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## Posthumously Conceived Children And Their Social Security Benefits Based On State Intestacy Law: How *Astrue v. Capato* Changes Future Social Security Benefits As Technology Advances

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## Posthumously Conceived Children And Their Social Security Benefits Based On State Intestacy Law: How *Astrue v. Capato* Changes Future Social Security Benefits As Technology Advances

### Cover Page Footnote

J.D. Candidate 2014, Loyola Law School, Los Angeles; B.A., Psychology, May 2009, University of Southern California. I want to thank Professor Jan Costello for her encouragement and guidance in writing this Comment. I would also like to thank Laura Riley at the Cancer Legal Resource Center for her invaluable feedback. A big thank you to the editors and staffers of the Loyola of Los Angeles Law Review, especially Lydia Lee, Mark Gray, and David Rosenberg. Finally, I want to thank my family and friends for all their support.

# POSTHUMOUSLY CONCEIVED CHILDREN AND THEIR SOCIAL SECURITY BENEFITS BASED ON STATE INTESTACY LAW: HOW *ASTRUE v. CAPATO* CHANGES FUTURE SOCIAL SECURITY BENEFITS AS TECHNOLOGY ADVANCES

Catherine Kim\*

## I. INTRODUCTION

A widowed spouse may have a variety of reasons why she wants to conceive after her spouse's death.<sup>1</sup> A widow can turn to in vitro fertilization to make "a tribute to one's deceased partner . . . [, to follow] religious reasons . . . [,] to know the genetic origin of one's child . . . [,to] produce a full sibling rather than a half sibling . . . [,or] to create a grandchild."<sup>2</sup> However, a recent U.S. Supreme Court case may impact their decision to do so. Before *Astrue v. Capato*,<sup>3</sup> courts inconsistently addressed the issue of Social Security benefits for posthumously conceived children under the United States Social Security Act (the "Act").<sup>4</sup> The Act states that

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1. Benjamin C. Carpenter, *A Chip Off the Old Iceblock: How Cryopreservation Has Changed Estate Law, Why Attempts to Address the Issue Have Fallen Short, and How to Fix It*, 21 CORNELL J. L. & PUB. POL'Y 347, 358 (2011).

2. Kristine S. Knaplund, *Legal Issues of Maternity and Inheritance for the Biotech Child of the 21st Century*, 43 REAL PROP. TR. & EST. L.J. 393, 398-99 (2008).

3. 132 S. Ct. 2021 (2012).

4. *Compare* *Beeler v. Astrue*, 651 F.3d 954 (8th Cir. 2011) (holding that a posthumously conceived child was not a "child" within the meaning of the Social Security Act), *Finley v. Astrue*, 601 F. Supp. 2d 1092 (E.D. Ark. 2009) (finding that denying Social Security benefits to a posthumously conceived child did not violate equal protection), *and* *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257 (Mass. 2002) (holding that in Massachusetts posthumously conceived

families of deceased workers are entitled to Social Security benefits.<sup>5</sup> Some courts ruled in favor of allowing benefits for posthumously conceived children,<sup>6</sup> while others denied such benefits.<sup>7</sup> In addition, the emergence and increasing use of in vitro fertilization and other assisted reproduction methods have exacerbated the problem of determining a child's legal parentage,<sup>8</sup> especially when wills omit posthumously conceived children.<sup>9</sup> Courts have, at times, struggled with deciding whether these children qualified under their deceased parent's benefits when there was no consent to or mentioning of posthumously conceived children under the decedent's written will or addendum.<sup>10</sup>

On May 21, 2012, the Supreme Court finally addressed this ambiguous issue in *Capato* and held that posthumously conceived children are not entitled to Social Security benefits if a state's intestacy law does not allow it.<sup>11</sup> Instead of following the Supremacy Clause's potential to or ability to "creat[e] a uniform federal rule," the Court surprisingly deferred to state intestacy law.<sup>12</sup> This, however, created the potential for unequal application of federal Social Security law to violate a citizen's due process rights.<sup>13</sup> Therefore, to address the potentially great variation in outcomes based on differing state intestacy laws, the states should adopt the Uniform Parentage Act.<sup>14</sup>

This Comment examines and analyzes the Court's holding in *Capato*. Part II of this Comment provides an overview of how

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children are considered a decedent's "issue" only when a genetic relationship is demonstrated, and consent to posthumous conception and support was given), *with Gillett-Netting v. Barnhart*, 371 F.3d 593 (9th Cir. 2004) (finding that posthumously conceived children are "children" for purposes of the Act).

5. U.S. SOCIAL SECURITY ADMINISTRATION, SSA PUBLICATION NO. 05-10084, SURVIVORS BENEFITS 4 (2012), available at [www.ssa.gov/pubs/10084.pdf](http://www.ssa.gov/pubs/10084.pdf) [hereinafter SSA BENEFITS].

