Steve Leimberg's Estate Planning Email Newsletter - Archive Message #1765

Date: 24-Jan-11

From: Steve Leimberg's Estate Planning Newsletter

Subject: **Capato v. Comm'r of Soc Sec: 3rd Circuit Allows Social Security Benefits to Posthumously Conceived Twins**

"Rapidly changing reproductive modes have impacted the definitions of family, children and descendants. Yet, it appears these issues are only begrudgingly being addressed in estate planning.

As estate planners, perhaps we need to be more attuned to such potentialities. I'm not sure many of us are ready to ask all of our clients if they have stored and frozen reproductive materials. After all, who amongst us thought we'd ever use the terms gametes or zygotes in our client conferences? However, perhaps we should at least ask this question when meeting with a client who presents as terminally ill. And maybe we should even ask it more often."

Jeff Baskies provides **LISI** members with his analysis of Caputo v. Comm'r of Social Security, a decision recently issued by the 3rd Circuit Court of Appeals holding that twins conceived after the death of their father via artificial insemination of frozen sperm were entitled to surviving children's insurance benefits under the Social Security Act. As Jeff points out, Caputo involves issues of posthumously born and posthumously conceived children, which may have been underappreciated by the estate planning bar.

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EDITORS NOTE: Before we get to Jeff's commentary, members should take note of the fact that **LISI** has posted **three** new and amazing podcasts by **Bob Keebler**. Bob's podcasts touch on important transfer and income tax issues raised by the Tax Reform Act of 2010, and include the following:

- Keebler - Math of Election Out of 2010 Estate Tax
- Keebler - Tax Planning with a $5,000,000 Gift Tax Exemption
- Keebler - Understanding 2010 Carryover Basis Provisions

Now, here is Jeff's commentary:

EXECUTIVE SUMMARY:

In a decision issued on January 4, 2011, the 3rd Circuit Court of Appeals held that twins conceived after the death of their father via artificial insemination of frozen sperm were entitled to surviving children's insurance benefits under the Social Security Act (42 USCS Sec 402(d). Capato v. Comm'r of Soc Sec, highlights issues of posthumously born and posthumously conceived children which heretofore have been mostly ignored in estate planning.

FACTS:

In August 1999, Robert Capato was diagnosed with esophageal cancer. As the chemotherapy treatments he was about to undergo could render him sterile, he deposited semen in a sperm bank for freezing and storage.

In March 2002, Robert Capato died a resident of Pompano Beach, Florida.

In January 2003 (after in vitro fertilization) Karen Capato conceived and she gave birth to twins on September 23, 2003. The court notes the children were born approximately 18 months after their father's death, and they were conceived approximately 10 months after his death.

After the birth of the twins, Karen Capato applied to the Social Security Administration ("SSA") for benefits on behalf of the twins as surviving children based on Robert's earnings. SSA denied her calim.

Karen filed for a hearing before an administrative law judge ("ALJ"), which

was held in May 2007; however, in November 2007 the ALJ ruled to deny Karen's claim for benefits for the twins. The Circuit Court stated in its opinion regarding the ALJ's ruling:

> Observing that "this is a case where medical-scientific technology has advanced faster than the regulatory process," id. at 6, and that this is a "very sympathetic case" in which "allowing benefits would appear to be consistent with the purposes of the Social Security Act," the ALJ nonetheless believed himself "constrained by applicable laws and regulations to find disentitlement." Id. at 7. Finding that the twins, conceived after the death of their father, "are not for Social Security purposes the 'child (ren)' of the deceased wage earner, Robert Capato, under Florida state law as required by section 216(h)(2)(A) of the Social Security Act," the ALJ concluded that they were not entitled to child's insurance benefits in accordance with sections 202(d)(1) and 216(e) of the Act and the relevant regulations. Id. at 8. The District Court affirmed, echoing the ALJ's interpretation of the Act and his conclusion that Mr. Capato was domiciled in Florida on the date of his death and, thus, that Florida's law of intestacy should be applied.

Karen Capato filed a timely appeal.

In its ruling the 3rd circuit noted:

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

> In determining whether an applicant is the child or parent of a fully or currently insured individual for purposes of this subchapter, the Commissioner of Social Security shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual is domiciled at the time such applicant files application or, if such insured individual is dead, by the courts of the State in which he was domiciled at the time of his death.

Thus the Commissioner of Social Security argued that to determine if the twins are entitled to benefits, they had to be "children" within the definition of sec 416(h) which means they had to be children under the Florida intestacy statutes. And the Commissioner argued they were not and thus could not be deemed children for receiving benefits.

