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In determining which persons are entitled to receive workmen's compensation death benefits, Professor Davis argues that support should be provided for all survivors who might reasonably have expected to receive support had the workman not suffered an accidental death. Although special rules are proposed for particular problems such as common law wives, non-legal wives, adopted children, stepchildren, and legitimacy, the author concludes that the general rule must be a simple one—statutes should provide for the payment of death benefits to "dependents"—to permit a flexible interpretation in individual cases. Such a reference to the acts and expectations of affected parties most accurately reflects the purpose of death benefits to substitute for the financial support that a workman gave others in his lifetime.

I. INTRODUCTION

Workmen's compensation death benefits are a substitute for the financial support that a worker gave others in his lifetime. Ideally they should fully replace for all survivors what a deceased worker could have been expected to have provided but for his occupational death. The most humanitarian and principled guide for the provision of such death benefits is to look to how a deceased employee spent the money earned during his lifetime and to what his survivors might reasonably have expected him to provide them. Such a reference to the acts and expectations of affected parties most accurately reflects the purpose of workman's compensation which is to shift the cost of work-connected death from those who received and expected to receive support from the employee to the employing industry and its customers. Anything less than such treatment would mean that some dependant survivors of a worker whose death was the result of an occupational accident would

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bear losses that are not visited upon similarly situated dependants of workers who avoid death.

The death benefits provided by compensation legislation must satisfy two tests. First, the benefits should cover the net economic loss resulting from occupational death.[1] Second, those survivors who could have expected to benefit from future earnings ought to share appropriately in the sum total of the benefits provided. This article focuses primarily upon this second question. The inadequacy of available benefits, however, may require the exclusion as beneficiaries of some survivors with expectations of support in order more adequately to provide for others. Thus, inadequacy of total benefits will be considered when it is relevant to the determination of who is entitled to receive benefits. To the extent that present laws fail to include all survivors with reasonable expectation of support and fail to provide fully adequate compensation for net economic losses, there is need for reform in the provision of death benefits.

Any desire for a more sophisticated system of settlements that recognizes significant situational distinctions, and tailors treatment by reference to how deceased workmen spent their earnings conflicts with the desire to simplify the administration of benefits by incorporating and using domestic relations rules to identify those survivors entitled to death benefits, and the desire for efficiency, achieved through seemingly simple and uniform arrangements. This is a basic conflict in compensation law.[2] This article, however, is premised on the belief that the principles of compensation would be better served by reference to what the worker did and what the survivors could have expected had the worker lived. For example, in the case of the spousal claimant, such a reference would be preferable to the incorporation of the ceremonial and recording requirements necessary to establish a legal marriage under domestic relations rules or the fault oriented rules that regulate the dissolution of marriages. Although statutory ambiguity allows administrators and courts to recognize the importance of the conduct

1. One study which explored the failure of compensation legislation to cover the economic losses resulting from employment death asks four questions: (1) how long would the worker have worked had the accident not occurred; (2) what would have been his gross earnings during this period; (3) what is the present value of these future earnings; and (4) how much of this earnings loss is a net loss to survivors. E. CHEIT, INJURY AND RECOVERY IN THE COURSE OF EMPLOYMENT 66-84 (1961). Based upon a careful examination of the answers to these questions, and upon a comparison of the benefits available under compensation statutes, the study concluded that death benefits in 36 of 51 jurisdictions replaced less than 20% of net economic losses. *Id.* at 109.

2. *See* E. CHEIT, *supra* note 1, at 249; *cf.* Horovitz, *The Meaning of "Disability" Under Workmen's Compensation Acts*, 1 NACCA L.J. 32 (1948).

and the expectations of the parties by stretching customary domestic relations rules, a more flexible statutory treatment of dependents is certainly a preferable solution.[3]

II. A Review of the Dependency Statutes

In defining the class of persons entitled to receive workmen's compensation death benefits, some statutes simply allocate benefits to deceased workmen's "dependents," that is, those persons who are able to prove dependency in fact.[4] Such a broad classification allows the decision-making body to allocate benefits with maximum reference to a deceased worker's previous and projected spending patterns. A great number of statutes, however, provide more restrictive methods for determining eligibility for death benefits. These methods, in some cases, supplement or replace the test of dependency in fact. On the one hand, there are statutory presumptions created for the benefit of certain classes of claimants which eliminate the need for a member of the class to prove actual dependency. On the other hand, some statutes restrict claimants to those members of a certain predefined class who can prove actual dependency and exclude all other persons who are not members of the class, even if such persons could prove dependency in fact.

