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Constitutional Law-A Less than Most Exacting Scrutiny for Illegitimates

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Scholarly criticism and case law are beginning to reflect the notion that *quasi in rem* jurisdiction is unnecessary except in those cases where it is unfair to assert it. The rapid expansion of *in personam* jurisdiction via the *International Shoe* minimum contacts doctrine and subsequent long-arm statutes provide state courts with considerable latitude in the assertion of *in personam* jurisdiction. Where a plaintiff cannot establish that the defendant has these minimum contacts with the forum state, the claim can be more fairly litigated elsewhere. In fact, without such minimal contacts, defendant should not be forced to bring his evidence and witnesses to a forum and litigate an unrelated claim.

Where a defendant does not have the requisite contacts with the forum state, and the property over which *quasi in rem* jurisdiction is asserted is an intangible, the potential unfairness to a defendant is even greater. If widely adopted, the *Seider* rule would subject the defendant to nationwide service of process. The only limitation on the assertion of jurisdiction would be the happenstance of whether defendant's insurance company did business in the forum, with a possible limitation of such jurisdiction to residents of the state or nonresidents whose cause of action arose within the state. As a result, the *Gregg* decision, although perhaps a misapplication of the preferred view, represents progressive application of the minimum contacts doctrine fully warranted by considerations of fair play and substantial justice.

RUSSELL L. WEAVER

CONSTITUTIONAL LAW—A LESS THAN MOST EXACTING SCRUTINY FOR ILLEGITIMATES

*Mathews v. Lucas*¹

Robert Cuffee lived with Belmira Lucas from 1948 through 1966 but they were never married. They had two children, Ruby Marie Lucas born in 1953 and Darin Edward Lucas born in 1960. In 1966, Robert Cuffee separated from the children's mother and moved to Rhode Island where he died in 1968. Ms. Lucas applied for child insurance benefits² for Ruby and Darin. Although establishing paternity, the children were able to prove

1. 96 S. Ct. 2755 (1976), *rev'g* Lucas v. Secretary of Health, Educ. & Welfare, 390 F. Supp. 1310 (D.R.I. 1975).

2. 42 U.S.C. § 402(d)(1) (1970), Social Security Act § 202 provides:
(d)(1) Every child (as defined in section 416(e) of this title) of an individual entitled to old-age or disability insurance benefits, or of an individual who dies a fully or currently insured individual, if such child— . . .

neither dependency on Robert Cuffee at the time of his death nor applicability of any of the statutory presumptions of dependency. Consequently their application for benefits was denied.

The Social Security Act states that a child of an insured individual is entitled to surviving child's benefits if the child is under 18, or a student under 22,³ and was dependent at the time of the parent's death.⁴ A legitimate or an adopted child is presumed dependent under the Act.⁵ This presumption of dependency extends to an illegitimate child if under state law he is able to inherit intestate from the insured parent.⁶ Further statutory classifications presume dependency of an illegitimate child if his parent had gone through a marriage ceremony which was invalid for some obvious legal defect,⁷ or the father⁸ had acknowledged his paternity in

3. 42 U.S.C. § 402(d)(1)(B) (1970), Social Security Act § 202(d)(1)(B)(i).

4. 42 U.S.C. § 402(d)(1)(C) (1970), Social Security Act § 202(d)(1) provides:
(C) was dependent upon such individual—

(i) if such individual is living, at the time such application was filed,

(ii) if such individual has died, at the time of such death, or

(iii) if such individual had a period of disability which continued until he became entitled to old-age or disability insurance benefits, or (if he has died) until the month of his death, at the beginning of such period of disability or at the time he became entitled to such benefits, shall be entitled to a child's insurance benefit for each month, beginning with the first month after August 1950 in which such child becomes so.

