CALIFORNIA Family Law Monthly

Schafer v. Astrue

It is indeed a Brave New World. Aldous Huxley published his novel anticipating futuristic developments in reproductive technology in 1932. Case law in 2011 makes us realize that the future has arrived. In *Schafer v. Astrue*, the mother, as guardian ad litem for her child , who was born years after the death of the child's biological father and whose birth was a result of posthumous in vitro fertilization, sought survivorship benefits for the child from the Social Security Administration. After denial by the SSA, she went to the U.S. District Court, where her application was also denied. She then appealed to the Fourth Circuit Court of Appeals, where her claim was also rejected. How could this be the result, when there was no dispute of the biological tie between the deceased father and his offspring? The Brave (and strange) New World of legal technicality and nuanced interpretation is found in the *Schafer* opinion.

As the mother in *Schafer* argued, one would think that a natural child – regardless of whether he is born after the biological father's death – fits the basic definition of a "child" in order to be eligible to receive survivorship benefits under the Social Security Act. Not so. Agreeing with the SSA's view that natural children must be able to inherit from the decedent under state intestacy law or satisfy certain exceptions to that requirement in order to count as "children" under the Act, the Court of Appeal held that the SSA's view best reflected Congressional intent and the Act's text, structure, and aim of providing benefits to those who unexpectedly lose a wage earner's support.

In determining whether to agree with the SSA's position, the Court of Appeal analyzed whether the SSA's interpretation was permissible under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* (1984) 467 U.S. 837. Citing *Chevron*, the *Schafer* decision held that "traditional tools of statutory construction" show that Congress intended the SSA to apply state intestacy law, even if it did not speak directly to that question, and the SSA's reasonable interpretation is entitled to deference.

The *Schafer* opinion is one in which the Court of Appeal chose to take a more traditional approach toward the definition of a "child" in the face of advancing reproductive technology. The consequence of the decision, as the Court of Appeal notes, is to leave the biological child of a father who died of cancer without survivorship benefits. While it may take some time for the Court of Appeal to catch up with modern medicine, *Shafer* determined that it is ultimately faithful to Congress' intent and determined not to "allow hard cases to make bad law."

Not that this is an easy question. The *Schafer* opinion acknowledges that its decision is contrary to decided cases in both the Ninth Circuit and the Third Circuit, and that another case is pending in the Eighth Circuit. Mrs. Schafer, the only solace we can offer you and your son is the observation by Alice in Alice in Wonderland: "It would be so nice if something made sense for a change." Amen.

MARSHALL S. ZOLLA