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The Common Law Wife And Workmen'S Compensation

of the criminal and the protection of the innocent.[27] There can be little doubt that whichever approach ultimately prevails, this aim, a constant goal in the field of the protection of individual rights, assures the continued use of the defense of entrapment.

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THE COMMON LAW WIFE AND WORKMEN'S COMPENSATION

In recent years Indiana, through legislative enactment and judicial decision, has been developing and voicing a dislike for the common-law marriage.[1] In 1957 this attitude culminated in legislation abolishing common-law marriage in the state.[2] For ten years prior to this abolition, however, Indiana's Workmen's Compensation Act contained a provision which, as interpreted in the case of *Stoner v. Howard Sober, Inc.*,[3] appears to have resulted in a denial of equal protection of the laws.

In the *Stoner* case, Mrs. Stoner, a party to a common-law marriage of four years, ten months, and nineteen days, was denied compensation after the accidental death of her husband because she failed to satisfy a requirement of section 40-1403a of the Indiana Workmen's Compensation Act, which provides in part as follows:

> "Total dependency—The following persons are conclusively presumed to be wholly dependent for support upon a deceased employee and shall constitute the class known as presumptive dependents in the preceding section:

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[27]The Court in Sherman said: "To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal." Sherman v. United States, 356 U.S. 369, 372 (1958). The concurring opinion contained these words: "[I]n holding out inducements they [police] should act in such a manner as is likely to induce to the commission of crime only these persons [criminals] and not others who would normally avoid crime and through self-struggle resist ordinary temptations." Id. at 384.

[1]The great weight of modern American authority on the subject supports and advocates this shift away from recognizing common-law marriages. The American Bar Association, the Commission on Uniform State Laws, and almost every authority in the field of social reform favors the abolition of the institution of common-law marriage. 1 Vernier, American Family Laws § 26 at 108 (1931). For a more detailed discussion of this shift see note 22 infra.

[2]"All marriages known as 'common law marriages' entered into subsequent to the effective date of this act shall be and the same are hereby declared null and void." Ind. Acts 1957, ch. 78, § 1.

[3]149 N.E.2d 121 (Ind. App. Ct. 1958).

> (a) A wife upon a husband with whom she is living at the time of his death, or upon whom the laws of the state impose the obligation of her support at such time. *The term 'wife' as used in this subsection shall exclude a common-law wife unless such common-law relationship shall have existed openly and notoriously for a period of not less than five [5] years immediately preceding the death."*[4]

The Indiana Industrial Board[5] found that Mrs. Stoner's common-law marriage, contracted on March 19, 1946, had not existed "openly and notoriously" for five years immediately prior to her husband's death on February 9, 1951, and therefore she was not entitled to an award of compensation. The case was appealed three times.[6] Each time compensation was denied. In each of the three hearings, appellant's counsel attempted to challenge the constitutionality of section 40-1403a, claiming that it denied Mrs. Stoner equal protection of the laws guaranteed by the fourteenth amendment of the United States Constitution[7] and article I of the Indiana Constitution.[8] The court in the principal case refused to allow the constitutional question to be raised, stating that appellant lacked standing to thus challenge the section.[9] The court further stated that "the rights and duties provided in the Workmen's Compensation Act are contractual in nature and arise out of the voluntary acceptance of the terms thereof on the part of the employer and the employee."[10] Having agreed to the section as a provi-

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[4]Ind. Ann. Stat. § 40-1403a (Burns' 1952 Replacement). (Emphasis added).

[5]"The industrial board shall have immediate charge of the administration of the provisions of the workmen's compensation act [§§ 40-1201—40-1414, 40-1503—40-1704] and such other duties as are hereinafter prescribed in this act [§§40-2104a, 40-2105, 40-2108]." Ind. Ann. Stat. § 40-2105a (Burns' 1952 Replacement).

[6]Mrs. Stoner appealed the original award of the Industrial Board denying her compensation. The Indiana Appellate Court found the Board's conclusion that claimant was not a dependent within the meaning of the Workmen's Compensation Act insufficient to support the award, in that it did not exclude every possibility of recovery. The cause was remanded for further proceedings. Stoner v. Howard Sober, Inc., 124 Ind. App. 581, 118 N.E.2d 504 (1954). On remand, the Board made the same findings of fact and conclusions of law that were deemed surplusage in the first appeal. The case was reversed and remanded again, with directions to make specific findings of fact as to the actual dependency of the claimant. Stoner v. Howard Sober, Inc., 141 N.E.2d 458 (Ind. App. Ct. 1957). In the determination in question, which was the third appeal, the amended and expanded award of the Board was affirmed, even though the claimant was still denied compensation. Stoner v. Howard Sober, Inc., 149 N.E.2d 121 (Ind. App. Ct. 1958).

