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Recovery under the Workmen's Compensation Act for the Death of a Minor

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himself. One form is the precise equivalent of the other. Whatever would be good as an attested will or codicil is good as an olographic one, if written, dated, and signed by the hand of the testator. And whatever may be done in or by the one may be done in or by the other. Therefore, if the formalities of attestation are not required in a document referred to by an attested will or codicil, the corresponding formalities are not required in a document referred to in an olographic will or codicil. ..... And we think that the rule is a sound and salutary one. If testators are to be encouraged by a statute like ours to draw their own wills, the courts should not adopt upon purely technical reasoning a construction which would result in invalidating such wills in half the cases."

In accord with the above quotation, it is submitted that since holographic wills are by our statute, apparently accorded equal rank with formal witnessed wills, what may be done by one type of will may also be done by the other. Assuming the presence of the three essentials for incorporation by reference in order to guard against fraud or mistake, it is believed that the court ought to permit incorporation of an extrinsic document not entirely in the handwriting of the testator in a holographic will.

Paul E. Hoffmann.

RECOVERY UNDER THE WORKMEN'S COMPENSATION ACT FOR THE DEATH OF A MINOR

A considerable variance exists in the Workmen's Compensation Laws of the several states with respect to the inclusion of "minors" in the definition of "employees" under the Act.

The statutes of four states, in defining employee, restrict persons coming under the Act to those lawfully employed.[1] In these states illegally employed minors are denied recovery under the Workmen's Compensation Act.[2]

Twenty-nine states have statutes making no mention whether the employment must be lawful or whether it may be unlawful.[3] In these jurisdictions there is a conflict as to

[1]Minnesota, Nebraska, Utah and West Virginia.

[2]Westerlund v. Kettle River Co. (1917) 137 Minn. 24, 162 N. W. 680; Allen v. Trester (1924) 112 Neb. 515, 199 N. W. 841; Jackson v. Monitor Coal and Coke Co. (1925) 98 W. Va. 121, 126 S. E. 492.

[3]Alabama, Connecticut, Delaware, Idaho, Illinois, Iowa, Indiana, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Vermont, Virginia, Washington and Wisconsin.

whether or not illegally employed minors are included as employees under the Act. Earlier decisions generally held that they were not entitled to compensation but would have to pursue their remedies at law, reasoning that the legislature intended only legal contracts of hiring,[4] and that to hold otherwise would nullify the provisions of the Child Labor Laws.[5] This view has in later cases been generally discarded.[6] The language of the Supreme Court of Errors of Connecticut[7] sets forth the now more commonly recognized position:

> "The argument of those decisions which hold that under provisions similar to ours minors employed in violation of a statute are not entitled to compensation largely comes to this, that the Legislature must be assumed to have intended, when it speaks of a contract of service, to include only legal contracts, and therefore it cannot have intended to include one made in violation of a statute. The difficulty with this argument, as it seems to us, is that as regards the child the Legislature very evidently did not regard him as in any sense a real wrongdoer if he entered into such a contract without there being a compliance with the statutes. It might be that the employer could get no advantage from such a contract in a court of law because he would not be permitted to set up the fact that he had acted in contravention of its mandate, but that would not necessarily prevent the child from claiming any benefit which might arise out of its terms. . . . "
>
> "The other principal argument advanced in those opinions which deny the right of compensation to a minor employed in contravention of a statute is that to admit him

[4]Sechlich v. Harris-Emery Co. (1918) 184 Iowa 1025, 169 N. W. 325; Hetzel v. Wasson Piston Ring Co. (1916) 89 N. J. 201, 98 A. 306, 307:
"It can hardly be doubted that the Legislature, in providing for the ingrafting of these statutory provisions on contracts of hiring, had in mind contracts which were valid in law or, at least, contracts the making of which was not prohibited by express legislative enactment; . . . ."

