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SOCIAL SECURITY BENEFITS FOR ILLEGITIMATE CHILDREN AFTER *LEVY v. LOUISIANA*

HERBERT SEMMEL*

Throughout history, society has regarded the illegitimate child with disdain, branding him with the "sin" of his adulterous parents as if he had control over his birth. Inasmuch as the law mirrors the ethics of society, the legal process has regarded him similarly. Fortunately time passes and opinions change. Last year, the Supreme Court of the United States decided two cases in which the rights of illegitimate children were at issue. Should these decisions be broadly applied, a further liberalization of the treatment of illegitimate children would follow. This paper is written to examine the possible impact of these decisions on the social insurance benefits payable under the Social Security Act since that Act contains provisions discriminating against illegitimates.

I. THE *Levy* AND *Glon* CASES

In *Levy v. Louisiana*,¹ five illegitimate children sued for damages because of the wrongful death of their mother. The Louisiana courts denied recovery, holding that a child under the Louisiana wrongful death statute meant a legitimate child. For the same reason, in *Glon v. American Guaranty & Liability Insurance Co.*,² a mother was denied recovery by the Louisiana courts for the wrongful death of her illegitimate son. The Supreme Court of the United States reversed in both cases, holding that the denial of the right to recover was an invidious discrimination which violated the equal protection clause of the fourteenth amendment of the Constitution.

The rather loose opinions of Justice Douglas in *Levy* and *Glon*, with an absurd analogy to incorporated bastards, an incorrect assumption that tortfeasors would go free because a surviving illegitimate could not recover, and a pull on the heartstrings, makes analysis of the cases difficult.³ The essence of the brief opinion in *Levy* is "that it is invidious to discriminate against them [illegitimate children] when no action, conduct or demeanor of theirs is possibly relevant to the harm that was done the mother."⁴

It is in the *Glon* case that the Court emphasizes the broad sweep of its ruling. Here the mother is permitted to recover for the loss of her illegitimate child although the Court must concede that the illegitimate status is caused by the "action" (or inaction at the crucial moment) of the mother. Conceding

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1. *Levy v. Louisiana*, 391 U.S. 68 (1968).

2. *Glon v. American Guar. & Liab. Ins. Co.*, 391 U.S. 73 (1968).

3. For a detailed analysis of the ramifications of *Levy* and *Glon* which are beyond the scope of this paper, see Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477 (1967) and *Legitimate and Illegitimate Offspring of Levy v. Louisiana—First Decisions on Equal Protection and Paternity*, 36 U. CHI. L. REV. 338 (1969).

4. 391 U.S. 68, 72 (1968).

the interest of the state in promoting legitimacy, the Court nevertheless concludes that

[There is] no possible rational basis . . . for assuming that if the natural mother is allowed recovery for the wrongful death of her illegitimate child, the cause of illegitimacy will be served. It would, indeed, be farfetched to assume that women have illegitimate children so that they can be compensated in damages for their death.⁵

Framing the issue in this narrow way—would denial of damages for wrongful death discourage illegitimacy?—prescribes the answer. The Court might have framed the question in terms of whether it is rational for a state to discourage illegitimacy by depriving the unwed mother of a variety of benefits which the mother of a legitimate child receives, including recovery of damages for wrongful death of a child. Such a classification of mothers may well fall within the area of legislative judgment to which the Court repeatedly says it gives great latitude. The failure of the opinion to view the issue in this broader view which might have led to a different result in *Giona* leads to the conclusion that the Court intended to use the "brute force" attributed to it by the dissent so as once and for all to end all disparate treatment based on the legitimacy or illegitimacy of a child's birth.

The broad language of *Levy* might be construed to support the granting of a benefit to a child by reason of his relationship to either parent. The status of the child is not a result of his "action, conduct or demeanor"⁶ whether he is seeking benefits through his father or mother. Nonetheless, both cases involved mother and child, not father and child. A disparate legal treatment of the illegitimate in relation to his father may have a rational basis in some context, and this must be considered in discussing the relevance of *Levy* and *Giona* to the social security laws.

