Relationship as a Problem in Old-Age and Survivors Insurance

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THE EXISTING PROVISIONS of title II of the Social Security Act require that in determining relationships between husbands and wives, and children and parents, the intestacy laws of the various States shall be applied. Since the provisions, interpretations, and application of the laws of the various States vary from one State to another, there has resulted a degree of administrative complexity, difficulty in obtaining uniformity in the determination of claims for benefits, and, to some extent, a public resentment of the benefit decisions made under these provisions.

When the old-age insurance program was expanded under the 1939 amendments to include protection for dependents and survivors, four new classes of beneficiaries were established—wives, widows, children, and parents—but the act did not undertake to define those classes with any preciseness. Instead, the act directed the Social Security Board to apply certain State laws in making its determination as to the relationship of dependents and survivors to the wage earner whose insured status is the basis of their claim to benefits. Section 209 (m) of the act provides:

> In determining whether an applicant is the wife, widow, child, or parent of a fully insured or currently insured individual for purposes of this title, the Board shall apply such law as would be applied in determining the devolution of intestate 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 same status relative to taking intestate personal property as a wife, widow, child, or parent shall be deemed such.

There appears to be nothing of record in congressional debate or committee hearings to indicate the reasons for using State intestacy laws for guidance in the determination of relationship. It may be noted that under the original Social Security Act the Board was required, in making lump-sum death payments under section 205, to consult the intestacy laws of the State in which the deceased worker was domiciled. There was, of course, no problem of determining which relatives were eligible for monthly benefits, since such benefits were provided only for the worker himself. Section 205 of the 1935 act directed the Board not only to make lump-sum payments to relatives given priority in the provisions of State intestacy laws, but also to determine if an alleged relationship was legal in accordance with the rules and definitions set forth in each of those laws. In certain instances, administration of the deceased worker's estate could be required before payment was made.

Simplifying the administrative task somewhat, the 1939 amendments were so drawn that the intestacy laws of the various States are no longer used to determine which relatives are eligible for benefits. Such determination is now set forth in the act itself, both as to the classes of relatives eligible for monthly benefits and relatives eligible for lump-sum death payments, in the order of their priority. However, the State laws continue to be used in determining whether a legal relationship between a relative and the wage earner exists, both for lump-sum and for monthly benefit purposes.

While there is much legal history to support the practice of having a Federal statute follow State determinations in questions of domestic relations, it is well known that the provisions, interpretations, and application of the laws of the several States show wide variation. It has been found that considerable complexity arises out of the conflicts among State laws with respect to many aspects of domestic relations. Such questions as validity of second marriages, impediment to marriage, prohibitions against marriage, and the burden of proof in each type of case are subjects of sharply conflicting rulings in the different States. Not only does this conflict lead to difficulty in determining the relationship between parties, but it has also from time to time been necessary for the Bureau of Old-Age and Survivors Insurance to make benefit decisions,

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under the terms of the act, which are contrary to good social policy and common sense. While the number of cases in which such problems arise is not large in relation to the whole group of claims, the outcome is often very serious for the claimants involved and is serious also in entailing difficulties, costs, and delays in the adjudication of claims by the Board.

In applying the law of a worker's domicile, the Board has sometimes been forced to disallow claims which would have been allowable had the wage earner concerned been domiciled in a different State. A recent case typifies this situation. The claimant widow's marriage to the wage earner took place in the District of Columbia in March 1930, slightly less than 6 months after her previous marriage was terminated by divorce in Virginia. According to Virginia law, there is a 6-month period after divorce during which the remarriage of either party is void, and this statute has extraterritorial effect. Therefore, the marriage was void. At the expiration of the 6-month period, a valid common-law marriage would have come into existence, and the claim would have been paid, had the couple been living in any one of a large number of States recognizing such marriages. Since the couple returned to live in Virginia, and since Virginia does not recognize common-law marriage, the claim had to be disallowed.

In addition to the lack of uniformity in claims decisions due to differences among the several jurisdictions, complexity also arises because of conflicts within certain State laws. When a question as to domicile arises after the wage earner has died, it becomes relatively difficult to make the proper determination as to which State law should be applied.