[5]Widdoes v. Laub (1925) 3 Del. (Harr) 4, 129 A. 344, 345:
"To hold otherwise would in a large degree nullify the Child Labor Law, and would have no tendency to discourage the practice which the statute has made illegal, for the employer's liability would be no greater in case of an illegal than of a legal employment."
Rock Island Coal Mining Co. v. Gilliam (1923) 89 Okl. 49, 213 P. 833; Lincoln v. National Tube Co. (1920) 268 Pa. 504, 112 A. 73.

[6]Landry v. E. G. Skinner and Co. (1931) 344 Ill. 579, 176 N. E. 895; Pierce's Case (1929) 267 Mass. 140, 166 N. E. 636; Noreen v. William Vogel and Bros. (1921) 231 N. Y. 317, 132 N. E. 102, 33 A. L. R. 340; Foundry Appliance Co. v. Ratliff (1925) 113 Ohio 1, 148 N. E. 237, 49 A. L. R. 1438; Humphreys v. Boxley Bros. Co. (1926) 146 Va. 91, 135 S. E. 890.

[7]Kenez v. Novelty Compact Leather Co. (1930) 111 Conn. 229, 149 A. 679, 681.

> within the Compensation Law would be to decrease the incentive upon the employer to comply with the statute, because he would, in case of injury, be holden to no heavier a liability for an illegal, than for a legal, employment. . . . Before giving to this argument controlling weight, the balance would have to be struck between the possibility of benefit from the employment of fewer minors in contravention of the statute and the advantages which would come from extending to those so employed the obvious and recognized benefits of the Compensation Law. In determining the legislative intent, we cannot think that the former consideration had weight, but we believe that the extension to the child of the benefits of the act better accords with the broad humanitarian purpose of the law, to give certain and speedy relief to those suffering injury in industry and to those dependent upon them."

The statutes of thirteen states include minors whether lawfully or unlawfully employed in their definition of employees.[8] Decisions under this type of statute hold that the personal representative of a deceased minor, employed in violation of the Child Labor Laws, cannot maintain an action at law to recover damages for the death of the minor, the exclusive remendy being under the Workmen's Compensation Laws.[9]

Thirteen states have further increased the benefits under the Act by providing for increased compensation in amounts varying from a fifty per cent increase to treble compensation for injuries to minors who were illegally employed.[10] Thus the trend in the statutes has been to increase the benefits to minors and the penalties against the employer for hiring children contrary to law.[11]

The Workman's Compensation Act of Montana as originally enacted did not mention minors in its definition of em-

[8]Arizona, Arkansas, California, Colorado, Florida, Georgia, South Carolina, Missouri, Montana, Nevada, North Carolina, North Dakota and Wyoming. Of the remaining two of the forty-eight states, Mississippi does not have a Workmen's Compensation Act, and the Kentucky Act does not include a definition of employees. Other pertinent provisions of the Kentucky Act are discussed later in this Article.

[9]Horn v. Planters' Products Co. (1930) 40 Ga. A. 787, 151 S. E. 552.

[10]Alabama, Florida, Illinois, Indiana, Maryland, Michigan, Missouri, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island and Wisconsin.

[11]For a discussion of other rights, remedies and duties of minors under the various Compensation Acts of the states, see Vol. 4, SCHNEIDER, WORKMAN'S COMPENSATION TEXT (1945) Chapt. 18, pp. 186-376.

ployees.[12] In 1925 the Legislature amended what is now Section 2863, Revised Codes of Montana, 1935, to include minors, whether lawfully or unlawfully employed.[13] A recent Montana case[14] held, in the death of a thirteen-year old girl employed as a passenger elevator operator in violation of the Child Labor Law[15] by an employer operating under the Workmen's Compensation Act, the minor having failed to elect not to be bound, that the employer was not liable in a statutory action for the child's death, the exclusive remedy being under the Act. This decision is in accord with the decisions of other states operating under similar statutes and would seem to be correct.[16] However, a dissenting opinion in this case indicated that to deny an action at law would be to deny any recovery:

> "..... in the usual case as here *nothing is payable under the workmen's compensation laws either* as ordinarily the minor has no dependents, and if he has the degree of dependency is small. .... Her employer is not liable to anyone for her death and *apparently no workmen's compensation will ever be received* by her parents as she had not worked long enough to draw even her first check.'"[17]

If such is true, the result would be extremely harsh.

