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Social Welfare -- The "Man in the House" Returns to Stay

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and state.[58] To hold otherwise would effectively destroy the concept of representative church government in the United States.[59]

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Social Welfare—The "Man in the House" Returns to Stay

Under the type of state welfare regulation popularly known as the "substitute father" rule, children otherwise eligible for benefits under the Aid to Families with Dependent Children[1] program are denied assistance if their natural parent maintains a continuing sexual relationship with someone of the opposite sex. This person is deemed to be a non-absent parent within the meaning of the Social Security Act, thus rendering the family ineligible for AFDC payments. Whether this person is legally obligated to support the children is irrelevant; whether he does in fact contribute to their support is also irrelevant; eligibility under such a rule is determined solely by the relationship between the parent (usually the mother of the children) and the "substitute" (usually an unrelated male).

In *King v. Smith*,[2] the Supreme Court unanimously held Alabama's "substitute father" rule invalid as inconsistent with Title IV of the Social Security Act, 42 U.S.C. § 601-09 (1964). Declining to reach the constitutional issue presented, the Court found the Alabama provision to be violative of the "Flemming Ruling"[3] and held that it defined

[58] *Cf.* Kedroff v. Saint Nicholas Cath., 344 U.S. 94, 110 (1952); Goodson v. Northside Bible Church, 261 F. Supp. 99, 103 (S.D. Ala. 1966).

[59] Barkley v. Hayes, 208 F. 319, 323 (W.D. Mo. 1913).

[1] Aid to Families with Dependent Children [hereinafter cited as AFDC] is one of the major components of the public assistance program established by the Social Security Act of 1935, 42 U.S.C. § 601-09 (1964). The program grants aid to dependent, needy children who have been "deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent," and who live with any of certain enumerated relatives. 42 U.S.C. § 606(a)(1) (1964). For a thorough discussion of AFDC and its predecessors, see W. BELL, AID TO DEPENDENT CHILDREN (1965).

[2] 88 S. Ct. 2128 (1968).

[3] 42 U.S.C. § 604(b) (1964). The ruling, given statutory approval in 1961 in response to a directive issued by the then Secretary of the Department of Health, Education & Welfare, Arthur Flemming, provides that

> A State plan for aid to dependent children may not impose an eligibility condition that would deny assistance with respect to a needy child on the basis that the home conditions in which the child lives are unsuitable, while the child continues to reside in the home. Assistance will therefore be

"parent" in a broader sense than that intended by the Social Security Act.[4] Although aid can be granted under the Act only if a "parent" is continually absent from the home, Congress intended the word "parent" to designate one owing a duty of support to the child imposed by state law. A state's definition of the word should therefore be no broader; one who owed no state-imposed duty of support was not a "parent," his association with the mother was not parental presence, and it did not justify severance of AFDC funds. An unrelated male adult in Alabama owed no such legal duty, and therefore the Court found the regulation invalid.

Some nineteen states[5] and the District of Columbia have such regulations and have been directly affected by the ruling.[6] This note will attempt to deal with the probable impact of the court's holding upon the welfare systems in these states and will consider, as an example, North Carolina's experience with the substitute father rule and the effect of the decision on this state.

There is a marked scarcity of case law on "man-in-the-house" rules, as there is on welfare law in general.[7] Such regulations have generally

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continued during the time efforts are being made either to improve the home conditions or to make arrangements for the child elsewhere.
Bureau of Public Assistance, Social Security Administration, Dep't of Health, Educ., and Welfare, State Letter No. 452 (Jan. 17, 1961).

[4] The Alabama regulation called for the termination of aid if the mother cohabited with the "substitute father," either inside the home or elsewhere; the mother then bore the burden of proving that the relationship had been discontinued before assistance could be resumed. The substitute's relationship with the children themselves was immaterial. ALABAMA STATE DEP'T OF PENSIONS AND SECURITY, MANUAL FOR ADMINISTRATION OF PUBLIC ASSISTANCE, Part I, Ch. II, § VI(V)(A) (1964). The plaintiff in *King* found her AFDC payments terminated because of alleged—and undisputed—weekend visits by one Willie Williams. Mr. Williams lived 15 miles away with his wife and eight of his nine children; he was not the father of any of Mrs. Smith's children and was both unwilling and unable to provide for their support, since he could hardly support his own family. This determination by the local welfare board left Mrs. Smith in the position of having to support her family on her cook's salary of 16 dollars a week. 88 S. Ct. at 2131.

