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NO. 22-1342

In the Supreme Court of Florida

Kathleen Steele,
Appellant,

v.

Kilolo Kijakazi, Acting Commissioner of Social Security,
Appellee.

On Certification from the United States Court of Appeals
For the Eleventh Circuit
NO. 20-11656-EE

BRIEF OF THE APPELLEE

Nadine DeLuca Elder
Supervisory General Attorney

Roger B. Handberg
United States Attorney

Todd B. Grandy
Assistant U.S. Attorney
Appellate Division

Natalie Liem
Special Assistant U.S. Attorney
General Attorney
Florida Bar No. 59187
Social Security Administration
Office of the General Counsel
Sam Nunn Atlanta Federal Center
61 Forsyth Street, S.W., Ste. 20T45
Atlanta, Georgia 30303
(404) 562-1094

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Introduction

This case comes before this Court on the following questions of Florida law certified by the United States Court of Appeals for the Eleventh Circuit:

> (1) Under Florida law, is P.S.S. "provided for" in the decedent's will within the meaning of Fla. Stat. § 742.17(4)?
>
> (2) If the answer is yes, does Florida law authorize a posthumously conceived child who is provided for in the decedent's will to inherit intestate the decedent's property?

Steele v. Comm'r of Soc. Sec., 51 F.4th 1059, 1065 (11th Cir. 2022). A "posthumously conceived child" refers to a child conceived from the eggs or sperm of a person or persons who died before the transfer of the eggs, sperm, or preembryos to a woman's body for conception. See id. at 1064; Fla. Stat. Ann. § 742.17(4) (West 2022).[1] The Court noted that the "phrasing of these questions 'is intended only as a guide.'"[2] Steele, 51 F.4th at 1065; (quoting United States v. Clarke, 780 F.3d 1131, 1133 (11th Cir. 2015)).

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[1] All references to the Florida Code Annotated are to the West 2022 edition.

[2] This Court has discretionary jurisdiction to decide the certified question. See Fla. Const., art. V, § (3)(b)(6); Fla. R. App. P. 9.030(a)(2)(C), 9.150(a).

The overarching issue here is whether Fla. Stat. Ann. § 742.17(4), which states that a posthumously conceived child "shall not be eligible for a claim against the decedent's estate unless the child has been provided for by the decedent's will," establishes intestacy rights if the decedent's will provided for the child. As explained below, the statutory language does not confer any intestacy rights, as it only discusses inheritance rights that a will devises. It is universally understood that intestacy rights are inheritance rights that arise in the absence of a will. The decedent's will here does not provide for P.S.S. or any other posthumously conceived child, but even if it does, meeting this condition of section 742.17(4) does not establish intestacy rights. This Court need look no further than the plain language of the statute to answer the Eleventh Circuit's certified question regarding the interpretation of this statute.

Statement of the Case

A. Statement of the Facts

Kathleen Steele (Appellant) married Philip Steele (the wage earner) on August 2, 1997, and remained married to him until his death on

September 29, 2011 (Tr. at 52, 63).[3] The wage earner died while domiciled in Florida (Tr. at 52, 73). In a letter dated May 2, 2013, Julio E. Pabon, M.D., explained that his clinic had obtained a sperm sample from the wage earner prior to the wage earner's death (Tr. at 65). Dr. Pabon said the wage earner intended for Appellant to use the wage earner's sperm for future conception, even if the wage earner died, but did not provide any documentation or other evidence regarding this assertion (Tr. 65). After the wage earner's death, Dr. Pabon's clinic assisted Appellant in conceiving P.S.S. (Claimant) through in vitro fertilization using the wage earner's sperm (Tr. 65). Appellant gave birth to Claimant on March 13, 2013, seventeen months after the wage earner died (Tr. 59-61). On Claimant's birth certificate, Appellant identified the wage earner as Claimant's father (Tr. 62).

