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DOMA AND THE SOCIAL SECURITY ACT: AN ODD COUPLE BEGETTING DISFAVORED CHILDREN

ROBERT E. RAINS*

INTRODUCTION

One of the shortest federal public laws in recent years, the 1996 Defense of Marriage Act (DOMA),¹ appears to be clear and definite. It has only two substantive provisions. The first (Section 2 of DOMA), which has received the most attention, carves out an exception to full faith and credit² by permitting states not to give effect to “any public act, record or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State.”³

The second substantive provision provides in its entirety:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.⁴

This provision is something of an anomaly in federal law; normally the federal government defers to the states on such domestic relations matters as whether a couple is legally married for federal purposes.⁵ For example, to be eligible for Social Security survivors’ benefits, the claimant must have been validly married under state law.⁶ To be counted as a spouse for purposes of

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1. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C (2006); 1 U.S.C. § 7 (2006)).

2. U.S. CONST. art. IV, § 1.

3. 28 U.S.C. § 1738C.

4. 1 U.S.C. § 7.

5. *See* Baehr v. Lewin, 852 P.2d 44, 58 (Haw. 1993).

6. *See* 20 C.F.R. § 404.345 (2008). *See also* Everetts v. Apfel, 214 F.3d 990, 992 (8th Cir. 2000) (recognizing that the Social Security Act defers to state courts); *accord* Renshaw v. Heckler, 787 F.2d 50, 52 (2d Cir. 1986).

Supplemental Security Income (SSI), “you [must be] legally married under the laws of the State where your and his or her permanent home is (or was when you lived together).”⁷ Similarly, federal courts will generally apply state law to determine marital status for federal tax purposes.⁸ The same holds true for immigration purposes (outside of “sham marriages”).⁹ Federal courts will also look to state law to determine marital status for applicability of spousal privilege under Rule 501 of the Federal Rules of Evidence.¹⁰

Nevertheless, DOMA constitutes a mandate by Congress that the federal government not recognize same-sex marriages, even if valid in the state where they were entered into.¹¹ Congress was initially concerned that the State of Hawaii might legalize same-sex marriage¹² as a result of the then ongoing litigation in *Baehr v. Lewin*.¹³ As set forth in the House Judiciary Committee Report accompanying DOMA:

Recognition of same-sex “marriages” in Hawaii could also have profound implications for federal law as well. The word “marriage” appears in more than 800 sections of federal statutes and regulations, and the word “spouse” appears more than 3,100 times. With very limited exceptions, these terms are not defined in federal law.

With regard to the issue of same-sex “marriages,” federal reliance on state law definitions has not, of course, been at all problematic. Until the Hawaii situation, there was never any reason to make explicit what has always been implicit—namely, that only heterosexual couples could get married. And the Committee believes it can be stated with certainty that none of the federal statutes or regulations that use the words “marriage” or “spouse” were thought by even a single Member of Congress to refer to same-sex couples.

But if Hawaii does ultimately permit homosexuals to “marry,” that development could have profound practical implications for federal law. For to the extent that federal law has simply accepted state law determinations of who is married, a redefinition of marriage in Hawaii to include homosexual

7. 20 C.F.R. § 416.1806(a)(1).

8. *See, e.g., Lee v. Comm’r*, 550 F.2d 1201, 1201–02 (9th Cir. 1977). But note an exception to apply the “rule of validation” as recognized in *Estate of Borax v. Comm’r*, 349 F.2d 666, 670 (2d Cir. 1965).

9. *See* 8 U.S.C. § 1186a(d)(1)(A) (2006) (requiring qualifying marriage for alien spouse to comply with laws of place where marriage occurred). *See also* *Chan v. Bell*, 464 F. Supp. 125, 130, 132 (D.D.C. 1978) (recognizing the authority of the states, rather than the INS, to determine marriage validity outside of fraud).

10. *United States v. Lustig*, 555 F.2d 737, 747 (9th Cir. 1977); *United States v. Panetta*, 436 F. Supp. 114, 125 (E.D. Pa. 1977), *aff’d*, 568 F.2d 771 (3d Cir. 1978).

11. Defense of Marriage Act, Pub. L. No. 104-199, § 2(a), 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C (2006)).

12. *See* H.R. REP. NO. 104-664, at 2 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906.

13. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

couples could make such couples eligible for a whole range of federal rights and benefits.¹⁴

Ironically, while the *Baehr* litigation was pending, the voters in Hawaii amended the state constitution to bar same-sex marriages, so such marriages were never legalized there.¹⁵ However, at this writing,¹⁶ five states do permit same-sex couples to marry: Massachusetts (as of 2004);¹⁷ Connecticut (2008);¹⁸ Iowa (2009),¹⁹ Vermont (2009),²⁰ and New Hampshire (enacted 2009, effective 2010).²¹ On Dec. 18, 2009, Washington, D.C. Mayor Adrian Fenty signed Bill 18-482, which legalized same-sex marriage in the District of Columbia effective March 2010,²² after Chief Justice John Roberts, acting as circuit justice for the District, refused to issue a stay.²³ Additionally, California permitted same-sex couples to enter into marriage for approximately six months in 2008,²⁴ during which there were approximately 18,000 such unions.²⁵ California voters approved Proposition 8 in November 2008, banning such marriages, and, while the California Supreme Court subsequently upheld Proposition 8, it also ruled that interim California same-sex marriages remained valid.²⁶

Beyond the states that permit—or in the case of California, have temporarily permitted—same-sex couples to marry, there are two other groups of states whose laws in this area implicate DOMA and Social Security benefits.

14. H.R. REP. NO. 104-664, pt. 4, at 10, *reprinted in* 1996 U.S.C.C.A.N. at 2914 (citations omitted).

15. *See Baehr v. Miike*, No. 29371, 1999 Haw. LEXIS 391, at *5-8 (Haw. Dec. 9, 1999) (recognizing constitutional amendment abrogating *Baehr v. Lewin*).

16. April 2010.

17. *Opinions of the Justices*, 802 N.E.2d 565, 572 (Mass. 2004).

18. *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 482 (Conn. 2008).

19. *Varnum v. Brien*, 763 N.W.2d 862, 907 (Iowa 2009).

20. VT. STAT. ANN. tit. 15, § 8 (Supp. 2009). *See Vermont Lawmakers Enact Same-Sex Marriage Bill*, 35 Fam. L. Rep. (BNA) No. 21, at 1251 (Apr. 7, 2009) [hereinafter *Vermont Lawmakers*].

21. An Act Relative to Civil Marriage and Civil Unions, 2009 N.H. Laws 60 (allowing persons to marry without regard to gender).

22. *See Fate of Same-Sex Marriage in D.C. Rests in Hands of Congress*, 36 Fam. L. Rep. (BNA) No. 8, at 1095 (Dec. 22, 2009). *See also Marriage—Homosexuality—District of Columbia—Law Takes Effect*, 36 Fam. L. Rep. (BNA) No. 18, at 1215 (Mar. 9, 2010) (noting that several same sex couples married in D.C. the first day possible under changed law).

23. *Jackson v. D.C. Bd. of Elections & Ethics*, 130 S. Ct. 1279, 1280 (2010).

24. *In re Marriage Cases*, 183 P.3d 384, 402 (Cal. 2008).

25. *California High Court Upholds Same-Sex Marriage Ban*, CNN.COM, (May 27, 2009, 8:20 AM), <http://www.cnn.com/2009/US/05/26/california.same.sex.marriage/index.html>.

26. *Strauss v. Horton*, 207 P.3d 48, 64, 119 (Cal. 2009). Whether Proposition 8 passes federal muster is another question. *See Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1003 (N.D. Cal. 2010) (declaring Proposition 8 unconstitutionally violates the Equal Protection and Due Process Clauses).

First, there are those states that, while they do not permit same-sex couples to marry within their jurisdiction, will recognize the validity of a same-sex marriage entered into elsewhere. New York State falls into this category.²⁷ In May 2009, prior to allowing same-sex marriages to be performed there, the Washington, D.C. Council also voted to recognize same-sex marriages from other jurisdictions.²⁸ In May 2010, the Maryland Department of Budget and Management announced that it was extending health benefits to the same-sex spouses of active and retired state employees who were married in another state.²⁹

Second, there are several states which permit same-sex couples to enter into variously named forms of legally recognized quasi-marriages. In the midst of the *Baehr v. Lewin* litigation, the Hawaii legislature enacted a law in 1997 allowing same-sex couples to become “reciprocal beneficiaries” with many of the “rights and benefits which are presently available only to married couples.”³⁰ Similarly, Vermont created “civil unions” for same-sex couples in 1999³¹ after its supreme court ruled that denying such couples the benefits of marriage violated the state constitution.³² Vermont granted parties to civil unions “all the same benefits, protections, and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage.”³³ In 2009, when Vermont amended its marriage law to permit same-sex couples to marry, it also repealed the procedure for such couples to enter civil unions, allowed existing civil unions to continue, and allowed parties to civil unions to marry their civil union partners if they so chose.³⁴ In 2004, New Jersey enacted its “Domestic Partnership Act,” permitting same-sex and opposite-sex couples to register as domestic partners and obtain some of the rights of married couples.³⁵ In late 2006, New Jersey enacted a Civil Union Act, amending the 2004 Domestic Partnership Act.³⁶ Under the Civil Union Act,

27. See *Godfrey v. Spano*, 920 N.E.2d 328, 337 (N.Y. 2009).

28. See Tim Craig, *Uproar in D.C. as Same-Sex Marriage Gains*, WASH. POST, May 6, 2009, at A7.

29. *Maryland Offers Health Benefits to Workers in Same-Sex Marriages from Other States*, 36 Fam. L. Rep. (BNA) No. 28, at 1335 (May 25, 2010).

30. 1997 Haw. Sess. Laws 1211. This Act became effective July 1, 1997.

31. An Act Relating to Civil Unions, 2000 Vt. Acts & Resolves 72–73.

32. *Baker v. State*, 744 A.2d 864, 867 (Vt. 1999). *But see Vermont Lawmakers Enact Same-Sex Marriage Bill*, 35 Fam. L. Rep. (BNA) No. 21, at 1251 (Apr. 7, 2009) (discussing the later grant to same-sex couples of full marriage rights).

33. 2000 Vt. Acts & Resolves 73 (codified with some differences in language at VT. STAT. ANN. tit. 15, ch. 23 § 1204(a) (2009)).

34. VT. STAT. ANN. tit. 15, § 8 (Supp. 2009); *Vermont Lawmakers*, *supra* note 20, at 1251.

35. Domestic Partnership Act, 2003 N.J. Laws 1, 4.

36. Act of Dec. 21, 2006, 2006 N.J. Laws 1, 3–7 (codified at N.J. STAT. ANN. § 37:1–28 (West 2002 & Supp. 2008) (responding to *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006)).

two eligible individuals of the same sex can enter a civil union and “receive the same benefits and protections and be subject to the same responsibilities as spouses in a marriage.”³⁷

It appears certain that the intention of Section 3 of DOMA was to deny federal marriage-based benefits to same-sex couples, or individual parties to same-sex couples, in state recognized marriages, reciprocal beneficiary relationships, civil unions, domestic partnerships, or any otherwise-labeled state legal status.³⁸ What is far from clear is the effect, if any, of DOMA on federal benefits for children born or adopted into such legal relationships. The language from the House Judiciary Committee Report,³⁹ expresses a concern that if Hawaii permitted homosexuals to marry, this “could make such *couples* eligible for a whole range of federal rights and benefits.”⁴⁰ In a later section, entitled “H.R. 3396 Advances the Government’s Interest in Preserving Scarce Government Resources,” the report is even more explicit, but again, only regarding couples, not their children:

[I]f Hawaii (or some other State) were to permit homosexuals to “marry,” these marital benefits would, absent some legislative response, presumably have to be made available to homosexual couples and surviving spouses of homosexual “marriages” on the same terms as they are now available to opposite-sex married couples and spouses. To deny federal recognition to same-sex “marriages” will thus preserve scarce government resources, surely a legitimate government purpose.⁴¹

Likewise, in his Signing Statement for DOMA, President Clinton made clear his understanding that Section 3 addressed only federal benefits for “spouses” in same-sex relationships:

I have long opposed governmental recognition of same-gender marriages and this legislation is consistent with that position. The act confirms the right of each State to determine its own policy with respect to same-gender marriage and clarifies for purposes of Federal law the operative meaning of the terms “marriage” and “spouse.”

This legislation does not reach beyond those two provisions.⁴²

While preserving scarce government resources is admittedly a legitimate government purpose,⁴³ the discretion to grant benefits to some but not to others

37. N.J. STAT. § 37:1–29 (2007). *See also id.* § 37:1–31 (detailing the rights and responsibilities of civil union couples).

38. *See* H.R. REP. NO. 104-664, at 31 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2935.

39. *See supra* text accompanying note 14.

40. *See* H.R. REP. NO. 104-664, at 10, *reprinted in* 1996 U.S.C.C.A.N. at 2914.

41. *Id.* at 18, 1996 U.S.C.C.A.N. at 2922.