The Montana Act provides that in the event of an injury causing death, compensation shall be paid first to beneficiaries, and if there be no beneficiaries, then to major dependents, and if there be no major dependents, then to minor dependents.[18] Beneficiaries include surviving wife or husband and certain children.[19] Major dependent means the father or mother, if actually dependent upon the decedent at the time of his injury.[20] Minor dependent includes certain brothers and sisters, to the extent of

[12]Ch. 96 §6j; LAWS OF MONTANA 1915:
"Employee ..... means every person in this State ..... who ..... is engaged in the employment of an employer carrying on or conducting any of the industries classified in ..... "

[13]Ch. 121 §3, LAWS OF MONTANA 1925:
"Employee ..... means every person in this state ..... who is in the service of an employer ..... under any appointment or contract of hire, express or implied, oral or written, including ..... minors, whether lawfully or unlawfully employed ....."

[14]Tarrant v. Helena Building & Realty Co. (1944) ....Mont....., 156 P. (2nd) 168.

[15]R. C. M. 1935, §3095.

[16]See note 9, *supra*.

[17]Tarran v. Helena Building & Realty Co. (1944) ....Mont....., 156 P. (2nd) 168, 172. Italics supplied.

[18]R. C. M. 1935, §2915.

[19]R. C. M. 1935, §2865.

[20]R. C. M. 1935, §2866.

such dependency.[21] In the event of the death of a minor it is clear that there would very seldom be any beneficiaries under this definition. Consequently, compensation would go to the father or mother, providing they were *actually dependent upon the deceased at the time of his injury,* and if neither is living or dependent, to brothers and/or sisters, if any, *to the extent of dependency.*

Montana has adopted the rule for determining dependency from *Honnold on Workmen's Compensation,* Volume 1, Section 70:[22]

> "While ordinarily no exact standard for the determination of dependency is prescribed by Statute, and it is difficult if not impossible, to formulate such a standard, it may be said in general terms that a 'dependent' is one who looks to another for support, one dependent on another for the ordinary necessities of life, for a person of his class and position, and that, to be entitled to compensation as a dependent, one need not deprive himself of the ordinary necessities of life to which he has been accustomed, but he cannot demand compensation merely to add to his savings or investments. It follows that dependency does not depend on whether the alleged dependents could support themselves without decedent's earnings, or so reduce their expenses that they would be supported independent of his earnings, but on whether they were in fact supported in whole or, in part by such earnings, under circumstances indicating an intent on the part of deceased to furnish such support."

This rule has been followed in substance in most jurisdictions.[23] It seems apparent then that under this criteria for determining dependency it would be entirely possible for a minor to be employed under such circumstances that his parents could not be said to be dependent upon him; and if his parents were found not to be dependent, it is extremely unlikely that any brothers or sisters he might have could be held to be de-

[21]R. C. M. 1935, §2867.

[22]Edwards v. Butte & Superior Mining Co. (1928) 83 Mont. 122, 270 P. 634, 636; Ross v. Industrial Accident Board (1938) 106 Mont. 486, 80 P. (2nd) 362, 365.

