GILLETT-NETTING v. BARNHART AND UNANSWERED QUESTIONS ABOUT SOCIAL SECURITY BENEFITS FOR POSTHUMOUSLY CONCEIVED CHILDREN

I. INTRODUCTION

Cryopreservation[1]—the freezing of sperm for later use in assisted reproduction—provides an invaluable failsafe for men vulnerable to sterilization;[2] however, using frozen sperm to conceive a child after a non-anonymous sperm donor's death creates bizarre and troubling scenarios. For example, William Kane wrote a letter, shortly before committing suicide in 1991, asking his girlfriend to conceive a child using his frozen sperm.[3] In 1994, Mirabel Baez asked a medical examiner to extract sperm

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1. *See infra* notes 23–29 and accompanying text.

2. Professor Leach predicted legal issues caused by sperm donation in 1962. *See* W. Barton Leach, *Perpetuities in the Atomic Age: The Sperm Bank and the Fertile Decedent*, 48 A.B.A. J. 942 (1962). He believed sperm banks, created to protect astronauts' sperm from mutation by space radiation, threatened the Rule against Perpetuities's stability. *Id*. at 943–44. Before both the 1991 Gulf War and the 2003 Iraqi War, many soldiers, fearing sterilization by biological or chemical weapons, had their sperm frozen. *See* Kristine Knaplund, *Postmortem Conception and a Father's Last Will*, 46 ARIZ. L. REV. 91, 91–92 (2004). This idea is not new; Montegazza predicted it in 1866. *See* Bruce L. Wilder, *Assisted Reproduction Technology: Trends and Suggestions for the Developing Law*, 18 J. AM. ACAD. MATRIM. LAW. 177, 178 (2002). Other common sperm freezers include men with cancer, who fear sterilization from chemotherapy, and athletes vulnerable to groin injuries. Knaplund, *supra* at 91–92.

3. Hecht v. Kane, 20 Cal. Rptr. 2d 275, 276–77 (Cal. Ct. App. 1993). William Kane killed himself in a Las Vegas hotel room. *Id*. at 276. Deborah Hecht, Kane's girlfriend, was thirty-eight years old and lived with him for the five years before his death. *Id*. Kane also had two adult children from a previous marriage. *Id*.

Before dying, Kane deposited fifteen vials of sperm in a California sperm bank. *Id*. Kane expressed his desire for a child with Deborah Hecht in his will's "Statement of Wishes." *Id*. at 276–77. Kane wrote a letter to his two living children discussing the possibility of Hecht having his posthumously conceived child. *Id*. Kane wrote:

> I address this to my children, because, although I have only two, Everett and Katy, it may be that Deborah will decide—as I hope she will—to have a child by me after my death. I've been assiduously generating frozen sperm samples for that eventuality. If she does, then this letter is for my posthumous offspring, as well, with the thought that I have loved you in my dreams, even though I never got to see you born.
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> If you are receiving this letter, it means that I am dead—whether by my own hand or that of another makes very little difference. I feel that my time has come; and I wanted to leave you with something more than a dead enigma that was your father. . . . I am inordinately proud of who I have been—what I made of me. I'm so proud of that that I would rather take my own life now than be ground into a mediocre existence by my enemies—who, because of my mistakes and bravado have gained the power to finish me.

Id. at 277.

from her dead husband.[4] In 1998, Jeremy Reno's mother, who wanted to "be a grandma," ordered doctors to keep her son alive until they surgically extracted his sperm.[5] Furthermore, sperm from a deceased man has now been used to produce a child,[6] and cryopreservation is becoming increasingly popular.[7] While frozen sperm used during a man's life causes no significant legal problems,[8] children conceived with a decedent's sperm complicate, *inter alia*, both the intestate[9] and testate[10] distribution of his estate.

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4. Mirabel Baez's husband died twenty-four hours earlier. Maggie Gallagher, *About Sperm the Ultimate Deadbeat Dads*, NEWSDAY, Feb. 1, 1994, at A28. Extraction of a deceased's sperm is possible during the first twenty-four hours after death. *See* Sharona Hoffman & Andrew P. Morriss, *Currents in Contemporary Ethics*, 31 J.L. MED. & ETHICS 721, 722 (2003). *But see* JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS & ESTATES 127 (6th ed. 2000) (stating a Los Angeles woman gave birth to a girl using her deceased husband's sperm, extracted thirty hours after his death).

5. Laura Dwyer, *Dead Daddies: Issues in Postmortem Reproduction*, 52 RUTGERS L. REV. 881, 881–82 (2000). Nineteen-year-old Jeremy Reno shot himself during a game of Russian roulette. *Id*. at 881. His mother, Pam Reno, said: "I told them I have to get my son's sperm. It's the only way I can become a grandma." *Id*. She planned on using a donor egg to conceive an embryo with her son's sperm; she then planned on contracting with a surrogate mother to carry the embryo. *Id*. Bioethicist Arthur Caplan correctly characterizes Mirabel Baez and Pam Reno's behavior as "sort of like raping someone when he is dead." Lori B. Andrews & Nanette Elster, *Regulating Reproductive Technologies*, 21 J. LEGAL MED. 35, 55 (2000).

6. *See* Stephen v. Comm'r of Soc. Sec., 2005 WL 2210651 (M.D. Fla. 2005). In *Stephen*, a widow, whose husband died only two weeks after their wedding, had her husband's sperm removed twenty-four hours after his death. *Id*. at *1. After several unsuccessful attempts at in vitro fertilization, the wife gave birth to a son four years after her husband's death. *Id*. From 1980–1995, eighty-two girlfriends, widows, fiancées, and family members requested a postmortem sperm extraction. *See* Knaplund, *supra* note 2, at 93–94. In some states, such as California, postmortem sperm retrieval is illegal without prior consent from the deceased. *See* CAL. BUS. & PROF. CODE § 2260 (West 2003). Both the New York Task Force on Life and Law and an American Bar Association committee recommended making postmortem sperm extraction illegal without prior consent from the deceased. *See* Knaplund, *supra* note 2, at 94.

7. For statistics showing the increasing use of assisted reproductive technologies, see CENTER FOR DISEASE CONTROL, ASSISTED REPROD. TECH. SUCCESS RATES (2003), http://www.cdc.gov/reproductivehealth/ART01/index.htm.

8. The Uniform Parentage Act does not treat a sperm donor as the parent unless he consents to being the parent. *See* UNIF. PARENTAGE ACT §§ 702–703 (amended 2002).

9. For a general discussion of inheritance rights, see Jamie Rowsell, Note, *Stayin' Alive: Postmortem Reproduction and Inheritance Rights*, 41 FAM. CT. REV. 400, 401–02 (2003). *See also* Kayla VanCannon, Note, *Fathering a Child From the Grave: What are the Inheritance Rights of Children Born Through New Technology After the Death of a Parent?*, 52 DRAKE L. REV. 331, 350–58 (2004). For a theoretical discussion of property rights and frozen embryos, see Jessica Berg, *Owning Persons: The Application of Property Theory to Embryos and Fetuses*, 40 WAKE FOREST L. REV. 159 (2005).

10. *See* Lisa Burkdall, Note, *A Dead Man's Tale: Regulating the Right to Bequeath Sperm in California*, 46 HASTINGS L.J. 875, 882–903 (1995). One major problem is the Rule Against Perpetuities: "A nonvested interest is good if is absolutely certain to vest, or fail to vest, not later than twenty-one years after the death of some life in being at the creation of the interest." CORNELIUS J. MOYNIHAN & SHELDON F. KURTZ, INTRODUCTION TO THE LAW OF REAL PROPERTY 243 (3d ed.

Implicating (and overlapping) the inheritance problem is the availability of Social Security survivor benefits ("Benefits") to posthumously conceived children.[11] A number of issues warrant consideration when examining the Benefits question: what relationship the birth mother must have with the deceased sperm donor; what qualifies as support from the decedent; whether to impose a time limit on conception; and whether children birthed by the decedent's widow, who are conceived with his sperm, should be considered legitimate. Two state courts have addressed the inheritance problem,[12] but the Ninth Circuit, in *Gillett-Netting v. Barnhart*,[13] became the first court to directly address the availability of Benefits to posthumously conceived children.

This Note will provide an overview of pertinent reproductive techniques used in posthumous conception, previous cases examining posthumously conceived children's inheritance rights, and Social Security. This Note will then explain why the Ninth Circuit correctly awarded the *Gillett-Netting* children Benefits. This Note will examine why the Ninth Circuit's reasoning leaves posthumously conceived children overly reliant

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2002). For a discussion of how posthumously conceived children effect the Rule Against Perpetuities, see Sharona Hoffman & Andrew P. Morriss, *Birth After Death: Perpetuities and the New Reproductive Technologies*, 38 GA. L. REV. 575 (2004). *See also* Laura Heard, *A Time to Be Born, a Time to Die: Alternative Reproduction and Texas Probate Law*, 17 ST. MARY'S L.J. 927 (1986).