Prior to his death, the wage earner retained the law firm Fisher & Sauls, P.A., to execute a will on March 11, 2010 (Tr. 95-99). This will provided that the terms "children" and "lineal descendants," as used in the will, should include any "later born or adopted children" (Tr. 95). After the

[3] Citations to "Tr." followed by a number refer to the PDF pages of the "Record/Transcript" added to the Florida Supreme Court Docket on October 13, 2022.

wage earner's death, an attorney at Fisher & Sauls, Louie Adcock, Jr., prepared a letter dated May 12, 2014, in which he stated he was "sure" it was in the wage earner's mind that his sperm "might be used after his death" (Tr. 94). Mr. Adcock said that the wage earner would be "disturbed" to find that Claimant had been excluded from benefits but also stated he did not recall having any conversation with the wage earner about preserving his sperm (Tr. 94).

B. Agency Decisions on Claimant's Inheritance Rights

On April 11, 2013, Appellant applied for child's insurance benefits (CIB) on the earnings record of the wage earner on behalf of Claimant (Tr. 52-58). The Social Security Administration (agency) denied Claimant's CIB application initially, on reconsideration, and in an Administrative Law Judge (ALJ) decision (Tr. 47-51, 68, 71-78, 161-63). The agency denied Claimant's CIB application based on its determination that Claimant could not inherit a child's share of the wage earner's estate through intestacy under Florida law (Tr. 73-78, 161-63).

As further explained in the ALJ's decision, an applicant must show he was the wage earner's child to qualify for CIB (Tr. 161). Under the Social Security Act (Act), the agency considers an individual to be a child of a wage earner if the individual could inherit a child's share of the wage

earner's intestate personal property under the law of the state in which the wage earner was domiciled at the time he died (Tr. 161). Because the wage earner had died domiciled in Florida, Florida law applied (Tr. 161).

The ALJ noted that the Florida Probate Code, specifically Fla. Stat. Ann. § 732.101, indicates that any part of a decedent's estate "not effectively disposed of by will" passes to the decedent's heirs, which includes all persons entitled to the decedent's property under the statutes of intestate succession (Tr. 161). The ALJ added that section 731.201 defines a "child" as a person entitled to take as a child under the Florida Probate Code by intestate succession from the parent, but no Florida statute or case law provides that a child's birth certificate establishes paternity for intestacy purposes (Tr. 161). The ALJ also considered a Florida Probate Code provision on "afterborn heirs," Fla. Stat. § 732.106, but determined this applied only to children conceived before a decedent's death, whereas Appellant had conceived Claimant after the wage earner's death (Tr. 162).

The ALJ then noted that Florida courts had applied paternity determinations under Chapter 742 of Florida's statutes on domestic relations in the context of determining intestate succession (Tr. 162). Given this precedent, the ALJ looked to Fla. Stat. Ann. § 742.17(4), which

addresses the inheritance rights of a child conceived through fertilization after the death of the egg or sperm donor (Tr. 162). Based on this statute, the ALJ determined that a posthumously conceived child such as Claimant and as described in this statute could not inherit from the donor "except through the person's will" (Tr. 162).

The ALJ acknowledged that the wage earner had executed a will that provided for any "later born" child but determined the will did not specifically provide for Claimant or indicate any intent to provide for a child conceived after the wage earner's death (Tr. 95-99, 163). The ALJ also noted that, despite assertions from the wage earner's attorney regarding the wage earner's intent, the attorney had "confess[ed]" he did not recall having a conversation with the wage earner about preserving his sperm (Tr. 94, 163). The ALJ further noted that, regardless of the existence of a will and the attorney's assertions, Claimant could not qualify as the wage earner's child under the Act because he could not inherit a child's share of the wage earner's intestate property (Tr. 163).

After the Appeals Council denied Appellant's request for review, she filed an action in the district court challenging the ALJ's decision (Tr. 40-44, 101, 151-52, 154-56).

C. District Court Proceedings and Eleventh Circuit Appeal

1. *District Court Decision*

Upon review of the record and the parties' joint brief, a United States Magistrate Judge recommended affirming the ALJ's decision (Tr. 164-73). The magistrate judge concluded that the ALJ had properly applied Florida law in determining Claimant would not be considered a child of the wage earner under the Act because Florida law did not establish intestacy rights for a posthumously conceived child (Tr. 169-71). The magistrate judge observed that Fla. Stat. Ann. § 742.17(4) recognized inheritance rights for a posthumously conceived child, but only if provided for in a will (Tr. at 170).