[23]London Guarantee & Accident Co. v. Industrial Accident Commission of California (1927) 203 Calif. 12, 270 P. 196; Blanton v. Wheeler & Howes Co. (1916) 91 Conn. 226, 99 A. 494; Benjamin F. Shaw Co. v. Palmatory (1919) 7 Del. (Boyce) 197, 105 A. 417; Dumond's Case (1926) 125 Me. 313, 133 A. 736; Gonales v. Chino Copper Co. (1924) 29 N. M. 228, 222 P. 903; Paul v. State Industrial Accident Commission (1928) 127 Oreg. 599, 272 P. 267; Hancock v. Industrial Commission (1921) 58 Utah 192, 198 P. 169.

pendent upon the deceased for support. In such a case there would be no beneficiaries, no major dependents, no minor dependents and no compensation; nor, under the decision in the principal case, could any statutory or common law action be brought since the Compensation Act is the exclusive remedy.[24]

Such a harsh result has been avoided in a few states by various methods. In Missouri it has been held that where the parents are not dependent upon a deceased minor they retain their common law right to an action at law reasoning that rights and remedies not provided for by the Workmen's Compensation Act are retained by those who had them prior to the Act.[25] This result was reached under a statute of the Act providing as follows:[26]

> ". . . . . The rights and remedies herein granted to an employee shall exclude all other rights and remedies of such employee . . . on account of such accidental injury or death, except such rights and remedies as are not provided for by this Chapter. . . . . "

Montana has no similar statute. If it did have, recovery in an action at law would often be defeated by the defenses of contributory negligence, assumption of risk or the fellow-servant rule. These defenses are denied the employer under the Workmen's Compensation Act.[27]

Three states have statutes giving the illegally employed minor the choice of two remedies.[28] It is there held that an il-

[24]R. C. M. 1935, §2838.

[25]Miller v. Hotel Savoy Co. (1934) 228 Mo. A. 463, 68 S. W. (2nd) 929.

[26]Revised Statutes Missouri, 1929, Vol. 1, Ch. 28, §3301.

[27]R. C. M. 1935, §2836. However, in an action for damages for injuries to a minor employed in violation of law, the violation of the statute is negligence per se and the defenses of contributory negligence and assumption of risk are not available. Daly v. Swift & Co. (1931) 90 Mont. 52, 300 P. 265. In other jurisdictions there is a considerable conflict of opinion but the growing, modern view is in accord, that neither contributory negligence nor assumption of risk can be relied upon by the master as a defense to an action for injuries to a child who is employed under the statutory age. Louisville, Henderson & St. Louis Railway Company v. McKinley Lyons (1913) 155 Ky. 396, 159 S. W. 971, 48 L. R. A. (N. S.) 667 and note thereto; 18 R. C. L., *Master and Servant* §130.

[28]Smith-Hurd Illinois Annotated Statutes, Ch. 48, §143:

> ". . . . . Provided further that any illegally employed minor or his legal representatives shall, except as hereinafter provided, have the right, within six months after the time of injury or death, to file with the commission a rejection of his rights to the benefits of this Act, in which case such illegally employed minor or his legal representatives shall have the right to pursue his or their common law or statutory remedies to recover damages for such injury or death. . . . ."

Carrols Kentucky Statutes, 6th Ed., 1922, §4911:

> "In case any minor employee who is injured or killed is, at the time

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legally employed minor may proceed under the Act, or he or his legal representative may file a rejection of his rights to the benefits under the Act and pursue his common law or statutory remedies for damages.[29] In such an action at law the common law defenses would be denied the employer since the employment was illegal.[30] But the speedy and inexpensive method of obtaining compensation under the Act must then give way to the long, tedious, expensive and uncertain litigation in a tort action. Furthermore, the non-dependent parents of a legally employed minor are not protected by this type of statute. Such statutes are, however, one step ahead of the law as it is in Montana today. They allow non-dependent parents of deceased minors a further chance, at least, to recover damages.

Three states have what would seem to be the best statute at this point. They raise, under certain circumstances, a conclusive presumption of dependency of a parent upon a deceased minor under the Workmen's Compensation Act.[31] Consequent-

of such injury, employed in willful and known violation by the employer of any law of this state regulating the employment of minors, his statutory guardian or personal representative of the minor so killed, may claim compensation under the terms of this act or may sue to recover damages as if this Act had not been passed. . . . ."

