Prepared for Juan Antunez

Steve Leimberg's Estate Planning Email Newsletter - Archive Message #1966

Date: 22-May-12
From: Steve Leimberg's Estate Planning Newsletter
Subject: **FLASH Jeff Pennell on the Supreme Court Decision in Caputo: An Update on the New Biology**

"The unanimous Supreme Court opinion in Capato embraced the government's argument that survivor benefits are intended only to help children who lost their source of support due to the unanticipated death of a parent — a purpose that is not involved with posthumously conceived children. As such, the Court's conclusion in Capato is not a one-size-fits-all determination that posthumously conceived DNA offspring cannot inherit, nor that they cannot qualify for Social Security Survivor benefits. All the Court determined is that the SSA approach of looking to state intestacy law is valid and controlling.

The question whether a provider of DNA intends for a posthumously conceived child to be treated as their own is easier than the question whether an ancestor intends for someone else to be able to use the DNA to create more beneficiaries of the ancestor's trust. Indeed, if clients were asked the question, "would you want your daughter-in-law to be able to make herself pregnant with your son's frozen sperm, to create more beneficiaries of your trust," would their answers predictably be the same as if they were asked "do you want your son-in-law to be able to withdraw your daughter's frozen egg (or their frozen embryo) and find a surrogate mother to make more beneficiaries of your trust"?

There is likely no way to predict a typical client's reaction to either question, nor to predict whether any client's response would distinguish between a daughter-in-law using the son's sperm and bearing the child herself as opposed to a son-in-law finding a surrogate mother to carry the daughter's child. As all of this shakes out, it may be wise for estate planners to draft for these issues, to articulate their clients' intent in each regard, particularly because state law is in flux, because one-size-fits-all legislation may not reflect a client's intent, and because conflict of laws issues may inform a court's reliance on the law of a different state."

On Monday, the Supreme Court weighed-in with its much anticipated decision in the Caputo case, a 9-0 decision that underscores the complex legal issues raised by what **Jeff Pennell** refers to as the "new biology."

LISI is very fortunate to be able to provide its members with **Professor Pennell's** analysis of the Caputo opinion.

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Here is Jeff's commentary:

EXECUTIVE SUMMARY:

An issue that has become increasingly common relates to the "new biology," by which a child can be conceived by means of artificial insemination using the egg or sperm of donors, who do not constitute parents simply by virtue of their biological contribution. In a series of cases the question has arisen of a posthumously conceived child's entitlement to Social Security Survivor Benefits following the death of a DNA provider (typically the male, but not necessarily). These cases have turned on a Social Security Administration (SSA) guideline that looks to state law intestacy statutes to determine the status of such a child. That policy was called into question in Capato v. Commissioner, which created a conflict between the Federal circuit courts that was resolved by the U.S. Supreme Court in Astrue v. Capato.

FACTS:

The very similar fact situation in most of the decided cases entails a deceased male who banked sperm prior to death that was used by his surviving widow to produce biological offspring through posthumous conception. In Capato the decedent's widow produced twins, born 18 months after his death. And then she claimed survivor benefits on their behalf. The SSA denied the request, a district court agreed with the government, but on appeal the Court of Appeals for the Third Circuit reversed, applying a different standard than has been used in all but one of the other cases decided to date. The Supreme Court granted certiorari to resolve a conflict between the circuits, and reversed the Third Circuit decision. Meaning that the children, biologically the decedent's offspring, are denied survivor benefits.

COMMENT:

Instead of asking who provided the DNA, other factors are involved in a determination of parentage involving the new biology.[i] Thus, the Uniform Parentage Act and, before it, the Uniform Status of Children of Assisted Conception Act both provide generally[ii] that any child conceived following artificial insemination of a woman is the child of that woman regardless of the lack of a biological relation. Similarly, if the birth mother is married, her husband is presumed to be the father, regardless of a lack of biological connection, unless he can prove that he did not consent to the artificial insemination.[iii]

This may prove to be true even if the insemination and subsequent birth both occur after the husband's death.[iv] When heirship is established under these new-biology dictates, a child produced by artificial insemination is treated as a naturally conceived child of the husband and wife for all purposes. Indeed, the child may be regarded as a marital child, because the parents were married, albeit one parent is deceased when the child is born (although this depends on state law and may not be true if state law provides that marriage ends upon the death of either spouse).

Easy early cases that confronted the policies involved here were In re Estate of Kolacy[v] and Woodward v. Commissioner of Social Security.[vi] Both cases began in federal court and were certified to state court for a determination of heirship under state law. Both involved young, intestate, leukemia victims who banked sperm before beginning chemotherapy that proved to be unsuccessful. The issue was the child's entitlement to federal survivor benefits under the Social Security Act, which the courts resolved based on heirship as determined under state law.[vii] Both cases involved posthumously conceived children—twin girls in each case—the product of their mother S being inseminated using the banked sperm after D's death. Each court concluded that D was the legal, genetic, and biological father of children born to his surviving widow 18 and 24 months (respectively) after his death.