The magistrate judge rejected Appellant's argument that the wage earner's will established intestacy rights for Claimant (Tr. 172). The magistrate judge explained that Florida law recognizes inheritance rights for a posthumously conceived child only through a will, and intestacy, "by its nature," involves inheritance in the absence of a will (Tr. at 172) (citing Black's Law Dictionary (9th ed. 2009)). Accordingly, the nature of the term "intestacy" precluded Appellant's interpretation of section 742.17(4). The district court, in turn, issued an order and judgment adopting the magistrate judge's report and recommendation and affirmed the Commissioner's decision (Tr. at 175-78).

2. *Eleventh Circuit Appeal*

In her appeal to the Eleventh Circuit, Appellant disputed the district court decision finding Claimant did not have intestacy rights as the wage earner's child. See Steele, 51 F.4th at 1062. Appellant argued that section 742.17(4) should be interpreted as creating intestacy rights for a child conceived posthumously if the decedent had provided for the child in a will. See id. at 1062, 1064. The agency disagreed, noting that intestacy rights specifically arise "in the *absence* of a will." Id. at 1062-64. The agency argued that section 742.17(4) recognized only inheritance rights of a posthumously conceived child that were created through a will and did not establish inheritance rights through intestacy, even implicitly. See id.

In its opinion, the Eleventh Circuit determined that as a matter of federalism and comity and, given the lack of Florida case law on this issue, it was appropriate to certify the question concerning the interpretation of section 742.17(4) to the Florida Supreme Court. Id. at 1065.

Summary of the Argument

Fla. Stat. Ann. § 742.17(4) establishes that the only inheritance rights Florida recognizes for posthumously conceived children are those established through a will. The statutory language discusses only inheritance rights created through a will and omits any mention of the terms

"intestate" or "intestacy." Interpreting this language to create intestacy rights based on the existence of a will would require the addition of words that the statute does not contain. It also would conflict with the widely understood plain meaning of the term "intestacy," which both legal and laymen's reference sources define as a condition that exists in the absence of a will.

By discussing only inheritance rights created with a will and omitting any mention of intestacy, the statutory language establishes the legislature's intent to recognize only inheritance rights created with a will. Moreover, the language of section 742.17(4) stands in stark contrast to the language the legislature used in other Florida statutory provisions that expressly recognized intestacy rights for children who were not posthumously conceived. The wage earner's will and related evidence do not show the wage earner's will provided for Claimant or any posthumously conceived child. But they hold no relevance either way in establishing intestacy rights for Claimant given the statutory language of section 742.17(4).

Argument and Citations of Authority

A. A Will Does Not Create Intestacy Rights.

I. Plain Meaning of "Intestate" and "Intestacy"

The Florida Probate Code[4] and the Uniform Probate Code define an "intestate" estate as any part of an estate that is "not effectively disposed of by will." Fla. Stat. Ann. § 732.101(1); Unif. Probate Code § 2-101(a) (2019). Black's Law Dictionary defines "intestacy" as the quality, state, or condition of a person having died "without a valid will" and "intestate" as relating to or involving the property owned by a person who died "without a valid will." Black's Law Dictionary (11th ed. 2019). The Merriam-Webster Dictionary likewise defines "intestate" as "having made no valid will" or "not disposed of by will." Merriam-Webster, https://www.merriam-webster.com/dictionary/intestate (last visited Jan. 9, 2023). And the Oxford English Dictionary defines "intestacy" as the condition of dying intestate "or without having made a will." Oxford English Dictionary, https://www.oed.com/view/Entry/98474?redirectedFrom=intestacy#eid (last revised March 2022). Accordingly, Florida statutes, the Uniform Probate Code, and both legal and non-legal dictionaries agree: the terms "intestacy"

[4] The Florida Probate Code consists of Chapters 731-735 of Title XLII of the Florida Statutes. Fla. Stat. Ann. § 731.005.

and “intestate” identify a state or condition that exists *in the absence of a will*.

