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Burns v. Astrue: Born in Peculiar Circumstances, Posthumously Conceived Children and the Adequacy of State Intestacy Laws

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BURNS V. ASTRUE: "BORN IN PECULIAR CIRCUMSTANCES," POSTHUMOUSLY CONCEIVED CHILDREN AND THE ADEQUACY OF STATE INTESTACY LAWS

ABSTRACT

A posthumously conceived child is one born to a woman who became pregnant by the preserved semen of a dead man. This Comment examines the rights of posthumously conceived children to receive social security benefits using an example from the Utah Supreme Court, *Burns v. Astrue*. Currently, the result is determined by the intestacy laws of the state where the semen donor died. It also discusses the applicable intestacy provisions in the states comprising the Tenth Circuit, as well as the approaches used by the Uniform Probate Code and the Uniform Parentage Act. The Comment concludes by addressing whether it would be more desirable to leave the determination of the issue to each state, to pass federal legislation that would bring all states into conformity with each other, or to adopt model legislation in every state.

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INTRODUCTION

Robert Burns wrote the poem *On the Birth of a Posthumous Child* in 1790.[1] In it, the great poet, whose last child was born on the day of his funeral,[2] noted that a baby born after its father's death has come into the world missing "the shelt'ring tree" that would "shield thee frae the storm."[3] Gayle Burns (no relation to the poet) was probably not thinking of the two-hundred-year-old poem when she decided in 2003 to become pregnant by preserved sperm from her deceased husband.[4] When she later applied for social security benefits, Gayle Burns applied for herself and her child because her deceased husband was no longer alive to care for them.[5] Subsequently, a legal battle arose as to whether the Government or Gayle Burns herself would be the sheltering tree for this posthumous child born two years and nine months after the death of its biological father.[6] The Utah Supreme Court recently decided the issue in *Burns v. Astrue*.[7]

The facts in *Burns* are similar to other cases that address posthumously conceived children: a husband or lover dies prematurely after cryogenically preserving his sperm; months or years later the woman conceives a child using the man's sperm and files for social security benefits based on the man's income.[8] Oftentimes, the woman will apply directly with the Social Security Administration (SSA).[9] The Social Security Act (Act), however, contains a provision that leaves such questions to state intestacy laws.[10] The laws in each state vary drastically; thus, the

1. Robert Burns, *On the Birth of a Posthumous Child, in* 1 THE COMPLETE POETICAL WORKS OF ROBERT BURNS 374, 374 (William Scott Douglas ed., 1871).
2. JAMES CURRIE, 1 THE LIFE OF ROBERT BURNS, WITH A CRITICISM ON HIS WRITINGS 52 (1838).
3. Burns, *supra* note 1.
4. Burns v. Astrue, 289 P.3d 551, 553 (Utah 2012).
5. *Id.* at 554.
6. *Id.*
7. 289 P.3d 551 (Utah 2012).
8. *See* Alycia Kennedy, Note, *Social Security Survivor Benefits: Why Congress Must Create a Uniform Standard of Eligibility for Posthumously Conceived Children*, 54 B.C. L. REV. 821, 821–22 (2013).
9. *See id.*
10. Astrue v. Capato *ex rel.* B.N.C. (*Capato II*), 132 S. Ct. 2021, 2028 (2012) (quoting 42 U.S.C. § 416(h)(2)(A) (2012)).

outcome of whether the child can receive benefits is determined by the location in which the husband or lover died.[11]

Part I of this Comment discusses the various forms of assisted reproductive technology that give rise to the legal issues of posthumously conceived children whose fathers die intestate. It also addresses the Act and its provisions that leave the status of a child to state intestacy laws. Finally, the deference afforded to the SSA, the circuit split, and the subsequent Supreme Court decision are addressed in Part I. Part II of this Comment discusses the state intestacy laws within the Tenth Circuit that address—or do not address—the ability of posthumously conceived children to inherit under state law as well as the adoption of the Uniform Parentage Act (UPA) and the Uniform Probate Code (UPC) and their effects. Part III explores the most recent posthumously conceived child case within the Tenth Circuit, *Burns v. Astrue*—a Utah Supreme Court case that examines one method the courts use to analyze consent to be the parent. Part IV examines the moral and ethical implications of providing or not providing social security benefits to posthumously conceived children. Part V analyzes whether a federal amendment to the Act or leaving the issue to state intestacy laws would be the best remedy going forward. Finally, Part VI recommends nationwide changes to state intestacy laws that must be considered in order to provide posthumously conceived children with access to benefits as well as protect social security funds from fraud.

I. BACKGROUND

A. Assisted Reproductive Technology and Cryopreservation

As early as 1790, women were being artificially inseminated via turkey basters.[12] In modern times, advancements in medicine have allowed for more sophisticated but equally unromantic methods of artificially conceiving. There are two popular mechanisms. Artificial insemination, the means used in *Burns v. Astrue*, is the most common form of Assisted Reproductive Technology (ART), possibly because it is the cheapest.[13] Also called intrauterine insemination, artificial insemination is performed by placing the sperm into the woman's uterus through artificial means such as a syringe (turkey basters are banished to the kitch-

11. 42 U.S.C. § 416(h)(2)(A) ("[T]he devolution of intestate personal property [is determined] . . . , if such insured individual is dead, by the courts of the State in which he was domiciled at the time of his death.").

12. Alyssia J. Bryant, Comment, *Death, Sperm Heists, and Test Tube Babies: Support for Measures to Prevent Social Security Abuse, Conserve Government Funds, and Protect Families*, 56 HOW. L.J. 917, 926 n.44 (2013).

13. Amanda Horner, Comment, *I Consented to Do What?: Posthumous Children and the Consent to Parent After-Death*, 33 S. ILL. U. L.J. 157, 159 (2008).

en).[14] In vitro fertilization (IVF), a much newer form of technology, is another popular method of ART.[15] This approach requires extracting the woman's egg from her uterus and combining it with a single sperm in a laboratory.[16] Both methods can be done with the use of cryogenically preserved semen—a practice that gives rise to the issue raised in this Comment.[17] In 1949, scientists discovered that they could treat sperm with glycerol and freeze it for extended periods.[18] This revelation later led to the first pregnancy derived from cryopreserved sperm in 1953.[19]

Before cryopreservation, the determination of one's heirs was relatively easy and straightforward.[20] The class was closed upon the death of the woman or it closed nine months after the man's death.[21] However, the advent of cryogenically preserved sperm stored in liquid nitrogen allows for long-term conservation and conception far beyond the death of the father.[22] In fact, it is possible to preserve semen for up to ten years or more when stored at temperatures minus 100 degrees Celsius.[23] Cryogenically preserved semen has complicated probate laws around the country and has presented new issues of survivorship in regard to social security benefits for children.

B. The Social Security Act and Status of a Child

In August of 1935, President Franklin D. Roosevelt signed the Act into law to establish a program that would allow retired workers over the age of 65 to receive benefits.[24] The Act, otherwise known as the "Old-Age, Survivors, and Disability Insurance," or more colloquially as Social Security, received a huge overhaul in 1939 in order to provide monthly benefits not only to retired workers but also to surviving families of workers who died prematurely.[25] The Act was created to protect individuals from becoming destitute when they lost their "earning power."[26]

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14. *See* 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, 352 (2011).

15. *Id.* at 353.

16. Horner, *supra* note 13, at 160.

17. *See* Carpenter, *supra* note 14, at 355.

18. *Id.*

19. *Id.* at 355–56.

20. *Id.* at 349.

21. *Id.*

22. *See* Gloria J. Banks, *Traditional Concepts and Nontraditional Conceptions: Social Security Survivor's Benefits for Posthumously Conceived Children*, 32 LOY. L.A. L. REV. 251, 270 (1999).