Similarly, posthumously conceived children interfere with the distribution of class gifts. *See* Knaplund, *supra* note 2, at 108–15 (recommending the rule of convenience's use to exclude posthumously conceived children from being considered part of a class gift). As Professor Knaplund explains:

> The basic rule of convenience provides that the class will close whenever any member of the class is entitled to immediate possession and enjoyment of his or her share. While this is a rule of construction and not a rule of law, and is not applied where the testator has evidenced contrary intent, the rule is adhered to more closely than any other rule of construction. Once the class is closed, no person can be added to the class.

Id. at 109 (internal quotations omitted). Thus, applying the rule of convenience prevents posthumously conceived children from being part of a class gift because they are not in being at the testator's death. In Professor Knaplund's view, the rule of convenience offers a simple solution to the complicated problems of a posthumously conceived child. *See id*. at 110–15. For a basic overview of class gifts, see MOYNIHAN & KURTZ, *supra* at 155.

11. *See generally* 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).

This issue's resolution also implicates the posthumously conceived child's birth mother because it may affect her eligibility for Social Security widow's benefits. A widow is eligible for benefits if she is the required age and not entitled to retirement benefits equal to, or larger than, the deceased worker's primary insurance amount. *See* 42 U.S.C. § 402(e) (2000). Additionally, she must file for the benefits and not be married. *Id*. Finally, she must meet one of six additional conditions; one condition requires the widow to be the biological mother of the deceased's child(ren). *See id.*; *see also* 20 C.F.R. § 404.355 (2004).

12. *See supra* note 3, *infra* notes 41–61, and accompanying text.

13. 371 F.3d 593 (9th Cir. 2004).

on state intestacy laws to prove their eligibility for Benefits. Finally, this Note will explain why Congress must amend the Social Security Act (the "Act") to include posthumously conceived children, offering a proposed change to it.

II. OVERVIEW

A. The Gillett-Netting Facts

Rhonda Gillett ("Gillett") married Robert Netting ("Netting") in 1993; shortly thereafter, they tried unsuccessfully to conceive a child.[14] Netting was diagnosed with cancer in 1994.[15] Before beginning chemotherapy, Netting had some of his sperm frozen;[16] at that time, Netting knew his sperm could impregnate Gillett after his death.[17] Additionally, Gillett claims Netting told her, a few months before dying, to continue trying to conceive a child even if he died.[18] Eighteen months after Netting's death, Gillett gave birth to twins conceived using his frozen sperm.[19] The Social Security Administration then denied the *Gillett-Netting* twins' (the "Twins") application for Benefits.[20] A federal district court affirmed the denial, holding the Twins did not meet the Act's definition of child.[21] On appeal, the Ninth Circuit awarded Benefits after determining the Twins were Netting's children and met the Act's dependency requirements.[22]

B. Posthumous Conception

For posthumous conception, the most important assisted reproduction technique[23] is cryopreservation—the freezing of "human semen, ova, or

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14. Gillett-Netting v. Barnhart, 231 F. Supp. 2d 961, 963 (D. Ariz. 2002). Gillett had problems becoming, and staying, pregnant. *Id*. She suffered two miscarriages before learning of a medical condition that interfered with her ability to conceive. *Id*.

15. *Id*.

16. *Id*.

17. *Id*.

18. *Id*. During Netting's cancer treatment, Gillett continued her fertility treatments. *Id*.

19. *Id*.

20. *Id*. at 964.

21. *See infra* notes 130–42 and accompanying text.

22. *See infra* notes 143–53 and accompanying text.

23. A comprehensive treatment of assisted reproduction technologies is outside this Note's scope. For an in-depth discussion of reproductive technologies, see Monica Shah, *Modern Reproductive Technologies: Legal Issues Concerning Cryopreservation and Posthumous Conception*, 17 J. LEGAL MED. 547, 548–51 (1996). *See also* Stacy Sutton, Note, *The* Real *Sexual Revolution: Posthumously Conceived Children*, 73 ST. JOHN'S L. REV. 857, 862–76 (1999).

For treatment of the legal issues associated with assisted reproduction technologies, see Andrews

embryos at very low temperatures for extended periods of time."[24] When needed, the sperm is thawed and commonly[25] used in either artificial insemination[26] or in vitro fertilization.[27] At present, experts agree frozen sperm remains viable for at least a decade,[28] while some claim a century.[29] In essence, cryopreservation can make a deceased man "fertile" for another "lifetime."

& Elster, *supra* note 5.

24. Banks, *supra* note 11, at 256–57 n.23. Cryopreservation was perfected in the early 1950s; in 1953 the first successful pregnancy using frozen sperm occurred. *See* Wilder, *supra* note 2, at 178. Freezing sperm is the most common form of cryopreservation, and this Note will focus on it. The viability of frozen eggs has improved recently, and frozen eggs should receive the same legal treatment as frozen sperm. *See* Andrews & Elster, *supra* note 5, at 59–60 (noting the birth of twins using frozen eggs). Freezing unfertilized eggs is not a standard practice because their high liquid content and size make working with them difficult. *See* Hoffman & Morriss, *supra* note 4, at 722. Technology, however, is rapidly improving, and frozen eggs may ultimately supplant sperm as the best cryopreservation option. *Id*. Although frozen embryos can produce successful pregnancies, no case has dealt with frozen embryos used in posthumous conception. Moreover, the political and ethical issues associated with embryo manipulation do not fall within this Note's scope.

25. Aside from in vitro fertilization and artificial insemination, additional methods of assisted reproduction exist. In gestational surrogacy the sperm and egg providers "enter into an agreement with a woman to gestate and give birth to the child and then release the child to them." Laurence C. Nolan, *Critiquing Society's Response to the Needs of Posthumously Conceived Children*, 82 OR. L. REV. 1067, 1070 (2003). This technique differs from traditional surrogacy because the birth mother is not the genetic mother. In gamete intrafallopian transfer, fertilization occurs in the woman's body, as the egg and sperm are injected directly into her fallopian tubes. *Id*. at 1071. In zygote intrafallopian transfer, the sperm and egg are fertilized using in vitro fertilization, and the fertilized egg is then injected directly into the woman's fallopian tubes. *Id*.

At present, two experimental techniques exist. Wilder, *supra* note 2, at 189–90. Intracytoplasmic transfer takes the nuclear DNA contained in one woman's egg and injects it into another woman's egg that has had its nuclear DNA removed. Wilder, *supra* note 2, at 189. This process results in the egg having "a genome whose make-up derived from both women." *Id*. Intracytoplasmic transfer assumes that something in an infertile woman's eggs cytoplasm, the non-nuclear part of the cell, prevents in vitro fertilization from resulting in a successful pregnancy. *Id*. Haploidization, presently untested in humans, clones a sperm or egg using DNA from an "adult somatic cell," such as a white blood cell or skin cell. *Id*. at 190.

26. Artificial insemination involves introducing sperm into the woman's vagina, cervical canal, or uterus. *See* VanCannon, *supra* note 9, at 339. The first recorded artificial insemination occurred in 1785. *See* Wilder, *supra* note 2, at 177.

Artificial insemination using frozen sperm does have a lower success rate (eight to ten percent) than using freshly harvested sperm (sixteen to eighteen percent). *See* Knaplund, *supra* note 2, at 96. Aside from a lower success rate, the other significant deterrent is expense. Artificial insemination costs $300 to $700 a cycle, with most women needing three to six cycles. *Id*. at 97. If artificial insemination fails, then another method, such as in vitro fertilization, becomes necessary. *Id*. After exhausting artificial insemination, the expense becomes prohibitive. For example, each attempted in vitro fertilization costs $8000 to $15,000. *Id*.

27. In vitro fertilization involves "removing ova, then adding sperm to the ova, and finally implanting any resulting preembyro(s) from the union of the sperm and the ova into the woman's womb." VanCannon, *supra* note 9, at 339.

28. *See* Banks, *supra* note 11, at 270.

29. *See* Rowsell, *supra* note 9, at 401.