CUMULATIVE SUPPLEMENT TO COMPILED STATUTES OF NEW JERSEY, 1911-1924, Vol. 2, §236-9:

". . . . . Nothing in this Chapter contained shall deprive an infant under the age of sixteen of the right or rights now existing to recover damages in a common law or other appropriate action or proceeding for injuries received by reason of the negligence of his or her master."

[29]Wynn Coal Co. v. Linsey (1929) 230 Ky. 53, 18 S. W. (2nd) 864; Hooven & Allison Co. v. Cox's Adm'r. (1937) 268 Ky. 266, 104 S. W. (2nd) 969; Damato v. DeLucia (1933) 110 N. J. 380, 166 A. 173.

[30]See note 27, *supra*.

[31]CODE OF IOWA, 1931, Ch. 70, §1402:

"The following shall be conclusively presumed to be wholly dependent upon the deceased employee:

. . . .

3. A parent of a minor who is receiving the earnings of the employee at the time when the injury occurred. . . ."

ANNOTATED LAWS OF MASSACHUSETTS, Vol. 4, Ch. 152, §32:

"The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employee:

. . . .

e. A parent upon an unmarried child under the age of eighteen years; provided that such child was living with the parent at the time of the injury resulting in death. . . . . "

PAGE'S OHIO GENERAL CODE. Vol. 1, §1465-82-4:

"The following persons shall be presumed to be wholly dependent for the support upon a deceased employee:

. . . .

c. It shall be presumed that there is sufficient dependency to entitle a surviving natural parent or surviving natural parents (share and share alike) with whom decedent was living at the

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ly, the parents of a deceased child, though not actually dependent upon the deceased at the time of the injury, are allowed compensation.[23] Thus the harsh result of denying a non-dependent parent any recovery for the death of a minor is avoided, and substituted therefor is certain relief under the Act. This is in keeping with the theory of Workmen's Compensation Acts, to afford a humanitarian, speedy and economical method by which compensation might be made, allowing the industry to which the employee contributed his labor to bear the expense which eventually is borne by the community at large by reason of the cost thereof being added to the cost of goods or services supplied.

It is hoped that the Legislature will give serious attention to this subject in the not too distant future.

Albert C. Angstman.

time of his death, to a total minimum award of one thousand dollars. . . . ."

[23]Double v. Iowa-Nebraska Coal Co. (1924) 198 Iowa 1351, 201 N. W. 97; Pierce's Case, note 6, *supra.*

RIGHTS OF EMPLOYEE AND EMPLOYER AGAINST A TORTIOUS THIRD PARTY UNDER WORKMEN'S COMPENSATION ACTS

The Workmen's Compensation Laws and court decisions of 47[1] states recognize the right of an injured employee to recover damages against a negligent third party, not under the act, who has caused the injury.[2] These "third party liability" statutes, as they are called, may be classified into five major categories:[3]

1. Those denying compensation altogether, thus leaving the employee to his remedy against the third party.[4]
2. Those allowing the employee to recover compensation only but requiring the employer to prosecute the suit

[1]Mississippi remains the only state not having adopted some form of Workmen's Compensation Act.

[2]New Hampshire, Ohio, and West Virginia have no third party liability statutes in their acts, but their courts nevertheless recognize this right.

[3]See DODD, ADMINISTRATION OF WORKMEN'S COMPENSATION, p. 607.