A. Presumptions of Dependency

Wives and minor children are probably the two classes of survivors that a deceased workman was most likely to have lived with, actually supported, or been obligated to support. On the basis of this substantial probability, most statutes create a presumption of

3. Although the Council of State Governments has recognized the need for legislative change, its 1963 proposal relies upon the traditional approach, using domestic relations rules to provide benefits for the widow, children, parents, brothers, sisters, grandparents and grandchildren. Council of State Governments, Suggested State Legislation Program for 1963, at 130, 160. The objections to this restrictive arrangement should be obvious. *See infra.*

Senators Javits and Yarborough are now seeking a national commission to evaluate the adequacy of state compensation laws, and it is hoped that such a commission, if established, would examine the adequacy of death benefits. *See* Javits, *National Commission to Improve Workmen's Compensation*, 4 Trial, Oct.-Nov., 1968, at 44.

4. *See, e.g.*, Md. Ann. Code art. 101, § 36 (1964 Replacement Vol.). *See* Wright Constr. Co. v. Brannan, 217 Md. 397, 142 A.2d 574 (1958), which reversed an award for a child whose father had not made support payments for 20 months before his occupational death. The opinion of the court and the dissent discuss the father's obligation to support his child, which alone is not sufficient to entitle the child to death benefits, and the relation of the obligation to support to the probability of his giving support which would entitle a claimant to death benefits under a test which looks solely to dependency. *See also* Kan. Gen. Stat. Ann. § 44-510b (Supp. 1968).

dependency for widows and children. This usually means that although other claimants are required to prove dependency, the widow and children are entitled to benefits on proof of status only.[5] Such statutory presumptions may be absolute or conditioned upon the widow or child having lived with the workman at the time of his death.[6]

Two policies seem to underlie the use of the absolute or conditional presumption. First, the presumption probably reflects a legislative assumption about how the workman should have spent his earnings. The absolute presumption deems the money to be so spent, while the conditional presumption tries to blend both what was in fact done with the notion of what ought to have been done. Second, the creation of a presumption of dependency in favor of widows and children may be intended to simplify the administration of death benefits. One result of simplification by the use of presumptions of dependency is that benefits for all members of a given class are the same standardized sum per week for the same fixed number of weeks.[7] The administration of benefits is often further simplified by providing the widow and children with priority over all other dependents so that the surviving widow or child automatically excludes all otherwise eligible claimants.

Simplification of the administration of death benefits through the use of presumptions may produce, however, a windfall to a survivor who would have received nothing had the workman lived, and defeat the expectation of others who would have received support from the deceased workman. For example, a woman was awarded death benefits as the surviving widow although she lived apart from her husband and bore five illegitimate children by five separate fathers.[8] Also, awarding benefits to the "legal" widow only has required the exclusion of a

5. N.Y. WORKMEN'S COMP. LAW § 16(1)(a) (legal wife entitled to benefits except when she has abandoned husband and such separation is sufficient to obtain judgment of separation under domestic relations law); TEX. REV. CIV. STAT. ANN. art. 8306, § 8a (1967) (but legal wife may be excluded if separated for three years).

6. Representative of the many statutes granting presumptions of dependency to the widow and children living with the worker at the time of his death are: CAL. LABOR CODE § 3501; IND. ANN. STAT. § 40-1403a (1965 Replacement Vol.); N.J. STAT. ANN. 34:15-13(f) (Supp. 1968).

7. *See* 3 A. LARSON, WORKMEN'S COMPENSATION LAW, table 15, at 548-50 (1968).

8. Gibbons v. Maryland Gas Co., 114 Ga. App. 788, 152 S.E.2d 815 (1966). *See also* Sims v. American Mut. Liab. Ins. Co., 59 Ga. App. 170, 200 S.E. 164 (1938) (compensation awarded a legal wife even though she entered into a bigamous marriage with another man). Immorality of the claimant, however, plays a more important role when the claimant is not the legal wife but knows of an existing prior marriage and, despite that knowledge, continues to live with a worker until his death. Insurance Co. of North America v. Jewel, 118 Ga. App. 599, 164 S.E.2d 846 (1968).

second wife living with the workman at the time of his death, when the first wife, after the workman's death, invalidated the worker's divorce from her.[9]

. B. *Exclusion of Dependents*

In addition to granting a presumption of dependency, either conditional or absolute, many statutes limit eligibility to certain classes of persons, such as the widow, widower, child, grandchild, parent, grandparent, brother, sister,[10] or to the members of the decedent's "family."[11] The effect of such "list" statutes is the exclusion of some survivors who were actually dependent on the deceased workman, but who cannot fit themselves within the terms of the limitations.[12] Thus, to the extent that such statutes exclude persons actually dependent on the deceased worker, they would appear inconsistent with the statutory intent to remove the burdens of accidental death from actual dependents and impose the costs of occupational death upon the employing industry and the consumers of its goods and services.