23. *Id.*

24. Bryant, *supra* note 12, at 920 ("President Roosevelt signed the Social Security Act . . . into law in 1935 . . . ."); Robert J. Myers, *Old-Age, Survivors, and Disability Insurance Provisions: Summary of Legislation, 1935–58*, SOC. SECURITY BULL. at 15 (1959) *available at* http://www.ssa.gov/policy/docs/ssb/v22n1/v22n1p15.pdf.

25. Kennedy, *supra* note 8, at 826 (stating that the goal of survivor benefits was "to replace the lost financial support of the deceased wage earner"); Myers, *supra* note 24.

26. Jimenez v. Weinberger, 417 U.S. 628, 633 (1974). The Court further explained that the "provisions excluding some afterborn illegitimates from recovery are designed only to prevent

Congress did not contemplate the technology available today that allows women to conceive children far beyond the father's death.[27] Nor did Congress contemplate the technology when it amended the Act in 1965 to read as it does now.[28] This is one reason why the current legislation is inadequate to protect posthumously conceived children.

In order to claim survivorship benefits under the Act, several requirements must be met.[29] These include: (1) the child is unmarried; (2) the child is under eighteen or subject to a disability; and (3) the child is dependent upon the individual at the time of the individual's death.[30] The Act, however, requires a more fundamental question to be answered first.[31] The child must satisfy the definition of "child" as set out in 42 U.S.C. § 416(e).[32] Prior to the Supreme Court's 2012 decision in *Astrue v. Capato* (*Capato II*),[33] federal appellate courts were split on the issue of whether posthumously conceived children fit the definition of child under the Act.[34] The appellate court decisions all turned on the definition of child in section 416(e) and section 416(h)'s elaboration on that definition.[35]

To meet the definition of a child under the Act, section 412(d) provides the first bit of guidance and sets out the "basic grant of benefits."[36] Section 402(d) states that "[e]very child (as defined in section 416(e) of this title) of an individual . . . who dies a fully or currently insured individual, ... shall be entitled to a child's insurance benefit."[37] Turning then to section 416(e), several definitions of child are provided, including: (1) a child or legally adopted child of an individual; (2) a stepchild; and (3) a grandchild or step-grandchild of an individual or his spouse.[38] Because the quoted preceding sections are vague and lack elaboration,[39] one must next turn to section 416(h)(2)(A), which is the "next gateway" to determine whether a child is eligible for benefits.[40] The provision entitled "Determination of Family Status" provides:

> In determining whether an applicant is the child or parent of a fully or currently insured individual for purposes of this subchapter, the

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spurious claims and ensure that only those actually entitled to benefit receive payments." *Id.* at 633–34.

27. *Capato II*, 132 S. Ct. 2021, 2026 (2012).
28. *Id.*
29. Schafer v. Astrue, 641 F.3d 49, 51 (4th Cir. 2011).
30. *Id.*; 42 U.S.C. § 402(d)(1)(B)–(C) (2012).
31. *Schafer*, 641 F.3d at 52.
32. Gillett-Netting v. Barnhart, 371 F.3d 593, 596 (9th Cir. 2004).
33. 132 S. Ct. 2021 (2012).
34. *Capato II*, 132 S. Ct. 2021, 2027 (2012).
35. *Id.* at 2027–28.
36. *Capato II*, 132 S. Ct. at 2027; *Schafer*, 641 F.3d at 52.
37. 42 U.S.C. § 402(d)(1)(C)(iii); *Capato II*, 132 S. Ct. at 2027.
38. 42 U.S.C. § 416(e) (2012); Beeler v. Astrue, 651 F.3d 954, 958 (8th Cir. 2011).
39. *Capato II*, 132 S. Ct. at 2027–28.
40. Bryant, *supra* note 12, at 924–25 (internal quotation marks omitted).

> 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.[41]

There are other "narrower categories" listed under section 416(h) that provide other methods for determining the status of a child, but these criteria do not apply to posthumously conceived children.[42]

Both the Supreme Court and the SSA consider section 416(h) as "completing § 416(e)'s sparse definition of 'child.'"[43] Both sections (e) and (h) are used together when analyzing the status of a child.[44] Thus, in order for a posthumously conceived child to receive benefits, the child must qualify under the applicable state's intestacy laws as stated in section 416(h)(2)(A).[45]

*C. Pre-*Capato II *and SSA Deference*

Before the Supreme Court decided *Capato II* in May 2012, there was much confusion in the federal courts about whether the regulations promulgated by the SSA were interpretations of sections 416(e) and 416(h) of the Act entitled to *Chevron* deference.[46] An agency's regulations are entitled to *Chevron* deference "when it appears that Congress delegated authority to the agency" and the agency promulgated rules using notice and comment rulemaking or "some other indication of a comparable congressional intent."[47] *Chevron* deference is a two-step process: (1) determine whether Congress spoke directly to the issue at hand; and (2) if not, whether the agency's interpretation is reasonable.[48] If both steps are satisfied, then the agency's interpretation is afforded deference.[49] In 2011, the Third, Fourth, Eighth, and Ninth Circuits were split on the issue of whether the SSA's interpretation of the Act was entitled to deference.[50] All four appellate courts used tools of statutory construction, but the Third and Ninth Circuits completely missed the most important textual clue.[51] The textual clue, contained in section 416(h),

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41. 42 U.S.C. § 416(h)(2)(A); *Capato II*, 132 S. Ct. at 2028.
42. Kennedy, *supra* note 8, at 827–28.
43. *Capato II*, 132 S. Ct. at 2029.
44. *Id.*; Kennedy, *supra* note 8, at 828.
45. *Capato II*, 132 S. Ct. at 2028.
46. Kennedy, *supra* note 8, at 830.
47. United States v. Mead Corp., 533 U.S. 218, 227–28 (2001).
48. Schafer v. Astrue, 641 F.3d 49, 54 (4th Cir. 2011) (citing Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984)).
49. *Id.*
50. Beeler v. Astrue, 651 F.3d 954, 962 (8th Cir. 2011); Kennedy, *supra* note 8, at 835 n.136.
51. *Capato II*, 132 S. Ct. 2021, 2024 (2012).

requires reference to section 416(h) after passing through section 416(e).[52]

The SSA has interpreted sections 416(e) and 416(h) of the Act using official "notice-and-comment rulemaking."[53] Additionally, Congress gave the Social Security Commissioner authority to issue regulations "that are 'necessary or appropriate to carry out' his functions."[54] The SSA's regulations are analogous to sections 416(e) and 416(h) of the Act[55] and parallel the statute's provisions by "elaborat[ing] on its terms."[56] The regulations refer the reader to other parts of the regulations, as does the Act, to determine whether the child is a "natural child," similar to references found in section 416(h) of the Act regarding the status of a child.[57] Under the regulations, a natural child is eligible for benefits if he or she meets any one of four conditions, including the condition of being capable of inheriting "the insured's personal property as his or her natural child under State inheritance laws."[58] The regulations establish "that the SSA interprets the Act to mean that the provisions of § 416(h) are the exclusive means by which an applicant can establish child status under § 416(e) as a natural child."[59]

In the 2004 decision *Gillett-Netting v. Barnhart*,[60] the Ninth Circuit became the first federal court to decide the issue of a posthumously conceived child's status under the Act.[61] The Ninth Circuit did not conduct a *Chevron* two-step analysis in its opinion to determine whether the SSA should be afforded deference.[62] The court, however, concluded that section 416(h) had no relevance in determining the status of a biological child conceived after the death of the father.[63] This provision was only

52. *Compare Capato II*, 132 S. Ct. at 2024 (stating that the "key textual clue" is found in 416(h), which states "for purposes of this subchapter" (internal quotation marks omitted)), *with* Capato *ex rel.* B.N.C. v. Comm'r of Soc. Sec., 631 F.3d 626, 629 (3d Cir. 2011) (determining that 416(h) is not applicable and thus does not need to be used to analyze posthumously conceived children), *rev'd sub nom.* Astrue v. Capato *ex rel.* B.N.C., 132 S. Ct. 2012 (2012), *and* Gillett-Netting v. Barnhart, 371 F.3d 593, 597 (9th Cir. 2004) (determining that 416(h) is only used when parentage is in dispute, and in the case of posthumously conceived children, parentage is not in dispute when the mother and father are known).