Although Congress has remained silent about posthumously conceived children,[30] commentators have addressed them.[31] The Uniform Status of Children of Assisted Conception Act, written in 1988, does not treat an individual as the parent if the embryo, egg, or sperm is not implanted in the mother before the individual's death.[32] The Uniform Parentage Act treats the decedent as the father if he consented, in writing, to posthumous conception.[33]

Other states have enacted laws addressing posthumously conceived children.[34] In North Dakota, a man who dies before his sperm is used to conceive a child is not the child's father.[35] Florida treats the decedent as

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30. Other countries have also addressed posthumous conception. For example, Germany, Sweden, Canada, and Australia (the state of Victoria) passed legislation prohibiting "posthumous assisted reproduction." Margaret Ward Scott, Comment, *A Look at the Rights and Entitlements of Posthumously Conceived Children*: *No Surefire Way to Tame the Reproductive Wild West*, 52 EMORY L.J. 963, 969 (2003). Western Australia prohibits use of a person's gametes after death and requires any existing gametes be destroyed within one year of the donor's death. *Id.* at 970. Conversely, Israel allows a surviving wife to use embryos, created with her husband's sperm, for up to one year after his death, regardless of his consent. *Id*. If the wife dies, Israel does not allow another woman to use the embryo. *Id*. Britain allows posthumous insemination when the deceased donor gave written consent. *Id*.

31. The Restatement of Property and Donative Transfers considers posthumously conceived children "in being" at the decedent's death, provided the child is born within "a reasonable time." RESTATEMENT (THIRD) OF PROPERTY: WILLS & DONATIVE TRANSFERS § 15.1 cmt. j (Tentative Draft No. 4, 2004). Professor Chester suggests adding § 2-108(b) to the Uniform Probate Code. Ronald Chester, *Posthumously Conceived Heirs Under a Revised Uniform Probate Code*, 38 REAL PROP. PROB. & TR. J. 727, 730–32 (2004). Section 2-108(b) would allow posthumous children to inherit if the "putative parent gave consent in record to a posthumous conception," and the complaint asking for a determination of the child's status "is filed . . . within three years of the putative parent's death." *Id*. at 730–31.

Bruce Wilder, chair of the Reproductive and Genetic Technologies Committee of the ABA Family Law Section, suggests that federal legislation should impose a two-year time limit when determining whether a posthumous child could be considered the deceased's heir. *See* Stephanie Ward, *Posthumous Kids Get Social Security*, 3 No. 24 A.B.A. J. E-REPORT 4 (June 18, 2004).

32. Unif. Status of Children of Assisted Conception Act § 4(b) (1988).

33. Unif. Parentage Act § 707 (2000) (amended 2002). The section states:

> If an individual who consented in a record to be a parent by assisted reproduction dies before placement of eggs, sperm, or embryos, the deceased individual is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child.

Id. Delaware, Texas, and Wyoming have adopted the Uniform Parentage Act. *See* DEL. CODE ANN. tit. 13, § 8-707 (2004); TEX. FAM. CODE ANN. § 160.707 (Vernon 2002); WYO. STAT. ANN. § 14-2-907 (2004). Washington has adopted the act's substance, but not its language. *See* WASH. REV. CODE § 26.26.730 (2002).

34. For example, Virginia treats the decedent as the parent if the decedent consented to being the parent in writing. VA. CODE ANN. § 20-158 (2004). Additionally, the child must be born within ten months of his death. VA. CODE ANN. § 20-164 (2004).

35. N.D. CENT. CODE § 14-18-04 (1997). The statute reads: "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." *Id*. For an overview of the model rules and state laws affecting posthumously conceived

the father if the decedent provided for the child in his will.[36] Louisiana allows a posthumously conceived child to inherit from the decedent if he consented to posthumous conception in writing, the surviving spouse is the child's mother, and the child is born within three years of his death.[37] California allows a posthumously conceived child to inherit from the decedent if the child proves the decedent consented to his genetic material's use in posthumous conception.[38] Finally, Massachusetts and New Jersey courts have construed existing statutes to treat a posthumously conceived child as a decedent's heir in certain situations.[39]

Few American cases[40] have addressed posthumously conceived children's inheritance rights. In 1994, *Hart v. Shalala*[41] raised the issue of whether a posthumously conceived child had a right to Benefits.[42] The federal district court, however, never reached a decision on this issue because the Social Security Commissioner settled the case by awarding Benefits.[43]

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children, see Knaplund, *supra* note 2, at 97–103.

36. FLA. STAT. ANN. § 742.17 (West 1997). The statute states:

> 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.

Id.

37. LA. REV. STAT. ANN. § 9:391.1(A) (West 2004). For a discussion of Louisiana's treatment of posthumously conceived children, see Brianne M. Star, Comment, *A Matter of Life and Death: Posthumous Conception*, 64 LA. L. REV. 613, 620–22 (2004).

38. *See* CAL. PROB. CODE § 249.5 (West Supp. 2005). This statute treats posthumously conceived children as existing during the decedent's lifetime if the decedent consented in writing to posthumous conception using his genetic material, and the child is in utero within two years of his death. *Id*. A court can order distribution of a decedent's estate without harming the posthumously conceived child's rights. *See id*. at § 249.8.

39. *See infra* notes 44–64 and accompanying text.

40. Foreign courts have dealt with posthumously conceived children. The most "widely discussed" case occurred in France when the widow of Alain Parpalaix asked to use her deceased husband's frozen sperm to conceive a child. Scott, *supra* note 30, at 968. The widow argued that Parpalaix stored the sperm, before succumbing to cancer, because he wanted to produce heirs. *Id*. Although Parpalaix's contract with the sperm bank had no provision addressing postmortem sperm use, a French court approved the widow's request. *Id*. Following this decision, the sperm bank adopted a policy prohibiting postmortem insemination, which French courts have upheld. *Id*. at 970. In 1994, France passed a law forbidding postmortem insemination. *Id*.

In 1984, Mario and Elsa Rios died in a plane crash, leaving frozen embryos at a fertility clinic in Melbourne, Australia. *Id*. at 968. A question arose if another couple could use the embryos. *Id*. at 969. An Australian court decided that another couple could use them, but any resulting child could not inherit from the Rios' estate. *Id*.

In 1996, the Tasmanian Supreme Court held that a frozen embryo, once born, can inherit its deceased father's estate. *Id*. at 970. In essence, the Tasmanian Supreme Court extended "the policy of intestate succession that typically applies to posthumous births" to posthumous conception. *Id*.

41. *See* Banks, *supra* note 10, at 251–56.

42. *Id*.

43. *See id*. at 255–56. When announcing the Social Security Administration would settle the

In re estate of Kolacy[44] raised the issue of whether posthumously conceived twins were the heirs of their mother's deceased husband.[45] The *Kolacy* twins wanted this declaration to establish their eligibility for Benefits.[46] After stipulating that the federal judiciary had jurisdiction over the Benefits question, the court decided the twins were the deceased husband's heirs.[47] Although the intestacy statute's plain language seemingly prevented the twins from being the husband's legal heirs,[48] the court held the statute's basic purpose is to allow children to take property from their parents.[49] Thus, once paternity is established, a posthumously conceived child should receive the legal status of heir.[50] The court explained a "fundamental policy of the law" should be to "enlarge the rights of a human being to the maximum extent possible"[51] and emphasized that New Jersey's legislature should resolve this intestacy question.[52]

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case, the Social Security Commissioner stated that resolution of this issue "should involve the executive and legislative branches, rather than the courts." *Id*.

If an applicant for Benefits disagrees with the initial determination of its claim, the applicant may appeal. *See generally* 20 C.F.R. §§ 404.901–404.955 (2004). First, an applicant may ask for a redetermination. *Id*. § 404.907. If the redetermination does not meet the applicant's expectations, then an administrative law judge may hear the appeal. *Id*. § 404.944. If the applicant still disagrees with the decision, the applicant can either have the Appeals Council review the decision or file an action in federal court. *Id*. § 404.966.

44. 753 A.2d 1257 (N.J. Super. Ct. Ch. Div. 2000).

45. *Id.* Fearing sterility from chemotherapy, the deceased husband froze his sperm after learning he had leukemia. He died one year later at the age of twenty-six. *Id*.

46. *See* 42 U.S.C. § 416(h)(2) (2000). Concurrently, the twins were pursing their Benefits claim with the Social Security Administration. *Kolacy*, 753 A.2d at 1259. For an overview of the claims process within the Social Security Administration, see *supra* note 43.

47. *Kolacy*, 753 A.2d at 1259–60. The *Kolacy* court explained that the twins' status as the decedent's heirs was a state-law question. *Id*.