The Kolacy court found that D's premortem deposit of sperm for artificial insemination of S after D's not unexpected death was consistent with the policy underlying an inapposite state law providing that a child born as a result of the artificial insemination of a woman "with the consent of her husband ... with semen donated by a man not her husband is treated in law

as if [the husband] were the natural father of a child thereby conceived" (emphasis added, to underscore that the statute did not address the case of semen donated by the inseminated mother's husband, which the legislature apparently did not anticipate). In Woodward the court did not make a factual finding whether the requisite consent existed to (1) permit posthumous reproduction and (2) support any resulting child. But the court did determine that, if unspecified timing requirements also are met, the resulting child will be a legal heir notwithstanding the traditional common law rule that heirs are ascertained at D's death.

Originally contrary to both cases was Gillett-Netting v. Commissioner of Social Security,[viii] which is distinguishable only because the man was older and the twins were one boy and one girl, but otherwise involved essentially the same facts and issue as both Kolacy and Woodward. The lower court held that heirs under state law must "survive" D and therefore had to be in existence at D's death, and rejected notions of D's intent because the intestate statute applies in the absence of a will, which is how decedents are expected to indicate their intent. On appeal the court relied on Arizona state law to the effect that all legitimate (marital) children are dependents and that the children involved in the case were the undisputed biological children of the decedent, citing Woodward.[ix]

The original holding in Gillett-Netting is basically the same as the final decision in Khabbaz v. Commissioner, Social Security Adm'n,[x] a fourth pea out of essentially the same pod. The court focused on language in the applicable state law that referred to "surviving issue" and concluded that "survive" implies remaining alive after another person's death. This child was not yet alive when D died and therefore could not meet the intended classification as a "surviving" heir. In the process the court dodged a social policy argument that D's DNA product should be included in the benefited class, saying that these policy issues are best left to the legislature to resolve.[xi]

Following a very similar path under slightly different facts, Finley v. Commissioner, Social Security Adm'n[xii] passed on the opportunity to make law and deferred to the legislature to address this issue. One difference in Finley was that a frozen embryo was implanted after the putative father's death, and the court rejected an argument that the child was "conceived" premortem when the embryo was created, the court noting that this "determination ... would implicate many public policy concerns" that were beyond the court's purview. Reflecting a similar concern, the drafters of UPC altered §2-120(k) to refer to a child "in gestation" at a particular time,

rather than in conception, to circumvent this issue.[xiii]

Also rejecting claims to survivor benefits, Stephen v. Commissioner of Social Security[xiv] found the critical factual difference to be that D's sperm was harvested on the day after his unexpected death due to cardiac arrest. The court held that, under the applicable state (Florida) law, "a child conceived from the ... sperm of a person ... who died before the transfer of their ... sperm ... 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,"[xv] which clearly could not have occurred here because the sperm was not obtained, much less transferred, prior to D's death.[xvi]

Similar to Finley, D's sperm also was harvested postmortem in Vernoff v. Astrue,[xvii] which allowed the court to reject the claim to survivor benefits – in Vernoff because a posthumously conceived child could not be dependent on a decedent who died prior to the child's conception. Subsequently, Beeler v. Astrue[xviii] rejected the child's claim because state law in effect at the decedent's death required conception of the child during the decedent's lifetime, and Schafer v. Astrue[xix] rejected the child's claim because state law in effect at the decedent's death required that the child be born within ten months after the decedent's death and in Schafer the child was born almost seven years after the decedent died.

Both Beeler and Schafer are poignant because they were decided subsequent to, and they rejected, the approach dictated by the court of appeals in Capato v. Commissioner of Social Security.[xx] As such, those three cases created a conflict between the circuits, which the U.S. Supreme Court resolved by reversing Capato. By that convoluted pathway, Capato thus became the lodestar in this context.

Unlike the test articulated by the Social Security Administration, which relies on the law that would determine devolution of D's intestate personal property in the state of D's domicile,[xxi] the appellate court in Capato applied a simplistic analysis in which "dependency" would play the critical role if the parties agreed that the applicant was the DNA offspring — an "undisputed biological child" — of the decedent.[xxii] That conclusion would have resulted in a remand to address the question whether the claimants could have been the decedent's dependents at his death, given that they were born after he died, but the Supreme Court's grant of certiorari and reversal of the appellate court's ruling instead made the dependency question irrelevant.

