted reproduction to conceive a child, from artificial insemination to fertilization outside of the womb using frozen sperm and eggs. However, many of those choices can lead to uncertainty regarding the legal status of the resulting child. With assisted reproduction, children can be both conceived and born after one or both parents have died. The rights of these posthumously conceived children have not been fully established.

The Ninth Circuit considered the rights of children conceived using new reproductive technology in *Gillett-Netting v.*

Barnhart.¹ In this case of first impression, the plaintiff, Rhonda Gillett-Netting, applied to the Social Security Administration (hereinafter "Administration") for survivorship benefits for her twin minor children who were conceived by in vitro fertilization ten months after her insured husband's death.² The Administration denied benefits to the children.³ Although the United States District Court for the District of Arizona upheld the Administration's denial of benefits, a panel of the United States Court of Appeals for the Ninth Circuit found that the children met the requirements of the Social Security Act (hereinafter "the Act") and that they were entitled to survivor's benefits.⁴

The determination of eligibility for benefits under the Act turns on two issues: the definition of "child" and a finding of dependency.⁵ Contrary to the decisions of the Administration and the lower court in this case and the reasoning of courts in other jurisdictions, the Ninth Circuit's determination of whether the children met the definition of "child" under the Act did not rest on the children's right to inherit from their father under state intestacy law. Rather, it rested on their legitimacy under state law.⁶ This Note discusses this shift in the standard for defining a "child."

At the time of the *Gillett-Netting* decision, the Ninth Circuit was the only federal court of appeals to consider whether a child conceived by in vitro fertilization after the death of one parent is entitled to receive benefits as a survivor under the Act.⁷ The ruling of the Ninth Circuit in *Gillett-Netting* is a de-

¹ *Gillett-Netting v. Barnhart*, 371 F.3d 593 (9th Cir. 2004).

² *Id.* at 595.

³ *Id.*

⁴ *Id.* at 599. See 42 U.S.C. § 402(d)(1) (2004) ("Every child (as defined in section 416(e) of this title) of an individual entitled to old-age or disability insurance benefits, or of an individual who dies a fully or currently insured individual, if such child (A) has filed application for child's insurance benefits, (B) at the time such application was filed was unmarried and (i) either had not attained the age of 18 or was a full-time elementary or secondary school student and had not attained the age of 19, or (ii) is under a disability (as defined in section 423(d) of this title) which began before he attained the age of 22, and (C) was dependent upon such individual (i) if such individual is living, at the time such application was filed, (ii) if such individual has died, at the time of such death ... shall be entitled to a child's insurance benefit.").

⁵ 42 U.S.C. § 416(e) (2004) (defining "child" as "the child or legally adopted child of an individual...").

⁶ *Gillett-Netting*, 371 F.3d at 597.

⁷ *Id.* at 596.

parture from the internal Administration rulings in all cases examined, both in the outcome and in the factors used in that determination. Even those state courts whose rulings were in agreement with the Ninth Circuit used different factors to determine eligibility for Social Security survivor benefits.

The Ninth Circuit's ruling in *Gillett-Netting* was limited to the facts of that case. It is unclear whether its reasoning will be persuasive in subsequent cases that address the issue of survivor benefits for posthumously conceived children. With eligibility based partially on state law, and with the majority of states not yet having determined the rights of these children, it is clear that this federal law will not be applied uniformly across all states within the Ninth Circuit. Therefore, this decision demonstrates the need for clarification of the terms used in the Act. Without these changes, the goals of the Administration, including providing support for dependents of an insured wage earner and avoiding individual determinations of dependency, will not be met.⁸ To the contrary, variations in state intestate succession laws that contradict the standard put forth by the court will require case-by-case determination of eligibility for each posthumously conceived child who applies for benefits and could lead to the inconsistent distribution of benefits.

Part I of this Note describes the technology of assisted reproduction, the requirements and purpose of the Act, and the challenges that arise when interpreting the Act using the variety of state statutes.⁹ Part II describes the instant case and explores the reasoning of both the district court and the Ninth Circuit.¹⁰ The implications of the decision are discussed in Part III.¹¹

I. BACKGROUND

The issue in this case has as its source the intersection of new reproductive technologies and the requirements for qualifying for survivor benefits under the Act. The situation is fur-

⁸ See *Jimenez v. Weinberger*, 417 U.S. 628, 634 (1974) (stating the purpose of the Act is to provide support for children born before or after a wage earner becomes disabled); *Califano v. Jobst*, 434 U.S. 47, 52 (1977) (discussing Congress's use of categories to determine dependency rather than requiring individualized proof).

⁹ See *infra* notes 12–71 and accompanying text.

¹⁰ See *infra* notes 72–119 and accompanying text.

¹¹ See *infra* notes 120–155 and accompanying text.

ther complicated by having this qualification based in part on state law when those laws have not always developed to encompass the new technology. As a result, the goals of the Act are not always met by the application of the law.

A. CURRENT REPRODUCTIVE TECHNOLOGY

To determine eligibility for benefits, the Act relies on traditional concepts of the parent-child relationship and presumed or actual dependency. This reliance makes it difficult to apply the Act in cases involving claimants conceived by assisted reproduction. To understand these difficulties, a description of current reproductive technology provides a basic understanding of the various methods of assisted reproduction.

One of the oldest and simplest methods of assisted reproduction is artificial insemination, which involves placing the sperm (from the husband or other male donor) into the vagina or uterus of the woman.¹² A more sophisticated procedure is in vitro fertilization (hereinafter "IVF"), in which the woman's ovum is fertilized outside the body and allowed to develop into a pre-embryo, which is then implanted into the woman's uterus.¹³ A related technology is gamete intrafallopian transfer (hereinafter "GIFT"),¹⁴ whereby, similar to IVF, the sperm and ovum are removed from the bodies but then are transferred to the woman's fallopian tube, where fertilization occurs.¹⁵ Yet another method is embryo lavage and transfer, in which the ovum is fertilized in one woman, and then the embryo is transferred to a second woman, who will carry it to term.¹⁶

These methods of conception are traditionally used by couples or single women using donated ova, sperm, or both. In most cases, the status of the resulting children is not questioned because the donating parties are living or are anonymous with no interest in the offspring. In some cases, however,

¹² Christine A. Djalleta, *A Twinkle in a Decedent's Eye: Proposed Amendments to the Uniform Probate Code in Light of New Reproductive Technology*, 67 Temp. L. Rev. 335, 337 (1994).