II. Florida Law

Under Florida intestacy law, a decedent’s lineal descendent is entitled to a share of the decedent’s estate not effectively disposed of by will. Fla. Stat. Ann. §§ 732.101(1), 732.103(1) see also Fla. Stat. Ann. § 731.201(9) (defining “descendant” in the Florida Probate Code to include children and noting “descendant” is synonymous with “lineal descendant”). Fla. Stat. Ann. § 731.201(3) of the Florida Probate Code additionally states that a “‘child’ includes a person entitled to take as a child under [the Florida Probate Code] by intestate succession from the parent whose relationship is involved.” Florida intestacy law also refers to “after born heirs,” explaining, “[h]eirs of the decedent conceived before his or her death, but born thereafter, inherit intestate property as if they had been born in the decedent’s lifetime” (Tr. 161). Fla. Stat. Ann. § 732.106. However, because Appellant conceived Claimant after the wage earner’s death, this provision does not apply to Claimant (Tr. 162).

The parties agree that only one Florida statute, Fla. Stat. Ann. § 742.17(4), addresses the inheritance rights of a posthumously conceived

child like Claimant. This statute is titled "Disposition of eggs, sperm, or preembryos; rights of inheritance" and provides:

> . . . a child conceived from the eggs, sperm, or preembryo of a person who died before the transfer of the eggs, sperm, or preembryo 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.

(Tr. 16). Fla. Stat. Ann. § 742.17(4).

A court's determination of the meaning of a statute starts with the statutory language. See State v. Gabriel, 314 So.3d 1243, 1246 (Fla. 2021). If the language is clear, the statute is given its plain meaning and the court does not look behind that language for legislative intent or resort to rules of statutory construction. See id. Section 742.17(4) states that the provision addresses "inheritance" rights and explains that a posthumously conceived child does not have "a claim" against a decedent's estate unless the decedent's will provides for the child. Although the terms "inheritance" and "a claim" could refer to inheritance rights created through a will, intestacy rights, or both, the language of section 742.17(4) ultimately identifies only claims created through a will. By identifying a decedent's will as the sole basis for "rights of inheritance" against a decedent's estate, the statutory language is clear that the only inheritance rights a posthumously

conceived child has against a decedent's estate are those created through a will.

The plain language of section 742.17(4) does not support an interpretation that the existence of a will that provides for a posthumously conceived child will also establish intestacy rights, as that language does not mention "intestate" property or "intestacy" at all, let alone identify either as a type of inheritance right that a posthumously conceived child has against a decedent's estate. In construing a statute, a court is "not 'at liberty to add words . . . that were not placed there by the Legislature.'" Statler v. State, 349 So.3d 873, 879 (Fla. 2022) (citation omitted); see also Armstrong v. City of Edgewater, 157 So.2d 422, 425 (Fla. 1963) (explaining that uncertainty over legislative intent in omitting a word should be resolved against adding words).

Interpreting the statutory language to mean that a will can establish intestacy rights is also at odds with the very nature of "intestacy." As previously discussed, such an interpretation runs contrary to the definition of intestacy used in Florida statutes, the Uniform Probate Code, and multiple dictionaries, all of which base the definition of "intestacy" around the *absence of a will*. See Fla. Stat. Ann. § 732.101(1); Unif. Probate Code § 2-101(a); Black's Law Dictionary (11th ed. 2019); Merriam-Webster,

https://www.merriam-webster.com/ dictionary/intestate (last visited Jan. 9, 2023); Oxford English Dictionary, https://www.oed.com/view/Entry/98474?redirectedFrom=intestacy#eid (last revised March 2022). Nothing in section 742.17(4) indicates an intent to subvert the plain meaning of "intestacy."

Appellant nevertheless contends that by applying the plain meaning of the word "unless" in section 742.17(4) to mean "except on the condition that," the statute creates intestacy rights once the conditions identified in the statute are met (Appellant's Br. at 8, 19-20). However, this interpretation ignores the rest of the statutory language. See Lab. Corp. of Am. v. Davis, 339 So.3d 318, 324 (Fla. 2022) ("'[T] he meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.'") (quoting Deal v. United States, 508 U.S. 129, 132 (1993)). The context in which the word "unless" is used in section 742.17(4) indicates that the only way a posthumously conceived child has "a claim" or "rights of inheritance" against the decedent's estate is if the decedent provided for the child in a will. This language does not indicate that the child also has "intestacy" rights once this condition is met. Fla. Stat. Ann. § 742.17(4).