48. The relevant section, which is now repealed, provided: "Relatives of the decedent conceived before his death but born thereafter inherit as if they had been born in the lifetime of the decedent." *Id*. at 1259–60. The *Kolacy* court explained this statute "is part of that traditional recognition of exceptions to the rule that takers from a decedent's estate should be determined as of the date" of his death. *Id*. at 1261. The court noted the statute's legislative history indicates it is a carryover from earlier statutes. *Id*. Thus, the court found the legislature did not intend to cover children of assisted reproduction. *Id*.

49. *Id*. at 1262–63.

50. *Id*. at 1262. The court, however, said a posthumous child cannot be a decedent's heir if it would "unfairly intrude on the rights of another person or would cause serious problems in terms of the orderly administration of estates." *Id*.

51. *Id*. at 1263. The court limited its statement by requiring an enlargement of rights be "consistent with the duty not to intrude unfairly upon the interests of other persons." *Id*.

52. *Id*. at 1261. The court states: "[I]t would be helpful for the Legislature to deal with these kinds of issues." *Id.* Moreover, the court warned of the potential dangers of posthumous reproduction:

> One would hope that a prospective parent thinking about causing a child to come into existence after the death of a genetic and biological parent would think very carefully about

In *Woodward v. Commissioner of Social Security*,[53] the Massachusetts Supreme Judicial Court outlined when Massachusetts will treat a posthumously conceived child as a decedent's heir.[54] *Woodward* marked the first time an American court of last resort dealt with posthumously conceived children's inheritance rights.[55] The court determined that a posthumously conceived child must prove a "genetic relationship between the child and the decedent."[56] Additionally, the decedent must have affirmatively consented[57] to posthumous reproduction and support of any resulting child.[58] Finally, even when these prerequisites exist, "time limitations may preclude" treating the child as the decedent's heir.[59]

The court's determination of posthumously conceived children's rights hinged on interpreting Massachusetts' intestacy and posthumous birth statutes.[60] Massachusetts does not expressly require posthumously born

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> the potential consequences of doing that. The law should certainly be cautious about encouraging parents to move precipitously in this area.

Id. at 1263.

53. 760 N.E.2d 257 (Mass. 2002). Like *Kolacy* and *Gillett-Netting*, *Woodward* involved twins conceived using the frozen sperm of a deceased cancer patient. In 1993, Warren Woodward and his wife of three and a half years, Lauren, found out Warren had leukemia. *Id.* at 260. The couple was childless and feared chemotherapy would leave Warren sterile. *Id*. Thus, he froze his sperm before undergoing a bone marrow transplant. *Id.* He died eights months later. *Id.* Two years later, Lauren Woodward gave birth to twin girls. *Id*. After the twins' birth, Lauren went to the local probate court and obtained a judgment amending the twins' birth certificate to list Warren as the father. *Id*. The probate judge did not make any findings of fact; instead, the judge accepted the "[v]oluntary [a]cknowledgment of parentage of [the children] . . . executed by [the wife] as mother, and [the wife], [a]dministratrix of the estate of [the husband], for father." *Id*. at 260–61.

54. *Woodward* did not rule on the factual circumstances because it was answering a question certified from the United States District Court for the District of Massachusetts. *Id*. at 260. The certified question asked:

> If a married man and woman arrange for sperm to be withdrawn from the husband for the purpose of artificially impregnating the wife, and the woman is impregnated with that sperm after the man, her husband, has died, will children resulting from such pregnancy enjoy the inheritance rights of natural children under Massachusetts' law of intestate succession?

Id. at 259.

55. *Id*. at 261.

56. *Id*. at 259.

57. For an explanation of what "affirmative consent" means, see Ronald Chester, *Inheritance Rights of the Posthumously Conceived Child: What Exactly Does* Lauren Woodward v. Commissioner of Social Security *Decide?*, 87 MASS. L. REV. 49, 49–51 (2002). Affirmative consent does not require an acknowledgment in writing. *Id*. Oral or written statements made by members of either parent's family, or records from the fertility clinic, should suffice. *Id*. at 50. As *Woodward* made clear, it seems unlikely that the Woodward children will receive Benefits because Lauren's purported proof of Warren's consent seems dubious. *Woodward*, 760 N.E.2d at 271 n.24.

58. *Woodward*, 760 N.E.2d at 259, 268–72. For in depth analysis of the court's reasoning, see generally Chester, *supra* note 57. *See also* Renee H. Sekino, Legal Update, *Posthumous Conception: The Birth of a New Class*, 8 B.U. J. SCI. & TECH. L. 362 (2002).

59. *Woodward*, 760 N.E.2d at 272.

60. *Id*. at 262–64. The statute provides: "Posthumous children shall be considered as living at the

children to exist at their father's death; thus, the court considered whether children conceived after the decedent's death deserve the same succession rights as children conceived before.[61] To answer this question, the court balanced three "powerful" state interests: "The best interest of children, the . . . orderly administration of estates, and the reproductive rights of the genetic parent."[62] Weighing these competing interests led to the court's creation of its three-part test (the "*Woodward* Test").[63] Like the *Kolacy* court, the *Woodward* court urged the state legislature to address this subject.[64]

C. Social Security

During the Great Depression, Congress enacted the Act as "a social insurance program" for retired workers over age sixty-five.[65] In 1939, Congress amended the Act,[66] making benefits available to the dependents and survivors of workers with qualified earnings.[67] Eligible survivors include widow(er)s, surviving children, the mother or father of an insured's child, and the insured's parents.[68]

In order to qualify for survivor benefits, a child must prove two things.[69] First, a child must meet the Act's definition of child,[70] which includes both legitimate[71] and natural[72] (illegitimate) children.[73] Second, a

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death of their parent." MASS. GEN. LAWS ch. 190, § 8 (2004). The court noted the term "posthumous children" is undefined. *Woodward*, 760 N.E.2d at 264. Furthermore, the statute, unchanged in 165 years, was adopted to deal with children in utero at the decedent's death. *Id*.

61. *Woodward*, 760 N.E.2d at 264.

62. *Id*. at 264–65.

63. Currently only Massachusetts follows *Woodward*; however, the Ninth Circuit called it a "well reasoned opinion." Gillett-Netting v. Barnhart, 371 F.3d at 596 n.3 (9th Cir. 2004).

64. *Woodward*, 760 N.E.2d at 272. The court opined: "The questions presented in this case cry out for lengthy, careful examination outside the adversary process, which can only address the specific circumstances of each controversy that presents itself. They demand a comprehensive response reflecting the considered will of the people." *Id*.

65. For an in-depth discussion of the Act's history and judicial interpretation, see Banks, *supra* note 10, at 304–57. For more information on the basic requirements needed to establish eligibility for Social Security, see 20 C.F.R. §§ 404.110–404.112 (2004).

66. Social Security Act Amendments of 1939, Pub. L. No. 76-666, 53 Stat. 1360, 1363–67.

67. *See* Banks, *supra* note 11, at 305–06. Congress later expanded the Act to include disability insurance and health insurance benefits. *Id*.

68. For each group's eligibility requirements, see 20 C.F.R. §§ 404.330–404.374 (2004).

69. *See* 42 U.S.C. § 402(d) (2000).

70. *See id*. For the Act's definition of child, see *id*. § 416(e) (2000).

71. Black's Law Dictionary defines legitimate child as: "Modernly, a child born or begotten in lawful wedlock or legitimized by the parent's latter marriage." BLACK'S LAW DICTIONARY 232 (7th ed. 1999).

72. Black's Law Dictionary defines illegitimate child as: "A child that was neither born nor begotten in lawful wedlock nor later legitimated." *Id*. Finally, it defines natural child as: "An

child must prove she "was dependent upon" the decedent.[74] The Supreme Court has held children considered legitimate under state law need prove nothing more to receive Benefits.[75] Other children must prove either actual[76] or "deemed"[77] dependency.

A natural child is deemed dependent if she proves one of four things: the child can inherit under the intestacy laws of the state where the decedent was domiciled at his death;[78] the decedent acknowledged the child in writing as his child before his death;[79] a court decreed the decedent the father before his death;[80] or a court ordered the decedent to pay child support for the child before the decedent's death.[81] The Act considers a child actually dependent when she proves "with satisfactory evidence" that the decedent was "the father . . . and was living with or contributing to the support" of the child when he died (the "Living with Test").[82] Congress added the last four criteria for determining dependency

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illegitimate child acknowledged by the father. An illegitimate child." *Id*. at 232–33.

73. *See* 42 U.S.C. § 416(e) (2000) (defining child). *See also* 20 C.F.R. § 404.354 (2004) (discussing what are permissible relationships to the insured). This Note will focus on legitimate and natural children. The Act also deals with stepchildren, adopted children, and grandchildren. For a discussion of these children, see Banks, *supra* note 11, at 311–20.