5. 42 U.S.C. § 402(d)(3)(A) (1970), Social Security Act § 202 provides:
(d)(3) A child shall be deemed dependent upon his father or adopting father or his mother or adopting mother at the time specified in paragraph (1)(C) of this subsection unless, at such time, such individual was not living with or contributing to the support of such child and—

(A) such child is neither the legitimate nor adopted child of such individual, or for purposes of this paragraph, a child deemed to be a child of a fully or currently insured individual pursuant to section 416(h)(2)(B) or section 416(h)(3) of this title shall be deemed to be the legitimate child of such individual.

6. 42 U.S.C. § 416(h)(2)(A) (1970), Social Security Act § 216(h)(2) provides:

(A) 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 the devolution of interstate personal property by the courts of the State in which such insured individual is domiciled at the time such applicant files application, or, if such insured individual is dead, by the courts of the State in which he was domiciled at the time of his death, or, if such insured individual is or was not so domiciled in any State, by the courts of the District of Columbia. Applicants who according to such law would have the name status relative to taking intestate personal property as a child or parent shall be deemed such.

7. 42 U.S.C. § 416(h)(2)(B) (1970), Social Security Act § 216(h)(2) provides:

(B) If an applicant is a son or daughter of a fully or currently insured individual but is not (and is not deemed to be) the child of such insured individual under subparagraph (A), such applicant shall nevertheless be deemed to be the child or such insured individual if such insured individual and the mother or father, as the case may be, of such applicant

writing, or a court had decreed paternity, or a court order had required the father to support the child.⁹ If the applicant does not qualify as a dependent under one of the classifications, he must show that at the time of death, the parent was living with or contributing to the support of the applicant.¹⁰

There has been disagreement over the legislative purpose of the Act. In *Norton v. Weinberger*,¹¹ a federal district court decided that Congress intended to provide benefits only when there is actual support lost to a child when his parent dies. The federal court in Rhode Island hearing the *Lucas* case¹² concluded the Congressional purpose of the Act was to provide benefits as a substitute for the right of support lost by a child when his parent dies¹³ and not to replace only the actual support lost.

went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment described in the last sentence of paragraph (1)(B), would have been a valid marriage.

8. The statutory classifications are written in sex-neutral language except § 416(h)(3)(C)(i) which deals only with a presumption of dependency based on paternity. It is not clear whether a child would be presumed dependent on the wage-earning mother based on a written acknowledgement of maternity or if the child would have to prove support or cohabitation at the time of death of the mother to be eligible for benefits. Possibly, mere proof of maternity may be accepted as being conclusive of maternal dependency.

9. 42 U.S.C. § 416(h)(3)(C)(i) (1970), Social Security Act § 216(h) provides:

(3) An applicant who is the son or daughter of a fully or currently insured individual, but who is not (and is not deemed to be) the child of such insured individual under paragraph (2) of this subsection, shall nevertheless be deemed to be the child of such insured individual if:

(C) in the case of a deceased individual—

(i) such insured individual—

(I) had acknowledged in writing that the applicant is his son or daughter,

(II) had been decreed by a court to be the father of the applicant, or

(III) had been ordered by a court to contribute to the support of the applicant because the applicant was his son or daughter, and such acknowledgment, court decree, or court order was made before the death of such insured individual

10. 42 U.S.C. § 416(h)(3)(C)(ii) (1970), Social Security Act § 216(h)(3)(C) provides:

(ii) such insured individual is shown by evidence satisfactory to the Secretary to have been the father of the applicant, and such insured individual was living with or contributing to the support of the applicant at the time such insured individual died.

11. 364 F. Supp. 1117 (D. Md. 1973), *vacated and remanded*, 418 U.S. 902 (1974), *reaffirmed*, 390 F. Supp. 1084 (D. Md. 1975), *aff'd sub nom.* *Norton v. Mathews*, 96 S. Ct. 2771 (1976).

12. 390 F. Supp. 1310 (D.R.I. 1975).