Consequently, Appellant's focus on the meaning of "unless" to argue that the statute identifies a condition to meet still does not establish intestacy rights once that condition is met. As noted above, the language of section 742.17(4) does not mention "intestacy" or rights to "intestate" property as a type of inheritance right that the statute recognizes once the conditions in the statute are met. Nothing else in the statutory language indicates the terms "a claim"[5] or "rights of inheritance" encompass intestacy rights, either. The plain language of the rest of the statute indicates that if a posthumously conceived child meets the condition that follows the word "unless", the child has inheritance rights that the decedent's will created, but nothing more.

Appellant additionally argues that any other interpretation of section 742.17(4) would result in treating a posthumously conceived children differently "than any other child" and "the legislature would not have intended" this result (Appellant's Br. at 20). As explained above, however,

[5] The Florida Solicitor General filed an amicus brief in support of Appellant, that further asserts that the term "claim" as used in the statute should encompass intestate inheritance based on its ordinary meaning (Amicus Br. 16 n.3). However, broadly construing "claim" to encompass intestacy ignores the remaining context of the statutory language, which clearly and expressly limits "claim" to that based on a will provision. See Fla. Stat. Ann. § 742.17(4).

where (as here) language is clear, the statute is given its plain meaning and a court does not look behind the statute's plain language for legislative intent. Gabriel, 314 So.3d at 1246. By expressly discussing whether a child is provided for in a will and omitting any mention of intestacy rights or intestate succession, section 742.17(4) is clear, and its plain meaning is that only inheritance rights created through a will are recognized under Florida law.

Moreover, Appellant cites no evidence of the legislative intent behind section 742.17(4), let alone evidence that the legislature intended for posthumously conceived children to receive similar or identical treatment as "any other child" in terms of intestacy rights.[6] Appellant instead

[6] The Florida Solicitor General asserts in his amicus brief that the legislature did not "purport to require" a bar on posthumously conceived children's inheritance rights to the decedent's intestate estate and notes that the legislative history of the statute indicates an intent to preclude inheritance rights for any unused preembryos "absent prior arrangement" without further indicating such inheritance rights were limited to those created with a will (Amicus Br.19-20). This apparent reliance on the absence of more explicit exclusionary language regarding legislative intent in the legislative history ignores the fact that there is also nothing in the legislative history or other evidence of a legislative intent purporting to recognize intestacy rights for posthumously conceived children. Furthermore, the plain language of the statute the legislature enacted ultimately referenced only a "prior arrangement" of a "will" with no other reference to intestacy. Neither the Florida Solicitor General's amicus brief nor Appellant identify any other part of the legislative history or other evidence of legislative intent indicating an intent to establish intestacy rights

suggests that a discussion of two Florida cases in the ALJ's decision somehow shows a legislative intent to establish intestacy rights for posthumously conceived children with section 742.17(4) (Appellant Br. at 20-21). The ALJ noted in his decision that the courts in Glover v. Miller, 947 So.2d 1254, 1257 (Fla. Dist. Ct. App. 2007), and In re Estate of Smith, 685 So.2d 1206, 1208 (Fla. 1996), held that paternity determinations under Chapter 742 of the Florida Statutes could establish paternity for purposes of intestate succession (Tr. 162). Given these holdings, the ALJ determined he could apply section 742.17(4) to the issue of whether Florida recognized intestacy rights for posthumously conceived children (Tr. 162). However, Appellant fails to explain how this part of the ALJ's decision showing only the ALJ's intent to apply section 742.17(4) to the question of *whether* a posthumously conceived child has intestacy rights shows a *legislative* intent to *establish* those rights.

In fact, neither the ALJ's decision nor the cases the ALJ discussed show a legislative intent to establish intestacy rights through section 742.17(4), as Appellant suggests. To the contrary, Glover and Smith lacked any discussion of the statute (Tr. 50, 161-63). All three decisions

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by enacting a statute that fails to mention intestacy and is contingent on the existence of a will.

acknowledged that a Chapter 742 paternity determination could establish paternity for purposes of intestate succession and thus play a key role in the determination of intestacy rights, but none indicated that a Chapter 742 paternity determination establishes intestacy rights (Tr. 162). See Glover, 947 So.2d at 1257; Smith, 685 So.2d at 1208. Significantly, none of these decisions indicated any provision of Chapter 742 itself established intestacy rights or any legislative intent to do so. Accordingly, nothing in the ALJ's decision or in Glover or Smith show a legislative intent to establish intestacy rights with section 742.17(4).

