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Social Security and Public Welfare - Dependent Children - Stepfather's Obligation [*Solman v. Shapiro*, 300 F. Supp. 409 (D. .Conn.), *affd mem.*, 396 U.S. 5 (1969)]

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Recent Decisions

SOCIAL SECURITY AND PUBLIC WELFARE — DEPENDENT CHILDREN — STEPFATHER'S OBLIGATION

Solman v. Shapiro, 300 F. Supp. 409 (D. Conn.), *aff'd mem.*, 396 U.S. 5 (1969).

Benefits under the Aid to Families with Dependent Children program (AFDC)[1] can no longer be characterized as a mere gratuity from the government. Informal, charitable notions of gift baskets for the needy, popular in earlier years, have given way to a complex, bureaucratic system of cooperative federalism, which prohibits arbitrary impairment by the states of a recipient's right to receive AFDC benefits.[2] In determining both the eligibility for and the amount of AFDC payments, the states must comply with the Social Security Act and the regulations promulgated thereunder by the Department of Health, Education and Welfare (HEW).[3] Moreover, the state's program must not offend the spirit of the Act to insure extensive home care for needy children. Implementation of the AFDC program was initially hindered by the discretionary latitude enjoyed by the states. Especially troublesome were state legislative schemes designed to reduce benefits flowing to otherwise eligible classes of recipients.[4] Sensitive to past abuses, a federal district court in the recent case of *Solman v. Shapiro*,[5] has delimited state power to determine eligibility requirements for AFDC benefits. The impact of the decision, however, may effectively alter state administration of the AFDC program in such a manner as to produce deleterious effects from the standpoint of federal welfare goals.

The plaintiffs in *Solman* had once been the sole supervisory relatives of their needy children and had qualified as beneficiaries under Connecticut's AFDC program. After their remarriage, how-

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[1] Social Security Act of 1935, 42 U.S.C. §§ 601-09 (Supp. IV, 1969).

[2] To the extent that a recipient is eligible for a specified payment, it is arguable that the AFDC program creates a vested right in such benefits which the states cannot abrogate sua sponte. *See* Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245-46 (1965). *See also* Harvith, *Federal Equal Protection and Welfare Assistance*, 31 ALBANY L. REV. 210, 224-42 (1967).

[3] Social Security Act, 42 U.S.C. § 601 (Supp. IV, 1969); 45 C.F.R. § 203.1 (1969). For the text of this regulation, see note 9 *infra*.

[4] *See* text accompanying notes 17-21 *infra*.

[5] 300 F. Supp. 409 (D. Conn.), *aff'd mem.*, 396 U.S. 5 (1969).

ever, Connecticut threatened to curtail, either wholly or in part, the plaintiffs' benefits on the ground that the needy children now had a stepfather living in the home. Plaintiffs challenged the validity of the state's action and sought injunctive relief from a three-judge federal court.[6] Specifically, they challenged Connecticut's statute and interpretive regulation[7] which provided that in determining the need of an AFDC recipient having a stepfather who was both employed and living in the house, the income of the stepfather would be deemed available for the support of the recipient whether or not the stepfather actually expended money on the recipient.[8]

In granting injunctive relief, the unanimous three-judge court held, without reaching constitutional questions, that Connecticut's statute contravened the pertinent federal regulation which provided that the income of the stepparent, who had no legal obligation of support, could not be deemed available for the support of the stepchild.[9]

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[6] A three-judge federal court may be convened where plaintiff asserts constitutional claims which are not insubstantial, coupled with claims based on conflicting state and federal laws, and, as here, where injunctive relief is sought to restrain state officials from the execution of a state statute on the ground that it is unconstitutional. *See* Brotherhood of Locomotive Eng'rs v. Chicago R.I. & Pac. R.R., 382 U.S. 423 (1966); Florida Lime & Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73 (1960).

[7] CONN. GEN. STAT. ANN. § 17-87(a) (1958) provided that in determining need of AFDC recipients:

> [T]he ability of a stepparent to provide for the support of his minor stepchild or stepchildren residing with him shall be considered in the same manner as that of a natural parent is considered, and a stepparent is defined for purposes of this section as one who marries the parent of a minor child or children of whom such stepparent is not the actual parent . . . .

