No.

In the Supreme Court of the United States

MICHAEL J. ASTRUE,
COMMISSIONER OF SOCIAL SECURITY, PETITIONER

v.

KAREN K. CAPATO, ON BEHALF OF B.N.C., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a child who was conceived after the death of a biological parent, but who cannot inherit personal property from that biological parent under applicable state intestacy law, is eligible for child survivor benefits under Title II of the Social Security Act, 42 U.S.C. 401 *et seq.*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and regulations:

Statutes and regulations—Continued: Page

Statutes and regulations—Continued:

Miscellaneous:

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The Solicitor General, on behalf of Michael J. Astrue, Commissioner of Social Security, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-12a) is reported at 631 F.3d 626. The order of the district court (App., *infra*, 15a-32a) is unreported. The decision of the administrative law judge (App., *infra*, 33a-47a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 2011. A petition for rehearing was denied on

March 9, 2011 (App., *infra*, 13a-14a). On May 27, 2011, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including July 7, 2011. On June 30, 2011, Justice Alito further extended the time to August 8, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Pertinent statutory provisions are set forth in an appendix to this petition. App., *infra*, 48a-59a.

STATEMENT

1. Title II of the Social Security Act (the Act), 42 U.S.C. 401 *et seq.*, provides retirement and disability benefits to insured wage earners. In 1939, Congress amended Title II to provide benefits to a deceased wage earner's surviving family members, including minor children, who were dependent on the wage earner before his or her death. Social Security Act Amendments of 1939, ch. 666, Tit. II, 53 Stat. 1362.

As relevant here, three statutory provisions now govern the availability of child survivor benefits. First, under 42 U.S.C. 402(d)(1), benefits are available to "[e]very child (as defined in section 416(e) of this title) of * * * an individual who dies a fully or currently insured individual," provided that the individual has made an application for benefits, is a minor or is disabled, and was dependent on the deceased wage earner at the time of death. 42 U.S.C. 402(d)(1). Second, Section 416(e) provides that "[t]he term 'child' means * * * the child or legally adopted child of an individual," and also provides that "child" means a "stepchild," "grandchild," or "stepgrandchild," so long as certain conditions are met. 42 U.S.C. 416(e)(1)-(3). Third, Section 416(h)(2)(A) directs that "[i]n determining whether an applicant is the

child" of a deceased wage earner, "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" the wage earner "was domiciled at the time of his death." 42 U.S.C. 416(h)(2)(A).

2. In 1999, Robert Capato deposited sperm at a fertility clinic. He died in March 2002, and respondent, his widow, subsequently underwent in vitro fertilization using the frozen sperm. In September 2003, she gave birth to twins. App., *infra*, 2a-3a.

Respondent applied for Social Security benefits on behalf of her children as survivors of a deceased wage earner. The Social Security Administration (SSA) denied the claim, and respondent requested a hearing before an Administrative Law Judge (ALJ). App., *infra*, 3a.

The ALJ affirmed the denial of benefits. App., *infra*, 33a-47a. Relying on Section 416(h)(2)(A), the ALJ reasoned that a child conceived after the death of his or her biological father can establish eligibility for benefits only by "showing that the child could inherit the wage earner's property as his child under the intestacy laws of the state where the wage earner was domiciled when he died." *Id.* at 39a. In this case, the ALJ found, Mr. Capato had been domiciled in Florida at the time of his death, and Florida's law of intestate succession permits children born after the death of a parent to inherit only if they were "conceived before his or her death, but born thereafter." *Id.* at 40a (quoting Fla. Stat. Ann. § 732.106 (West 2005)); see *id.* Fla. Stat. Ann. § 742.17(4) (West 2010). "Because the twins cannot inherit a child's share of the wage earner's personal property, under Florida's intestacy law," the ALJ concluded that "they do not

qualify as the wage earner's 'children' under the Social Security Act." App., *infra*, 41a.

The Social Security Appeals Council denied review, making the ALJ's decision the final agency decision. App., *infra*, 16a; see 20 C.F.R. 404.955.

3. Respondent sought judicial review in the United States District Court for the District of New Jersey, and the district court affirmed the denial of benefits. App., *infra*, 15a-32a. The court determined that "[s]ubstantial evidence supports the ALJ's finding that the insured was domiciled in the State of Florida at the time of death," and it agreed with the ALJ that, because posthumously conceived children are excluded from intestate succession under Florida law, respondent's children were ineligible for benefits under Section 416(h)(2)(A). *Id.* at 24a.

4. The court of appeals reversed. App., *infra*, 1a-12a. Rejecting the agency's interpretation of the Act, the court held that Section 416(h)(2)(A)'s instruction to apply state intestacy law is applicable only in cases in which biological parentage is disputed. *Id.* at 10a. The court saw no reason "why, in the factual circumstances of this case, where there is no family status to determine, we would even *refer* to [Section] 416(h)." *Id.* at 7a. The court concluded that, under Section 416(e), "the undisputed biological children of a deceased wage earner and his widow [are] 'children' within the meaning of the Act," without regard to state intestacy law. *Id.* at 12a. The court therefore remanded "for a determination of whether, as of the date of Mr. Capato's death, his children were dependent or deemed dependent on him, the final requisite of the Act remaining to be satisfied." *Ibid.*

5. The court of appeals denied a petition for rehearing en banc. App., *infra*, 13a-14a.

REASONS FOR GRANTING THE PETITION

The Third Circuit's rejection of the Social Security Administration's longstanding and wholly reasonable interpretation of the Social Security Act warrants this Court's review. Since the provisions for child survivor benefits were first added to the Act in 1939, SSA has interpreted 42 U.S.C. 416(h)(2)(A) to mean exactly what it says—that in determining whether an applicant is the "child" of an insured wage earner for the purpose of obtaining survivor benefits, the agency "shall apply such law as would be applied in determining the devolution of intestate personal property" in the State in which the wage earner was domiciled at the time of his or her death. See, *e.g.*, 20 C.F.R. 404.355(a); 20 C.F.R. 403.832(a) (Supp. 1940). This case involves children conceived after the death of their father. Because the applicable state law would not confer intestacy rights in that context, SSA correctly determined that the children are not entitled to survivor benefits.

In reaching a contrary conclusion, the court of appeals held that because the children have a biological relationship with the deceased wage earner, they need not demonstrate a legal child-parent relationship with him under Section 416(h) in order to obtain benefits. That holding is contrary to the text, legislative history, and purposes of the Act, and it fails to give appropriate deference to SSA's longstanding and reasonable construction of the statute.

The question presented in this case is the subject of a circuit conflict. Like the court below, the Ninth Circuit has rejected SSA's interpretation of Section 416 as

applied to the biological but posthumously conceived children of a deceased wage earner. See *Gillett-Netting* v. *Barnhart*, 371 F.3d 593 (2004). On the other hand, the Fourth Circuit has ruled in the government's favor in an essentially identical case. See *Schafer* v. *Astrue*, 641 F.3d 49 (2011), pet. for reh'g denied (Aug. 1, 2011). The Fifth Circuit has also affirmed the agency's interpretation of Section 416(h) as applying to all applicants, not just those whose biological parentage is in dispute, see *Conlon ex rel. Conlon* v. *Heckler*, 719 F.2d 788, 800 (1983), and the District of Columbia and Sixth Circuits have expressed a similar view, see *Javier* v. *Commissioner of Soc. Sec.*, 407 F.3d 1244 (D.C. Cir. 2005); *DeSonier* v. *Sullivan*, 906 F.2d 228 (6th Cir. 1990).

The question of statutory interpretation raised by this case is of recurring significance in the administration of the Social Security program. In setting aside the agency's decision, the court of appeals disregarded a regulatory framework that applies to all applications for survivor benefits and that has been in place for more than 70 years. Because the question presented is both important and recurring, and because the decision below is wrong, this Court's resolution of the conflict is warranted.

A. The Decision Below Is Contrary To The Text, History, And Purposes Of The Social Security Act, And It Disregards The Agency's Reasonable Interpretation Of The Act

1. a. In order to obtain child survivor benefits under the Social Security Act, an applicant must establish, among other things, that he or she is the child of a deceased wage earner. Section 402(d) affords survivor benefits to "[e]very child (as defined in section 416(e) of

this title) * * * of an individual who dies a fully or currently insured individual," provided that the child "was dependent upon such individual * * * at the time" of the individual's death, and provided that certain other requirements not at issue here are met. 42 U.S.C. 402(d)(1). The definitions applicable to determining whether an applicant for survivor's benefits qualifies as a "child" are set forth in 42 U.S.C. 416, entitled "Additional definitions." Subsection (e) of 42 U.S.C. 416, referred to in Section 402(d)(1), defines "child" as, *inter alia*, "the child or legally adopted child of an individual." 42 U.S.C. 416(e)(1). Although Section 416(e) proceeds to define "legally adopted child" in some detail, it does not further define the word "child."

That further definition is supplied by Subsection (h) of Section 416, entitled "[d]etermination of family status." As relevant here, Subsection (h)(2) provides that, "[i]n determining whether an applicant is the child * * * 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 [the insured] was domiciled at the time of his death." 42 U.S.C. 416(h)(2)(A). Subsections (h)(2)(B) and (h)(3)(C) of Section 416 then describe three alternative ways in which an applicant who does not satisfy that definition of a "child" under 42 U.S.C. 416(h)(2)(A) may nevertheless be "deemed" a child for purposes of Section 416(e). See 42 U.S.C. 416(h)(2)(B) (applicant is deemed a "child" if the insured and the other parent went through a marriage ceremony that would have been valid but for certain legal impediments), 42 U.S.C. 416(h)(3)(C)(i) (applicant is deemed a "child" if the insured had acknowl-

edged paternity in writing, had been decreed by a court to be a parent, or had been ordered to pay child support), 42 U.S.C. 416(h)(3)(C)(ii) (applicant is deemed a "child" if there is satisfactory evidence that the insured was the applicant's parent and the insured was living with or supporting the applicant at the time of the insured's death).

The court of appeals did not dispute that respondent's children do not qualify as the "children" of Mr. Capato under any of the four categories specified in Sections 416(h)(2) and (3). In particular, the court acknowledged that they do not qualify under Section 416(h)(2)(A) because the law of Florida—the State in which Mr. Capato was domiciled at the time of his death—would not recognize them as his children for purposes of intestate succession. App., *infra*, 7a; see Fla. Stat. Ann. § 732.106 (West 2005); *id.* § 742.17(4) (West 2010). Accordingly, they are not eligible for Social Security benefits as his surviving children.

b. In reaching a contrary conclusion, the court of appeals effectively engrafted onto the statute an amorphous fifth category of eligibility, covering applicants who are "undisputed biological children" of deceased wage earners. App., *infra*, 10a. Tellingly, the court of appeals made little effort to locate its standard in the text of the statute, other than to make clear that it is *not* found in Section 416(h). *Id.* at 11a ("[W]e do not read [Sections] 402(d) or 416(e) as requiring reference to [Section] 416(h) to establish child status."). But neither Section 402(d)(1) nor Section 416(e)—nor, for that matter, Sections 416(h)(2) or (3)—uses the term "undisputed biological child[]" or "biological child" in defining whether an applicant qualifies as a "child." And there is no basis in the Act for adding to Section 416(h)(2) and

(3)'s carefully drawn list of situations in which an applicant qualifies as a "child" for purposes of Section 416(e). To the contrary, the mandatory language of Section 416(h)(2)(A)—"[i]n determining whether an applicant is the child * * * the Commissioner * * * *shall* apply such law," 42 U.S.C. 416(h)(2)(A) (emphasis added)—demonstrates that the test set out in that provision is exclusive, where, as here, the alternative tests in 42 U.S.C. 416(h)(2)(B) and (3)(C) are not satisfied.