13. *Id.* at 1320. The District Court of Rhode Island concluded that the decision in *Jiminez v. Weinberger*, 417 U.S. 628 (1974) was inconsistent with the notion that the primary purpose of the Social Security Act was to replace only the actual support lost by the child at the time of his father's disability. Similar language is used in various federal and state legislation for the purpose of presuming

The Supreme Court has held that a child's right to financial support by his father cannot be conditioned on his legitimacy.¹⁴ By concluding the purpose of the Act was to provide benefits as a substitute for the right of support lost, the District Court of Rhode Island decided that the purpose would be satisfied by proof of paternity alone without regard to whether or not the child was supported by or lived with his father. The court further decided that the additional requirements of cohabitation or support which must be established by an illegitimate child not presumed dependent under the Act do nothing to further the purpose of the Act and are merely a reflection of society's view that a legitimate child is more deserving of support than an illegitimate child. The District Court of Rhode Island held in the *Lucas* case that the denial of benefits to the applicants violated the fifth amendment's Due Process Clause because other children including all legitimate children were statutorily entitled to benefits regardless of the absence of support or cohabitation.

The Supreme Court reversed. After studying the legislative history of the Act, the Court concluded that it was intended to replace only the actual support lost by a child when his parent dies. The Court continued that the Act was not "impermissibly discriminating in providing only for those children for whom the loss of a parent is an immediate source of need"¹⁵ and that the statute's matrix of classifications bore a reasonable relationship to actual dependency at death.

The fifth¹⁶ and fourteenth¹⁷ amendments to the Constitution prohibit federal or state discrimination which results in the denial of equal protection. Under the mere rational basis test, statutory classifications do not deny equal protection provided that they are rationally related to a legitimate state concern.¹⁸ However, when the classification impairs a fundamental right¹⁹ or discriminates on the basis of race²⁰ or other classifications the Court has deemed "suspect,"²¹ the judicial scrutiny transcends the rational basis standard and the discrimination must be justified as necessary to promote a "compelling state interest."²²

The *Lucas* Court rejected the argument that classifications treating paternity and not dependency. *See, e.g.*, Uniform Paternity Act, 38 U.S.C. § 101(4) (1970) (veteran's benefits).

14. *See Gomez v. Perez*, 409 U.S. 535 (1973) (*per curiam*). The Court invalidated a Texas law which denied to illegitimate children the right to paternal support while granting that right to all legitimate children.

15. 96 S. Ct. at 2763.

16. U.S. CONST. amend. V. Equal protection incorporated via Due Process Clause. *See Bolling v. Sharpe*, 347 U.S. 497 (1954).

17. U.S. CONST. amend. XIV, § 1.

18. *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949).

19. *See, e.g., Shapiro v. Thompson*, 394 U.S. 618 (1969) (right to travel).

20. *See, e.g., Strauder v. West Virginia*, 100 U.S. 303 (1879).

21. Alienage and national origin have also been held to be suspect classifications. *See, e.g., Graham v. Richardson*, 403 U.S. 365 (1971).

22. *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

legitimate and illegitimate offspring differently are constitutionally suspect.²³ Earlier cases had not reached this question²⁴ but appeared to use a higher level of scrutiny than mere rational basis.²⁵ Seven times in the last decade the Court has invalidated federal and state legislation that imposed disabilities on the illegitimate child.²⁶ Only once did the Court uphold discrimination against the illegitimate child. In *Labine v. Vincent*²⁷ the Court refused to strike down state legislation which denied an illegitimate child the right to inherit intestate from his father. The most puzzling aspect of the *Labine* case was the Court's use of rational basis as the standard of review.²⁸ The reasons given for the *Labine* decision were that a state had a legitimate interest in regulating titles and there was an absence of a total bar to the illegitimate child as he could have inherited if named in his father's will.