The unanimous Supreme Court opinion in Capato validates the government's state law intestacy approach as being consistent with Congress' intent that survivor benefits only assist children who lost their source of support due to the unanticipated death of a parent. According to the Court, if state intestacy law permits a child to inherit, "it may reasonably be thought that the child will more likely be dependent during the parent's life" – which is a funny construct in the case of a posthumously conceived child, who could not possibly have been the decedent's dependent during life. In a sense, the government's approach, blessed by Capato, avoids the dependency issue entirely.

In doing so, however, Capato does little to alter the fact that the government's approach yields different results under different state laws, because intestacy statutes differ. In Capato, the Court relied on Florida law,[xxiii] under which a posthumously conceived child can only inherit as provided in a decedent's will – not by intestacy. But the Court acknowledged that intestacy determined by statute in other states would provide an inheritance to posthumously conceived children who are born or conceived within statutorily specified time limits.[xxiv] As such, the Court's conclusion simply blesses the SSA approach of looking to state intestacy law as a valid and controlling regulatory approach, but it fails to establish a uniform national rule.

Albeit that these cases have produced inconsistent results, the issue in each was relatively easy. The more challenging situation is one that the courts have just begun to address. If D leaves DNA in the freezer and that DNA is used postmortem with the requisite permission to produce a child, it seems relatively clear that D intended that child to be a beneficiary of D's estate. But what about relatives of the DNA provider? Assume, for example, that the provider's ancestor created a trust for the provider's benefit for life, remainder to the provider's descendants. Does the settlor intend to give anyone (the provider's surviving spouse or anyone else) a blank check to create more remainder beneficiaries? That question was answered in the affirmative by In re Martin B.[xxv]

The question whether a provider intends for a posthumously conceived child to be treated as their own is easier than the question whether an ancestor intends for someone else to be able to use the DNA to create more beneficiaries of the ancestor's trust. Indeed, if clients were asked the question, "would you want your daughter-in-law to be able to make herself pregnant with your son's frozen sperm, to create more beneficiaries of your trust," would their answers predictably be the same as if they were asked

“do you want your son-in-law to be able to withdraw your daughter's frozen egg (or their frozen embryo) and find a surrogate mother to make more beneficiaries of your trust”? There is likely no way to predict a typical client's reaction to either question, nor to predict whether any client's response would distinguish between a daughter-in-law using the son's sperm and bearing the child herself as opposed to a son-in-law finding a surrogate mother to carry the daughter's child.

The court in Martin B may have reflected the direction the law appeared to be developing at that time, treating the offspring as a child of the DNA provider and therefore as a descendant of any other ancestor, for all purposes. But the issue in Martin B is similar to the stranger-to-the-adoption rule, as to which the law remains unsettled. Remember the common law rule that an individual who adopted a child was regarded as the child's parent for all purposes relating to the adopting parent's estate, but the child was not treated as a descendant of the adopting parent's ancestors. That rule then was changed by statute and adopteds were treated as natural born for all purposes. But more recently there has been a push back with respect to adult adoption and the stranger-to-the-adoption rule. The notion being that maybe an ancestor's intent is not the same if adoption is used to make an adult a beneficiary of an ancestor's estate plan, and thus adopted adults should not be treated as natural born. It may be that a similar iteration will occur in the posthumous conception context as well, by creating a stranger-to-the-freezer rule.

As all this shakes out, it may be wise for estate planners to draft for these issues, to articulate their clients' intent in each regard. Particularly because state law is in flux, because one-size-fits-all legislation may not reflect a client's intent, and because conflict of laws issues may inform a court's reliance on the law of a different state.

HOPE THIS HELPS YOU HELP OTHERS MAKE A POSITIVE DIFFERENCE!

Jeff Pennell

CITE AS:

LISI Estate Planning Newsletter #1966, (May 22, 2012) at http://www.leimbergservices.com/ Copyright 2012 Leimberg Information

CITE:

Astrue v. Capato, No. 11-159

CITATIONS:

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[i] See Uniform Parentage Act §702, and Uniform Status of Children of Assisted Conception Act §4(b).

[ii] Absent a gestational agreement otherwise. See Uniform Parentage Act Article 8.

[iii] See Uniform Parentage Act §705. See also Restatement (Third) of Property (Wills and Other Donative Transfers) §14.8, and §2.5 comment *l* (1999), stating that

> the traditional view is that a child who is conceived and born after the decedent's death cannot be an heir. This proposition, however, is open to reexamination with respect to a child produced from genetic material of the decedent by assisted reproductive technology. Most statutory codifications ... are not inconsistent with such a reexamination because they do not preclude inheritance by a child conceived after the decedent's death.
>
> This Restatement takes the position that, to inherit from the decedent, a child produced from genetic material of the decedent by assisted reproductive technology must be born within a reasonable time after the decedent's death in circumstances indicating that the decedent would have approved of the child's right to inherit. If the ... procedure occurs after the husband's death, and if the child is born within a reasonable time after the husband's death, the child should be treated as the husband's child for purposes of inheritance *from* the husband. Once conceived, such a child is the husband's and wife's child for all purposes of inheritance by, from, or through an intestate decedent who dies thereafter (emphasis in original).