Death benefits may be further limited by excluding those survivors capable of supporting themselves even though they may have in fact enjoyed benefits from the deceased worker's earnings during his lifetime. This limitation is generally applicable only to children who have attained a specified age, and to widowers who are denied benefits on the death of a working wife unless the widower is incapable of supporting himself.[13] If widows, however, are automatically entitled to

9. *See* Harmes v. Industrial Comm'n, 40 Ill. 2d 488, 240 N.E.2d 674 (1968). Alternate solutions to the problem of the bigamous claimant would be to focus upon actual dependency and not the legal relationship, Kendall v. Housing Authority, 196 Md. 370, 76 A.2d 767 (1950), or to split the available benefits among the wives, Ritchie v. Katy Coal Co., 313 Ky. 310, 231 S.W.2d 57 (1950).

10. *E.g.*, CAL. LABOR CODE § 3503 includes aunt, uncle, brother-in-law, sister-in-law, nephew, and niece as well as spouse, child, stepchild, parent, and brother and sister; DEL. CODE ANN. tit. 19, § 2330(a) (1953) (widow, widower, children, father, mother, brothers, and sisters).

11. *E.g.*, KY. REV. STAT. § 342.075(3) (1962) combines the membership or living in the household requirement with the list by providing: "No person shall be considered a dependent in any degree unless he is living in the household of the employee at the time of the accident, or unless such a person bears to the employee the relation of father, mother, husband, or wife, father-in-law or mother-in-law, grandfather or grandmother, child or grandchild, or brother or sister of the whole or half blood."

12. *See* Knoxville Gray Eagle Marble Co. v. Meek, 159 Tenn. 577, 21 S.W.2d 625 (1929), Consolidated Underwriters v. Ward, 57 S.W.2d 964 (Tex. Civ. App. 1933). *But see* Peay v. Fred Kulow & Co., 226 Mich. 512, 197 N.W. 1020 (1924) (aunt entitled to benefits as member of the deceased's family). But the mother-in-law may be able to bring herself within the class entitled to benefits where the statute provides for members of the decedent's family. Archibald v. Employers' Liab. Assur. Corp., 202 La. 89, 11 So. 2d 492 (1942).

13. KY. REV. STAT. § 342.075(b) (1962) (incapacitated husband who has not abandoned

death benefits under a statutory presumption of dependency, it would seem that widowers, whose wives suffer a work-connected death, should enjoy similar treatment. Indeed, there may be a constitutional argument for equal treatment of surviving spouses whether the worker was a man or a woman. For example, a recent decision of a federal district court in Illinois extended to the wife the benefits of an Indiana law which allowed a husband to recover for loss of consortium for negligent injury to his wife, but did not allow the wife to sue for loss of consortium because of negligent injury to her husband. The statute, according to the court, discriminated unreasonably and arbitrarily against women, and its failure to provide corresponding rights for men and women violated the equal protection clause of the fourteenth amendment.[14] In any event, a differential treatment of widow and widower is inconsistent with the general principle of compensation law that losses caused by occupational death should fall on employers and those who consume the employer's goods and services.[15]

III. THE DEPENDENT SPOUSE: EXCLUDING THE TRULY MERETRICIOUS RELATIONSHIP

A. Benefits for the Widow

Most compensation acts provide roughly uniform death benefits for all dependent widows. This uniformity within each state is due, in part, to the general presumption of dependency which entitles a widow to benefits without any showing of actual dependency, as well as to the leveling of benefits produced by statutory limitations providing low dollar maximums on weekly payments and arbitrary limits on the

wife entitled to benefits); VT. STAT. ANN. tit. 21, § 634 (1959) (widower entitled "only if incapable of self-support and actually dependent wholly or partially . . . at the time of . . . injury"). But contrast R.I. GEN. LAWS ANN. § 28-33-13(b) (1968), which gives a conclusive presumption to a "husband upon a wife with whom he lives or upon whom he is dependent at the time of her death." Cataldo v. Admiral Inn, Inc., 227 A.2d 199 (R.I. 1967) read the presumption as giving the husband who lives with the wife at the time of her occupational death a right to benefits and upheld it against a constitutional challenge.

14. Karezewski v. Baltimore & O. R.R., 274 F. Supp. 169 (N.D. Ill. 1967).

15. The alternate theory of compensation, that of "least social cost," requires that "distribution of unavoidable losses . . . which imposes the least hardship upon individuals and results in the smallest diminution of the community's economic assets." E. DOWNEY, WORKMEN'S COMPENSATION 9 (1924). If this alternate theory were followed to justify the denial of benefits to widowers except when they are incapable of supporting themselves, then no reason exists to give widows a presumption of dependency. Equality could be achieved for widows and widowers by making dependency a condition of all death benefits, not just the widower's benefits. Such equality might well result in most widows receiving benefits while no more widowers become entitled to benefits.

number of total payments.[16] Although this practice of treating all widows alike, regardless of age or other factors, provides an apparent equality, the practice is actually unfair and inequitable.