[5] Alabama, Arizona, Arkansas, Florida, Georgia, Indiana, Kentucky, Louisiana, Michigan, Mississippi, Missouri, New Hampshire, New Mexico, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, and Virginia. 88 S. Ct. at 2143.

[6] The decision "beneficially affect[ed] more than 21,000 in Alabama and perhaps as many as 400,000 throughout the country. . . ." N.Y. Times, Aug. 25, 1968, § 6 (Magazine), at 28.

[7] This is understandable in that most potential plaintiffs have neither the means of securing legal aid, nor knowledge of their rights, and are usually placated with administrative review of their case—if even this right is exercised by them. For example, appeals in one North Carolina County were estimated at no more than two per month. Interview with Gerald Allen, University of North Carolina School of Social Work, in Chapel Hill, N.C., Sept. 6, 1968. The right to ad-

withstood attack in the state courts in the few instances in which they have been challenged.[8] Recently, however, at least one state has liberalized its rule by administrative review,[9] and other similar regulations are being challenged in the federal courts.[10] In other jurisdictions, recent administrative decisions have reversed denials of AFDC benefits to children on the grounds that their mother was convicted of welfare fraud,[11] and have required a high standard of proof as to the existence of a "man-in-the-house" before curtailing AFDC payments.[12] The decision in *King*[13] marked the first time such a regulation has been challenged successfully in the federal courts, and perhaps in any appellate court.

Essentially, the Supreme Court held that denial of AFDC payments to otherwise eligible children must not leave a vacuum in the support provided the child—there must be either a legally responsible adult as defined under a state's own support laws, or "other adequate care and assistance" as required by the statutory implementation of the Flemming Ruling.[14] The effect of the opinion is to prohibit denial of the funds solely on the basis of the mother's relationship with a man not legally obligated to support her children. The significance of the decision is not so sweeping as it might appear, however. The Court noted that actual contributions from a "man-in-the-house" could be taken into considera-

ministrative appeals, however, is carefully pointed out in most generally distributed welfare literature. *See, e.g.*, N.C. DEPT. OF PUBLIC WELFARE, PUBLIC ASSISTANCE FOR NEEDY PEOPLE IN NORTH CAROLINA, INFOR. BOOKLET No. 36 (1968).

[8] *See, e.g.*, People v. Shirley, 55 Cal. 2d 521, 360 P.2d 33, 11 Cal. Rptr. 537 (1961); People v. Ford, 236 Cal. App. 2d 438, 46 Cal. Rptr. 144 (4th Dist. Ct. App. 1965), *appeal dismissed*, 384 U.S. 100 (1966); People v. Rozell, 212 Cal. App. 2d 875, 28 Cal. Rptr. 478 (3d Dist. Ct. App. 1963). All of these decisions affirmed convictions of "grand theft" of welfare benefits by reason of nondisclosure of an alleged "man-in-the-house." *See also* County of Kern v. Coley, 229 Cal. App. 2d 172, 40 Cal. Rptr. 53 (5th Dist. Ct. App. 1964), affirming a judgment for the plaintiff county in a suit to recover alleged overpayments of ANC (California's AFDC) funds because of the unreported income of an unrelated male living in the house.

[9] Matter of D, Hearing before N.Y. State Dep't of Social Welfare (1966), *noted in* 5 WELFARE L. BULL. 3 (1966).

[10] McPherson v. Montgomery, Civ. No. 46759 (N.D. Cal., filed March 25, 1967), *noted in* 9 WELFARE L. BULL. 9 (1967); Robinson v. Board of Comm'rs., No. 3399-66 (D.D.C., filed Dec., 1966), *noted in* 7 WELFARE L. BULL. 3 (1967).