Justice Douglas, in his opinion, stressed the closeness of the mother-child relationship. Accordingly, a state may seek to justify a classification based on legitimacy, generalizing that more fathers live with and have a close relation to their legitimate children than with their illegitimate children. Such a generalization, even if accurate, does not support the rationality of all forms of disparate treatment of illegitimates; rather it offers a means of analysis of each type of treatment to ascertain whether the difference is rational. The question in these terms should be whether the particular benefit is based on the closeness of the father-child relationship or on some other factor. Thus, the obligation of a father to support his child cannot be related to the closeness of the relationship; indeed, legal enforcement of the obligation is found mostly in cases where the father has demonstrated his lack of concern by desertion or nonsupport. Accordingly, a denial of support based on closeness of relationship must be viewed as irrational, punitive and unconstitutional under *Levy*.

5. 391 U.S. at 75.

6. See note 3 *supra* and accompanying text.

If a state's purpose were to encourage marriage, it is hardly rational to suppose that it would not be accomplished by denying benefits to illegitimates based on their relationship to their fathers. This justification, offered by so many in opposing welfare benefits, presupposes a most unusual consideration in the mind of either progenitor at the time of conception. If anything, relieving a father of any responsibility to an illegitimate may encourage illegitimacy.

A more difficult issue in this type of analysis, and the one most crucial to the question of social security benefits, is the constitutionality of state intestacy laws which, with some exceptions, do not permit an illegitimate to inherit from his father. Interpretation of the words such as "child" or "heir" in wills and trusts to mean only legitimate children may reasonably be founded on the more usual closeness of the father-legitimate child relation, since the court is determining the testator's presumed intent in disposing of his property. However the same reasoning is inapplicable to intestacy laws. A rigid adherence to the fiction that the intestacy laws are a substitute will is unduly formalistic and unrealistic. Certainly many people are unaware of the intestacy laws and few lawyers would recommend that clients rely on intestacy to express their intent on distribution of their estates. Intestacy laws reflect the state's judgment as to whom property should descend when the decedent has not specified its disposition. It is clear that the state's classification has no basis in the closeness of the relationship; estranged wives and rejected legitimate children share equally with loved ones. If it is argued that the preference for wives and legitimate children is permissible, since it is based on the normative situation of a closer relationship than with the illegitimate child, what rational basis is there for preferring the remote legitimate collateral relative to a man's own child, even an illegitimate one. The denial of a right to inherit under the intestacy laws is largely a continuation of an historical primitive attitude toward illegitimates.

A more practical reason for distinguishing between the mother-child and father-child relationship is the difficulty of proof of paternity. In cases where benefits are claimed upon the death of the putative father, the most likely situation in a claim for Social Security benefits, the most reliable proof of non-paternity, the blood test, will be impossible and the man will not be available to testify. However, the courts have always felt free to reject the uncontradicted testimony of the mother, even if internally consistent, if the court regards the testimony as lacking in credence because of the witness' demeanor or other circumstances. Justice Douglas appears to have rejected any argument based on difficulties of proof in the majority opinion in *Glonn*.

Opening the courts to suits of this kind may conceivably be a temptation to some to assert motherhood fraudulently. That problem, however, concerns burden of proof. Where the claimant is plainly the mother, the State denies equal protection of the laws to withhold relief merely because the child, wrongfully killed, was born to her out of wedlock.⁷

7. 391 U.S. at 76.

In *Shapiro v. Thompson*,⁸ the Court similarly refused to accept prevention of fraud as a constitutionally rational basis for imposing a one-year residency requirement for public assistance. "[I]t is unreasonable to accomplish this objective [prevention of fraud by the receipt of welfare payments from two states] by the blunderbuss method of denying assistance to all indigent newcomers for an entire year."⁹