The court of appeals saw no need to refer to Section 416(h) because, in its view, the text of Section 416(e) "is so clear." App., *infra*, 10a. As the Fifth Circuit has observed, however, the "definitional tautology" in Section 416(e)—*i.e.*, "a 'child' is a child"—"does not provide much guidance" in determining whether an applicant qualifies as the child of a deceased wage earner as a legal matter. *Conlon*, 719 F.2d at 800; cf. *United States* v. *Bestfoods*, 524 U.S. 51, 56, 66 (1998) (describing the definition of "owner or operator" in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601(20)(A)(ii) ("any person owning or operating such facility"), as a "tautology" that is "useless[]" in construing the statute). Indeed, "it is not clear just how the SSA *could* give 'full meaning' to the statutory proposition that 'a "child" is a child' without help from neighboring provisions." *Schafer*, 641 F.3d at 56. Even the court of appeals acknowledged that it is easy to imagine cases in which the determination of biological parentage is complex. App., *infra*, 11a (noting that "[t]he use of donor eggs, artificial insemination, and surrogate wombs could result in at least five potential parents") (citation omitted). As the Fourth Circuit correctly concluded, "it [is] very unlikely Congress would have left the SSA so utterly in the dark about such a

critical term." *Schafer*, 641 F.3d at 55. And, in fact, Congress did not do so. Its "more comprehensive effort[]" to supply a definition in Section 416(h) provides a "plain and explicit instruction on how the determination of child status should be made." *Ibid.*

That does not mean that Section 416(e) does no work in the statutory scheme. To the contrary, Section 416(e)(1) clarifies that both natural children and legally adopted children are eligible for benefits; Section 416(e)(2) includes certain stepchildren; and Section 416(e)(3) includes even certain grandchildren and stepgrandchildren. The inclusion of those potential beneficiaries "importantly expands the scope of the Act and distinguishes it from narrower benefits programs." *Schafer*, 641 F.3d at 56; cf. *Cleland* v. *OPM*, 984 F.2d 1193, 1195 (Fed. Cir. 1993) (holding that grandchildren are not entitled to survivorship benefits under the civil service retirement program, 5 U.S.C. 8341(e)(2), because they are not specifically identified in that statute).

By contrast, the court of appeals' reading of the statute makes several provisions of Section 416(h) superfluous. Section 416(h)(2)(B) provides that a child who is ineligible to inherit under state law may nevertheless be deemed a "child" if he or she "is the son or daughter of [the] insured" and if his or her parents "went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment * * * would have been a valid marriage." 42 U.S.C. 416(h)(2)(B). Similarly, Section 416(h)(3)(C)(ii) applies to a child who cannot inherit under state law, provided that the insured wage earner was "the mother or father of the applicant" and was "living with or contributing to the support of the applicant" at the time of the insured's death. 42 U.S.C. 416(h)(3)(C)(ii). If being an "undis-

puted biological child[]" were sufficient for eligibility, then neither of those provisions would serve any purpose, since each of them applies only to applicants who are the biological children of insured wage earners but who also must satisfy additional criteria. App., *infra*, 10a; see *Schafer*, 641 F.3d at 55 ("Congress would not have imposed an additional proof requirement on these undisputed children if undisputed biological parentage sufficed under [Section] 416(e)(1).").

The court of appeals' view that Section 416(h)(2)(A) has "no relevance" where a biological relationship is established, App., *infra*, 8a (quoting *Gillett-Netting*, 371 F.3d at 596), is further refuted by Section 416(h)(1)(A). That provision instructs the Commissioner to look to state law in all cases to determine whether a marriage was valid for purposes of deciding whether a surviving spouse is eligible for benefits. Thus, as the heading to Section 416(h) ("Determination of family status") makes clear, the tests in Section 416(h)(1)(A) and Section 416(h)(2)(A) are intended to be used in *all* cases to determine whether the requisite family status—"husband," "wife," or "child"—is established in the first place. The court of appeals erred in refusing to apply the plain terms of that provision.

2. The court of appeals' decision also reflects a basic misunderstanding of the background and legislative history of the current version of Sections 416(h)(2) and (3). The court relied on the reasoning of *Gillett-Netting*, in which the Ninth Circuit stated that language in Sections 416(h)(2) and (3) was "added to the Act to provide various ways in which children could be entitled to benefits even if their parents were not married or their parentage was in dispute." 371 F.3d at 596. The Ninth Circuit's view of the 1965 amendments was inaccurate, and

in any event, its conclusion that those amendments have "no relevance" to children whose parents were married or whose biological parentage is not in dispute, *ibid.*, does not follow.

As enacted in 1939, the child survivor provisions of the Social Security Act were similar in structure to the current law. They contained a provision granting benefits to every "child," see 42 U.S.C. 402(c)(1) (1940), a provision paralleling the current definition of "child," see 42 U.S.C. 409(k) (1940) ("The term 'child' * * * means the child of an individual."), and a provision paralleling the current versions of Sections 416(h)(1)(A) and (2)(A). See 42 U.S.C. 409(m) (1940) ("In determining whether an applicant is the wife, widow, child, or parent of a fully insured or currently insured individual, * * * the Board shall apply such law as would be applied in determining the devolution of intestate personal property."). Under those provisions, the only way *any* child (or wife, widow, or parent) could be eligible for benefits was by establishing that he or she would have been able to inherit under state intestacy law.

In 1965, Congress amended the Act to broaden eligibility for child survivor benefits. See Old-Age, Survivors, and Disability Insurance Amendments of 1965, Pub. L. No. 89-97, Tit. III, § 339, 79 Stat. 409. The Senate Report accompanying those amendments made clear Congress's understanding that "whether a child meets the definition of a child for the purpose of getting child's insurance benefits based on his father's earnings depends on the laws applied in determining the devolution of intestate personal property in the State in which the worker is domiciled." S. Rep. No. 404, 89th Cong., 1st Sess. Pt. I, at 109 (1965) (*Senate Report*); see *Schafer*, 641 F.3d at 57 (citing pre-1965 cases holding "that all

those claiming child status had to prove the ability to inherit under state law"). The Committee went on to observe that "States differ considerably in the requirements that must be met in order for a child born out of wedlock to have inheritance rights." *Senate Report* 109. In that context, some States prohibited intestate succession altogether, while others were more generous. *Id.* at 109-110. In order to provide greater uniformity, the Committee explained, the amendments provided for the eligibility of children who could not inherit under state law, "if the father had acknowledged the child in writing, had been ordered by a court to contribute to the child's support, had been judicially decreed to be the child's father, or is shown by other evidence satisfactory to the Secretary of Health, Education, and Welfare to be the child's father and was living with or contributing to the support of the child." *Ibid.* Those amendments are now codified in Section 416(h)(3)(C).

The history of the 1965 amendments demonstrates that Congress understood—and agreed with—the proposition that under the pre-1965 version of the Act, children who could not inherit under applicable state intestacy law were ineligible for survivor benefits. In amending Section 416(h) to broaden eligibility for benefits, Congress did not alter the role of Section 416(h) as the provision that governs the determination of family status for every benefits application; instead, it added alternative mechanisms to Section 416(h) under which a child who could not inherit under state intestacy law may nonetheless establish the requisite child-parent relationship. As the Fourth Circuit correctly concluded, "[t]he Act's legislative history could hardly be clearer" in establishing that "Congress understood the Act's framework as requiring all natural children to pass

through [Section] 416(h) to claim child status." *Schafer*, 641 F.3d at 58.

3. The court of appeals' interpretation also disregards the purposes of Section 416(h). Even in the context of federal programs, child-parent relationships are generally determined by state law. See *Mansell* v. *Mansell*, 490 U.S. 581, 587 (1989) ("Because domestic relations are preeminently matters of state law, we have consistently recognized that Congress, when it passes general legislation, rarely intends to displace state authority in this area."); see also *United States* v. *Morrison*, 529 U.S. 598, 615 (2000) (identifying "family law" as a field of "traditional state regulation"); *Schafer*, 641 F.3d at 62 ("Congress's efforts toward cooperative federalism here are hardly surprising. Family and inheritance law fall squarely within the states' historic competence."). As this Court has explained, "[t]he word 'children,' although it to some extent describes a purely physical relationship, also describes a legal status," which "requires a reference to the law of the State which create[s] those legal relationships." *De Sylva* v. *Ballentine*, 351 U.S. 570, 580 (1956).

Section 416(h)(2)(A)'s incorporation of state intestacy law rests not only on principles of federalism but also on the reality that, because survivor benefits are designed to provide support to survivors from the insured's Social Security wage account, state intestate-succession laws provide a sound guide in determining eligibility. As a general matter, "where state intestacy law provides that a child may take personal property from a [parent's] estate, it may reasonably be thought that the child will more likely be dependent during the parent's life and at his death." *Mathews* v. *Lucas*, 427 U.S. 495, 514 (1976). By contrast, categorically extending benefits to children

who were conceived only after the death of a parent would ill-serve "the Act's basic aim of primarily helping those children who lost support after the unanticipated death of a parent." *Schafer*, 641 F.3d at 58.

Indeed, in holding that the biological relationship between a posthumously conceived child and the deceased biological parent is sufficient, by itself, to establish a legal child-parent relationship for benefits purposes, the court of appeals adopted a rule that is broader than that adopted by any State in legislation directly addressing the question of posthumous conception. See, *e.g.*, Ala. Code § 26-17-707 (LexisNexis 2009); Cal. Prob. Code § 249.5 (West Supp. 2011); Colo. Rev. Stat. § 19-4-106(8) (2010); Del. Code Ann. tit. 13, § 8-707 (2009); Fla. Stat. Ann. § 742.17(4) (West 2010); La. Rev. Stat. Ann. § 9:391.1 (West 2008); N.M. Stat. § 40-11A-707 (Supp. 2010); N.D. Cent. Code § 14-20-65 (2009); Tex. Fam. Code Ann. § 160.707 (Vernon 2008); Utah Code Ann. § 78B-15-707 (2008); Va. Code Ann. § 20-158 (2008); Wash. Rev. Code Ann. § 26.26.730 (West 2005); Wyo. Stat. Ann. § 14-2-907 (2009) (all either excluding posthumously conceived children from intestate succession, or limiting the inheritance rights of such children to situations in which the deceased parent consented in a record to posthumous conception); see Uniform Parentage Act § 707, 9B U.L.A. 73 (Supp. 2011) (as amended in 2002) (a deceased individual is not a "parent" of a posthumously conceived child unless the individual "consented in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of a child"). If Congress wishes to adopt a broad rule like that announced by the Third and Ninth Circuits as a matter of federal law, it has the authority to do so. But in light of the many complexities

arising from rapid technological change in this area, Congress has chosen, so far, to leave the matter to the States. There is no basis for judicial creation of a federal rule that amends the statutory framework of the Social Security Act.

4. Even if the Act were susceptible to the interpretation adopted by the court of appeals, the court erred in disregarding the SSA's contrary interpretation of the statute, which is reasonable and entitled to deference.

The agency's longstanding position has been that the definition of "child" in Section 416(h) governs the meaning of "child" in Section 416(e)(1) and thus Section 402(d)(1). See 20 C.F.R. 404.355(a). Indeed, the agency's regulations articulating that interpretation date back to 1940, the year after Congress first added child survivor benefits to the Act. See 20 C.F.R. 403.832(a) (Supp. 1940) ("A son or daughter (by blood) of a wage earner, who is the child of such wage earner or has the same status as a child, *under applicable State law*, is the 'child' of such wage earner.") (citation omitted, emphasis added); accord 20 C.F.R. 404.1101 (Supp. 1952) (24 Fed. Reg. 13,077 (1951)); 20 C.F.R. 404.1109 (Supp. 1960). Significantly, that interpretation was well settled in 1965 when Congress amended Section 416(h), but Congress did nothing to disturb it. See *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."). The agency's consistent interpretation of the statute, as set out in its published regulations, is entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). See *Barnhart* v. *Walton*, 535 U.S. 212, 217-222, 225 (2002)

(deferring to the Commissioner's "considerable authority" to interpret the Social Security Act).

In addition, the agency has addressed the specific question presented here in its Program Operations Manual System (POMS), stating that "[a] child conceived by artificial means after the [insured's] death cannot be entitled [to benefits] under the Federal law provisions of the Act (section 216(h)(3))," and that "[s]uch a child can only be entitled if he or she has inheritance rights under applicable State intestacy law." SSA, POMS GN 00306.001(C)(1)(c), https://policy.ssa.gov/poms.nsf/lnx/0200306001. To the extent that the POMS provision reflects an interpretation of the statute, it is entitled at least to deference under *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 139-140 (1944). See *Washington State Dep't of Soc. & Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 385-386 (2003). To the extent it reflects an interpretation of the SSA's own regulations, it is entitled to even greater deference under *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997). The court of appeals identified no basis for setting aside the agency's considered view.