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

7. See *Beeler*, 651 F.3d at 965-66; *Finley*, 601 F. Supp. 2d at 1103, 1106; *Woodward*, 760 N.E.2d at 272.

8. Knaplund, *supra* note 2, at 393.

9. Carpenter, *supra* note 1, at 360.

10. See *id.* at 418-22.

11. *Astrue v. Capato*, 132 S. Ct. 2021, 2034 (2012).

12. *Id.*

13. *Id.* at 2033.

14. See UNIF. PARENTAGE ACT (amended 2002), available at [http://www.uniformlaws.org/shared/docs/parentage/upa\\_final\\_2002.pdf](http://www.uniformlaws.org/shared/docs/parentage/upa_final_2002.pdf).

*Capato* came before the Supreme Court. Part III discusses the historical background of Social Security benefits. Part IV explains how the Court reached its conclusion despite fluctuating precedent. Part V addresses why the Court's holding was correct but could potentially have some negative implications because the outcome of a case can vary greatly depending on which state statute applies. It also examines the Uniform Parentage Act as the proper solution to cure the defects in *Capato*. Lastly, Part VI illustrates how the *Capato* case affects future Social Security benefits cases by reflecting on the rapid growth of assisted reproduction technology.

## II. STATEMENT OF THE CASE

### A. Facts

*Capato* arose after Karen Capato was denied Social Security benefits for her twins conceived through in vitro fertilization after the death of her husband, Robert Capato.<sup>15</sup> The Capatos had preserved Robert's sperm after he was diagnosed with esophageal cancer because the couple wanted more children and his prescribed chemotherapy treatment would likely have rendered him sterile.<sup>16</sup> In the event Robert became sterile, the couple intended to conceive using in vitro fertilization; however, they were unable to do so before his untimely death.<sup>17</sup> Eighteen months after his death, Karen used in vitro fertilization to conceive the twins whose benefits were at issue in this case.<sup>18</sup> Because Robert died in Florida, the administrative law judge and district court applied Florida state intestacy law to examine the issue.<sup>19</sup>

### B. Procedural History

When Karen Capato brought her insurance benefits claim to an administrative law judge, her request was denied. The judge reasoned that because the case was related to "medical-scientific

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15. *Capato*, 132 S. Ct. at 2025–26.

16. *Id.* at 2026.

17. *Id.*

18. *Id.*

19. *Capato v. Astrue*, No. 08-5405 (DMC), 2010 WL 1076522, at \*6 (D. N.J. Mar. 23, 2010), *aff'd in part and vacated in part*, *Capato ex rel. B.N.C. v. Comm'r of Social Sec.*, 631 F.3d 626 (3d Cir. 2011), *rev'd*, *Astrue v. Capato*, 132 S.Ct. 2021 (2012).

technology [that] ha[d] advanced faster than the regulatory process . . . [he] believed himself constrained by applicable laws and regulations to find disentitlement.”<sup>20</sup>

A District Court of New Jersey affirmed on the grounds that “the twins would qualify for benefits only if, as 42 U.S.C. § 416(h)(2)(A) specifies, they could inherit from the deceased wage earner under state intestacy law.”<sup>21</sup> Because Robert had been domiciled in Florida, state law specified that “posthumously conceived children do not qualify for inheritance through intestate succession.”<sup>22</sup>

The Third Circuit Court of Appeals reversed the district court’s opinion by defining “child” under 42 U.S.C. § 416(e).<sup>23</sup> Through its interpretation, the Third Circuit determined that the twins were “undisputed biological children of [the] deceased wage earner . . . [, and] his children were dependent or deemed dependent on [their father].”<sup>24</sup>

The Commissioner of Social Security, Michael Astrue, petitioned the U.S. Supreme Court to determine whether the Capato twins fell within the definition of “child[ren]” under § 416 of the Act.<sup>25</sup>

### III. HISTORICAL FRAMEWORK

*Capato* addressed an ambiguity in the Act regarding the distribution of survivor benefits. The Act states that families of deceased workers are entitled to Social Security benefits.<sup>26</sup> As an employee works and pays Social Security taxes, he or she earns credits toward Social Security benefits, which the surviving immediate family members can receive.<sup>27</sup> Benefits cover children under age eighteen and can include stepchildren, grandchildren, step-

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20. *Capato ex rel. B.N.C. v. Comm’r of Soc. Sec.*, 631 F.3d 626, 628 (3d Cir. 2011), *rev’d*, *Astrue v. Capato*, 132 S.Ct. 2021 (2012) (citations omitted) (internal quotation marks omitted).

21. *Capato*, 132 S. Ct. at 2026. Title 42 of the United States Code Service defines “The Public Health and Welfare.” 42 U.S.C. § 416 specifies additional definitions of the Social Security Act. 42 U.S.C. § 416 (2006).