53. *Beeler*, 651 F.3d at 959; Kennedy, *supra* note 8, at 829 (citing 20 C.F.R. §§ 404.350, .354 to .355 (2012)).

54. *Beeler*, 651 F.3d at 959–60 (citing 42 U.S.C. §§ 405, 902 (2012)).

55. It should be noted that 20 C.F.R. § 404.354 is analogous to § 416(e) of the Act, and 20 C.F.R. § 404.355(a) is analogous to § 416(h)(2)(A) of the Act. *Id.* at 960.

56. Kennedy, *supra* note 8, at 831.

57. Section 404.354 of the regulations includes language that should refer the reader to § 404.355 to determine whether the child is a "natural child" similar to the guidance found in § 416(e) of the Act. *Beeler*, 651 F.3d at 960.

58. 20 C.F.R. § 404.355(a)(1) (2012); *Beeler*, 651 F.3d at 960.

59. *Beeler*, 651 F.3d at 960 (internal quotation marks omitted).

60. 371 F.3d 593 (9th Cir. 2004).

61. Bryant, *supra* note 12, at 931; Kennedy, *supra* note 8, at 832.

62. *Gillett-Netting*, 371 F.3d at 597 n.4; Kennedy, *supra* note 8, at 832.

63. Kennedy, *supra* note 8, at 832.

used to determine if the child could receive benefits when the "parents were not married or [the] parentage was in dispute."[64]

Approximately six years later, the Third Circuit agreed with the Ninth Circuit and declined to give *Chevron* deference to the SSA's interpretation of the statute.[65] The court stated that section 416(h) merely offers other methods by which a child can inherit when parentage is in doubt.[66] The court reasoned that the plain language of the statute demonstrates that when a child is the biological offspring of the parents, courts only need to pass through sections 402(d) and 416(e).[67] The court ended its opinion by noting that "technology has outpaced federal and state laws," which fail to address the issue of posthumously conceived children.[68] The public policy reasoning behind the Ninth and the Third Circuit opinions demonstrates that Social Security laws need to address these issues that will continue to arise with the continuing advancement of medical technology.[69]

The Eighth and Fourth Circuit decisions, handed down in 2011, contained reasoning that greatly conflicted with the Ninth Circuit, thus creating the circuit split.[70] Both the Eighth Circuit and the Fourth Circuit agreed with the SSA's interpretation of the Act, which requires applicants to pass through section 416(h) in order to determine the status of a posthumously conceived child for purposes of the Act.[71] The Fourth Circuit determined that Congress had spoken to the issue because the plain language of the statute demonstrated that the meaning of child included the definitions under section 416(h).[72] The court noted that Congress's intent was clear because section 416(h) included the words "*for purposes of this subchapter*," which required reference to section 416(e).[73] The court concluded that even if Congress did not speak clearly on the issue, the agency's interpretation is reasonable and deference should be granted.[74]

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64. *Gillett-Netting*, 371 F.3d at 596; Kennedy, *supra* note 8, at 833.

65. Kennedy, *supra* note 8, at 835–36.

66. Capato *ex rel.* B.N.C. v. Comm'r of Soc. Sec., 631 F.3d 626, 631 (3d Cir. 2011), *rev'd sub nom.* Astrue v. Capato *ex rel.* B.N.C., 132 S. Ct. 2021 (2012).

67. *Id.*

68. *Id.* at 632 (quoting *Gillett-Netting*, 371 F.3d at 595) (internal quotation marks omitted); Bryant, *supra* note 12, at 934.

69. *See* Bryant, *supra* note 12, at 936.

70. *See* Kennedy, *supra* note 8, at 837.

71. *See* Schafer v. Astrue, 641 F.3d 49, 53 (4th Cir. 2011); Beeler v. Astrue, 651 F.3d 954, 961 (8th Cir. 2011); Kennedy, *supra* note 8, at 837.

72. *See Schafer*, 641 F.3d at 54.

73. *Id.* (quoting 42 U.S.C. § 416(h)(2)(A) (2006)).

74. *Id.* at 51.

D. Capato II*: The Supreme Court Addresses a Sticky Situation*

The Supreme Court finally settled the issue of deference in *Capato II*.[75] Justice Ginsburg, delivering the opinion for a unanimous Court, swiftly concluded that the SSA's interpretation of the Act denying social security benefits to a child conceived after the father's death was, at the very least, "a permissible construction that garners the Court's respect under *Chevron*."[76] The Court looked to the core purpose of the Act, which was to establish a program to "provide . . . dependent members of [a wage earner's] family with protection against the hardship occasioned by [the] loss of [the insured's] earnings."[77] The purpose was not simply to generate income for the needy.[78]

The Court did not conduct a thorough *Chevron* analysis, but instead glossed over steps one and two, and simply held that the SSA's interpretation of the Act was better than the one proposed by the respondent, because it was at the very least a reasonable interpretation.[79] The Court spent most of the opinion combing through the statute and addressing the respondent's arguments of statutory interpretation, thereby implying that Congress's intent was unambiguous.[80] For instance, the respondent argued, and the Third Circuit had agreed, that there was no reference to section 416(h) in section 416(e), and thus, section 416(e) was irrelevant in this case.[81] The Court used its statutory interpretation repertoire to counter this argument.[82] Justice Ginsburg noted that the "key textual clue" lies in subsection 416(h)(2)(A), which states that in order to determine "whether an applicant is the child . . . of [an] insured individual *for purposes of this subchapter*, the Commissioner . . . shall apply [state intestacy law]."[83] The word "subchapter" in section 416(h) refers to sections 401 to 434, which is the entirety of Subchapter II.[84] Although it is not a direct reference, it is a reference nonetheless and "Congress had no need to place a redundant cross-reference" in either section 416(h) or section 416(e).[85]

Justice Ginsburg wrote that using state intestacy law to determine the status of a child under the Act is "anything but anomalous"; the Act

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75. *Capato II*, 132 S. Ct. 2021, 2034 (2012).

76. *Id.* at 2025–26 (citation omitted); Kennedy, *supra* note 8, at 840.

77. *Capato II*, 132 S. Ct. at 2032 (alterations and omission in original) (quoting Califano v. Jobst, 434 U.S. 47, 52 (1977)) (internal quotation marks omitted).

78. *Id.*

79. *See id.* at 2026; Kennedy, *supra* note 8, at 840.

80. *See Capato II*, 132 S. Ct. at 2030–32; *see also* Kennedy, *supra* note 8, at 839–40.

81. *Capato II*, 132 S. Ct. at 2031.

82. *Id.*

83. *Id.* at 2023–24, 2031 (alterations and omissions in original) (emphasis added) (quoting 42 U.S.C. § 416(h)(2)(A) (2012)).

84. *Id.* at 2031.