42. Presidential Statement on Same-Gender Marriage, 32 WEEKLY COMP. PRES. DOC. 1829, 1830 (Sept. 20, 1996).

43. *See Bowen v. Owens*, 476 U.S. 340, 345 (1986).

cannot be “clearly wrong, a display of arbitrary power, not an exercise of judgment.”⁴⁴

The legality of denying federal benefits to state recognized same-sex spouses is, however, increasingly being challenged. February 2009, Ninth Circuit Judge Stephen Reinhart issued an order in *In re Levenson*, directing that Mr. Levenson’s same-sex California spouse be added to Levenson’s federal health, dental and vision benefits.⁴⁵ The benefits-plan administrator had denied Levenson’s request to add his spouse—made three days after they were legally married in California.⁴⁶ Judge Reinhart found that the application of DOMA to deny benefits to Mr. Levenson’s same-sex spouse violated the Due Process Clause of the Fifth Amendment and could not “survive even rational basis review.”⁴⁷ Regarding the government interest in preserving scarce resources, Judge Reinhart opined:

The denial of health insurance to same-sex spouses may in a comparatively few cases relieve the government of paying its portion of a family coverage premium. However, that a government policy incidentally saves the government an insignificant amount of money does not provide a rational basis for that policy if the policy is, as a cost-saving measure, drastically underinclusive, let alone founded upon a prohibited or arbitrary ground. That rule applies here: There is no rational relationship between the sex of an employee’s spouse and the government’s desire to limit its employee health insurance outlays; the government could save far more money using other measures, such as by eliminating coverage for all spouses; and the application of DOMA in this context sometimes saves the government no money at all.⁴⁸

When Levenson’s same-sex spouse was still not enrolled in his health care plan after several months because the Office of Personnel Management (OPM) prevented his enrollment, Judge Reinhart entered a subsequent order directing the office of the Federal Public Defender for the Central District of California to pay Levenson a monetary award under the Back Pay Act in an amount equal to the wrongfully denied benefits.⁴⁹

In March 2009, Gay & Lesbian Advocates & Defenders (GLAD) filed suit in the United States District Court for the District of Massachusetts directly challenging the legality of DOMA’s provision denying federal benefits to

44. *Mathews v. De Castro*, 429 U.S. 181, 185 (1976) (quoting *Helvering v. Davis*, 301 U.S. 619, 640 (1937)).

45. *In re Levenson*, 560 F.3d 1145, 1151 (9th Cir. 2009).

46. *Id.* at 1146.

47. *Id.* at 1149.

48. *Id.* at 1150–51 (citations omitted).

49. *In re Levenson*, 587 F.3d 925, 937 (9th Cir. 2009). Ninth Circuit Chief Justice Alex Kozinski entered similar orders on behalf of a staff attorney, Karen Golinski, who had legally married her same-sex partner in California. *In re Golinski*, 587 F.3d 956, 959 (9th Cir. 2009). Judge Kozinski, however, avoided a direct constitutional challenge to DOMA. *Id.* at 958.

same-sex couples married under state law.⁵⁰ The court found that “DOMA fail[ed] to pass constitutional muster even under the highly deferential rational basis test.”⁵¹ In so finding, the court explained that neither Congress’s rationales⁵² nor the government’s justifications⁵³ for DOMA established a rational relationship between the classification of “marriage” or “spouse” to a legitimate governmental objective.⁵⁴ As a result, the court held that DOMA was in violation of “core constitutional principles of equal protection”⁵⁵ and it granted the plaintiffs’ motion for summary judgment.⁵⁶

In June 2009, President Obama signed a Presidential Memorandum requesting an increase in benefits to same-sex domestic partners of federal employees:

For civil service employees, domestic partners of federal employees can be added to the long-term care insurance program; supervisors can also be required to allow employees to use their sick leave to take care of domestic partners and non-biological, non-adopted children. For foreign service employees, a number of benefits were identified, including the use of medical facilities at posts abroad, medical evacuation from posts abroad, and inclusion in family size for housing allocations.⁵⁷

In July 2009, the Commonwealth of Massachusetts sued the U.S. Departments of Health and Human Services and Veterans Affairs and the United States of America, asserting that DOMA “interferes with the Commonwealth’s sovereign authority to define and regulate marriage” and “constitutes an overreaching and discriminatory federal law.”⁵⁸ The complaint cited, among other detriments to same-sex couples, the denial of spousal Social Security benefits.⁵⁹ Addressing the claim that DOMA conserves scarce government resources, the complaint alleged:

50. Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374 (D. Mass. 2010).

51. *Id.* at 387.

52. The court listed the purported rationales: “(1) encouraging responsible procreation and child-bearing, (2) defending and nurturing the institution of traditional heterosexual marriage, (3) defending traditional notions of morality, and (4) preserving scarce resources.” *Id.* at 388.

53. The government’s rationale included “preserving the status quo.” *Id.* at 390.

54. *Id.*

55. Gill, 699 F. Supp. 2d at 387.

56. *Id.* at 397.

57. Press Release, Office of the Press Sec’y, Fact Sheet: Presidential Memorandum on Fed. Benefits & Non-Discrimination (June 17, 2009), available at http://www.whitehouse.gov/the_press_office/Fact-Sheet-Presidential-Memorandum-on-Federal-Benefits-and-Non-Discrimination. See also Federal Benefits and Non-Discrimination, 70 Fed. Reg. 29,393 (June 22, 2009).

58. Complaint at 1, Massachusetts v. U.S. Dep’t of Health & Human Servs., 698 F. Supp. 2d 234 (D. Mass. 2010) (No. 1:09-11156-JLT).

59. *Id.* at 12.

DOMA was also enacted for the purported purpose of preserving federal resources by denying benefits and entitlements to married individuals in same-sex relationships who would qualify for such benefits if they were in a different-sex relationship. The Congressional Budget Office, however, has estimated that, if marriages between same-sex couples were recognized in all fifty states and by the federal government, the federal budget would benefit by \$500 million to \$900 million annually. This net benefit is due to estimated increased revenues through income and estate taxes and decreased outlays for Supplemental Security Income, Medicaid, and Medicare.⁶⁰

The district court agreed with the plaintiffs, and found DOMA unconstitutional on a number of grounds.⁶¹ The court found that DOMA, by violating the Equal Protection Clause, “impose[d] an unconstitutional restriction on the receipt of federal funding.”⁶² Additionally, by defining marriage in DOMA, Congress “encroache[d] upon the firmly entrenched province of the state” and thereby ran afoul of the Tenth Amendment.⁶³

The focus on DOMA’s consequences for same-sex couples, while certainly understandable, obscures the effect on the already tangled law governing derivative Social Security benefits for children of wage-earners. This article will first set forth the complex rules for determining who is the dependent child of an insured wage earner. It then examines the inconsistent application of those rules to cases involving children conceived using the frozen sperm of their deceased fathers. This article next addresses the difficult issues that have arisen in the family law context regarding the legal status of a same-sex couple’s child who is not the biological or adoptive child of one member of that couple, and, against that background, analyzes DOMA’s ramifications on the non-biological, non-adoptive child of one member of a same-sex couple who dies or becomes eligible for Social Security benefits. Finally, the article will enunciate a set of basic principles and specific child-oriented reforms to end the disadvantages faced by certain children of non-traditional families in securing needed Social Security benefits.

I. BACKGROUND: WHO IS THE DEPENDENT CHILD OF AN INSURED WAGE EARNER?

The Social Security Administration (SSA) provides monthly benefits, commonly known as Child’s Insurance Benefits, to the dependent child of an insured wage earner (an insured) who is disabled, retired, or deceased.⁶⁴ In the

60. *Id.* at 10–11 (citations omitted).

61. *Massachusetts v. Dep’t of Health & Human Serv.*, 698 F. Supp. 2d 234, 236 (D. Mass. 2010).

62. *Id.* at 248.

63. *Id.* at 253.

64. 42 U.S.C. § 402(d)(1) (2006).

ordinary course of events, there is no question as to who is the child of an insured wage earner. But as in family law, particularly where parents are not, or were not, married to each other, the SSA may be called upon to adjudicate legal parenthood as a predicate to a child's receipt of derivative—also known as auxiliary—benefits.⁶⁵ And, as in family law, a child may in some circumstances be deemed not to be a person's *legal* child for Social Security purposes—even though she is that person's *biological* child.⁶⁶

The Social Security Act contains complex rules for determining who is an insured's child⁶⁷ and when the child is dependent upon a wage-earner.⁶⁸ A child under the Social Security Act, includes the “child or legally adopted child of an individual,” and, in some circumstances, a stepchild or grandchild of an individual.⁶⁹ The SSA's regulations impose further requirements (or clarifications, depending on one's point of view) for determining who is an individual's child.⁷⁰ As with the rules governing who is married, these rules significantly defer to state law.⁷¹ A child is the natural child of an insured wage earner if any one of the following conditions is met:

1. “[The child] could inherit the insured's personal property as his or her natural child under State inheritance laws . . .”⁷²
2. “[The child is] the insured's natural child and the . . . [child's] mother or father went through a ceremony which would have resulted in a valid marriage between them except for a ‘legal impediment’ [that prevented the marriage from being valid.]”⁷³ Such a legal impediment will be found if the couple married in good faith, but one of them was unknowingly still married to someone else at the time of the ceremony⁷⁴ or a “defect in the procedure followed.”⁷⁵

65. *See id.* § 416(h).

66. *See, e.g.,* Michael H. v. Gerald D., 491 U.S. 110, 130 (1989).

67. 42 U.S.C. § 416(e).

68. *Id.* § 402(d).

69. *Id.* § 416(e).

70. 20 C.F.R. §§ 404.354–404.358 (2009).

71. *Id.*

72. *Id.* § 404.355(a)(1). The U.S. Supreme Court has issued a series of inconsistent opinions in cases challenging state intestacy laws regarding children born out of wedlock. *Compare* Labine v. Vincent, 401 U.S. 532, 537–40 (1971) (holding that Louisiana intestacy laws precluding illegitimate children from inheritance rights of legitimate children were not in contravention of due process or equal protection clauses), *with* Trimble v. Gordon, 430 U.S. 762, 776 (1977) (holding that Illinois probate act classifying child inheritance rights based on illegitimacy denied equal protection), *and* Lalli v. Lalli, 439 U.S. 259, 275 (1978) (holding that a New York statute requiring filiation order for illegitimate children to inherit from father did not violate equal protection).

73. 20 C.F.R. § 404.355(a)(2).

74. *Id.* § 404.346(a). There is considerable and conflicting state law on successive marriages. *Compare* Chandler v. Cent. Oil Corp., 853 P.2d 649, 654 (Kan. 1993) (finding that

3. “[The child is] the insured’s natural child and [the child’s] mother or father has not married the insured, but the insured has either acknowledged in writing . . . [that the child is his], been decreed by a court to be [the child’s] father or mother, or been ordered by a court to contribute to [child] support.”⁷⁶ However, “[i]f the insured is deceased, the acknowledgement, court decree, or court order must have been made or issued before his or her death.”⁷⁷
4. Where the child’s biological parent has not married the insured, and the child cannot furnish evidence of an acknowledgement, court decree or court order, the child may produce other evidence to demonstrate his or her status as the child of the insured. However, in this circumstance, the child must also “show that the insured was either living with [the child] or contributing to [the child’s] support at the time [the child] applied for benefits,” or, “if the insured [was] not alive at the time . . . [the child] must have evidence to show that the insured was either living with . . . or contributing to [the child’s] support” at the time the insured died.⁷⁸

Under certain circumstances, a legally adopted child may be awarded benefits as the child of the insured.⁷⁹ Again, the SSA looks to the law of the state (or foreign country if the adoption took place there) to determine the validity of an adoption.⁸⁰ Likewise, under certain circumstances, a stepchild may receive benefits if, after his or her birth, the natural or adopting parent married the insured.⁸¹ The SSA will look to state law to determine the validity of the marriage,⁸² unless of course, it is a same-sex marriage which DOMA prevents the SSA from recognizing.⁸³ In limited circumstances, benefits may

burden is on spouse from earlier marriage to overcome presumption of validity of later marriage), *with Estate of Henry*, 353 A.2d 812, 813–14 (Pa. 1976) (finding that “presumption of continuance of prior marriage prevails unless facts are shown which have the effect of overcoming this presumption”).

75. 20 C.F.R. § 404.346(a). *Compare* *Accounts Mgmt., Inc. v. Litchfield*, 576 N.W.2d 233, 235 (S.D. 1998) (holding that failure to record marriage license did not render marriage void), *with Ravenal v. Ravenal*, 338 N.Y.S.2d 324, 328 (1972) (holding that marriage ceremony performed by someone other than a clergyman or minister rendered such marriage void).

76. 20 C.F.R. § 404.355(a)(3). What will constitute a legally acceptable acknowledgment of paternity may be a contentious issue. *See, e.g., Lalli*, 439 U.S. at 266–67.

77. 20 C.F.R. § 404.355(a)(3). For an extreme example of a paternity order entered decades after the father’s death, see *Harris v. Johnson (In re Estate of Johnson)*, 767 So. 2d 181 (Miss. 2000).

78. 20 C.F.R. § 404.355(a)(4).