There is ample evidence that a woman widowed at age 46 is far less likely to remarry or otherwise overcome the adverse effect of her husband's death than the woman widowed at age 25.[17] Similarly, the woman widowed at age 42 will exhaust her 300 or 400 weeks of compensation benefits long before she becomes entitled to old age or retirement benefits, while the 55-year-old widow may well continue to receive her payments when she becomes eligible for old age payments. Despite such real differences in need at different ages, however, only nine states provide tailored treatment in the form of true annuities.[18] Most statutes provide benefits only for a limited period, and terminate the widow's rights upon remarriage.[19]

It is easy to justify the termination of a widow's benefits upon her remarriage on the grounds that she is no longer dependent.[20] This insistance upon dependency as the controlling principle, however, is ironically overlooked by statutes which limit death benefits to a fixed number of weekly payments. If the termination of dependency because of remarriage within the statutory period allowable for payment of benefits is recognized, dependency that continues beyond the arbitrary statutory maximum period should also be recognized and adequately compensated.

As a program for replacement of earnings and support lost by occupational death, the system of weekly payments of death benefits is a tailored treatment, and in this respect, periodic payments have an advantage over a system of lump sum payments, although there is evidence that lump sums have been well used when they have been paid.[21] On the other hand, the fear of excessive claims appears to put limits on the payment of adequate benefits in cases where greatest

16. *See* A. LARSON, *supra* note 7, table 15, at 548-49.

17. E. CHEIT, *supra* note 1, at 128-29.

18. Arizona, Connecticut, Maine, Nevada, New York, North Dakota, Oregon, Washington, and West Virginia. The Longshoremen's Act and the Federal Employees' Compensation Act provide true annuities. 3 A. LARSON, *supra* note 7, table 15.

19. *Id.*

20. The saving effected for the compensation carrier by a widow's remarriage is acknowledged in some states by a lump sum settlement, or incentive payment, for the widow who remarries. ARK. STAT. ANN. § 81-1315(d) (1947); N.J. STAT. ANN. § 34:15-13(f) (Supp. 1968).

21. E. CHEIT, *supra* note 1, at 276, citing a California survey indicating that injured workers who chose lump sums with a plan for the use of the lump sum had reported overwhelmingly that the plan was successfully carried out. For other comments on lump sum settlement, see H. & A. Somers, Workmen's COMPENSATION 161 (1954).

hardship is shown; that is, where dependency outlasts the maximum statutory period. It is possible to draw an analogy to the conflict over limitations on the allowed dollar amount of payments for medical treatment. Despite an avowed purpose to give full medical treatment to all persons disabled by their occupations, several statutes have put dollar limits on the amount of medical treatment that must be provided.[22] Although some success has been achieved in removing these limits,[23] or in raising the dollar amounts,[24] there can never be a true tailoring of benefits to actual losses when there are dollar limits on available medical benefits, or when a widow is entitled to receive benefits for only a fixed period or a lump sum settlement.

One way to answer the fears that the cost of adequate benefits for widows will be excessive is to suggest that the annuities paid to unremarried widows be cut off when the widow becomes eligible for old age or survivor's benefits under social security. This approach would be premised on the reasonable assumption that the social security program should have primary responsibility for the relief of the loss of income during the retirement years,[25] while compensation benefits should cover wage earning losses during occupational years.[26] Another proposal would be to provide a minimum of 300 weeks of benefits for all widows, but allow those widows who were married for a longer period of time to receive benefits for a period proportioned to the length of the widow's total married life, not to run past age 62 or 65.

The prospects for legislative changes are not promising. Fatal accidents comprise less than one percent of the total of all compensation claims,[27] and a good portion of those claimants are

22. 3 A. LARSON, *supra* note 7, table 13, at 542, shows 15 states have limits upon medical benefits.

23. The table cited in note 22 *supra* shows that Iowa limits benefits to $3,000. The limit in Iowa, however, has been raised to $7,500, IOWA CODE ANN. § 85.27 (Supp. 1969); and it is possible to obtain additional sums upon application to the Industrial Commissioner.

24. The trend toward full medical benefits is fully discussed in E. CHEIT, *supra* note 1, at 37-38 (1961). This author has prepared estimates of the cost of removing dollar limits on medical benefits for those states which have such limits (*Id.*, table 2.5, at 44-45) as well as a formula for the calculation of such costs, all of which should interest anyone who wishes to see such limitations removed from compensation legislation.

25. The trend to increase coverage of death and disability under social security has increased the overlap with workmen's compensation coverage. *See* J. POLLACK, DISABILITY UNDER SOCIAL SECURITY IN OCCUPATIONAL DISABILITY AND PUBLIC POLICY (E. Cheit & M. Gordon eds. 1963).

26. The reasons for maintaining a compensation system separate from broader systems of social insurance are discussed in W. BEVERIDGE, SOCIAL INSURANCE AND ALLIED SERVICES (1942).