85. *Id.* at 2030–31 (stating that the phrase "purposes of this subchapter" in § 416(h)(2)(A) refers to the entirety of Subchapter II, so there is no need to put another reference to 416(e) in the statute).

refers to state law in other provisions to determine family status, such as the definition of "wife."[86] For instance, in section 416(b), the definition of wife is somewhat amorphous by stating "the wife of an [insured] individual."[87] The definition is further clarified in section 416(h) where the cross-reference "for purposes of this subchapter" is found. It directs that the applicant must be married and if not, then the status of wife must be determined by state intestacy laws.[88] This same method of defining the family status is found for "husband" and "widower" within the Act as well.[89]

The Court also disagreed with the Third Circuit's reversal based on the biological status of the child and the respondent's argument regarding the legitimacy of the child.[90] The Third Circuit determined that the analysis could stop at section 416(e) because the status of a child is determined by its biological status.[91] Justice Ginsburg disagreed by writing that nothing in section 416(e) indicated that the biological status of the child determined its status as a child under the Act.[92] The word "biological" did not appear anywhere in the Act.[93] The respondent countered with the dictionary definition of child and argued that it meant "legitimate offspring."[94] But, once again, nothing in Congress's definition of child showed intent for a child to merely attain status as a child through legitimacy or illegitimacy.[95] Therefore, the Court determined that "'biological' parentage" is not a prerequisite for classification as a child for purposes of 416(e).[96]

II. INTESTACY LAWS WITHIN THE TENTH CIRCUIT STATES AND THE UNIFORM CODES

For posthumous conception cases, the status of a child requires reference to the intestacy laws of the state where the father was domiciled when he died.[97] Currently, only seven states explicitly allow posthumously conceived children to inherit from deceased parents.[98] The remaining states either expressly prohibit posthumously conceived children from inheriting intestate property, do not address it at all, or mandate

86. *Id.* at 2031; Kennedy, *supra* note 8, at 841.
87. *Capato II*, 132 S. Ct. at 2031 (alteration in original) (internal quotation marks omitted).
88. *Id.*
89. *Id.*
90. *Id.* at 2027, 2029.
91. *Id.* at 2029.
92. *Id.* at 2030.
93. *Id.* (internal quotation marks omitted).
94. *Id.* at 2029 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 465 (2d ed. 1934) (internal quotation marks omitted).
95. *Id.*
96. *Id.* at 2030.
97. 42 U.S.C. § 416(h)(2)(A) (2012).
98. Currently, Alabama, Delaware, District of Columbia, Hawaii, Idaho, Missouri, and New York each have a statute expressly allowing posthumously conceived children to inherit under state intestacy laws. *See* Bryant, *supra* note 12, at 930.

various types of prerequisites before they can inherit.[99] Four states within the Tenth Circuit require prerequisites for a posthumously conceived child to inherit from the parents. Colorado and New Mexico have adopted the UPC, whereas Utah and Wyoming have adopted the UPA.[100] Two states within the Tenth Circuit—Kansas and Oklahoma—do not address posthumously conceived children whatsoever.[101] Part II discusses the UPC and the Tenth Circuit states that have adopted the intestacy sections of the UPC. Then it discusses the UPA and the states that have adopted the intestacy portions of the UPA. Finally, it examines other methods by which Tenth Circuit states have dealt with the issue of posthumously conceived children within their statutes.

A. Uniform Probate Code

The UPC was adopted in full by nineteen states and has been partially adopted by many others since its inception in 1969.[102] A major revision of the UPC by the National Conference of Commissioners on Uniform State Laws (NCCUSL) took place in 2008, which helped modernize the UPC's treatment of children of assisted reproduction.[103] Before the 2008 amendments (UPC Amendments), the UPC did not address what happens when a parent dies before sperm is taken from cryopreservation to be used for insemination.[104] Since the UPC Amendments, the only states within the Tenth Circuit that have adopted the section on artificial reproduction are Colorado and New Mexico.[105]

The UPC Amendments address consent and the timing of conception with much more clarity than any other model act.[106] Under the UPC Amendments, the parent must provide consent, which can be shown by a signed record that "evidences the individual's consent."[107] The wife can choose to conceive the child up to thirty-six months after the death of the husband.[108] The UPC allows for a presumption of consent of a posthu-

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99. *See id.* at 931.

100. Wendy S. Goffe, *Postmortem Conception Quandary: When Must an Heir Be Here?*, 40 EST. PLAN. 17, 18–24 (July 2013); N.M. STAT. ANN. § 45-2-120 (2013).

101. *See* KAN. STAT. ANN. § 59-501 (2012); OKLA. STAT. tit. 84, § 228 (2013).

102. *Probate Code Amendments (2008) Summary*, UNIFORM L. COMMISSION, http://uniformlaws.org/ActSummary.aspx?title=Probate%20Code%20Amendments%20(2008) (last visited May 26, 2014).

103. *Id.*

104. Kristine S. Knaplund, *Children of Assisted Reproduction*, 45 U. MICH. J.L. REFORM 899, 901 (2012).

105. *Legislative Fact Sheet – Probate Code Amendments (2008)*, UNIFORM L. COMMISSION, http://uniformlaws.org/LegislativeFactSheet.aspx?title=probate%20Code%20Amendments%20(2008) (last visited May 26, 2014); *Parentage Act*, UNIFORM L. COMMISSION, http://www.uniformlaws.org/Act.aspx?title=Parentage%20Act (last visited May 26, 2014) (showing that Utah adopted the UPA regarding posthumous conception).

106. Jennifer Matystik, Recent Development, *Posthumously Conceived Children: Why States Should Update Their Intestacy Laws After* Astrue v. Capato, 28 BERKELEY J. GENDER L. & JUST. 269, 288–89 (2013) (noting that the UPC is more clear than the UPA and the ABA Model Act).

107. UNIF. PROBATE CODE § 2-120(f)(1) (amended 2010).

108. *Id.* § 2-120(k)(1).

mously conceived child as follows: (1) as long as a wife can prove that there was no divorce proceeding at her husband's death;[109] (2) that the father intended to serve as the parent of the child but was unable to do so because of illness or death;[110] or (3) if "intent is established by clear and convincing evidence."[111]

Additionally, the NCCUSL encourages states to "enact a provision requiring genetic depositories to provide a consent form that would satisfy [the] subsection" regarding consent.[112] The drafters of the 2008 UPC Amendments cited to a consent form included in the California Health and Safety Code.[113] This consent form states, "if you wish to allow a child conceived after your death to be considered as your heir (or beneficiary of other benefits such as life insurance or retirement) you must specify that in writing and you must sign that written expression of intent."[114] This is an excellent example of how donor sites could aid couples going through traumatic cancer treatments to specifically consider and deal with the possibility of conceiving after the father has died.

The UPC provision on posthumously conceived children was modelled after an amendment to the Uniform Status of Children of Assisted Conception Act (USCACA), which was drafted in 1988 by the NCCUSL.[115] Originally, the USCACA explicitly excluded posthumously conceived children, but in 2000 the NCCUSL struck the provision and decided to recognize posthumously conceived children as long as the deceased parent consented to be the parent of the child.[116]

1. Colorado and New Mexico

Both Colorado and New Mexico explicitly addressed posthumously conceived children in their intestacy statutes by adopting the 2008 amendments to the UPC.[117] Colorado adopted the 2008 amendments for assisted reproduction in 2009 and the legislation became effective in 2010.[118] New Mexico's statute adopting the 2008 amendments to the UPC took effect in 2012.[119]

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109. *Id.* § 2-120(h)(1).
110. *Id.* § 2-120(f)(2)(B).
111. *Id.* § 2-120(f)(2)(C).
112. NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, AMENDMENTS TO UNIFORM PROBATE CODE 43 (2008); Matystik, *supra* note 106, at 289.
113. NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, *supra* note 112, at 43 (citing CAL. HEALTH & SAFETY CODE § 1644.7 (West 2013), titled "Form provided to depositor regarding decedent's intent for use of material pursuant to Probate Code § 249.5").
114. HEALTH & SAFETY § 1644.7.
115. Goffe, *supra* note 100, at 23.
116. *Id.*
117. COLO. REV. STAT. § 15-11-120 (2013); N.M. STAT. ANN. § 45-2-120 (West 2013); UNIF. PROBATE CODE § 2-120(f) (amended 2010).
118. Elizabeth A. Bryant et al., *Changes to Colorado's Uniform Probate Code*, 39 COLO. LAW. 41, 41 (2010).
119. § 45-2-120; UNIF. PROBATE CODE § 2-120.