[11] Matter of J., Case No. U.C.—1858, N.J. Dep't of Inst. & Agencies (May 25, 1967); Matter of W., Case No. U.C.—808, N.J. Dep't of Inst. & Agencies (May 2, 1967); *noted in* 9 WELFARE L. BULL. 10 (1967).

[12] Matter of C., Case No. C-29-208-0, D.C. Dep't of Public Welfare (April 20, 1967) ("reasonable and substantial evidence"); Matter of D., Case No. VC—1210, N.J. Dep't of Inst. & Agencies (April 20, 1967) ("beyond a reasonable doubt"), *noted in* 9 WELFARE L. BULL. 9 (1967).

[13] Smith v. King, 277 F. Supp. 31 (M.D. Ala. 1967).

[14] 42 U.S.C. § 604(b) (1964).

tion in computing need.[15] Also, states apparently may still terminate AFDC payments under such a rule, provided the man is one whom the state has defined as owing a legal duty of support to the child. In any case, in fact, where an alternative provision is made for the child's support, *King* will have little effect. The "substitute father" rule is overturned only in those instances where AFDC funds are completely terminated and the children left without other adequate care.

It is possible that states may attempt to amend their laws to impose duties of support on stepfathers and common-law husbands. If only *King* were controlling, these devices might be successful in decreasing the AFDC caseload. The Department of Health, Education, and Welfare (HEW), however, has responded to the Court's decision by amending its regulations to provide that the determination of whether a child has been deprived of parental support or care "will be made only in relation to the child's natural or adoptive parent, or in relation to a child's stepparent who is ceremonially married to the child's natural or adoptive parent and is legally obligated to support the child under state law."[16] In another section, the directive specifically excludes reliance by a state on a "substitute parent" or "man-in-the-house" as a basis for a finding of ineligibility or for assuming availability of income.[17]

Thus, HEW has apparently substituted its own authority for that of the state in defining "parent," for the Court's decision alone probably left states free under the Social Security Act to define "parent" as long as their definition was limited to those owing a duty of support imposed by state law. Now HEW has further limited the policy by eliminating, for instance, common-law stepfathers, regardless of the state's support laws. In addition, the new regulation prohibits a state from assuming income from a non-parent to be available in the computation of the family's resources. Rather, the state must assume the burden of proving "actual contributions."[18]

[15] 88 S. Ct. at 2134. In addition, states are free, under the Social Security Act, to set their own standards of need and the amount of support to be given, and may take into consideration in determining need any resources a family might have. 42 U.S.C. § 602(a)(7) (1964). Any contributions counted, however, must be "actual" and on a regular basis. DEP'T OF HEALTH, EDUC. AND WELFARE, HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION, IV, § 3131. In fact, states have been asked since the ruling to encourage contributions from an unrelated adult living in the home. Letter from Mary E. Switzer, Administrator, Social and Rehabilitation Service, HEW, to State Administrators, August 8, 1968.

[16] 33 Fed. Reg. 11290 (1968).

[17] *Id.*

[18] *Id.*

The principal difficulty with HEW's extension of the *King* holding is the absence of any real enforcement power, short of complete termination of federal matching funds—hardly a desirable alternative.[19] To the extent that the new regulation exceeds the Court's decision, a more useful power of enforcement is advisable.[20] In any case, there is little likelihood that dilatory or evasive measures will be undertaken by the states for the time being;[21] Congress recently enacted legislation, effective July 1, 1969, "freezing" the amount of federal matching funds that will be available to the states for their AFDC programs, using as a base period the first quarter of 1968.[22] Ordinarily, then, the proportion of AFDC children eligible for these grants would be set, and there would be no incentive on the part of the states to absorb more children into their caseloads, since the base period has passed. Congress, however, provided an exception in the Act for children who began to receive aid after March, 1968, as a result of the judicial decision invalidating a substitute parent rule or residence test.[23] Thus the children readmitted as a result of *King* will be added to the total during the base period in order to determine the proportion to be granted federal matching aid. In light of the impending "freeze," there is every incentive for a state to comply fully and immediately with the Court's decree, so as to make eligible for federal matching grants the greatest possible number of children during the base period.[24]

[19] Though it is not an unprecedented one. *Cf.* Gardner v. Alabama, 385 F.2d 804 (5th Cir. 1967), *cert. denied*, 88 S. Ct. 773 (1968) (order terminating federal funds for noncompliance with the Civil Rights Act of 1964 upheld).

