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## Workmen's Compensation - Death Benefits - Priority of Claimants

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recipient will have no cause for complaint. This means that if the broker performs services under an exclusive listing contract, the fact that he did not bind himself so to perform cannot be relied upon by the owner as a basis for escaping his own obligation.

This treatment of the exclusive listing contract is in keeping with the majority view at common law, which holds that where an agent has expended time, effort or money in attempting to secure a purchaser, the owner of the real estate will be bound by the listing agreement, for the consideration necessary to support his promise has been supplied.<sup>12</sup>

It may be conceded that from a practical viewpoint the decision in this case is sound. However, the reasoning employed by the court in disposing of the issues involved is open to some objection.

*John C. Wagnon*

WORKMEN'S COMPENSATION—DEATH BENEFITS—  
PRIORITY OF CLAIMANTS

Decedent's mother and the nephew of his concubine claimed compensation under the Workmen's Compensation Act as his dependents. The mother was found to be partially dependent and, in the absence of definite proof of greater contributions to her support by the deceased, was given the statutory minimum. Compensation to the nephew was resisted on the grounds that the nephew was not decedent's child or a member of his family, and, alternatively, that he was in a deferred class, whose claim to compensation was dependent upon the absence of a member of higher rank. *Held*, (1) the nephew was a wholly dependent of decedent's family, and (2) the presence of a *partial* dependent of a higher rank did not preclude compensation to a total dependent of a lower rank, even if Sections 1231, 1232, 1251 and 1252 of the Workmen's Compensation Act establish and rank classes. *Patin v. T. L. James & Company, Incorporated*, 218 La. 949, 51 So. 2d 586 (1951).

The supreme court admitted that a reading of Section 1232 alone would lead to the conclusion that the minor was barred from recovery. However, it held that the first sentence of Section

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12. *Bell v. Dimmerling*, 149 Ohio St. 165, 78 N.E. 2d 49 (1948), and the cases there cited.

1231,<sup>1</sup> and both Sections 1232<sup>2</sup> and 1251<sup>3</sup> in their entirety, apply only to total dependents, that the second sentence of Section 1231<sup>4</sup> and Section 1253<sup>5</sup> apply to partial dependents, and that Section 1252<sup>6</sup> applies to both partial and total dependents. This

1. La. R.S. 23:1231: "For injury causing death within one year after the accident there shall be paid to the legal dependents of the employee, actually and wholly dependent upon his earnings for support at the time of the accident and death, a weekly sum as hereinafter provided, for a period of three hundred weeks."

2. La. R.S. 23:1232: "Payment to dependents shall be computed and divided among them on the following basis:

"(1) If the widow or widower alone, thirty-two and one-half per centum of wages.

"(2) If the widow or widower and one child, forty-six and one-quarter per centum of wages.

"(3) If the widow or widower and two or more children, sixty-five per centum of wages.

"(4) If one child alone, thirty-two and one-half per centum of wages of deceased.

"(5) If two children, forty-six and one-quarter per centum of wages.

"(6) If three or more children, sixty-five per centum of wages.

"(7) If there are neither widow, widower, nor child, then to the father or mother, thirty-two and one-half per centum of wages of the deceased. If there are both father and mother, sixty-five per centum of wages.

"(8) If there are neither widow, widower, nor child, nor dependent parent entitled to compensation, then to one brother or sister, thirty-two and one-half per centum of wages with eleven per centum additional for each brother or sister in excess of one. If other dependents than those enumerated, thirty-two and one-half per centum of wages for one, and eleven per centum additional for each such dependent in excess of one, subject to a maximum of sixty-five per centum of wages for all, regardless of the number of dependents."

3. La. R.S. 23:1251: "The following persons shall be conclusively presumed to be wholly and actually dependent upon the deceased employee:

"(1) A wife upon a husband with whom she is living at the time of his accident or death.

"(2) A husband, mentally or physically incapacitated from wage earning, upon a wife with whom he was living at the time of her accident or death.

"(3) A child under the age of eighteen years (or over eighteen years of age, if physically or mentally incapacitated from earning) upon the parent with whom he is living at the time of the injury of the parent."

4. La. R.S. 23:1231: ". . . If the employee leaves legal dependents only partially actually dependent upon his earnings for support at the time of the accident and death, the weekly compensation to be paid shall be equal to the same proportion of the weekly payments for the benefit of persons wholly dependent as the amount contributed by the employee to such partial dependents in the year prior to his death bears to the earnings of the deceased at the time of the accident."

5. La. R.S. 23:1253: "If there is no one wholly dependent and more than one person partially dependent, so much of the death benefit as each is entitled to shall be divided among them according to the relative extent of their dependency. No person shall be considered a dependent, unless he is a member of the family of the deceased employee, or bearing to him the relation of husband or widow, or lineal descendant or ascendant, or brother or sister, or child."

6. La. R.S. 23:1252: "In all other cases, the question of legal and actual dependency in whole or in part, shall be determined in accordance with the facts as they may be at the time of the accident and death; in such other cases if there are a sufficient number of persons wholly dependent to take up

application of Section 1232 to total dependents only would require compensation to be given to all classes until the maximum compensation is exhausted or until a total dependent is found. The presence of a total dependent, however, would preclude recovery by a member of a subordinate class, unless it be assumed that the supreme court, in effect, has served notice that no ranking of dependents was intended by the legislature.<sup>7</sup>

In view of the wording and history of the statute it is difficult to see that such a position could be validly sustained.