II. RELEVANT DECISIONS IN THE WAKE OF *Levy* AND *Glon*

Although the cases decided since *Levy* and *Glon* are insufficient in number to permit a definitive judgment as to what the future holds, the courts, with the exception of a majority of the Ohio Supreme Court,¹⁰ have concurred in Justice Douglas' sympathy for the illegitimate and have applied *Levy* and *Glon* broadly. In one case, the Missouri Supreme Court¹¹ (and the minority in Ohio) relied on the lack of fault on the part of the illegitimate child and held that *Levy* required a reversal of long-standing decisions denying an illegitimate the right to support from his father. In another,¹² the New Jersey Supreme Court held that *Levy* required that an illegitimate recover for the wrongful death of his father in the same manner as legitimates. The Court refused to rule on the constitutionality of the New Jersey intestacy law denying inheritance to illegitimates from their father, although the issue was squarely before it. The New Jersey wrongful death statute had granted the right to sue to those who inherit by intestacy, thus excluding the illegitimate plaintiffs in the case. The Court examined *Levy* and *Glon* and concluded, "We find it impossible to tell from *Levy* and *Glon* whether their thesis will embrace the devolution of intestate property, especially of the putative father."¹³ The Court decided to ignore the issue because the reference to the intestacy law in the wrongful death statute was "incidental" and

the underlying principle [of *Levy*] must be that when children suffer tortious injury by the wrongful death of a parent, their legitimacy is irrelevant to the tortfeasor's liability, and hence it is invidious to grant a remedy to the legitimate and withhold it from the illegitimate child. Under that thesis, it can be of no logical moment whether that parent was the mother or the father.¹⁴

The Court may be excused for framing the issue in terms of liability, for Justice Douglas' opinion implies that the issue is whether the tortfeasor will go

8. *Shapiro v. Thompson*, 394 U.S. 618 (1969).

9. *Id.* at 637.

10. By a 4-3 vote the Ohio Supreme Court refused to give an illegitimate the right to sue his father for support. The majority rejected a constitutional argument based on *Levy* in a brief footnote. "The rights announced in *Levy* were based on the intimate, familial relationship which exists between a mother and her child, whether the child is legitimate or illegitimate." *Baston v. Sears*, 15 Ohio St. 2d 166, 168, 239 N.E.2d 62, 63 (1968).

11. *R. v. R.*, 431 S.W.2d 152 (Mo. 1968).

12. *Schmoll v. Creecy*, 54 N.J. 194, 254 A.2d 525 (1969).

13. *Id.* at 196, 254 A.2d at 528.

14. *Id.* at 197, 254 A.2d at 529.

free or be required to pay.¹⁵ The analysis is nonetheless faulty. The issue may not be the liability of the tortfeasor at all but rather to whom the proceeds of any recovery will be distributed,¹⁶ and that question is essentially the same if the property to be distributed comes from the tort recovery or assets accumulated by the deceased during his lifetime. In New Jersey the statute confirms this identity by incorporating the intestacy law into the wrongful death statute. Thus the decision in New Jersey must logically be applicable to inheritance on intestacy.

The North Dakota Supreme Court has also given direct support to the right of illegitimates to inherit by intestacy and indirect support to such inheritance from the father. The North Dakota intestacy law permitted an illegitimate to inherit from his mother but not from or through his legitimate half-brother on his mother's side, a result which was declared unconstitutional under *Levy*.¹⁷ Significantly, the Court gave no consideration to the "closeness of relationship" test but founded its decision entirely on the "no fault" concept applicable to both the mother and father relationship. "This statute, which punishes innocent children for their parents' transgressions, has no place in our system of government, which has as one of its basic tenets equal protection for all."¹⁸

Perhaps the most significant application of *Levy* for Social Security purposes can be found in the Fifth Circuit's decision in *Hebert v. Petroleum Pipe Inspectors Corp.*,¹⁹ for it is the federal courts which will determine the effect of *Levy* on Social Security benefits. The district court had dismissed a wrongful death action brought under the Jones Act on behalf of illegitimate children of the deceased seaman on the ground that they were not "children" within the meaning of the Act "because they were the adulterously illegitimate offspring of the deceased father so denominated by Louisiana law." The Fifth Circuit reversed *per curiam*, citing only *Levy*. The significance lies in the fact that the reference to *Levy* (and hence the constitutional issue) was unnecessary since the Fifth Circuit and the other handful of cases in point had all agreed that illegitimates could recover under the Jones Act as a matter of statutory interpretation.²⁰

III. SOCIAL SECURITY BENEFITS

The social insurance provisions (old age, survivor's and disability insurance and dependent's benefits) of the Social Security Act treat illegitimate children

15. 391 U.S. at 71.