B. The Decision Below Contributes To A Circuit Conflict On An Important Question Warranting This Court's Review

The decision below is in accord with the Ninth Circuit's decision in *Gillett-Netting*, but it is in direct conflict with the Fourth Circuit's decision in *Schafer*. See *Schafer*, 641 F.3d at 55 (describing the interpretation of Section 416 adopted by the Third and Ninth Circuits as "craft[ed] from whole cloth," and concluding that it "cannot be right"). On August 1, 2011, the Fourth Circuit denied a petition for rehearing en banc in *Schafer*,

making it unlikely that the circuit conflict could be resolved without intervention from this Court.[*]

In addition, the reasoning of the court below is incompatible with that of the Fifth Circuit in *Conlon*. The claimant in that case argued that her daughter was the deceased wage earner's "child" under Section 416(e)(1) and therefore did not need to satisfy any of the criteria in Sections 416(h)(2) and (3) in order to obtain benefits. The court rejected that argument, explaining that "Section 416(e)(1) is * * * modified by sections 416(h)(2) and (3) which provide the final words on who is to be considered a child for purposes of section 416(e)(1)." *Conlon*, 719 F.2d at 800. The Fifth Circuit concluded that because the claimant's daughter "does not fit within the definition of a 'child' under either section 416(h)(2)(A) or section 416(h)(3)(C)(i)(II), she would not be considered a child under section 416(e)." *Ibid.* The Fifth Circuit thus has squarely rejected the reading of Section 416(e) adopted by the Third Circuit in this case. Accordingly, there is little doubt that, were it confronted with that question of statutory interpretation in the precise context of a posthumously conceived child, the Fifth Circuit would disagree with the decision below.

The decision below is also in tension with decisions of the District of Columbia and Sixth Circuits, in which those courts have addressed the role of Section 416(h) in the statutory scheme. In *Javier*, the District of Columbia Circuit held that an applicant who had been proved not to be the biological child of a wage earner was nevertheless entitled to benefits because, under the circumstances of the case, the law of the wage earner's domicile

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[*] The same issue is currently pending in the Eighth Circuit in *Beeler* v. *Astrue*, No. 10-1092 (argued Dec. 17, 2010).

did not permit a challenge to the child's parentage. 407 F.3d at 1246-1248. In reaching that conclusion, the court correctly recognized that, "[t]o determine whether an applicant meets the Act's definition of 'child'" as set out in Section 416(e), "the SSA must: 'apply such law as would be applied in determining the devolution of intestate personal property,'" as required by Section 416(h). *Id.* at 1247 (quoting 42 U.S.C. 416(h)(2)(A)). In *DeSonier*, there was no dispute that the applicant was the biological child of a deceased wage earner, but the Sixth Circuit correctly recognized "that a claimant's relationship to a deceased wage earner is determined by applying the laws of the state in which the worker was domiciled at the time of his death," 906 F.2d at 229, and it therefore conducted an extensive analysis of state law in order to determine the applicant's eligibility, *id.* at 234-235. The approach taken by the court in this case cannot be reconciled with those decisions.

The question of statutory interpretation at issue in this case is of recurring significance in the administration of the Social Security system. SSA has acquiesced in *Gillett-Netting* only for cases arising in the Ninth Circuit, so it now applies a different rule there than in the rest of the country. See 70 Fed. Reg. 55,656 (2005). This Office has been informed by SSA that it has received more than 100 applications for survivor benefits by posthumously conceived children, and that the rate of such applications has increased significantly in recent years. Indeed, several cases are currently pending in district courts around the country. See, *e.g.*, *Bosco* v. *Commissioner of Social Security*, No. 10-07544 (S.D.N.Y.); *Amen* v. *Astrue*, No. 4:10-cv-3216 (D. Neb.); *Burns* v. *Astrue*, No. 2:09-cv-926 (D. Utah); see also *Beeler* v. *Astrue*, No. 1:09-cv-0019 (N.D. Iowa Nov. 12,

2009), appeal pending, No. 10-1092 (8th Cir. argued Dec. 17, 2010). More broadly, the decision below disregards a 70-year-old regulatory framework that applies to all applications for child survivor benefits.

Because the decision below conflicts with decisions of other courts of appeals, is incorrect, and presents an important and recurring question, this Court's review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 2011

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 10–2027

KAREN K. CAPATO, O/B/O B.N.C., K.N.C., APPELLANT

v.

COMMISSIONER OF SOCIAL SECURITY

Argued: Nov. 15, 2010
Opinion Filed: Jan. 4, 2011

OPINION OF THE COURT

Before: BARRY, CHAGARES and VANASKIE, Circuit Judges.

BARRY, Circuit Judge.

This case—a case that involves the rights of the posthumously conceived children of a deceased wage earner and his widow—requires us to consider the intersection of new reproductive technologies and what is required to qualify for child survivor benefits under the Social Security Act (the "Act"). It goes without saying that these technologies were not within the imagination, much less the contemplation, of Congress when the relevant sections of the Act came to be, and that they present a host of difficult legal and even moral questions.

We need not reach those difficult questions given the discrete factual circumstances of this case. We, nonetheless, cannot help but observe that this is, indeed, a new world.

I. *Background*

A. *Factual History*

Robert Capato was born in the State of Washington in 1957 and, aside from a ten-year period when he resided in California, lived in Washington until the 1990s. Mr. Capato met his future wife, Karen, in Washington and subsequently moved with her to Colorado, where they lived for two years. In early 1999, the couple moved to Florida for Mr. Capato's business, and lived in Florida for approximately three years. At some point while in Florida, they decided to move to New Jersey and took some steps in that regard, but did not leave Florida prior to Mr. Capato's death.

In August 1999, shortly after the Capatos' wedding in New Jersey, Mr. Capato was diagnosed with esophageal cancer, and was told that the chemotherapy he required might render him sterile. The Capatos, however, wanted children, and thus, before he began his course of chemotherapy, Mr. Capato deposited his semen in a sperm bank, where it was frozen and stored. Somewhat surprisingly, given the treatment that Mr. Capato was by then undergoing, Ms. Capato conceived naturally and gave birth to a son in August 2001. The Capatos, however, wanted their son to have a sibling.

Mr. Capato's health deteriorated in 2001, and he died in Florida in March of 2002. His death certificate listed his residence as Pompano Beach, Florida. Three months

before his death, he executed a will in Florida naming as his beneficiaries the son born of his marriage to Ms. Capato and two children from a prior marriage. Although Ms. Capato claims that she and her husband spoke to their attorney about including "unborn children" in the will, "so that it would be understood that . . . they'd have the rights and be supported in the same way that [their natural born son] was already privileged to," App. at 288, the will did not contain any such provision.

Shortly after Mr. Capato's death, Ms. Capato began in vitro fertilization using the frozen sperm of her husband. She conceived in January 2003 and gave birth to twins on September 23, 2003, eighteen months after Mr. Capato's death.

B. *Procedural History*

In October 2003, Ms. Capato applied for surviving child's insurance benefits on behalf of the twins based on her husband's earnings record. The Social Security Administration denied her claim, and Ms. Capato timely requested a hearing before an administrative law judge ("ALJ"). A hearing was held on May 30, 2007, with testimony taken from Ms. Capato and two friends. On November 28, 2007, the ALJ rendered his decision denying Ms. Capato's claim. Observing that "[t]his is a case where medical-scientific technology has advanced faster than the regulatory process," *id.* at 6, and that this is a "very sympathetic case" in which "allowing benefits would appear to be consistent with the purposes of the Social Security Act," the ALJ nonetheless believed himself "constrained by applicable laws and regulations to find disentitlement." *Id.* at 7. Finding that the twins,

conceived after the death of their father, "are not for Social Security purposes the 'child(ren)' of the deceased wage earner, Robert Capato, under Florida state law as required by section 216(h)(2)(A) of the Social Security Act," the ALJ concluded that they were not entitled to child's insurance benefits in accordance with sections 202(d)(1) and 216(e) of the Act and the relevant regulations. *Id.* at 8. The District Court affirmed, echoing the ALJ's interpretation of the Act and his conclusion that Mr. Capato was domiciled in Florida on the date of his death and, thus, that Florida's law of intestacy should be applied. This timely appeal, over which we have jurisdiction pursuant to 28 U.S.C. § 1291, followed. We will affirm in part and vacate in part, and remand for further proceedings.[1]

II. *Discussion*

A. *Standard of Review*

We review *de novo* the District Court's decision to uphold the denial of benefits. *Boone v. Barnhart,* 353 F.3d 203, 205 (3d Cir. 2003). We review the ALJ's deci-

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[1] We will affirm the dismissal of Ms. Capato's Equal Protection claim. As the Ninth Circuit found in a similar challenge, "the [Social Security Administration] is not excluding all posthumously-conceived children, only those that do not meet the statutory requirements under State law." *Vernoff v. Astrue,* 568 F.3d 1102, 1112 (9th Cir. 2009). Such a classification does not violate Equal Protection laws because it is reasonably related to the government's interest in assuring that survivor benefits reach children who depended on the support of a wage-earner and lost that support due to the wage-earner's death. *See id.* ("[T]he challenged classifications are reasonably related to the government's twin interest in limiting benefits to those children who have lost a parent's support, and in using reasonable presumptions to minimize the administrative burden of proving dependency on a case-by-case basis.").

sion to assure that it was supported "by substantial evidence in the record." *Adorno v. Shalala,* 40 F.3d 43, 46 (3d Cir. 1994) (internal quotation marks and citation omitted). "Sustantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate." *Ventura v. Shalala*, 55 F.3d 900, 901 (3d Cir. 1995) (internal quotation marks and citation omitted). "Where the ALJ's finding of fact are supported by substantial evidence, we are bound by those findings, even if we would have decided the factual inquiry differently." *Fargnoli v. Massanari*, 247 F.3d 34, 38 (3d Cir. 2001).

B. *Entitlement to Child's Insurance Benefits*

Title II of the Social Security Act, codified at 42 U.S.C. § 401 *et seq.,* allows certain categories of children to receive a survivor's benefit following the death of a "fully or currently insured individual." 42 U.S.C. § 402(d)(1). The purpose of "federal child insurance benefits" is not to provide general welfare benefits, but to "replace the support that the child would have received from his father had the father not died." *Jones ex rel. Jones v. Chater,* 101 F.3d 509, 514 (7th Cir. 1996) (citing *Mathews v. Lucas,* 427 U.S. 495, 507–08, 96 S. Ct. 2755, 49 L. Ed. 2d 651 (1976)); *see also Adams v. Weinberger,* 521 F.2d 656, 659 (2d Cir. 1975) (the purpose of the Act is to provide support to children who have lost "actual" or "anticipated" support). In general, "the [Act] is to be accorded a liberal application in consonance with its remedial and humanitarian aims." *Eisenhauer v. Mathews*, 535 F.2d 681 (2d Cir. 1976).

To qualify for child's insurance benefits, the applicant must be the "child," as defined in § 416(e) of the

Act, of an individual entitled to benefits or who is fully or currently insured. 42 U.S.C. § 402(d)(1). Section 416(e) defines "child" broadly as, in relevant part, "the child or legally adopted child of an individual." *Id.* § 416(e)(1). Additionally, and as relevant here, the "child" (a) must have filed an application for benefits, (b) must be unmarried and less than eighteen years old (or an elementary or secondary school student under nineteen), and (c) must have been dependent upon the deceased individual at the time of his or her death. *Id.* § 402(d)(1)(A)–(C). "Every child (as defined in section 416(e) of this title)" will qualify, assuming, of course, that the other requisites have been met. *Id.* § 402(d)(1).

Section 416(h), entitled "Determination of family status," offers other ways by which to determine whether an applicant is a "child":

> 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.

Id. § 416(h)(2)(A).

Moreover, if an applicant is unable to inherit from the deceased wage earner under state intestacy law, the Act provides three alternative mechanisms by which to deem the applicant a "child" for purposes of survivor benefits. These alternatives are, on their face, inapplica-

ble here and are set forth only for completeness. First, the applicant is deemed to be the "child" of the insured individual if the applicant is the son or daughter and the covered parent went through a marriage ceremony that would have been valid but for a legal impediment. *Id.* § 416(h)(2)(B). Second, the applicant is deemed to be the "child" where the in either (a) acknowledged in writing that the applicant was his or her child; (b) was decreed by a court to be the mother or father of the applicant; or (c) was ordered by a court to pay child support. *Id.* § 416(h)(3)(C)(i). Third, the applicant is deemed to be the "child" where the deceased individual is shown to be the mother or father, and the deceased individual was living with or contributing to the child's support at the time of death. *Id.* § 416(h)(3)(C)(ii).