This statute was implemented by a regulation providing that when an employed stepparent is living in the home eligibility for AFDC benefits exists only if his income and all income from other sources is insufficient to meet the family's total need. 1 CONN. STATE WELFARE MANUAL § 345.3, *cited in* 300 F. Supp. at 412. This regulation very carefully circumscribed the purview of the state's consideration of a stepfather's income.

[8] Plaintiffs contended that Connecticut's curtailment of AFDC benefits was contrary to the Social Security Act and the HEW regulations promulgated thereunder. Because a stepfather is not obligated by Connecticut statutes to support his stepchildren, plaintiffs contended further that the state's implementation of the AFDC program was in violation of the equal protection and due process clauses of the 14th amendment. 300 F. Supp. at 412.

[9] 45 C.F.R. § 203.1 (1969) provides:

> (a) A State plan for aid and services to needy families with children . . . must provide that the determination whether a child has 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, or (if the State plan includes such cases) the unemployment of his father, 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 of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children.*

An understanding of whether the Connecticut welfare regulation[10] represented a proscribed departure from the HEW regulation delimiting state administrative discretion with respect to allocating AFDC payments requires an examination of the conceptual development of the welfare system. In the period before Congress enacted the present AFDC program, the states believed that they could impose their own standards of morality upon welfare recipients because welfare was generally characterized as a gift of government funds.[11] Initially, then, a mere handful of the poor participated in these limited programs of state financial aid. In this early period, the state-funded programs emphasized the value of a good home life for the child, and all efforts were directed toward insuring a "suitable home" by requiring mothers to demonstrate that they were proper and competent custodians of their children.[12] Following the

(b) The inclusion in the family, or the presence in the home, of a "substitute parent" or "man-in-the-house" or any individual other than one described in paragraph (a) of this section is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State . . . . [I]n the consideration of all income and resources in establishing financial eligibility and the amount of the assistance payment, *only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in paragraph (a) of this section will be considered available for children in the household in absence of proof of actual contributions.* (emphasis added).

[10] 1 CONN. STATE WELFARE MANUAL § 345.3, *cited in* 300 F. Supp. at 412.

[11] *See* Reich, *supra* note 2, at 1245.

[12] This concept of the "worthy poor" is interesting for the light it sheds upon later state attempts to curtail AFDC benefits to those who, in some way, demonstrated their "unworthy" character. There was a distinct preference for the "worthy poor," and the concept pervaded the precursors of the AFDC program.

In the early part of this century, because of their supposed incapacity for "moral regeneration," the great majority of poor people were excluded from the various pension and welfare programs such as so-called "mother's pension programs," where only mothers beyond moral reproach were selected for handouts. This selection process was accomplished through a careful screening of each mother. Resultantly, a majority of the needy mothers and their children were excluded from "pension" benefits.

The mother's pension programs operated under two principles: (1) Only a small class of indigents was selected for special public treatment; (2) the state's financial support of the mother was designed to enable her to maintain a "suitable home," but only if the mother could demonstrate her worth as a proper custodian of her children. The purpose of this program was to insure that a small group of children would remain in their own homes to develop, through supervision and education, into decent citizens who would become assets to society. W. BELL, AID TO DEPENDENT CHILDREN 5 (1965); *see* J. BROWN, PUBLIC RELIEF 1929-1939, at 26-32 (1940); H. LEYENDECKER, PROBLEMS AND POLICY IN PUBLIC ASSISTANCE 46 (1955); Reich, *supra* note 2, at 1245.

It is, perhaps, helpful from a historical viewpoint to note that during the pre-1935 heyday of the mother's pension programs the idea that poverty could be eliminated was nonexistent. Thus, the "suitable home" provisions in state welfare programs "were ideally suited to provide the assurance taxpayers may have needed that only 'worthy' families, reflecting the highest of publicly held values, reaped rewards." W. BELL, *supra* at 19. For states such as Alabama, the "worthy poor" notion dovetailed with the traditionally Victorian southern mores and, not surprisingly, was carried over into the

passage of the Social Security Act in 1935, the states enjoyed some financial relief, but they also acquired in the federal government a new partner with a different view of welfare.