Weber v. Aetna Casualty & Surety Co.,²⁹ decided in 1972, was an attempt by the Court to establish guidelines for deciding whether classifications based on illegitimacy are violative of equal protection. According to *Weber*, the inquiry is a dual one: "What legitimate interest does the classification promote? What fundamental personal rights might the classification endanger?"³⁰ This balancing test appears to require more than a mere rational basis because it takes into account factors other than the state's interest. The test falls short of requiring the highest level of judicial scrutiny because the balancing factors could weigh in favor of the state absent a compelling state interest. The end result of this balancing test is a middle level of review in which the Court apparently requires a reasonable relationship between the classifications based on legitimacy and the state's reason for using it.³¹

23. 96 S. Ct. at 2761, 2762. The Court recognized that illegitimacy, like race or national origin, is beyond the control of the illegitimate and that such discrimination is often illogical and unjust. But the Court refused to elevate illegitimacy to a suspect class as some classifications based on legitimacy may be rational. The Court added that discrimination against illegitimacy has never historically approached the severity of racial discrimination.

24. *Jiminez v. Weinberger*, 417 U.S. 628, 631-32 (1974).

25. See generally Note, *Illegitimacy and Equal Protection*, 49 N.Y.U.L. REV. 479 (1974).

26. *Jiminez v. Weinberger*, 417 U.S. 628 (1974); *New Jersey Welfare Rights Organization v. Cahill*, 411 U.S. 619 (1973) (*per curiam*); *Gomez v. Perez*, 409 U.S. 535 (1973); *Richardson v. Griffin*, 409 U.S. 1069, *aff'g mem.* 346 F. Supp. 1226 (D. Md. 1972); *Richardson v. Davis*, 409 U.S. 1069, *aff'g mem.* 342 F. Supp. 588 (D. Conn. 1972); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972); *Levy v. Louisiana*, 391 U.S. 68 (1968); *Glonn v. American Guar. & Liab. Ins. Co.*, 391 U.S. 73 (1968). See generally Note, *Illegitimacy and Equal Protection*, *supra* note 25.

27. 401 U.S. 532 (1971).

28. *Id.* at 538.

29. 406 U.S. 164 (1972). The Court invalidated a Louisiana statute that discriminated against illegitimate children in workmen's compensation benefits.

30. 406 U.S. at 173.

31. Various commentators have recognized a middle level of scrutiny somewhere between rational and compelling and have labeled the level as one requiring

The *Lucas* Court ended speculation that illegitimacy might be a suspect class but seemed to stop short of dropping the level of protection down to a mere rational basis. Although it cited *Labine* as controlling, the Court indicated that the *Weber* balancing test, not mere rational basis, was the analytical tool used in sustaining the legislation. *Labine* was controlling merely to the extent that *Lucas* also involved a fact situation in which the discrimination did not pose an absolute bar and was related to a valid governmental interest. The Court concluded that "the statutory classifications are permissible . . . because they are *reasonably* related to the likelihood of dependency at death."³²

The Court's determination that the classifications reasonably further legislative purpose is open to question. The classifications do not differentiate on the criteria of dependency at the time of death.³³ In their application, an actual showing of dependency is a prerequisite for only one class.³⁴ In their effect, benefits are received by many children not dependent on their wage-earning parent at the time of death.

Administrative convenience was used to justify the fact that the classes presumed dependent were overinclusive. The Court did not consider other means of eliminating the onerous task of case by case determinations of dependency. For example, Congress could have presumed dependency for only those children residing with their fathers at the time of death or having a court decree of child support. All others could still qualify by an actual showing of support. This presumption would be closer to Congress' intent in replacing only support actually lost to the child by the death of his father³⁵ without classifying on the basis of legitimacy.