16. In *Schmoll v. Creecy*, 54 N.J. 194, 254 A.2d 525 (1969), the deceased left two legitimate children as well as five illegitimate children.

17. In re Estate of Jensen, 162 N.W.2d 861 (N.D. 1968).

18. *Id.* at 878.

19. *Hebert v. Petroleum Pipe Inspectors, Inc.*, 396 F.2d 237 (5th Cir. 1968).

20. See, *Hassan v. A. M. Landry & Son, Inc.*, 321 F.2d 570 (5th Cir. 1963), *cert. den.*, 375 U.S. 967; *Civil v. Waterman Steamship Corp.*, 217 F.2d 94 (2d Cir. 1954); *Doyle v. Albatross Tanker Corp.*, 260 F. Supp. 303 (S.D.N.Y. 1965), *aff'd* 367 F.2d 465 (2d Cir. 1966); Note, *The Rights of Illegitimates Under Federal Statutes*, 76 HARV. L. REV. 337, 346-53 (1962).

differently and less advantageously than legitimate children in three major respects. Section 216(h)(2)(A),²¹ makes eligibility for children's benefits depend on the definition of child in the state intestacy laws, most of which do not grant illegitimates the right to inherit from their father.²² Second, section 202(d)(3)²³ removes the requirement of dependency of a child on his parent as a condition for benefits for all legitimate children, but not for all illegitimate children. Third, under section 203(a)(3)²⁴ when total benefits payable on the account of an insured exceed the statutory maximum, *all* benefits payable to illegitimate children, under the special provisions making certain illegitimates eligible, are reduced first without reduction for any other beneficiary of the same insured. A reduction affecting any recipient other than an illegitimate child is, in contrast, made pro rata for all recipients from the account of the same insured. In addition under section 202(g)(1)²⁵ mothers of illegitimate children are denied mothers' benefits because they have never been married to the father of the child while mothers of legitimate children will receive such benefits if they were married to the deceased insured at the time of his death or met the special tests for surviving divorced mothers. Whether any of these distinctions could be considered rational after *Levy* and *Glon* remains to be considered.

A. Social Security Benefits—The Father-Child Relationship

Children's benefits under the Social Security Act may be payable if a parent qualifies for a retirement or disability pension or if a parent dies while fully or currently insured.²⁶ At present, when illegitimate children do not qualify for Social Security benefits it is usually because their claim is based on the eligibility and earnings of their father. As will be seen, most illegitimates can qualify for children's benefits based on their mother's account. However, a mother may have insufficient quarters of covered earnings to qualify either herself or the child for benefits or she may have a lower earning base than the father, resulting in less benefit for the child than he could have obtained were he entitled to benefits based on his father's earnings. In many cases, the father dies, becomes disabled or retires before the mother's status entitles the child to benefits. Thus the illegitimate child may receive no benefits in the event he cannot qualify on his father's account.

Whether *Levy* changes the existing situation will depend on whether the *Levy* rationale applies to the father-child relationship. For the reasons explained above, the remainder of this paper assumes that *Levy*, in at least some respect, is applicable.

21. 42 U.S.C. § 416(h)(2)(A) (1964).

22. H. CLARK, *LAW OF DOMESTIC RELATIONS* § 5.4 (1968).

23. 42 U.S.C. § 402(d)(3) (1964).

24. 42 U.S.C. § 403(a)(3) (1964).

25. 42 U.S.C. § 402(g)(1) (1964).