Thus, "child" is defined in different subsections of the Act—§ 416(e) and again in §§ 416(h)(2)(A), 416(h)(2)(B), and 416(h)(3). Were we to determine that the § 416(h)(2)(A) definition of "child" is appropriate here and go on to apply the law of intestacy of Florida, as the Commissioner argues we should, we would affirm. But neither the Commissioner nor the District Court, who agreed with the Commissioner, has told us why, in the factual circumstances of this case, where there is no family status to determine, we would even *refer* to § 416(h). Under § 402(d), the child is a "child" as defined in § 416(e). To accept the argument of the Commissioner, one would have to ignore the plain language of § 416(e) and find that the biological child of a married couple is not a "child" within the meaning of § 402(d) unless that child can inherit under the intestacy laws of the domicile of the decedent. There is no reason appar-

ent to us why that should be so, and we join the Ninth Circuit in so concluding.

In *Gillett–Netting v. Barnhart*, 371 F.3d 593 (9th Cir. 2004), a case factually identical to the case before us,[2] the Ninth Circuit explained that §§ 416(h)(2) and (3) "were added to the Act to provide various ways in which children could be entitled to benefits even if their parents were not married or their parentage was in dispute," and have "no relevance" for determining whether a claimant is the "child" of a deceased wage earner where parentage is not in dispute. 371 F.3d at 596. The Commissioner conceded that Mr. Netting's children were his biological children, *id.*, at 597, as here the Commissioner concedes that Mr. Capato's children are his. The Ninth Circuit found that the district court erred when it concluded that Mr. Netting's children were not "children" for purposes of the Act.[3]

In response to *Gillett–Netting*, the Commissioner issued an "Acquiescence Ruling," effective September 22, 2005.[4] *See* Social Security Acquiescence Ruling

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[2] The husband was diagnosed with cancer, was advised that chemotherapy might render him sterile, and his semen was frozen and stored in hopes that, even after he died, his wife would have his children. His wife conceived by means of in vitro fertilization and gave birth to twins eighteen months after his death.

[3] Because, in the case before us, the District Court did not reach the issue of dependency given its conclusion that the definition of "child" was not satisfied, we, therefore, need not address the Ninth Circuit's conclusion that Mr. Netting's children were "conclusively deemed dependent on [him] under the Act" and why that was thought to be so. 371 F.3d at 599.

[4] "An acquiescence ruling explains how we will apply a holding in a decision of a United States Court of Appeals that we determine conflicts with our interpretation of a provision of the Social Security Act (Act) or

05–1(9), 70 Fed. Reg. 55,656 (Sept. 22, 2005). The Acquiescence Ruling limited the application of *Gillett–Netting* to claims within the Ninth Circuit. *Id.* at 55,657. It also contained a "Statement as to How *Gillett–Netting* Differs From SSA's Interpretation of the Social Security Act." *Id.* In that Statement, the Commissioner hewed to the arguments she had made to the Ninth Circuit: in all cases, § 416(h) "provides the analytical framework that we must follow for determining whether a child is the insured's child for the purposes of section [416(e)]," and § 416(h)(2)(A) directs the application of state intestacy law or the alternative mechanisms in §§ 416(h)(2)(B) and 416(h)(3)(C) to determine whether a child is a "child." *Id.* An "after-conceived" child, she continued, cannot satisfy the alternative mechanisms in §§ 416(h)(2)(B) and 416(h)(3)(C), and "[c]onsequently, to meet the definition of 'child' under the Act, an after-conceived child must be able to inherit under State law." *Id.* There was no explanation as to why the statute even suggests, much less compels, that result.

The Commissioner has attempted to explain to us why the Ninth Circuit's analysis of the Act's legislative history was "indisputably mistaken." The explanation goes as follows: "When child survivor benefits were established in 1939, section 416(h)(2)(A) was the only way any child could be eligible for benefits." Appellee's Br. at 34. Because no effective means existed at that time to scientifically prove a child-parent relationship, Congress determined that the primary way to prove child status

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regulations when the Government has decided not to seek further review of that decision or is unsuccessful on further review." *See* Social Security Acquiescence Ruling 05–1(9), 70 Fed. Reg. 55,656 (Sept. 22, 2005).

should be eligibility to inherit under state law. *Id.* Given that state laws would have provided for inheritance by the child of a marriage, that child would have no problem qualifying as the wage-earner's "child" for survivor benefits under the Act. The Commissioner argues that even though Congress added § 416(h)(3) in 1965 to provide additional ways by which a child could prove "child" status, "that addition did nothing to change the exising requirement that all children, even including children of married parents whose parentage was not in dispute, satisfy at least one of the provisions of section 416(h)." *Id.* at 35.

The explanation ignores the fundamental question: why should we, much less why *must* we, refer to § 416(h) when § 416(e) is so clear, and where we have before us the undisputed biological children of a deceased wage earner and his widow. The plain language of § 402(d) and 416(e) provides a threshold basis for defining benefit eligibility. The provisions of § 416(h) then provide for "[d]etermination of family status"—subsection (h)'s heading—to determine eligibility where a claimant's status as a deceased wage-earner's child is in doubt. Were it the case that such status had to be determined here, we would turn to the relevant provisions of § 416(h). But a basic tenet of statutory construction is that "[i]n the absence of an indication to the contrary, words in a statute are assumed to bear their 'ordinary, contemporary, common meaning.'" *Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202, 207, 117 S. Ct. 660, 136 L. Ed. 2d 644 (1997) (quoting *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship,* 507 U.S. 380, 388, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993)). The term "child" in § 416(e) requires no further definition when all par-

ties agree that the applicants here are the biological offspring of the Capatos. Stated somewhat differently, we do not read §§ 402(d) or 416(e) as requiring reference to 416(h) to establish child status under the facts of this case. Our analysis does not render § 416(h) superfluous but, rather, places it in context with § 416(e) and the clear command of § 402(d)(1) to refer to § 416(e) to define the word "child."[5]

We acknowledge that another factual scenario might render the Commissioner's concerns more persuasive. Those concerns must, however, await another case, though we note them ourselves with some concern:

> [A]lthough biological paternity can now be scientifically proven to a near certain degree of probability, modern artificial reproduction technologies currently allow for variations in the creation of child-parent relationships which are not solely dependent upon biology. The use of donor eggs, artificial insemination, and surrogate wombs could result in at least five potential parents. Accordingly, even in modern times, the basic assumption underlying the *Gillett–Netting* panel's reasoning—*i.e.,* that biological paternity always results in an 'undisputed' child-parent relationship—is unfounded.

Appellee's Br. at 36 (internal citation omitted).

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[5] Because we can resolve this issue based on our analysis of Congress' "unambiguously expressed intent" in the statutory language, we need not determine whether the Commissioner's interpretation is a permissible construction of the statute. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 842–43, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).

To be sure, as the Ninth Circuit put it, "[d]eveloping reproductive technology has outpaced federal and state laws, which currently do not address directly the legal issues created by posthumous conception." *Gillett–Netting*, 371 F.3d at 595. As we have noted, the more difficult of those legal issues are not before us. What *is* before us is a discrete set of circumstances and the narrow question posed by those circumstances: are the undisputed biological children of a deceased wage earner and his widow "children" within the meaning of the Act? The answer is a resounding "Yes." Accordingly, we will vacate the order of the District Court in part and remand for a determination of whether, as of the date of Mr. Capato's death, his children were dependent or deemed dependent on him, the final requisite of the Act remaining to be satisfied.[6]

[6] Given this disposition, it is not necessary for us to determine where Mr. Capato was domiciled at his death or to delve into the law of intestacy of that state. We note, however, that were we to decide the issue of domicile, we would likely conclude that it was Florida.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 10-2027

KAREN K. CAPATO, O/B/O B.N.C., K.N.C., APPELLANT

v.

COMMISSIONER OF SOCIAL SECURITY

Mar. 9, 2011

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
(D.C. Civil No. 08-cv-05405)

SUR PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

District Judge: HONORABLE DENNIS M. CAVANAUGH.

Present: MCKEE, *Chief Judge*, SLOVITER, SCIRICA, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., and VANASKIE, *Circuit Judges.*

The petition for rehearing en banc filed by Appellee having been submitted to the judges who participated in the decision of this Court, and to all the other available

circuit judges in active service, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing *en banc* is DENIED.

BY THE COURT:

/*s*/ MARYANNE TRUMP BARRY
MARYANNE TRUMP BARRY
Circuit Judge

Dated: Mar. 9, 2011

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No.: 08-5405 (DMC)

KAREN K. CAPATO O/B/O B.N.C. K.N.C., PLAINTIFF

v.

MICHAEL J. ASTRUE, COMMISSIONER OF SOCIAL SECURITY, DEFENDANT

Filed: Mar. 23, 2010

OPINION

Hon. DENNIS M. CAVANAUGH:

This matter comes before the Court upon Karen Capato's ("Plaintiff') appeal from the Commissioner of Social Security's ("Commissioner") final decision denying Plaintiff's request for child's insurance benefits on the account of deceased wage earner Robert Nicholas Capato (the "decedent") under the Social Security Act (the "Act"). No oral argument was heard pursuant to Rule 78 of the Federal Rules of Civil Procedure. For the reasons set forth below, the final decision of the Commissioner is affirmed.

I. BACKGROUND[7]

A. Procedural Background

On October 31, 2003, Plaintiff applied for child's insurance benefits on behalf of the minor children on the account of deceased number holder Robert Nicholas Capato. (Transcript "Tr." 31-33). Plaintiff's application was denied. Plaintiff filed a request for reconsideration, and, again, these claims were denied. (Tr. 194-95, 206-12). On May 11, 2006, Plaintiff requested a hearing by an Administrative Law Judge ("ALJ"). (Tr. 213). On May 30, 2007, Plaintiff appeared with counsel before ALJ Joel Friedman. (Tr. 257-315). ALJ Friedman considered the evidence and testimony de novo and, on November 28, 2007, issued a decision denying the claims. (Tr. 11-21). On September 10, 2008, the Appeals Council denied Plaintiff's request for review. (Tr. 6-8). This action followed.

B. Factual Background

1. Testimonial Evidence

Decedent wage earner was born in Kent, Washington on May 1, 1957. (Tr. 235). Plaintiff testified that she and the decedent met in the mid-1990s in Seattle, Washington. (Tr. 281-82). They lived together in Florida, first in Tampa and later in Pompano Beach, and were married in New Jersey. (Tr. 282). The decedent started a chain of health clubs in Florida. (Tr. 286). Plaintiff further testified that their final destination was going to be New Jersey. (Tr. 287). In August 1999, the decedent was diagnosed with esophageal cancer. *Id.* Plaintiff

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[7] The facts set-forth in this Opinion are taken from the Parties' statements in their respective briefs.

testified that, immediately after the decedent's diagnosis, they decided to freeze his sperm because the chemotherapy used to treat the decedent's cancer could lead to infertility. (Tr. 283-84). Plaintiff testified that, in August 2001, she and the decedent had their first child together; this child, D.C., was conceived through natural means. (Tr. 284). Plaintiff further testified that, shortly before the birth of D.C., she and the decedent decided to move to New Jersey to try to open businesses there. (Tr. 285). It was at this time that Plaintiff and the decedent had conversations about where they would live in New Jersey (Tr. 285-86). Plaintiff testified that the decedent executed his last will and testament and that the decedent talked with an attorney about including unborn children in the will. (Tr. 288). Plaintiff testified that the decedent attempted to incorporate a business in New Jersey to start opening health clubs there so that, ultimately, the family could move there. (Tr. 291).

Testifying on Plaintiffs behalf was Michelle Ann Cappola ("Ms. Cappola"). (Tr. 267-72). Ms. Cappola testified that she had known Plaintiff for 30 years, first becoming friends in high school. (Tr. 267). She testified that she had met the decedent, who had indicated to her in an undated conversation that he wanted a sibling for his child D.C. (Tr. 268). Ms. Cappola also testified that she was employed part-time as a realtor and had conversed with the decedent about business locations in the State of New Jersey. (Tr. 269). She stated that, as far as she knew, the decedent also wanted to move his residence to New Jersey. *Id*. Also testifying on Plaintiffs behalf was Jan Cooper ("Ms. Cooper"). (Tr. 272-78). Ms. Cooper testified that she had known Plaintiff for 15 years through work. (Tr. 273). Ms. Cooper testified that, when Plaintiff and the decedent were living in

Florida, they had talked with her after the birth of their child D.C. about moving to New Jersey. (Tr. 275). She testified that, at Thanksgiving in 2001, the decedent told her that he had been preserving sperm so that D.C. would not be an only child (Tr. 276).