From its inception, the AFDC program envisioned a system based on need rather than worthiness. The goal of AFDC was to enable the states to provide home care for all needy children through a comprehensive plan of cooperation with the federal government.[13] However, the state plan was required to meet certain federal guidelines designed to prevent arbitrary administrative measures before a state could receive financial help from the federal government.[14] By placing primary emphasis on the needs of the child rather than on arbitrary standards such as the morality of the child's mother, this program represented a significant departure from the prior concept of welfare. Notwithstanding an exclusive need standard clearly delineated by Congress,[15] many states continued to chart a course systematically designed to curtail benefits to the "unworthy" poor.

Two basic ploys were utilized to effectively discriminate against classes of welfare recipients. First, any recipient found living in an unsanitary home or under immoral conditions could have his AFDC payments curtailed until such time as the home conditions met the state-imposed standards.[16] Although the federal government outlawed "suitable home" provisions in 1960,[17] an almost indistinguishable doctrine evolved. This doctrine, the odious "substitute father" provision, gave the welfare agencies the power to curtail aid pay-

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administrative policy of the state's AFDC program. This provided a handy mechanism by which the states could justify to the federal government their denial of aid to certain needy families. *See* note 19 *infra* & accompanying text.

[13] Social Security Act § 401, ch. 531, § 401, 49 Stat. 627 (1935), *as amended*, 42 U.S.C. § 601 (Supp. IV, 1969).

[14] The minimum qualifications for a state plan are set out in 42 U.S.C. § 602(a) (1964), *as amended*, 42 U.S.C. § 602(a) (Supp. IV, 1969). Some of the qualifications are: (1) A state plan must be mandatory on all of its political subdivisions; (2) it must provide for financial participation by the state; (3) it should provide for a single administrative state agency; and (4) the plan should set out procedures for a fair administrative hearing of recipients' asserted claims of state action to wrongfully deny AFDC benefits. *Id.*

[15] Social Security Act §§ 401-06, ch. 531, §§ 401-06, 49 Stat. 627 (1935), *as amended*, 42 U.S.C. §§ 601-09 (Supp. IV, 1969).

[16] This requirement was a thinly veiled carryover of the suitable home concept which had pervaded the earlier mother's pension programs. *See* note 12 *supra* & accompanying text. *See generally* W. BELL, *supra* note 12, at 93-123; Comment, *Non-Need Related Provisions for the Receipt of AFDC*, 9 J. FAMILY L. 101, 106 (1969).

[17] This became known as the "Fleming Rule." In 1960, after it was shown that Louisiana had denied aid to over 20,000 children, the then Secretary of HEW, Arthur Fleming, issued a ruling disallowing state denial of AFDC aid based on "suitable home" provisions. W. BELL, *supra* note 12, at 147.

ments whenever evidence indicated that a recipient's mother was having an illicit affair with a male.[18]

Two factors allowed those states adopting the doctrine to continue to circumvent the policy delineated in the Social Security Act. First, the statutory scheme embodying the AFDC program lacked adequate federal guidelines for controlling state administration of the benefits. Ironically, this dearth of standards resulted from the wide discretion that Congress had purposely incorporated into the Act in the belief that state-federal cooperation would be enhanced.[19] The second factor that enabled the states to continue discriminatory practices was the practical difficulty encountered by welfare recipients in their efforts to finance legal action against the offending states.[20]

The broad spectrum of the state's regulatory domain was abruptly

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[18] This male was not a stepfather as in the instant case, but rather some phantom creature who darted in and out during the night to make love with his mistress. Although there is an argument to be made that the state had a valid interest in upholding the moral standards of the community, the unvarnished effect of a state regulation which assumed a paternal obligation based on infrequent cohabitation was to discriminate against a certain class of needy children. This male would not even meet a common sense definition of a "parent," yet a finding of his presence in the house effectively curtailed AFDC payments to the needy children of his supposed mistress. In one case, for example, a grant was discontinued because investigators "believed a shirt they found did not belong to the mother's son, as both she and the boy contended, but rather to a man." W. BELL, *supra* note 12, at 90.

It is interesting to note that a mother in California is, even today, in danger of criminal prosecution for grand theft if she fails to inform the welfare agency that she is living with a man who is capable of helping her financially. *See* People v. Shirley, 55 Cal. 2d 521, 360 P.2d 33, 11 Cal. Rptr. 537 (1961) (mother convicted of grand theft of county welfare funds where she failed to report a man was living with her who contributed money for her support).