26. Section 202(d)(1), 42 U.S.C. § 402(d)(1) (1964).

SOCIAL SECURITY BENEFITS

1. *The Definition of "Child"*

The basic definition of "child" has not been materially changed since the Social Security Act was amended in 1939 to provide children's benefits. Under current law "the term 'child' means (1) the child or legally adopted child of an individual" with numerous special provisions expanding the definition.²⁷ "Child," of course, could be construed in accordance with common usage to mean any natural child of a man. But the Act has always contained a provision which has been uniformly applied to deny benefits to illegitimates who do not inherit under any state law, except for those who now qualify under the special provisions of sections 216(h)(2)(B) or (h)(3).²⁸ Section 216(h)(2)(A)²⁹ provides:

In determining whether an applicant is the child or parent of a fully or currently insured individual for purposes of this subchapter, the Secretary shall apply such law as would be applied in determining whether the devolution of intestate personal property by the courts of the State in which such insured individual is domiciled. . . . Applicants who according to such law would have the same status relative to taking intestate personal property as a child or parent shall be deemed such.

Since illegitimates rarely inherit by intestacy from their fathers, this section has uniformly been applied to exclude illegitimates from the definition of "child" of their father.³⁰ The result was that prior to the 1965 amendments, few illegitimates could recover benefits based on their father's earnings.

The 1965 amendments³¹ opened the way for a large group of illegitimate children to receive benefits where paternity had been established by a written acknowledgement by the father or a court determination, or by a judicial support order based on paternity.³² Such acknowledgement or decree must occur before the death or disability of the father or, in the case of benefits on retirement, one year before he became entitled to old-age benefits or reached age 65, whichever is earlier. Illegitimates, thus recognized, can receive benefits even though the father is neither living with nor supporting the child. In addition, if the insured is shown by evidence satisfactory to the Social Security Administration to be the father of the applicant and was living with or contributing to the support of the child at the required time, the illegitimate is deemed to be the child of his father for purposes of the statute even without an acknowledgement or court decree. Section 216(h)(2)(B) also grants status as a "child" to one who is illegitimate solely because a legal impediment prevented the validity of a good faith marriage ceremony between his mother and father.

27. Section 216(e), 42 U.S.C. § 416(e) (1964).

28. 42 U.S.C. § 416(h)(2)(B) (1964) and (h)(3) (Supp. 1969).

29. 42 U.S.C. § 416(h)(2)(A) (1964).

30. *E.g.*, *Warrenberger v. Folsom*, 239 F.2d 846 (3d Cir. 1956); *Rivera v. Celebrezze*, 248 F. Supp. 807 (D.P.R. 1966).

31. 79 Stat. 409 (1965).

32. Section 216(h)(3), 42 U.S.C. § 416(h)(3) (Supp. 1969).

As a result, the only illegitimates who now are not deemed to be "children" under the Act (assuming paternity could be established satisfactorily) are those whose father has neither acknowledged them in writing nor been judicially declared to be their father, and who is neither living with nor contributing to the child's support. Although no figures are available to measure the number in this excluded group, it is likely to be substantial. Moreover, it is this group of deserted children who are most likely to be receiving public assistance, generally in the form of Aid To Families with Dependent Children. The denial of Social Security benefits submits them to the indignities of the public assistance system and, at the same time, shifts approximately half the cost of their support from the federal government to the states.

Levy may very well result in the inclusion of this group under the definition of "child." If *Levy* is held to bar any distinction between legitimates and illegitimates in inheriting from the father under intestacy laws, then illegitimates can meet the statutory definition of child in section 216(h)(2)(A) and will avoid any disparate treatment. If *Levy* does not require any change in the intestacy laws, then the illegitimate's status under the Social Security Act is not improved.

Professor Krause has suggested a possible middle ground which in turn raises a question of interpretation of the Social Security Act.³³ Applying "closeness of relationship" analysis, *Levy* may permit a state to allow legitimates to take by intestacy ahead of illegitimates but prohibit favoring a more remote legitimate relative over an illegitimate child. In such event, is an illegitimate child one who under the state intestacy law "would have the same status relative to taking intestate personal property as a child"?³⁴ This question should be answered affirmatively. A state adopting the suggested priorities on intestacy would in effect be creating a class of "children" for intestacy purposes and then creating priorities within the class. The illegitimate would derive his right to inherit based on his status as a "child" of the deceased, the statutory test under the definition provided in section 216(h)(2)(A).