22. *Capato*, 132 S. Ct. at 2026.

23. *Id.* at 2027.

24. *Capato ex rel. B.N.C.*, 631 F.3d at 632.

25. *Capato*, 132 S. Ct. at 2027.

26. SSA BENEFITS, *supra* note 5.

27. *Id.*

grandchildren, and adopted children.<sup>28</sup> Before *Capato*, the courts had been divided in their interpretations of the Act by allowing some potential beneficiaries to collect benefits, but not others.<sup>29</sup> Now, courts are free to interpret eligibility based on state intestacy law.<sup>30</sup>

#### IV. REASONING OF THE COURT

Justice Ginsburg authored the unanimous opinion in *Capato*.<sup>31</sup> The opinion reiterated that under the Act, biological children are entitled to benefits “only if they qualify for inheritance from the decedent under state intestacy law, or satisfy one of the statutory alternatives to the requirement.”<sup>32</sup> Since the statute was written in 1939, “[t]he technology that made the twins’ conception and birth possible, it is safe to say, was not contemplated by Congress when the relevant provisions of [the Act] originated (1939) or were amended to read as they now do (1965).”<sup>33</sup>

With the statute in mind, the Supreme Court considered a variety of issues that *Capato* presented to determine whether the twins were entitled to benefits: (1) what factors should be used to determine the definition of “child”; (2) how was state intestacy law an issue; and (3) whether the Due Process Clause was violated.<sup>34</sup>

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28. *Id.*

29. Compare *Beeler v. Astrue*, 651 F.3d 954 (8th Cir. 2011) (concluding that a child posthumously conceived through artificial insemination was not eligible for benefits because her father’s deathbed statement and signature agreeing to accept and acknowledge paternity did not satisfy the paternity acknowledgment requirement under the Act’s provision allowing a child to be deemed a natural child); *Finley v. Astrue*, 601 F. Supp. 2d 1092 (E.D. Ark. 2009) (reviewing the constitutionality of the Social Security Commissioner’s decision denying claims for benefits because although the child was created as an embryo during the time of the child’s parents’ marriage, the embryo was not implanted in the mother’s womb until after the father’s death), and *Woodward v. Comm’r of Soc. Sec.*, 760 N.E.2d 257 (Mass. 2002) (establishing eligibility if genetic relationship with the decedent is proven and decedent consented both to reproduce posthumously and support any resulting child), with *Gillett-Netting v. Barnhart*, 371 F.3d 593 (9th Cir. 2004) (holding that posthumously conceived children were children within the Act’s definition because the deceased father was the biological father and married to the children’s mother).

30. *Capato*, 132 S. Ct. at 2034.

31. *Id.* at 2025.

32. *Id.* at 2026.

33. *Id.*

34. *Id.* at 2027–34.

### A. *The Definition of “Child”*

While the Third Circuit found it unnecessary to analyze § 416(h) because the twins were undeniably Robert Capato’s biological children, the Supreme Court found a major flaw in the Third Circuit’s reasoning.<sup>35</sup>

The Third Circuit determined that § 416(h) would be applied when a child’s family status needed to be determined and § 416(e) when the claimant was the biological child of a married couple.<sup>36</sup> However, the Supreme Court pointed out different variations of what would qualify under the definition of “child” and determined that marriage does not “always make the parentage of a child certain, nor does the absence of marriage necessarily mean that a child’s parentage is uncertain.”<sup>37</sup> “Under Florida law, a marriage ends upon the death of a spouse,” so, because the Capato twins were conceived posthumously, they “would not qualify as ‘marital’ children.”<sup>38</sup> On the other hand, the Act qualifies an offspring for insurance benefits as a “natural child” if he or she meets any of the following four criteria:

- (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; or
- (4) other evidence shows that the insured is the applicant’s natural father or mother and was either living with, or contributing to the support of, the applicant.<sup>39</sup>

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35. *Id.* at 2029; *Capato ex rel. B.N.C. v. Comm’r of Soc. Sec.*, 631 F.3d 626, 631 (3d Cir. 2011), *rev’d*, *Astrue v. Capato*, 132 S.Ct. 2021 (2012).

36. *Capato*, 132 S. Ct. at 2029.

37. *Id.* at 2030.

38. *Id.*

39. *Id.* at 2028–29 (internal quotation marks omitted) (citing 20 C.F.R. § 404.355(a) (2006)).