[7]"No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

[8]"The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens." Ind. Const. art. I, § 23.

[9]149 N.E.2d at 123.

[10]Ibid.

sion of his contract with his employer, the decedent "would be in no position to challenge his own voluntary agreement as depriving him of his constitutional rights; and, as appellant acquires any rights she may possess as a dependent of the decedent solely under and by virtue of his said contract, she, too, is in no position to challenge said contract as depriving her of the asserted constitutional right."[11]

In effect the court held that the decedent, by contractually agreeing to section 40-1403a of the Act, waived his wife's derivative right to challenge the section as denying her equal protection of the laws. Ordinarily an individual can waive any right which has been provided for his benefit either by contract, by statute, or by constitution.[12] "To constitute a 'waiver' there must be generally, first, an *existing right, benefit, or advantage;* secondly, knowledge, actual or constructive, of the existence of such right, benefit, or advantage; and, lastly, an actual intention to relinquish it, or such conduct as warrants an inference of relinquishment."[13] Thus it is possible to waive voluntarily and intentionally an *existing constitutional right,* as long as such a waiver is not against public policy.[14] It is doubtful, however, under the facts of the principal case, whether there was an *existing right* which decedent could effectively waive. Nowhere in the report is there any mention of the date on which the decedent voluntarily contracted and elected to accept and to be bound by the provisions of the Workmen's Compensation Act. If the contract under the Act was made prior to the contract of marriage, then any waiver resulting from the former contract and relating to the rights of the parties to the marriage would be a waiver of a non-existent right, rather than an effective waiver of an existing right. The court not only fails to discuss the possibility of there being such an ineffective waiver, but it also

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[11]Ibid.

[12]Gilman v. Butzloff, 155 Fla. 888, 22 So. 2d 263, 265 (1945); Kempa v. State, 58 N.E.2d 934, 935 (Ind. 1945); Brown v. State, 219 Ind. 251, 37 N.E.2d 73, 77 (1941); Bachelor v. State, 189 Ind. 69, 125 N.E. 773, 776 (1920); Lamb v. Davis, 56 N.W.2d 481, 483 (Iowa 1953); Hittson v. Chicago, R.I. & P. Ry., 43 N.M. 122, 86 P.2d 1037, 1039 (1939); Cameron v. McDonald, 216 N.C. 712, 6 S.E.2d 497, 499 (1940).

[13]Cliett v. Williams, 97 S.W.2d 272, 274 (Tex. Civ. App. 1936). (Emphasis added). Accord, San Bernadino Inv. Co. v. Merrill, 108 Cal. 490, 41 Pac. 487, 488 (1895); National Parafine Oil Co. v. Chappellet, 4 Cal. App. 505, 88 Pac. 506, 507 (1906); Jonas v. City of W. Palm Beach, 76 Fla. 66, 79 So. 438, 441 (1918); State v. City of Anaconda, 41 Mont. 577, 111 Pac. 345, 347 (1910).

[14]"It is a general rule that any right or privilege to which a person is legally entitled, whether secured by contact, conferred by statute, or guaranteed by the constitution, may be waived by him; provided it is intended for his sole benefit, and does not infringe upon the rights of others, and such waiver is not against public policy." Hittson v. Chicago, R.I. & P. Ry., 43 N.M. 122, 86 P.2d 1037, 1039 (1939).

ignores the principle that "a State can not grant a privilege subject to the agreement that the grantee will surrender a constitutional right, even in those cases where the State has the unqualified power to withhold the grant altogether."[15] Thus there seems to be some question as to whether the court was correct when it stated that decedent contractually waived his 'right, and thereby appellant's right, to challenge the constitutionality of the provision. For the remainder of this comment it will be assumed that the decedent did not effectively waive his constitutional right and that Mrs. Stoner, by virtue of her position as widow of the decedent, has the right to challenge the constitutionality of section 40-1403a.