There should be no need to await individual state court decisions on the intestacy issue for illegitimates to receive Social Security benefits. Even though the applicable state court may not yet have ruled as to the effect of *Levy*, the state courts are bound by the supremacy clause and therefore the state intestacy law as modified by *Levy* is the "law as would be applied in determining the devolution of intestate personal property by the courts of the State" under section 216(h)(2)(A). Indeed, even a rejection by a state court of the application of *Levy* to fathers or to intestacy should not be decisive. It is the responsibility of the federal agencies and the federal courts where Social Security litigation takes place to determine whether state interpretation of the United States Con-

33. Krause, *Legitimate and Illegitimate Offspring of Levy v. Louisiana—First Decisions in Equal Protection and Paternity*, 36 U. CHI. L. REV. 338, 354 (1969).

34. Section 216(h)(2)(A), 42 U.S.C. § 416(h)(2)(A) (1964).

stitution is correct. Federal benefits should not and may not be denied by incorporation of an unconstitutional state law into federal statute. In *Shapiro v. Thompson*, the Court said that "Congress may not authorize the States to violate the Equal Protection Clause. . . . Congress is without power to enlist state cooperation in a joint federal-state program by legislation which authorizes the States to violate the Equal Protection Clause."³⁵

2. Dependency Test

Children's benefits under the Social Security Act have always been conditioned in theory upon the child's dependency on his parent. In fact, however (with minor exceptions inapplicable here), legitimate children have always been eligible for benefits even though they neither reside with nor receive support from their father. Section 202(d) provides that a legitimate child is deemed dependent upon his father unless he has been adopted by some other individual.³⁶ When the special provisions of sections 216(h)(2)(B) and (h)(3) were added to include certain illegitimates within the scope of the definition of "child," section 202(d) was also modified to read

For the purposes of this paragraph, a child deemed to be a child of a fully or currently insured individual pursuant to section 216(h)(2)(B) or section 216(h)(3) shall be deemed to be the legitimate child of such individual.³⁷

The result of the incredibly tortured language of 202(d) is that all children are eligible for benefits regardless of whether they are living with or supported by their father, except illegitimate children whose paternity has not been acknowledged in writing by the father or judicially decreed. If after *Levy*, such illegitimates fall within the definition of "child," may they still be denied benefits because of non-dependency when others receive them without regard to dependency? It is difficult to find a rational basis for such a distinction other than the administrative difficulties of ascertaining paternity, a reason which apparently lacks constitutional weight. A father is legally obligated to support his children, legitimate and illegitimate alike, in almost every state, and *Levy* may well require equal treatment of legitimates and illegitimates in child support.³⁸ It hardly seems rational to deny benefits only to that group of deserted illegitimate children who have been unfortunate enough not to have some public authority or adult pursue his father and obtain a judicial decree or written acknowledgment of paternity. "[I]t is invidious to discriminate against them when no action, conduct, or demeanor of theirs is possibly relevant"³⁹ to the nature of the benefit or the basis of the classification.

35. 394 U.S. 618, 641 (1969).

36. 42 U.S.C. § 402 (d)(3) (Supp. 1969).

37. *Id.*

38. See Krause, *supra* note 33 at 353.

39. *Levy v. Louisiana*, 391 U.S. 68, 72 (1968).

3. Maximum Benefit Limitations

Benefits under the Social Security Act are generally based on the earnings of the insured individual either since 1950 or reaching age 21, whichever is later, excluding the five lowest earning years in that period. From the average monthly wage, the primary insurance amount is determined from a schedule in section 215(a). The primary insurance amount is the monthly payment the insured individual would receive upon retirement at 65. Both children's benefits and mother's benefits are paid at three-fourths of the primary insurance benefit of the insured individual. Thus, an insured worker who died in 1969 with average earnings for benefit purposes of \$300 per month would have a primary insurance amount of \$127.10. If he left a wife and two children, each would be eligible for a benefit of \$95.40 ($\frac{3}{4}$ of \$127.10) or a total of \$286.20. They would not actually receive that much because section 203(a) imposes maximum limits on the benefits payable on the account of one insured individual.⁴⁰ In the case of the worker above, the maximum limit is \$240 per month; under section 203(a), the mother's and children's benefits would be reduced pro rata, so that each would receive \$80 a month.