Occasionally, complete examination of one of these complex situations brings about a manifestly absurd result under the very State laws which the Board is required to follow. In a recent Louisiana case, for example, it had to be determined that, in effect, there were two legal widows. The decision in this case was, therefore, that the lump-sum death payment should be certified one-half to the legal widow and one-half to the putative widow of the deceased wage earner.

On occasion a claim is filed by a family whose reputation in the community is without blemish. When the various technicalities are taken into account, however, as they must be in examining an application for insurance benefits, it is found that a determination must be made that the husband and wife were not legally married and the children, under the law of many States, must be ruled to be illegitimate. Aside from the denial of benefits, the possible exposure of the alleged widow and children as not having a legal relationship to the wage earner may have drastic repercussions on the lives of these people.

Sometimes a widow will find herself in a difficult situation in spite of the fact that her marriage to the deceased wage earner was contracted in good faith. If, for example, she married a man under an erroneous belief that he was single, the fact that she entered the relationship in good faith can in most instances have no legal weight in the Board's decision. In one typical case, in which a widow's claim was disallowed because of an undissolved prior marriage of the wage earner, the following statement appears in the case folder:

> I, _____, hereby state that at the time I married Joseph _____ . . . I had no knowledge of any previous marriage having been contracted by Joseph _____. He had always told me he was single and it is so stated on the marriage certificate. We had never been remarried at a later date. The first time I had ever heard of his having been previously married was at his death, when his brother mentioned the fact to me.

The facts stated in this document could not affect the result.

Extent of the Problem

The lack of harmony between relationships as determined under State law and the true social and economic facts surrounding those relationships is a problem the extent of which can never be determined. The cases which have been disallowed must be considered merely a sample of the possible claims involving this type of situation, many of which may never reach the Board for adjudication. Field-office personnel interview some prospective claimants who withdraw without filing claims after discovering that a disallowance is probable. It is probable that other potential claimants fail to file claims because they expect disallowances after hearing of the experiences of friends and neighbors. Because of the complexity of the question, it is usually impossible for a layman to judge as to his own eligibility. But many are loath to file if a disallowance seems in prospect. Erroneous information, or mistrust of governmental agencies, or reluctance to risk exposing an

unpleasant family situation—any of these may deter a potential claimant from filing. It is impossible to tell how many claims are thus discouraged.

Effect Upon Children

The congressional committee hearings and the discussions of the Advisory Council both stressed the importance of insurance protection for orphans. The Council stated that such protection is at least as important to the community and to society as an old-age insurance program.[1] It has been found that the most acute relationship problem concerns the question of legitimacy. Under the interpretation of the existing law, illegitimate children are denied eligibility to benefits based upon the wage records of their fathers, except in very rare instances. The need for revising the treatment of these children is at least as great as the need for revision in the case of a woman who claims to be the widow but who cannot be recognized as having been the legal wife of a deceased wage earner.

It must be kept in mind that illegitimate children do not always come from temporary indiscretion or immoral conduct, but are often the children of men and women who are living together in the belief that they are husband and wife. Sometimes a man and woman enter into marriage in good faith, believing themselves to have been legally capable of contracting a valid marriage. They have children and conduct themselves in accordance with all established conceptions of morality and propriety. Then the marriage is found to have been invalid because of a formality in a State law.

There have been instances, for example, in which a man and woman, intending to be married, have obtained a marriage license and then, not realizing the necessity of a marriage ceremony in addition, have considered themselves married, lived their lives together, and had children. In many cases it is only the technicalities of State laws which prevent the full legal recognition of the marriage and the legitimacy of the children. Sometimes the children are ruled to be illegitimate because the State law forbids the recognition of common-law marriages. In other instances a proper ceremonial marriage may have taken place and still not be valid because of technical provision as to the dissolution of previous marriages. In other cases, again, it is merely the question of burden of proof which constitutes the impediment to the validity of a second marriage.