74. 42 U.S.C. § 402(d)(1)(C) (2000).

75. Jimenez v. Weinberger, 417 U.S. 628, 635 (1974).

76. 42 U.S.C. § 416(h)(3)(C)(ii) (2000). The provision states that dependency exists when: "such insured individual is shown by evidence satisfactory to the Commissioner of Social Security to have been the mother or father of the applicant, and such insured individual was living with or contributing to the support of the applicant at the time such insured individual died." *Id*.

77. *Id*. § 416(h)(2)(A). The provision states:

> In determining whether an applicant is the child or parent of a fully or currently insured individual for purposes of this subchapter, 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, or, if such insured individual is dead, by the courts of the State in which he was domiciled at the time of his death, or, if such insured individual is or was not so domiciled in any State, by the courts of the District of Columbia. 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.

Id.

78. *See id*.

79. *Id*. § 416(h)(3)(C)(i)(I).

80. *Id*. § 416(h)(3)(C)(i)(II).

81. *Id*. § 416(h)(3)(C)(i)(III).

82. *Id*. § 416(h)(3)(C)(ii). For the section's text, see *supra*, note 76. This provision, which examines whether actual dependency exists, is considered the "last resort test." *See* Banks, *supra* note 11, at 345.

in 1965,[83] after realizing the Act relied too heavily upon state intestacy laws, to the detriment of natural children.[84]

The Supreme Court examined the constitutionality of treating natural and legitimate children differently in *Jimenez v. Weinberger*[85] and *Mathews v. Lucas*.[86] In *Jimenez*, two illegitimate children, who did not meet the Act's dependency requirements,[87] appealed their rejection of disability insurance benefits.[88] The Court held the denial of benefits violated the "equal protection of the laws guaranteed by the due process provision of the Fifth Amendment."[89] It explained the Act divided afterborn illegitimate children into two classes: those that can become legitimated (receive benefits) and those who cannot become legitimated (receive no benefits).[90] It found these classes both "over inclusive" and "under inclusive."[91] After recognizing the government's legitimate interest in preventing spurious claims,[92] the Court held this interest was not "reasonably related" to "the blanket and conclusive exclusion of

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83. Act of July 30, 1965, Pub. L. No. 89-97, 79 Stat. 286 (amending the Act to expand coverage for medical insurance and to increase benefits under old age, survivor, and disability insurance).

84. The legislative history states:

> [I]n a national program that is intended to pay benefits to replace support lost by a child when his father retires, dies, or becomes disabled, whether a child gets benefits should not depend on whether he can inherit his father's intestate personal property under the laws of the State in which his father happens to live.

S. REP. NO. 89-404, at 110 (1965), *as reprinted in* 1965 U.S.C.C.A.N. 1943, 2050.

85. 417 U.S. 628 (1974).

86. 427 U.S. 495 (1976).

87. As the Court explained, benefits "were denied solely because they are proscribed illegitimate children who were not dependent on Jimenez at the time of the onset of his disability." *Jimenez*, 417 U.S. at 631. Furthermore, the children could not use state intestacy law to be deemed dependent because Illinois law barred non-legitimated children from taking in intestacy. *Id.* at 630. Finally, the children did not meet the Living with Test because "neither child's paternity had been acknowledged or affirmed through evidence of domicile and support before the onset of their father's disability." *Id.* at 631.

88. *Id.* at 630–31. Under the Act, the requirements for insurance based on death and disability are virtually identical. *See generally* 42 U.S.C. § 402 (2000). At the time of *Jimenez*, the Act required the Living with Test to be met at the onset of the disability. *Jimenez*, 417 U.S. at 630–31. At present, the Act requires the Living with Test be met "at the time such applicant's application for benefits was filed." 42 U.S.C. § 416(h)(3)(B)(ii) (2000).

89. *Jimenez*, 417 U.S. at 637.

90. *Id.* at 635–36.

91. *Id.* at 637.

92. The government argued the Act's purpose is "to provide support for dependents of a wage earner who has lost his earning power, and that the provisions excluding some afterborn illegitimates from recovery are designed to only prevent spurious claims and ensure that those actually entitled to benefit receive payments." *Id.* at 633–34. Furthermore, the government argued denying the *Jimenez* class benefits was proper because "it is 'likely' that these illegitimates, as a class, will not possess the requisite economic dependency on the wage earner" and that "eligibility for such illegitimates would open the door to spurious claims." *Id.* at 634.

appellant's subclass of illegitimates."[93] Because the potential for spurious claims was equal in both classes, to deny one "benefits presumptively available to the other" violates the Fifth Amendment.[94]

Two years later, the Court decided *Mathews v. Lucas*.[95] Here, two illegitimate children, whose deceased father neither acknowledged his paternity nor lived with or supported the children at his death,[96] appealed their Benefits denial.[97] The Court had to determine if forcing these children to prove actual dependency at the father's death violated the Fifth Amendment.[98] As a preface to its decision upholding the denial's constitutionality, the Court explained the Act is "not a general welfare provision," but was designed to "replace support lost by a child when his father . . . dies."[99] It found the statutory classifications permissible because they are "reasonably related to the likelihood of dependency at death."[100] Finally, the Court found the government's interest in administrative convenience met the required scrutiny.[101] Thus, the children's denial did not violate the Fifth Amendment. The Court distinguished *Jimenez*, explaining the *Jimenez* children had no opportunity to prove dependency while the *Lucas* children could still do so.[102] Furthermore, it pointed to the more carefully drawn distinctions between legitimates and illegitimates in the context of survivor benefits.[103] In his dissent, Justice Stevens believed

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93. *Id*. at 636.
94. *Id*. at 636–37.
95. 427 U.S. 495 (1976).
96. *Id*. at 497.
97. *Id*. at 497–98.
98. *Id*. at 497.
99. *Id*. at 507.
100. *Id*. at 508–09. The Court did not use their most "exacting scrutiny" because discrimination based on legitimacy does not "command extraordinary protection from the majoritarian political process." *Id*. at 506 (quoting San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)).
101. *Matthews*, 427 U.S. at 509–11.
102. *Id*. at 511–13. The Court explained:

> But this conclusiveness in denying benefits to some classes of afterborn illegitimate children, which belied the asserted legislative reliance on dependency in *Jimenez*, is absent here, for, as we have noted, any otherwise eligible child may qualify for survivorship benefits by showing contribution to support, or cohabitation, at the time of death.

Id. at 512.
103. *Id*. at 513. The Court opined: "Here, by contrast, the statute does not broadly discriminate between legitimates and illegitimates without more, but is carefully tuned to alternative considerations. The presumption of dependency is withheld only in the absence of any significant indication of the likelihood of actual dependency." *Id*. at 513.

Jimenez controlled[104] and characterized the majority's ruling as little more than the perpetuation of traditional thinking about illegitimates.[105]

Given this precedent and the Act's language, the only viable option for a posthumously conceived child to receive Benefits is either being found the decedent's heir,[106] which means relying on inconsistent state laws, or proving actual dependence under the Living with Test.[107] Although posthumously conceived children seem unlikely to satisfy the Living with Test, posthumously born children provide a similar, and previously adjudicated, fact pattern. Federal circuits, however, are split on how to apply the Living with Test to posthumously born children.[108]

Initially, courts applied either a regular and substantial support test or a regular and continuous support test.[109] In *Adams v. Weinberger*,[110] the Second Circuit abandoned this standard because it creates a result for which the Act does not call: excluding almost all posthumously born children.[111] This result occurs because unborn children depend solely on their mother.[112] The Second Circuit then proposed the commensurate support standard (the "Commensurate Standard"), looking at "whether the support by the father for the unborn child was commensurate with the needs of the unborn child at the time of the father's death."[113] The Second Circuit awarded Benefits because the deceased father's contribution of one hundred dollars for a hospital bill was commensurate with the child's needs.[114]

In *Boyland v. Califano*,[115] the Sixth Circuit also abandoned the "regular and substantial"[116] standard.[117] The Second Circuit explained the "regular

104. *Id.* at 516–18 (Stevens, J., dissenting). Justice Stevens summed up his dissent succinctly, "I am unable to identify a relevant difference between *Jimenez* and this case." *Id.* at 518.

105. *Id.* at 518–23 (Stevens, J., dissenting). Justice Stevens declared: "I am persuaded that the classification which is sustained today in the name of 'administrative convenience' is more probably the product of a tradition of thinking of illegitimates as less deserving persons than legitimates." *Id.* at 523.

106. *See supra* notes 78–84 and accompanying text.

107. *See id.*

108. *See infra* notes 109–29 and accompanying text.