The "substitute father" statutes were finally declared illegal in the landmark decision of King v. Smith, 392 U.S. 309 (1968), where the Court observed that there were other ways in which states could regulate community moral standards so that needy children would not suffer in the process. The Court pointed out that "Congress has made at least this one determination: that destitute children who are legally fatherless cannot be flatly denied federally funded assistance on the transparent fiction that they have a substitute father." 392 U.S. at 334.

[19] In *King v. Smith*, Mr. Chief Justice Warren noted that "there is no question that States have considerable latitude in allocating their AFDC resources, since each State is free to set its own standard of need and to determine the level of benefits by the amount of funds it devotes to the program." 392 U.S. at 318. *See* Westberry v. Fisher, 297 F. Supp. 1109 (S.D. Me. 1969). For limitations on the present scope of state discretion, see note 39 *infra* & text accompanying note 38.

[20] The unavailability of a federal forum was particularly acute prior to the liberalization of class action requirements by the 1966 amendments to the Federal Rules of Civil Procedure. *See* 37 F.R.D. 71, 79 (1965). Unchallenged by welfare recipients, state welfare agencies wielded so much unbridled discretion that, as one commentator observed, the agencies virtually made "the law by administrative interpretations under the pressure of current public opinion — interpretations that [were] neither consistent from one jurisdiction to another nor in accord with the original purposes of the legislature." Reich, *supra* note 2, at 1252.

limited by the landmark case of *King v. Smith*,[21] wherein Alabama's substitute father regulation was held violative of the Social Security Act.[22] The Alabama regulation presumptively considered the income of the substitute father available to the children of his mistress.[23] The state could thereby deny AFDC benefits to the children of any mother who cohabited with an able-bodied male who was not her husband. Alabama's administrative plan rested upon notions of morality regarding the mother's conduct rather than the congressional standard of need.[24] Alabama justified this result through its interpretation of the federal regulation defining a "dependent child" as "a needy child . . . who has 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."[25] Alabama sought to bring its definition of a substitute father within the literal meaning of a non-absent "parent" as set forth in the Act. Under this strained definition, the child had not been deprived of parental support because the mother's paramour was a "parent" who was deemed present in the home. In this way the state effectively denied aid to children who were otherwise eligible.

In rejecting this logic, the Supreme Court pointed out that Alabama was, in effect, positing eligibility on whether the substitute father had sexual relations with the mother, rather than on a finding of whether this paramour was legally obligated to support the child or actually did contribute to his support. The Court rea-

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[21] 392 U.S. 309 (1968).

[22] 42 U.S.C. §§ 601-09 (Supp. IV, 1969). At the time of the King decision, HEW-approved "substitute father" policies were also in effect in Arizona, Arkansas, Florida, Georgia, Kentucky, Michigan, Missouri, New Hampshire, New Mexico, North Carolina, Oklahoma, South Carolina, and Texas. Additional "man-in-the-house" policies existed in the District of Columbia, Indiana, Louisiana, Mississippi, Tennessee, and Virginia. Kargman, *Acquiring New Relations by Statutory Regulation: Reflections on King v. Smith*, 2 FAMILY L.Q. 378 (1968). *See* Comment, *supra* note 17; 20 MERCER L. REV. 325 (1969); 47 TEXAS L. REV. 349 (1969).

[23] Further, under the Alabama regulation any able-bodied man was considered to be the father of the applicant's children if he lived in the applicant's home for the purpose of cohabitation with her, or even if he infrequently visited the home for this purpose. ALA. MANUAL FOR ADMIN. OF PUB. ASSISTANCE, pt. I, ch. II, § VI(V)(A), *cited in* 392 U.S. at 313-14.

[24] In *King*, the Supreme Court made it very clear that the sole congressional standard was need:

> The appellees . . . meet Alabama's need requirements; their alleged substitute father makes no contribution to their support; and they have been denied assistance solely on the basis of the substitute father regulation. Further, the regulation itself is unrelated to need, because the actual financial situation of the family is irrelevant in determining the existence of a substitute father. 392 U.S. at 320.