¹³ Emily McAllister, *Defining the Parent-Child Relationship in an Age of Reproductive Technology: Implications for Inheritance*, 29 Real Prop. Prob. & Tr. 55, 61 (1994).

¹⁴ Djalleta, *supra* note 13, at 338.

¹⁵ McAllister, *supra* note 14, at 64.

¹⁶ *Id.* at 64-65.

modern technology has enabled doctors to harvest sperm from the body of a recently deceased man to be used to impregnate a woman.¹⁷ Currently, sperm, ova, fertilized eggs, and embryos can be preserved using the process of cryopreservation for use at some future date.¹⁸ Because of this technology, births can occur theoretically hundreds of years after the death of either (or both) parents.¹⁹

B. SOCIAL SECURITY ACT

1. *Requirements Under the Social Security Act*

Under the Act, establishment of the parent-child relationship is important because a claimant for benefits must meet two requirements. First, a claimant must be the child of an insured individual, as that term is defined in the Act.²⁰ Second, a claimant must be dependent on the insured wage earner at the time of his or her death.²¹ Because the term “child” is defined only minimally by the Act, interpretation of the term under state law becomes central to the determination of whether an individual is entitled to survivor’s benefits.²²

The term “child” is defined under the Act as any “child or legally adopted child of an individual.”²³ The Act also states that “child” status can be established if the claimant would be considered a child of the insured individual under the intestate succession laws of the state where the deceased resided at death, or if the marriage of the child’s parents was invalid only because of some previously unknown legal impediment.²⁴ In addition, the following actions taken before the insured wage earner dies can also bestow “child” status on the claimant: acknowledgment in writing by the deceased that the claimant is his or her child, a decree by a court that the deceased is the

¹⁷ *Doctor Details Sperm Removal from Dead Man*, L.A. Times, Jan. 20, 1995, at 20.

¹⁸ McAllister, *supra* note 13, at 62–63 (1994) (explaining that in cryopreservation, embryos and eggs are cooled and dehydrated for long-term frozen storage; semen is also frozen for long-term storage in sperm banks).

¹⁹ Djalleta, *supra* note 12, at 335.

²⁰ 42 U.S.C. § 416(e) (2004).

²¹ 42 U.S.C. § 402(d)(1) (2004).

²² *Id.*

²³ 42 U.S.C. § 416(e) (2004).

²⁴ 42 U.S.C. §§ 416(h)(2)(A), (B) (2004).

parent of the claimant, or a court order requiring the deceased to pay support for the claimant because he or she is the child of the deceased.²⁵

The Seventh Circuit has adhered to a strict requirement for a court decree of paternity before the death of the insured parent in order for the child to receive benefits.²⁶ The United States Supreme Court has also upheld the denial of benefits based on the lack of a formal parent-child relationship. In *Mathews v. Lucas*, as in *Gillett-Netting*, the fact that the decedent was the children's father was not disputed.²⁷ However, even though the children were born during the nearly 20 years that he lived with their mother, the father never acknowledged his paternity in writing, nor was it determined by a judicial proceeding during his lifetime.²⁸ As a result, the Supreme Court found that the children did not qualify for Social Security benefits because they were "non-marital" (i.e., illegitimate) and did not satisfy any of the requirements for dependency.²⁹

The determination of dependency is closely related to the legitimacy of the child. The Act distinguishes marital (i.e., legitimate) children, meaning those children born to a married couple, from non-marital children, or those children born out of wedlock, when determining eligibility for survivor death benefits.³⁰ Marital children are presumed dependent and entitled to Social Security survivor benefits if the deceased parent was insured.³¹ Non-marital children, however, must show that they were actually dependent upon their deceased father before they are considered eligible for survivor benefits because non-marital children who do not live with their father or do not receive support from him are not deemed dependent.³² One who is determined to be a child of the deceased based on the existence of any of the conditions in §416(h)(3) of the Act is also considered legitimate and therefore dependent.³³

²⁵ 42 U.S.C. § 416(h)(3) (2004).

²⁶ *Trammell v. Bowen*, 819 F.2d 167 (7th Cir. 1987) (denying benefits to children when the judgment of paternity was obtained four months after the death of the father).

²⁷ *Mathews v. Lucas*, 427 U.S. 495, 501 (1976).

²⁸ *Id.* at 497.

²⁹ *Id.* at 501.

³⁰ 42 U.S.C. § 402(d)(1)(C) and § 402(d)(3)(A).

³¹ 42 U.S.C. § 402(d)(3)(A).

³² *Id.*

³³ 42 U.S.C. § 416(h)(3)(C).

When the Administration denies benefits to non-marital children born after the father dies or becomes disabled, it is because the children cannot show the requisite economic dependency on the wage earner that would entitle them to recover under the Act.³⁴ However, a showing of actual dependency is not a condition of eligibility in every case.³⁵ Under certain circumstances, a child can be deemed dependent by statute and does not have to demonstrate actual dependency or prove paternity in order to qualify for benefits.³⁶

2. *Purpose of the Act*

The primary purpose of Social Security survivor's benefits, according to the United States Supreme Court, is to provide support for dependents of a deceased insured wage earner, including anticipated support from a parent who has died.³⁷ The Ninth Circuit has further defined one goal of the Act as being to provide income security to family units, not simply to aid individual blood relatives of the wage earner.³⁸ For example, persons who have never worked (and therefore never contributed to the Social Security fund) are able to collect benefits under certain circumstances.³⁹ These "secondary beneficiaries" are not only blood relatives, but are also generally defined as those persons who were dependent on the wage earner at the time of his death or disability.⁴⁰

One goal of the Administration is to avoid adjudicating the question of dependency in individual claims.⁴¹ The Administration has created categories of beneficiaries for purposes of determining dependency.⁴² Instead of requiring individualized proof on a case-by-case basis, the Administration has elected to use criteria such as age, marital status, and eligibility under

³⁴ Jimenez, 417 U.S. at 633.

