Providing Death Benefits to Children Born Out of Wedlock: A "Legitimate" Issue

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Children born out of wedlock is a growing trend in the United States.[1] According to recent statistics published by the North Carolina Department of Health and Human Safety, from January through March 2024 more than 40% of children born in North Carolina were born out of wedlock.[2] Given this statistic, it is foreseeable that, more and more often, practitioners will be presented with death claims where the issue arises of whether to provide death benefits to a child born out of wedlock.

For background, the North Carolina Workers' Compensation Act ("Act") states persons wholly dependent upon the deceased are entitled to death benefits.[3] Further, a "child shall be conclusively presumed to be wholly dependent" upon the deceased.[4] Under the Act, a "child" is defined to "include a posthumous child, a child legally adopted prior to the injury of the employee, and a stepchild or *acknowledged child born out of wedlock dependent upon the deceased*…."[5] Of note, this definition was changed in 2013 to replace "acknowledged illegitimate children" with "acknowledged child born out wedlock."[6] Regardless of the nomenclatural change, a child born out of wedlock has presented issue for North Carolina Courts – and correspondingly, workers' compensation practitioners.

This article will outline precedent, and the standards of proof, set by our Courts for a child born out of wedlock's entitlement to death benefits. This article addresses our Courts' findings particularly on the issue of dependency, not the acknowledgment of the child born out of wedlock. Specifically, this article will discuss four cases: The first two cases address a legal dependency standard, generally holding that a decedent as the respective parent of a child born out of wedlock bears a legal obligation to the child, which is sufficient for the child to be dependent upon the deceased; The second two cases are more recent and discuss a factual dependency, requiring children born out of wedlock to show substantial dependence upon the deceased.

Legal Dependency

First, in 1935, the Supreme Court, in Lippard v. Southeastern Express Co., noted children born out of wedlock could be entitled to death benefits, contrary to common law principle which did not provide benefits for "illegitimate children."[7] The decedent, Lippard, sustained a compensable fatal injury while his fiancé was pregnant.[8] Lippard's fiancé gave birth to his child after his fatal injury; thus, the Court was presented with the issue of whether this child born out of wedlock was dependent upon his deceased father and entitled to death benefits.[9] In ruling to provide the child death benefits, the Supreme Court considered the interpretation of N.C.G.S. § 97-2(12), and stated:

> "The dependency which the statute recognizes as the basis of the right of the child

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> to compensation grows out of the relationship, which in itself *imposes upon the father the duty to support the child, and confers upon the child the right to support by its father.* The status of the child, social or legal, is immaterial."[10]

Thereafter, in Hewett v. Garrett, the Supreme Court in 1968 was, again, tasked with deciding whether a deceased employee's child born out of wedlock was entitled to death benefits.[11] The decedent, Hewett, was listed on the child's birth certificate as her father.[12] Hewett's child and the child's mother resided with the child's maternal grandmother.[13] Hewett also resided in the maternal grandmother's residence while contributing to the support of the child and child's mother.[14] However, Hewett separated from the child's mother and did not provide support to either for four-and-a-half years prior to his death.[15]

The Court contemplated the definition of child under N.C.G.S. § 97-2(12), noting this statute recognized "*a distinction between actual and legal dependency*" for which, "*[a] legal dependence is sufficient and the law fixes that type of responsibility on the father of [a child born out of wedlock].*"[16] Based on this legal dependence (i.e., Hewett was listed on the child's birth certificate as her father), the Court concluded that "[a]lthough evidence is lacking that he contributed to the child's support after he separated from the mother, his legal responsibility continued. His failure to support did not work a forfeiture of the child's right to participate in the death benefits under Workmen's Compensation."[17] Thus the Court awarded death benefits to the child.[18]

Factual Dependency

More recently, in 1985, the Court of Appeals, in Winstead v. Derreberry, considered whether a stepchild was entitled to death benefits.[19] The Court considered the definition of child under N.C.G.S. § 97-2(12), and noted the definition provided a "sub-group" of each classification; specifically, the grammatical phrasing of this section requires a stepchild and children born out of wedlock to prove they were dependent upon the deceased.[20] In distinguishing from the legal dependency standard set in Lippard and Hewett, the Court noted that stepchildren could not possibly prove legal dependency, unless the child was adopted, so rather the Legislature's intent was to afford a "presumption of dependency to those persons who would most usually be factually dependent upon the deceased thereby alleviating the burdensome requirement of proof of dependency in every case."[21] Thus, the Court noted that stepchildren could also be factually dependent upon the deceased, and created a substantial dependency test specific for determination of a stepchild's dependency upon the deceased.[22]