Reductions due to the maximum-benefit-limit are always pro rata among those claiming benefits based on the earnings of another, except when the claimant is an illegitimate child. Section 203(a)(3) provides that in the event the maximum benefit provisions come into effect, the reduction shall first be applied solely to those to whom benefits are payable solely by reason of the special provisions for illegitimate children in section 216(h)(3). Thus, if our worker left an illegitimate child eligible under 216(h)(3), in addition to his wife and two legitimate children, the illegitimate child would receive no benefits because of section 203(a)(3). This provision seems clearly unconstitutional if *Levy* has any relation to the father-child relationship. As noted above, the one area where the law has given relative equality to illegitimates is in their right to support from their father, and given *Levy*, it is difficult to offer a rational legislative purpose for depriving illegitimates of all their benefits while granting benefits to legitimate children. The purpose of children's benefits is to provide a substitute for the loss of support which results from the death, retirement, or disability of the parent. The constitutional issue can be avoided if *Levy* is read as amending state intestacy laws so that illegitimates can inherit from their father. In that event, illegitimates will be freed from the discriminatory provisions of 203(a)(3) since they will qualify not "solely by reason of section 216(h)(3)" but also because they would be children within the definition of section 216(h)(2)(A). Thus, where maximum limits come into play, those illegitimates already eligible under 216(h)(3) would also benefit from *Levy*.⁴¹

40. 42 U.S.C. § 403(a) (Supp. 1969).

41. It is conceivable that all the maximum benefit limitations in Social Security may be successfully attacked on constitutional grounds along the lines of recent cases declaring family limits on public assistance payments violative of equal protection. *See, e.g., Williams v. Dandridge*, 297 F. Supp. 450 (D.C. Md. 1968). Although there are significant differences

SOCIAL SECURITY BENEFITS

B. Social Security Benefits—The Mother-Child Relationship

If *Levy* is applicable only to the mother-child relation it will have little impact on children's benefits under social security. In most states illegitimate children now inherit from their mothers under intestacy laws,⁴² therefore they will be deemed a "child" under section 216(h)(2)(A) in the same manner as a legitimate child. Since they qualify for benefits without reference to the special provision for illegitimates in section 216(h)(3), they are not subject to any discrimination under 203(a)(3) in the event of benefit reductions where the statutory maximums are exceeded. Technically, section 203(d)(3) would continue to treat some illegitimate children differently in case of the dependency test. That section expressly provides that a legitimate child is deemed to be dependent on his insured parent whether or not he is in fact so dependent, whereas an illegitimate child is not deemed dependent unless his insured parent was either living with *or* contributing to the support of the child. However, the Social Security Administration has removed this disparity in its regulations in the case of a child claiming benefits on his mother's earnings by providing that the child is deemed to be dependent on his mother if she is his natural mother.⁴³ In other words, illegitimates are treated the same as legitimates for purposes of waiving the dependency requirement in case of benefits claimed on the mother's earnings. There does not appear to be any statutory basis for this special treatment in the mother's case as section 202(d)(3) specifically refers to both the "father or adopting father or his mother or adopting mother." Nevertheless, it meets the constitutional requirement imposed by *Levy*. If an illegitimate cannot be denied recovery of tort damages for the wrongful death of his mother, it follows that he also cannot be denied social insurance benefits payable on the death, retirement or disability of his mother when a legitimate child can recover in the same circumstances. Both insurance benefits and tort recovery are provided to compensate, among other things, for the loss of support from the parent. No more rational basis exists for denying insurance benefits than for denying tort recovery.