[iv] See Uniform Parentage Act §707.

[v] 753 A.2d 1257 (N.J. Super. 2000).

[vi] 760 N.E.2d 257 (Mass. 2002).

[vii] The federal statutory construct in 42 U.S.C. §§402 and 416 involves the following provisions, the last of which providing the state intestacy connection:

> §402(d)(1)(C): an applicant is entitled to survivor benefits if the applicant is "a child (as defined in section 416(e)) [who] was dependent upon the [decedent] at the time of the [decedent's] death."
>
> §416(e)(1): one of several enumerated categories of persons who are a "child," this states that "child" means "the child or legally adopted child of an individual."
>
> §416(h)(2)(A): "In determining whether an applicant is the child of [a decedent] for purposes of this subchapter, the Commissioner of Social Security shall apply such law as would be applied in determining the devolution of [the decedent's] intestate personal property . . . by the courts of the State in which [the decedent] was domiciled at the time of . . . death."

[viii] 231 F. Supp. 2d 961 (D. Ariz. 2002), rev'd, 371 F.2d 593 (9th Cir. 2004).

[ix] Later cases reveal that this holding ignored 42 U.S.C. §416(h)(2)(A) and essentially relied on only §§402(d)(1)(C), requiring dependency, and 416(e)(1), defining a child, which the court held was not disputed, in terms of the biology.

[x] 930 A.2d 1180 (N.H. 2007).

[xi] Curiously, the *Kolacy* court specifically disregarded the state Attorney General's request that it not rule, recognizing that the state court's ruling might not bind a federal determination of heirship and that its ruling in

this particular case would not "unfairly intrude on the rights of other persons or ... cause serious problems in terms of the orderly administration of estates." The court regarded its ruling as helpful until such time as the legislature undertook "to deal consciously and in a well informed way with at least some of the issues presented by reproductive technology" in the kind of situation posed.

[xii] 372 Ark. 103 (2008).

[xiii] See Bass, What If You Die, And Then Have Children, 145 Trusts and Estates 20 (April 2006); Bailey, An Analytical Framework for Resolving the Issues Raised by the Interaction Between Reproductive Technology and the Law of Inheritance, 47 DePaul L. Rev. 743, 783, 797 (1998) (suggesting that, in states that presume paternity based on conception during the marriage, if a woman's egg is fertilized before the husband dies, a posthumous child will be his heir regardless of the interval between his death and the child's birth, and stating that inheritance based on conception prior to death was the law in 19 states at that time); and Shapo, Matters of Life and Death: Inheritance Consequences of Reproductive Technologies, 25 Hofstra L. Rev. 1091 (1997).

[xiv] 386 F. Supp. 2d 1257, 1260 (M.D. Fla. 2005).

[xv] See Fla. Stat. §742.17(4).

[xvi] Readers who wish to inquire how this postmortem medical procedure works may consult Andrews, The Sperminator, NY Times Magazine, Mar 28, 1999, 62-65. See also Goldfarb, Posthumous Conception and Inheritance Rights, 36 N.Y. State Bar Ass'n Trusts and Estates L. Section Newsletter 43 (Summer 2003); Scott, A Look at the Rights and Entitlements of Posthumously Conceived Children: No Surefire Way to Tame the Reproductive Wild West, 52 Emory L.J. 963 (2003).

[xvii] 568 F.3d 1102 (9th Cir. 2009).

[xviii] 651 F.3d 954 (8th Cir. 2011).

[xix] 641 F.3d 49 (4th Cir. 2011).

[xx] 631 F.3d 626 (3d Cir. 2011), rev'd sub nom., Astrue v. Capato, 566 U.S. *** (2012).

[xxi] See Program Operations Manual System (POMS) GN 00306.001(C)(1)(c), "to meet the definition of 'child' under the Act, an after-conceived child must be able to inherit under State law." This provision is available at secure.ssa.gov/poms.nsf/lnx/0200306001.

[xxii] See 42 U.S.C. §§416(e)(1) and 402(d)(1)(C).

[xxiii] Fla. Stat. Ann. §742.17(4), which applied because Florida was the state of the decedent's domicile at death.

[xxiv] The Court listed intestacy provisions in California, Colorado, Iowa, Louisiana, North Dakota, and the UPC.

[xxv] 841 N.Y.S.2d 207 (Surr. Ct. 2007).