Appellant also argues that the legislature's decision to group section 742.17(4) within Fla. Stat. Ann. §§ 742.13-742.17 shows a legislative intent to establish intestacy rights once the conditions within Fla. Stat. Ann. §§ 742.13-742.17 are met (Appellant's Br. at 23). Yet none of these statutes use the terms "intestate" or intestacy." See Fla. Stat. Ann. §§ 742.13-742.17. None of these statutes otherwise indicate that the mention of "inheritance" rights and "a claim" in section 742.17(4) encompass or establish *intestacy* rights, where the statutory language discusses only will provisions. See id. Appellant cites no other statute, rule, congressional history, or other legal authority or record to support her conclusory arguments regarding legislative intent.

The Florida Solicitor General similarly argues that the placement of this statute within the title of the Florida Statutes on "Domestic Relations" and within a chapter titled "Determination of Parentage" "suggests" an intent to establish a parent-child relationship "in the eyes of the law," apparently to encompass granting intestacy rights to posthumously conceived children (Amicus Br. 18-19). This argument, however, still fails to address the lack of any mention of "intestate" or "intestacy" rights in the statute itself or, indeed, any other part of this title or chapter of the Florida Statutes.

The Solicitor General's extension of this argument, that the Florida legislature's enactment of this statute was intended to take part of a "broader nationwide trend" to grant intestacy rights to posthumously conceived children like sixteen other states, merely highlights the differences between section 742.17(4) and the non-Florida statutes on which the Florida Solicitor General relies that explicitly address intestacy rights (Amicus Br. at 20 n.4). Five of the non-Florida statutes relied on expressly state that these statutes establish conditions to recognize a parent-child relationship for the purposes of "intestate succession" (Amicus Br. at 20 n.4). See Ark. Code Ann. § 28-9-221 (West 2022) (establishing conditions to recognize parent-child relationship "for the purposes of

intestate succession"); 755 Ill. Comp. Stat. 5/2-3(a)-(b) (West 2022) (establishing conditions to recognize posthumous child's rights to share of "property passing by intestate succession"); Iowa Code § 633.220A(1) (West 2022) (establishing conditions to recognize parent-child relationship for "purposes of rules relating to intestate succession"); N.D. Cent. Code §§ 30.1-4-15, 30.1-4-19 (West 2022) (establishing conditions to recognize parent-child relationship "for purposes of intestate succession"); N.H. Rev. Stat. Ann. §§ 168-B:2(IV), 168-B:14 (West 2022) (establishing conditions to recognize parent-child relationship for the purposes of "Intestate succession"). Section 742.17(4) notably contains no similar language or any mention of intestacy or intestate succession.

Five other statutes on which the Florida Solicitor General relies establish conditions to recognize a parent-child relationship within subdivisions of those states' probate codes that expressly address "intestate succession" (Amicus Br. at 20 n.4). See Colo. Rev. Stat. §15-11-120(11) (West 2022) (establishing conditions to recognize parent-child relationship within Part of Colorado Statutory Code Article 11, titled "Intestate Succession"); Me. Stat. tit. 18-C, § 2-118 (2022) (establishing conditions to recognize parent-child relationship within Part of Maine Probate Code titled "Intestate Succession"); N.M. Stat. Ann. § 45-2-120(K)

(West 2022) (establishing conditions to recognize parent-child relationship within Part of New Mexico Probate Code titled "Intestate Succession"); N.Y. Est. Powers & Trusts Law § 4-1.3(b) (McKinney 2022) (establishing conditions to recognize parent-child relationship for purposes of "any" disposition of property within Article of New York Estates, Powers, and Trusts Law titled "Descent and Distribution of an Intestate Estate"); Or. Rev. Stat. § 112.077(4) (West 2022) (establishing conditions to recognize an entitlement to an interest in decedent's estate within subchapter of Oregon Probate Code titled "Intestate Succession"). Unlike these statutes, section 742.17(4) notably is not within any chapter or title within the Florida Probate Code or any other part of the Florida Statutes that expressly addresses intestacy rights or intestate succession.