27. The proportion of fatal accidents to all accidents is indicated by the 1968-69 MINN. WORKMEN'S COMP. BIENNIAL REP. 26, which has a table indicating only 251 fatal accidents out of a total of 64,465 accidents in the year ended June 30, 1968.

dependents who eventually remarry or otherwise adjust. Relief initiated by the courts seems equally unlikely. Although our legal system goes to great lengths to assure that legislatures and administrators do not force those who are alike into separate catagories that are given different treatment, there is no similar judicial guarantee, other than the vague principle of due process of law,[28] that legislatures will not create classifications that ignore differences in age, length of marital relationship and other relevant characteristics. Realistically, however, a system of classification which treats unequals alike is as potentially unreasonable as the unequal treatment of equals. Someday, perhaps, a judical remedy may be fashioned.

B. Defining the Spousal Relationship

1. *Legal Wives.*—Statutes that provide death benefits for the widow have been interpreted by the courts to mean a legal widow only.[29] Relief from this rigid rule, however, may be obtained in some cases if the woman claiming benefits as a widow offers proof of her marriage to the deceased workman. This evidence would shift, to the employer or the compensation carrier, the burden of proving that there was an impediment to the marriage or that the marriage had been dissolved.[30]

One important effect of an insistence upon providing benefits for the legal widow only is the exclusion of the divorced spouse. Although such a person is entitled, under a court order, to a portion of the workman's earnings, the loss of support she suffers on the workman's death would not be replaced by compensation death benefits.[31] There are probably two reasons for excluding the ex-spouse from eligibility for death benefits: (1) to provide more adequate benefits for the wife living with the worker at the time of his death, and (2) a general hostility to divorcees. This treatment of the divorced spouse, however, is irrational to the extent that it provides a general rule to be applied without regard to the actual dependency. It works to deny benefits to

28. *See* Silver King Coalition Mines Co. v. Industrial Comm'n, 101 Utah 12, 116 P.2d 771 (1941), which recognized a possible constitutional objection to a disproportionate treatment of beneficiaries but upheld a Utah statute construed to give a sole minor survivor the same benefits accorded an adult dependent with one minor.

29. Woods v. Hardware Mut. Cas. Co., 141 S.W.2d 972 (Tex. Civ. App. 1940), and cases cited in note 8 *supra*.

30. Parker v. American Lumber Corp., 190 Va. 181, 56 S.E.2d 214 (1949); Comment, *Presumption of Validity of Second Marriage to Allow Beneficiary to Recover*, 6 BAYLOR L. REV. 242 (1954).

31. Arey v. Viscose Corp. of Va., 19 OPINIONS OF THE INDUS. COMM'N OF VA. 133.

survivors, who may have been innocent parties in the divorce proceedings, when the spouse obligated to make the support payments happens to be the victim of a fatal occupational accident. In balancing the claims of the divorced spouse against those of the employer and those of competing claimants, the principle that compensation benefits should replace the support that lost earnings would have provided dictates that the expectations of the former spouse should be recognized.

Among statutes which do not require that the widow be living with the workman at the time of his death in order for her to be entitled to benefits, many provide that the rights of the legal wife will be barred if she has deserted or abandoned him for a specified period of time.[32] New York expressly provides that a wife's abandonment that would be sufficient to obtain a judgment of separation will bar the widow's claim.[33] The three-year separation which will bar widows' claims in Texas has been said to have been drawn from the divorce statutes.[34] These provisions intertwine fault and nondependency. Other grounds for divorce, such as adultery, however, do not bar the legal wife's claim. Thus the statutory rules making abandonment or separation a bar to claims must be interpreted as a recognition of the absence of actual dependency, rather than an incorporation of the fault concepts of divorce law into workmen's compensation.

2. *Common Law Wives.*—In states which recognize common law marriages, however reluctantly, the common law wife is entitled to death benefits under workmen's compensation.[35] Indiana limits this doctrine by excluding a common law wife from eligibility for death benefits unless the relationship existed openly and notoriously for not less than five years immediately preceeding the workman's death.[36]

In states which do not recognize common law marriages,[37] the woman claiming dependency as a common law wife is denied death benefits. This exclusion is a sanction of domestic relations law and it is an arbitrary sanction in that a woman whose common law husband

32. MD. ANN. CODE art. 101, § 36(j) (1964 Replacement Vol.) (one-year desertion bars claim); TEX. REV. CIV. STAT. ANN. art. 8306, § 8a (1967) (three-year separation).

33. N.Y. WORKMEN'S COMP. LAW § 16 (McKinney 1965).

34. Doty v. Travelers Ins. Co., 31 F. Supp. 8 (S.D. Tex. 1940).

35. Shelton v. Belknap, 155 Tex. 37, 282 S.W.2d 682 (1955).

36. IND. ANN. STAT. § 40-1403a (1965). The Indiana statute further requires that the relationships have been entered into before January 1, 1958. *See* Comment, *The Common Law Wife and Workmen's Compensation*, 16 WASH. & LEE L. REV. 79 (1959).