The Court declared that the factors that give rise to the presumption of dependency, such as legitimacy, a written acknowledgement of paternity, and the ability to inherit intestate, do not lack a substantial relation to the likelihood of actual dependency. But the requirement is dependency *at the time of death*. A written acknowledgement of paternity some time in the past would seem to have only a tenuous connection with dependency at the time of death. Living in a state in which an illegitimate child is able to inherit intestate appears to have no relationship at all with the likelihood of

reasonableness. See generally Gunther, *The Supreme Court, 1971 Term—Foreword, In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 20-22 (1972). Gunther states that the Court is now applying a means-focused equal protection scrutiny which is more demanding than the traditional rational basis test. See also Note, *Illegitimacy and Equal Protection*, *supra* note 25 at 482-85. A standard of reasonableness which is somewhat more demanding than the traditional standard under equal protection was established in *Weber*.

32. 96 S. Ct. at 2764 (emphasis added).

33. See statute cited notes 3-7, 9 *supra*.

34. See statute cited note 10, *supra*.

35. See *Beaty v. Weinberger*, 478 F.2d 300 (5th Cir. 1973). Eighty-two percent of legitimate children do not receive support from their absent fathers compared with 90% of illegitimate children who do not receive paternal support. *Id.* at 306 n.9.

dependency at the time of death. Even the presumption that a legitimate child is dependent on his father is ignoring the reality of the high divorce rate and the low percentage of child support contributed by absent fathers.³⁶

Through legislation, Missouri³⁷ could offset the discriminatory effect of the child insurance benefits provision of the Social Security Act upheld in *Mathews v. Lucas*. Illegitimate children whose deceased fathers last resided in Missouri would be presumed dependent³⁸ if Missouri would change its intestate inheritance law that presently does not allow an illegitimate child to inherit intestate from his natural father.³⁹ However, judicial action alone may provide a remedy to securing child insurance benefits for the illegitimate not presumed nor actually dependent through Missouri's very liberal *equitable adoption decree*.⁴⁰ A Missouri court of equity will decree adoption to protect the interest of a child when the adopting parent has expressly agreed to adopt, or by his acts and conduct has placed himself in a position where it would be inequitable to permit it to be asserted that the child was not adopted.⁴¹ The acts and conduct upon which the Missouri courts have repeatedly placed great emphasis are taking the child into the adopting parent's house⁴² and obtaining from the child the love, affection, companionship and services which ordinarily accrue to a parent.⁴³ The doctrine is limited to those cases in which equity and justice would in no other way be served, upon proof that the adopted child is actually and equitably entitled to such relief.⁴⁴ One who seeks to establish an equitable adoption by estoppel must produce clear, cogent and convincing evidence.⁴⁵ The decree, although not putting the adopted child in quite the same status as one legally adopted, will allow the child to inherit from the

36. *Id.* at 306.

37. See MISSOURI CENTER FOR HEALTH STATISTICS, MISSOURI VITAL STATISTICS 1974 (1975). In 1974 9,795 illegitimate children were born in Missouri. This totals almost 18% of the total births in the state. In the City of St. Louis, over 64% of the non-white children born in 1974 were illegitimate.

38. See statute cited note 6, *supra*.

39. *Banks v. Galbraith*, 149 Mo. 529, 51 S.W. 105 (1899); *Baker v. Stucker*, 213 Mo. App. 245, 248 S.W. 1003 (K.C. Ct. App. 1923).

40. *Stanley v. Secretary of Health, Educ. & Welfare*, 356 F. Supp. 793 (W.D. Mo. 1973). See also Cowherd, *Rights of Illegitimate Children in Missouri*, 40 MO. L. REV. 631 (1975).

41. *Hegger v. Kausler*, 303 S.W.2d 81 (Mo. 1957); *Capps v. Adamson*, 362 Mo. 539, 242 S.W.2d 556 (1951); *Drake v. Drake*, 328 Mo. 966, 43 S.W.2d 556 (En Banc 1931); *Mize v. Sims*, 516 S.W.2d 561 (Mo. App., D. Spr. 1974).

42. *Hegger v. Kausler*, 303 S.W.2d 81 (Mo. 1957).

43. *Taylor v. Coberly*, 327 Mo. 940, 38 S.W.2d 1055 (1931).