³⁵ Califano, 434 U.S. at 52.

³⁶ Jimenez, 417 U.S. at 635.

³⁷ *Id.* at 634; *see also* Califano, 434 U.S. at 50; *Tsosie v. Califano*, 630 F.2d 1328, 1337 (9th Cir. 1980); *Adams v. Weinberger*, 521 F.2d 656, 659 (2d Cir. 1975).

³⁸ *Sims v. Harris*, 607 F.2d 1253, 1255 (9th Cir. 1979).

³⁹ *Id.*

⁴⁰ Califano, 434 U.S. at 50.

⁴¹ *Id.* at 52.

⁴² Trammell, 819 F.2d at 169.

state intestate succession laws to determine probable dependency.⁴³

C. CASE LAW INTERPRETING THE ACT

New reproductive technologies raise several legal issues. This Note concentrates on the status of posthumously conceived children, that is, the newer category of children who are both conceived and born after the death of a parent using frozen sperm, eggs, or embryos. Case law concerning this category of children is sparse. As a result, this Note explores the status of another category of children in the context of eligibility for Social Security benefits. Specifically, this Note compares the status of posthumously conceived children with non-marital children whose fathers have died.

Cases that interpret the Act in relation to non-marital children discuss issues of dependency by comparing marital and non-marital children. A posthumously conceived child may arguably be likened to a non-marital child because the living parent is no longer married once the spouse has died. In some states, being conceived and born after a parent dies would preclude the child from establishing a legal relationship with the deceased parent and prevent the child from qualifying for benefits.⁴⁴

1. *Non-Marital Children*

Marital children born before the wage earner/parent dies or becomes disabled are entitled to benefits regardless of whether they were living with or being supported by the parent at the time of his or her death or disability.⁴⁵ Similarly, marital children born after the wage earner/parent becomes disabled are entitled to benefits even though they were not alive at the

⁴³ See, e.g., *Califano*, 434 U.S. at 52 ("A child who is married or over 18 and neither disabled nor a student is denied benefits because Congress has assumed that such a child is not normally dependent on his parents.").

⁴⁴ See N.D. Cent. Code § 14-18-04 (1991). The North Dakota statute is based on the USCACA and states in part that "[a] person who dies before conception using his sperm or her eggs is not a parent of any resulting child born of the conception." The statute even explicitly provides that a posthumously conceived child may not take as an heir through intestate succession, although the child may be provided for in a will. N.D. Cent. Code § 14-18-04 (1991).

⁴⁵ *Jimenez*, 417 U.S. at 634.

time the parent became disabled.⁴⁶ Non-marital children may qualify for benefits if state law permits them to inherit from the wage earner, their illegitimacy results solely from a formal, non-obvious defect in their parents' marriage, or they are legitimated in accordance with state law.⁴⁷

Because non-marital children are not presumed dependent, the courts will look to the father's contribution to the support of the child in determining whether to grant Social Security survivor benefits to the child.⁴⁸ For example, the Ninth Circuit considered whether a father's support of an unborn child was sufficient to entitle the child to benefits after the father killed himself when his girlfriend was three-months pregnant.⁴⁹ The court held that a child is deemed dependent on the father if the father's support "was commensurate with the needs of the unborn child at the time of the father's death."⁵⁰ In using this standard, the court rejected the more stringent test used by the Administrative Law Judge in the Social Security Administration hearing.⁵¹ That test required that the father contribute support in a "regular and substantial manner" during the mother's pregnancy.⁵² This is significant for posthumously conceived children because they could never qualify for benefits under the more stringent test.

2. *Posthumously Conceived Children*

As illustrated in the following cases, the Administration has generally denied benefits to children who are both conceived and born after the death of their father. The decisions to deny benefits have been based variously on facts that would also result in the denial of benefits to non-marital children: the

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ 42 U.S.C. § 402(d)(3).

⁴⁹ *Doran v. Schweiker*, 681 F.2d 605, 608 (9th Cir. 1982) (adopting the test from *Adams v. Weinberger*, 521 F.2d 656 (2d Cir. 1975), as the basis for determining that an illegitimate, posthumously born child was dependent on its father).

⁵⁰ *Id.* at 608–609 (citing *Adams v. Weinberger*, 521 F.2d 656 (2d Cir. 1975)). Although the child's father and the pregnant woman did not live together and the father did not provide her with financial support, he did help with moving and home repairs. The court considered this support to be commensurate with his abilities as an unemployed person and found that it met the needs of the fetus. As a result, the court awarded benefits to the child. *Doran*, 681 F.2d at 608.

⁵¹ *Doran*, 681 F.2d at 607.

⁵² *Id.* at 608.

child cannot inherit under the applicable state laws for intestate succession, the child was never acknowledged by the father, there was no proof or decree of paternity, or the child could not show actual dependency on the father.

In *Hart v. Shalala* (hereinafter "*Hart*"), the child's mother filed for social security survivor's benefits for her child, who was conceived by GIFT and born twelve months after the death of her father.⁵³ The Administration denied the claim on the ground that the child was not the father's legal child.⁵⁴ The Administration first reasoned that the child was not a qualified heir under Louisiana law because she was neither alive at the time of her father's death nor was she born within 300 days of his death.⁵⁵ Second, the child was also considered illegitimate because she was born more than 300 days after her parents' marriage ended (upon the death of her father)⁵⁶ and paternity was not proven within the statutorily required period.⁵⁷ Third, she was unable to ever prove paternity because her father had not acknowledged her as his child before he died.⁵⁸

Hart appealed the Administration's denial of benefits. Following a *de novo* review, the Administrative Law Judge (hereinafter "ALJ") awarded survivor's benefits to both the child and her mother, based on the finding of a biological connection between the child and her deceased father.⁵⁹ Following appeal by the Administration of the ALJ's decision, the Appeals Council of the Administration accepted that the posthumously conceived child was the biological child of the father, but it overturned the decision of the ALJ on the ground that the child was not dependent on her father at the time of his death.⁶⁰ The case was eventually resolved in favor of the claimants when the Social Security Commissioner determined that survivor benefits would be paid to the child on public policy grounds.⁶¹ The de-

⁵³ See Gloria J. Banks, *Traditional Concepts and Nontraditional Conceptions: Social Security Survivor's Benefits for Posthumously Conceived Children*, 32 Loy. L.A. L. Rev 251 (1999) (describing *Hart v. Shalala* No. 94-3944 (E.D. La. 1994)).