[20] Federalizing the whole AFDC program has been suggested by one noted author. BELL, *supra* note 1, at 186. Bell points out that although the federal taxpayer in 1960 paid 58.4 per cent of the cost of AFDC, in Southern states the federal government paid such proportions of the cost as 79.8 per cent in Alabama, 80.2 per cent in Arkansas, and 77.8 per cent in North Carolina. *Id.* at 219 n.36.

[21] Although North Carolina, subsequent to the lower court decision in *King*, adopted a welfare regulation conditioning receipt of AFDC upon proof that instruction in birth control methods had been received by the applicant (or that she was sterile), the regulation has since been repealed, upon order from HEW. Resolution of the State Board of Public Welfare of North Carolina, Sept. 25, 1968.

[22] Tax Adjustment Act of 1968, H.R. 15414, 90th Cong., 2d Sess. 114 CONG. REC. H4685 (1968).

[23] *Id.* North Carolina's birth-control restriction mentioned above did not come within this categorical exception; there was, therefore, no incentive for the state to refrain from applying it.

[24] After July 1, 1969, however, restrictive measures by some states designed to weed out certain classes of recipients from the welfare rolls may occur. Administrative review of such measures will be needed to insure that the newly-won rights of AFDC mothers and children are not jeopardized by state-imposed

North Carolina, for example, recently deleted its version of the "substitute father" rule[25] in response to an advisory letter from HEW;[26] it is reasonably safe to assume that the decision will have a similar effect in other states with such rules. In order to understand the significance of *King* in states other than Alabama, it is helpful to examine briefly the North Carolina rule and its background. The original North Carolina rule was adopted in 1955 and underwent at least two revisions, the latest of which (May 1, 1968) probably represented an attempt to accomodate the lower court decision in *King* and its anticipated affirmation by the Supreme Court.

As revised in 1959, the rule provided simply that a county board of public welfare could terminate aid to a woman with an illegitimate child if it found that a "common law relationship" existed between the woman and a man to whom she was not married.[27] The manual then enumerated several "factors" for determining the existence of such a relationship.[28] This rule discriminated against illegitimate children (or children with illegitimate siblings); in addition, it obviously came within the type of rule proscribed by *King* and the HEW directive, in that the sole basis for determining eligibility was the "common law" relationship between the woman and her paramour, without regard to the support and needs of the child.

In 1965, the State Board of Public Welfare received a new chairman,[29] who personally revised the regulation,[30] effective May 1, 1968:

> No child who is living with one of his or her parents, such parent not being physically or mentally incapacitated, shall be deemed de-

restrictions. It is perhaps regrettable that HEW does not have more power to insure these rights by administrative sanctions than by recourse to piecemeal litigation in the federal courts.

[25] DIVISION OF PUBLIC ASSISTANCE, N.C. STATE BD. OF PUBLIC WELFARE, PUBLIC ASSISTANCE MANUAL § 440 (1968) [hereinafter cited as PUBLIC ASSISTANCE MANUAL].

[26] Resolution of the State Board of Public Welfare of North Carolina, Sept. 25, 1968.

[27] PUBLIC ASSISTANCE MANUAL § 440 (1959).

[28] These included frequent association with one another, "evidence of pregnancy, evidence that the man provides food or makes regular contributions toward support of the mother and children, or that he shows an interest in the mother and children that would be expected of a husband and father." *Id.*

[29] Governor Moore appointed Robert C. Howison, Jr., a Raleigh attorney, to succeed Howard E. Manning as Chairman, effective April 1, 1965. N.C. STATE BD. OF PUBLIC WELFARE, BIENNIAL REPORT, JULY 1, 1964—JUNE 30, 1966, 15 (1966).

[30] Interview with Robert H. Ward, Assistant Commissioner, N.C. Dep't of Public Welfare, in Raleigh, N.C., Sept. 6, 1968.