109. Boyland v. California, 633 F.2d 430, 433–34 (6th Cir. 1980).

110. Adams v. Wainberger, 521 F.2d 656 (2d Cir. 1975).

111. *Id.* at 660. The Second Circuit noted Benefits should not be denied in marginal cases and the *Adams* child did not present a danger of "'spurious' claims." *Id.* at 659.

112. *Id.* at 660.

113. *Id.*

114. *Id.* at 660–61.

115. 633 F.2d 430 (6th Cir. 1980).

116. Over time, the Social Security Administration has changed its regulations so that they are more in line with the thinking of the courts. For a history of the now replaced "regular and substantial" standard, see *id.* at 433–34 n.12. The current Social Security regulations state: "Contributions must be

and substantial" standard only operates fairly when the deceased has a regular and substantial income.[118] In *Boyland*, the deceased did not; thus, the Sixth Circuit adopted a new standard, examining the deceased's contributions in light of his economic condition (the "Economic Standard").[119] The court awarded Benefits because the deceased contributed what he could afford.[120]

The Ninth Circuit addressed posthumously born children in *Doran v. Schweiker*.[121] Here, the deceased father[122] publicly acknowledged the child's paternity;[123] however, his only contributions were fixing the mother's roof during a rainstorm and helping her move.[124] The Ninth Circuit created its own standard, a hybrid of the Economic and Commensurate Standards (the "*Doran* Standard").[125] Using this standard, the Ninth Circuit awarded Benefits, holding the deceased father supported the unborn fetus according to its needs and his means.[126]

Using these standards, courts have been able to award more posthumously born children Benefits.[127] Yet the *Doran* standard, the

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made regularly and must be large enough to meet an important part of your ordinary living costs." 20 C.F.R. § 404.366 (2004).

117. *Boyland*, 633 F.2d at 434.

118. *Id*.

119. *Id*. The court stated: "Instead, attention should be focused on whether the contributions that were made to the support of his children were important to them given their needs and the wage earner's economic circumstances and ability to support." *Id.*

120. *Id*. Buying the children lunch and small presents, along with gifts of five to ten dollars on numerous occasions, met the Economic Standard. *Id*.

121. 681 F.2d 605 (9th Cir. 1982).

122. *Id.* at 606. The deceased committed suicide three months before the child's birth. *Id*.

123. *Id*.

124. *Id*.

125. *Id*. at 608–09.

126. *Id*. at 610.

127. *See* Wolfe v. Sullivan, 988 F.2d 1025, 1029 (10th Cir. 1993). In *Wolfe*, the Tenth Circuit adopted the Commensurate Standard and held supporting the mother is enough to meet it. *Id*. The *Wolfe* court denied Benefits because the deceased father stopped giving the child's mother gifts upon learning of her pregnancy. *Id*. at 1028–29.

See also Smith v. Heckler, 820 F.2d 1093, 1096–97 (9th Cir. 1987) (father who did not know of child before death supported child because he supported the mother); Parsons for Bryant v. Health and Human Servs., 762 F.2d 1188, 1191 (4th Cir. 1985) (payments totaling fifty dollars to provide transportation to doctor's visit were sufficient where father died in fifth month of pregnancy); Wharton *ex rel.* Wharton v. Bowen, 710 F. Supp. 903, 906 (E.D.N.Y. 1989) (child awarded Benefits where child's mother was five months pregnant with the child and living with the deceased at his death); Younger *ex rel*. Younger v. Sec'y of Health and Human Servs., 667 F. Supp. 531, 534–35 (W.D. Mich. 1987), *rev'd*, 856 F.2d 197 (6th Cir. 1988) (contribution of two hundred dollars to pay mother's living expenses met required level of support); Gay *ex rel.* McBride v. Heckler, 583 F. Supp. 499, 503–04 (N.D. Ga. 1984) (paying no support to the mother, but buying baby clothes for the unborn child meets support requirement). For a collection of cases which construe the Act liberally, see Banks, *supra* note 11, at 317–18.

controlling standard for *Gillett-Netting*, cannot expand to include every scenario,[128] and some circuits still follow the Social Security Regulations' standard.[129] Thus, the *Doran* Standard's availability (along with the Commensurate and Economic Standards) to posthumously conceived children seems questionable because no opportunity existed for the deceased father to support either the unborn fetus or the pregnant mother.

D. The Gillett-Netting *Decisions*

The district court ruled against the Twins because they did not meet the Act's definition of child.[130] It explained the Social Security Regulations require natural children prove they can take from the deceased in intestacy.[131] According to the district court, although Arizona treats legitimate and illegitimate children equally,[132] it also requires a descendent to "survive" the decedent.[133] Because the Twins did not survive Netting, they met neither Arizona's nor the Act's requirements.[134]

In dicta, the district court explained why the Twins would have failed the Act's dependency requirements.[135] First, the Twins could not prove actual dependency.[136] Without significant explanation, the district court also believed the Twins could not be deemed dependent as legitimated children,[137] foreclosing the Twins only other method of proving

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128. *See* Orsini *ex rel.* Orsini v. Sullivan, 903 F.2d 1393, 1393–96 (11th Cir. 1990) (denying benefits to a posthumously born child who was a one-week-old fetus at time of father's death because the mother received no support from the father; thus the child was not dependent); Chester *ex rel.* Chester v. Sec'y of Health and Human Servs., 808 F.2d 473, 477 (6th Cir. 1987) (single gift of thirty dollars does not satisfy the Living with Test); Johnson *ex rel.* Bryant v. Sec'y of Health and Human Servs., 801 F.2d 797, 799 (6th Cir. 1986) (posthumously born child did not receive Benefits because father provided neither support to the mother nor set aside funds for the child); Jones v. Schweiker, 668 F.2d 755, 758 n.5 (4th Cir. 1981), *vacated* 460 U.S. 1077 (1983) (contributions to mother before conception were not made because of possible pregnancy and are not support for the child).

129. *See* Allen *ex rel.* Allen v. Callahan, 120 F.3d 86, 87 (7th Cir. 1997) (reaffirming the Seventh Circuit's adherence to the "regular and substantial" test).

130. Gillett-Netting v. Barnhart, 231 F. Supp. 2d 961, 966–67 (D. Ariz. 2002), *rev'd* 371 F.3d 593 (9th Cir. 2004).

131. *Gillett-Netting*, 231 F. Supp. 2d at 965–66. The regulations list four ways for natural children to be eligible, which are identical to those listed in the Social Security Act. *Compare* 42 U.S.C. § 416 (2000), *with* 20 C.F.R. § 04.355(a)(1)-(4) (2004).

132. *Gillett-Netting*, 231 F. Supp. 2d at 966. Arizona law treats a person as "the child of that person's natural parents, regardless of their marital status." *Id.*

133. *Id.*

134. *Id.*

135. *Id. See also* Ronald R. Volkmer, *Status of Posthumously Conceived Children*, 30 EST. PLAN. 252, 252 (2003) (characterizing the dependency discussion as *dicta* and explaining the decision).

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

137. *Id.* The district court's reasoning in this case seems incomplete. It supported its conclusions as follows:

dependency.[138] The district court then distinguished *Woodward*[139] and *Kolacy*[140] as unpersuasive because they did not apply Arizona law.[141] Finally, the district court cited *Lucas* as a defense to the Twins' equal protection claim.[142]

On appeal the Ninth Circuit reversed after concluding the Act's definition of child only applies when parentage is disputed.[143] Furthermore, it held that the Twins were dependent because Arizona treats them as legitimate children (who need prove nothing more to receive Benefits).[144] It found the Twins were Netting's children because both the Social Security Administration and Gillett stipulated that he was their biological father.[145] The Ninth Circuit then examined whether the Twins met the Act's dependency requirements.[146] Although it agreed the Twins could not demonstrate actual dependency,[147] it deemed the twins dependent because "Arizona has eliminated the status of illegitimacy,"[148] and considers every child the legitimate child of its natural parents.[149] Quoting *Lucas*, the Ninth Circuit opined: "All legitimate children, are statutorily entitled . . . to survivorship benefits regardless of actual dependency."[150] The Ninth Circuit was careful to emphasize that its

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> As to the legitimacy element, Arizona treats all children as legitimate by statute. This statue, however, was enacted to prevent the State from treating children of unwed parents differently than children of married parents. The statute does not salvage Plaintiff's claim in this case. In any event, whether Juliet and Pier's are Robert's "legitimate" children as defined by the Act is irrelevant as they do not meet the "child" requirement of § 402(d).

Id. (internal citations omitted).