⁵⁴ *Id.* at 252.

⁵⁵ See La. Civ. Code Ann. arts. 934, 953, 954, 957 (West 1997).

⁵⁶ See La. Civ. Code Ann. arts. 178-180, 184 (West 1993).

⁵⁷ See La. Civ. Code Ann. art. 209 (West 1997).

⁵⁸ Banks, *supra* note 54, at 253. See also La. Civ. Code Ann. arts. 184, 185 (West 1991)).

⁵⁹ Banks, *supra* note 54, at 254.

⁶⁰ *Id.* at 255.

⁶¹ *Id.* at 256.

ceased father's intent to allow his wife to use his sperm to conceive a child after his death was crucial to this decision.⁶²

The intent of the deceased father was also one of the deciding factors in *In re Kolacy*, in which twin children were conceived by IVF and born 18 months after the death of their father.⁶³ In that case, the children's mother asked the New Jersey Superior Court for a determination of the status of her children as intestate heirs to her deceased husband's estate.⁶⁴ The New Jersey state court determined that the children were the offspring of their father and held that the children should be granted "the legal status of being . . . heir[s] of the decedent, unless doing so would unfairly intrude on the rights of other persons or would cause serious problems in terms of the orderly administration of estates."⁶⁵ Although not binding on the Administration, a favorable ruling would likely be helpful to the plaintiff in her later federal claims for survivor benefits before the Administration because the determination of whether an applicant is a "child" under the Act is based in part on the law of intestate succession of the state in which the insured individual was domiciled at the time of death.⁶⁶

The question of inheritance rights was also central in *Woodward v. Commissioner of Social Security* (hereinafter "*Woodward*"), a case involving twins conceived by artificial insemination and born 24 months after the death of their father.⁶⁷ The United States District Court for the District of Massachusetts asked the Massachusetts Supreme Judicial Court to review the question whether children conceived and born after the death of their father have the same inheritance rights as natural children under the Massachusetts law of intestate succession.⁶⁸ At stake again were survivor's benefits for the children under the Act.⁶⁹ The Massachusetts Supreme Judicial court held that a posthumously conceived child has such inheritance rights if all of the following circumstances exist: (1) a

⁶² *Id.* at 254.

⁶³ *In re Kolacy*, 332 N.J. Super. 593 (N.J. Super. Ct. Ch. Div. 2000).

⁶⁴ *Id.* at 595.

⁶⁵ *Id.* at 602.

⁶⁶ 42 U.S.C. § 416(h)(a)(A).

⁶⁷ *Woodward v. Commissioner of Social Security*, 760 N.E.2d 257, 260 (Mass. 2002).

⁶⁸ *Id.* at 259.

⁶⁹ *Id.* at 260.

genetic relationship between the deceased and the child is established, (2) the decedent consented not only to the posthumous conception, but also to the support of any resulting children, and (3) any statutory time limitations are met and notice is given to all interested parties.⁷⁰

II. *GILLETT-NETTING V. BARNHART*

A. THE DISTRICT COURT DECISION TO DENY BENEFITS

After the Administration denied benefits to the minor children in *Gillett-Netting v. Barnhart* (hereinafter "*Gillett-Netting*"), the plaintiff appealed to the Arizona district court.⁷¹ In making its determination, the district court addressed the question whether the children met the requirements of the Act: whether they were "natural children" as defined by the Act, and whether they were dependent on their father.⁷²

1. *Determination of "Child" Status*

The twins' designation as natural children depended on whether they could inherit from their father under Arizona law.⁷³ The district court determined that the twins were not "natural" children based on the facts that they were born outside of marriage (in fact, they were not yet conceived at the time of their father's death) and that they could not inherit from the deceased under Arizona intestate succession laws.⁷⁴ Accordingly, the children were not presumed to be dependent upon the deceased.⁷⁵ Moreover, the plaintiff could not show actual dependency; because the children were not in existence at the time of their father's death, he could not have been contributing to their support.⁷⁶

⁷⁰ *Id.* at 259.

⁷¹ *Gillett-Netting*, 371 F.3d at 599.

⁷² *Gillett-Netting v. Barnhart*, 231 F. Supp. 2d 961, 964 (D. Ariz. 2002).

⁷³ *Id.* at 965.

⁷⁴ *Id.* at 963.

⁷⁵ *Id.* at 967.

⁷⁶ *Id.*

Posthumously conceived children do not fit neatly into any of the definitions of "child" provided in the Act.⁷⁷ The plaintiff took the position that her twins were the "natural" children of her deceased husband for purposes of the Act because he was undisputedly their biological father.⁷⁸ The district court looked for the definition of "child" in the Act by examining the provision that is used for determining family status.⁷⁹ From this section, the district court decided that the twins' status as children was dependent upon the intestate succession laws of Arizona.⁸⁰

Arizona intestate succession law has no explicit provision for posthumously conceived children. Given this omission, the plaintiff contended that her children should be presumed to be included in the class of descendants that qualify as heirs because Arizona law does not specifically exclude them.⁸¹ She also argued that the timing of the conception of the children and her marital status at that time were irrelevant. At the district court level, the Social Security Commissioner argued that under Arizona law, children must exist at the time of the insured party's death in order to receive survivor benefits.⁸²

The district court agreed with the Social Security Commissioner's assessment, citing the requirement that heirs must survive the decedent.⁸³ The only exception to this requirement is for children "in gestation" at the time of their father's death.⁸⁴ The Gillett-Netting twins, who were born over a year after the death of their father, clearly did not fit this exception. Because the children were not born during the period of their parents' marriage and could not inherit from the deceased under Ari-

⁷⁷ 42 USC § 416(e) (defining the term "child" to mean (1) the child or legally adopted child of an individual, (2) a stepchild, and (3) a person who is the grandchild or stepgrandchild of an individual or his spouse (under certain circumstances)).