[4]Wyoming, §124-109, Wyo. Rev. Stats., 1931, Suppl. of 1940. It is to be observed, however, that when the employee is injured by a negligent third party while engaged in an extra-hazardous occupation, he is permitted by this statute the dual remedy characteristic of the group in Note 8, infra.

against the third party, any excess over the amount of compensation being paid to the employee.[5]

3. Those requiring the employee to elect between compensation or the third party suit. Under this type of statute, the employee's election to sue the third party releases the employer, while an election to take compensation subrogates the employer to the cause of action against the third party.[6]
4. Those similar to No. 3 except that if the employee elects to sue, the employer remains liable for any deficiency up to the amount of what would have been due under the compensation statute.[7]
5. Those where the employee may simultaneously accept compensation and sue the third party, but the employer is almost universally subrogated to the extent of compensation liability out of the third party recovery.[8]

[5]Missouri §3309, Rev. Stats. of Mo., 1929; and North Carolina, §8081(r), 8081(r), No. Car. Code of 1939. The latter state allows the employee to sue if the employer fails to act within six months.

[6]Massachusetts, §15, Chp. 152, Gen'l. Laws of Mass.; Florida, §39, Chp. 17481, LAWS OF FLORIDA, 1935; Idaho, §43-1004, Idaho Code Anno., 1932; Maine, §24, Chp. 55, Rev. Stats. of Maine, 1930; North Dakota, §396a20, Suppl. to Comp. Laws of N. D., 1913-25; Texas, §6a, Art. 8307, Vernon's Texas Civil Stats. (1941). Vermont §6511, Public Laws of Vt., 1933; Kansas, §44-504, Genl. Stats. of Kansas, 1935; Michigan, §8454, Comp. Laws of Mich. 1929; Delaware, §6108, Rev. Code of Dela., 1935; South Carolina, p. 1237, ACTS OF SOUTH CAROLINA, 1936; Maryland, §72, Art. 101, Anno. Code of Md., (1939); Utah, §42-1-58, Rev. Stats. of Utah, 1933; Virginia, §1887 (12), Va. Code of 1930; Oregon, §49-1814, Ore. Code Anno., 1935. By the Oregon statute, however, if the employee is engaged in extra-hazardous employment when injured by the third party, the insurer remains liable for any deficiency as of those states grouped in Note 7, infra.

[7]New York, §29, Chp. 66, Cahill's Consol. Laws of N. Y., 1930; Arizona, §56-949, Ariz. Code Anno., 1939; Colorado, §366, Ch. 97, Colo. Stats. Anno., 1935; Nevada, §2687, Nev. Comp. Laws, 1929; Washington, §7675, Vol. 8, Remington's Rev. Stats. of Wash., (1932). Oklahoma, §13368, Okla., Stats., 1931.

[8]Montana, R. C. M., 1935, §2839; Ch. 230, §1, LAWS OF MONTANA 1943; Alabama, §7587, Code of Ala. 1923; California, Act 4749, §29, Codes and Genl. Laws of Calif., Consol. Suppl. 1925-27; Arkansas, Work. Comp. Law, §40, Ark. Stat. Suppl, 1944; Connecticut, §5231, Genl. Stats. of Conn., Rev. of 1930; Georgia, §3154(2) (d) Ga. Code, 1926; Illinois, Ch. 48, §166, Ill. Anno. Stats., Perm. Ed. (1941); Indiana, §40-2229, Burns Ind. Stats. Anno. 1933; Kentucky, §4890, Carroll's Ky. Stats. 1930; Iowa §1382, Code of Ia. 1931; New Mexico, §156-124, N. M. Stats. Anno. 1929; Louisiana, §4397, La. Genl. Stats. 1939; Wisconsin, §102.29, Wis. Stats. 1939; Minnesota, §4272-5, Mason's Minn. Stats. 1927; South Dakota, §64.0301, S. D. Code of 1939; Nebraska, §48-118, Comp. Stats. of Nebr. 1929; Pennsylvania, §671, Purdon's Penn. Stats. Anno. 1931; Rhode Island, Ch. 300, Art. III, §20, Genl. Laws of R. I. 1938; Tennessee, §6865, Code of Tenn. 1932.