[25] 42 U.S.C. § 606(a)(1) (Supp. IV, 1969).

soned that "Congress must have meant by the term 'parent' an individual who owed to the child a *state-imposed legal duty of support.*"[26] The majority decried a system whereby "children . . . are told, as Alabama has told these appellees, to look for their food to a man who is not in the least obligated to support them."[27] The Court's mandate was clear: No asserted interest of the state to uphold community moral standards could excuse the state from the diligent observance of the premise that all welfare programs should be based on the *need* of the recipient. For the first time an indigent welfare group had precipitated the overthrow of a significant state-devised discriminatory scheme.[28] In the wake of *King v. Smith*, the HEW promulgated a regulation reflective of the federal need standard enunciated by the Supreme Court.[29]

The *Solman* case is set against this developmental milieu. Since Connecticut did not have a law of general applicability imposing a *legal obligation* on a stepfather to support his stepchildren,[30] the state relied on section 240(h) of the Social Security Act which, on its face, allows the states in determining the level of a recipient's benefits to take into account the income of "any other individual" living in the home[31] as well as the income of the AFDC recipient. By urging the court to adopt a literal interpretation of the words "any other individual," Connecticut sought to demonstrate statutory authority for distinguishing the *King* decision on the ground that Connecticut had considered the stepfather's income only to compute the aggregate family AFDC payment and not to render the step-

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[26] 392 U.S. at 329 (emphasis added).

[27] *Id.* at 30.

[28] Before the *King* decision, federal "negotiators" had the burden of correcting any discrimination by the states in their management of the AFDC program. Although the abuses of the states were noted and documented by these investigators, little was accomplished toward correcting these abuses because the federal government had failed to adequately limit the states' administrative discretion. Because these states controlled the direction of the program, they were consistently able to devise evasive tactics which managed to neutralize to some extent public criticism — which in turn forestalled a court challenge. Ultimately, it became obvious that the states' policies were effectively denying aid to truly needy children. *See* W. BELL, *supra* note 12, at 189.

[29] 45 C.F.R. § 203.1 (1969).

[30] 300 F. Supp. at 414.

[31] 42 U.S.C. § 602(a)(7) (Supp. IV, 1969) provides that the state welfare agency:

> [S]hall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or *of any other individual* (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid .... (emphasis added).

For a discussion of the HEW regulation interpreting this subsection and the relevance thereof to *Solman*, see note 36 *infra* & accompanying text.

children *ineligible* for AFDC benefits.[32] Connecticut, in essence, was not trying to avoid *King* so much as it was trying to emphasize what it believed were legal and factual distinctions between the Alabama "substitute father" provision and the Connecticut stepfather regulation.

After an examination of Connecticut's reasoning, the district court concluded that the state had misread the Act when it characterized "other individual" to mean an individual whose income may be considered within the total family need for the purpose of *decreasing* that family's benefits under the AFDC program. Conceding that the statutory language standing alone ostensibly allows a state, in determining need, to consider the income of *any other person* living in the same home as the needy child,[33] the *Solman* court cautioned that the HEW had engrafted thereon a regulatory restriction known as the "essential person" doctrine.[34] Under this doctrine, the recipient has the sole power to designate as "essential" a person whose presence in the home is necessary for the child's well-being.[35] The state welfare agency may consider the needs and income of an individual so designated only in order to *increase* the aid to the AFDC recipient and to insure the essential person's continued presence in the home.[36] By reading the statute to authorize a reduction of AFDC payments, Connecticut was asserting a flexibility that was nonexistent.

The state was thwarted in its effort to reduce the burden of AFDC payments to recipients whose husbands were stepfathers of needy children because it was unable to avoid the "essential person" rationale. Moreover, Connecticut was unable to prove actual ex-

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[32] 300 F. Supp. at 414.

[33] Social Security Act § 240(h), 42 U.S.C. § 602(a)(7) (Supp. IV, 1969).

[34] IV HEW, HANDBOOK OF PUB. ASSISTANCE ADMIN. § 3131(4), *cited in* 300 F. Supp. at 414.

[35] An essential person may be, for example, an older brother who can babysit for the needy child while the mother is employed and provide a sense of well-being over and above the necessities of sustaining life. *See* 300 F. Supp. at 414.

[36] The HEW " 'essential person rule' permits a state 'to establish the need of the individual on a basis that recognizes as essential to him the presence in the home of other needy persons . . . .' " IV HEW, HANDBOOK OF PUB. ASSISTANCE ADMIN. § 3131(4), *quoted in* 300 F. Supp. at 414.