In 1947 the Indiana Legislature enacted section 40-1403a to introduce an element of certainty into the awarding of compensation to common-law wives, and to reduce the possibility of recovery by a party to a meretricious union.[16] The purpose of this section was not to discriminate between one legal wife and another legal wife, but instead it was to insure that the common-law relationship was genuine, not merely transitory and meretricious.[17] At first glance section 40-1403a seems well designed to achieve this purpose, but upon reconsideration it appears that in addition to achieving its stated purpose, the section also: (1) effects a result that is clearly contrary to the acknowledged purpose of workmen's compensation acts, (2) elevates a mere matter of difficulty of proof into a position of public policy, and (3) contains a classification that is apparently unconstitutional.

As announced by the Indiana Appellate Court in *In re Duncan*,[18] the general underlying purpose of that state's Workmen's Compensation Act is to place the economic burden and loss arising from the injury to an employee on the employer and his consumers, rather than on the dependents of the injured employee. In fact, the title of the Indiana Act itself states that one of its purposes is "to provide compensation for injuries and death of employees resulting from" accidents arising out of and in the course of their employment.[19] The effect of section 40-1403a, which denies compensation to a common-law wife unless she has lived "openly and notoriously" with her husband for five years immediately prior to his death, is clearly opposed to this acknowledged purpose. The section makes it impossible for a common-law wife, whose marriage is of less than five years

[15]City of Alexandria v. Texas Co., 172 Va. 209, 1 S.E.2d 296, 299 (1939).
[16]Note, 32 Ind. L.J. 99, 108 (1956).
[17]Guevara v. Inland Steel Co., 120 Ind. App. 47, 88 N.E.2d 398, 401 (1949).
[18]73 Ind. App. 270, 127 N.E. 289, 291 (1920).
[19]See Title, Ind. Acts 1929, ch. 172.

duration, to recover an award as a presumptive dependent. Such a wife, and not industry, is burdened with the economic loss resulting from her husband's death.

The Indiana Act, prior to the passage of section 40-1403a, made no distinction between wives based upon the type or duration of their marriage.[20] A common-law wife was allowed to recover when her marriage was established by that weight of evidence required for the proving of a common-law marriage under other circumstances. The recognized difficulty involved in proving such a marriage was one of the factors which initially led to the passage of this section, and then in turn to the complete abolition of common-law marriage in 1957. Prior to this abolition Indiana recognized common-law marriage,[21] although somewhat reluctantly in recent years.[22] This recognition was in line with the accepted policy of encouraging marriage.[23] In *Teter v. Teter,* the Indiana Appellate Court made the following

[20]Guevara v. Inland Steel Co., 120 Ind. App. 47, 88 N.E.2d 398, 401 (1949).

[21]"No marriage shall be void or voidable for the want of license or other formality required by law, if either of the parties thereto believed it to be a legal marriage at the time." Ind. Ann. Stat. § 44-302 (Burns' 1952 Replacement). Prior to 1957, the courts of Indiana consistently recognized the validity of common-law marriages. Anderson v. Anderson, 235 Ind. 113, 131 N.E.2d 301 (1956); Bolkovac v. State, 229 Ind. 294, 98 N.E.2d 250 (1951); Schumacher v. Adams County Circuit Court, 225 Ind. 200, 73 N.E.2d 689 (1947); Cossell v. Cossell, 223 Ind. 603, 63 N.E.2d 540 (1945); Norrell v. Norrell, 220 Ind. 398, 44 N.E.2d 97 (1942); Argiroff v. Argiroff, 215 Ind. 297, 19 N.E.2d 560 (1939); United States Steel Corp. v. Weatherton, 126 Ind. App. 189, 131 N.E.2d 335 (1956); In re Dittman's Estate, 124 Ind. App. 198, 115 N.E.2d 125 (1953); Guevara v. Inland Steel Co., 120 Ind. App. 47, 88 N.E.2d 398 (1949); Schilling v. Parsons, 110 Ind. App. 52, 36 N.E.2d 958 (1941); Vincennes Bridge Co. v. Vardaman, 91 Ind. App. 363, 171 N.E. 241 (1930).