⁷⁸ *Gillett-Netting*, 231 F.2d at 965.

⁷⁹ 42 USC § 416(h)(2)(A) ("In determining whether an applicant is the child or parent of a fully or currently insured individual for purposes of this title . . . , the Commissioner of Social Security shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual is domiciled at the time such applicant files application. . . . Applicants who according to such law would have the same status relative to taking intestate personal property as a child or parent shall be deemed such.")

⁸⁰ *Gillett-Netting*, 231 F.2d at 966.

⁸¹ *Id.*

⁸² *Id.* (citing A.R.S. § 14-2104(A), requiring that heirs survive the decedent).

⁸³ *Id.*

⁸⁴ *Id.* (citing A.R.S. § 14-2108).

zona intestate succession laws, the district court determined that they were not children of the deceased for purposes of the Act.⁸⁵

The district court's reasoning in *Gillett-Netting*—that benefits should be denied because the children could not inherit under state laws of intestate succession—was consistent with the reasoning used by the Administration in the earlier cases of *Hart* and *Woodward*. In *Hart*, the Administration denied benefits to a posthumously conceived child because she could not inherit under the state law of intestate succession.⁸⁶ Specifically, the child was born more than 300 days after her parents' marriage ended (upon her father's death) and she was unable to prove paternity because her father had not acknowledged her as his child before he died.⁸⁷ For these reasons, the child was not the father's legal child and was therefore deemed ineligible for survivor's benefits.⁸⁸

In *Woodward*, the Administration denied benefits to posthumously conceived twins even though the plaintiff had obtained a statement from the Probate and Family Court that confirmed the paternity of the children.⁸⁹ The plaintiff appealed to the Supreme Judicial Court of Massachusetts, which determined that posthumously conceived children had the same inheritance rights as natural children under the Massachusetts law of intestate succession.⁹⁰ Although the decision of the Massachusetts court was not binding on the Administration, it is illustrative of the problematic nature of the language used in the state statutes.

The intestacy statute at issue in *Woodward* contained a provision for "posthumous children," but this term was not defined.⁹¹ The Massachusetts court noted that in regard to intestate succession, the legislature did not include any wording that would require that posthumous children be "in utero" or

⁸⁵ *Gillett-Netting*, 231 F.2d at 963.

⁸⁶ Banks, *supra* note 54, at 252 (citing La. Civ. Code Ann. arts. 178–180, 184 (West 1993)).

⁸⁷ Banks, *supra* note 54, at 253 (citing La. Civ. Code Ann. art. 209 (West 1997)); see also La. Civ. Code Ann. arts. 184, 185 (West 1991).

⁸⁸ Banks, *supra* note 54, at 253.

⁸⁹ Woodward, 760 N.E.2d at 260.

⁹⁰ *Id.* at 259.

⁹¹ *Id.* at 264 (citing Mass. Gen. Laws Ann. ch. 190, § 8, which provides that "[p]osthumous children shall be considered as living at the death of their parent.").

“in existence” at the time of the death of the decedent.”⁹² The court compared the absence of such language in the Massachusetts law with language contained in laws of other states that expressly provide “[a] successor must exist at the death of the decedent,”⁹³ and “[a] person who dies before a conception using that person’s sperm or egg is not a parent of any resulting child born of the conception.”⁹⁴

Unlike the intestate succession statute at issue in *Woodward*, the Arizona law at issue in *Gillett-Netting* did not address the issue of posthumous children, except to require that a child must survive the decedent or be “in gestation” in order to inherit by intestate succession. Because the *Gillett-Netting* twins were not in gestation at the time of their father’s death, they could not inherit from their father. The Arizona district court in *Gillett-Netting* thus distinguished *Woodward* on the basis of the presence of language requiring intestate heirs to be “in existence” at the time of a decedent’s death, and on the basis of the absence of language affirmatively addressing the category of posthumous children in the Arizona intestacy statute.⁹⁵ Arizona law does not address the issue of posthumous children except to require that a child must be “in gestation” for purposes of intestate succession.⁹⁶

2. *Determination of Dependency*

A second requirement to qualify for survivor’s benefits is that the children must have been dependent on their father when he died.⁹⁷ Certain classes of children are presumed dependent and do not have to show actual dependency. These classes are marital children (including those in utero at the time of the parent’s death) and those who can inherit from the parent under state intestate succession laws.⁹⁸ An offspring who fits into either of these classes is considered a “child” who is presumed to be dependent for purposes of the Act. For chil-

⁹² *Woodard*, 760 N.E.2d at 264.

⁹³ La. Civ. Code Ann. art. 939 (West 2000).

⁹⁴ N.D. Cent. Code § 14-18-04 (1997).

⁹⁵ *Gillett-Netting*, 231 F.2d at 968. See also *supra* note 93 for Massachusetts statute. Arizona has no such provision.

⁹⁶ *Id.*

⁹⁷ 42 USC § 402(d)(1).

⁹⁸ *Gillett-Netting*, 231 F.2d at 967.

dren born outside of a valid marriage, certain actions on the part of the wage earner will give their offspring the status of "child."⁹⁹ These children, and those born to a marriage made invalid by a legal impediment, are also presumed dependent for purposes of eligibility for Social Security benefits.¹⁰⁰

In *Gillett-Netting*, the Arizona district court found that the twins did not qualify for "child" status under the Act; as a result, it considered the issue of dependency only briefly.¹⁰¹ The district court found that the twins were not entitled to a presumption of dependency because they could not inherit from their father under Arizona law nor could they demonstrate actual dependency because they did not exist at the time their father died.¹⁰² The district court therefore denied benefits to the children because they found that the children did not fit the statutory definition of "child," they could not inherit under Arizona intestate succession law, and were not actually or presumptively dependent upon their deceased father.