37. Tennessee is said to have abrogated the common law in relation to marriage in 1858. *See* Crawford v. Crawford, 198 Tenn. 9, 277 S.W.2d 389 (1955).

happens to be the victim of an industrial accident is excluded from death benefits to replace the support she formerly received while another women, who maintains a similar common law marriage and whose mate is fortunate enough to avoid accidental death, does not bear the hardship of this sanction.

The strongest argument against providing death benefits to the common law wife in those states which do not recognize the relationship is that the "marriage" can be terminated at any time. The spouse, therefore, cannot reasonably expect to benefit from the future earnings of the workman. The Indiana statute provides a partial answer to this challenge by providing a time test of five years, assuming that a relationship which continues that long is very likely to continue indefinitely. This principle should be carried further, however, to be fully effective. Other factors, such as the fact that the woman bears children by the workman, should be considered in determining whether a shorter period of time than five years would entitle the woman to receive death benefits.[38]

3. *Non-legal Relationships.*—One of the fundamental principles of compensation law is that the claimant's fault or misconduct does not normally affect his rights to benefits. Applied to dependency, this would mean that proof of actual dependency would not be defeated by proof of the immoral character of the relationship out of which the dependency grew.[39] Thus, a test that looks to actual and expected dependency to determine whether it is likely that support would have continued if the deceased workman had lived should not be modified for moral considerations. Even in the truly meretricious relationship, benefits should be awarded if no other parties are involved and the relationship has lasted long enough to indicate the likelihood that it will continue indefinitely.

In practice, the good faith of a claimant may play a role in determining whether she is entitled to benefits as a widow. Thus, even though her marriage is illegal, the claimant may be allowed compensation benefits if she entered into the relationship innocently and in good faith, but will be denied benefits if she knew that she had engaged in a meretricious relationship.[40] Where the legal wife and the

38. The mother of an illegitimate would be entitled to receive benefits for the child (*see* note 42 *infra*) and should receive benefits for herself if actually dependent.

39. *See* 2 A. LARSON, *supra* note 7, § 63.41.

40. *Compare* Eason v. Alexander Shipyards, Inc., 47 So. 2d 114 (La. App. 1950), *and* Perry v. Sun Coal Co., 183 Tenn. 141, 191 S.W.2d 181 (1945), *with* McDonald v. Kelly Coal Co., 335 Mich. 325, 55 N.W.2d 851 (1952), *and* Fields v. Hollowell & Hollowell, 238 N.C. 614, 78 S.E.2d 740 (1953).

good faith wife both claim dependency under a statute requiring recognition of the legal wife, the best approach would reject an all-or-nothing solution and divide the death benefits between both claimants. Thus, in one reported case, the decedent abandoned his first wife, and, without obtaining a divorce, "remarried" another woman who had no reason to suspect the continuing validity of the prior marriage. By splitting the death benefits, the court recognized both dependencies—one the decedent actually supported and the other he was obligated to support.[41]

As noted previously, the greatest hardship is experienced by the woman widowed at about age 42. At this age, even if not legally married, the woman is likely to have lived with her husband many years, and an appropriate remedy ought to be fashioned to reach these cases of greatest hardship without providing undeserved benefits. This could possibly be accomplished by limiting the period for which the non-legal wife would be entitled to death benefits to a period equal to the length of time of open cohabitation. Providing further, that if such a period did not exceed a specified minimum, perhaps five years, all benefits would be denied. Such a test would look to actual dependency, rather than moral judgments.

IV. Other Dependency Problems

A. Legitimacy

Under statutes granting presumptions of dependency to children of a deceased worker, a question arises whether illegitimate children are included within the term "children." On the one hand, it could be argued that the illegitimate child is similar to the non-legal wife, and should be excluded for the protection of the legal family. This reasoning would require exclusion of the claims of dependent illegitimates only when there is a legitimate child or legal wife to be protected. On the other hand, if the exclusion of the non-legal wife were based on a notion of moral blameworthiness, rather than on the concept of protection of the legal wife, the analogy could not apply to an illegitimate child, who must be considered blameless. Thus, the illegitimate child could fare better than the non-legal wife, and might claim the right to share benefits with legitimates, as well as to be entitled when no legitimates exist.[42]

41. Ritchie v. Katy Coal Co., 313 Ky. 310, 231 S.W.2d 57 (1950).

42. *See* Caddo Contracting Co. v. Johnson, 222 La. 796, 64 So. 2d 177 (1953) (covered illegitimate children, as well as legitimate children, the mother of the illegitimates asserting only their rights, not her own).