It is hardly questionable that the statute does create the following classes: (1) the widow or widower and children; (2) father or mother, or both; (3) brothers and sisters and other dependents.<sup>8</sup>

It was generally accepted and was held by the courts that the presence of one or more members of a prior class precluded any consideration of compensation for members of a lower class.<sup>9</sup> Furthermore, a member of a subordinate class had to allege and prove the absence of any member of a prior class.<sup>10</sup> This often resulted in inequities, and the courts looked for a reasonable means to avoid such an impasse. In *McDonald v. Louisiana, Arkansas & Texas Transportation Company*,<sup>11</sup> the court reasoned that the subordinate classes were to be allowed compensation until the maximum permitted was exhausted. In *Hamilton v. Consolidated Underwriters*<sup>12</sup> it was held that dependent brothers and sisters meeting the test of "legal dependents" were not to be relegated to a deferred third class. The necessity of deciding that members of such a class should receive compensation despite

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the maximum compensation, the death benefit shall be divided equally among them, and persons partially dependent, if any, shall receive no part thereof."

7. The supreme court, at least twice, conceded only for argument that the statute establishes and ranks classes. See 218 La. 949, 959, 963, 51 So. 2d 586, 590 (1951).

8. *Supra* note 2.

9. *Brown v. Weber-King Lbr. Co.*, 7 La. App. 444 (1928); *Dugas v. Gulf State Utilities Co.*, 145 So. 376 (La. App. 1933).

10. *Brown v. Weber-King Lbr. Co.*, 7 La. App. 444 (1928). However, compensation was allowed to dependent parents if the widow was neither living with nor dependent on decedent at the time of his death. *Bradley v. Swift & Co.*, 167 La. 249, 119 So. 37 (1928); *Evans v. Big Chain Stores, Inc.*, 133 So. 487 (La. App. 1931); *Henderson v. City of Shreveport*, 26 So. 2d 766 (La. App. 1946). In the absence of parents a sister could claim. *Powell v. Paramount-Richards Theatres, Inc.*, 22 So. 2d 859 (La. App. 1945). A surviving child not entitled to compensation would not bar deferred claimants. *Jones v. Dendinger, Inc.*, 147 So. 732 (La. App. 1933) (parents); *Harvey v. Caddo DeSoto Cotton Oil Co., Inc.*, 199 La. 720, 6 So. 2d 747 (1942) (sister).

11. 28 So. 2d 502 (La. App. 1946).

12. 21 So. 2d 432 (La. App. 1944).

the presence of a member of a prior class was obviated. At any rate, the court did, under the circumstances, allow those naturally falling in Class 3 to receive compensation when Class 2 was represented.<sup>13</sup>

Even though both the Orleans<sup>14</sup> and the First Circuit<sup>15</sup> Courts of Appeal had adopted the attitude that the statute had created classes and ranked them, the latter, relying at least in part on the denial of certiorari in the *McDonald* case and the granting of certiorari in the *Williams v. Jahncke Service, Incorporated*, case,<sup>16</sup> changed its position to that of the Second Circuit.<sup>17</sup>

A number of possible combinations of the classes present themselves:

(1) a total dependent of a prior class and a partial dependent of a subordinate class. Subject to the possibilities that the supreme court will eliminate any ranking of classes and that the court may determine that the partial dependent is a "legal dependent,"<sup>18</sup> the partial dependent will receive nothing.

(2) A total dependent of a prior class and a total dependent of a subordinate class. The same position and the same caveats as in (1) above would seem to be valid.

(3) A partial dependent of a prior class and a partial dependent of a subordinate class. Since it seems that all ranking of partial dependents has been eliminated, the latter would not be barred from compensation.

(4) A partial dependent of a prior class and a total dependent of a subordinate class. This is the instant case. Compensation to the subordinate dependent is allowable.

The decision is sound from both social and economic viewpoints. So long as the maximum is not encroached upon there

13. The decision rested upon the interpretation given the statute in *Archibald v. Employers' Liability Assur. Corp.*, 202 La. 89, 11 So. 2d 492 (1942). The result seems to be that the "legal dependents" of Section 1231 becomes a "floating" group not subject to permanent classification.

14. *Archibald v. Employers' Liab. Assur. Corp.*, 20 So. 2d 178 (La. App. 1944); *Williams v. Jahncke Service, Inc.*, 38 So. 2d 400 (1949).

15. *Lunkin v. Triangle Farms*, 24 So. 2d 213 (La. App. 1945).

16. 38 So. 2d 400 (La. App. 1949). The writ was granted and the case disposed of on an entirely different point. See *Williams v. Jahncke Service, Inc.*, 217 La. 1078, 48 So. 2d 93 (1950).

17. See *Patin v. T. L. James & Co., Inc.*, 42 So. 2d 304 (La. App. 1949) and 43 So. 2d 58 (1949).

18. *Archibald v. Employers' Liability Assur. Corp.*, 202 La. 89, 11 So. 2d 492 (1942).

is no valid objection to allowing compensation to all those who would have been receiving financial benefit from the decedent's continued existence. The difficulty of eliminating all consideration of classes and ranks lies, however, in the wording and history of the statute.

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