Under New Mexico and Colorado law, the first determination that must take place is whether there is a parent–child relationship between the deceased and the child.[120] In order for a parent–child relationship to be established when a child is conceived through ART, these states require the father to consent to "assisted reproduction by the birth mother with intent to be treated as the other parent of the child."[121] Additionally, determination of intestate succession depends on whether the child is "treated as in gestation" at the time of the father's death.[122] If the child is conceived through ART and the father dies before the birth of the child, the child will be "treated as in gestation,"[123] if the child is: (1) "[i]n utero not later than thirty-six months after the individual's death;" or (2) "[b]orn not later than forty-five months after the individual's death."[124]

Similar to the UPC, consent can occur through a signed record or it can be impliedly met by satisfying one of the following: (1) the sperm donor showed an intent "to function as a parent of the child no later than two years after the child's birth" but was unable to do so due to "death, incapacity, or other circumstances";[125] (2) the sperm donor "[i]ntended to be treated as a parent of a posthumously conceived child, if that intent is established by clear and convincing evidence";[126] or (3) "[i]f the birth mother is a surviving spouse and at her deceased spouse's death no divorce proceeding was pending."[127] The presumption of consent essentially does away with the need for consent to be in writing, unlike the UPA.[128]

B. The Uniform Parentage Act

Section 707 of the UPA, titled "Parental Status of Deceased Individual," addresses the issue of posthumously conceived children.[129] The statute 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.[130]

120. § 15-11-120(4); § 45-2-120(D); Bryant, *supra* note 12, at 931.
121. § 15-11-120(6); § 45-2-120(F); *see* Bryant, *supra* note 12, at 931.
122. § 15-11-120(11); § 45-2-120(K).
123. § 15-11-120(11); § 45-2-120(K).
124. § 15-11-120(11)(a)–(b); § 45-2-120(K)(1)–(2).
125. § 15-11-120(6)(b)(II); § 45-2-120(F)(2)(b).
126. § 15-11-120(6)(b)(III); § 45-2-120(F)(2)(c).
127. § 15-11-120(8)(b); § 45-2-120(H)(2).
128. Matystik, *supra* note 106, at 291.
129. UNIF. PARENTAGE ACT § 707 (amended 2002).
130. *Id.*

Similar to the UPC, section 707 was modelled after an amendment to the USCACA.[131] Eight states have adopted the UPA in part or in whole.[132] Both Wyoming and Utah included aspects of the Act in their intestacy laws to acknowledge posthumously conceived children.[133]

Several differences between the UPC and the UPA are worth noting. Unlike the UPC, section 707 of the UPA does not provide a time frame after the death of the father in which the woman must conceive the child.[134] Additionally, the 2000 version of the UPA required written consent if a "spouse" died before placement of the sperm; not just any individual.[135] It was amended in 2002 to apply to both spouses and non-spouses who consent in writing.[136] Finally, the UPA requires the parent's consent to be in writing.[137] The UPC, however, allows for a presumption of consent of a posthumously conceived child.[138]

1. Utah

Utah adopted laws regarding the parental status of a deceased spouse similar to those defined under the 2000 version of the UPA.[139] The amendment, codified in U.C.A. subsection 78b-15-707 and effective in 2008, provides, "If a spouse dies before placement of . . . sperm . . . the deceased spouse is not a parent of the resulting child," unless he "consented in a record that if assisted reproduction were to occur after death" he "would be the parent of the child."[140]

The definition of "parent" is contained in subsection 78b-15-201, but the definition of "consent" is not defined anywhere in Utah's UPA.[141] Utah's definition of "parent" requires that the father establish a parent–child relationship.[142] The father establishes the parent–child relationship by "having consented to assisted reproduction by a woman under Part 7, Assisted Reproduction [78b-15-707], which resulted in the birth of the child."[143] Thus, the definition of a parent is circular within section 78b-15-707 and the child can only receive inheritance rights if the father establishes consent to be the parent of the child.[144] The case that illustrates

131. Goffe, *supra* note 100, at 25.
132. *Parentage Act*, UNIFORM L. COMMISSION, http://www.uniformlaws.org/Act.aspx?title=Parentage%20Act (last visited May 26, 2014).
133. Goffe, *supra* note 100, at 18–24.
134. UNIF. PARENTAGE ACT § 707.
135. Goffe, *supra* note 100, at 25 (emphasis omitted).
136. *Id.*
137. *Id.*
138. *Id.*
139. UTAH CODE ANN. § 78b-15-707 (LexisNexis 2013); UNIF. PARENTAGE ACT § 707.
140. § 78b-15-707.
141. Burns v. Astrue, 289 P.3d 551, 555 (Utah 2012).
142. *Id.*
143. § 78b-15-201(2)(e).
144. *Burns*, 289 P.3d at 555.

this Utah law, *Burns v. Astrue*, is discussed in more detail in Part III of this Comment.

2. Wyoming

Wyoming adopted section 707 of the UPA of 2000.[145] Section 14-2-907, titled "Parental Status of Deceased Individual," directly addresses the issue of posthumously conceived children.[146] It requires that the father consent to be the parent "before placement of . . . sperm."[147] Wyoming's definition of a "parent" begins in section 14-2-501, which states that a "father-child relationship is established" when the man has "consented to assisted reproduction by his wife under article 8 of this act which resulted in the birth of the child."[148] Thus, like Utah, Wyoming requires consent before the placement of the sperm for artificial insemination, but it does not specify a time limit after the death of the father.

C. Other Approaches in the Tenth Circuit

1. Kansas

Kansas's intestacy succession statute defines a child to mean a "biological child[]."[149] A "posthumous child" is explicitly included in this definition.[150] However, a posthumously *conceived* child is not mentioned in this statute, nor in Kansas case law. In *Baugh v. Baugh*,[151] a child born just a few months after the father died intestate received the entirety of the wrongful-death insurance money.[152] Both the parents and the girlfriend of the dead father tried to split the insurance money but were denied because a Kansas statute explicitly leaves the inheritance of a parent who dies intestate and without a spouse to the surviving children in order to protect the interests of the child.[153]

The intestacy law in Kansas defines child to be the biological child. A posthumously conceived child whose father is clearly the man from whom the woman is trying to receive the benefits may be able to receive benefits based on her deceased husband's wages.[154] However, Kansas courts have not directly addressed the issue; thus, it has yet to be determined whether a posthumously conceived child will be able to inherit from the father.

145. Goffe, *supra* note 100, at 18–24.
146. WYO. STAT. ANN. § 14-2-907 (2013).
147. *Id.*
148. § 14-2-501(b)(v).
149. KAN. STAT. ANN. § 59-501(a) (2013).
150. *Id.*
151. Baugh v. Baugh *ex rel.* Smith, 973 P.2d 202 (Kan. Ct. App. 1999).
152. *Id.* at 204–05.
153. *Id.* at 206.
154. § 59-501(a).

2. Oklahoma

Oklahoma adopted the UPA, but did not adopt its intestacy laws for children.[155] Oklahoma law states, "Posthumous children are considered as living at the death of their parents."[156] This statute seems to provide for benefits for posthumously conceived children without any prerequisites, but the statute does not distinguish between posthumous children and posthumously conceived children.[157] At the time this statute was enacted, however, cryopreservation was not as popular as it is now.[158] Therefore, it may be difficult for an advocate to make the case that posthumously conceived children should be included in this definition.

III. *BURNS V. ASTRUE*: THE UTAH SUPREME COURT REJECTS SOCIAL SECURITY BENEFITS FOR POSTHUMOUSLY CONCEIVED CHILDREN WITHOUT SUFFICIENT PROOF OF CONSENT

A. Facts

Michael Burns was married to his wife, Gayle, for just two-and-a-half years when he discovered he had cancer.[159] Fearing he would become sterile from radiation treatment and chemotherapy, the couple decided to cryogenically preserve his sperm at the University of Utah School of Medicine, Division of Urology.[160] Before preserving the semen, Mr. Burns filled out a storage agreement with the University.[161] Importantly, subsection 31 of the agreement gave Mr. Burns two options as to how the University would deal with his semen upon his death.[162] Option one was to destroy the semen, which Mr. Burns left blank.[163] Option two, which he initialed, stated that the semen was to be "[m]aintained in storage for future donation to Gayle Burns . . . who will assume all of the obligations and terms described in this contract."[164] Michael Burns filled out his wife's name in the blank showing his intent to have his wife receive the sperm upon his death.[165]

Unfortunately, "cancer-related complications" claimed Mr. Burns's life in March 2001.[166] His wife, however, using artificial insemination,

155. *Parentage Act*, *supra* note 132 (showing a map where Oklahoma has adopted the Uniform Parentage Act). Section 707 of the Uniform Parentage Act is different than the Oklahoma provision, thus Oklahoma has not adopted the UPA to address posthumously conceived children. *Compare* OKLA. STAT. tit. 84, § 228 (2013), *with* UNIF. PARENTAGE ACT § 707 (amended 2002).