138. For an explanation of dependency under the Act, see *supra* notes 70–84 and accompanying text.

139. *Gillett-Netting*, 231 F. Supp. 2d at 968.

140. *Id*. at 968–69.

141. *Id*.

142. *Id*. at 969–70. On appeal, the Ninth Circuit did not discuss this issue because it ruled in favor of the Twins. *See infra* notes 143–50 and accompanying text.

143. Gillett-Netting v. Barnhart, 371 F.3d 593, 597–99 (9th Cir. 2004). *See supra* notes 69–84 and accompanying text.

144. They are deemed dependent under 42 U.S.C. § 402(d)(3) because *Jimenez* held children considered legitimate under state law are entitled to Benefits without proving more. *See* Jimenez v. Weinberger, 417 U.S. 623, 635 (1974).

145. *Gillett-Netting*, 371 F.3d at 597. The Ninth Circuit noted that the Social Security Commissioner did not dispute that Netting was the Twins' biological father. *Id*.

146. *Id*.

147. *Id*. at 597–98.

148. *Id*. at 598–99 (quoting State v. Mejia, 399 P.2d 116, 117 (1965)). Arizona law states: "Every child is the legitimate child of its natural parents and is entitled to support and education as if born in lawful wedlock." ARIZ. REV. STAT. § 8-601 (1999).

149. *Gillett-Netting*, 371 F.3d at 598–99.

150. *Id*.

decision hinged on Arizona law legitimating the Twins.[151] It cautioned that its holding neither applies uniformly to all posthumously-conceived children[152] nor determines the Twins' intestacy rights under Arizona law.[153]

III. ANALYSIS

The Ninth Circuit reached the proper result in *Gillett-Netting*. Courts liberally construe the Act because they consider it remedial and lean towards inclusion in marginal cases such as *Gillett-Netting*.[154] Moreover, the Twins should not lose their right to Benefits based solely on the timing of their birth. Although Netting and Gillett's marriage technically ended at Netting's death, their repeated attempts at conception indicated their desire to conceive a legitimate child.[155] The only difference between a posthumously born legitimate child (who only need prove that the mother's deceased husband is its father) and the Twins, is Gillett's difficulty getting pregnant, which delayed conception until after Netting's death. It seems unfair to deny Benefits based solely on this difficulty. Furthermore, this timing issue does not create a danger of spurious claims, leaving the government with the weaker rationale of administrative convenience to support the denial.[156] While this denial still appears constitutional under *Lucas*, awarding Benefits using the legitimacy argument ensured a fair result.

The Ninth Circuit also reached the proper result because the district court's reasoning appeared incomplete and unreasonably dismissive of the Twins' valid arguments. While the district court's interpretation of Arizona intestacy law is plausible,[157] it seems contrary to both the Act's

151. *Id.*

152. *Id.* at 599 n.7. In this footnote, the Ninth Circuit explains that if the sperm donor had not married the mother, Arizona would not treat him as the child's natural parent, and, if alive, he would have no obligation to support the child. *Id*. The child would then have to prove dependency under the Act. *Id*.

153. *Id*. at 599 n.8.

154. *See* Adams v. Weinberger, 521 F.2d 656, 659 (explaining "[t]he Social Security Act is remedial and its humanitarian aims necessitate that it be construed broadly and applied liberally."); Henry Broderick, Inc. v. Squire, 163 F.2d 980, 982 (9th Cir. 1947) (explaining "it has been consistently held that a narrow and legalistic interpretation of the scope of the Act here in question would not be in conformance with the broad purposes of federal social security legislation.").

155. Technically, Gillett and Netting were not married at the Twins' birth because a marriage ends at the death of one the partners. 52 AM. JUR. 2D. *Marriage* § 8 (2000).

156. *See supra* note 92 and accompanying text.

157. The Ninth Circuit avoided discussing Arizona's survivorship requirement relied on by the district court. *See supra* note 144 and accompanying text. A plausible explanation is that the only issue for deciding the Benefits question is whether the children are legitimate, not if they survived Netting.

recognized remedial nature and Arizona's facially liberal laws.[158] Moreover, the district court's discussion of dependency eroded the opinion's credibility by writing off the Twins' legitimacy argument without significant explanation.[159] Failing to sufficiently distinguish *Woodward* and *Kolacy*, the only cases examining posthumously conceived children's rights, continued the credibility erosion.[160] Moreover, the district court could have certified the intestacy question to the Arizona Supreme Court.[161] Finally, if the Ninth Circuit had adopted the district court's reasoning, it would leave posthumously conceived children with no way of receiving Benefits.

The Ninth Circuit's reasoning does raise some red flags.[162] First, circumventing the district court's argument about the definition of child implies that the Ninth Circuit either did not want to determine the Twins' intestacy status in Arizona or did not believe the definition included the Twins. Furthermore, the Ninth Circuit's attempt to explain away this definition failed.[163] The Ninth Circuit claimed the definition of child relied on by the district court only applies when the "parents were never married";[164] however, it improperly applied precedent to support this proposition.[165] Although the Ninth Circuit properly avoided the intestacy question, its avoidance of the district court's argument creates the possibility that merely disputing paternity will derail future Benefits claims by posthumously conceived children. Next, the Ninth Circuit seems to foreclose any possibility of proving dependency outside of state intestacy and legitimacy laws.[166] This leaves posthumously conceived

158. *See supra* note 154.

159. *See supra* notes 130–35 and accompanying text.

160. *See supra* notes 139–42 and accompanying text. The district court, however, had the right to ignore *Woodward* and *Kolacy* because they are not controlling authority.

161. *See supra* note 54.

162. One author correctly asserts that the *Gillett-Netting* approach necessitates a case-by-case analysis, which seems contrary to Social Security Administration's goal of categorical decision making. *See* Karen Minor, 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, 35 GOLDEN GATE U. L. REV. 85, 108 (2005). This assertion, however, ignores that the fact that courts already apply a case-by-case analysis with posthumously born children, and that the Ninth Circuit's decision to apply it to posthumously conceived children seems like a logical extension of this philosophy. *See supra* notes 106–26 and accompanying text

163. Gillett-Netting v. Barnhart, 371 F.3d 593, 597 n.4 (9th Cir. 2004).

164. *Id*.

165. *See id*. (citing Campbell *ex rel.* Campbell v. Apfel, 177 F.3d 890, 891–92 (9th Cir. 1999)).

166. By not mentioning any other possible avenues for proving dependency, the Ninth Circuit makes it clear that Arizona law rescued the Twins' claim. Furthermore, the Ninth Circuit explained that its ruling does not establish the Twins as Netting's heir under Arizona law. *Gillett-Netting*, 371 F.3d at 599 n.8. Thus, it relied heavily on the legitimacy argument.

children in the position of illegitimate children before 1965[167]—totally reliant on inconsistent state laws—but Congress did not intend this position for any category of illegitimate (natural) children.[168] Furthermore, it means the deceased father's state of residence,[169] as opposed to his consent or support, becomes the sole basis for determining whether posthumously-conceived children may receive Benefits.[170]

As a result, the Ninth Circuit should have created, or adopted, a test to prove the Twins were actually dependent. First, the Ninth Circuit could have applied the *Doran* standard.[171] Netting's notice of his sperm's possible use in posthumous conception, his statements to Gillett, and her continuing fertility treatments[172] should constitute support to the Twins under the *Doran* standard.[173] Similarly, the Ninth Circuit could have adopted the *Woodward* Test for determining actual dependency in situations involving posthumously conceived children.[174] Netting and the Twins satisfy the test's first prong because they share a genetic relationship.[175] The Twins partially satisfy the second prong because Netting's comments to Gillett suggest he affirmatively consented to posthumous conception using his sperm.[176] More proof, such as evidence that Netting paid for his sperm's storage or the fertility treatments, would likely be necessary to prove Netting consented to supporting posthumously conceived children.[177] The Twins also satisfy the third

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167. For a discussion of the Act's legislative history, see *supra* notes 80–81 and accompanying text.

168. *See supra* note 159.

169. In fact, a recent decision by a federal district court supports this conclusion. In *Stephen v. Comm'r of Soc. Sec.*, 2005 WL 2210651 (M.D. Fla. Sept. 7, 2005), the court held that a child, who was conceived with sperm extracted from his dead "father," was not eligible for benefits because under Florida law this child could not bring a claim against the father's estate. *Id*. at *4–6. The court also distinguished *Gillett-Netting* because it applied Arizona, and not Florida, law. *Id*. at *6.