> prived of parental support or care, for the purpose of determining eligibility for aid to families with dependent children, if some person of the opposite sex from such parent is acting in loco parentis to the child. A person shall be deemed acting in loco parentis to the child if such person acts as a parent to the child and treats the child as his own.[31]

Several significant changes are to be noted: the rule referred to "no child," reflecting the intent of the Board not to restrict the rule to mothers of illegitimates;[32] in addition, the language was made mandatory instead of being in the discretion of the local welfare boards; finally, "in loco parentis" terminology was substituted for the "common law" relationship previously required. Apparently this subtle modification was designed to circumvent semantically the effect of the lower court ruling in *King*, that decision having censured restrictions on eligibility based on the mother's relationship with a man, but having said nothing explicit about the *child's* relationship with his "substitute parent." The distinction, however, was insignificant; for, as stated later by the Supreme Court, "the actual financial situation of the family [was] irrelevant in determining the existence of a substitute father."[33] The criteria of *King* had not been met: there was still no state-imposed duty of support, no "other adequate care and assistance" provided for the child. The rule also fell squarely within HEW's prohibition of eligibility conditions based on persons other than "parents," as HEW defined the term. The regulation could not survive.

The *King* decision is a salutary one, for "substitute parent"-type rules have little to recommend them. A variety of persons familiar with the problems of social welfare have attacked them;[34] the National Advisory Commission on Civil Disorders has recommended their total abolition;[35] and at least some state welfare administrators, trained in social

[31] PUBLIC ASSISTANCE MANUAL § 440 (1968).

[32] Interview with Clifton M. Craig, Commissioner, N.C. Dep't of Public Welfare, in Raleigh, N.C., Sept. 6, 1968. Bell notes a similar instance in Mississippi where, after federal attorneys pointed out the discrimination of such a rule, it was changed to exclude all children. BELL, *supra* note 1, at 98.

[33] 88 S. Ct. at 2135.

[34] *See* People v. Shirley, 55 Cal. 2d 521, 360 P.2d 33, 11 Cal. Rptr. 537 (1961) (Peters, J., dissenting). *See generally* BELL, *supra* note 1; Reich, *Individual Rights and Social Welfare: The Emerging Issues*, 74 YALE L.J. 1245 (1965); tenBroek, *The Impact of Welfare Law upon Family Law*, 42 CALIF. L. REV. 458 (1954); Wickenden, *Poverty, Civil Liberties, and Civil Rights: A Symposium*, 41 N.Y.U.L. REV. 328, 333 (1966); *Symposium*, 54 CALIF. L. REV. 319 (1966).

[35] REPORT OF THE NATIONAL ADVISORY COMM'N ON CIVIL DISORDERS 464 (1968).

work, have reservations as to their merits.[36]

Such restrictions permit discrimination by biased local officials; they hold the AFDC mother to an uncommonly strict code of personal conduct;[37] they may be self-defeating in purpose—for if all but the most casual contact with a man is suspect, how is an AFDC mother ever to gain a husband? The "substitute parent" rule is arguably incorrect in its basic assumptions—the presence of a "man-in-the-house," far from rendering a home "unsuitable," may be beneficial to the psychological growth of the children;[38] he may develop a relationship with them warmer than that of many "natural" parents, particularly the type whose support is sought to be enforced by abandonment proceedings. Further, the backbone of such laws—the "worthy poor" concept, which confined poor relief to the "morally fit" indigent—is scarcely consistent with modern notions of social welfare.[39]

King v. Smith very likely signifies a new role for the Supreme Court in protecting the rights of welfare recipients, though it is of but small significance compared with the work yet to be done. The entire, complex system of social welfare needs to be reformed—"legalized"—by insuring recipients of their basic rights in a modern welfare state[40] and by guaranteeing them the procedural safeguards needed to assert those rights. Ideally, the reform should come from within, by administrative decision coupled with realistic welfare legislation and funding by Congress and the states. It is more likely, however, that in the interim it will fall to the courts to insure these rights—even though, as in *King*, their decisions may only implement already-existing administrative regulations.

[36] Interview with Clifton M. Craig, *supra* note 29; interview with Robert H. Ward, *supra* note 27.