[22]The shift in Indiana's attitude toward common-law marriage, from one of ready recognition and acceptance to one of reluctance and growing distaste, reflects the general trend in the United States. Although Lord Hardwicke's Act, 26 Geo. 2, c. 33 (1753), requiring publicity and a regular ceremony for the creation of the marital relation in England, was passed prior to the American Revolution, most of the original colonies, as well as the states which subsequently joined the Union, adopted the earlier policy of giving recognition to these informal, consensual marriages. The reason for this recognition can be seen in the character of the United States during its early years. The country was sparsely populated, the communities were few and far between, and the availability of persons authorized to solemnize marriage was limited. As late as 1931, a majority of the states still recognized common-law marriages. As of 1958, with the abolition of common-law marriage in Indiana in 1957, only eighteen states and the District of Columbia still recognized them. It is generally felt that the factors which led to the recognition of common-law marriage are no longer existent. For a complete history of the common-law marriage see Dalrymple v. Dalrymple, 2 Hagg. Const. 54, 67-72, 161 Eng. Rep. 665, 668-72 (1811). See also Keezer, Marriage and Divorce § 28 (3d ed. 1946); 2 Pollack and Maitland, History of English Law 369-74 (2d ed. 1923); 1 Vernier, American Family Laws § 26 at 102-10 (1931).

[23]Meister v. Moore, 96 U.S. 76, 81 (1877).

statement: "The want of form, or the lack of ceremonial rites, does not impair a marriage contract, in cases where it is entered into from good motives and with an intention to contract a present marriage, and is followed by an open acknowledgement of the marital relation."[24] In a later decision,[25] the Indiana Supreme Court, in referring to the importance of cohabitation in the contracting of a marriage *per verba de praesenti,* stated that "cohabitation does not of itself constitute a common-law marriage. It is merely *evidence of marriage* . . . ."[26] If cohabitation is merely *"evidence of marriage,"* a requirement of five years open and notorious cohabitation does not appear to be based upon sound principles, for "at each particular moment in the existence of a person, he must either be married or single; there is no intermediate position."[27] In enacting a provision requiring a five year period of cohabitation, the Indiana Legislature did not intend to redefine common-law marriage.[28] Instead it intended to introduce some fixed standard of measurement into the proving of a common-law marriage entitling the surviving spouse to recover under the Workmen's Compensation Act.[29] In fixing a standard it appears that the legislature was somewhat overzealous. While it is quite true that there often are great difficulties involved in proving the existence of common-law marriages and that occasionally false claims may go undetected, public policy does not seem to require the barring of all claims, whether fraudulent or honest, based upon such marriages where the period of cohabitation is less than five years. "The institution and maintenance of suits for false claims is recognized, but to what extent in comparison with honest ones is not a matter of judicial notice; nor is it a matter of such notice in what measure false claims are successful. *To hold that all honest claims should be barred merely because otherwise some dishonest ones will prevail is not enough to make out a case of public policy."*[30]

While it appears that the effect of section 40-1403a leaves much to be desired, and that the stated purpose of this statute has been

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[24]101 Ind. 129 (1884), cited with approval in Schilling v. Parsons, 110 Ind. App. 52, 36 N.E.2d 958, 961 (1941).

[25]Meehan v. Edward Valve & Mfg. Co., 65 Ind. App. 342, 117 N.E. 265 (1917).

[26]Id. at 266 (Emphasis added).

[27]Bishop, Marriage, Divorce, and Separation § 317 (1891).

[28]The five year requirement was not intended to modify the law on what constitutes a common law marriage. Guevara v. Inland Steel Co., 120 Ind. App. 47, 88 N.E.2d 398, 401 (1949).

[29]See note 16 supra.

[30]Chiuchiolo v. New England Wholesale Tailors, 84 N.H. 329, 150 Atl. 540, 543 (1930). (Emphasis added).

overstepped, these observations cannot be made the basis for constitutional objection. There does, however, seem to be a constitutional objection to the section on the ground that it contains an unconstitutional classification. An excellent definition of what constitutes a valid classification was made by the Indiana Supreme Court in *Bedford Quarries Co. v. Bough:*

> "The legislature may make a classification for legislative purposes, but it must have some reasonable basis upon which to stand.... Such legislation must not only operate equally upon all within the class, but the classification must furnish a reason for and justify the making of the class.... Not only must the classification treat all brought under its influence alike, under the same conditions, but it must embrace all of the class to which it is naturally related. Neither mere isolation nor arbitrary selection is proper classification."[31]

To all appearances, the classification in section 40-1403a fails to comply with these criteria.