156. tit. 84, § 228.

157. Courtney Hannon, Comment, Astrue v. Capato*: Forcing a Shoe That Doesn't Fit*, 16 J. HEALTH CARE L. & POL'Y 403, 412–13 (2013).

158. *Id.* at 413.

159. Burns v. Astrue, 289 P.3d 551, 553 (Utah 2012).

160. *Id.*

161. *Id.*

162. *Id.* at 556.

163. *Id.* at 553.

164. *Id.*

165. *Id.*

166. *Id.*

was able to use her husband's cryogenically preserved sperm to conceive a child two years after his death.[167] Shortly after giving birth to a child, I.M.B., on December 23, 2003, Mrs. Burns applied for social security benefits for both herself and for her child based on her deceased husband's income.[168] The SSA twice denied her application for benefits on the grounds that she had failed to show that her child was "Mr. Burns's 'child' as defined by the Social Security Act."[169]

B. Procedural History

After Mrs. Burns's application was rejected twice by the SSA, both an administrative law judge and the Third Judicial District Court of Utah ruled that she should have received benefits based on her deceased husband's income.[170] The state court decided that Mr. Burns was the father of the child and the administrative law judge reversed the SSA's decision to reject her application.[171] The SSA's Appeals Council reopened her case due to "errors in the administrative law judge's decision granting benefits" and ruled that Gayle "was not entitled to benefits . . . because they had not shown that I.M.B. was the 'child' of Mr. Burns as defined in the Social Security Act."[172] Gayle Burns appealed to the United States District Court in Utah where the court certified the state law question giving the Utah Supreme Court jurisdiction over the matter.[173]

C. Opinion

As a result of the Social Security Act leaving the status of the child to state intestacy laws, the court was required to interpret a section of the Utah Uniform Parentage Act.[174] It states:

> If a spouse dies before placement of eggs, sperm, or an embryo, 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.[175]

Due to the clear language of the statute, the court noted that it was important to find some evidence of Mr. Burns's consent to have his cryogenically preserved sperm result in the birth of the child.[176] The court then looked to the meaning of "parent" as defined by the UPA, which circularly defines parent as dependent upon the formation of a parent–

167. *Id.*
168. *Id.* at 554.
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. UTAH CODE ANN. § 78b-15-707 (LexisNexis 2013).
176. *Burns*, 289 P.3d at 554.

child relationship.[177] In order for a dead parent to establish a parent–child relationship, the deceased spouse must "consent to 'be a parent of the child.'"[178]

Mrs. Burns argued that subsection 3I alone constituted her husband's consent to be the child's parent.[179] Additionally, she directed the court's attention to the agreement's "numerous references to pregnancy . . . and artificial insemination," which further "demonstrate[d] that subsection 3I constitute[d] Mr. Burns's consent to be a parent of a child conceived after his death."[180] For instance, the first section of the agreement stated, "[s]emen is desired by the donor for one or more of the following reasons."[181] The possible choices were: (1) "[p]rior to irradiation and/or chemotherapy, and" (2) "[p]rior to artificial insemination."[182] But Mr. Burns never circled or indicated in any way that he chose "[p]rior to artificial insemination."[183] In fact, Mrs. Burns admitted that, if her husband had chosen, he would have circled "[p]rior to irradiation and/or chemotherapy" instead of "[p]rior to artificial insemination."[184]

Mrs. Burns further urged the court to consider other parts of the agreement as evidence of consent, but the court rejected her arguments because "something more is required to constitute consent."[185] The court noted that the purpose is clearly stated in the first sentence of the agreement: "to act as an agreement to store semen for the purpose of . . . storage in liquid nitrogen."[186] Furthermore, Mr. Burns did not choose to circle "[p]rior to artificial insemination" in the first section.[187] The other areas that Mrs. Burns argued were evidence of consent dealt with either fee scheduling for the semen storage or "the process under which the University [would] release the samples to the donor."[188] The court concluded that these sections had nothing to do with consent to be the parent of the child.[189] Thus, the court held that the agreement did "not constitute sufficient consent in a record to be the parent of a child conceived by artificial means following the donor's death" under Utah Code Annotated section 78b-15-707.[190]

177. *Id.* at 555 (citing § 78b-15-102(17)).
178. *Id.* (quoting § 78b-15-707).
179. *Id.* at 556.
180. *Id.*
181. *Id.* (alteration in original) (internal quotation marks omitted).
182. *Id.* (alterations in original) (internal quotation marks omitted).
183. *Id.* (alteration in original) (internal quotation marks omitted).
184. *Id.* (alterations in original) (internal quotation marks omitted).
185. *Id.* at 557.
186. *Id.* (internal quotation marks omitted).
187. *Id.* (alteration in original) (internal quotation marks omitted).
188. *Id.*
189. *Id.*
190. *Id.*

The court did not elaborate on its explanation of "something more is required to constitute consent."[191] By making this statement, however, the court implied that if the contract explicitly addressed consent in another manner, then the contract would have constituted consent on the record.

IV. MORAL AND POLICY CONCERNS IN LIGHT OF *BURNS V. ASTRUE* AND TENTH CIRCUIT STATE INTESTACY LAWS

A. The Administration of Estates

States have begun to acknowledge the need to protect posthumously conceived children by permitting them to inherit from a parent who dies intestate.[192] There are, however, still states that either expressly exclude posthumously conceived children from their statutes or do not address their needs at all.[193] There are several arguments for and against excluding posthumously conceived children. Some argue that exclusion brings finality to the distribution of the estate.[194] Others argue that it is socially disadvantageous for the child to be brought up in a single-parent home.[195]

Those states excluding posthumously conceived children argue that "waiting for the potential birth" of the child "could tie up estate distributions indefinitely."[196] Excluding posthumously conceived children brings finality to the distribution of the estate and provides for a more fair and efficient process when probate courts are administering estates.[197] This argument, however, is misguided.[198] Probate matters are already a lengthy process.[199] The personal representative is not required to provide immediacy in the distribution of assets, but merely to ensure that assets are distributed properly.[200] Oftentimes a personal representative will wait many months before distributing assets.[201] For instance, in some states, personal representatives must wait at least four months in order to allow creditors ample opportunity to bring claims against the decedent's estate.[202] In addition, personal representatives may further delay distribution in order to ensure that the resolution of disputed claims, payment of

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191. *Id.*
192. Banks, *supra* note 22, at 259.
193. States that expressly exclude posthumously conceived children are as follows: Arkansas, Florida, Minnesota, and Ohio; States that do not address posthumously conceived children are as follows: Maine, South Dakota, and West Virginia. Bryant, *supra* note 12, at 931.
194. Carpenter, *supra* note 14, at 406.
195. Banks, *supra* note 22, at 298.
196. Khabbaz *ex rel.* Eng v. Comm'r, Soc. Sec. Admin., 930 A.2d 1180, 1184 (N.H. 2007); Carpenter, *supra* note 14, at 406 n.379.
197. Carpenter, *supra* note 14, at 406 (citing *In re* Martin B., 841 N.Y.S.2d 207, 209 (Sur. Ct. 2007)).
198. *Id.*
199. *Id.* at 407.
200. *Id.* at 406–07.
201. *Id.* at 407.
202. *Id.*

taxes, inability to contact heirs, or other business matters are attended to.[203]

B. The Interests of the Woman and Child

Proponents of exclusion also argue that it would be socially disadvantageous for the child to be born after the death of a parent.[204] Some scholars note that single-parent mothers are more likely to bring up children who will be poor, drop out of school, and take part in delinquent activity.[205] Thus, posthumously conceived children degrade the traditional American family and keep children from developing a relationship with their parents.[206] Under these arguments, birth of the child should not be encouraged.