Children born of unions in which such conditions exist are likely to be deemed illegitimate and lose benefits to which they would otherwise be entitled. The most striking aspect of this type of injustice is the fact that accidents of residence are a determining factor of prime importance. The act as now constituted disallows the claim of a child whose parents reside in one State but would have awarded him benefits had his parents lived in another State, one in which their marriage would have been deemed valid and the child legitimate.

There have been cases in which inquiry has elicited the fact that the entire family in question lived together under one roof and that the father's interest in the children was as genuine and as sincere as if the parents had contracted a marriage valid under the State law and the children had been recognized as legitimate. The children had been living with the father, and he had been supporting them. They were his dependents and were the direct sufferers from the loss of his wage income. Within the structure of our social insurance philosophy, it seems reasonable that such children should receive the same protection of the law as is now given to legitimate children.

Difficulties Affecting Legal Marriage Status

Since it is not easy for persons other than lawyers to visualize the difficulties faced by many individuals in establishing the legality of their marriage status and the legitimacy of their children, it might be well to review the major problems which the Board has encountered in interpreting the present requirements for determining family relationships.

Removal of legal impediment to marriage.—A marriage contracted while a legal obstacle exists is not a valid marriage. But if the impediment is removed it may be possible for that marriage to become valid. However, State laws are in conflict as to whether, and the means by which, such validity may be established. For example:

A man and a woman entered into a common-law relationship in Wisconsin in 1900. The woman had been previously married, at age 14, but had left her first husband several years after their marriage. She and her second husband had lived as man and wife in various States for the past 40 years. The wife had heard that her first husband died in 1927.

[1] Advisory Council on Social Security, *Final Report*, Dec. 10, 1938, p. 17.

It was ruled that this woman is not the legal wife of the wage earner according to the law of the State, California, in which they are now domiciled and in which they had lived since the time the impediment was removed.

Illustrative examples of this situation may be found in other States. In Georgia no new agreement is necessary to validate a common-law marriage after an impediment is removed, but a new agreement is necessary under similar circumstances in Minnesota. In Virginia a bigamous marriage does not ripen into a legitimate relationship upon the death of the former spouse, although it does in West Virginia. However, in West Virginia, if the impediment happens to be a prohibition against remarriage within the statutory period after a divorce, the marriage is void. In Ohio a valid marriage comes into existence after removal of an impediment, but in Michigan there must be a new agreement between the parties if neither party entered into the marriage in good faith.

One of the best examples that can be furnished of the inconsistencies resulting from State law is a comparison of the following cases:

Case 1. The wage earner, A, married Margaretha in 1912 and was divorced by her in 1922. In 1919, before the divorce, he married the claimant widow.

Case 2. The wage earner, B, married Mary in 1905, and they separated a few years later. Mary died in 1937. In 1922 the wage earner married the claimant widow.

There are striking similarities in these cases: (a) at the time of death, both wage earners were domiciled in New York, (b) both of the claimant widows married the wage earners in New York, (c) both second marriages continued for approximately 20 years, (d) both second marriages were void when entered into, and (e) both first marriages eventually were legally terminated. However, the widow in Case 1 is a legal widow, but the widow in Case 2 is not a legal widow. Had the first wife of B (in Case 2) died before 1933 instead of in 1937, the second wife's relationship would have become a valid common-law marriage. The claim of the second wife, as the widow, would then have been paid instead of being disallowed. This result would have followed from the fact that a New York statute invalidating common-law marriage was enacted in 1933 (see table 1). It cannot be seriously contended that A's widow is morally superior to B's widow, nor does she have greater "natural" rights to social insurance protection. The social objectives of the act ought not to be thwarted by such legal technicalities.

Waiting period after divorce.—Another source of difficulty is the determination whether a marriage which occurred after a divorce had taken place is valid. In many States a waiting period is required before remarriage is permitted, and if a claimant's marriage is found to have taken place within the waiting period the claim must be disallowed in certain cases, regardless of any other factor, because of the language of some State statutes, while in other States having similar statutes disallowance may or may not be required. The complexity and hardships resulting from this requirement are illustrated by the following case:

The claimant, a widow with a minor child, had been married for the second time on July 1, 1923. Her divorce from her first husband did not become final until November 27, 1923. Although her second marriage had taken place within the waiting period, she could, under California law, have had her divorce made final before her remarriage if she had filed a petition. This was not done, however, and when the claim was filed the Bureau had to rule that her second marriage was not valid and that she was not the legal widow.