79. *Id.* § 404.356.

80. *Id.*

81. *Id.* § 404.357.

82. *Id.*

83. *See supra* note 4 and accompanying text.

also be available to an insured's grandchild or step-grandchild,⁸⁴ or equitably adopted child.⁸⁵

For each of these categories of children, there are somewhat different rules for determining dependency on the insured, which is a necessary element for receipt of benefits.⁸⁶ The following section of this article discusses cases involving children conceived after the death of their father, illustrating the difficulties inherent in applying state law to federal benefits, especially where state and federal statutes simply do not address new reproductive technologies. These cases also provide the necessary background for understanding how DOMA may harm children brought into non-traditional families in non-traditional ways.

II. THE SSA AND CHILDREN CONCEIVED AFTER THE DEATH OF A PARENT

A. *Judith Hart (Louisiana)*

A decade before enactment of DOMA, advances in artificial reproductive technology already presented challenges to the SSA in applying the Social Security Act to situations which Congress had surely not envisioned when it drafted the relevant statutory language. The first such case to draw national publicity was that of Judith Hart, the biological child of Nancy Young Hart and Edward W. Hart Jr.⁸⁷ Judith was conceived by gamete intrafallopian transfer three months after her father's death.⁸⁸ The Harts had been married for four years, a time during which they tried unsuccessfully to conceive.⁸⁹ In 1990, Edward was diagnosed with esophageal cancer.⁹⁰ After receiving the diagnosis, but before starting chemotherapy, Edward had a sperm sample taken and frozen for the specific purpose of having Nancy later impregnated with his child.⁹¹ Edward died within a few months, and, after his death, Nancy utilized

84. 20 C.F.R. § 404.358.

85. *Id.* § 404.359.

86. *Id.* §§ 404.360–404.365.

87. Gloria J. Banks, *Traditional Concepts and Nontraditional Conceptions: Social Security Survivor's Benefits for Posthumously Conceived Children*, 32 LOY. L.A. L. REV. 251, 251 (1999). See also Mark Curriden, *A Dad for Judith Hart: Judge Says Child Eligible for Benefits*, A.B.A. J., Aug. 1995, at 30, 30 [hereinafter Curriden, *A Dad for Judith Hart*]; Mark Curriden, *No Benefits for "Miracle" Baby: Suit by Artificially Inseminated Mother Seeks Reversal*, A.B.A. J., Mar. 1995, at 18, 18 [hereinafter Curriden, *No Benefits*]; Joseph Wharton, *"Miracle" Baby Denied Benefits*, A.B.A. J., Feb. 1996, at 38, 38 [hereinafter Wharton, *Miracle Baby*]; Joseph Wharton, *Social Security Case Settled*, A.B.A. J., May 1996, at 40, 40 [hereinafter Wharton, *Social Security*].

88. Banks, *supra* note 87, at 251.

89. Curriden, *No Benefits*, *supra* note 87, at 18.

90. *Id.*

91. *Id.*

the frozen sperm.⁹² Judith was the happy result, born on June 4, 1991, ten days short of a year after Edward's death.⁹³ Under the law of Louisiana (Judith's state of birth), Judith was considered to be an illegitimate child because she was born more than 300 days after the dissolution of her parents' marriage caused by her father's death.⁹⁴ As an illegitimate child, Judith had to prove filiation within one year of the death of her father; but Nancy was unable to file within the statute of limitations because she was recovering from childbirth and had not yet received a birth certificate for Judith.⁹⁵ Also, under Louisiana's laws, Judith did not qualify as an heir of her father for intestacy purposes.⁹⁶ Furthermore, Judith could not show that Edward had acknowledged her, prior to his death, as his biological daughter.⁹⁷

In 1992, Nancy Hart applied to the SSA for Judith to receive survivor's benefits on Edward's account.⁹⁸ The SSA rejected her claims.⁹⁹ A Social Security Administrative Law Judge (ALJ) subsequently reversed the denial and directed that Judith, and therefore Nancy, receive survivor's benefits.¹⁰⁰ Unfortunately for Judith, the SSA's Appeals Council reopened the case on its own motion¹⁰¹ and reversed the ALJ, thus reinstating the SSA's denial of benefits.¹⁰² Having exhausted her administrative remedies, Nancy Hart filed suit on behalf of Judith in the United States District Court for the Eastern District of Louisiana.¹⁰³ However, that court never issued a ruling on Judith's status as the child of Edward Hart for SSA purposes. Rather, in March 1996, the Commissioner of the SSA, Shirley Chater, moved for a voluntary remand, announcing that the SSA would pay Judith survivor's benefits.¹⁰⁴ In so doing, Commissioner Chater stated:

This case raises significant policy issues that were not contemplated when the Social Security Act was passed many years ago. . . . Resolving these significant policy issues should involve the executive and legislative branches, rather than the courts.¹⁰⁵

92. Banks, *supra* note 87, at 251; Curriden, *No Benefits*, *supra* note 87, at 18.

93. Banks, *supra* note 87, at 251–52.

94. *Id.* at 252.

95. *Id.* It is, of course, possible that Nancy was simply unaware of the ten-day limitation she faced or that she was overwhelmed by the events surrounding childbirth. *See id.*

96. *Id.*

97. *Id.* at 253.

98. Banks, *supra* note 87, at 251–52.

99. *Id.*

100. *Id.* at 254.

101. 20 C.F.R. § 404.969 (2009); Banks, *supra* note 87, at 254.

102. Banks, *supra* note 87, at 254.

103. *Id.* at 255.

104. *Id.* at 255–56; Wharton, *Social Security*, *supra* note 87, at 40.

105. Wharton, *Social Security*, *supra* note 87, at 40.

As will be seen, more than a decade later, the legislative and executive branches have not resolved those issues, and by default they continue to be adjudicated by the courts under a statute that SSA admits was not drafted in contemplation of those issues.¹⁰⁶ Not only has Congress failed to update the Social Security Act to address modern reproductive technologies, but the states, by-and-large, have generally failed to make adjustments in their laws.¹⁰⁷ Nor have subsequent Social Security commissioners acted so generously toward children conceived by non-traditional methods, as did Commissioner Chater. The result has been a definite “mixed bag” for such children.

B. Amanda and Elyse Kolacy (New Jersey)

In a case tragically similar to that of the Hart family, Mariantonia and William Kolacy were a young married couple in New Jersey trying to conceive when William was diagnosed in 1994 with leukemia.¹⁰⁸ William provided two sperm samples, which Mariantonia banked.¹⁰⁹ Despite chemotherapy, William died in 1995 at the age of 26.¹¹⁰ Almost exactly a year later, in accordance with her late husband’s wishes,¹¹¹ Mariantonia used his sperm and her eggs at Cornell’s infertility clinic to create embryos that were implanted in her.¹¹² The result was the birth of Amanda and Elyse Kolacy in November 1996, more than 18 months after their father’s death.¹¹³ Thereafter, Mariantonia applied to the SSA for dependent child benefits for Amanda and Elyse on William’s account.¹¹⁴

The SSA denied the twins’ claim, and a Social Security ALJ affirmed that denial in a written opinion in November 1999.¹¹⁵ Mariantonia then brought suit in New Jersey state court seeking a declaratory judgment that Amanda and Elyse have the status of William’s intestate heirs.¹¹⁶ Because Mariantonia asserted, *inter alia*, that the New Jersey Parentage Act was unconstitutional,

106. *Id.*

107. See Robert E. Rains, *What the Erie “Surrogate Triplets” Can Teach State Legislatures About the Need to Enact Article 8 of the Uniform Parentage Act (2000)*, 56 CLEV. ST. L. REV. 1, 3 (2008).

108. *In re Estate of Kolacy*, 753 A.2d 1257, 1258 (N.J. Super. Ct. Ch. Div. 2000).

109. *Id.*

110. *Id.*

111. *Id.* at 1263.

112. *Id.* at 1258.

113. *Estate of Kolacy*, 753 A.2d at 1258.

114. *Id.* at 1259.

115. *Id.*

116. *Id.* at 1258.

the New Jersey Attorney General appeared to defend the statute.¹¹⁷ Neither the SSA nor its Commissioner was a party to the proceedings.¹¹⁸

Unlike the *Hart* case, the *Kolacy* case proceeded to a decision on the merits. Judge Stanton recognized that there was no New Jersey precedent governing whether a child conceived after the death of her biological father, and born more than 18 months after his death, is his legal heir.¹¹⁹ The New Jersey Statute provided in relevant part: “Relatives of the decedent conceived before his death but born thereafter inherit as if they had been born in the lifetime of the decedent.”¹²⁰ Mirroring the Commissioner of the SSA’s comments about the Social Security Act, Judge Stanton acknowledged that the New Jersey legislature “was not giving any thought whatever to th[is] kind of problem” when it enacted the intestacy provision.¹²¹ While recognizing “[i]t would undoubtedly be useful for the Legislature to [address] . . . the issues presented by reproductive technology,” Judge Stanton nevertheless declined the state attorney general’s invitation to abstain from deciding the case on the merits.¹²² The judge likewise declined Mariantonia’s invitation to hold the statute unconstitutional.¹²³ Rather, Judge Stanton reasoned that the intent of the law was to include children—such as the twins—where it was clear that they were the biological children of the deceased parent and that the deceased parent had “unequivocally expressed his desire that [the mother] use his stored sperm after his death to bear his children.”¹²⁴

I discern a basic legislative intent to enable children to take property from their parents and through their parents from parental relatives. Although the Legislature has not dealt with the kind of issue presented by children such as Amanda and Elyse, it has manifested a general intent that the children of a decedent should be amply provided for with respect to property passing from him or through him as the result of a death. It is my view that the general intent should prevail over a restrictive, literal reading of statutes which did not consciously purport to deal with the kind of problem before us.¹²⁵

117. *Id.*

118. *Estate of Kolacy*, 753 A.2d at 1258.

119. *Id.* at 1260.

120. *Id.* (quoting N.J. REV. STAT. § 3B: 5-8). After the decision in *Kolacy*, the New Jersey legislature amended this section on “after born heirs” to read as follows: “An individual in gestation at a particular time is treated as living at the time if the individual lives 120 hours or more after birth.” 2004 N.J. Laws 1442 (codified at N.J. REV. STAT. § 3B:5-8 (2004)). Under this test, Amanda and Elyse were “living” less than eighteen months after William’s death.

121. *Estate of Kolacy*, 753 A.2d at 1261.

122. *Id.*

123. *Id.* at 1260.

124. *Id.* at 1262–63.

125. *Id.* at 1262.

Accordingly, Amanda and Elyse were the legal heirs of William Kolacy under the intestacy laws of New Jersey.¹²⁶ Given that conclusion by the New Jersey court, this would make Amanda and Elyse entitled to survivor's benefits as the dependent children of the wage-earner, William.¹²⁷

C. *The Woodward Twins (Massachusetts)*

In another case eerily similar to the fact patterns in *Hart* and *Kolacy*, Lauren Woodward and her husband, Warren, were a childless couple in Massachusetts when he was diagnosed with leukemia in January 1993.¹²⁸ The Woodwards banked Warren's sperm and he then underwent a bone marrow transplant.¹²⁹ Nevertheless, Warren died in October 1993, and Lauren was appointed the administratrix of his estate.¹³⁰ Subsequently, Lauren successfully conceived using Warren's stored sperm and later gave birth to twin girls in October 1995.¹³¹

In January 1996, Lauren applied to the SSA for children's benefits for the twins and mother's benefits for herself, as survivors of the wage-earner, Warren.¹³² The SSA rejected these claims on the grounds that the twins were not Warren's children under the Social Security Act.¹³³

In February 1996, while pursuing her appeals within the Social Security administrative system, Lauren filed an action in the state Probate and Family Court "for correction of birth record."¹³⁴ Acting in dual capacities as: 1) wife/mother and 2) administratrix of the estate, Lauren filed a stipulation of "voluntary acknowledgement of parentage."¹³⁵ Based on this stipulation, the Probate Court judge entered a judgment of paternity and an order to amend both birth certificates declaring the deceased Warren to be the twins' father.¹³⁶

Notwithstanding the judgment of paternity and amended birth certificates, a Social Security ALJ affirmed the denial of benefits, finding that the Massachusetts intestacy and paternity laws precluded the twins' inheritance from Warren.¹³⁷ After the SSA's Appeals Council denied review, Lauren filed a complaint seeking judicial review in the United States District Court for the

126. *Estate of Kolacy*, 753 A.2d at 1263–64.

127. See 20 C.F.R. §§ 404.355(a)(1), 404.361(a).

128. *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257, 260 (Mass. 2002).

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Woodward*, 760 N.E.2d at 260.

134. *Id.*

135. *Id.* at 260–61.

136. *Id.*

137. *Id.* at 261.