Additionally, excluding posthumously conceived children ignores women's reproductive rights and causes them to be marginalized and discriminated against simply because they chose to conceive after the death of the father.[207] Professor Gloria Banks, a scholar on wills and trusts, concedes that while public policy should not necessarily promote "orphaned children," there are constitutional safeguards protecting women's reproductive rights, which should not be restricted in any manner by the state.[208] The right to procreate is constitutionally protected and, as Justice Douglas wrote in *Skinner v. Oklahoma*,[209] is "one of the basic civil rights of man . . . fundamental to the very existence and survival of the race."[210] Punishing posthumously conceived children merely because the mother opted to reproduce after the death of the father cuts against the fundamental civil right described by Justice Douglas in *Skinner*.[211] By restricting procreation rights, the state withholds much-needed benefits from single-parent households.[212] Posthumously conceived children are often brought up in single-parent households, which causes governmental benefits to be more important than ever.[213] The woman and child are in need of the benefits and society is prejudicing them by not considering their interests.[214]

Several different interests need to be balanced when determining whether posthumously conceived children should inherit from a deceased

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203. *Id.*
204. Banks, *supra* note 22, at 298.
205. Bonnie Steinbock, *Sperm as Property*, 6 STAN. L. & POL'Y REV. 57, 62 (1995) (citing Sara McLanahan & Karen Booth, *Mother-Only Families: Problems, Prospects, and Politics*, 51 J. MARRIAGE & FAM. 557 (1989)).
206. Banks, *supra* note 22, at 299.
207. *Id.* at 302.
208. *Id.* at 298–99.
209. 316 U.S. 535 (1942).
210. *Id.* at 541; Banks, *supra* note 22, at 302.
211. Banks, *supra* note 22, at 302 (quoting *Skinner*, 316 U.S. at 541).
212. Matystik, *supra* note 106, at 281.
213. *Id.*
214. Banks, *supra* note 22, at 302.

parent, including the interests of the child, the deceased parent, the surviving parent, and the state.[215] As most states in the Tenth Circuit have already done, state statutes should uniformly address time limits and requirements of consent in order to balance the interests of all the parties involved.[216] But encouraging legislatures to draft and adopt a model act is tricky, as Justice Breyer noted during oral arguments for *Capato II*.[217] He speculated that legislatures would perceive the situation as one where children conceived by traditional methods were already consuming the Social Security trust fund,[218] and posthumously conceived children would "take the money away from the other children."[219]

Justice Breyer's point brings up the question of whether a mother who makes a conscious choice to conceive a child after her husband or lover has died should be entitled to benefits at taxpayer expense. A good argument can be made that a woman who has made a deliberate choice to bear a deceased man's child should be responsible for all of the expenses. States that exclude posthumously conceived children are "stigmatizing and isolating" the children by preventing them from establishing a parent–child relationship for the purposes of receiving social security benefits.[220] Society should not treat these children as "modern day Frankensteins."[221] They are human beings whose "liberties and rights are indisputably protected by principles of fairness and equity promoted by the Constitution."[222] Thus, a balance should be struck between the interests of the surviving partner or spouse, the decedent who donated the sperm, the posthumously conceived child, and the state.[223]

V. ALLOWING STATES TO ADDRESS POSTHUMOUSLY CONCEIVED CHILDREN

Currently, federal law does not expressly provide benefits for posthumously conceived children.[224] As stated previously, the SSA requires parties to refer to their state's intestacy laws. [225] Due to the delicate nature of issues involved with posthumously conceived children, many scholars argue for a federal amendment to the Act in order to bring about

215. Laurence C. Nolan, *Critiquing Society's Response to the Needs of Posthumously Conceived Children*, 82 OR. L. REV. 1067, 1090 (2003).

216. Morgan Kirkland Wood, Note, *It Takes a Village: Considering the Other Interests at Stake When Extending Inheritance Rights to Posthumously Conceived Children*, 44 GA. L. REV. 873, 898, 904–05 (2010).

217. Matystik, *supra* note 106, at 279–80.

218. *Id.* at 281–82.

219. *Id.* at 281.

220. *Id.*

221. Banks, *supra* note 22, at 303.

222. *Id.* at 304.

223. *See* Wood, *supra* note 216, at 902.

224. Raymond C. O'Brien, *The Momentum of Posthumous Conception: A Model Act*, 25 J. CONTEMP. HEALTH L. & POL'Y 332, 358 (2009).

225. *Id.*

national uniformity.[226] However, in light of the recent government gridlock and shutdown, the SSA's ability to look at posthumously conceived children on a "case-by-case" basis[227] is not likely nor is it feasible.

Furthermore, a federal amendment expressly providing benefits for posthumously conceived children would run contrary to the Act's purpose and Congress's original intent in promulgating the Act.[228] Posthumously conceived children were not contemplated during the drafting of the Act because the technology to produce them was not available at that time.[229] The purpose of the Act was originally "to provide . . . dependent members of [a wage earner's] family with protection against the hardship occasioned by [the] loss of [the insured's] earnings."[230] The aim was not to benefit the needy, but to provide support for a child who lost a living parent so the child was not thrust into poverty.[231] Congress was attempting to protect the Social Security trust fund by limiting the benefits to those children who were no longer able to receive their parents' support.[232] It is therefore tough to argue that survivor benefits should be extended for a child of someone who "did not exist" when the child was born.[233] By allowing states to address the issue, more children may actually be benefitting than otherwise would be the case under a uniform federal approach.[234]

At least one author has argued that the SSA is more capable than the states to handle the distribution of federal funds on a "case-by-case basis"[235] because the organization has added many people to its staff and has "plenty of resources."[236] The federal government, however, initiated federal spending cuts in 2013,[237] causing federal agencies to impose mandatory sequestration on current employees and initiate nationwide hiring freezes.[238] For example, many agencies had to shut down operations in late 2013,[239] including the SSA.[240] During the Congressional

226. Banks, *supra* note 22, at 258; Kennedy, *supra* note 8, at 822.

227. *Capato II*, 132 S. Ct. 2021, 2032 (2012).

228. Bryant, *supra* note 12, at 923.

229. Matystik, *supra* note 106, at 280.

230. *Capato II*, 132 S. Ct. at 2032 (alterations in original) (quoting Califano v. Jobst, 434 U.S. 47, 52 (1977)) (internal quotation marks omitted).

231. Bryant, *supra* note 12, at 943.

232. *Id.*

233. *Id.* at 943–44.

234. Matystik, *supra* note 106, at 280–81.

235. The Supreme Court stated in *Capato II* that the SSA was not capable of handling the issue of posthumously conceived children because they would have to do so on a "case-by-case basis" since each case is unique and requires analysis. *Capato II*, 132 S. Ct. at 2032–33.

236. Kennedy, *supra* note 8, at 845.

237. Joe Davidson, *Report: Sequestration Cuts Could Get Worse in 2014*, WASH. POST, Dec. 3, 2013, at B04.

238. *First Command: Federal Employees Bracing for Second Round of Sequestration*, WIRELESS NEWS, Nov. 6, 2013.