B. THE NINTH CIRCUIT COURT DECISION TO GRANT BENEFITS

1. *Benefits Based on "Child" Status and Legitimacy*

The Arizona district court affirmed the decision of the Administration that the children were ineligible for survivor's benefits, and the plaintiff appealed the district court's decision to the Ninth Circuit.¹⁰³ On appeal, the Ninth Circuit reversed the judgment of the district court.¹⁰⁴ In reaching its decision, the Ninth Circuit first determined that because it was undisputed that the twins were the biological children of the deceased, they would be considered "children" for purposes of the Act.¹⁰⁵ Second, the Ninth Circuit court found that the twins were "legitimate" under Arizona law and were therefore pre-

⁹⁹ 42 U.S.C. § 416(h)(3). These actions include acknowledgment in writing by the deceased that the claimant is his or her child; a decree by a court that the deceased is the parent of the claimant; or a court order requiring the deceased to pay support for the claimant because he or she is the child of the deceased. *Id.*

¹⁰⁰ 42 U.S.C. § 416(h)(3)(C)(ii).

¹⁰¹ *Gillett-Netting*, 231 F.2d at 964.

¹⁰² *Id.* at 967.

¹⁰³ *Id.* at 963.

¹⁰⁴ *Id.*

¹⁰⁵ *Gillett-Netting*, 371 F.3d at 597.

sumed dependent.¹⁰⁶ As a result, actual dependency on the insured wage earner did not have to be shown.¹⁰⁷

In determining that the Gillett-Netting twins were “children” under the Act, the Ninth Circuit, in contrast to earlier decisions, did not look to state intestate succession laws. Instead, the court relied on Ninth Circuit precedent that had interpreted “child” to mean a natural child or biological child of the deceased.¹⁰⁸ According to the court, the provisions of the Act that refer to state intestacy law are pertinent only when the parents of the child are not married or when the paternity of the child is in dispute.¹⁰⁹ Because the twins’ parents were married before the death of their father and because the paternity of the twins was never at issue, the Ninth Circuit concluded the children did not have to meet any further standard in order to be deemed children of the deceased.¹¹⁰

The Ninth Circuit pointed out that “legitimate” children are presumed dependent, and by statute all children are considered “legitimate” in Arizona.¹¹¹ The district court had dismissed the statute as being “enacted to prevent the State from treating children of unwed parents differently than children of married parents” and found that it did not support the plaintiff’s claim.¹¹² In contrast, the Ninth Circuit looked to the plain language of the statute and determined that posthumously conceived children were entitled to a presumption of dependency under Arizona law.

2. *Intent of Deceased Parent*

The Massachusetts Supreme Court in *Woodard*, like the Ninth Circuit in *Gillett-Netting*, concluded that posthumously

¹⁰⁶ *Id.* at 598. See also A.R.S. § 8-601 (“Every child is the legitimate child of its natural parents...”).

¹⁰⁷ *Gillett-Netting*, 371 F.3d at 598.

¹⁰⁸ *Id.* at 596 (citing *Weinberger v. Salfi*, 422 U.S. 749, 781 n. 12 (1975) and *Tsosie v. Califano*, 630 F.2d 1328, 1333 (9th Cir. 1980)) (“[T]he term ‘child’ includes a person’s natural children and his legally adopted children.”).

¹⁰⁹ *Gillett-Netting*, 371 F.3d at 598 (explaining that 42 U.S.C. S§ 414(h)(2), (3) provide a method for an illegitimate claimant to establish eligibility, and that these methods are not needed if the claimant is legitimate).

¹¹⁰ *Gillett-Netting*, 371 F.3d at 597.

¹¹¹ *Id.*; see also A.R.S. § 8-601 (“Every child is the legitimate child of its natural parents...”).

¹¹² *Gillett-Netting*, 231 F.2d at 967.

conceived twins were entitled to benefits.¹¹³ The *Woodward* court based its decision in part on a showing of the father's intent to reproduce posthumously.¹¹⁴ Like the deceased father in *Woodward*, the deceased parent in *Gillett-Netting* also expressed the desire that his wife continue trying to conceive using his sperm even after his death.¹¹⁵ The Arizona district court had dismissed the plaintiff's "intent" argument, stating that the intent of a decedent is pertinent only to the distribution of property through a will.¹¹⁶ By contrast, intestate succession is governed by statute; the statute structures the disposition of the decedent's property and the decedent's intent is not considered.¹¹⁷ On appeal, the Ninth Circuit eliminated any need for a discussion of the decedent's intent, because it determined that the children met the definition of "child" without considering whether the children could inherit under state intestate succession laws.¹¹⁸

III. IMPLICATIONS OF THE NINTH CIRCUIT'S RULING

The Ninth Circuit's ruling in *Gillett-Netting* represents a divergence from the reasoning traditionally employed by courts in determining eligibility for Social Security benefits under the Act. In the past, courts have based benefits-eligibility on whether a child has the right to inherit under state intestate succession laws.¹¹⁹ By contrast, in *Gillett-Netting*, the Ninth Circuit ruled that a posthumously conceived child need only meet the standards of "natural child" and legitimacy under state law to be entitled to benefits.¹²⁰ By looking to the biological connection between the deceased parent and posthumously conceived child, in combination with a determination of the child's "legitimacy" under state law, the Ninth Circuit applied a less stringent standard than what the Act seems to require. As a result, the ruling in *Gillett-Netting* may increase the uncer-

¹¹³ *Woodward*, 760 N.E.2d at 265.

¹¹⁴ *Id.* at 272.

¹¹⁵ *Gillett-Netting*, 231 F.2d at 963.

¹¹⁶ *Id.* at 966-967.

¹¹⁷ *Id.* at 967.

¹¹⁸ *Gillett-Netting*, 371 F.3d at 598.