District of Massachusetts.¹³⁸ That court certified the following question to the Massachusetts Supreme Judicial Court (SJC):

If a married man and woman arrange for sperm to be withdrawn from the husband for the purpose of artificially impregnating the wife, and the woman is impregnated with that sperm after the man, her husband, has died, will children resulting from such pregnancy enjoy the inheritance rights of natural children under Massachusetts' law of intestate succession?¹³⁹

To this question the Massachusetts SJC responded with a "definite maybe."¹⁴⁰ The court rejected both Lauren's position that posthumously conceived children must always be allowed to inherit from their biological parent by virtue of their genetic connection and the SSA's position that such children can never inherit because they were not "in being" prior to the parent's death.¹⁴¹ The court noted that the Massachusetts intestacy statute, unlike those of Louisiana and North Dakota, has no requirement that a successor must exist at the death of the decedent.¹⁴²

The court recognized that the case implicates three important State interests: the best interests of children, the orderly administration of estates, and the reproductive rights of the deceased genetic parent.¹⁴³ Clearly it is in the best interest of posthumously conceived children to receive monetary support from their parents' estates.¹⁴⁴ However, such rights necessarily conflict with the rights of the deceased's other children.¹⁴⁵ The intestacy statute promotes the orderly administration of estates by requiring "certainty of filiation" and creating limitation periods for actions against the intestate estate.¹⁴⁶ Because death of one spouse necessarily terminates a marriage, "posthumously conceived children are always nonmarital."¹⁴⁷ Although the Massachusetts intestacy laws have a one-year period for commencing paternity claims, the certified question did not include the timeliness of the twins' claims.¹⁴⁸

Regarding the state's interests to honor the reproductive choices of individuals, the court concluded that "donor parent must clearly and

138. *Woodward*, 760 N.E.2d at 261.

139. *Id.* at 259.

140. *Id.*

141. *Id.* at 262.

142. *Id.* at 264 (citing LA. CIV. CODE ANN. art. 939 (West 2000); *see also* N.D. CENT. CODE ANN. 14-18-04 (Michie 1997)). The Louisiana statute, effective July 1, 1999, was not in existence at the time of the birth of Judith Hall. *See discussion supra* Part II.A.

143. *Woodward*, 760 N.E.2d at 265-68.

144. *Id.* at 265.

145. *Id.* at 266.

146. *Id.*

147. *Id.* at 266-67.

148. *Woodward*, 760 N.E.2d at 267-68.

unequivocally consent not only to posthumous reproduction but also to the support of any resulting child.”¹⁴⁹ Despite using the language “clearly and unequivocally,” the court explicitly declined to explicate “what proof would be sufficient.”¹⁵⁰ Indeed, it seems unlikely that a young man under a death sentence of terminal illness, trying to make it possible for his wife to carry his child after his death, would ordinarily be making explicit plans to support such a child from the next world. And, even though there is a certain logic to the court’s conclusion that such a child is non-marital if conceived after the death of the father, both husband and wife might well assume to the contrary—if they thought about the matter at all.

The SJC thus found that mere genetics are not sufficient to establish legal parentage and left the question to the district court for further evaluation after Mrs. Woodward presented evidence of Warren’s intent.¹⁵¹ Finally, the SJC rebuked the Probate and Family Court judge for entering the paternity judgment and amending the twins’ birth certificates without giving notice to every other interested party, including potential heirs.¹⁵²

D. *Juliet and Piers Netting (Arizona)*

In yet another case with starkly similar facts, Rhonda Gillett-Netting filed a claim for survivor’s benefits for her twins, Juliet and Piers Netting.¹⁵³ Rhonda and Robert were a married couple in Arizona, trying to conceive, when he was diagnosed with cancer in December 1994.¹⁵⁴ He delayed the start of therapy in order to deposit his sperm, which was cryogenically preserved.¹⁵⁵ Despite chemotherapy, Robert died on February 4, 1995.¹⁵⁶ Before he died, Robert confirmed that he wanted Rhonda to have his child using his frozen sperm.¹⁵⁷ Rhonda underwent in vitro fertilization in December 1995, and gave birth to the twins on August 6, 1996.¹⁵⁸

149. *Id.* at 269.

150. *Id.* at 270.

151. *Id.* at 271. In this regard, the Massachusetts SJC misconceived the function of a federal district court reviewing a denial of Social Security benefits. The reviewing federal court does *not* take additional evidence. See *Gillett-Netting v. Barnhart*, 371 F.3d 593, 595 (9th Cir. 2004). It only reviews the administrative record made below. *Id.* If the record is incomplete, it may remand the case and “order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding.” 42 U.S.C. § 405(g) (2006).

152. *Woodward*, 760 N.E.2d at 271.

153. *Gillett-Netting*, 371 F.3d at 594.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 595.

158. *Gillett-Netting*, 371 F.3d at 595.

In one potentially significant regard, this case was factually different from the three preceding ones. Robert, who was 59 years old at the time of his marriage to Rhonda in 1993, had three children from a prior marriage.¹⁵⁹

Rhonda filed for children's benefits for the twins in August 1996 based on Robert's earnings record, and the SSA rejected that claim.¹⁶⁰ At the third administrative level, a Social Security ALJ ruled that the twins were not dependent on Robert, because, "the last possible time to determine dependents [sic] on the wage earner's account is the date of the death of the wage earner."¹⁶¹ After losing the claim before the SSA's Appeals Council, Rhonda filed for judicial review in the United States District Court for the District of Arizona.¹⁶² She asserted that the twins were Robert's surviving, dependent children, and that denying them that status violated their equal protection rights.¹⁶³ District Court Judge Roll rejected these claims.¹⁶⁴

First, Judge Roll reasoned that one's biological children are not necessarily one's "children" for purposes of the Social Security Act.¹⁶⁵ He linked being the child of a wage-earner with the ability to inherit from the wage-earner under the state's intestacy laws.¹⁶⁶ As Judge Roll interpreted Arizona's intestacy laws, the twins could not inherit since they were neither born nor in gestation when Robert died.¹⁶⁷ Although this conclusion foreclosed benefits under the Social Security Act, Judge Roll went on to address whether the twins were dependent upon Robert.¹⁶⁸ He acknowledged that the United States Supreme Court stated in *Mathews v. Lucas*,¹⁶⁹ "a child who is legitimate . . . is considered to have been dependent at the time of the parent's death,"¹⁷⁰ and

159. *Gillett-Netting v. Barnhart*, 231 F. Supp. 2d 961, 963–64 (D. Ariz. 2002), *rev'd*, 371 F.3d 593 (9th Cir. 2004).

160. *Gillett-Netting*, 371 F.3d at 595.

161. *Id.*

162. *Id.*

163. *Gillett-Netting*, 231 F. Supp. 2d at 964.

164. *Id.* at 967.

165. *Id.* at 965.

166. *Id.* at 965.

167. *Id.* (interpreting ARIZ. REV. STAT. ANN. § 14-2108).

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

169. *Mathews v. Lucas*, 427 U.S. 495, 499–500 (1976).

170. *Gillett-Netting*, 231 F. Supp. 2d at 967 (quoting *Lucas*, 427 U.S. at 499–500). In *Lucas*, the Supreme Court upheld—against an equal protection challenge—the Social Security Act's requirement that certain illegitimate children show that the deceased wage earner was their parent and, at the time of his death, was living with those children or contributing to their support. *Lucas*, 427 U.S. at 515–16 (1976).

that “Arizona law treats all children as legitimate by statute.”¹⁷¹ Nevertheless, he concluded that the twins were not dependent on Robert.¹⁷²

Finally, applying the rational basis test, Judge Roll concluded that denying the twins dependent child status and hence survivors’ benefits did not violate their equal protection rights under the Fifth Amendment to the Constitution.¹⁷³ Relying on *Lucas*, he found that the Social Security Act’s “purpose in providing survivor’s benefits . . . is to replace the unanticipated lost support resulting from the decedent’s death.”¹⁷⁴ He reasoned that since Robert died before the twins were conceived, they suffered no unanticipated lost support.¹⁷⁵

It is, frankly, difficult to perceive where Judge Roll found the requirement that the loss of income be unanticipated. The passage in the *Lucas* decision to which Judge Roll refers does not support such a requirement. Rather, the Court in *Lucas* cited the “legislative history [which] indicat[ed] that the statute was not a general welfare provision for legitimate or otherwise ‘approved’ children of deceased insureds, but was intended just ‘to replace the support lost by a child when his father . . . dies.’”¹⁷⁶ Based on this legislative history, the *Lucas* Court concluded: “Taking this explanation at face value, we think it clear that conditioning entitlement upon dependency at the time of death is not impermissibly discriminatory in providing only for those children for whom the loss of the parent is an immediate source of the need.”¹⁷⁷

Judge Roll’s requirement that a loss of parental income be unanticipated simply does not withstand scrutiny. If a woman purposefully were to get pregnant by her terminally ill husband, knowing he was not even expected to live to see the child born, the resulting child would unquestionably be entitled to survivor’s benefits if the father was an insured wage-earner.¹⁷⁸ Additionally a wage earner who has already stopped working and is receiving Social

171. *Gillett-Netting*, 231 F. Supp. 2d at 967 (citing ARIZ. REV. STAT. ANN. § 8-601).

172. *Id.* at 967 (determining that the Arizona statute was meant to address the legitimacy children born to unwed couples and did not apply to the case at bar).

173. *Id.* at 970.

174. *Id.* (citing *Lucas*, 427 U.S. at 507).

175. *Id.*

176. *Lucas*, 427 U.S. at 507 (quoting S. REP. NO. 89-404, pt. 10 (1965), *reprinted in* 1965 U.S.C.C.A.N. 1943, 2050).

177. *Id.*

178. *See* 20 C.F.R. §§ 404.355, 404.361(a) (2010).

[T]he primary purpose of [Social Security child’s benefits] is to provide support for dependents of a disabled wage earner. . . . Under [the Social Security Administration’s] view the Act’s purpose would be to replace only that support enjoyed prior to the onset of disability; no child would be eligible to receive benefits unless the child had experienced actual support from the wage earner prior to the disability, and no child born after the onset of the wage earner’s disability would be allowed to recover. We do not read the statute as supporting that view of its purpose.

Jimenez v. Weinberger, 417 U.S. 628, 634 (1974).

Security Disability Insurance benefits can have a child who is immediately eligible for child's benefits on that parent's account.¹⁷⁹ In either of these situations, benefits are payable even though there was nothing unanticipated about the parent's loss of income. Indeed, had Rhonda conceived using Robert's preserved sperm the day before he died, the resulting child unquestionably would have been an eligible survivor.

In a rather brief opinion, the Ninth Circuit reversed.¹⁸⁰ As had prior courts, the Ninth Circuit noted that "[d]eveloping reproductive technology has outpaced federal and state laws."¹⁸¹ Neither the Social Security Act nor Arizona family law clarified the twins' status.¹⁸² Nevertheless, by virtue of the fact that the twins were Robert's biological children and their paternity was undisputed, they were his children under the Social Security Act for purposes of survivor's benefits.¹⁸³ Furthermore, because all children under Arizona family law are deemed to be legitimate and the Social Security Act equates legitimacy with dependency, the twins were Robert's dependent children.¹⁸⁴ As Robert's dependent children, they were statutorily entitled to survivor's benefits, which rendered their equal protection claim moot.¹⁸⁵

It is worthwhile to pause here and note a critical distinction between Arizona law and Massachusetts's law. In *Woodward*, the Massachusetts SJC had been clear that the Woodward twins were "nonmarital" children because they were conceived after their father's death.¹⁸⁶ In *Gillett-Netting*, the Ninth Circuit found that those twins were "legitimate" under Arizona law.¹⁸⁷ The *Gillett-Netting* Court never addressed whether the twins were marital or nonmarital children. Nevertheless, in a footnote, the court suggested that if a sperm donor had not been married to the mother, a resulting child would have to show actual dependency on the sperm donor father to be entitled to survivor's benefits on his earnings record.¹⁸⁸ Hence, implicitly at least, the Ninth Circuit deemed the *Gillett-Netting* twins to be marital children.¹⁸⁹

179. See 20 C.F.R. § 404.350(a) (2010).

180. *Gillett-Netting v. Barnhart*, 371 F.3d 593, 594 (9th Cir. 2004).

181. *Id.* at 595.

182. *Id.* at 595–96.

183. *Id.* at 597.

184. *Id.* at 598.

185. *Gillett-Netting*, 371 F.3d at 594 n.1.

186. *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257, 262 (Mass. 2002).

187. *Gillett-Netting*, 371 F.3d at 598.

188. *Id.* at 599 n.7.