In *Solman*, however, none of the stepfathers had been designated "essential persons." From a practical standpoint this is understandable because the earning power of the stepfathers was probably sufficient to preclude the chance that AFDC benefits would have to be *increased* in order to enable the stepfather to remain in the home. Put another way, it would be senseless for a recipient to designate someone an essential person unless the effect were an *increase* in the overall family benefits. Of course, the *Solman* court ruled that this practical result is required by the essential person doctrine.

penditures by the stepfather and, thus, it was unable to consider such outlays available for the support of the children as required in the absence of a state support statute embracing stepparents.[37] Therefore, the upshot of *Solman* is that the income of a stepfather living in the home cannot be deemed available to the recipient except under the aegis of a state-imposed support obligation or to the extent that it is actually expended for the recipient's support.[38] *Solman* purportedly upheld the policy enunciated so forcefully by the Supreme Court in *King* that the exclusive requirement for AFDC eligibility is need.

It is arguable, however, that the *Solman* court may have extended the *King* rationale to a situation that is critically different from the "substitute father" provision. There is a strong likelihood that the Connecticut regulatory scheme with respect to stepfathers' income did not depart from the federal criterion of need, and, what is more, may have evinced a more direct relationship to a finding of need than the very federal regulation under which the *Solman* court struck down the Connecticut plan. The Connecticut regulation provided that the state could only deem a stepfather's income available when: (1) he was employed, and (2) he actually lived in the home. Careful scrutiny of this twofold standard reveals that it is premised on a wholly logical assumption, *i.e.*, that a stepfather who is employed and living in the home is likely to use his income toward maintaining the family.[39] Connecticut's welfare regulation was unquestionably a far cry from Alabama's presumptive consideration of a paramour substitute father's income. Moreover, an administra-

[37] 300 F. Supp. at 415. In considering this same point, the Supreme Court in *King* read a narrow meaning into the availability of the "resources of any child or relative," noting that HEW regulations restrict these resources to those *actually* available to the recipient and exclude from consideration any income which is merely *assumed* to be available. 392 U.S. at 319.

[38] Relying on the language of the Supreme Court, Judge Blumenfeld noted that "where the support of a child is at stake, the only relevant circumstance which may relieve the state of its duty to provide AFDC support for a needy child is whether its stepfather did in fact support the child." 300 F. Supp. at 415-16.

[39] *King* clearly held that *need* is the only classification upon which a state could base eligibility for AFDC benefits. Therefore, Alabama's classification of a "substitute father" as a parent, since it had no relevance to the criterion of need, was held to be an arbitrary classification. In effect, there was no way to determine whether this "substitute father" would ever financially assist the children of his mistress since his primary interest was in her rather than in the children. On the other hand, where a stepfather is present in the home his interest can be expected to encompass more than a relationship with the woman. Since he is married to the mother, the stepfather is in a position to take some interest in her children, and "the community has always expected that when a man entered into a marriage contract with a woman who had prior children he was knowingly and willingly undertaking the burden of supporting the whole family . . . ." Brief for Appellant at 9, Shapiro v. Solman, 396 U.S. 5 (1969), *aff'g mem.* 300 F. Supp. 409.

tive presumption based on a stepfather who has a steady job and who is continually present in the family abode seems more likely to produce fair results than the present HEW requirement of a ceremonial marriage and a state support law of general application.[40] That is, the mere existence of a legal duty of support seems less likely to generate available income from the stepfather than the Connecticut requirement of *the stepfather's presence in the home as a wage earner.* Further analysis reveals that the Connecticut regulations provided that a stepfather's income was but one factor to be considered, and if it were shown that the stepfather did not earn sufficient income to provide for a decent way of life *the state would contribute the difference or assume the entire burden.*[41] The better test to determine the level of state AFDC payments to stepchildren is not whether the state has a general law obligating all stepfathers to support their stepchildren, but *whether the stepfather is a wage earner who actually lives in the home.*

In jurisdictions where there is no general support statute, *Solman* has sharply curtailed state discretion in the administration of their AFDC programs because the states are unable to alleviate the heavy

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[40] *See* 45 C.F.R. § 203.1 (1969).