The remaining statutes on which the Florida Solicitor General relies do not mention intestacy or intestate succession but do broadly and expressly grant a posthumously conceived child the same property rights as a child born within the decedent's lifetime (Amicus Br. at 20 n.4). See Cal. Prob. Code § 249.5(a)-(c) (West 2022); Conn. Gen. Stat. § 45a-785(a) (West 2022); La. Stat. Ann. § 9:391.1 (2022); Md. Code Ann., Est. & Trusts § 3-107 (West 2022); R.I. Gen. Laws §§ 15-8.1-707(b), 33-1-4 (West 2022); Va. Code Ann. §§ 20-158(B), 64.204 (West 2022). Unlike the

language of those state statutes, however, the express language of section 742.17(4) does not establish similar status for a posthumously conceived child and instead recognizes only property claims that a will confers. This distinction undercuts the Florida Solicitor General's attempt to group Florida's law with the law of these other states.

In contrast to the language of section 742.17(4) and its lack of any mention of the term "intestate" or "intestacy," Fla. Stat. Ann. § 732.106 unambiguously provides intestacy rights for a specific class of children and excludes posthumously conceived children with language that more closely follows the statues upon which the Florida Solicitor General relies regarding intestacy rights and establishing parent-child status for purposes of intestate succession. Specifically, this statute addresses the inheritance rights of "after born" children, defined as children conceived before a decedent's death, but born thereafter, to the exclusion of the posthumously conceived children defined in section 742.17(4). Compare Fla. Stat. Ann. § 732.106 with Fla. Stat. Ann. § 742.17(4). Section 732.106 specifies that after born children "inherit *intestate* property as if they had been born in the decedent's lifetime." Id. (emphasis added).[7]

[7] The Florida Solicitor General concludes this argument by noting that the Commissioner's interpretation of section 742.17(4) puts Florida in a

The language of this statute establishes that only children conceived *prior* to, but born after, the decedent's death are treated like any other child of the decedent born in the decedent's lifetime with respect to intestacy rights, necessarily excluding the posthumously conceived children described in section 742.17(4). See Leatherman v.Tarrant Co. Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 167 (1993) (noting that when a statute explicitly mentions one type of individual, it implicitly excludes unmentioned others); State v. Miller, 227 So.3d 562, 564 (Fla. 2017). The contrast between the language in sections 732.106 and 742.17(4) further undermines Appellant's claim that the legislature intended for section 742.17(4) to establish intestacy rights without ever using the terms "intestacy" or "intestate" in the statute.

The existence of section 732.106 additionally undermines the Florida Solicitor General's argument that because the definition of a "child" entitled to an intestate share of a parent's estate in Fla. Stat. Ann. § 731.201(3) does not expressly exclude posthumously conceived children from the

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minority of states that decline to extend intestacy rights to posthumously conceived children (Amicus Br. 21). Even so, that observation in no way undermines the above arguments that the plain language of section 742.17(4) does not extend intestacy rights to posthumously conceived children.

definition, this supports the recognition of intestacy rights for such children (Amicus Br. 21). Section 731.201(3) expressly excludes some categories of children, e.g., anyone who is "a stepchild, a foster child, a grandchild, or a more remote descendant," but the rest of the Florida Probate Code shows this list of exclusions is only representative, not exhaustive.

Section 732.106 recognizes further exclusions on who is entitled to a child's share of a decedent's intestate estate, i.e., children who do not meet the condition of having been conceived prior to the decedent's death. Fla. Stat. Ann. § 731.108(2) additionally excludes who is entitled to a child's share of the decedent's intestate estate, i.e., any child born out of wedlock who does not meet the conditions of section 731.108(2)(a)-(c). Suggesting that section 731.201(3) establishes intestacy rights for every other category of children not expressly excluded renders the language of section 732.106 and the requirements of section 731.108(2)(a)-(c) meaningless.

Appellant lastly alleges that any other interpretation of section 742.17(4) would mean a posthumously conceived child provided for in a will "would have no inheritance rights" (Appellant's Br. at 23). This statement is, of course, incorrect, as section 742.17(4) expressly acknowledges that a will that provides for the child will confer inheritance rights on the child. Appellant simply has not shown how the plain language

of this statute, which makes no mention of intestacy rights, somehow establishes such rights based on a will that provides for the child, particularly where the very nature of intestacy is that it exists *in the absence* of a will.