189. In response to *Gillett-Netting*, the SSA issued an acquiescence ruling, AR 05-1(9), that applies only to the Ninth Circuit. SSAR 05-1(9), 70 Fed. Reg. 55,656, 55,656 (Sept. 22, 2005). SSA noted its disagreement with the Ninth Circuit's opinion, but directed its adjudicators within that circuit as follows:

In a claim for survivor's benefits, we will determine that a biological child of an insured individual who was conceived by artificial means after the insured's death is the

E. Robert Stephen (Florida)

Robert Stephen was the posthumously conceived child of Floridians Michelle Stephen and her deceased husband Gar Stephen.¹⁹⁰ Michelle and Gar's marriage was short-lived; they wed on October 25, 1997, and he died of a heart attack on November 17, 1997.¹⁹¹ The following day, Michelle "had Gar's sperm extracted from his deceased body and cryo-preserved."¹⁹² There was no indication that Gar had pre-approved the post-mortem extraction of his sperm, nor that he left a will.¹⁹³

Michelle became pregnant after multiple fruitless attempts at in vitro fertilization, and gave birth to Robert on June 20, 2001.¹⁹⁴ Michelle and Gar were listed as Robert's parents on his birth certificate.¹⁹⁵

In April 2002, Michelle filed an application with the SSA for Robert to receive surviving child's benefits on Gar's account.¹⁹⁶ The SSA turned down this claim both initially and on reconsideration; at the third administrative level, an ALJ affirmed the denial.¹⁹⁷ Applying Florida law, the ALJ reasoned that Robert was not Gar's dependent child as he could not inherit from Gar

insured's "child" for purposes of the Act. We will not apply section 216(h) of the Act in determining the child's status. In addition, if such child is considered legitimate under State law, we will consider the child to be the insured's "legitimate" child and thus deemed dependent upon the insured for purposes of section 202(d)(3) of the Act. All of the States and jurisdictions within the Ninth Circuit, except Guam, have eliminated distinctions between legitimate and illegitimate children. These States allow all children the same rights which flow between parents and their children, regardless of the parents' marital status. A child acquires these rights if he establishes that an individual is his parent under State family law provisions. Accordingly, if all other requirements are met, adjudicators will consider such child entitled to child's benefits under section 202(d).

Id. at 55,657.

190. *Stephen v. Comm'r of Soc. Sec.*, 386 F. Supp. 2d 1257, 1259 (M.D. Fla. 2005).

191. *Id.*

192. *Id.* This is reminiscent of the famous English case of Diane Blood. *Regina v. Human Fertilisation & Embryology Auth. (Ex Parte Blood)*, [1999] Fam. 151 (Eng.). After Diane's husband, Stephen, contracted meningitis, doctors removed two sperm samples from his comatose body by "electro-ejaculation." *Id.* at 172. Stephen Blood, who had never given consent for the extraction of his sperm, died shortly thereafter. *Id.* at 172-73. Britain's Human Fertilisation [sic] and Embryology Authority prevented Diane Blood from using the sperm to impregnate herself in Britain, but she ultimately won the right under the European Community Treaty to take the sperm to Belgium where she was treated and had two successful pregnancies. See *Diane Blood Pregnant Again*, BBC NEWS (Feb. 8, 2002, 9:39 AM), http://news.bbc.co.uk/2/hi/uk_news/england/1809296.stm.

193. *Stephen*, 386 F. Supp. 2d at 1265.

194. *Id.* at 1259.

195. *Id.*

196. *Id.*

197. *Id.*

under Florida's law of intestate succession,¹⁹⁸ and Gar had not provided for Robert in a will.¹⁹⁹ The Appeals Council adopted the ALJ's decision, and Michelle appealed to the United States District Court for the Middle District of Florida.²⁰⁰

The district court conceded that under Florida law, Robert was Gar's genetic and legitimate child.²⁰¹ But, those conclusions did not necessitate that Robert be Gar's child under the Social Security Act, so as to be eligible to receive survivor's benefits.²⁰² The court concluded that Robert was not dependent upon Gar at the time of Gar's death.²⁰³ The court noted that Robert was not born until three years after Gar died.²⁰⁴ Further, the court found that Robert was not even Gar's child within the meaning of the Social Security Act; as a posthumously conceived child, he was not eligible to make a claim against Gar's estate absent such provision in a will.²⁰⁵ The court observed that "this case would have been more difficult had Gar left a will that provided for 'any child of mine' or 'any issue of mine' without defining 'child' or 'issue.'"²⁰⁶

Finally, the court distinguished the Ninth Circuit's decision in *Gillett-Netting*.²⁰⁷ Whereas *Gillett-Netting* had been decided under Arizona law, which did not deal specifically with posthumously conceived children, Florida law did specifically address such children.²⁰⁸ The pertinent section of Florida law provided:

A child conceived from the eggs or sperm of a person or persons who died before the transfer of their eggs, sperm, 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.²⁰⁹

In the absence of a will executed by Gar, Robert had no claim against Gar's estate under Florida law.

198. *Stephen*, 386 F. Supp. 2d at 1260.

199. *Id.*

200. *Id.*

201. *Id.* at 1264 (citing FLA. STAT. § 742.17 (enacted May 14, 1993, effective May 15, 1993, as amended 1998)).

202. *Id.* at 1264–65.

203. *Stephen*, 386 F. Supp. 2d at 1265. The Social Security Act requires that the child be dependent at the time of the insured's death. 42 U.S.C. § 402(d)(1)(C).

204. *Stephen*, 386 F. Supp. 2d at 1265.

205. *Id.*

206. *Id.* at 1265 n.10.

207. *Id.* at 1265 (citing *Gillett-Netting v. Barnhart*, 371 F.3d 593 (9th Cir. 2004)).

208. *Id.* (citing FLA. STAT. § 742.17(4) (1998)).

209. FLA. STAT. § 742.17(4) (2005).

F. *Christine Khabbaz (New Hampshire)*

Donna Eng and Rumzi Khabbaz married in 1989 and had a son six years later.²¹⁰ In April 1997, Rumzi was diagnosed with a terminal illness and began to bank his sperm so that Donna might be able to conceive another child by him.²¹¹ Indeed, he executed a consent form to that effect, stating his “desire and intent to be legally recognized as the father of the child to the fullest extent allowable by law.”²¹² Rumzi died in May 1998.²¹³ One year later, Donna conceived using his banked sperm.²¹⁴ She gave birth to Christine Rumzi in the summer of 2000.²¹⁵

Donna applied to the SSA for survivor’s benefits for Christine, but the SSA denied that claim.²¹⁶ After losing at all administrative levels, Donna sought judicial review in the United States District Court for the District of New Hampshire, which certified the following question to the Supreme Court of New Hampshire: “Is a child conceived after her father’s death via artificial insemination eligible to inherit from her father as his surviving issue under New Hampshire intestacy law?”²¹⁷

The New Hampshire Supreme Court responded in the negative.²¹⁸ As framed by that court, the key question under New Hampshire’s laws governing estate distribution was whether Christine was Rumzi’s “surviving issue.”²¹⁹ The court looked to the dictionary definition of “surviving” as meaning “remaining alive or in existence.”²²⁰ Since Christine was neither alive nor in existence when Rumzi died, she was not his “surviving issue.”²²¹ Donna’s alternative arguments for bringing Christine under New Hampshire’s estate-distribution laws were unpersuasive to the court, which expressed its concern that making estates wait for the potential birth of a posthumously conceived child would wreak havoc with the statutory scheme.²²² In contradistinction to Massachusetts law as articulated in *Woodward*,²²³ New Hampshire law deemed

210. *Khabbaz v. Comm’r, Soc. Sec. Admin.*, 930 A.2d 1180, 1182 (N.H. 2007).

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Khabbaz*, 930 A.2d at 1182.

216. *Id.*

217. *Id.*

218. *Id.*

219. *See id.* at 1183.

220. *Khabbaz*, 930 A.2d at 1183–84 (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED 2303 (2002)).

221. *Id.* at 1184.

222. *Id.* (finding the scheme designed to determine “surviving issue” could not function where banked sperm could create additional issue after death).

223. *See discussion supra* Part II.C.

that Christine's parents were "not 'unwed'" despite the fact that Rumzi was dead when Christine was conceived; thus, she was the child of married parents and was not illegitimate.²²⁴ As in Massachusetts, the New Hampshire justices called on the state legislature to study and address the complex questions surrounding new reproductive technologies.²²⁵

After the New Hampshire Supreme Court handed down its decision, the parties stipulated in the federal court action to the entry of judgment in favor of the Commissioner.²²⁶

G. *Baby Boy Finley (Arkansas)*

Amy and Wade Finley, Jr. married in October 1990.²²⁷ They pursued fertility treatments at the University of Arkansas for Medical Sciences, and, in June 2001, doctors produced ten embryos using their gametes.²²⁸ Two embryos were implanted into Amy, but she later had a miscarriage.²²⁹ Four were frozen for preservation.²³⁰ In July 2001, Wade died intestate in Arkansas.²³¹ In June 2002, Amy was implanted with two of the remaining embryos, resulting in a single pregnancy.²³² She gave birth to a boy on March 4, 2003, roughly twenty months after Wade's death.²³³ A few weeks before the child was born, Amy obtained an order from the Lonoke County Circuit Court that, upon the baby's delivery:

[T]he State Registrar of the Arkansas Department of Health, Division of Vital Records, shall enter and state upon the certificate of birth that Wade W. Finley, Jr., now deceased, is the father of [W.F.]; [a]nd that, thereafter, all State and Federal Agencies, of the United States of America, shall uphold the findings of this Court's conclusion of paternity—in [Plaintiff] the mother and Wade W. Finley, Jr. the father—for any and all lawful purposes; and, that [W.F.] is the legitimate child of [Plaintiff] and Wade W. Finley, Jr. for any and all lawful purposes.²³⁴

A month after the birth of the child, Amy filed for mother's insurance benefits for herself and child's insurance benefits for the child, based on

224. *Khabbaz*, 930 A.2d at 1185.

225. *Id.* at 1186 (citing *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257, 272 (Mass. 2002)).

226. *Finley v. Astrue*, 601 F. Supp. 2d 1092, 1110 n.32 (E.D. Ark. 2009) (citing *Khabbaz v. Comm'r of Soc. Sec. Admin.*, 930 A.2d 1180 (N.H. 2007)).

227. *Finley v. Astrue*, 270 S.W.3d 849, 850 (Ark. 2008).

228. *Id.*

229. *Id.*

230. *Id.* The four embryos remaining from the original ten were not preserved. *Id.* at 850 n.3.

231. *Id.* at 850.

232. *Finley*, 270 S.W.3d at 850–51.

233. *Id.* at 851.

234. *Id.* (alterations in original).

Wade's earnings record.²³⁵ The SSA denied the claims both initially and on reconsideration.²³⁶ Although a Social Security ALJ issued a decision granting the benefits, the SSA's Appeals Council reversed the ALJ.²³⁷

Thereafter, Amy filed suit in the United States District Court for the Eastern District of Arkansas,²³⁸ and that court certified the following question to the Supreme Court of Arkansas: "Does a child, who was created as an embryo through in vitro fertilization during his parents' marriage, but implanted into his mother's womb after the death of his father, inherit from the father under Arkansas intestacy law as a surviving child?"²³⁹ The Arkansas Supreme Court answered this question in the negative.²⁴⁰ The Arkansas intestacy statute provides: "Posthumous descendants of the intestate *conceived before his or her death* but born thereafter shall inherit in the same manner as if born in the lifetime of the intestate."²⁴¹

Amy argued that her child was "conceived" when her egg was fertilized by Wade's sperm in June 2001, a month before he died and was, therefore, not a posthumously conceived child.²⁴² The SSA argued that the child "was neither born nor conceived during Amy and Wade's marriage, which ended upon Wade's death."²⁴³

The Arkansas Supreme Court decided not to decide the meaning of the term "conceived" under the statute.²⁴⁴ Instead the court reasoned that the Arkansas General Assembly "did not intend for the statute to permit a child, created through in vitro fertilization and implanted after the father's death, to inherit under intestate succession" because the statute was enacted in 1969—long before in vitro fertilization was developed.²⁴⁵

This rationale is not terribly convincing. It is akin to saying that the First Amendment does not apply to speech via radio, television, or the Internet, simply because those technologies did not exist when the Bill of Rights was adopted. Equally unconvincing is the court's discussion of the Arkansas Code provision addressing artificial insemination of a married woman. The code states: "Any child conceived following artificial insemination of a married

235. *Id.*

236. *Id.*

237. *Finley*, 270 S.W.3d at 851.

238. *Id.* at 851.

239. *Id.* at 850.

240. *Id.*

241. *Id.* at 853 (emphasis in original) (quoting ARK. CODE ANN. § 28-9-210(a) (Supp. 2004)).

242. *Finley*, 270 S.W.3d at 851.

243. *Id.*

244. *Id.* at 853.

245. *Id.* 853–54 (citing Dena S. Davis, *The Puzzle of IVF*, 6 HOUS. J. HEALTH L. & POL'Y 275 (2006); Janet L. Dolgin, *Surrounding Embryos: Biology, Ideology, & Politics*, 16 HEALTH MATRIX: J.L. & MED. 27 (2006)).

woman with the consent of her husband shall be treated as their child for all purposes of intestate succession. Consent of the husband is presumed unless the contrary is shown by clear and convincing evidence.”²⁴⁶ The court reasoned that this provision was “inapposite” because it went to the legitimacy of a child and because it addressed artificial insemination rather than in vitro fertilization.²⁴⁷ But, unless legitimate children cannot take through intestacy under Arkansas law, then it is highly relevant that such a child is legitimate. Moreover, the statute evinces a broader legislative intent that children born through artificial reproductive technology between a married woman and her husband be treated as their legitimate offspring. The court’s rationale suggests that had Wade’s sperm—rather than an embryo—been separately frozen and used after his death to artificially impregnate Amy, the resulting child would be legitimate and, presumably, could inherit, unlike the child here. This appears to be, at best, a classic “distinction without a difference.”