However, the Supreme Court did not “invoke any of the alternative criteria as a basis for the twins’ ‘child’ status.”<sup>40</sup> Using state law to determine a child’s status “is anything but anomalous” because “[t]he Act commonly refers to state law on matters of family status.”<sup>41</sup>

Ultimately, the Court concluded that the Social Security Administration’s definition of “child” under § 416(e) must be interpreted in light of § 416(h).<sup>42</sup> When Congress allows an agency, such as the Social Security Administration, to hold policy-making responsibilities, it is reasonable to defer to the agency’s interpretation of its own statutes and regulations.<sup>43</sup> Thus, the Social Security Administration’s interpretation was a reasonable interpretation and entitled to deference.<sup>44</sup>

### *B. State Intestacy Law*

In addition, the Court determined the Capato twins’ eligibility to receive Social Security benefits by looking at the deceased parent’s domicile state’s intestacy law.<sup>45</sup> The Supreme Court addressed the issue of how the Act applied state law for intestacy limitations.<sup>46</sup> This included “duration-of-relationship limitations,”<sup>47</sup> under which a parent-child relationship must exist for a certain amount of time before the insured’s death.<sup>48</sup> The Supreme Court also discussed various states’ “time limits,” which range from several months to years, and allowed states to “treat[] a posthumously conceived child as in gestation at the individual’s death, but only if specified time limits are met.”<sup>49</sup> The Supreme Court, however, stated that the Act’s purpose was not to “generally benefit[] needy persons” but to “provide . . . dependent members of [a wage earner’s] family with protection against the hardship occasioned by [the] loss of [the

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40. *Id.* at 2028.

41. *Id.* at 2031.

42. *Id.*

43. *Id.* at 2033–34 (citing *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001)).

44. *Id.* at 2033.

45. *Id.* at 2026.

46. *Id.* at 2031.

47. *Id.*

48. *Id.* at 2031–32.

49. *Id.* at 2032 (quoting UNIF. PROBATE CODE § 2-120(k) (amended 2010), 8 U.L.A. 58 (Supp. 2011) (internal quotation marks omitted)).

insured's] earnings.”<sup>50</sup> The Court recognized that the Act's “refer[ence] to state law to determine the status of a posthumously conceived child[,] . . . adhered to without deviation for many decades, is at least reasonable.”<sup>51</sup> Justice Ginsburg's opinion complimented the Act for “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.”<sup>52</sup> However, since the Act will still be applied on a disorderly state-by-state basis, Justice Ginsburg's opinion delved nicely into the need for something more uniform.<sup>53</sup> Therefore, as discussed below, the Court should have taken a further step in interpreting the Act.

### C. Due Process Clause

Additionally, the *Capato* Court addressed Karen Capato's constitutional concerns, especially the need for a higher level of scrutiny.<sup>54</sup> The Court agreed that the “serious constitutional concerns under the equal protection component of the Due Process Clause” were easily met under the rational basis test.<sup>55</sup> Karen Capato had argued that the Social Security Administration's interpretation of the Act treated posthumously conceived children “as an inferior subset of natural children who are ineligible for government benefits simply because of their date of birth and method of conception.”<sup>56</sup> The Court dismissed the argument because Congress had emphasized that “[reserving] benefits [for] those children who have lost a parent's support, and . . . using reasonable presumptions to minimize the administrative burden of proving dependency on a case-by-case basis.”<sup>57</sup>

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50. *Id.* at 2032 (citing *Califano v. Jobst*, 434 U.S. 47, 52 (1977)).

51. *Id.* at 2033.

52. *Id.* at 2032.

53. Brief of Amicus Curiae Cancer Legal Resource Center of the Disability Rights Legal Center as Amici Curiae in Support of Respondents at 10, *Capato*, 132 S. Ct. 2021 (No. 11-159), 2012 WL 392545, at \*10.

54. *Capato*, 132 S. Ct. at 2033.

55. *Id.*

56. *Id.* (citing Brief for Respondent at 42–43, *Capato*, 132 S. Ct. 2021 (No. 11-159), 2012 WL 273128, at \*42–43).

57. *Id.* (quoting *Vernoff v. Astrue*, 568 F.3d 1102, 1111 (9th Cir. 2009) (alterations in original)).

The opinion concluded that the Act was a viable “resolution of Karen Capato’s application for child’s insurance benefits by reference to state intestacy law.”<sup>58</sup> The focus on state intestacy law in the Act thus relieves courts from having to scrutinize on a case-by-case basis.<sup>59</sup>

## V. ANALYSIS

The *Capato* Court was correct to deny the twins Social Security benefits based on their father’s earned income. The Act parallels the state interests and benefits family members most affected by a death, meaning those that are alive or in gestation at the time of death.<sup>60</sup> The Supreme Court justified its reasoning by viewing the Act’s interpretation to be “at least reasonable.”<sup>61</sup>

### A. *Improper Reasons to Conceive Posthumously*

The Court ruled correctly because putting restrictions on Social Security benefits would limit improper reasons to posthumously conceive. The government implemented survivor benefits to protect and support family members already depending on the deceased wage earner’s income while he or she was alive.<sup>62</sup> First, it was important to limit the government’s liability of Social Security benefits by creating a clear cutoff for Social Security beneficiaries.<sup>63</sup> Surely, there is a policy argument that people may abuse the system for improper reasons, and the government still may have to pay based on state intestacy law. Because there are so many variations of

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58. *Id.* at 2034.