Although the Winstead Court did not hold this test directly applies to children born out of wedlock, the Court's grammatical interpretation of N.C.G.S. § 97-2(12) classified stepchildren and children born out of wedlock into the same "sub-group," impliedly requiring the same burden of proof.[23]

In 2022, the Court of Appeals in Thompson by and Through Morris v. J.H. Honeycutt & Sons, Inc., (notably an unpublished decision), considered whether a child born out of wedlock was also entitled to death benefits.[24] The decedent, Thompson, acknowledged and provided financial support to the child. However, the child was born out of wedlock, and while the decedent was alive, there was doubt the child was actually his, and a later DNA test showed the child likely was not.[25] In

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considering whether the child was entitled to death benefits, the Court used the Winstead Court's grammatical conclusion of N.C.G.S. § 97-2(12), and stated, the test "is whether (1) the decedent acknowledged an illegitimate child in sufficient fashion; and (2) the child was substantially dependent on decedent."[26]

Regarding substantial dependency, the Court, in applying Winstead, stated "[t]he ultimate fact to be determined is whether the acknowledged, illegitimate child was substantially dependent on the financial support of Decedent … as compared with all other sources of financial support."[27] The Court declined to provide a bright line rule of how much financial support was sufficient to show substantial dependency, and did not apply the Winstead Court's test for stepchildren, but found there was sufficient evidence to show the child was substantially dependent upon the deceased.[28]

Discussion

With the increase in children born out of wedlock, workers' compensation practitioners in North Carolina will likely see more cases pertaining to death benefits for such children and should be aware of the legal and factual dependency standards.

For legal dependency, the Supreme Court's rulings in Lippard and Hewett remain precedent. Thus, the Commission could find a deceased employee to be the parent of a child born out of wedlock, if the decedent was on the child's birth certificate, as in Hewett, and therefore bore a legal obligation to support the child, which is sufficient to show legal dependence. If the decedent is not on the birth certificate or there is some question of parentage, the Commission should, theoretically, apply a factual dependency consideration.

Hypothetically, what if there was a child support order requiring the deceased employee to pay support to a child-born-out-of-wedlock's mother? If that is the case, a civil court would have had to conclude the decedent was the child's parent. Is that sufficient for the Commission to apply a legal dependency standard? This is obviously a grey area of law, but with the liberal leanings of case law on the issue, I suspect any legal documentation showing parentage would be sufficient to apply the legal dependency standard.

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1. Gretchen Livingston, The Changing Profile of Unmarried Parents, Pew Research Center (April 25, 2018) https://www.pewresearch.org/social-trends/2018/04/25/the-changing-profile-of-unmarried-parents/.
2. NC State Center for Health Statistics, YTD2024 Quarter 2 (Jan-Jun) North Carolina Resident Births by County of Residence and Marital Status of Mother https://schs.dph.ncdhhs.gov/data/provisional/Birth/2024/YTD2024PB11ResidentBirthsbyCountybyMaritalStatus.html.
3. See generally N.C.G.S. § 97-38.
4. N.C.G.S. § 97-39.

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5. N.C.G.S. § 97-2(12) (2021) (emphasis added).
6. See S.L. 2013-198 § 25, eff. June 26, 2013; compare Sec. 2, ch. 120, Public Laws of N.C. 1929. Sec. 8081 (i), N.C. Code of 1931; see Lippard v. Southeastern Express Co., 207 N.C. 507, 177 S.E. 801 (1935).
7. Lippard, 207 N.C. 507 (1935).
8. Id.
9. Id.
10. Id. (emphasis added).
11. Hewett v. Garrett, 274 N.C. 356, 163 S.E.2d 372 (1968).
12. Hewett, 274 N.C. at 359-60.
13. Id.
14. Id.
15. Id.
16. Id. (emphasis added).
17. Hewett, 274 N.C. at 360.
18. Id.
19. Winstead v. Derreberry, 73 N.C. App. 35, 326 S.E.2d 66 (1985).
20. Winstead, 73 N.C. App. at 39-41.
21. Winstead, 73 N.C. App at 40-41.
22. Winstead, 73 N.C. App. at 42
23. Winstead, 73 N.C. App. 35 at 40-41.
24. Thompson by & Through Morris v. J.H. Honeycutt & Sons, Inc., 2022-NCCOA-939, 287 N.C. App. 395, 881 S.E.2d 645 (2022).
25. Thompson, 2022-NCCOA-939, ¶¶ 4-8.
26. Thompson, 2022-NCCOA-939, ¶ 15.
27. Thompson, 2022-NCCOA-939, ¶ 16 (quoting Winstead, 73 N.C. App. at 42).
28. Thompson, 2022-NCCOA-939, ¶ 18.

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