It should be noted that separate classifications of legitimates and illegitimates may violate the equal protection clause of the fourteenth amendment. In *Levy v. Louisiana*,[43] the Supreme Court considered a state wrongful death statute that limited offspring capable of suing under the statute to those who are legitimate. In reversing the dismissal of an action for wrongful death brought by the decedent's five illegitimate children, the Court held that the statute worked an invidious discrimination against illegitimate children and contravened the fourteenth amendment, since legitimacy and illegitimacy of birth had no relation to the nature of the wrong allegedly inflicted on the deceased. It is quite possible that the logic of this holding would be extended to strike down separate classifications for legitimate and illegitimate children in workmen's compensation.[44]

It is doubtful that the test of actual dependency for eligibility should be used for both the non-legal wife and the illegitimate child. The non-legal wife, who has a degree of control over the relationship between herself and the decedent, is probably treated fairly when entitled to benefits according to her actual dependency. A statute that determines the rights of children according to actual dependency, however, might in fact discriminate against illegitimates who do not live with the worker. Even though an obligation exists in almost every state to support illegitimates who live apart from the worker,[45] such support may not be provided. No inference adverse to the illegitimate should be drawn from the failure to enforce the parents' obligations because the enforcement of such rights is beyond the control of the child. It could be suggested that both actual dependency and legal obligation are appropriate standards for determining eligibility of children. Any presumption of dependency should apply to all children, illegitimate as well as legitimate.

B. Adopted Children and Stepchildren

It is easier to fit a legally adopted child into the scheme of rights fixed for the natural children of a workman who adopts the child than it is to determine the appropriate rule for a worker's stepchildren.

43. 391 U.S. 68 (1968).

44. The treatment accorded illegitimates in all states is covered in Davis, *The Illegitimate Child*, Workmen's Compensation section of volume 33 JOURNAL OF THE AMERICAN TRIAL LAWYERS ASSOCIATION, to be published in the fall of 1969.

45. The virtual unanimity of all states in providing such an obligation is discussed in Karuse, *Bringing the Bastard into the Great Society—A Proposed Uniform Act on Legitimacy*, 44 TEXAS L. REV. 829, 848 (1966).

Generally, stepchildren will not be entitled to benefits on stepparent's death unless this is expressly provided by statute.[46] The marriage of the stepparent to the natural parent of the stepchild creates a two-link relationship between stepchild and stepparent. If the stepchild were living with the stepparent and were dependent upon him, the relationship would be quite similar to an adoption of the child. The relationship is easily distinguished, however, from a legal adoption in that the stepchild may be able to look to another parent, not the stepparent, for financial support. The adopted child, however, would be unable to expect support from his natural parents.

The basic problem in providing benefits for a workman's stepchildren or adopted children is the possibility that such children may be entitled to benefits if the child's natural parent suffered an occupational death.[47] In the case of stepchildren, the mere possibility of double dependency should not be a valid reason to deny death benefits where the stepchild was actually dependent upon the stepparent. Thus the test of dependency in fact could eliminate double dependency for stepchildren.

Under the better view, there is no possibility of double dependency for adopted children, since that view maintains that a child adopted by another is not entitled to benefits on the death of its natural parent.[48] Some states, however, do permit an adopted child to participate in death benefits on the occupational death of a natural parent, analogizing compensation rights to the child's right to inherit from its natural parent.[49] Compensation benefits, however, should replace the support a workman gave and could be expected to give, and the natural parent would be unlikely to give such support when there is no obligation. The possibility that a child adopted by another might inherit on the natural parent's death if the parent's earnings were accumulated and then distributed intestate or by will to the child is far too tenuous to provide a satisfactory basis for the analogy.

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46. *E.g.*, PA. STAT. ANN. tit. 77, § 562 (Supp. 1969).

47. *See* Day v. Town Club, 241 Iowa 264, 45 N.W.2d 222 (1950) (possible double dependency of stepchild).

48. Liberty Mut. Ins. Co. v. Clem, 288 F. Supp. 533 (N.D. Tex. 1968); New Amsterdam Cas. Co. v. Freeland, 216 Ga. 491, 117 S.E.2d 538 (1960). *See also* Alexander v. Employers Mut. Liab. Ins. Co., 102 Ga. App. 750, 118 S.E.2d 215 (1960); Patton v. Shamburger, 431 S.W.2d 506 (Tex. 1968), *noted in* 22 SW. L.J. 699 (1968).

49. Holland Constr. Co. v. Sullivan, 220 Ark. 895, 251 S.W.2d 120 (1952); Wilson v. Hill, 6 Terry 251, 71 A.2d 425 (Del. Super. Ct. 1950); Employers' Mut. Ins. Co. v. Industrial Comm'n, 70 Colo. 229, 199 P. 483 (1921); Snook v. Herrmann, 161 N.W.2d 185 (Iowa 1968); Shulman v. Board of Fire Underwriters, 15 App. Div. 2d 700, 223 N.Y.S.2d 312 (1962).