The legal requirements for waiting period before remarriage after a divorce, in 10 selected States in which specific cases have been ruled on by the Office of the General Counsel of the Federal Security Agency, are as follows:

State	*Waiting period*
Arkansas	None.
Connecticut	None.
Georgia	None, unless specified by the jury.
Idaho	6 months. Marriage in interim is void if performed in Idaho.
Massachusetts	Marriage of guilty party within 2 years is void.
Minnesota	Marriage within 6 months is voidable.
Michigan	Court granting divorce may prohibit remarriage for as long as 2 years in its discretion.
New York	Marriage of guilty party during lifetime of former spouse is void, unless court grants permission to remarry.
Oregon	Marriage within 6 months is void.
Wisconsin	Marriage within 1 year is void.

Presumption of validity of second marriage.—In most States there is a presumption of the validity of the last marriage. In terms of survivors insurance benefits, this means that, when each of two women alleges that she is the legal spouse, the one who married the wage earner last will in most cases receive the benefit award. However, this is not true in all cases. In Ohio, for one, there is no such presumption; the facts must be completely developed in adjudicating the claim.

In those States which presume the validity of the last marriage, the first wife may rebut the presumption by obtaining a statement from the clerk of the court in each jurisdiction where the wage earner has resided since their separation, indicating whether a divorce has been granted to the wage earner. If no court record of a divorce is found, the presumption fails, the second spouse is considered illegal, and frequently the children are deemed illegitimate. The following quotation is an excerpt from an opinion of the General Counsel of the Federal Security Agency:

> Generally speaking, in order to overcome the presumption that prevails in favor of an existing as against a previous marriage, it is necessary that there be official certification from all the counties in which the deceased resided during the period when a divorce might have been obtained by him, to the effect that no such divorce appears on the records. Ordinarily where the first wife is a claimant or potential claimant the burden of obtaining such certifications may reasonably be imposed upon her, and if she fails to produce them we have considered that it is proper to make a determination that the presumption has not been overcome.

The only value of the presumption is that it allows cases in which necessary facts cannot be ascertained to be brought to a conclusion. The presumption accomplishes this purpose because it is very difficult in most cases, and impossible in many, for the first spouse to trace the whereabouts of the wage earner over a period of time. There is little doubt that practically all the individuals receiving the payment when this presumption is applied would not be considered legally married if the true facts were known.

How this difficulty may obstruct the proper functioning of the survivors insurance system can be shown by a specific example. The wage earner, Mr. W, married A in 1925, and the couple separated in 1927. In 1934, W contracted a second marriage with B, who lived with him until his death in 1940. A daughter was born of this relationship in 1935. The whereabouts of W from the time of his separation from his first wife until his death were accounted for by his brother, who stated that during that time W had lived only in two counties in Alabama. A search of the records in those counties was made, and it was found that no divorce proceedings with respect to the first marriage and no legitimation proceedings involving the child by his second wife had ever been instituted.

The second wife filed the following statement in connection with her claim:

> W and I were married in . . . County, Alabama, July 22, 1934. I went with W about a month before we were married. During the time we were going together I asked him if he had ever been married before and he said he had not. I told him that I wanted to know because I didn't want to marry anyone that had ever been married.
>
> I married W on the above mentioned date under the impression that he had never been married before. We lived together continuously from the day we married up to the time he went to his mother's when he became ill.
>
> I never heard of his first wife until I filed a claim with the Social Security Board.

In this case the required application of Alabama law necessitated the disallowance of the claim of the second widow and of the child. Had the wage earner moved about the country to any extent, so that it would have been difficult to trace his whereabouts, it probably would not have been possible to present evidence that every county in which he had resided had no record of a divorce from his first wife. Under those circumstances the second marriage would have been presumed valid, the child ruled legitimate, and monthly benefit payments would have been awarded to the second wife and the child. Instead, a lump-sum payment was awarded to the first widow, who had had no association with the wage earner for the 13 years preceding his death.