2. Documentary Evidence

Plaintiff and the decedent were married in Weehawken, New Jersey, on May 15, 1999. (Tr. 236). The decedent was diagnosed in 1999 with esophageal carcinoma. (see Tr. 245). In April 2000, Plaintiff and the decedent began a program of preserving sperm for in vitro fertilization at the Northwest Center for Infertility and Reproductive Endocrinology in Florida. (Tr. 76-95). On December 7, 2000, Dr. Howard Adler ("Dr. Adler") of the Center for Hematology-Oncology evaluated the decedent's cancer (Tr. 245-47). Dr. Adler noted that Plaintiff was diagnosed with esophageal carcinoma and was receiving radiation treatment and chemotherapy (Tr. 245). Dr. Adler continued the decedent on these treatments, with medicine to help his appetite (Tr. 246-47). On April 11, 2001, Dr. Adler opined that the decedent was doing quite well and indicated that the decedent was receiving aggressive treatment (Tr. 244). However, by November 2001, Dr. Adler noted that, after a period of doing quite well, the decedent had a recurrence of the disease and his prognosis was poor (Tr. 242).

On December 12, 2001, the decedent executed his last will and testament under Florida law. (Tr. 161-89). This will disposes of the decedent's tangible personal property to Plaintiff, if she survives him, and then to any of his children who survive him (Tr. 161). The residuary

estate was distributed to two children from a previous marriage and to Plaintiff, with a provision for the decedent's child D.C., if Plaintiff did not survive him (Tr. 162). If neither Plaintiff nor D.C. survived him, then decedent's residuary estate was to be distributed in accordance with the intestacy laws of Florida, with the decedent's heirs to be determined at the time of his death. *Id.* The will provides for administration of a marital trust, a family trust, and a trust for D.C. (Tr. 163-65).

On March 23, 2002, the decedent died of metastatic esophageal cancer. (Tr. 235). At the time of his death, the decedent resided in Pompano Beach, Florida. *Id.* Shortly thereafter, Plaintiff underwent artificial insemination treatments in Florida. (Tr. 96-102). Plaintiff later received artificial insemination treatments at Reproductive Medicine Associates of New Jersey ("RMA") starting in November 2002. (Tr. 103-34). On September 23, 2003, Plaintiff gave birth to twins, the minor children. (Tr. 237-38). Dr. Richard Scott ("Dr. Scott") of RMA wrote a letter dated December 1, 2003, indicating that the minor children were conceived in January 2003 from the decedent's sperm. (Tr. 136).

II. STANDARD OF REVIEW

The Court's review is limited to determining whether the Commissioner's decision is based upon the correct legal standards and is supported by substantial evidence in the record as a whole. *See* 42 U.S.C. § 405 (g); *see also Richardson v. Perales*, 402 U.S. 389, 390 (1971). A reviewing court must uphold the Commissioner's factual decisions if they are supported by "substantial evidence." 42 U.S.C. §§ 405(g), 1383(c)(3); *Williams v. Sullivan*, 970 F.2d 1178, 1182 (3d Cir. 1992), *cert. denied*

sub nom., *Williams v. Shalala*, 507 U.S. 924 (1993). Substantial evidence is defined as that quantum of evidence which a "reasonable mind might accept as adequate to support a conclusion." *Perales*, 204 U.S. at 401 (quoting *Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229 (1938)). If there is substantial evidence in the record to support the Commissioner's factual findings, they are conclusive and must be upheld. 42 U.S.C. § 405(g). "Substantial evidence" means more than "a mere scintilla." *Richardson v. Perales*, 402 U.S. 389,401 (1971) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

> Some types of evidence will not be "substantial." For example, [a] single piece of evidence will not satisfy the substantiality test if the [Commissioner] ignores, or fails to resolve, a conflict created by countervailing evidence. Nor is evidence substantial if it is overwhelmed by other evidence—particularly certain types of evidence (e.g. that offered by treating physicians)—or if it really constitutes not evidence but mere conclusion.

Wallace v. Sec'y of Health & Human Servs., 722 F.2d 1150, 1153 (3d Cir. 1983) (quoting *Kent v. Schweiker*, 710 F.2d 110, 114 (3d Cir. 1983)). The ALJ must make specific findings offact to support the ALJ's ultimate conclusions. *Stewart v. Sec'y of HEW*, 714 F.2d 287, 290 (3d Cir. 1983). "Where the ALJ's findings of fact are supported by substantial evidence, the [reviewing court] is bound by these findings, even if [it] would have decided the factual inquiry differently." *Fargnoli v. Massanari*, 247 F.3d 34, 35 (3d Cir. 2001). Thus, substantial evidence maybe slightly less than a preponderance.

Stunkard v. Sec'y of Health & Human Servs., 841 F.2d 57, 59 (3d Cir. 1988).

"The reviewing court, however, does have a duty to review the evidence in its totality." *Schonewolf v. Callahan*, 972 F. Supp. 277, 284 (D. N.J. 1997) (citing *Daring v. Heckler*, 727 F.2d 64, 70 (3d Cir. 1984)). In order to review the evidence, "a court must 'take into account whatever in the record fairly detracts from its weight.'" *Id.* (quoting *Willibanks v. Sec'y of Health & Human Servs.*, 847 F.2d 301, 303 (6th Cir. 1988)). The Commissioner has a corresponding duty to facilitate the court's review: "[w]here the [Commissioner] is faced with conflicting evidence, he must adequately explain in the record his reasons for rejecting or discrediting competent evidence." *Ogden v. Bowen*, 677 F. Supp. 273, 278 (M.D. Pa. 1987) (citing *Brewster v. Heckler*, 786 F.2d 581 (3d Cir. 1986). As the Third Circuit has held, access to the Commissioner's reasoning is indeed essential to a meaningful court review:

> Unless the [Commissioner] has analyzed all evidence and has sufficiently explained the weight he has given to obviously probative exhibits, to say that his decision is supported by substantial evidence approaches an abdication of the court's duty to scrutinize the record as a whole to determine whether the conclusions reached are rational.

Gober v. Matthews, 574 F.2d 772, 776 (3d Cir. 1978) (quoting *Arnold v. Sec'y of HEW*, 567 F.2d 258, 259 (4th Cir. 1977).

"[The reviewing court] need[s] from the ALJ not only an expression of the evidence []he considered which supports the result, but also some indication of the evidence

which was rejected." *Cotter v. Harris*, 642 F.2d 700, 705 (3d Cir. 1981). Without such an indication by the ALJ, the reviewing court cannot conduct an accurate review of the matter; the court cannot determine whether the evidence was discredited or simply ignored. *See Burnett v. Comm'r of Soc. Sec.*, 220 F.3d 112, 121 (3d Cir. 2000) (citing *Cotter*, 642 F. 2d at 705); *Walton v. Halter*, 243 F.3d 703, 710 (3d Cir. 2001). "The district court . . . is [not] empowered to weigh the evidence or substitute its conclusions for those of the fact-finder." *Williams*, 970 F.2d at 1182 (citing *Early v. Heckler*, 743 F.2d 1002, 1007 (3d Cir. 1984)).

III. DISCUSSION

Before this Court is Plaintiff's appeal of the ALJ's decision finding that Plaintiff's minor children do not qualify as children of the decedent under the Social Security Act and thus are not entitled to child's insurance benefits. Plaintiff argues that the Commissioner's decision was not supported by substantial evidence; that the ALJ was biased and failed to heed the documentation presented and the testimony of the witnesses; that Plaintiff and decedent's minor children, the Capato twins' rights to equal protection under the Fifth Amendment have been violated; that the denial of benefits for the twins violates the Act's statutory scheme; and that the Commissioner's decision to issue an acquiescence ruling limiting application of *Gillet-Netting v. Barnhart*, 371 F.3d 593 (9th Cir. 2004) to the Ninth Circuit arbitrarily denies benefits to children outside of the Ninth Circuit. Finding that the ALJ properly evaluated the applicable law, and because the ALJ's and Commission-

er's decisions were supported by substantial evidence, this Court affirms the decision of the ALJ.

A. The Commissioner's Decision was Supported by Substantial Evidence

Substantial evidence supports a finding that the twins do not qualify as children of the decedent under the Act. There are two ways for minor children to qualify for dependent's benefits under the Act. The minor children of the decedent may establish their rights to inherit as the decedent's children under state intestacy laws pursuant to 42 U.S.C. Section 416(h)(2)(A) or through the alternative mechanisms under 42 U.S.C. Section 416(h)(2)(B), Section 416(h)(2)(C)(i) or Section 416(h)(2)(C)(ii).

1. The Twins Are Not "Children" Under the Social Security Act's Criteria

The Act includes both a definition of "child" and instructions on how the Commissioner should determine whether an applicant is a "child." Under 42 U.S.C. Section 416(e), "child" can mean "(1) the child or legally adopted child of an individual, (2) a stepchild . . . and (3) a person who is the grandchild or stepgrandchild. . . . " However, Congress's instructions for the primary method utilized by the Commissioner in determining parent-child relationships is provided under Section 416(h)(2)(a) of the Act, captioned "Determination of Family Status," which states:

> In determining whether an applicant is the child . . . of a fully or currently insured individual for purposes of this title, the Commissioner of Social Security shall apply such law as would be applied in de-

> termining the devolution of intestate personal property . . . by the Courts of the State in which [such insured individual] was domiciled at the time of his death . . . 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.

If an applicant does not qualify as a "child" under this provision, Congress provided three alternative mechanisms for establishing child status; however, each requires that the insured be living at the time of the child's conception. *See* 42 U.S.C. § 416(h)(2)(B) (applicant is deemed to be the "child" of the insured if the insured and other parent went through a marriage ceremony that would have been valid but for certain legal impediments); 42 U.S.C. § 416(h)(3)(C)(i) (applicant is deemed to be the "child" of the insured if the insured had acknowledged paternity in writing, or if a court decreed the insured to be the parent or ordered the insured to pay child support, and such acknowledgment, court decree, or court order was made *"before the death of the insured"* (emphasis added); and 42 U.S.C. § 416(h)(3)(C)(ii) (applicant is deemed the "child" if there is satisfactory evidence that the insured was the applicant's parent and the insured was living with or supporting the applicant at the time of death).

Substantial evidence supports the ALJ's finding that the insured was domiciled in the State of Florida at the time of death. The Capato twins are neither heirs under Florida's intestacy law nor beneficiaries of the decedent's will. Therefore, under Section 416(h)(2)(a), the twins are not entitled to Social Security benefits.

i. The Decedent was Domiciled in Florida

There is substantial evidence to support the ALJ's decision, in determining which state's intestacy laws to apply, that the decedent was domiciled in Florida at the time of his death. "[D]omicile is established by physical presence in a place in connection with a certain state of mind concerning one's intent to remain there." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 (1989) (citing *Texas v. Florida*, 306 U.S. 398, 424 (1939).

Under *District of Columbia v. Murphy*, 314 U.S. 441, 455 (1941) residence alone is sufficient to raise a presumption of domicile. "The place where a man lives is properly taken to be his domicile until facts adduced establish the contrary." The decedent's residence was in Florida at the time of his death. (Tr. 235). Further, the decedent executed his last will and testament in the State of Florida, with all matters involving the validity and interpretation of the will governed by the laws of Florida. (Tr. 160-189). The residuary clause of the will stated that any residuary estate not distributed to those named in the will was to be distributed to the decedent's heirs at law determined at the time as if he had died unmarried and intestate under Florida law then in effect. (Tr. 162). Plaintiff testified that she and the decedent had plans to move to New Jersey, and that they looked at real estate in New Jersey, but these plans were vague and indefinite, therefore, the ALJ's finding that the decedent was not domiciled in New Jersey was supported by substantial evidence. "It is not important if there is within contemplation a vague possibility of eventually going elsewhere, or even of returning whence one came." *Gallagher v. Philadelphia Transp. Co.*, 185 F.2d 543, 545 (3d Cir. 1950); *see also Barrett v. Greater*

Hatboro Chamber of Commerce, Inc., 2005 U.S. Dist. LEXIS 18673, *10 (E.D. Pa. Aug. 19, 2005); *Murphy v. Miller*, 2005 U.S. Dist. LEXIS 1823, *3 (E.D. Pa. Feb. 8, 2005). At the time of his death in 2002, the decedent had lived in Florida for roughly three years, a period sufficient to acquire domicile in Florida. The Third Circuit Court of Appeals has stated that "[a]n individual can change domicile instantly." *McCann v. George W. Newman Irrevocable Trust*, 458 F.3d 281, 286 (3d Cir. 2006).