59. *Id.* at 2032.

60. *Id.*

61. *Id.* at 2033.

62. SSA BENEFITS, *supra* note 5.

63.

Since 1939, the Social Security Act has provided ‘survivor benefits’ to replace the economic support a family loses after a parental death . . . if the worker’s spouse provides primary care for an eligible child, the spouse may also receive monthly benefits until that child reaches age sixteen or is no longer disabled. The amount payable to a survivor equals 75% of the decedent’s primary insurance amount, which is the monthly benefit amount that would have been payable to the worker upon initial entitlement at full retirement age. However, a family maximum provision limits the total benefits to a family to between 150% and 188% of the worker’s primary insurance amount. This can be a great benefit to a family.

Carpenter, *supra* note 1, at 384.

state intestacy law, the Court should have provided a clearer definition of “child” and utilized this definition as a limiting principle to cut off Social Security benefits. However, since the Court failed to do so in *Capato*, the states should implement the Uniform Parentage Act so that the definition of “child” would be standardized across the states. Alternatively, the Court should federalize a definition of “child” pursuant to the Supremacy Clause.<sup>64</sup>

Second, the Court made the right decision because encouraging widowed parents to posthumously conceive for incentives, such as financial gain, would be immoral. Receiving Social Security benefits “without the deceased spouse’s consent is unethical and may violate a right to . . . procreative liberty. Even if no such rights exist, the practice should be discouraged on public policy grounds.”<sup>65</sup> Consequently, rather than allowing posthumously conceived children to receive benefits easily, the Court made the right decision to follow state intestacy law.

### B. Constitutional Concerns

The Court determined that the Due Process Clause had not been violated because Congress’s regime for determining the status of posthumously conceived children met the rational basis test.<sup>66</sup> The U.S. Constitution asserts that the federal and state governments may not deprive any person of life, liberty, or property without due process of law.<sup>67</sup> The state may deprive a person of life, liberty, or property, but it must do so by due process of law.<sup>68</sup> There are two kinds of due process: substantive due process and procedural due

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64. Kristine S. Knaplund, *Children of Assisted Reproduction*, 45 U. MICH. J.L. REFORM 899, 935 (2012).

65. *Id.* at 922.

66. *Capato*, 132 S. Ct. at 2033; *Rational Basis Test*, LEGAL INFO. INST. CORNELL U. LAW SCH. (Aug. 19, 2010, 5:23 PM), [http://www.law.cornell.edu/wex/rational\\_basis\\_test](http://www.law.cornell.edu/wex/rational_basis_test) (“Under the rational basis test, the courts will uphold a law if it is rationally related to a legitimate government purpose. The challenger of the constitutionality of the statute has the burden of proving that there is no conceivable legitimate purpose or that the law is not rationally related to it. This test is the most deferential of the three levels of review in due process or equal protection analysis (the other two levels being intermediate scrutiny and strict scrutiny), and it requires only a minimum level of judicial scrutiny.”).

67. U.S. CONST. amend. V; *id.* amend. XIV, § 1.

68. *See id.* amend. V; *id.* amend. XIV, § 1.

process.<sup>69</sup> The *Capato* Court analyzed substantive due process to determine whether the government interest was important enough to justify the deprivation, and whether Congress's regime was sufficiently linked to that interest.<sup>70</sup> When determining whether the *Capato* twins' due process rights had been violated, the Court decided that Social Security benefits fall under property rights, which include entitlements.<sup>71</sup> Here, the federal government passed and enforced the Act, which paralleled state action.<sup>72</sup> Since there was a deprivation of property, the government had to satisfy due process.<sup>73</sup>

The Court then applied the rational basis test to determine whether the Act interpretation violated substantive due process.<sup>74</sup> The government's interest was legitimate because the Act was intended to provide benefits to the dependents most likely to be adversely affected by the death of a benefit-receiving parent.<sup>75</sup> The means to achieve this interest, by following state intestacy law eligibility, was not the only possible approach; however, it was a reasonable approach that was not arbitrary.<sup>76</sup> Therefore, the Act's interpretation and application satisfied due process.