¹¹⁹ See, e.g., *Banks*, *supra* note 54, at 253 (describing *Hart v. Shalala* No. 94-3944 (E.D. La. 1994)); *Woodward*, 760 N.E.2d at 265.

¹²⁰ 42 U.S.C. §§ 402(d)(1), 416(e) (requiring status as a legal child of the insured and dependence on the insured wage earner at the time of his or her death).

tainty that is already inherent in the application of the Act. This uncertainty arises from the fact that some states have laws describing the rights of posthumously conceived children, whereas others have yet to address the issue.

A. THE NINTH CIRCUIT'S DECISION WILL LEAD TO
UNCERTAINTY IN THE DETERMINATION OF
ELIGIBILITY FOR BENEFITS

1. *Uniform Parentage Act*

The first uniform act designed to address the rights of posthumously conceived children was the Uniform Status of Children of Assisted Conception Act (hereinafter "USCACA") of 1988.¹²¹ The USCACA provides that "[a]n individual who dies before implantation of an embryo, or before a child is conceived other than through sexual intercourse, using the individual's egg or sperm, is not a parent of the resulting child."¹²² This act was incorporated in the Uniform Parentage Act (hereinafter "UPA").¹²³ Under the UPA, a deceased man is generally presumed to be the natural father of a child if he and the natural mother were married to each other and the child's birth occurs within 300 days after the marriage was terminated by death.¹²⁴ Assisted reproduction is also addressed in the UPA, which states the man who provides the sperm for assisted reproduction is considered the father of the child, as long as he intended to become a parent of the child and both the man and woman consent to the procedure in writing.¹²⁵ In addition, Section 707 of the UPA states that "[i]f 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."¹²⁶ Under the UPA, therefore, a deceased father would have to consent in writing to the use of his sperm, or any

¹²¹ Uniform Status of Children of Assisted Conception Act § 4(b) (1988).

¹²² *Id.*

¹²³ Uniform Parentage Act (2002).

¹²⁴ UPA § 204 (2002).

¹²⁵ UPA §§ 703, 704 (2002).

¹²⁶ UPA § 707 (2002).

frozen embryos fertilized by his sperm, before the resulting offspring could be considered his legal child.

A few states have addressed the status of posthumously conceived children, specifically their legal parentage and the impact of this designation on who may inherit through intestate succession, through legislation modeled on the UPA.¹²⁷ However, the various statutes lead to different results, ranging from those that prevent posthumous children from establishing a legal relationship with the deceased parent to those that limit the ability to do so only under certain circumstances.

2. *State Law Governing the Rights of Posthumously Conceived Children*

The Ninth Circuit's decision to award benefits in *Gillett-Netting*—based in part on the biological connection between the deceased parent and posthumously conceived child—is a result that will not be consistently reached under the laws of the various states. As a result, claims of surviving children may be denied solely as a result of the state where they are domiciled. For example, designation as a “natural child” would not seem to be sufficient in a state such as Virginia, where the statute concerning assisted reproduction is similar to the USCACA. Under the Virginia statute, a person who dies before the implantation of an embryo cannot be the parent of any resulting child.¹²⁸ The Virginia statute, however, has two exceptions that allow the child to obtain the legal status of a “child” of a deceased parent. A person may be deemed to be the parent of the child if the deceased person consented in writing to being a parent or if implantation of the embryo occurs before the physician performing the procedure learns of the person's death.¹²⁹ However, a second Virginia statute expressly states that for purposes of intestate succession, the child must be born within ten months of the parent's death.¹³⁰ Under these two statutes, a posthumously

¹²⁷ UPA § 204 (2002).

¹²⁸ Va. Code Ann. § 20-158(B) (Michie 1995). As to embryos implanted before the death of the parent, the statute states in part that “[a]ny child resulting from the insemination of a wife's ovum using her husband's sperm, with his consent, is the child of the husband and wife notwithstanding that, during the ten-month period immediately preceding the birth, either party died.” *Id.*

¹²⁹ *Id.*

¹³⁰ Va. Code Ann. § 20-164.

conceived child would not qualify as "child" unless her mother was impregnated immediately after her father died, even if he had stated his intent to father a child.

There is even more confusion in states such as Florida that address the status of a child conceived by means of assisted reproduction only in the context of marital children.¹³¹ Offspring born within wedlock are presumed to be the "children" of the husband and wife, whereas a child conceived after the death of a parent is not, even if the biological relationship is established.¹³² As a result, in these states, although a posthumously conceived child can take under a deceased parent's will, she does not have a legal parent-child relationship that would allow her to inherit under intestate succession.¹³³

Another state, however, directly addresses the issue of posthumously conceived children and specifically excludes them from any inheritance rights.¹³⁴ Under Louisiana law, "legitimate" children are defined as "either born or conceived during marriage or [those] who have been legitimated" and "[i]llegitimate children are those who are conceived and born out of marriage."¹³⁵ No distinction or exception is made for posthumously conceived children.¹³⁶

As a result of varying state laws, children may be prevented from establishing natural child status or ability to inherit through intestate succession in some states, whereas under the ruling in *Gillett-Netting*, children in Arizona may get benefits under a more lenient test. Moreover, the reasoning of the Ninth Circuit in previous cases awarding benefits is not consistent with the court's reasoning in *Gillett-Netting*.¹³⁷

¹³¹ Fla. Stat. Ann. § 742.11 (West 1997).

¹³² *Id.* The statute requires that both parents consented in writing to the artificial or in vitro insemination. *Id.*

¹³³ Fla. Stat. Ann. § 742.17 (West 1997) ("[A] child conceived from the eggs or sperm of a person or persons who died before the transfer of their eggs, sperm or pre-embryos to a woman's body shall not be eligible for a claim against the decedent's estate unless the child has been provided for by the decedent's will.").

¹³⁴ La. Civ. Code Ann. art. 1474 (West Supp. 1996). In Louisiana, to receive an inter vivos gift, the child must be in utero at the time the donation was made; to receive a donation by mortis causa ("in the contemplation of death"), the unborn child must be in utero at the time of the testator's death. In other words, children have the capacity to inherit only if they exist at the time of the parent's death. *Id.*

¹³⁵ La. Civ. Code Ann. art. 179 and 180.