Plaintiff provided additional documentary evidence to this Court, not provided to the ALJ, in an attempt to persuade this Court that Florida was not the domicile of the decedent. This new evidence consists of papers of incorporation for NICAP Industries, Inc. ("NICAP") (Ex. 1), federal tax returns from the decedent and his corporation (Ex. 2), and a photocopy of the decedent's passport (Ex. 3). However, the Social Security Act only provides for review of the Commissioner's decision and the evidence upon which the findings and decision are based, unless the new evidence is material and good cause is shown for why the evidence was not incorporated into the original record. 42 U.S.C. § 405(g); *Szubak v. Sec'y of Health & Human Servs.*, 745 F.2d 831, 833 (3d Cir. 1984) (requiring a showing of good cause for not incorporating new evidence into the administrative record). Here, this new evidence was generated between 1998 and 2003 and was in Plaintiff s possession. Plaintiff has failed to show good cause as to why it was not presented to the ALJ or Appeals Council. Regardless, this evidence is not material and does not merit reversal of the ALJ's findings. The tax returns demonstrate that the decedent's corporation was incorporated in Washington, but are not evidence of fixed,

definite plans to leave Florida. (Ex. 1). While the decedent listed a Washington address as the registered agent, Washington law requires such an address within the state for service of process. *See* Rev. Code Wash. Ann. § 23B.05.010. Tellingly, correspondence between the Internal Revenue Service and Plaintiff in her capacity as a corporate officer, dated July and August 2000, shows that NICAP's address is in Florida. (Ex. 2). NICAP's W-2 statements show that wages were paid to the decedent and Plaintiff who gave their address in Florida. (Ex. 2). The passport indicates that the decedent was born in Washington and that the passport was issued in Seattle in 1998, but does not indicate the decedent's home address. (Ex. 3). Therefore, this evidence is not sufficient to overturn the ALJ's finding that the decedent was both a resident and domiciliary of Florida.

ii. The Twins Do Not Qualify as "Children" of the Decedent Under Florida's Inheritance Laws

Under Florida's inheritance law, the possible heirs to an intestate estate include descendants, who are defined as persons "in any generational level down the applicable individual's descending line" and include, *inter alia*, children. Fla. Stat. Ann. § 731.201(9); *see* Fla. Stat. Ann. § 732.103(1). The laws of intestate succession specifically refer to "afterborn heirs," who are defined as "heirs of the decedent *conceived before his or her death,* but born thereafter." Fla. Stat. Ann. § 732.106 (emphasis added). The Supreme Court in *Leatherman v. Tarrant Co. Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 167 (1993) stated that when a statute explicitly mentions one type of individual, it implicitly excludes unmentioned others.

Florida law also provides:

> A child conceived from the eggs or sperm of a person or persons who died before the transfer of their eggs, sperms, or preembryos 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.

Fla. Stat. Ann. § 742.17(4). This is further evidence that under Florida law a child posthumously conceived does not have the legally recognized relationship to the biological parent that a child conceived in the parent's lifetime would have.

In *Stephen ex rel. Stephen v. Barnhart*, 386 F. Supp. 2d 1257, 1264-1265 (M.D. Fla. 2005) the District Court for the Middle District of Florida denied a claim for child's insurance benefits filed on behalf of the posthumously conceived child. In *Stephen*, the decedent died before the conception of the minor child. The minor child's mother applied for child's insurance benefits under the Act. *Id*. at 1259. The court held that, under Florida's intestacy laws, the minor child could not inherit from the wage earner's estate. *Id*. at 1260. Therefore, the minor child was not the "child" of the wage earner under 42 U.S.C. § 416(h)(2)(A). The decedent was domiciled in Florida, so the same law applies here.

The minor children do not meet the definition of "child" under 42 U.S.C. Sections 416(e) and 416(h), so there is no need to address dependancy, the Act's second requirement of eligibility for benefits under 42 U.S.C. 402(d).

B. The ALJ was Not Biased

In Plaintiffs brief, Plaintiff points to facts from a Memorandum submitted to the ALJ that Plaintiff alleges are erroneous. Plaintiff argues that since the ALJ founnd these "errors" to be fact, it shows a "predisposition to ignore testimony." Plaintiffs Brief ("Pl. Br.") at 5. Plaintiff also asserts that the ALJ relied on a legal memorandum that was not served on Plaintiff. These are the most cogent allegations of bias by the Plaintiff. Plaintiff also restated arguments about domicile. However, even if Plaintiffs allegation that the ALJ adopted errors as fact is taken as true, Plaintiff admitted that "These errors are not in themselves critical . . . " *Id*. As for the legal memorandum, Plaintiffs attorneys responded affirmatively when asked if they had a chance to review the exhibits (Tr. 261) and stated that there was no objection when the ALJ asked if Plaintiff had any objection to accepting the documents into evidence (Tr. 262). This Court finds substantial evidence to support the ALJ's determinations, and finds allegations of bias to be unsupported by the record.

C. The Commissioner's Denial of Benefits Did Not Violate the Equal Protection Clause

Plaintiff's argument that it would be a violation of Equal Protection to apply the Ninth Circuit's holding in *Gillett-Netting v. Barnhart*, 371 F.3d 593 (9th Cir. 2004), entitling children conceived through in-vitro fertilization following their father's death to receive Social Security benefits, only within the jurisdiction of the Ninth Circuit, is unsupported.

The Act treats all children the same, whether or not posthumously conceived, through the neutral incorpora-

tion of state intestacy laws. *See*, *e.g.*, *Vernoff v. Astrue*, 568 F.3d 1102, 1112 ("SSA is not excluding all posthumously conceived children, only those that do not meet the statutory requirements under state law."). The Supreme Court in *Vacco v. Quill*, 521 U.S. 793, 800 (1997) pronounced the principle that laws that apply to all evenhandedly "unquestionably comply" with the mandates of the Equal Protection Clause.

Congress, in mandating that the Commissioner look to state intestacy law in order to determine eligibility for Social Security benefits, recognized that states have great interest in regulating family issues. Under guidance of the Supreme Court, federal courts generally defer to state laws in this regard. In *United States v. Morrison*, 529 U.S. 598, 615 (2000) the Supreme Court identified "family law" as an area of "traditional state regulation."

D. The Commissioner was Reasonable to Limit the Acquiescence Ruling to the Ninth Circuit

The Commissioner was required to issue an acquiescence ruling under 20 C.F.R. Section 404.985 because the Ninth Circuit's holding in *Gillett-Netting* conflicts with the Commissioner's interpretation of the Act and no further judicial review was sought.

The Commissioner explained the logic of exempting only the parties in an applicable circuit from being bound by its interpretation of a rule in its response to a comment on the 1998 revisions to 20 C.F.R. Section 404.985:

> As discussed in the preamble to the 1990 acquiescence regulations, 55 FR at 1012-1013 a number of

> studies on the subject of Federal acquiescence have noted that nationwide adoption of the decision of the first circuit court to address an issue (intercircuit acquiescence) would preclude other circuit courts from considering the issue. In 1984 . . . the Solicitor General of the United States expressed similar concerns, stating that the practical effect of that legislation would be to require the Department of Justice to consider seeking Supreme Court review of the first adverse decision on an issue by any court of appeals. The Department of Justice reiterated these concerns in 1997. . . . An approach that would require nationwide adoption of the first circuit court decision on a particular issue would not improve SSA's adjudicatory and policy making processes, but would instead result in the first circuit court that happened to rule on an issue setting SSA's national rules on that subject. In effect, the circuit court that would rule first would rule last. This result could hardly be intended by any reasonable interpretation of acquiescence and would undermine the advantages, which would have been recognized by the Supreme Court, of having issues considered by more than one circuit.

63 Fed. Reg. 24927 (May 6, 1998). Instead of allowing more than one circuit to consider an issue, Plaintiffs argument would give Supreme Court precedence to the first circuit court to decide that particular issue.

IV. CONCLUSION

For the aforementioned reasons, the Court concludes that the ALJ's decision is **affirmed**. An appropriate Order accompanies this Opinion.

/s/ DENNIS M. CAVANAUGH
DENNIS M. CAVANAUGH, U.S.D.J.

Dated: March 23, 2010

APPENDIX D

SOCIAL SECURITY ADMINISTRATION
Office of Disability Adjudication and Review

DECISION

IN THE CASE OF	**CLAIM FOR**
Karen K. Capato (Natural Mother) o/b/o [REDACTED] and [REDACTED] (Infants)	Mother's Surviving Child's Insurance Benefits (Issue of Paternity)
(Claimant)	[REDACTED] [REDACTED] [REDACTED] [REDACTED] XREF: [REDACTED]
Robert N. Capato (Deceased)	(Deceased Wage Earner)
(Wage Earner)	(Social Security Number)

JURISDICTION

On October 31, 2003, the protective filing date, Karen K. Capato, the deceased wage earner's widow, filed concurrent applications under Title II of the Social Security Act, for mother's and surviving child's insurance benefits, on behalf of her natural children, [REDACTED] and [REDACTED] Capato, twins born on September 23, 2003, based upon the earnings record of Robert Capato, her husband and the deceased wage earner (exhibits 1, 2). Karen Capato is the mother and natural guardian of [REDACTED] and [REDACTED]. The application for mother's insurance benefits for herself was based upon her marriage to the deceased wage earner, on May 15,

1999, and her caring for his two newborn children. Her entitlement was contingent upon the entitlement of the children. Those claims were denied by the Administration and are now before me upon a timely written request for hearing, filed on May 18, 2006 (20 CFR 404.929 et seq.; exhibit 13). Karen K. Capato (hereinafter "the claimant"), along with several lay witnesses, appeared and testified at a hearing held on May 30, 2007, in Newark, New Jersey. The claimant is represented by Bernard and Robert Kuttner, attorneys at law (exhibits 15, 25 and 26).

ISSUES

The general issue to be determined in this case before me is whether [REDACTED] and [REDACTED] (hereinafter "the twins") are entitled to surviving child's insurance benefits, based upon the earnings record of Robert Capato, the deceased wage earner.

The specific issue to be decided by me is whether the evidence submitted is sufficient to establish that [REDACTED] and [REDACTED] are the surviving "children" of the deceased wage earner, pursuant to Sections 202 (d)(1) and 216(e); (h)(2)(3) of the Social Security act, as amended.

After careful review of the entire record, I find that [REDACTED] and [REDACTED] do not qualify as the deceased wage earner's "children" under the Social Security Act, and they do not qualify for surviving child's insurance benefits, based upon his earnings record, for the reasons hereinafter stated. Consequently, Karen Capato does not qualify for derivative mother's insurance benefits.

STATEMENT OF THE EVIDENCE

A marriage certificate, issued by the State of New Jersey, on June 11, 1999, indicates that Robert Capato and Karen M. (nee) Kuttner (Capato), then ages 42 and 36, respectively, were married on May 15, 1999, in Weehawken, New Jersey (exhibit 18).

In 1999, the wage earner was diagnosed with esophageal cancer (exhibits 3, 23, 24).

On December 12, 2001, in Fort Lauderdale, Florida, the wage earner, Robert Capato, executed his Last Will and Testament. He was then a resident of Broward County, Florida (exhibit 7).

On January 11, 2002, in Fort Lauderdale, Florida, the claimant, Karen Capato, executed her Last Will and Testament. She was then a resident of Broward County, Florida (exhibit 6).

A death certificate, issued by the State of Florida, establishes that Robert Capato, then age 44, died on March 23, 2002, in Boca Raton, Florida, as a result of metastatic esophageal cancer. His residence is listed as Pompano Beach, Florida. Thus, the wage earner died while domiciled in Florida. His wife, Karen Capato, is listed as informant of information and his surviving spouse (exhibit 17).

On September 23, 2003, approximately 18 months or 1 1/2 years after the death of the wage earner, [REDACTED] and [REDACTED], natural born twin children, were born to Karen Capato, in Morristown New Jersey. The father of the twin children, presently infants 4-years of age, is listed as "Robert Capato" (exhibits 19, 20).

On October 31, 2003, the protective filing date, Karen Capato, the surviving widow of Robert Capato, applied for surviving child's insurance benefits, on behalf of the newborn twins, based upon the earnings record of her husband, the deceased wage earner, Robert Capato (exhibit 2). The claimant, Karen Capato, also filed an application for mother's insurance benefits, on October 31, 2003, the protective filing date, for herself, based upon her marriage to the deceased wage earner and her caring for his two newborn children. Her entitlement was contingent upon the entitlement of the surviving children (exhibit 1).

The original and derivative claims were disallowed at the initial determination level by the Social Security Administration (exhibit 10). When the children's claims were denied, the claim for mother's insurance benefits was also denied for "no child in care" (exhibit 11).