Given the serious problems with the court’s reasoning, it is encouraging that the opinion ended with a plea to the Arkansas General Assembly “to revisit the intestacy succession statutes to address the issues involved in the instant case and those that have not but will likely evolve.”²⁴⁸

Despite the fact that the parties had previously agreed in the federal district court that the question to be certified to the Arkansas Supreme Court would be dispositive of the case, Amy nevertheless continued to pursue her claim in federal court.²⁴⁹ She argued that the Commissioner’s denial of benefits: “(1) violated her and her son’s rights to equal protection under the 5th and 14th Amendments; (2) failed to give full faith and credit to the February 14, 2003 Order of the Lonoke County Circuit Court; and (3) was contrary to established law.”²⁵⁰

Amy asserted two equal protection theories.²⁵¹ First, she asserted that the decisions of the Arkansas Supreme Court and the Commissioner “created a whole new class of children who will be deprived of certain rights solely because they were not conceived and born in a ‘normal’ or ‘accepted’ manner.”²⁵² Second, she asserted that the Social Security Act “deprives her of equal protection because it incorporates state intestacy law, which creates the possibility that claimants will be treated differently on a state-by-state basis.”²⁵³ Applying rational basis review,²⁵⁴ the court rejected both

246. *Finley*, 270 S.W.3d at 854 (quoting ARK. CODE ANN. § 28-9-209(c) (Supp. 2004)).

247. *Id.*

248. *Id.* at 855.

249. *Finley v. Astrue*, 601 F. Supp. 2d 1092, 1097–98 (E.D. Ark. 2009).

250. *Id.* at 1098.

251. *Id.* at 1099.

252. *Id.*

253. *Id.*

254. *Finley*, 601 F. Supp. 2d at 1103.

arguments.²⁵⁵ As to the first argument, the court found it rational for the state not to include as heirs for intestacy purposes children born months or even years after their father's death; this reasonably related to "the orderly, timely, and final disposition of estate property."²⁵⁶ As to the latter argument, the court found it rational for Congress to apply state intestacy law, citing authority that "there is no federal law of domestic relations."²⁵⁷

Next, the court readily rejected Amy's full faith and credit argument. The federal full faith and credit statute²⁵⁸ has been interpreted to "require[] federal courts to give state court judgments the same preclusive affect those judgments would be given in the courts of the states rendering them."²⁵⁹ Here, the Arkansas Supreme Court had already ruled that Amy's son could not inherit from his father's estate despite the Lonoke County Court paternity judgment.²⁶⁰

Amy's third argument—that existing law supports an award of benefits—largely relied on the decision in *Gillett-Netting*.²⁶¹ The court easily disposed of this argument since *Gillett-Netting* was based on the Ninth Circuit's interpretation of Arizona law, whereas Amy's son could not inherit under Arkansas law as definitively construed by the Arkansas Supreme Court.²⁶²

H. *Brandalynn Vernoff (California)*

California residents, Gabriela and Bruce Vernoff, had been married for five years when, in July 1995, Bruce suddenly died.²⁶³ At Gabriela's direction, doctors extracted several sperm samples from Bruce's cadaver.²⁶⁴ In June 1998, almost three years after Bruce's death, Gabriela underwent in vitro using Bruce's sperm, which resulted in the March 1999 birth of a daughter, Brandalynn.²⁶⁵ Gabriela filed for child survivor benefits for Brandalynn, along with a claim for benefits for herself as Brandalynn's mother.²⁶⁶ The SSA denied the claims, and a decade-long legal battle ensued.²⁶⁷ While the appeal was pending, the Ninth Circuit handed down its decision in *Gillett-Netting*,

255. *Id.* at 1104, 1106.

256. *Id.* at 1104.

257. *Id.* at 1105–06 (quoting *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956)).

258. 28 U.S.C. § 1738 (2006).

259. *Finley*, 601 F. Supp. 2d at 1106 (quoting *Gas Aggregation Servs., Inc. v. Howard Avista Energy, LLC*, 458 F.3d 733, 737 (8th Cir. 2006)).

260. *Id.*

261. *Id.* at 1106–09.

262. *Id.* at 1109.

263. *Vernoff v. Astrue*, 568 F.3d 1102, 1105 (9th Cir. 2009).

264. *Id.*

265. *Id.*

266. *Id.*

267. *See id.*

which prompted a remand to the SSA to reconsider the claims in light of that decision and the SSA's Acquiescence Ruling 05-1(9) implementing that decision in all Ninth Circuit states, including California.²⁶⁸ The SSA reaffirmed its denial of the claims in 2006, and the district court upheld that denial in 2007.²⁶⁹

On appeal to the Ninth Circuit, Gabriela pressed both her statutory claims and an Equal Protection claim.²⁷⁰ But, the same court that had granted the Gillett-Netting claims applying Arizona domestic relations law denied the Vernoff claims under California law.²⁷¹ The court noted that while Netting delayed his cancer treatment in order to deposit sperm for his wife's later use and confirmed that he wanted her to use his sperm to have his child, there was no evidence of Bruce Vernoff's consent to either the post-mortem harvesting of his sperm or its subsequent use by his widow to create a child.²⁷²

In order for Brandalynn to establish her dependency on the insured, she needed to: 1) show actual dependency at the time of her father's death; 2) satisfy the *Gillett-Netting* and SSAR requirements by "establishing that the insured is her 'parent' under California law and that she is, therefore, both legitimate and dependent"; or 3) demonstrate that she could inherit from the insured under California's intestacy laws.²⁷³

Obviously the first option was not available since Brandalynn was not conceived at the time of her father's death.²⁷⁴

The second option also was unavailable. Under California law a man "is presumed to be the natural parent of a child, . . . if '[h]e and the child's natural mother are or have been married to each other and the child is born during the marriage or within 300 days after the marriage is terminated by death.'"²⁷⁵ Brandalynn was born over three and one-half years after Bruce Vernoff's death.²⁷⁶ Bruce had neither received Brandalynn into his home and openly held her out as his child, nor had he acknowledged paternity.²⁷⁷ No basis existed under California law to establish Bruce as Brandalynn's natural parent; indeed, "California law does not equate natural parent status with biological parenthood such that a mere biological relationship is sufficient" for natural

268. *Vernoff*, 568 F.3d at 1105. See *supra* note 189 (discussing *Gillett-Netting* and the acquiescence ruling).

269. *Vernoff*, 568 F.3d at 1105.

270. *Id.* at 1104.

271. *Id.* at 1112.

272. *Id.* at 1105.

273. *Id.* at 1106-07 (citing SSAR 05-1(9), 70 Fed. Reg. 55,656 (Sept. 22, 2005)).

274. *Vernoff*, 568 F.3d at 1107.

275. *Id.* (alteration in original) (quoting CAL. FAM. CODE § 7611(a)). But see *In re Jerry P.*, 116 Cal. Rptr. 2d 123 (Cal. Ct. App. 2002) (finding the underlying statute unconstitutional).

276. *Vernoff*, 568 F.3d at 1107.

277. *Id.* at 1108.

parent status.²⁷⁸ The court emphasized the lack of consent on the part of Bruce, the deceased biological father, distinguishing this case from both *Gillett-Netting* and *Woodward*.²⁷⁹ Nor could Brandalynn meet the third option by demonstrating her ability to inherit from Bruce under the California Probate Code at the time of Bruce's death.²⁸⁰

Unable to demonstrate dependency, Gabriela finally argued that the SSA's exclusion from benefits of certain posthumously conceived children—including Brandalynn—violated the Equal Protection Clause of the Fifth Amendment.²⁸¹ Relying on *Matthews v. Lucas*, the court applied rational basis review and, as in *Lucas*, found the denial of benefits rational.²⁸² The court noted that only those children who do not meet the statutory requirements under California law are excluded, and “the challenged classifications are reasonably related to the government's twin interests 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.”²⁸³

I. *B.E. Beeler (Iowa)*

The most recent in this line of cases involved an Iowa couple, Patti and Bruce Beeler.²⁸⁴ In November 2000, while they were engaged to be married, Bruce was diagnosed with leukemia.²⁸⁵ Bruce postponed chemotherapy treatments in order to bank sperm for Patti's future use.²⁸⁶ He signed a form indicating, “In the event of my death, I wish to bequeath all my banked semen to my spouse/partner.”²⁸⁷ Bruce and Patti married in December 2000.²⁸⁸ When Bruce reentered the hospital in January 2001, both he and Patti signed a second form expressing their desire that Patti be inseminated for the purpose of conceiving a child.²⁸⁹ The form also stated: “Male partner hereby agrees to accept and acknowledge paternity and child support responsibility of any resulting child or children.”²⁹⁰ Bruce died in May 2001, and Patti was

278. *Id.*

279. *Id.* at 1109–10.

280. *Id.* at 1110–12.

281. *Vernoff*, 568 F.3d at 1112.

282. *Id.*

283. *Id.*

284. *Beeler v. Astrue*, No. C09-0019, slip op. at 3 (N.D. Iowa Nov. 12, 2009).

285. *Id.*

286. *Id.*

287. *Id.* at 3–4. Of three copies the laboratory's version of this form indicated the bequest, as did one of two patient copies. *Id.* at 4.

288. *Id.*

289. *Beeler*, No. C09-0019, at 4–5.

290. *Id.* at 5.

inseminated with his sperm in July 2002.²⁹¹ A daughter, B.E.B., was born in April 2003, almost two years after Bruce's death.²⁹²

In June 2003, Patti filed for child's insurance benefits on behalf of B.E.B., and the SSA denied that claim at all four administrative levels.²⁹³ In February 2009, Patti sought judicial review in the United States District Court for the Northern District of Iowa.²⁹⁴ In a decision filed in November 2009, the Magistrate Judge reversed the SSA and directed an award of benefits to B.E.B. on Bruce's account.²⁹⁵

The critical issue before the court was whether B.E.B. was the child of the wage earner within the meaning of the Social Security Act.²⁹⁶ The Commissioner did not contest that B.E.B. was Bruce's biological child.²⁹⁷ Relying heavily on *Gillett-Netting* and the plain meaning of the statute, the court readily concluded that B.E.B. was Bruce's child for the purposes of Social Security.²⁹⁸ Under that authority, a biological child is necessarily a "child" for SSA purposes.²⁹⁹ Hence, the court deemed it unnecessary to evaluate whether under Iowa law, B.E.B. was entitled to inherit from Bruce.³⁰⁰

But, even if it were necessary for B.E.B. to demonstrate that she could inherit from Bruce under Iowa law, she would have met that burden.³⁰¹ Under Iowa Code §633.222, a biological child will inherit from her father if either "(1) the evidence proving paternity is available during the father's lifetime, or (2) the child has been recognized by the father as his child."³⁰² Relying on Iowa decisional law, the court found that the two forms signed by Bruce, in combination, satisfied the second part of the test, recognition by the father.³⁰³

Finally, the court found that while not actually dependent on Bruce at the time of his death, B.E.B. was "deemed dependent" on Bruce because under Iowa law she was his legitimate child.³⁰⁴ Under Iowa Code § 252A.3(4), a child born to parents who were married "at any time prior or subsequent to the birth of such a child" is the legitimate child of both parents.³⁰⁵ B.E.B. met this

291. *Id.*

292. *Id.*

293. *Id.* at 2.

294. *Beeler*, No. C09-0019, at 2.

295. *Id.* at 19.

296. *Id.* at 3.

297. *Id.* at 8. In fact, DNA testing showed over a 99% probability that Bruce was B.E.B.'s biological father. *Id.* at 5 n.11.

298. *Id.* at 8.

299. *Beeler*, No. C09.0019, at 10.

300. *Id.* at 11.

301. *Id.*

302. *Id.* at 12 (quoting IOWA CODE § 633.222 (2007)).

303. *Id.* at 12-14.

304. *Beeler*, No. C09.0019, at 11.

305. *Id.* at 17 (quoting IOWA CODE § 252A.3(4)).

standard. Furthermore, because Bruce acknowledged in writing that any child born to Patti using his sperm would be his child, B.E.B. was also deemed dependent on Bruce under the Social Security Act.³⁰⁶

As the court concluded that B.E.B. was Bruce's legitimate child and she was entitled to benefits on his account; and even if she were not his legitimate child under state law, she would nonetheless be deemed dependent on Bruce at the time of his death, and hence eligible for child's insurance benefits.

III. THE (SOMETIMES) NEBULOUS FAMILY LAW STATUS OF CHILDREN OF SAME-SEX COUPLES

As the above discussion makes clear, the eligibility of a child conceived by non-traditional means for Social Security benefits on a parent's account implicates a complex interplay of state and federal law, leading to varying results depending on the specific facts of the case and the state of the child's birth. Applying the restrictions of DOMA to children born to—or adopted by—one member of a same-sex couple adds legal complexity to the potential detriment of such children.