[37] See BELL, *supra* note 1; Commissioner King, defendant in the *King* case, has another view: "[T]he mother has a choice in this situation to give up her pleasures or act like a woman ought to act and continue to receive aid. . . ." King v. Smith, 88 S. Ct. 2128, Append. Vol. I, 103 (1968).

[38] Brief for appellants at 32, King v. Smith, 88 S. Ct. 2128 (1968).

[39] For an extended discussion of the origins of poor relief and the evolution of the "worthy poor" concept, see BELL, *supra* note 1. There is another reason, perhaps more compelling to welfare administrators, for rejecting any "suitable home" provision: a rule allowing very much local discretion may well run afoul of the federal requirement that the state plan be uniformly administered by a single state agency whose rules, regulations, and standards are mandatory on local administrative authorities. *See* 42 U.S.C. § 602(a)(1), (3) (1964).

[40] While we would question any tendency to accept welfare dependency as a permanent condition of any group, it is both humane and necessary for the nation to take thought now for the 15 per cent of its citizens who would be reached by welfare reform.
The Christian Science Monitor, Sept. 4, 1968, at 16, col. 1.

Perhaps this reformation will come with an opinion as significant in the area of poverty law as *Brown v. Board of Education*[41] was in civil rights. *King v. Smith* is far from being that case. What is called for is something on the order of a decision insuring, as a right, a minimum standard of material comfort.[42]

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Torts—Recent Extensions in Builder-Vendor's Liability for Defects

For the buyer of a home who suffers injury or loss due to defective construction,[1] the traditional obstacle in a suit against the builder-vendor has been the ancient rule of caveat emptor,[2] that unless the vendee has a claim of fraud or of breach of expressed warranty, he takes the risk himself of quality and condition.[3] Today that rule is subject to broad and growing exceptions,[4] which threaten to replace it with implied warranty and a general duty of due care.

Some of these expanding areas are touched upon by a recent South Carolina case. In *Rogers v. Scyphers*,[5] the wife of the vendee of a new house sued the subdeveloper[6] for negligent construction and for negligent

[41] 347 U.S. 483 (1954).

[42] Or one implementing Professor Reich's "theory of entitlement" to welfare benefits; Professor Reich would elevate the receipt of public assistance, long regarded as a privilege, to the status of a legal right. Reich, *supra* note 34, at 1252.

[1] Construction is described as "defective" if it is faulty, or lacking something essential to its completeness, or not reasonably safe for its anticipated use. Galloway v. City of Winchester, 299 Ky. 87, 92, 184 S.W.2d 890, 893 (1944); Schipper v. Levitt & Sons, 44 N.J. 70, 92, 207 A.2d 314, 326 (1965); BLACK'S LAW DICTIONARY 506 (4th ed. 1951).

[2] *See, e.g.*, Smith v. Tucker, 151 Tenn. 347, 270 S.W. 66 (1925), *overruled by* Belote v. Memphis Dev. Co. 208 Tenn. 434, 346 S.W.2d 441 (1961). *See generally* 55 AM. JUR. *Vendor and Purchaser* § 57 (1946); 7 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 926A (3d ed. 1963).

[3] *See, e.g.*, State *ex. rel.* Jones Store Co. v. Shain, 352 Mo. 630, 634, 179 S.W.2d 19, 20 (1944), *overruled by* Morrow v. Caloric Appl. Corp., 372 S.W.2d 41 (Mo. 1963). See Note, *Right of Purchaser in Sale of Defective House*, 4 WEST. RES. L. REV. 357 (1953) for a survey of vendee's limitations fifteen years ago.

[4] *See* notes 8, 24, 25, 41 & 43 *infra*. *See generally* Bearman, *Caveat Emptor in Sales of Realty—Recent Assaults upon the Rule*, 14 VAND. L. REV. 541 (1961) [hereinafter cited as Bearman].

[5] — S.C. —, 161 S.E.2d 81 (1968).

[6] Mrs. Rogers sued the Industrial Life Insurance Company, which actually built the house, and Scyphers, who was president and principal stockholder in the company and was supervisor of the construction. The company conveyed the house to Scyphers, who sold it to Rogers. The court does not distinguish one defendant from the other. *Id.*