In order to facilitate the administration of its Workmen's Compensation Act, Indiana has created a classification based entirely upon the type and duration of a marriage, while generally no distinction is made on such a basis.[32] "In the United States there are no degrees or differences in marriage. The denial in many states of validity to a common-law marriage and the acceptance of that form by others still leaves unchanged the status once recognized of any union no matter how contracted. *A marriage in America is full and complete in every respect or it does not exist at all."*[33] A wife is a wife, and a marriage is a marriage, and it is immaterial whether the relation is founded in ceremony or in mutual consent alone. Certainly the Indiana Legislature would not attempt to classify wives according to their height, their weight, or the color of their hair. It has classified them according to the type and duration of their marriages, which seems just as capricious a classification. If common-law marriages are recognized, as they were in Indiana until 1957, then a wife's common-law marriage ought to have all the incidents of a ceremonial marriage. Once common-law marriages are recognized, there is no rational basis for dis-

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[31]168 Ind. 671, 80 N.E. 529 (1907).

[32]An extensive search of the Ind. Ann. Stat. (Burns' 1952 Replacement) fails to reveal any similar distinction being drawn in the titles dealing with decedent estates, descent, husband and wife, wills, bequests and devise, or probate.

[33]Black, Common Law Marriages, 2 U. Cinc. L. Rev. 113, 127 (1928). (Emphasis added). In this article Mr. Black makes a spirited defense of common-law marriage, and presents a comprehensive summary of the atttitude toward these marriages in 1928.

tinguishing between a common-law marriage of four years, ten months, and nineteen days, and one of five years. In fact, there is no rational basis for distinguishing between a common-law marriage and a ceremonial marriage of the same duration. No period of cohabitation is required before a wife whose marriage is founded in ceremony is entitled to recover under the Act.[34] To require a period of cohabitation of a common-law wife is clearly prejudicial to her interests. A right should not be afforded one wife and denied another wife when their marriages are equally valid,[35] their children are equally legitimate,[36] and they equally inherit from their deceased spouses.[37] The Indiana Legislature has taken one natural class, composed of ceremonial and common-law wives, and split it into two parts. It has then designated these two parts as two classes, and proceeded to legislate against one of these parts. If the Legislature looked upon common-law marriages with great disfavor and felt they were a fruitful source of perjury and fraud,[38] then it should have abolished them in 1947 instead of attempting to regulate them through an apparently unconstitutional classification. It is clearly within the power of the Indiana Legislature to abolish common-law marriage,[39] but it is not within its power to establish arbitrary and discriminatory marriage classifications.

Thus it appears that the provisions of section 40-1403a of the Indiana Workmen's Compensation Act are open to question on several grounds. The effect of the classification made in this section is clearly contra to the generally accepted purpose of workmen's compensation acts. While the difficulty of proof may mean that false claimants can be successful, this is not a sufficient reason to justify

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[34]Ind. Ann. Stat. § 40-1403a (Burns' 1952 Replacement).

[35]"It is also held that the contracting parties to a common-law marriage are husband and wife as fully and to the same effect and extent as if there had been a statutory and ceremonial marriage...." Dunlop v. Dunlop, 101 Ind. App. 43, 198 N.E. 95, 98 (1935).

[36]"The parties to such marriage [common-law] are husband and wife and their legal status is that of married persons; their children are legitimate...." Baker v. Mays & Mays, 199 S.W.2d 279, 284 (Tex. Civ. App. 1946). Accord, Monroe v. Middle Atl. Transp. Co., 85 N.E.2d 801 (Ohio Ct. App. 1949); Umbenhower v. Labus, 85 Ohio St. 238, 97 N.E. 832 (1912).

[37]See note 32 supra.

[38]Anderson v. Anderson, 235 Ind. 113, 131 N.E.2d 301, 305 (1956), adopting the language in In re Dittman's Estate, 115 N.E.2d 125, 130 (Ind. App. Ct. 1953).

[39]"The marriage relationship, regardless of whether the source of such relationship was common-law or ceremonial, is of such vital concern to society, the public, and the state, that it is subject to legislative control and regulation. Pry v. Pry, 225 Ind. 458, 75 N.E.2d 909, 913 (1947); Sweigart v. State, 213 Ind. 157, 12 N.E.2d 134, 138 (1938); Wiley v. Wiley, 75 Ind. App. 456, 123 N.E. 252, 255 (1919).