In contrast, the Court could potentially have interpreted the Act as unconstitutional. For example, a longer time period or broader eligibility standard could encourage and help widowed spouses exercise their fundamental constitutional right to have children.<sup>77</sup> Other constitutional concerns include "discrimination against children (who have no control over the timing and method of their conception and birth), their siblings, and their surviving parents."<sup>78</sup> These issues illustrate that there was a fundamental right at stake, so

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69. Peter Strauss, *Due Process*, LEGAL INFO. INST. CORNELL U. LAW SCH., [http://www.law.cornell.edu/wex/due\\_process](http://www.law.cornell.edu/wex/due_process).

70. ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 546 (3d ed. 2006) ("Substantive due process looks to whether there is a sufficient justification for the government's action.")

71. Strauss, *supra* note 69.

72. *Astrue v. Capato*, 132 S. Ct. 2021, 2025 (2012).

73. CHERMERINSKY, *supra* note 70, at 549.

74. *Capato*, 132 S. Ct. at 2033.

75. *Id.* at 2032–33.

76. *Id.* at 2033–34.

77. CHERMERINSKY, *supra* note 70, at 546.

78. Brief of Amicus Curiae Cancer Legal Resource Center of the Disability Rights Legal Center as Amicus Curiae in Support of Respondents, *supra* note 53, at 14.

the Supreme Court should have applied strict scrutiny.<sup>79</sup> However, the Supreme Court dismissed this argument by stating that the case involved a property right or entitlement, which circumvented the need to address the fundamental rights issue.<sup>80</sup> Therefore, the Act's definition and interpretation are constitutional because the Court deferred to state law.

*C. How the Court's Reasoning May Lead to Negative Implications*

There are, however, several unintended consequences of the *Capato* decision, such as unequal application of the Act based on differing state intestacy laws. The outcome of a case can vary greatly depending on where the plaintiff is domiciled.

The *Capato* case would have been decided differently if the court had applied New Jersey law instead of Florida law. Although the trial court determined that Robert Capato was domiciled in Florida and thus used Florida state law to determine the twins' Social Security benefit qualifications, many of the factors considered show why New Jersey law should have been applied.<sup>81</sup> First, the Capatos lived in Florida as newlyweds, but they had married in New Jersey.<sup>82</sup> In addition, Karen Capato stated that "their final destination was going to be New Jersey . . . to try to open businesses there."<sup>83</sup> Robert Capato had "attempted to incorporate a business in New Jersey to start opening health clubs there so that, ultimately, the family could move there."<sup>84</sup> He stayed in Florida to receive his radiation and chemotherapy treatments, but he even told others of his intent to move to New Jersey.<sup>85</sup> Even after his death, Karen received artificial insemination treatments in New Jersey.<sup>86</sup>

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79. CHEMERINSKY, *supra* note 70, at 546.

80. *Capato*, 132 S. Ct. at 2033–34.

81. *Id.* at 2026.

82. *Capato v. Astrue*, No. 08-5406, 2010 WL 1076522, at \*1 (D.N.J. Mar. 23, 2010), *aff'd in part and vacated in part*, *Capato ex rel. B.N.C. v. Comm'r of Soc. Sec.*, 631 F.3d 626 (3d Cir. 2011), *rev'd*, *Astrue v. Capato*, 132 S.Ct. 2021 (2012).

83. *Id.*

84. *Id.*

85. *Id.* at \*2.

86. *Id.* at \*3.

The Capato twins would have benefitted from Social Security benefits under New Jersey intestacy law, which has a separate statute for omitted children in wills.<sup>87</sup> The statute reads:

[I]f a testator fails to provide in his will for any of his children born or adopted after the execution of his will, the omitted after-born or after-adopted child receives a share in the estate as follows; . . . (2) If the testator had one or more children living when he executed the will, and the will devised property or an interest in property to one or more of the then-living children, an omitted after-born or after-adopted child is entitled to share in the testator's estate.<sup>88</sup>

Robert Capato's will included the son he had with Karen Capato during his life, as well as two children from a previous marriage.<sup>89</sup> Since his will devised property or interests in property to his then-living children,<sup>90</sup> applying the New Jersey statute to the omitted after-born twins would entitle them to a share in Robert's estate.

Furthermore, Robert could have purposefully excluded "passing intestate succession" through the following New Jersey provision: "I have intentionally made no provision in this will for any future children who might be born to or adopted by me and my present spouse or any future spouse, other than as otherwise specifically provided in this will."<sup>91</sup> The Drafter's Notes state that this "statement should include posthumous after-born, or after-adopted children, to eliminate the possibility that any such child will be treated as a pretermitted heir."<sup>92</sup> Therefore, since Robert's will contained no specific provision to block intestate succession, New Jersey law could ultimately have entitled the twins to Social Security benefits.<sup>93</sup>

Other states, such as Georgia, Idaho, Minnesota, South Carolina, and South Dakota, have purposely excluded posthumously conceived children to prevent them from inheriting from their deceased parents' estates.<sup>94</sup> Surprisingly, Florida was the first state to recognize

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87. N.J. STAT. ANN. § 3B:5-16 (West 2005).