Where a child is the natural or adopted child of one member of a same-sex couple and is adopted under state law by the partner of the parent, there should be no question about that child's eligibility to claim Social Security benefits on the account of the adoptive parent.³⁰⁷ Likewise, where both members of a same-sex couple adopt a child who is not the biological child of either partner, that child should unquestionably be treated as the legal child of each adopting parent for Social Security purposes.³⁰⁸ In this regard, it is noteworthy that a number of states that do not permit same-sex couples to enter into marriage or legally recognized quasi-marital relationships such as civil unions, nevertheless, allow them to adopt each other's child or a third-party child.³⁰⁹

The difficulty occurs where a child being raised by a same-sex couple is neither the natural nor the adoptive child of one (or both) of them. Thorny issues have arisen around the United States in the family law context where a child has been raised by a same-sex couple who later separate and the biological parent then tries to prevent her ex-partner from having a further relationship with the child.³¹⁰ State courts have been divided as to whether the

306. *Id.* at 18–19 (citing 42 U.S.C. § 416(h)(3)(C)(i)(I) (2006)).

307. 20 C.F.R. § 404.356 (2009).

308. *Id.*

309. For example, Pennsylvania has a state DOMA prohibiting same-sex marriage and the recognition of out-of-state same-sex marriages. 23 PA. CONS. STAT. ANN. §§ 1102, 1704 (West 1996). Nevertheless, Pennsylvania has recognized the ability of same-sex couples to adopt for almost a decade. *In re Adoption of R.B.F.*, 803 A.2d 1195, 1202–03 (Pa. 2002). *See also, e.g.*, *Baker v. State*, 744 A.2d 864, 870 (Vt. 1999) (recognizing that Vermont allowed same-sex couples to adopt long before the litigation that led to civil unions).

310. *See infra* notes 315–31 and accompanying text.

former partner who is neither a biological nor adoptive parent has any legal rights (or duties) vis-à-vis the child.³¹¹

The cases are, quite properly, heavily fact-based. Some courts have found such a former partner to lack standing to assert visitation rights.³¹² Other courts have granted the former partner rights using equitable doctrines including “in loco parentis” or “de facto parent” standing.³¹³

A. Custody and Visitation Issues

In one Pennsylvania case, *Jones v. Jones*, the court ultimately awarded primary physical custody to the “nonbiological”—and non-adoptive—parent.³¹⁴ Two women, Patricia and Ellen, lived together as a lesbian couple in Pennsylvania, starting in 1988.³¹⁵ They could not enter into a same-sex marriage or state-recognized quasi-marital relationship under Pennsylvania law, nor did the record indicate that they did so out-of-state.³¹⁶ An anonymous sperm donor was utilized, and Ellen gave birth to twin boys in December 1996.³¹⁷ The parties lived together until January 2001, when Ellen left their residence, taking the twins with her.³¹⁸ The trial judge granted primary physical custody to Ellen, the biological mother, awarding Patricia “relatively typical partial custody visitation rights.”³¹⁹ However, after Ellen engaged in “a multi-year effort to exclude [Patricia] from the children’s lives” and “tried in every way possible to sabotage [Patricia’s] relationship with the children,” the trial court moved primary physical custody of the children to Patricia, their “non-biological mother.”³²⁰ On appeal, Ellen argued that this was error, *inter alia* because the trial judge had not found her to be unfit.³²¹ But, the Pennsylvania Superior Court upheld the trial court.³²² While the evidentiary

311. See *infra* notes 315, 328, 333 and accompanying text.

312. See, e.g., *Janice M. v. Margaret K.*, 948 A.2d 73, 93 (Md. 2008) (finding no standing to sue for visitation rights as *de facto* parent). Cf. *Stadter v. Siperko*, 661 S.E.2d 494, 498–99 (Va. Ct. App. 2008) (refusing to acknowledge partner as *de facto* parent, but acknowledging standing as “person of legitimate interest” with burden of showing unfitness of biological parent).

313. See, e.g., *SooHoo v. Johnson (In re SooHoo)*, 731 N.W.2d 815, 822, 826 (Minn. 2007) (*in loco parentis*); *Rubano v. DiCenzo*, 759 A.2d 959, 976 (R.I. 2000) (*de facto*); *In re M.K.S.-V.*, 301 S.W.3d 460, 465 (Tex. Ct. App. 2009) (finding partner had standing to seek conservatorship).

314. *Jones v. Jones*, 884 A.2d 915, 919 (Pa. Super. Ct. 2005), *appeal denied*, 912 A.2d 838 (Pa. 2006).

315. *Id.* at 917.

316. See *supra* note 309.

317. *Jones*, 884 A.2d at 917.

318. *Id.*

319. *Id.*

320. *Id.* at 918–19.

321. *Id.* at 916.

322. *Jones*, 884 A.2d at 919.

scales were tipped hard in favor of a parent in custody litigation, she did not actually have to be shown to be unfit in order for the non-parent to prevail.³²³

In other situations, courts have deemed the former partner to be the legal parent of the other partner's biological child by virtue of the state-recognized legal relationship—or former relationship—between the two partners. Unquestionably, the most notorious of these cases is the bitter and long-running *Miller-Jenkins* interstate custody battle between Lisa Miller and her former partner, Janet Jenkins.³²⁴ While residing in Virginia, Miller and Jenkins entered into a “civil union” in Vermont.³²⁵ Miller was subsequently artificially inseminated and gave birth to a child, Isabella, in April 2002 while they still lived in Virginia.³²⁶ In August 2002, the couple relocated to Vermont where they raised Isabella together until September 2003, when Miller moved back to Virginia, taking Isabella with her.³²⁷ Miller initially filed in Vermont to dissolve the civil union, asking the court to award her primary custody and requesting that the court award Jenkins parent-child contact.³²⁸ She later did a complete about-face and filed in Virginia, asking the Virginia court to declare that Jenkins had no parental rights.³²⁹

Meanwhile, in the ongoing Vermont litigation, the Vermont court held that Jenkins had parental rights vis-à-vis Isabella by virtue of the Vermont Civil Union law.³³⁰ When the Virginia trial court ruled that Jenkins had no parental or visitation rights, a direct interstate conflict was created.³³¹

The Virginia Court of Appeals reversed the trial court, finding that the federal Parental Kidnapping Prevention Act (PKPA) barred the Virginia trial court from exercising jurisdiction over the custody claim.³³² The court of appeals rejected the natural mother's claim that DOMA somehow superseded the PKPA with regard to children of same-sex couples.³³³ As in the Pennsylvania case of *Jones v. Jones*, the Vermont trial court ultimately ordered primary custody to be changed from the natural mother to the non-biological mother, after it became clear that the natural mother would ignore visitation

323. *Id.* at 918. Interestingly, the Superior Court referred to Patricia in different parts of its opinion as a “non-biological parent” and as a “third party” who was a “non-parent.” *Id.* at 916, 918.

324. *See Miller-Jenkins v. Miller-Jenkins*, 661 S.E.2d 822 (Va. 2008); *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951 (Vt. 2006).

325. *Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d 330, 332 (Va. Ct. App. 2006).

326. *Id.*

327. *Id.*

328. *Id.*

329. *Id.*

330. *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 957 (Vt. 2006).

331. *See id.*

332. *Miller-Jenkins*, 637 S.E.2d at 332.

333. *Id.* at 336.

orders and prevent the non-biological mother from having a relationship with the child.³³⁴

B. Support Issues

In addition to the troubling question of whether a non-adopting, former same-sex partner of a parent has parental rights vis-à-vis the child, there is the additional question of whether that former partner has a financial obligation to the child under state law, which might satisfy the dependency requirement under the Social Security Act. Under certain circumstances, a state court may impose liability for support on the former partner, either applying statutory law, common law, or equitable principles.³³⁵ If the state statute—whether a same-sex marriage act, civil union, or related law—provides for such liability, then it is a straightforward matter of statutory construction, assuming the parties had entered into such a legally recognized relationship. But, if not, the questions become more complex, and the states are divided.

In a 2001 case, *D.R.M.*, the Washington Court of Appeals found that a woman had no liability to support the child of her same-sex former domestic partner.³³⁶ Anne and Kelly had lived together starting in 1992, but had “never attempted to marry, nor did they ever participate in any type of union ceremony or commitment ceremony.”³³⁷ The trial court, however, “found that the parties’ actions were consistent with a marriage.”³³⁸ They sought out medical assistance together with an aim toward having Kelly get pregnant by artificial insemination and give birth to a child that Anne would later adopt.³³⁹ Kelly ultimately received artificial insemination treatments; Anne was present for the doctor’s appointments.³⁴⁰

The treatments were successful, but before the women knew that Kelly was pregnant, their relationship fell apart.³⁴¹ Kelly gave birth to a baby girl in June 1997.³⁴² Anne made some voluntary support payments to Kelly both

334. *Miller-Jenkins v. Miller-Jenkins*, No. 454-11-03, at 19 (Vt. Rutland Cnty. Fam. Ct. Nov. 20, 2009), *aff’d*, 2010 Vt. 98 (Vt. 2010). At this writing, the natural mother has not complied with the order to turn over custody, and the trial court has issued a warrant for her arrest. See *Arrest Warrant Issued in Lesbian Parent Custody Case*, ADVOCATE.COM (Feb. 23, 2010), http://www.Advocate.com/News/Daily_News/2010/02/23/Arrest_Warrant_in_lesbian_parent_custody_case/.

335. See Caroline P. Blair, Note, *It’s More Than a One-Night Stand: Why a Promise to Parent Should Obligate a Former Lesbian Partner to Pay Child Support in the Absence of a Statutory Requirement*, 39 SUFFOLK U. L. REV. 465, 475 (2006).

336. *State ex rel. D.R.M.*, 34 P.3d 887, 894 (Wash. Ct. App. 2001).

337. *Id.* at 890.

338. *Id.*

339. *Id.*

340. *Id.*

341. *D.R.M.*, 34 P.3d at 890.

342. *See id.*

before and after the birth of the child.³⁴³ Kelly, however, did not go forward with efforts to arrange a co-parenting plan or adoption by Anne.³⁴⁴ When Kelly went on public assistance, the state sued Anne for support payment, and Kelly filed a separate action against Anne, which was consolidated for trial with the first action.³⁴⁵ The trial court denied relief in both actions, and the Washington Court of Appeals affirmed.³⁴⁶

The Court of Appeals recognized that a parent may be either biological or adoptive.³⁴⁷ Anne was neither.³⁴⁸ The court found no requirement under Washington law that a child have two parents.³⁴⁹ The court likewise rejected a duty of support based on theories of “intended parent,”³⁵⁰ estoppel,³⁵¹ and breach of promise.³⁵²

The following year, the Pennsylvania Superior Court applied the doctrine of equitable estoppel to uphold a support duty placed on the non-adopting same-sex former partner of a lesbian mother.³⁵³ In the case of *H.A.N. v. L.S.K.*, a lesbian couple had decided to have children together.³⁵⁴ L.S.K. ultimately had five children—a single child, followed by quadruplets—through artificial insemination by anonymous sperm donors.³⁵⁵ When the quadruplets were four years old, the parties separated and L.S.K. moved across the country with the children.³⁵⁶ Although she never adopted the children, H.A.N. sued L.S.K. for custodial rights; L.S.K. responded with a complaint against H.A.N. for child support.³⁵⁷ The two lawsuits proceeded down parallel tracks. H.A.N. won shared legal and partial physical custody of the children while denying any obligation to support them.³⁵⁸ The trial court ruled that H.A.N. could not have it both ways: by her conduct she was estopped from claiming she was not liable for child support.³⁵⁹

343. *Id.*

344. *Id.*

345. *Id.* at 890–91.

346. *D.R.M.*, 34 P.3d at 891, 898.

347. *Id.* at 891.

348. *Id.* at 892.

349. *Id.* at 892.

350. *Id.* at 894.

351. *D.R.M.*, 34 P.3d at 897.

352. *Id.* at 898.

353. *L.S.K. v. H.A.N.*, 813 A.2d 872, 877–79 (Pa. Super. Ct. 2002).

354. *Id.* at 874.

355. *Id.* at 874–75.

356. *Id.* at 875.

357. *Id.* at 874–75.

358. *L.S.K.*, 813 A.2d at 874–75.

359. *Id.* at 875–76.

The Pennsylvania Superior Court affirmed, applying the doctrine of equitable estoppel.³⁶⁰ It found that unlike a stepparent who steps into the role of parent to pre-existing children, H.A.N. committed herself to a course of conduct with L.S.K. that brought these five children into being.³⁶¹

Yet another layer of complexity may be involved where a same-sex couple has a child using a known sperm donor or surrogate mother. This gives rise to the possibility of more than two persons asserting parental rights, or having parental duties, toward the same child. Such a scenario came to fruition in *Jacob v. Shultz-Jacob*, decided by the Pennsylvania Superior Court in 2007.³⁶² Two Pennsylvania women, Jodilynn and Jennifer, had entered into a civil union in Vermont.³⁶³ Jodilynn had two children by a known sperm donor, Carl, who was involved with the children's lives from their birth.³⁶⁴ After Jodilynn left the relationship, her former partner, Jennifer, commenced custody litigation which ultimately resulted in all three adults—Jodilynn, Jennifer and Carl—having various custodial rights toward the children.³⁶⁵ When Jodilynn sued Jennifer for child support, Jennifer did not deny liability but asked the trial court to join Carl as a party defendant who was also liable for child support since he was “essentially a third parent.”³⁶⁶ The trial court denied joinder, and Jennifer appealed.³⁶⁷

The appellate court reversed, distinguishing the case from *L.S.K.* since in this case the lesbian ex-partner was not contesting her own child support liability and the natural father had voluntarily made significant financial contributions to the children already.³⁶⁸ However, the appellate court did apply one principle from *L.S.K.* to the case: estoppel.³⁶⁹ Since Carl had custodial rights based on his biological parenthood, it would be fundamentally unfair for him to disclaim financial responsibility.³⁷⁰ The result—apparently unique in

360. *Id.* at 877–78. Estoppel applies to “prevent[] one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true.” BLACK’S LAW DICTIONARY 589 (8th ed. 2004).