Presumptions of validity of marriage are not uniform. In some States the presumptions are stronger than in others. In no State is the presumption irrebuttable.

Validity of common-law marriage.—Conflict in State laws on common-law marriage is one of the sources of greatest inconsistency. For example, common-law marriages are not valid at the present time in Massachusetts, New York, and Wisconsin. But children of a purported common-law marriage are illegitimate according to New York and Massachusetts law; in Wisconsin they are legitimate. In Indiana, Pennsylvania, and all other States in which common-law marriages are recognized, the wife or widow and the children of such marriages are recognized as having a legal status.

Frequently, in cases in which two individuals

marry while there is a legal impediment to such a marriage and the impediment is later removed, the determining factor as to the subsequent legality of the marriage is whether the parties are living in a jurisdiction in which common-law marriages are valid. The following is a quotation from an opinion of the General Counsel:

> It is the opinion of this office that upon the removal of the impediment of a prior existing marriage a valid marriage does not come into existence under the law of the Territory of Hawaii. *The rule that a valid marriage arises in such a situation obtains only in those jurisdictions in which common-law marriage is recognized (38 C. J. 1297) or there is a statutory provision to the effect that the removal of such impediment creates a valid marriage.* There is no such statute in Hawaii, nor are common-law marriages recognized. [Italics supplied.]

The position of the 51 jurisdictions in recognizing common-law marriages is shown in table 1. It is to be noted that there is an almost even division among the jurisdictions on this subject; 24 recognize common-law marriages, and 27 do not. A large proportion of the problem—both as to marriage and as to illegitimate children—could be solved if there were uniform provisions with respect to such marriages.

Table 1.—*States listed in accordance with legal recognition of common-law marriage, 1941*

States recognizing common-law marriage	States not recognizing common-law marriage
Alabama. Alaska (not recognized between May 3, 1917, and Apr. 28, 1933). Colorado. District of Columbia. Florida. Georgia. Idaho. Indiana. Iowa. Kansas. Michigan. Minnesota. Mississippi (not recognized between 1892 and April 21, 1906). Montana. Nevada. New Hampshire (if, upon death of 1 of the parties, relationship had existed for 3 years). Ohio. Oklahoma. Pennsylvania. Rhode Island. South Carolina. South Dakota. Texas. Wyoming.	Arizona (recognized before Oct. 1, 1913). Arkansas. California (recognized before May 20, 1895). Connecticut. Delaware. Hawaii. Illinois (recognized before July 1, 1905). Kentucky. Louisiana. Maine. Maryland. Massachusetts. Missouri (recognized before June 20, 1921). Nebraska (recognized before Aug. 3, 1923). New Jersey (recognized before Dec. 1, 1939). New Mexico. New York (recognized before 1902; not recognized from Jan. 1, 1902, to Dec. 31, 1907; recognized from Jan. 1, 1908, to Apr. 29, 1933). North Carolina. North Dakota. Oregon (recognized before June 4, 1920, if relationship had existed for 1 year and there is living issue). Tennessee (spouse and spouse's legal representatives are estopped to deny the existence of a marriage). Utah (recognized before Mar. 3, 1887, and probably until June 15, 1888). Vermont. Virginia. Washington. West Virginia. Wisconsin (recognized before Jan. 1, 1918).

Attempts to marry which fail.—In States which do not recognize common-law marriage there are difficulties which arise because parties intending to be married fail to comply with all the requirements of the jurisdiction. Mention has already been made of the fact that in some cases individuals obtain a marriage license but fail to have a ceremony performed, believing they have complied with the law. In other instances individuals are "married" by people who are not authorized to perform marriage ceremonies. Or individuals may have been "married" by persons authorized to perform marriage ceremonies, but have failed to obtain a marriage license as required by law. There is conflict among the States as to whether marriages of these types are valid or invalid. For example, New York law provides that the requirement of a marriage license is directory only, whereas under Missouri law a license is required, and marriages contracted without such license are null and void.