88. *Id.*

89. *Astrue v. Capato*, 132 S. Ct. 2021, 2026 (2012).

90. *Id.*

91. 10A N.J. Forms Legal & Bus. § 24:274 (2012).

92. *Id.*

93. *Capato*, 132 S. Ct. at 2026.

94. Carpenter, *supra* note 1, at 378.

posthumously conceived children in probate court “if the decedent provided for the child in the decedent’s will.”<sup>95</sup> Thus, *Capato* changes the outcome of cases in these states because they will be determined on a state-by-state basis.

The good news is that “[c]ourt records show only about 100 other federal benefit applicants in a similar situation as *Capato*.”<sup>96</sup> However, the definition of “a ‘child’ in relation to a parent and whether current state and federal law [is] flexible enough to incorporate a growing range of technological conception possibilities” was left unanswered.<sup>97</sup>

#### D. Future Amendment of the Law

Although there is not a tremendous number of posthumously conceived children applying for Social Security benefits, the number of families using artificial insemination, in vitro fertilization, cryopreservation, and surrogacy is increasing as technology advances.<sup>98</sup> The law must adapt to these changes for the future. Because the Court did not specifically define “child,” similar cases may soon appear seeking a clearer definition of “child.”

Furthermore, if the Third Circuit’s proposed broad interpretation of “child” had been used, it would treat all biological and genetic children equally.<sup>99</sup> This presents further constitutional concerns of “discrimination against children (who have no control over the timing and method of their conception and birth), their siblings, and their surviving parents (who did nothing more objectionable than exercise their fundamental right to procreate).”<sup>100</sup> Parental rights should come at the time when the parents decided to procreate rather than “at the moment of childbirth or even pregnancy.”<sup>101</sup> Therefore, “when a construction of the statute is fairly possible by which a serious doubt of constitutionality may be avoided, a court should

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95. *Id.* at 379–80.

96. Bill Mears, *Justices Deny Benefits for Child Conceived After Death of Parent*, CNN (May 21, 2012, 5:00 PM), [http://articles.cnn.com/2012-05-21/justice/justice\\_scotus-posthumous-conception-ruling\\_1\\_survivors-benefits-children-justices?\\_s=PM:JUSTICE](http://articles.cnn.com/2012-05-21/justice/justice_scotus-posthumous-conception-ruling_1_survivors-benefits-children-justices?_s=PM:JUSTICE).

97. *Id.*

98. Carpenter, *supra* note 1, at 357.

99. Brief of Amicus Curiae Cancer Legal Resource Center of the Disability Rights Legal Center as Amicus Curiae in Support of Respondents, *supra* note 53, at 11.

100. *Id.* at 14 (citation omitted).

101. *Id.* at 15 (citing *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998)).

adopt that construction.”<sup>102</sup> The Capatos determined that they wanted to freeze Robert’s sperm prior to chemotherapy,<sup>103</sup> and this showed their decision to have children in the future.

However, it should also be considered that full siblings, including then-living children and posthumously conceived children, would be treated differently.<sup>104</sup> Even though Social Security benefits are meant for children who had relied on the deceased parent for support, this could cause other complications, such as the widowed spouse receiving fewer benefits for the surviving family if the surviving family includes posthumously conceived children.<sup>105</sup> There simply would be no predictability or finality in the law. The Court ultimately rejected the Third Circuit’s broad interpretation of “child,” not because of its unreasonable interpretation, but because the Social Security Administration’s proposed interpretation was more consistent with the purpose of the Act.<sup>106</sup>

#### *E. Possible Bright-Line Rule*

Moreover, some states have a broader definition of the Act.<sup>107</sup> An ideal legal framework to compare to would be the Uniform Parentage Act<sup>108</sup> because it only recognizes posthumously conceived children if the deceased parent indicated, in writing, the intent to have posthumous children and recognize them as heirs.<sup>109</sup> Although some criticize that the Uniform Parentage Act is too narrowly construed,<sup>110</sup> it is a simpler way of controlling the issue and provides much needed uniformity in the law. There are other frameworks, such as the Uniform Probate Act, that broadly define the issue;<sup>111</sup> however, when a state does not “address the status of posthumously

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102. *Id.* at 10 (internal quotation marks omitted) (citing *Califano v. Yamasaki*, 442 U.S. 682, 693 (1979)).

103. *Astrue v. Capato*, 132 S. Ct. 2021, 2026 (2012).

104. Brief for National Senior Citizens Law Center and National Organization of Social Security Claimants’ Representatives as Amicus Curiae in Support of Respondents at 14, *Capato*, 132 S. Ct. 2021 (No. 11-159), 2012 WL 416747, at \*14.