¹³⁶ *Id.*

¹³⁷ *Moorehead v. Bowen*, 784 F.2d 978 (9th Cir. 1986); *Moreno v. Richardson*, 484 F.2d 899 (9th Cir. 1973).

Where the Ninth Circuit awarded benefits to a non-marital child who had been acknowledged by the father, the court's ruling was not based on the undisputed fact that the child was the "natural child" of the insured wage earner and therefore presumed dependent; instead, the court first relied on the state law of inheritance to establish that the child was "legitimate."¹³⁸ It then determined that this status was sufficient for the child to inherit under intestate succession.¹³⁹

In an even earlier case, the Ninth Circuit looked beyond the father's admission that he was the father of the non-marital child in question and instead looked at whether the child had been legitimated under state law.¹⁴⁰ In contrast with its reasoning in *Gillett-Netting*, the wage earner's acknowledgment of being the natural father of the child was not sufficient in itself for a determination of the status of "child" for purposes of qualifying for benefits under the Act.¹⁴¹

B. NINTH CIRCUIT'S STANDARD DOES NOT SERVE THE GOALS OF THE ACT

Eligibility for survivor benefits is based partially on state law, yet the majority of states have not yet determined the rights of these children; as a result, this federal law will not be applied uniformly across all states. Without clarification of the terms used in the Act, the goals of the Administration, including avoiding individual determinations of dependency and providing support for dependents of an insured wage earner, will not be met.¹⁴² The Ninth Circuit's ruling would be most persuasive where the state statutes expressly address the status of posthumously conceived children.¹⁴³ When a statute already

¹³⁸ Moorehead, 784 F.2d at 978. (noting that under Cal. Prob. Code § 255, a parent-child relationship was established, making the child "legitimate for purposes of inheritance.").

¹³⁹ Moorehead, 784 F.2d at 978.

¹⁴⁰ *Moreno v. Richardson*, 484 F.2d 899, 904 (9th Cir. 1973) (citing Cal. Civ. Code § 230, which states, "[t]he father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such . . . and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth.").

¹⁴¹ *Moreno*, 484 F.2d at 901.

¹⁴² See *supra* note 8.

¹⁴³ Ann. Cal. Prob. Code § 249.5 (West 2005). Posthumously conceived children are deemed to be born "in the lifetime of the decedent" if the decedent had specified in

provides that children in this category can establish a natural parent-child relationship that is recognized for purposes of intestate succession, the standard put forth in the Ninth Circuit's ruling in *Gillett-Netting* becomes merely an alternative argument for the granting of benefits.¹⁴⁴ When state law is not so well defined, the ruling in this case can add to the uncertainty of the result.

Using categories for purposes of determining dependency of non-marital children has been justified because without the categories, dependency would have to be determined on a case-by-case basis with several results.¹⁴⁵ First, the definition of "dependent" used by each ALJ could differ.¹⁴⁶ Additional costs of individualized determinations tend to reduce the level of benefits.¹⁴⁷ Finally, the greater variability would tax the principle that likes should be treated alike.¹⁴⁸ Variations in state intestate succession laws that contradict the standard put forth by the court will require case-by-case determination of eligibility for each posthumously conceived child who applies for benefits.

The goal of the use of legitimacy has been described as the prevention of false claims; that is, the denial of benefits is justified because allowing benefits to non-marital children would allow false claims.¹⁴⁹ The United States Supreme Court recognized the possibility that evidence of parentage or support may be more likely to be fabricated when the child is not born until after the wage earner has become entitled to benefits.¹⁵⁰ This rationale could also apply to posthumously conceived children. The Court found, however, that false claims were not prevented by the policy that divides posthumously born non-marital children into two categories for purposes of determining eligibility

writing that his or her genetic material should be used to produce a child and the child of the genetic material is in utero within two years of the person's death.

¹⁴⁴ Cal. Prob. Code §§ 249.5(a)(b)(c) (West 2005) (requiring written confirmation by the decedent authorizing the use of his or her genetic material for the conception of a child after his or her death, written notice to the person responsible for the distribution of the estate to make him or her aware of the existence of the genetic material, and conception within 2 years of the decedent's death.).

¹⁴⁵ Trammell, 819 F.2d at 169.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ Jimenez, 417 U.S. at 634.

¹⁵⁰ *Id.*

for benefits.¹⁵¹ Those non-marital children who could inherit or were legitimated under state law could qualify for survivor benefits,¹⁵² while those who did not meet these criteria would be denied benefits.¹⁵³ The Court held that the blanket exclusion of this second category of non-marital children is not necessarily reasonably related to the prevention of false claims because the potential for false claims is exactly the same for both subclasses of non-marital children.¹⁵⁴

IV. CONCLUSION

New reproductive technologies require a change in substantive state law and the clarification of terms used in federal and state statutes. Defining statutory terms is often inherently challenging, especially when emerging technology can alter the meaning of those terms. The basis of the ruling of the Ninth Circuit in *Gillett-Netting* diverges from that used in many of the lower courts and that used in previous decisions by the Ninth Circuit. These courts based eligibility on the right to inherit under state intestate succession laws, whereas the Ninth Circuit in *Gillett-Netting* looked at the biological connection between the parent and child in combination with a determination of legitimacy under state law. By not relying on a consistent ground to determine eligibility, the *Gillett-Netting* analysis necessitates a case-by-case determination, contrary to the intent of the Administration, when it established categories of children. As a result, claims of surviving children may be denied solely because of the state they live in. This defeats the purpose of the Act, which is to provide support to the survivors of an insured individual. The law and terms within those laws must be updated to encompass these new technologies and the children that result from them.

KAREN MINOR *

¹⁵¹ *Id.* at 635–637.

¹⁵² *Id.* at 635–636.

¹⁵³ *Id.* at 636.

¹⁵⁴ *Id.*

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