In one illustrative case the following agreement had been made in writing:

> G----------, Ill., June 2nd, 1915
>
> This certifies that I, L------ S------ and C------ F------ of ----------, Iowa, have this day entered into a common Law Marriage. Said L------ S------ agrees to live together in the ordinance of Law and in the State of Matrimony. The said C------ F------ agrees to live together in the ordinance of Law and in the state of Matrimony. The said L------ S------ and the said C------ F------ both agree that this contract be as binding as though a marriage license were issued and a marriage ceremony performed.
>
> Witness our hand this 2nd day of June 1915.
>
> (Signed) L------ S------
> C------ F------
>
> Witness: W. H------
> Witness: J------ D------
>
> *Justice of the Peace.*

This agreement, in itself, would not be sufficient to constitute a valid marriage in Illinois. It would be necessary for the justice of the peace actually to solemnize the marriage by some formality or ceremony in which he declared the parties to be married. Probably some such phrase as "I now pronounce you man and wife" would be satisfactory, but its lack would leave the parties legally unmarried.

The good faith of the parties, together with the intention to enter into a legal relationship and the belief that such a relationship is legal, are frequently deemed insufficient or immaterial in establishing a legal relationship in those States which do not recognize common-law marriage.

Unless the letter of the law has been observed, the claims of such parties must be disallowed.

Illegitimate Children

It should be clear from the preceding discussion that the illogical and unsocial treatment of illegitimate children is due largely to similar treatment of the mothers of these children. A revision of the law to provide for uniform treatment of wives and widows more in accord with common sense and justice would also eliminate to a great extent the discrimination against illegitimate children. In addition to the types of situations already discussed, a few additional points in regard to illegitimate children are worthy of mention.

Inheritance rights.—When the wage earner is the mother, her issue may become entitled to insurance benefits without being legitimate; only rarely, however, can illegitimate children of a male wage earner become entitled until the father has complied with the State requirement for legitimation. These requirements vary from State to State and fall roughly into three classifications: intermarriage of the parties; recognition or acknowledgment of the child by his father; or a combination of these requirements.

Occasionally, as in the following illustration, a child is able to meet the legitimation requirements and becomes eligible for benefits.

The wage earner, W, who was domiciled in Oklahoma, died in October 1940. He was survived by an illegitimate child and a widow (not the mother of the child). For the child to be considered a "child" for purposes of the act there must have been recognition of the child in writing by the father, in accordance with Oklahoma law. Fortunately for the claimant, the wage earner's mother had preserved a letter written by him to her, and reading in part as follows:

> I received your letter. Was indeed glad to hear from you. this leave all well. Hope you are the same. Oh yes L—[the child's mother]—have got a boy and she is planning on you coming to get it. It sure is a beautiful baby. He got a full head of hair, dimple in his cheek, big feet. Ha ha ha ha. He was born on Dec. 15, 1938 . . .

In a postscript to the letter the wage earner indicated that he had given the child his own name. The fortuitous existence of this personal and informal letter established legitimation and benefit rights for the child, since acknowledgment under Oklahoma law must be in writing. The fact that there were probably a dozen people who could testify that the deceased was the father of the child was immaterial. Had the letter been destroyed, the child would not have received benefits.

It is interesting to note in this connection that, although the Board is compelled frequently to exclude the wage earner's own illegitimate issue, the illegitimate child of the wage earner's wife by an earlier relation with some other man may, under the present wording of the act, be considered a stepchild of the wage earner and receive benefits based upon the wage earner's wage record. Thus, if the child in the case just cited had been the illegitimate child of the woman to whom the wage earner was married at the time of his death, the child's benefits would have been payable without any question as to whether the wage earner was the natural father of the child.

In a majority of the States even a written acknowledgment would not be sufficient to enable the child to inherit. Generally it is necessary that the father marry the mother of the child in order to accomplish this result. The fact that the wage earner was supporting his child, was living with it, and was otherwise treating it as any normal father would, is also immaterial in most States as far as determining legal relationship—and hence benefit rights—is concerned. For example:—

The wage earner, H, filed claim in February 1940 for primary insurance benefits and also for benefits on behalf of his three minor children. The wage earner's claim was allowed, but the claim for the three children was disallowed because they were illegitimate. Whereupon the wage earner petitioned the probate court to legitimate his three sons. In December 1940 the court legitimated the children, and insurance benefits were immediately awarded to them.