105. *See Capato*, 132 S. Ct. 2021.

106. *Id.* at 2034.

107. *Carpenter*, *supra* note 1, at 368.

108. UNIF. PARENTAGE ACT § 707 (amended 2002).

109. *Id.*

110. *Knaplund*, *supra* note 64, at 919.

111. *Id.*

conceived children in its probate code, a court may look to the [Uniform Parentage Act] to determine the parties' relationship."<sup>112</sup>

To address the potentially great variation in outcomes based on differing state laws, the states should adopt the Uniform Parentage Act. During oral argument, Karen Capato's attorney referenced a preemptive federal rule that "a child born four years after her father's death would be eligible for benefits."<sup>113</sup> In a cryopreservation and estate law article, Professor Benjamin Carpenter noted that, because the issue of posthumously conceived children and Social Security benefits is still a fairly new concept,

[t]hirty-three states, plus the District of Columbia, still have not addressed whether a posthumously conceived child has any interest in the deceased parent's estate, or whether such a child can be included as child, issue, heir, descendant, or similar term under a class-gift provision in a will, trust agreement, or other governing instrument.<sup>114</sup>

Therefore, the Uniform Parentage Act suggests that if a spouse dies "before placement of eggs, sperm, or embryos, the deceased spouse is not a parent of the resulting child unless the deceased spouse consented in a record that, if assisted reproduction were to occur after death, the deceased spouse would be a parent of the child."<sup>115</sup> Since the Act is outdated, a uniform rule should be adopted because "[d]eveloping reproductive technology has outpaced federal and state laws, which currently do not address directly the legal issues created by posthumous conception."<sup>116</sup> A uniform definition of "child," such as the one used in the Uniform Parentage Act, would solve the inequity created by differing state intestacy laws and would provide finality to the families affected.<sup>117</sup> Although the Court referred to state intestacy laws as a way of avoiding case-by-case situations,<sup>118</sup> states should take another step forward by implementing a uniform statute.

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112. Carpenter, *supra* note 1, at 369.

113. *Astrue v. Capato*, 132 S. Ct. 2021, 2032 (2012) (citation omitted).

114. Carpenter, *supra* note 1, at 401.

115. UNIF. PARENTAGE ACT § 707 (amended 2002).

116. *Gillett-Netting v. Barnhart*, 371 F.3d 593, 595 (9th Cir. 2004).

117. *See* Carpenter, *supra* note 1, at 350–51.

118. *Astrue v. Capato*, 132 S. Ct. 2021, 2032 (2012).

In *Capato*, the outcome would have differed depending on whether Florida or New Jersey intestacy laws applied. However, if the Uniform Parentage Act is used in all Social Security benefits cases for posthumously conceived children, the outcome would be predictable and equal for similar cases. The Capato twins would still be ineligible for Social Security benefits under both the Uniform Parentage Act and the Uniform Probate Act because there was no written statement of intent by the deceased father.<sup>119</sup> However, even if the Capato twins did not win this particular case, the Uniform Parentage Act would still be a better method to determine which children would receive benefits because it provides a clearer answer for future cases. As a result, there would be fewer complications in determining benefits and distinguishing various factors, such as whether the deceased had wanted children before his death and whether his place of domicile mattered, because they would all fall within the bright-line rule.

## VI. CONCLUSION

The *Capato* Court's holding will impact future Social Security cases and add an unnecessary factor for a widowed spouse to consider when deciding whether to conceive after his or her spouse's death.<sup>120</sup> The Court interpreted the Act to provide a clearer framework to prevent people from taking advantage of the benefits intended for family members whose need was anticipated at the time of the wage-earner's death.<sup>121</sup> For the time being, the ruling correctly addressed constitutional concerns and ensured that the Act's interpretation was "at least reasonable."<sup>122</sup> However, state legislatures should modify and update state intestacy law to include the Uniform Parentage Act's definition of "child" so that our legal system can move forward alongside the rapid growth of assisted reproduction technology. *Capato* answered many important questions but failed to address others. Without such a universal adjustment, cases will come to court to readdress the definition of "child." Full biological siblings, born before and after the death of

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119. *Id.* at 2026.

120. Carpenter, *supra* note 1, at 358.

121. *See Capato*, 132 S. Ct. at 2032.

122. *Id.* at 2033.

the decedent parent, may be treated unequally and discriminated against solely based on the timing of their births.<sup>123</sup> In order to address these issues, either states should adopt the Uniform Parentage Act's definition of "child," or Congress should adopt such a definition in the Act in the near future to coincide with advancing technology.<sup>124</sup>

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123. Brief of National Senior Citizens Law Center and National Organization of Social Security Claimants' Representatives as Amicus Curiae in Support of Respondent, *supra* note 104, at 14.

124. *Capato*, 132 S. Ct. at 2034.