A child's adoption after the natural parent's death has been held not to terminate his rights to death benefits.[50] This result can be justified because it encourages the adoption of the orphaned child. On the other hand, the marriage of a child might well be considered an event which terminates the dependency.[51] The latter conclusion is probably based more on the policy of discouraging early marriage, however, than it is an appraisal of what the parent would have done had he not suffered an occupational death. Finally, a child in an orphanage, or penal institution, would probably not be entitled to benefits, except where the institution would have been entitled to recover support payments from the parent were he living.[52]

C. Priority Among Dependents

Competition among survivors raises the difficult question of priority. Most statutes give the surviving spouse and children priority over other dependents. The inadequacy of overall available benefits probably dictates the exclusion of some dependents, even though they have expectations of support, in order to give maximum benefits to those most closely related to the decedent. Such reasoning may require the exclusion of the divorced wife in order to give the wife married to the worker at the time of death more adequate benefits, or the exclusion of partially dependent parents in order more fully to provide for the widow and children. Convenience of administration might also be cited to justify the exclusion of partial or more remote dependents in favor of the surviving spouse or children. But such a compromise is unprincipled. Apportioning benefits in a manner similar to the way the decedent divided his earnings would not be especially difficult to administer. It would fit the expectations of the affected parties. If benefits are inadequate, that problem should affect all dependents equally.

D. Absence of Dependents and Alien Dependents

When there is no dependent entitled to benefits, statutes often require that some amount be paid into a fund, such as the second injury fund, designated for the occasion.[53] Such a provision brings home to the employer, and to those responsible for employment safety, the fact

50. *In re* Jones, 84 Idaho 327, 372 P.2d 406 (1962).
51. ARK. STAT. ANN. § 81-1315(d) (1947).
52. Harve De Grace Fireworks Co. v. Howe, 206 Md. 158, 110 A.2d 666 (1955).
53. *E.g.*, ALA. CODE tit. 26, § 288(2) (1958).

of an employment death, and may serve to increase employment safety.[54]

Death benefits may not be awarded, under some statutes, if the dependent involved is an alien,[55] although treaties may avoid the implementation of this restriction. Such limitations run contrary to the purpose of replacing the support that was afforded by the worker during his lifetime, except when such benefits would fall into the hands of an alien property custodian or otherwise be denied to the dependent.[56] Furthermore, a number of treaties regulate the implementation of this restriction on aliens.[57] Nevertheless, if benefits otherwise payable are reduced or denied because the beneficiaries are aliens, the policy of making the costs of employment death felt by those responsible for employment safety requires that such unawarded funds be applied to a second injury fund or otherwise used for compensation.

V. CONCLUSION

The purpose of death benefits under compensation law should be to replace support that the deceased workman provided others during his lifetime. Support should be provided for all survivors who might reasonably have expected to receive support had the workman not suffered an accidental death. Fault oriented rules should not be borrowed from domestic relations law. Neither should statutes try to provide for the exclusion of those actually supported by the decedent such as stepparents and brothers and sisters of the half blood.[58] In order to authorize those who administer compensation benefits to see that death benefits take the place of actual support, statutes should provide simply for the payment of death benefits to "dependents."

If notions of morality require the exclusion of the non-legal wife whose relationship is merely meretricious, a time limitation could be used to exclude the truly meretricious relationship and still entitle the

54. Calabresi, *Does the Fault System Optimally Control Primary Accident Costs?*, 33 LAW & CONTEMP. PROB. 429 (1968).

55. 3 A. LARSON, *supra* note 7, table 17, at 552.

56. The treaties between the United States and other countries which contain provisions relating to workmen's compensation are collected in the Digests of Laws, published by the Workmen's Compensation Board, State of New York, at 87 (1969 rev. ed.).

57. The most sensible provision is one such as is found in New York which provides that when a nonresident would not have full control of the benefit payment, the benefits shall be paid to the comptroller; and whenever the conditions which limit the beneficiary's right to control payments have been removed, payment will be made to the beneficiary.

58. *Cf.* Traders & Gen. Ins. Co. v. Stanaland, 189 S.W.2d 55, *aff'd*, 145 Tex. 105, 195 S.W.2d 118 (1946) (half-brother included); Southern Surety Co. v. Weaver, 273 S.W. 838 (Tex. Comm'n App. 1925) (stepmother excluded).

non-legal wife to benefits when long cohabitation or other factors make some expectations of the future support reasonable. The divorced spouse, of course, should always share in any benefits available as a dependent whenever she has or could have obtained a court order for her support.

Although equal treatment of widow and widower is best achieved by eliminating any presumption of dependency, special provisions for children seem appropriate. No child has the power to compel a parent to regularize the parent's relationship, or to enforce the parent's obligation of support. Neither should a child be compelled to prove that the parent had met the parent's general obligations of support. If the term "child" is defined to include the stepchildren, the adopted child, the illegitimate, and all posthumous children both legal and illegitimate, all such children should be entitled to a presumption of dependency. The possibility of double dependency for stepchildren and adopted children should be met by including the stepchild so long as double dependency is only a possibility, and excluding the child adopted by another before the death of its natural parent.