44. *Hegger v. Kausler*, 303 S.W.2d 81, 88-89 (Mo. 1957); *Hogane v. Otterbach*, 269 S.W.2d 9 (Mo. 1954); *Rich v. Baer*, 361 Mo. 1048, 238 S.W.2d 408 (1951); *Menees v. Cowgill*, 359 Mo. 697, 223 S.W.2d 412 (1949). *Holloway v. Jones*, 246 S.W. 587 (Mo. 1922). See also Gardner, *Equitable Adoption in Missouri*, 20 MO. L. REV. 199 (1955).

45. *Long v. Willey*, 391 S.W.2d 301 (Mo. 1965).

estate of the adopted parent.⁴⁶

The doctrine has been used primarily in suits to name the equitably adopted child as a lawful heir of the deceased adoptive parent.⁴⁷ In *Stanley v. Secretary of Health, Education & Welfare*⁴⁸ the District Court for the Western District of Missouri⁴⁹ held that a child who met the requirements of equitable adoption was eligible for child insurance benefits as a legally adopted child of the wage earner. A legally adopted child is conclusively presumed dependent.⁵⁰ There have been several Missouri cases in which an illegitimate child was held to be equitably adopted by his natural father in actions against the deceased father's estate.⁵¹ Extending the illegitimate child's claim of equitable adoption by his natural father to an action for child insurance benefits would be the next logical step.⁵²

In *Mathews v. Lucas*, the reasonable level of scrutiny utilized through the *Weber* balancing test provided the illegitimate with virtually no more protection than a mere rational basis test would have provided. The practical result of *Mathews v. Lucas* may be an increased use by state and federal legislators of classifications based on legitimacy in efforts to serve adminis-

46. *Lukas v. Hays*, 283 S.W.2d 561 (Mo. 1955); *Thomas v. Malone*, 142 Mo. App. 193, 126 S.W. 522 (K.C. Mo. App. 1910).

47. See Cowherd, *supra* note 40; see also Gardner, *supra* note 44.

48. 356 F. Supp. at 803, provides in pertinent part:

Therefore, as an aid to achievement of the Congressional purpose and objective of the Social Security Act, Section 402 (d)(9)(B) will be liberally construed so that narrow technical views will not be employed to impede or prevent the accomplishment of the legislative intent that children otherwise qualified . . . receive child insurance benefits when the evidence clearly shows that the adoptive parent did not adopt the child . . . solely to qualify the child for child insurance benefits.

49. The District Court for the Eastern District of Missouri came to the same result in *Watermon v. Secretary of Health, Educ. & Welfare*, 342 F. Supp. 968 (E.D. Mo. 1972).

50. 42 U.S.C. § 402(d)(3)(A) (1970), Social Security Act § 202(d)(3)(A).

51. *McCary v. McCary*, 239 S.W. 848 (Mo. 1922); *Mize v. Sims*, 516 S.W.2d 561 (Mo. App., D. Spr. 1974).

52. A number of doctrines which should be advantageous for the child claiming equitable adoption have been developed under Missouri case law. A subsequent estrangement between the child and the adopting parent has no effect once an agreement to adopt has been reached. See *Mize v. Sims*, 516 S.W.2d at 565-66. It is unnecessary that the word "adopt" should be used in connection with the incurring of such liability and maintenance of the relation may of itself be sufficient evidence, in equity, upon which to rest the resulting obligation. *Id.* at 567.

Another advantage of equitable adoption is that it needs no formal court decree. The facts themselves constitute the equitable adoption. Thus an affidavit reciting the facts of the equitable adoption should be included with the illegitimate child's application for child insurance benefits. Whether or not the stated facts constituted an equitable adoption under Missouri law initially would be a decision for the Social Security Administration. See *Stanley v. Secretary of Health, Educ. & Welfare*, 356 F. Supp. 793, 800 (W.D. Mo. 1973). It should be emphasized that this doctrine would seem to have applicability only when there was co-habitation between parent and child, even if it were for only a short period of time.