In rejecting the Commissioner's argument the court stated:

> The explanation ignores the fundamental question: why should we, much less why must we, refer to § 416(h) when § 416(e) is so clear, and where we have before us the undisputed biological children of a deceased wage earner and his widow. The plain language of §§ 402(d) and 416(e) provides a threshold basis for defining benefit eligibility. The provisions of § 416(h) then provide for "determination of family status"-subsection (h)'s heading-to determine eligibility where a claimant's status as a deceased wage-earner's child is in doubt. Were it the case that such status had to be determined here, we would turn to the relevant provisions of § 416(h). But a basic tenet of statutory construction is that "in the absence of an indication to the contrary, words in a statute are assumed to bear their 'ordinary, contemporary, common meaning.' "Walters v. Metro. Educ. Enters., Inc., 519 U.S. 202, 207 (1997) (quoting Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 388 (1993)). The term "child" in § 416(e) requires no further definition when all parties agree that the applicants here are the biological offspring of the Capatos. Stated somewhat differently, we do not read §§ 402(d) or 416(e) as requiring reference to § 416(h) to establish child status under the facts of this case. Our analysis does not render § 416(h) superfluous but, rather, places it in context with § 416(e) and the clear command of § 402(d)(1) to refer to § 416(e) to define the word "child."

Thus citing to and aligning with a 2004 decision from the 9th Circuit, which the 3rd Circuit found to be factually identical to the Capato case, the 3rd Circuit held

that the Capato twins are in fact entitled to Social Security benefits as a result of being the unquestioned biological children of the deceased. Gillett-Netting v. Barnhart, 371 F.3d 593 (9th Cir.2004),

COMMENT:

Rapidly changing reproductive modes have impacted the definitions of family, children and descendants. Yet, it appears these issues are only begrudgingly being addressed in estate planning.

Although not pertinent to the decision regarding social security benefits, it is interesting for purposes of considering estate planning, that apparently Robert Capato prepared a will 3 months before his death naming as his beneficiaries the son born of his marriage to Karen Capato and two children from a prior marriage. The court noted that "although Ms. Capato claims that she and her husband spoke to their attorney about including "unborn children" in the will, "so that it would be understood that they'd have the rights and be supported in the same way that [their natural born son] was already privileged to," App. at 288, the will did not contain any such provision."

As estate planners, perhaps we need to be more attuned to such potentialities. I'm not sure many of us are ready to ask all of our clients if they have stored and frozen reproductive materials. After all, who amongst us thought we'd ever use the terms gametes or zygotes in our client conferences? However, perhaps we should at least ask this question when meeting with a client who presents as terminally ill. And maybe we should even ask it more often.

Alternatively, perhaps we should be drafting definitional clauses for our clients which are broad enough to include after-born and posthumously conceived children. For example, we could perhaps use language such as this:

> A. Child.
>
> 1) In determining who is or are the children of a beneficiary hereunder (specifically including Grantor), the following people shall be deemed to be children of such beneficiary:
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> a) Any children of such beneficiary named herein;
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> b) Any children of such beneficiary hereafter born or adopted (as defined

herein);

c) Any children hereafter born to a gestational surrogate commissioned by such beneficiary or such beneficiary's spouse, so long as such child or children is/are born prior to _____ (___) years after such beneficiary's death and the child is conceived with the use of such beneficiary's sperm or egg;

d) Any children born to such beneficiary's spouse prior to _____ (___) years after such beneficiary's death, through natural, artificial or in vitro insemination/fertilization (or some other process) with such beneficiary's sperm; and

2) Notwithstanding anything to the contrary contained herein, the following people shall not be considered a child of a beneficiary for all purposes hereunder:

a) Any child born out of wedlock who is not acknowledged in writing as such beneficiary's child; and

b) Any child or children born as a result of eggs, sperm or preembryos donated by such beneficiary, not pursuant to a procedure otherwise contemplated under sub-sections c or d of Paragraph 1of this definition.

3) If a person is determined not to be a child of a beneficiary hereunder, such person and such person's descendants shall not be considered descendants hereunder.

Such broad language may not fit every scenario, but perhaps it might be more appropriate than our "old fashioned" definition of children as: "those named hereinabove and hereafter born to or adopted by me." I'm sure many readers have developed even more creative definitions, and I'd be pleased to hear from you if you have suggestions.

Also, for those amongst us active in our state bars and interested in statutes regarding broadening definitions of children (for intestacy purposes, for example), citing the Capato ruling might present an opportunity to push such agendas forward. The 3rd Circuit quoted the Ninth Circuit in saying: "developing reproductive technology has outpaced federal and state laws, which currently do not address directly the legal issues created by posthumous

conception." Perhaps the Capato ruling can be a catalyst to move state legislatures forward.

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

Jeff Baskies

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