239. *Congress Lays Groundwork for Blame over Obamacare and Possible Shutdown*, WASH. TIMES, Sept. 15, 2013, http://www.washingtontimes.com/news/2013/sep/15/government-shutdown-obamacare/.

gridlock of 2013, up to 800,000 federal employees were furloughed, and only the most "essential" workers were kept in federal offices.[241] Austerity measures will most likely continue for some time, because of Congress's continuous gridlock over making federal deficit decisions.[242] Thus, the SSA may not be in a position to cope with a uniform change in federal law that would require the agency to look at each and every posthumously conceived child case.[243] Allowing states to address the issue of federal benefits is not only more efficient, but it complies with the concept of federalism that prompted Congress to defer to state intestacy laws.[244]

Because of the SSA's inability to take on cases of posthumously conceived children, the UPC and the UPA are currently the best vehicles for providing benefits to applicants. The two model codes restrict the pool of qualifying individuals by requiring either recorded consent or imposing time limits.[245] This mode of qualifying individuals is the best method of balancing the interests of the deceased father, the woman conceiving, the taxpayers, and the posthumous child.[246] Like *Burns v. Astrue*, the UPA's requirement of recorded consent must indicate that the sperm is to be used specifically for artificial insemination in the case of death of the father.[247] This requirement prevents applicants from filing fraudulent claims that may have been against the wishes of the decedent.[248]

Although the UPA and UPC are the best options, the UPA's strict consent requirement does not adequately address the interests of the posthumously conceived child.[249] Additionally, the UPC allows an applicant to receive benefits even if there is no express written consent, which may result in the interests of the deceased not accurately being followed.[250] Some argue, however, that a lack of written consent should not keep a child from inheritance rights because a non-posthumous child can already inherit without specific consent when the parent dies intestate.[251]

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240. Annie Karni, *Government Shutdown Leaves Local Furloughed Workers Struggling with Bills*, N.Y. DAILY NEWS, Oct. 6, 2013, 2:58 AM, http://www.nydailynews.com/news/politics/shutdown-leaves-furloughed-workers-struggling-article-1.1477581.

241. *Lockheed Martin to Furlough 3K Workers*, ASSOCIATED PRESS, Oct. 4, 2013.

242. Davidson, *supra* note 237.

243. The Supreme Court stated that it would be "burdensome" for the SSA to make "case-by-case determinations" as to whether a child was "dependent on her father's earnings." *Capato II*, 132 S. Ct. 2021, 2032 (2012). Thus, it can be inferred that this burden coupled with the current austerity measures being taken by the federal government weighs against requiring the SSA to rule upon each posthumously conceived child case.

244. Kennedy, *supra* note 8, at 844–45.

245. Matystik, *supra* note 106, at 287, 289.

246. *Id.* at 282.

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

248. Carpenter, *supra* note 14, at 421.

249. Matystik, *supra* note 106, at 287.

250. *See id.* at 289–91.

251. *Id.* at 283.

Ultimately, requiring written consent should be required to prove the intent of the decedent and to protect against "fraudulent claims by surviving partners."[252]

In regard to time limits, the only states within the Tenth Circuit that impose such constraints are Colorado and New Mexico. Benjamin Carpenter argues that time constraints allow the states "to provide finality to the administration process in those scenarios where a posthumously conceived child could 'divest' others of all or a part of their share of the decedent's estate."[253] Otherwise, an estate would have to wait—potentially for years—for a posthumous child to be born, thus requiring an estate to remain open indefinitely.[254] The time constraint imposed by Colorado and New Mexico is three years for conception, which allows the wife a period of grieving for her lost loved one, a certain amount of time to make an informed decision, several attempts at becoming pregnant, and "a fairly efficient estate administration."[255]

VI. RECOMMENDATIONS

Because many Americans move from state to state for various reasons, state statutes addressing posthumously conceived children should be more uniform.[256] However, the legislative process of adopting a large package such as the UPC or UPA is difficult and cumbersome.[257] Additionally, the potentially hot-button interests involved with posthumous conception and the impact on the federal budget of providing for these children are the sorts of issues likely to produce more demagoguery than compromise between liberal and conservative politicians.[258] As previously discussed, the interests involved with posthumous conception include: (1) the SSA's trust fund and its potential depletion; (2) a state's desire to promote efficiency and speed in its probate courts; (3) the desires of the deceased father and the need for his consent; (4) the woman's reproductive rights; (5) the inheritance rights of children born during the husband's lifetime; (6) and the rights of the posthumously conceived children themselves.[259]

A hybrid UPA–UPC standard would best strike a balance between all interests involved.[260] This model would include the "written consent

252. Carpenter, *supra* note 14, at 421.
253. *Id.* at 425.
254. *Id.*
255. *Id.* at 424–26; N.M. STAT. ANN. § 45-2-120(K) (West 2013).
256. *Probate Code Summary*, UNIFORM L. COMMISSION, http://www.uniformlaws.org/ActSummary.aspx?title=Probate%20Code (last visited May 26, 2014).
257. *Id.*
258. Historically, the issues of the woman's reproductive rights and issues relating to the federal budget have proven to be extremely divisive. *See* Yvonne Lindgren, *The Rhetoric of Choice: Restoring Healthcare to the Abortion Right*, 64 HASTINGS L.J. 385, 413 (2013); *Federal Government Shuts Down*, FRONTRUNNER, Oct. 1, 2013.
259. *See* Matystik, *supra* note 106, at 282.
260. *Id.* at 292.

requirement of the UPA" and the "time limit requirement of the UPC."[261] Use of the time limit requirement from the UPC would allow states to bring the desired finality to the distribution of the estates, while also allowing women to have a period of grieving for their loved one. Although the three-year time limit proposed by the UPC seems arbitrary, the NCCUL Commissioners chose that period to allow the "surviving spouse or partner a period of grieving, time to make up his or her mind about whether to go forward with assisted reproduction, and a reasonable allowance for unsuccessful . . . pregnancy."[262] The thirty-six month period also "coincides with Section 3-1006, under which an heir is allowed to recover property improperly distributed or its value from any distributee during the later of three years after the decedent's death or one year after distribution."[263] Thus, the UPC's time restriction serves both the interests of the state and the interests of the woman involved in the posthumous conception.

The consent requirement is important for the decedent's interests because it ensures that only an intended beneficiary receives the inheritance rights.[264] The UPA's consent requirement has been criticized as being too strict (requiring consent on the record), which can result in inheritance rights "be[ing] overly exclusive."[265] However, the UPC's consent requirement allows for too many presumptions, which could possibly lead to more fraudulent claims and could prevent the decedent's intent from being considered.[266] Thus, the combination of the time restrictions from the UPC and the consent requirement from the UPA would be most amenable to providing for all the interests involved.

One final solution would require sperm donor sites to provide a consent form that would establish a parent–child relationship in the event the wife decides to conceive a child by inseminating herself with her husband's sperm after his death.[267] The drafters of the UPC refer to California Health and Safety Code section 1644.7 as a model consent form for sperm donor sites to use.[268] Requiring such a form would force the couple to specifically consider the issue and make their intentions clear from the beginning. Use of such a form would also "promote efficien-

261. *Id.*

262. UNIF. PROBATE CODE § 2-120(k) cmt. subsec. (k) (2010); Carpenter, *supra* note 14, at 373–74.

263. UNIF. PROBATE CODE § 2-120(k) cmt. subsec. (k).

264. Matystik, *supra* note 106, at 283.

265. *Id.* (stating that the consent-on-the-record requirements are too strict, because "state[s] will generally allow a non-posthumously conceived biological child to inherit when there is not a will").

266. Carpenter, *supra* note 14, at 420 (stating that if legislatures did not "require proof that the decedent consented to the posthumous use of his or her genetic material . . . the door would be open to the possibility of improper posthumous use of one's genetic material—for instance, postmortem sperm retrieval").

267. UNIF. PROBATE CODE § 2-120 legis. note.; Horner, *supra* note 13, at 176.

268. Matystik, *supra* note 106, at 289.

cy"[269] by removing any difficulty the woman might later have when faced with trying to prove the wishes of the father regarding the child born in these peculiar circumstances.

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269. *Id.*

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