361. *L.S.K.*, 813 A.2d at 877.

362. *Jacob v. Shultz-Jacob*, 923 A.2d 473 (Pa. Super. Ct. 2007).

363. *Id.* at 476.

364. *Id.*

365. *Id.*

366. *Id.*

367. *Jacob*, 923 A.2d at 476.

368. *Id.* at 480–82.

369. *Id.* at 480.

370. *Id.* at 480.

the law of the United States³⁷¹—was three individuals with parental rights and responsibilities.³⁷²

The *Jacob* decision leads directly to the possibility that the SSA could be obligated to pay survivor's benefits to a child if any one of three parental figures were to die, surely a thought that would alarm any SSA actuary. Indeed, in an ironic twist, Carl died before the appellate decision was announced, and apparently the children began receiving Social Security survivor's benefits on his account.³⁷³

IV. DOMA'S IMPACT ON NON-BIOLOGICAL, NON-ADOPTED CHILDREN OF ONE MEMBER OF SAME-SEX COUPLES

DOMA has compelled the SSA to confront the issue of whether a non-biological and non-adoptive child of a person who is, or has been, a member of a same-sex couple may be eligible for survivor's or disability benefits on the account of that parental figure where the parent-child relationship is established by a state same-sex marriage (or quasi-marriage) law. For example, in the bitter Vermont-Virginia interstate custody battle between Lisa Miller and Janet Jenkins, the Vermont courts declared Isabella to be the legal child of her non-biological, non-adopting parent by virtue of Vermont's (now superseded) Civil Union law.³⁷⁴ Normally, if a parent with an adequate Social Security earnings record becomes disabled, her child will be entitled to disability insurance benefits under Title II of the Social Security Act as an "auxiliary beneficiary."³⁷⁵ And, as discussed in Parts I and II, if that parent dies, her dependent child will be entitled to survivor's benefits.³⁷⁶ But, if the parent-child relationship is created by a state's same-sex marriage (or quasi-marriage) law, would payment of benefits to the child contravene DOMA's mandate that for all federal purposes, "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or wife?"³⁷⁷ The federal government has given inconsistent answers to this question and, to date, it is not clearly resolved.

371. However, the Court of Appeal for Ontario, Canada, has reached a similar result in *A.A. v. B.B.*, 2007 ONCA 2 (CanLII).

372. For an in-depth analysis of *Jacob*, see Robert E. Rains, Case Commentary, *Three Parents?*, 20 DENNING L.J. 197 (2008).

373. *Id.* at 204 n.48.

374. See *supra* notes 20, 324–34 and accompanying text.

375. 20 C.F.R. § 404.350 (2010). While the term "auxiliary beneficiary" is not defined in this chapter, 20 C.F.R. Section 229.48 in the same title states "auxiliary beneficiary (spouse and children)." *Id.* § 229.48(d).

376. *Id.* § 404.350. See discussion *supra* Parts I, II.

377. 1 U.S.C. § 7 (2006).

In July 2004, shortly after the Massachusetts Supreme Judicial Court ruled that Massachusetts must permit same-sex marriage,³⁷⁸ the Congressional Research Service (CRS) issued a Report for Congress entitled, “The Effect of State-Legalized Same-Sex Marriage on Social Security Benefits and Pensions.”³⁷⁹ That report, while not directly addressing the status of the child of a state-recognized same-sex marriage, made clear that DOMA requires that, “the legalization of same-sex marriage at the state level has no effect in determining the validity of marriage for Social Security purposes.”³⁸⁰

If taken to its logical extension, the CRS Report would preclude benefits for the non-biological and non-adoptive child of a same-sex parent whose parental rights are based on legal recognition of a same-sex relationship. However, after the decision of the Vermont Supreme Court in *Miller-Jenkins* in 2006 that the child born to one member of a civil union is the legal child of the other member, the SSA sought further guidance from the Office of Legal Counsel (OLC) of the United States Justice Department.³⁸¹ The resulting OLC opinion, issued in October 2007, found no preclusive effect mandated by DOMA:

A child’s inheritance rights under state law may be independent of the existence of a marriage or spousal relationship, and that is indeed the case in Vermont. Accordingly, we conclude that nothing in DOMA would prevent the non-biological child of a partner in a Vermont civil union from receiving CIB [child’s insurance benefits] under the Social Security Act.³⁸²

The OLC opinion went on to apply this conclusion to a specific claim then pending before the SSA. Two women, identified in the opinion as Karen and Monique, entered into a civil union in Vermont in 2002.³⁸³ Monique bore a son, Elijah, in 2003.³⁸⁴ Although Karen did not adopt Elijah, his birth certificate listed her as his “2nd parent;” other documents used the term “civil union parent.”³⁸⁵ In 2005, the SSA found Karen to be disabled and she filed for auxiliary benefits for Elijah as her dependent child.³⁸⁶

378. Opinions of the Justices, 802 N.E.2d 565 (Mass. 2004).

379. LAURA HALTZEL & PATRICK PURCELL, CONG. RESEARCH SERV., RS 21897, THE EFFECT OF STATE-LEGALIZED SAME-SEX MARRIAGE ON SOCIAL SECURITY BENEFITS AND PENSIONS (2004).

380. *Id.* at 2.

381. Whether the Defense of Marriage Act Precludes the Non-biological Child of a Member of a Vermont Civil Union from Qualifying for Child’s Insurance Benefits under the Social Security Act, 31 Op. O.L.C. 1, 1 n.1 (2007) [hereinafter DOMA Preclusion].

382. *Id.* at 1.

383. *Id.* at 2.

384. *Id.*

385. *Id.*

386. DOMA Preclusion, *supra* note 381, at 2.

One interesting aspect of the OLC opinion is that it explicitly provided that, “[b]ecause Karen was domiciled in Vermont at the time of Elijah’s application, we look to Vermont law for guidance.”³⁸⁷ This suggests that a parent could potentially “game the system” by moving to a state like Vermont before filing an application for his or her child.

Applying Vermont law to the issue of Elijah’s relationship with Karen, the OLC opinion readily concluded that, in light of *Miller-Jenkins*, “Vermont law would recognize Elijah as Karen’s child for purposes of his right to inherit, should she die intestate.”³⁸⁸

The OLC opinion then turned to whether DOMA would bar SSA from recognizing that state-created relationship. The OLC rather elliptically concluded that it would not.

By its terms, 1 U.S.C. § 7 does not apply to Elijah’s eligibility for CIB under the Social Security Act. As discussed, Elijah’s eligibility arises out of his status as Karen’s “child” under section 416, and the law provides that he “shall be deemed such” simply because he “would have the same status relative to taking intestate personal property as a child” under Vermont law. That analysis does not require any interpretation of the words “marriage” or “spouse” under the Social Security Act or any other provision of federal law. Nor does the analysis even require interpreting those terms under Vermont law in a way that might have consequence for the administration of federal benefits. An individual may qualify as a “child” under section 416 wholly apart from the existence of any marriage at all, as would be the case of a natural-born child of an unmarried couple, or, as is the case here, where Vermont recognizes a parent-child relationship outside the context of marriage. The fact that Elijah’s right of inheritance ultimately derives from Vermont’s recognition of a same-sex civil union is simply immaterial under DOMA. Accordingly, DOMA would not preclude Elijah from qualifying for CIB as a child of Karen under the Social Security Act.³⁸⁹

Since the SSA had informed the OLC in advance that it would be bound by the OLC’s opinion,³⁹⁰ one might have thought the issue to have been resolved. But it was not.

In late May 2008, Florida resident Gary Day sued the SSA through the Lambda Legal Defense and Education Fund in the United States District Court for the District of Columbia, seeking a writ of mandamus to compel the SSA to make a decision on his application for child’s insurance benefits, which he filed in February 2006 for his two children.³⁹¹ In January 2008, the SSA had ruled that Day was disabled within the meaning of Title II of the Social

387. *Id.* at 3.

388. *Id.* at 3–4.

389. *Id.* at 5 (citations omitted).

390. *Id.* at 1 n.1.

391. Complaint at 1, 6, *Day v. Soc. Sec. Admin.*, No. 1:08-CV-00896 (D.D.C. May 28, 2008).

Security Act with an onset date of June 23, 2003.³⁹² Day was listed as a parent of each child on that child's California birth certificate and had obtained orders from the Superior Court of California for the County of Los Angeles establishing his parental rights as to each child.³⁹³ The Complaint rather obliquely asserted that "[n]either of the Judgments Establishing Parental Rights was based on any presumption in, nor operation of, California law respecting the relationship between Plaintiff Gary Day and any other adult person."³⁹⁴

In August 2008, the SSA issued an Emergency Message Policy Instruction to its internal units, citing the October 2007 OLC opinion and directed that if a claim is made for auxiliary benefits for a child, the claim must be submitted for a legal opinion to the Regional Chief Counsel, "if the NH (Number Holder) is not the biological parent and a parental relationship is alleged based upon . . . a same-sex marriage, civil union, or other legal relationship, such as a domestic partnership."³⁹⁵ Some eight months later, in April 2009, the SSA sent a letter to Gary Day's attorneys indicating that the SSA would award child's benefits to his children.³⁹⁶ This good news for the children arrived three years and three months after Day filed the applications for benefits for them.

V. GENERAL PRINCIPLES AND SPECIFIC PROPOSALS

No matter what one's views on DOMA and same-sex relationships and, for that matter, the creation of children by such nontraditional methods as post-mortem conception, it is past time for both the state and federal governments to directly address these matters through a child-centered approach. Continuing to evade legislative responsibility at the state and federal levels has not stopped—and will not stop—children from being conceived through non-traditional means and being born into non-traditional families. Punishing such children by denying them benefits to which other children would be entitled may save small amounts of public money, but it is hardly sound public policy. Nor would recognizing the rights of such children likely "open the floodgates" to a massive raid on the public fisc. The following proposals flow from these principles:

392. *Id.* at 6.

393. *Id.* at 4, 5.

394. *Id.* at 5. While those judgments are not attached to the Complaint, it is a reasonable inference that the children were the result of a surrogacy arrangement in California using Day's partner's sperm.

395. SSA EM-08080 (Aug. 1, 2008).

396. See Erin Baer, *Social Security Administration to Provide Benefits in Lambda Legal Case Representing Gay Father's Children*, LAMBDA LEGAL (Apr. 23, 2009), http://www.lambdalegal.org/news/pr/pr_ssa-to-provide-benefits-in-lambda-legal-case-representing-gay-fathers-children.html.

1. Congress should amend DOMA³⁹⁷ to provide that it shall not be construed to deny benefits to children who are the legal or equitable children of wage earners.

2. State legislatures should amend their parentage laws to provide that where two adults take—or cause to have taken—medical steps with the intention of creating a child that they intend to raise, they are both the legal parents of the resulting child or children with full parental rights and responsibilities.³⁹⁸

3. State legislatures should enact provisions akin to Article 8 of the Uniform Parentage Act (2000),³⁹⁹ providing for the ability to have surrogacy agreements approved by a court before conception, with the court entering an order at that time identifying the legal parents of any child resulting from the surrogacy.⁴⁰⁰

4. Finally, in all cases where the legal choice is between a minor child having one legal parent or two, all doubts should be resolved in favor of there being two adults with legal rights and responsibilities toward that child.⁴⁰¹ And, if that means that the child would become eligible for Social Security benefits on the second parent's earnings record, that is a price that we, as a society, should be collectively willing to pay.

397. This Article purposefully takes no position on whether DOMA should be repealed in whole or in part, but simply assumes it will remain federal law.

398. See *Buzzanca v. Buzzanca (In re Marriage of Buzzanca)*, 61 Cal. App. 4th 1410, 1412–13 (Cal. Ct. App. 1998) (holding that former husband and wife who had entered into a surrogacy agreement using donor sperm were legal parents of resulting child who was not biologically related to either of them).

399. UNIFORM PARENTAGE ACT §§ 801–809 (amended 2002), 9B U.L.A. 362–69 (Supp. 2010).

400. See generally *Rains*, *supra* note 108, at 34.

401. This position is contrary to that taken by the Pennsylvania Supreme Court in *Ferguson v. McKiernan*, where the court found a known sperm donor to a separated and later divorced woman to have no legal responsibilities to the resulting child. *Ferguson v. McKiernan*, 940 A.2d 1236, 1242, 1248 (Pa. 2007) (enforcing a non-parentage agreement between donor and birth mother).