[41] Brief for Appellant at 10, Shapiro v. Solman, 396 U.S. 5 (1969). Connecticut argued that the state statute "was not passed to punish or discourage anyone. The statute merely codified what was already an accepted social fact, and actually the State of Connecticut went even further by offering to ease any burden if it were too heavy." *Id.* at 11.

It should be noted that a stepfather's income may be considered in order to reduce AFDC benefits upon a showing that he held his stepchildren out to the community as his own. This exception to the general rule is based on the theory that a person standing in loco parentis to a child is entitled to the rights and also subject to the liabilities of an actual parent. J. MADDEN, ON PERSONS AND DOMESTIC RELATIONS 367 (1931). In fact, a Connecticut court has recently upheld the denial of AFDC benefits on the theory of loco parentis because the stepfather had held the stepchildren out to the world as his own. The court conceded that Connecticut had no law obligating the stepfather to support his stepchildren, "but if he has assumed the parental relation, acting in loco parentis, and holds them out to the world as members of his own family, he may incur the same liability for support as if they were his own children." Ladd v. Welfare Comm'r, 3 Conn. Cir. Ct. 504, 217 A.2d 490 (Cir. Ct. App. Div. 1965).

A more convincing argument was the object of a recent New Jersey decision. Here the state court affirmed the state welfare agency's curtailment of AFDC funds to a family with a stepfather. The court held that the income of the stepfather, if living in the home, is includable for purposes of AFDC even though he is under no obligation by state law to support the stepchildren. The court distinguished *King* because: (1) The state was not trying to indirectly enforce a standard of sexual mores, and (2) the stepfather had held himself out to the world as the father. Tartaglio v. Division of Pub. Welfare, 102 N.J. Super. 592, 246 A.2d 483 (Super. Ct. App. Div. 1968).

It seems to be a distinction without a difference to presume that a stepfather contributes support money to his stepchildren where he meets the technical elements of a "holding out" test but not where he is earning money and lives at home. In the latter case, the stepfather has merely failed to vocalize his affection for his stepchildren to a point where a court is prepared to say that he held them out as his own.

burden of welfare disbursements unless they can prove that support payments have actually been made by a stepfather.[42] Adherence to this strict standard can be expected to produce some unsettling effects. Because in the *Solman* situation the state must contribute to the support of stepchildren and because, presumptively, the state has no legal machinery to require contributions of the stepfather, this decision creates an inducement for stepfathers to disregard moral obligations of support. Assume, for example, that *S* is a stepfather of four children living in State *A* which has a statute obligating stepfathers to support their stepchildren. If *S* earns $200 per month, the welfare agency in state *A* is able to deem his entire salary available for the children's support; and, assuming the current need of the family is $600 per month, the net AFDC disbursement is $400. Given the above facts, in state *B* which, like Connecticut, imposes no support obligation on stepfathers the welfare agency could not offset the total family need by the amount of *S*'s salary. Thus, the AFDC program would bear the total $600 expenditure; however, *S* would be able to spend his salary in any manner he desired. In comparison with natural parents who are universally required to support their own children,[43] stepfathers living in states such as Connecticut derive a double windfall from the *Solman* rule: (1) The stepparent is free of any legal compulsion to support his stepchildren, and (2) he is free of any moral obligation because AFDC payments are available to his children regardless of his personal income. A graver implication, especially troublesome considering the limited resources available in many states, is the fiscal roadblock imposed by the inflexible *Solman* standard that may effectively impede allocation of state resources to more critical areas of need. By its turgid reading of the HEW regulation, the *Solman* court has failed to recognize a situation where the state is competent to regulate and should be given the discretion to do so.

This decision has not given the states many alternatives. The pro forma enactment of a statewide support obligation seems the most expedient choice — perhaps, the only choice. Otherwise, in reasoning that the patently discriminatory regulation struck down in *King* was analogous to the Connecticut welfare guidelines — guidelines which were arguably within the scope of permissible

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[42] The *Solman* court noted: "There is no doubt that the state may properly take into account amounts actually expended by the stepparent in support of the stepchildren." 300 F. Supp. at 416.

[43] H. CLARK, HANDBOOK OF THE LAW OF DOMESTIC RELATIONS § 15.1, at 488 (1968).