Since most claims of children under the age of 18 arise in connection with the death of an insured wage earner, the opportunity for compliance with the legitimation requirements is often no longer available. In only a minority of the cases similar to the two illustrated above is it possible to legitimate the child.

Inheritance rights versus the right to support.—One reason for excluding illegitimate children under the intestacy laws of the various States is to prevent an illegitimate child from laying claim to the estate of an alleged father. However, in all or practically all States the child may lay claim to support from his father. The father's moral obligation has been held by the courts to be a sufficient consideration for his express agreement to support the child; if he promises to pay the

mother or a third person for the child's support, such promise is enforceable.[2]

Furthermore, there are statutes in nearly all States by which the mother of an illegitimate child, or, if she is a pauper or likely to become one, the public authorities may institute a special action, called a bastardy prosecution, against the man claimed to be the father of the child, and on proof of the fact the court has power to make him pay a stated allowance for the child's support.[3]

Thus the incapacity of an illegitimate child to inherit from his father does not destroy his right to support. State laws clearly recognize his dependency status. In fact, some States specifically stipulate that illegitimate children are eligible to receive benefits under workmen's compensation laws on account of an injury suffered by the father. For example, reference may be made to the following excerpt from the compiled laws of Oregon:

> Section 102–1704. In case an unmarried man and an unmarried woman shall have cohabited in the State of Oregon as husband and wife for over one year prior to the death of or accidental injury received by such man, and children shall be living as a result of said relation, said woman and said children shall be entitled to compensation under the [workmen's compensation] act the same as if said man and woman had been legally married.

Other States place illegitimate children among those eligible to benefit by defining the term "child" very broadly; still others bring them in by including those children to whom the father stood in loco parentis. It seems incongruous that the old-age and survivors insurance system, developed to protect dependents of deceased wage earners, should be prevented from paying benefits to bona fide dependent children because of laws relative to inheritance rights.

Foster Children

While title II of the Social Security Act recognizes the benefit rights of adopted children and stepchildren as well as those of natural children, foster children are ignored even though they are in fact part of the wage earner's family and look to him for the everyday necessities of life. Adoption proceedings, like most legal proceedings, are luxuries beyond the reach of workers in the low income groups. Adequate statistical information as to the number of foster children in the United States is not readily available, but it seems reasonable to assume that the foster parent-child relationship is at least as frequent among covered wage earners as is the adoption relationship. It is self-evident that a foster child dependent upon an insured wage earner needs the protection of the law as much as the adopted child or his own child and should have protection for the same reasons.

Aside from being beyond the reach of a great part of our insured population, adoption proceedings are frequently a remote and unfamiliar action to them. When foster children are brought into the household, formalization of the relationship seems unnecessary to many foster parents. The following quotation is from a statement made by a widow whose claim for benefits on behalf of her foster child was disallowed:

> In 1930 C_____, my sister-in-law, sent for me. My husband and I went to her home. She was ill and told us she did not believe she was going to live. She told me and my husband that we could have the baby, J. E. C_____; that she wanted us to take the child, and that whichever of us lived the longer should keep the child. The next day she died and the child has been with me ever since that time. My first husband, R. B_____, died in 1935, and in accordance with our agreement, the child continued to live with me as my child. We had always treated him as our own. *We did not adopt him as we did not know it was necessary, nor did we ever discuss whether or not he could inherit from us.* We considered him as our child because he had been given to us.
>
> In October 1935 I married J. T. B_____, and the child, J. E. C. B_____ lived with us as our own child. *Neither of us thought of adopting him.* [Italics supplied.]

The italicized phrases above are probably typical of the thought that is given by many foster parents to the question of securing inheritance rights for the foster child. Undoubtedly it is a prevailing practice among families in all walks of life, and particularly in the lower income groups, to take in the orphan of a brother, sister, or other close relative and "bring up" the child.