The impact of *Levy* on benefits on the mother's earnings will apply only in those few states which do not permit illegitimates to inherit from their mothers by intestacy. *Levy* appears to require the end to such discrimination.⁴⁴ After *Levy*, all state intestacy laws should be read as including illegitimate children of the mother within the term "child," and thus the illegitimate will meet the definition of "child" in section 216(h)(2) of the Social Security Act. Thus they will be eligible for children's benefits based on the mother's earnings.

in the bases for payments of social insurance as contrasted with public assistance (*see Shapiro v. Thompson*, 394 U.S. 618 at 633 n.10 (1969)) the constitutional argument should be asserted in Social Security claims and litigation.

42. H. CLARK, *LAW OF DOMESTIC RELATIONS* § 5.4 (1968).

43. 20 C.F.R. § 404.327 (1967).

44. *In re Estate of Jensen*, 162 N.W.2d 861 (N.D. 1968).

C. *Social Security Mother's Benefits*

When an insured individual dies, his widow (and in some cases a surviving divorced wife) may be eligible for a mother's benefit if she has in her care a child of the deceased eligible for children's benefits.⁴⁵ The mother of an illegitimate child usually cannot obtain similar benefits since she was never married to the deceased.⁴⁶ *Levy* and *Glon*a might require an end to this disparate treatment of mothers of illegitimates; it might be argued that mother's benefits are in fact intended as a benefit to the child. In *Newsom v. Social Security Board*, the court said that the purpose of mother's benefits was "to extend financial protection to the widow, regardless of her age, while she has in her care a child of the deceased husband entitled to child's insurance benefits, to supplement the orphan's benefits and, either to enable the widow to remain at home and care for the child, or, at least to assume parental responsibility for the welfare and care of the child if she did not live in the same home with the child."⁴⁷ Congressional intent that the mother's benefit is for the child's interests may be evidenced by the fact that widows are provided a separate benefit upon reaching age 60.⁴⁸ If *Levy* is read broadly to mean that illegitimate and legitimate children must be treated alike in terms of benefits accruing from the father-child relationship, it could be argued that the Constitution requires that the illegitimate be given that same opportunity for additional care and support from his mother as is afforded legitimate children through the benefit payable to their mother. Approached from the perspective of the mother of an illegitimate, *Glon*a can be read to assert that a mother cannot be denied a benefit based on a relationship to her illegitimate child which is afforded mothers of legitimates. "To say that the test of equal protection should be the 'legal' rather than the biological relationship is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of a State to draw such 'legal' lines as it chooses."⁴⁹ The class of persons receiving benefits are mothers of the deceased children and Congress may not constitutionally discriminate within such a class solely on the basis of whether the mother ever entered into a formal marriage with the father.

In support of constitutionality, it might be asserted that mother's benefits may be viewed as being payable because of the personal relationship between the mother and father (the insured individual) rather than the mother-child or father-child relationship. It would be reasonable for Congress to grant benefits to persons who have been married to an insured individual and deny it to others who may have had as close, if not closer, relationship to the insured than his wife. Certainly the provision for wife's benefits provides no constitutional com-

45. Section 202(g), 42 U.S.C. § 402(g) (1964).

46. See § 216(h)(1)(B), 42 U.S.C. § 416(h)(1)(B) (1964), as to the case of an invalid marriage entered into in good faith.

47. 70 F. Supp. 962, 964 (E.D. Mich. 1947).

48. Section 202(e), 42 U.S.C. § 402(e) (Supp. 1969).

49. *Glon*a v. American Guar. & Liab. Ins. Co., 391 U.S. 73, 75-76 (1968).

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pulsion to provide similarly for mistresses. According to this view, the statutory scheme provides benefits to wives upon reaching age 60 or earlier in certain cases, including the case where the recipient cares for a child of a deceased insured. But such a view of the statutory scheme is inaccurate; widows under 60 do not receive benefits (unless disabled) because of their marital status, and the mother's benefit terminates if a child of the insured is no longer in her care or reaches eighteen. The conclusion is that the mother's benefit is payable solely because of the mother-child relation, not the wife-husband relation, and therefore no distinction is valid based on the legitimacy of the child.