B. The Wage Earner's Will Did Not "Provide For" Claimant.

The Commissioner additionally submits that the wage earner's will did not provide for Claimant. That will neither expressly provided for Claimant nor indicated an intent to provide for a child conceived after the wage earner's death (Tr. 95, 110). Although the will defined "children" to include those who were "later born or adopted," this definition grouped both "later born" and "adopted" children into a single category. Because Florida law does not extend adoption rights to deceased individuals, grouping these terms together in this definition indicates that it encompassed children later born or adopted after the effective date of the wage earner's will, but only within his lifetime (Tr. 95, 110). See Fla. Stat. Ann. § 63.042(2).

Appellant also submitted a letter in which an attorney from the firm the wage earner employed to prepare his will, Mr. Adcock, speculates about the wage earner's intentions in preparing a will (Tr. 94, 109). Yet Mr. Adcock admitted that his statements regarding the wage earner's intentions were only Mr. Adcock's opinion and "confess[ed]" that he did not recall

having a conversation with the wage earner about preserving his sperm (Tr. 94, 109). Mr. Adcock presented no evidence to support his opinion concerning the wage earner's intentions beyond making conclusory assurances that he was "sure" he knew what was in the wage earner's mind (Tr. 94, 109).

Regardless of the definitions in the wage earner's will and Mr. Adcock's unsupported opinions about the wage earner's intentions, the wage earner's will should have no bearing on the outcome of this case given the plain language of section 742.17(4). As discussed above, this statute does not recognize *intestacy* rights for a posthumously conceived child such as Claimant, as the statutory language never mentions "intestacy" rights or rights against the decedent's "intestate" estate. Nor does it indicate that the "inheritance" rights it does mention encompass intestacy rights. The statute mentions only rights created through a will. Interpreting the statutory language to mean that a will can establish "intestacy" rights runs contrary to the plain meaning of the language actually used in the statute and the very nature of the definition of "intestacy." No will provision or additional context for the will that Mr. Adcock's letter offers changes Florida intestacy law on this matter.

Accordingly, this Court should determine that section 742.17(4) does not create intestacy rights based on the existence of a will.

Conclusion

For all the forgoing reasons, this Court should affirm the Commissioner's interpretation of section 742.17(4).

Respectfully submitted,

Roger B. Handberg
United States Attorney

David P. Rhodes
Assistant United States Attorney
Chief, Appellate Division

Todd B. Grandy
Assistant United States Attorney
Appellate Division

By: */s/ Natalie Liem*
Natalie Liem
Special Assistant U.S. Attorney
General Attorney
Social Security Administration
Office of the General Counsel
Florida Bar No. 59187
Sam Nunn Atlanta Federal Center
61 Forsyth Street, S.W., Suite 20T45
Atlanta, Georgia 30303
(404) 562-1094
natalie.liem@ssa.gov

Of Counsel:

Nadine DeLuca Elder
Supervisory General Attorney

Certificate of Compliance

The undersigned counsel for Appellee certifies that this brief was prepared using Arial 14-point font, in compliance with Fla. R. App. P. 9.045(b). According to the word count functions of the word-processing system used to prepare this brief, it contains 5,508 words including headings, footnotes, and quotations, and excluding portions of the brief which are not counted pursuant to Fla. R. App. P. 9.045(e), in compliance with Fla. R. App. P. 9.210(a)(2)(B).

Certificate of Service

I hereby certify that on this the 11th day of January, 2023, I electronically filed the foregoing Appellee's Brief through the Florida Courts E-Filing Portal, which will send a notice of electronic filing to the following counsel of record:

Enrique Escarraz, III, Esq.
rattorne@tampabay.rr.com, and

Roger W. Plata, Esq.
rplata@tampabay.rr.com

/s/ Natalie Liem
Natalie Liem
Special Assistant U.S. Attorney
Assistant Regional Counsel
Social Security Administration
Office of the General Counsel
Sam Nunn Atlanta Federal Center
61 Forsyth Street, S.W., Suite 20T45
Atlanta, Georgia 30303
(404) 562-1024