Thereafter, on June 16, 2004, the claimant filed timely requests for reconsideration on all three claims, asserting that the initial decision failed to adhere to case law, that the medical evidence clearly establishes the paternity of the twins by Robert Capato and that Robert Capato intended to have children either after his cancer treatment or post-mortem (exhibit 8).

By Notice of Reconsideration, dated March 25, 2006, the claimant was advised that the twins were not entitled to surviving child's insurance benefits based on the Social Security earnings record of Robert Capato, because she had not submitted evidence sufficient to establish that the twins were the legal "child(ren)" of Robert Capato, under applicable State and Federal statutes (exhibit 12).

On May 18, 2006, the claimant filed her pending Request for Hearing, through her attorney, arguing that there is clear and convincing evidence that the twins are the "children" of the wage earner, that the wage earner made detailed arrangements which resulted in their birth, and that "New Jersey law, not Florida law, should govern as New Jersey has an interest to protect the rights of the twins, who were born in New Jersey and have lived in New Jersey their entire lives" (exhibit 13).

As primary evidence of the parent-child relationship of the twins, conceived after the death of their putative/alleged father, Robert Capato, the claimant has presented extensive medical records from the Northwest Center for Infertility and Reproductive Endocrinology, located in Florida, indicating that she had been a patient undergoing evaluation and treatment for her longstanding infertility and that after the wage earner's death, the claimant underwent fertility treatment using frozen sperm specimens donated by the deceased wage earner, prior to his death and with his consent, for insemination, which resulted in the birth of the twins, on September 23, 2003. Those embryos did in fact result from his sperm and through in vitro fertilization to the claimant, in January 2003, resulted in the births of the twins in September 2003. Thus, the twins were conceived by artificial means after the wage earner's death, in Florida. During the pregnancy, the claimant moved to New Jersey. She presently resides in Basking Ridge, New Jersey (exhibits 3, 23, 24).

ANALYSIS OF THE EVIDENCE AND APPLICABLE LAW

In this case, I have considered and reviewed the following applicable and relevant legal memoranda submitted by the Social Security Administration and the attorney for the claimant regarding the issue of paternity of the surviving children of the deceased wage earner:

SOCIAL SECURITY ADMINISTRATION

1) Memorandum from Assistant Regional Commissioner (San Francisco Region)—Request for Legal Opinion—dated January 4, 2005 (exhibit 10);

2) Legal Opinion from Atlanta Region—Office of Regional Chief Counsel by Assistant Regional Council—dated February 24, 2006 (exhibit 11); and,

3) Notice of Reconsideration—dated March 25, 2006 (exhibit 12).

LEGAL MEMORANDA OF ATTORNEY FOR THE CLAIMANT

1) May 14, 2007 (exhibit 15);

2) May 18, 2007 (exhibit 25); and,

3) June 4, 2007 (exhibit 26).

The major question presented for resolution is whether [REDACTED] and [REDACTED] (the twins), who were conceived and born after the death of their putative father, the wage earner, Robert Capato, qualify for child's insurance benefits as the wage earner's "children" under Title II of the Social Security Act.

The answer depends upon the status of children conceived by in vitro fertilization after a wage earner's death, predicated upon Florida State law.

Because the fertilization that produced the twins and their gestation period began after their putative father died (hence the descriptive term "after-children"), the threshold question is whether the twins qualify as the "children" of the wage earner, as that term is defined under the Social Security Act for purposes of child's insurance benefits. The Act requires that an individual be the dependent "child" of the wage earner to qualify for child's benefits (Section 202(d), Social Security Act). The Act defines a "child" and provides for the determination of family status in two relevant subsections (Section 216(e), (h), Social Security Act). The only provision of the Act under which an after child can establish eligibility requires a showing that the child could inherit the wage earner's property as his child under the intestacy laws of the state where the wage earner was domiciled when he died (Section 216(h)(2)(A), Social Security Act). There are no other provisions of the Act under which an after-child could qualify for benefits on the earnings record of a deceased wage earner. In this case, since the wage earner died before the twins' conception, it was impossible for him to acknowledge in writing that the twins were his children, or impossible to have been decreed by a court to be the father of the twins, or impossible to have been ordered by a court to contribute to the support of the twins, or show by satisfactory evidence that he was "living with or contributing to the support" of the twins when he died (Section 216(h)(3)(C)(i)(ii), Social Security Act).

Because the evidence shows that the wage earner died domiciled in Florida, I must apply Florida law in determining whether the twins would be entitled to a child's share of the wage earner's intestate personal property. The twins will qualify for Social Security child's benefits on the wage earner's earnings record only if they can establish that they could inherit a child's share of the wage earner's personal property under Florida's intestacy laws.

Florida's law of intestate succession specifically refers to "afterborn heirs" and defines them as "heirs of the decedent conceived before his or her death, but born thereafter" (Fla. Stat. Ann., Section 732.106 [2005]). This statue provides that "afterborn heirs" inherit intestate property as if they had been born in the decedent's lifetime (Id.). None of the Florida statutes directly define the term "conceived". In this case, the wage earner's sperm was harvested and frozen before his death, his wife was inseminated using the wage earner's sperm, and his wife conceived in January 2003. Because conception occurred in January 2003 as a result of in vitro fertilization, no interpretation has been found of relevant Florida statutes under which the twins could be found to have been "conceived" before the wage earner's death (exhibit 11).

The Florida Probate Code does not directly address the issue of inheritance rights arising from a post-mortem assisted fertilization and implantation. Although the wage earner's will provided for Devon Capato, a child born on August 22, 2001, through in vitro fertilization, two children by a previous marriage, and "an infant in gestation", the wage earner's will did not mention any children that might subsequently be conceived using his

frozen sperm. Thus, the twins could not claim to be beneficiaries of the wage earner's estate under Section 742.17(4) of the Florida Probate Code (exhibit 11).

More importantly, the twins' intestate inheritance rights are not governed by the wage earner's will. Florida's intestacy statutes control. It is significant that the Florida intestacy statutes do not mention explicitly the class of after-children among the surviving issue who can inherit by intestacy (the rules that govern distribution of property not covered by a will), as opposed to those who can inherit through a will. Thus, Florida statutes exclude the twins from collecting by intestacy because an after-child is eligible for a claim against a decedent "only" when the deceased parent provides for him or her in a will (Fla. Stat. Ann., Section 742.17(4); exhibit 11). Consequently, I conclude that, under Florida law, an after-child cannot inherit through intestacy and, therefore, under the Social Security Act, cannot be deemed to have the same status relative to taking intestate personal property as a child (Section 216(h)(2)(A), Social Security Act; exhibit 11).

Because the twins cannot inherit a child's share of the wage earner's personal property, under Florida's intestacy law, they do not qualify as the wage earner's "children" under the Social Security Act, and they do not qualify for child's benefits on his earnings record (42 U.S.C. Section 416(h)(2)(A); exhibit 11).

In his initial legal memorandum, dated May 14, 2007, the attorney for the claimant mounts a multi-faceted legal attack on the denial of benefits by the Administration grounded principally upon legal arguments incorporating the alleged violation of the statutory scheme of the

Social Security Act, the alleged violation of "equal protection" under the Fifth Amendment of the Constitution and his reliance as precedent upon a 9th Circuit Court of Appeals opinion, which ruled in favor of the children by holding that children conceived by in vitro fertilization ten (10) months following their father's death met the definition of "child" under the Social Security Act because they were the "natural, or biological, child[ren] of the insured" (exhibit 15; May 14, 2007; *Gillett-Netting v. Barnhart,* 371 F.3d 593 [9th Cir. 2004]). Additionally, the attorney for the claimant argues that since the twins were born in New Jersey where their mother was born and has resided, and, in view of her Florida residence for a period of only three (3) years, New Jersey law should apply and govern the issues in this case (exhibit 11, page 12).

In his subsequent legal memorandum, dated May 18, 2007, the attorney for the claimant again relies upon the 9th Circuit Court of Appeals *Gillett-Netting* case as a legal precedent exactly on point. Additionally, he advances the legal argument that the Social Security Administration had the right to issue an Acquiescence Ruling which restricts the holding of the 9th Circuit Court of Appeals to that jurisdiction, but the Administration has no right to attempt to limit a 9th Circuit Court of Appeals decision to that Circuit only, since the 9th Circuit case represents the "law of the land" applicable also in the Third (3rd) Circuit Court of Appeals, under whose jurisdiction the State of New Jersey falls (exhibit 25).

In his last memorandum of law, dated June 4, 2007, the attorney for the claimant argues that the wage earner was not a permanent resident of Florida, that he engaged in conduct demonstrating an intention to relocate

to New Jersey before his death, that the Commissioner of the Social Security Administration "pick[ed] a forum [Florida] where the infants born posthumously" have no rights which was in error and that application of the laws of Florida to the claimants is "improper and unfair" (exhibit 26).

As previously mentioned, the issue in this case is the eligibility for survivor benefits of two twins not only born, but conceived by in vitro fertilization after the father's death. It is noted that the record clearly establishes that the two children are, in fact, the children of the deceased wage earner, who died from cancer. His sperm were preserved and there is sufficient documentary evidence to show that the children resulted from the use of those sperm. The wage earner and the mother of the children were married, living in Florida and I find the testimony clearly establishes that it was the intent of the deceased wage earner (who knew that he was terminally ill) and his wife to have the children even after his death. There is a court case in the 9th Circuit Court of Appeals region in which the child was found entitled to such benefits, but there is no case in our 3rd Circuit.

The record in this case contains well-prepared legal briefs submitted by counsel for the claimants and from the Office of the Regional Chief Counsel, Region IV, Atlanta. I note initially that the Chief Counsel memo states that Florida law must be considered in this case. However, the legal representative for the claimants argues that Florida law should not be applied because the wage earner used to live in the 9th Circuit region of the country, and, furthermore, that he intended to move back to New Jersey. However, there is no legal merit to this argument. The claimant was clearly a resident of

Florida for several years at the time of his death. This is reflected in his death certificate and in the fact that his will was prepared under Florida law and filed for probate in that state. His intent to relocate to New Jersey, or his prior residence is not relevant to this proceeding.

Similarly lacking in legal merit is the claimant's argument that we are bound by 9th Circuit law because no other Circuit, or the United States Supreme Court, has ruled to the contrary. If this were true, then the Social Security Administration would always be bound by whatever Circuit decided an issue first, and the issue would never even get to another Circuit.

This is a case where medical-scientific technology has advanced faster than the regulatory process. I start by noting that I find fully credible **all** the testimony here, by the children's mother and by friends who also testified and/or submitted supporting statements. It is clear that this is a very sympathetic case, with nothing but the highest intentions involved. There is no ulterior motive here and the amount of expense to which the parents went in order to conceive the children is clearly more than they might ever receive as Social Security benefits. The parents in this matter showed courage in the face of tragic medical adversity and acted in a manner that we all can understand and to which we can readily relate.

When the wage earner discovered that he was seriously, very possibly fatally ill and needed to start chemotherapy, which was expected to result in sterility, he preserved his sperm in order to be able to have children in the future. The married couple began in vitro fertilization unsuccessfully, but the mother became pregnant the

conventional way and gave birth to Devon Capato. They had a child, but as the wage earner's condition worsened, they decided that they did not want Devon to be an only child, so they resumed the in vitro fertilization process. It was not successful until after the wage earner died, but as noted, there is no question that the children (as luck would have it, there were twins born), were his.

Thus, the issue is whether or not the two children conceived after the death of the father are entitled to survivor benefits under Social Security law. There is little doubt also that equity supports the claimant's applications and that a favorable decision would not be inconsistent with the intention of the statute. However, the issue is whether or not such a decision can be rendered by me, or, whether in fact this is a policy decision that needs to be addressed at the Social Security Administration level. It appears to me that the latter is the case.

After reading the arguments presented, I must conclude that even though the children were born in New Jersey, Florida law does apply with respect to their rights to inherit from the father. Under that law, as noted by the Regional Counsel's legal brief, the children are not entitled to inherit, and, therefore, are not entitled to Social Security benefits on the earnings record of the deceased wage earner. As noted, I feel constrained by applicable and controlling Social Security laws and regulations to find disentitlement, even though allowing benefits to the children would appear to be consistent with the purposes of the Social Security Act.

In accordance with Sections 202(d)(1) and 216(e) of the Social Security Act, [REDACTED] and [REDACTED]

are not entitled to surviving child's insurance benefits on the Social Security earnings record of the deceased wage earner.