Similarly, the Social Security Administration recently issued a notice stating it would follow *Gillett-Netting* throughout the Ninth Circuit. See Social Security Administration Acquiesce Ruling 05-1(9), Gillett-Netting v. Barnhart; Application of State Law and the Social Security Act in Determining Eligibility for a Child Conceived by Artificial Means after an Insured Individual's Death, 70 Fed. Reg. 55656 (Sept. 22, 2005).

170. *See* 42 U.S.C. § 416(h)(1)(A)(i) (2000).

171. *See supra* notes 121–26 and accompanying text.

172. *See supra* notes 16–18 and accompanying text.

173. In fact, Netting's actions seem stronger evidence of support than most courts have relied on to find support in cases of posthumously born children. *See supra* note 124. Evidence that Netting paid at least part of the expenses for either the sperm's storage or Gillett's fertility treatments would strengthen the indicia of support.

174. Like the *Doran* Standard, which applies to posthumously born children, courts could employ the *Woodward* Test with posthumously conceived children.

175. *See supra* note 145.

176. *See supra* notes 14–19 and accompanying text.

177. It is hard to find a difference between this kind of support and a father paying a one hundred

prong because their birth occurred within a reasonable time after Netting's death.[178] Although the *Woodward* Test was not created to interact with the Act's definitions, its requirements promote the government's concern for preventing spurious claims[179] while providing posthumously conceived children with a chance to prove actual dependency. The Ninth Circuit took the safer route to awarding Benefits, but adopting either the *Woodward* Test or *Doran* Standard would have given posthumously conceived children a method of proving dependency when they reside in states with unhelpful intestacy and legitimacy laws.[180] Obviously, in states granting posthumously conceived children inheritance rights these tests would be unnecessary.[181]

IV. PROPOSAL

As *Woodward* and *Kolacy* correctly warned, this problem's ultimate resolution lies with legislatures.[182] Congress should amend the Act, adding a section allowing posthumously conceived children to receive Benefits.[183] The new section would provide a last resort test for posthumously conceived children.[184] It would blend elements of the *Woodward* Test[185] and various state laws granting posthumously conceived children inheritance rights.[186] The new section would state that if a genetic relationship is proven, a child shall be deemed dependent if the decedent consented[187] to posthumous conception using his genetic material and (1)

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dollar hospital bill. *See supra* notes 109–14 and accompanying text. *Compare supra* note 127 (listing support that met the Living with Test), *with supra* note 128 (listing support that did not meet the Living with Test). Obviously, Netting providing for the Twins' support in his will would suffice.

178. *See supra* note 19.

179. *See supra* note 92.

180. *See supra* note 35 and accompanying text.

181. *See supra* notes 36–39 and accompanying text.

182. *See supra* notes 52, 64 and accompanying text.

183. One Note has recommended that changes in the Social Security Regulation or state laws will adequately address this problem. *See* Ann-Patton Nelson, Casenote, *A New Era of Dead-Beat Dads: Determining Social Security Survivor's Benefits for Children Who Are Posthumously Conceived*, 56 MERCER L. REV. 759, 775–76 (2005). This approach has two major flaws. First, relying on state law does not resolve the problem because it still leads to differing treatment for similarly situated children. Second, as suggested by the *Woodward* and *Kolacy* courts, the legislature, and not an administrative agency, is the proper venue for change. *See supra* notes 52, 64. Another author, without providing specific guidelines, has called for a clarification of statutory language on both a state and federal level. *See* Minor, *supra* note 163, at 108.

184. *See* Banks, *supra* note 11, at 317 (referring to the Living with Test as the "last resort test").

185. *See supra* notes 62–64 and accompanying text.

186. *See supra* notes 36–39 and accompanying text.

187. A possible solution would require all sperm banks to discuss posthumous conception with their non-anonymous donors. *See* Burkdall, *supra* note 10, at 905–06 (offering a proposed plan for

the decedent was married to the mother at the time of his death; (2) the decedent was living with or contributing to the mother's support at the time of his death; or (3) the decedent provided for any posthumously conceived child, using his non-anonymously donated sperm, in his will.[188] Furthermore, the new provision would require that the children be born within three years of the deceased's death.[189]

This scheme, for example, would make the Twins eligible because they share a genetic relationship with Netting, he consented to posthumous conception, he was married to Gillett at his death, and they were born within three years of his death.[190] Similarly, this scheme provides Benefits for posthumously conceived children whose parents never married, but whose parents meet the requirements.[191]

More importantly, this proposal allows some posthumously conceived children to receive Benefits but prevents spurious claims and keeps Social Security from becoming a general welfare provision.[192] It avoids this result by requiring the decedent's consent along with a provable relationship between the posthumously conceived child's mother and the decedent. For example, Jeremy Reno's mother could find a willing woman to carry, and birth, Jeremy's child.[193] This child, however, would be ineligible for Benefits because Jeremy neither consented to posthumous conception nor knew the birth mother.[194] Similarly, any child Mirabel Baez conceives

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requiring extensive documentation of consent at the time of donation). If the donor wanted to consent, he could sign a form at that time. This proposal would alleviate many of the proof issues. If there is no form signed at this time, this creates a rebutable presumption of non-consent. Installing this system would also work as a safeguard against spurious claims because, in the absence of a signed form, the rebutable presumption makes proving consent difficult.

188. Obviously, some government body will need to decide what standard of consent is needed and what does and does not fall into the category of contribution. For a discussion of different types of consent, see Chester, *supra* note 57. The Social Security Administration should deal with these kinds of issues.

189. This requirement would allow the widow time not only to grieve but also to attempt conception. *See* Chester, *supra* note 31, at 736–39. As Professor Chester explains, anything shorter than three years does not give a woman the proper amount of time to become pregnant using assisted reproduction. *See id*. at 738. Furthermore, this requirement prevents the government from supporting children born an unreasonably long time after their father's death. *See id*. at 736–39 (explaining how this time limitation affects the distribution of estates).

190. *See supra* notes 16–18.

191. It would make little sense, given the Act's inclusion of other illegitimate children, to require the birth mother to have been married to the sperm provider. For example, this section could extend to situations where a couple was engaged but were never married, or a solider who died in battle before having a chance to conceive with fiancée or girlfriend. Furthermore, it would apply to a couple like Kane and Hecht. *See supra* notes 2–3 and accompanying text.

192. *See supra* note 92 and accompanying text.

193. *See supra* note 5 and accompanying text.

194. *See supra* note 188.

using her dead husband's sperm would be ineligible for Benefits because the husband did not consent to posthumous conception.[195] This proposal prevents the government from supporting children it would not normally support.[196] Finally, this proposal discourages women in any of the above situations from conceiving a deceased's child because it prevents them from receiving any government support for themselves or the child.[197]

This proposal strikes a balance between reproductive freedom, the child's best interests, and the government's policy interests. While it obviously requires posthumously conceived children to meet more requirements than a legitimate child or certain classes of illegitimate children, it prevents their *de jure* exclusion. Furthermore, it creates a usable test to prove dependency that does not rely on state law.[198] Finally, enacting this section will avoid litigation by posthumously conceived children that challenge the Act's constitutionality.

V. CONCLUSION

Congress must address this problem. Posthumous conception using assisted reproduction is not a passing phenomenon. As technology advances, posthumous conception will continue to increase in popularity.[199] Both the judiciary[200] and commentators[201] have urged legislative action. Other developed nations have formulated policies, and America should follow their lead.[202] Without congressional guidance to ensure consistent treatment, similarly situated children will receive inconsistent treatment from the federal government. Answering the Benefits question now will allow Congress to lay the foundation for a

195. *See supra* note 4 and accompanying text. This proposal would not have caused a different result in *Stephens v. Comm'r of Soc. Sec.*, 2005 WL 2210651 (M.D. Fla. Sept. 7, 2005), because Gar Stephens, the deceased husband, did not consent to a post-mortem sperm extraction—or conception. *Id*. at *1–6.

196. *See supra* note 128. For example, someone like Kane could not bequeath his vials of sperm to "any willing woman" to conceive my child for public policy reasons. Burkdall, *supra* note 10, at 903–04.

197. *See supra* notes 10, 69–84.

198. *See supra* notes 83–84.

199. *See supra* note 7.

200. *See supra* notes 52, 64 and accompanying text.

201. *See supra* notes 1–11, 23–39 and accompanying text. *See also* Ronald Volkmer, *Posthumously Conceived Children Eligible for Social Security*, 31 EST. PLAN. 564 (2004) (characterizing the legislative treatment of this subject at both state and federal level as inadequate).

202. *See supra* note 30.

cohesive policy addressing the complex issues created by assisted reproduction and life cycle manipulation.[203]

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203. For example, human cloning and genetically engineered children.

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