Even when the parents are aware of the significance of adoption proceedings, difficulties beset them which are detrimental to the child's benefit rights, through no fault of its own. For example, consider this excerpt from an affidavit filed with the Bureau:

> . . . On or about April 30, 1930, the mother agreed to and did surrender full custody of said child to her. A petition was prepared for the child's adoption but was not carried through because the father demanded payment for his consent and there was no money available. However, on or about April 1, 1931, the father and mother both signed the consent for adoption of M_____ by H. and F. L_____ but then Mr. L_____ had no money to pay the costs and fees involved. During all these intervals M_____ was considered and reared up as my own child . . .

[2] Peck, Epaphroditus, *The Law of Persons and of Domestic Relations* (3d ed.), Chicago, 1930, p. 399.

[3] Ibid., pp. 399-400.

In addition, many cases have been filed in which the child was taken from an orphans' home and the preliminary steps to adoption were made, but the legal action necessary to perfect the adoption was never completed. In other cases, the foster parent contracted with a children's home to adopt the child but did not comply with the agreement.

The prevalence of such practices is perhaps indicated by the fact that, of the 26 States in which the Bureau has had cases requiring submission to the Office of the General Counsel, 24 have been found to have a theory known as "equitable adoption." Under this theory a foster child may be recognized as a "child" under State law, and hence as a "child" within the meaning of section 209 (m), if the foster parent has contracted to adopt the child but has failed to fulfill the obligation. A curious feature of equitable adoption is that the child is not considered an adopted child, since legal adoption has not been completed, but rather is considered technically a "child," since it can inherit.

The theory of equitable adoption is not a satisfactory solution to the problem, not only because some States have no such theory but also because a specific contract is usually necessary before the theory can become operative.

Ample precedent has been found in the workmen's compensation laws of many States for the inclusion of the foster child as a dependent. Some define "child" to include the child to whom the deceased employee stood in loco parentis. Others include the adopted child and define this term to cover children who are treated as adopted as well as those who have been legally adopted. A larger group define actual dependents (in contrast to presumed dependents) in terms broad enough to permit the inclusion of the foster child. Provided that safeguards are written into the legislation which would limit benefits to bona fide cases, the inclusion of foster children under title II would make more nearly complete the system of protection offered to the dependent children of insured wage earners.

Toward a Solution to the Problem

Experience in making administrative determinations on family relationship seems to indicate clearly the need for modification of the existing provisions of law. Two methods of approach to a solution to the problem suggest themselves. The first would be to write into the Social Security Act specific provisions which would extend benefit rights to individuals who are found to be in the types of situations previously described. The second method would be to substitute for the present provisions a definition of familial relationships that would be Federal in scope and would permit the application of uniform principles to this aspect of the old-age and survivors insurance program.

It is also clear from the Board's experience that any modifications adopted must take into consideration and offer a solution to the specific questions discussed above. These questions relate to the circumstances under which a valid marriage shall be deemed to have been created; to the determination of which of several marriages shall be deemed to be valid; to considerations of good faith on the part of individuals entering into imperfect relationships; and to the possible extension of benefit rights to illegitimate and foster children. These and other questions must be considered and answered in any proposal to solve the problems examined in this article—problems that arise from marriages which to the individuals concerned and to the community are frequently not distinguishable from the legally perfect marriage except in a technical sense.

Modification of the existing provisions with respect to dependents' and survivors' benefit rights under the program would in no way attempt to modify or control the application of State laws with respect to familial relationships in any of the areas in which the States have jurisdiction. Deviations from existing determinations under State law would relate exclusively to the payment of benefits under title II. These benefits are paid from Federal funds and are supported by Federal taxes uniformly levied and collected.

A uniform definition of relationship which can be applied in the administration of the old-age and survivors insurance program would not of itself solve all the problems which arise out of the conflict of laws in the spheres of marriage, divorce, and domicile. But it should prove a long step in the direction of a solution. It would allow simplification of the administration of the program, and the protection of dependents of insured wage earners could be achieved more realistically in situations which at present frequently give rise to benefit awards and claim disallowances that are counter to the intent and social policy of the program.