FINDINGS OF FACT

After careful consideration of the entire record, I make the following findings of fact and conclusions of law:

1) The evidence of record establishes that [REDACTED] and [REDACTED] are the natural "after-children" of the deceased wage earner, conceived and born by means of frozen sperm specimens and in vitro fertilization.

2) [REDACTED] and [REDACTED] are not for Social Security purposes the "child(ren)" of the deceased wage earner, Robert Capato, under Florida state law as required by section 216(h)(2)(A) of the Social Security Act.

3) In accordance with Sections 202(d)(1) and 216(e) of the Social Security Act and under Social Security Regulations, [REDACTED] and [REDACTED] are not entitled to surviving child's insurance benefits, and accordingly Karen Capato is not entitled to mother's benefits on the Social Security earnings record of the deceased wage earner.

DECISION

It is my decision that based upon the applications for surviving child's insurance and derivative mother's insurance benefits protectively filed on October 31, 2003, [REDACTED] and [REDACTED] are not entitled to child's and mother's benefits, respectively, based upon

the earnings record of the deceased wage earner, Robert Capato.

/s/ JOEL H. FRIEDMAN
JOEL H. FRIEDMAN
Administrative Law Judge

[Nov. 28, 2007]
Date

APPENDIX E

1. 42 U.S.C. 402(d)(1) provides:

Old-age and survivors insurance benefit payments

(d) Child's insurance benefits

(1) Every child (as defined in section 416(e) of this title) of an individual entitled to old-age or disability insurance benefits, or of an individual who dies a fully or currently insured individual, if such child—

(A) has filed application for child's insurance benefits,

(B) at the time such application was filed was unmarried and (i) either had not attained the age of 18 or was a full-time elementary or secondary school student and had not attained the age of 19, or (ii) is under a disability (as defined in section 423(d) of this title) which began before he attained the age of 22, and

(C) was dependent upon such individual—

(i) if such individual is living, at the time such application was filed,

(ii) if such individual has died, at the time of such death, or

(iii) if such individual had a period of disability which continued until he became entitled to old-age or disability insurance benefits, or (if he has died) until the month of his death, at the beginning of such period of disability or at the time he became entitled to such benefits,

shall be entitled to a child's insurance benefit for each month, beginning with—

(i) in the case of a child (as so defined) of such an individual who has died, the first month in which such child meets the criteria specified in subparagraphs (A), (B), and (C), or

(ii) in case of a child (as so defined) of an individual entitled to an old-age insurance benefit or to a disability insurance benefit, the first month throughout which such child is a child (as so defined) and meets the criteria specified in subparagraphs (B) and (C) (if in such month he meets the criterion specified in subparagraph (A)),

whichever is earlier, and ending with the month preceding whichever of the following first occurs—

(D) the month in which such child dies or marries,

(E) the month in which such child attains the age of 18, but only if he (i) is not under a disability (as so defined) at the time he attains such age, and (ii) is not a full-time elementary or secondary school student during any part of such month,

(F) if such child was not under a disability (as so defined) at the time he attained the age of 18, the earlier of—

(i) the first month during no part of which he is a full-time elementary or secondary school student, or

(ii) the month in which he attains the age of 19,

but only if he was not under a disability (as so defined) in such earlier month;

(G) if such child was under a disability (as so defined) at the time he attained the age of 18 or if he was not under a disability (as so defined) at such time but was under a disability (as so defined) at or prior to the time he attained (or would attain) the age of 22—

(i) the termination month, subject to section 423(e) of this title (and for purposes of this subparagraph, the termination month for any individual shall be the third month following the month in which his disability ceases; except that, in the case of an individual who has a period of trial work which ends as determined by application of section 422(c)(4)(A) of this title, the termination month shall be the earlier of (I) the third month following the earliest month after the end of such period of trial work with respect to which such individual is determined to no longer be suffering from a disabling physical or mental impairment, or (II) the third month following the earliest month in which such individual engages or is determined able to engage in substantial gainful activity, but in no event earlier than the first month occurring after the 36 months following such period of trial work in which he engages or is determined able to engage in substantial gainful activity),

or (if later) the earlier of—

(ii) the first month during no part of which he is a full-time elementary or secondary school student, or

(iii) the month in which he attains the age of 19,

but only if he was not under a disability (as so defined) in such earlier month; or

(H) if the benefits under this subsection are based on the wages and self-employment income of a stepparent who is subsequently divorced from such child's natural parent, the month after the month in which such divorce becomes final.

Entitlement of any child to benefits under this subsection on the basis of the wages and self-employment income of an individual entitled to disability insurance benefits shall also end with the month before the first month for which such individual is not entitled to such benefits unless such individual is, for such later month, entitled to old-age insurance benefits or unless he dies in such month. No payment under this paragraph may be made to a child who would not meet the definition of disability in section 423(d) of this title except for paragraph (1)(B) thereof for any month in which he engages in substantial gainful activity.

2. 42 U.S.C. 416 provides in pertinent part:

Additional definitions

* * * * *

(e) Child

The term "child" means (1) the child or legally adopted child of an individual, (2) a stepchild who has been such stepchild for not less than one year immediately preceding the day on which application for child's insur-

ance benefits is filed or (if the insured individual is deceased) not less than nine months immediately preceding the day on which such individual died, and (3) a person who is the grandchild or stepgrandchild of an individual or his spouse, but only if (A) there was no natural or adoptive parent (other than such a parent who was under a disability, as defined in section 423(d) of this title) of such person living at the time (i) such individual became entitled to old-age insurance benefits or disability insurance benefits or died, or (ii) if such individual had a period of disability which continued until such individual became entitled to old-age insurance benefits or disability insurance benefits, or died, at the time such period of disability began, or (B) such person was legally adopted after the death of such individual by such individual's surviving spouse in an adoption that was decreed by a court of competent jurisdiction within the United States and such person's natural or adopting parent or stepparent was not living in such individual's household and making regular contributions toward such person's support at the time such individual died. For purposes of clause (1), a person shall be deemed, as of the date of death of an individual, to be the legally adopted child of such individual if such person was either living with or receiving at least one-half of his support from such individual at the time of such individual's death and was legally adopted by such individual's surviving spouse after such individual's death but only if (A) proceedings for the adoption of the child had been instituted by such individual before his death, or (B) such child was adopted by such individual's surviving spouse before the end of two years after (i) the day on which such individual died or (ii) August 28, 1958. For purposes of clause (2), a person who is not the stepchild of

an individual shall be deemed the stepchild of such individual if such individual was not the mother or adopting mother or the father or adopting father of such person and such individual and the mother or adopting mother, or the father or adopting father, as the case may be, of such person went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment described in the last sentence of subsection (h)(1)(B) of this section, would have been a valid marriage. For purposes of clause (2), a child shall be deemed to have been the stepchild of an individual for a period of one year throughout the month in which occurs the expiration of such one year. For purposes of clause (3), a person shall be deemed to have no natural or adoptive parent living (other than a parent who was under a disability) throughout the most recent month in which a natural or adoptive parent (not under a disability) dies.

* * * * *

(h) Determination of family status

(1)(A)(i) An applicant is the wife, husband, widow, or widower of a fully or currently insured individual for purposes of this subchapter if the courts of the State in which such insured individual is domiciled at the time such applicant files an application, or, if such insured individual is dead, the courts of the State in which he was domiciled at the time of death, or, if such insured individual is or was not so domiciled in any State, the courts of the District of Columbia, would find that such applicant and such insured individual were validly married at the time such applicant files such application or, if such insured individual is dead, at the time he died.

(ii) If such courts would not find that such applicant and such insured individual were validly married at such time, such applicant shall, nevertheless be deemed to be the wife, husband, widow, or widower, as the case may be, of such insured individual if such applicant would, under the laws applied by such courts in determining the devolution of intestate personal property, have the same status with respect to the taking of such property as a wife, husband, widow, or widower of such insured individual.

(B)(i) In any case where under subparagraph (A) an applicant is not (and is not deemed to be) the wife, widow, husband, or widower of a fully or currently insured individual, or where under subsection (b), (c), (d), (f), or (g) of this section such applicant is not the wife, divorced wife, widow, surviving divorced wife, husband, divorced husband, widower, or surviving divorced husband of such individual, but it is established to the satisfaction of the Commissioner of Social Security that such applicant in good faith went through a marriage ceremony with such individual resulting in a purported marriage between them which, but for a legal impediment not known to the applicant at the time of such ceremony, would have been a valid marriage, then, for purposes of subparagraph (A) and subsections (b), (c), (d), (f), and (g) of this section, such purported marriage shall be deemed to be a valid marriage. Notwithstanding the preceding sentence, in the case of any person who would be deemed under the preceding sentence a wife, widow, husband, or widower of the insured individual, such marriage shall not be deemed to be a valid marriage unless the applicant and the insured individual were living in the same household at the time of the death of the insured individual or (if the insured individual is living) at

the time the applicant files the application. A marriage that is deemed to be a valid marriage by reason of the preceding sentence shall continue to be deemed a valid marriage if the insured individual and the person entitled to benefits as the wife or husband of the insured individual are no longer living in the same household at the time of the death of such insured individual.

(ii) The provisions of clause (i) shall not apply if the Commissioner of Social Security determines, on the basis of information brought to the Commissioner's attention, that such applicant entered into such purported marriage with such insured individual with knowledge that it would not be a valid marriage.

(iii) The entitlement to a monthly benefit under subsection (b) or (c) of section 402 of this title, based on the wages and self-employment income of such insured individual, of a person who would not be deemed to be a wife or husband of such insured individual but for this subparagraph, shall end with the month before the month in which such person enters into a marriage, valid without regard to this subparagraph, with a person other than such insured individual.

(iv) For purposes of this subparagraph, a legal impediment to the validity of a purported marriage includes only an impediment (I) resulting from the lack of dissolution of a previous marriage or otherwise arising out of such previous marriage or its dissolution, or (II) resulting from a defect in the procedure followed in connection with such purported marriage.

(2)(A) 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.

(B) If an applicant is a son or daughter of a fully or currently insured individual but is not (and is not deemed to be) the child of such insured individual under subparagraph (A), such applicant shall nevertheless be deemed to be the child of such insured individual if such insured individual and the mother or father, as the case may be, of such applicant went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment described in the last sentence of paragraph (1)(B), would have been a valid marriage.

(3) An applicant who is the son or daughter of a fully or currently insured individual, but who is not (and is not deemed to be) the child of such insured individual under paragraph (2) of this subsection, shall nevertheless be deemed to be the child of such insured individual if:

(A) in the case of an insured individual entitled to old-age insurance benefits (who was not, in the month preceding such entitlement, entitled to disability insurance benefits)—

(i) such insured individual—

(I) has acknowledged in writing that the applicant is his or her son or daughter,

(II) has been decreed by a court to be the mother or father of the applicant, or

(III) has been ordered by a court to contribute to the support of the applicant because the applicant is his or her son or daughter,

and such acknowledgment, court decree, or court order was made not less than one year before such insured individual became entitled to old-age insurance benefits or attained retirement age (as defined in subsection (l) of this section), whichever is earlier; or

(ii) such insured individual is shown by evidence satisfactory to the Commissioner of Social Security to be the mother or father of the applicant and was living with or contributing to the support of the applicant at the time such applicant's application for benefits was filed;

(B) in the case of an insured individual entitled to disability insurance benefits, or who was entitled to such benefits in the month preceding the first month for which he or she was entitled to old-age insurance benefits—

(i) such insured individual—

(I) has acknowledged in writing that the applicant is his or her son or daughter,

(II) has been decreed by a court to be the mother or father of the applicant, or

(III) has been ordered by a court to contribute to the support of the applicant because the applicant is his or her son or daughter,

and such acknowledgment, court decree, or court order was made before such insured individual's most recent period of disability began; or

(ii) such insured individual is shown by evidence satisfactory to the Commissioner of Social Security to be the mother or father of the applicant and was living with or contributing to the support of that applicant at the time such applicant's application for benefits was filed;

(C) in the case of a deceased individual—

(i) such insured individual—

(I) had acknowledged in writing that the applicant is his or her son or daughter,

(II) had been decreed by a court to be the mother or father of the applicant, or

(III) had been ordered by a court to contribute to the support of the applicant because the applicant was his or her son or daughter,

and such acknowledgment, court decree, or court order was made before the death of such insured individual, or

(ii) 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.

For purposes of subparagraphs (A)(i) and (B)(i), an acknowledgment, court decree, or court order shall be deemed to have occurred on the first day of the month in which it actually occurred.

* * * * *