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*Wengler v. Druggists' Mutual  
Insurance Company*: No More  
Skirting the Issue of Sex  
Discrimination in Workers'  
Compensation Dependency Statutes

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On April 22, 1980, the United States Supreme Court in *Wengler v. Druggists' Mutual Insurance Co.*<sup>1</sup> held that a provision of the Missouri Workers' Compensation law which established a conclusive presumption of dependency for widows, but which required widowers to prove incapacity or dependency, ran afoul of the Equal Protection Clause of the fourteenth amendment.

That decision reflected an already emerging national awareness that the present-day social and economic fabric no longer fit the

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1. 446 U.S. 142 (1980).

outmoded statutory framework of an era of gender bias. Even before the Supreme Court issued its mandate in *Wengler*, three states had already abolished their similarly worded workers' compensation dependency provisions as being violative of equal protection.<sup>2</sup> This comment will explore the development of that socio-economic coming of age and the subsequent repeal and revision of workers' compensation dependency provisions left in the wake of *Wengler* and its precursors.

## I. HISTORICAL PERSPECTIVE

In the late 1960's, before sex discrimination was considered a viable constitutional affront, widowers in several jurisdictions were effectively foreclosed by statute from receiving dependency benefits upon the work-related deaths of their breadwinning wives.<sup>3</sup> Correspondingly, working women faced with the prospect of an untimely job-related death could not expect to find the same future financial solace for their family that the workers' compensation scheme held out to their male co-workers.

An Illinois plaintiff in 1969 tried a novel approach to the dilemma in *Duley v. Caterpillar Tractor Co.*<sup>4</sup> Clarence Duley, whose wife had died in a forklift accident on her job, pursued a wrongful death claim against her employer, notwithstanding the Illinois Workers' Compensation Act's exclusive remedy provision. That provision barred employees subject to the Workers' Compensation Act and their dependents from pursuing any other remedies at law.<sup>5</sup> Another section of the Act, the dependency provision, required widowers, but not widows, to prove total dependency in order to receive death benefits.<sup>6</sup> Accordingly, the

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2. *Tomarchio v. Township of Greenwich*, 75 N.J. 62, 379 A.2d 848 (1977); *Arp v. Workers' Compensation Appeals Bd.*, 19 Cal. 3d 395, 563 P.2d 849, 138 Cal. Rptr. 293 (1977); *Passante v. Walden Printing Co.*, 53 A.D.2d 8, 385 N.Y.S.2d 178 (1976). See notes 25-31 *infra* and accompanying text.

3. As late as 1975, 22 workers' compensation statutes had sex-based dependency provisions: Arkansas, California, Colorado, Georgia, Idaho, Indiana, Louisiana, Michigan, Minnesota, Mississippi, Missouri, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Puerto Rico, South Dakota, Tennessee, Utah, Vermont, and West Virginia. See Localio, *Presumption of Dependence in Workers' Compensation Death Benefits as a Denial of Equal Protection*, 3 WORKERS' COMPENSATION L. REV. 517, 519 (1976). See note 40 *infra*.

4. 44 Ill. 2d 15, 253 N.E.2d 373 (1969).

5. ILL. ANN. STAT. ch. 48, § 138.5(a) (Smith-Hurd 1969).

6. The applicable provisions of the statute read as follows:

The amount of compensation which shall be paid for an accidental injury to the employee resulting in death is:

(a) If the employee leaves any widow, child or children whom he was under legal obligation to support at the time of his accident, a sum equal to 9.25 times the average earnings of the employee, but not less in any event than \$10,250 and not more in any event than \$18,000.

(b) If no amount is payable under paragraph (a) of this Section and

widower-claimant argued that since he was not totally dependent upon his wife for support and was, therefore, not a statutory dependent for the purposes of the Workers' Compensation Act, then the exclusive remedy provision of that Act was inapplicable in his case, leaving him free to sue under a wrongful death theory of recovery.

It was a creative attempt that nonetheless failed to sway the court. The obvious flaw in such reasoning was that the jurisdiction of the administrative workers' compensation forum and coverage under the Workers' Compensation Act was grounded in the deceased claimant, not in whoever might allege dependency. To hold otherwise would subvert the exclusive remedy provision by providing a vehicle whereby parties who did not meet statutory dependency requirements could be given greater leeway to pursue legal remedies than were available to statutorily recognized dependents.<sup>7</sup> Clearly, such a result could bring to a halt the machinery of the workers' compensation scheme, which is premised upon the employer's accepting vicarious liability for work-related accidents without regard to fault in return for the worker's foregoing his traditional tort remedies.

Having failed to convince the court that he was entitled to pursue a wrongful death claim, plaintiff Duley resorted to what was then a fallback argument, that the statutory classification requiring widowers to prove total dependency unreasonably discriminated according to sex. Unfortunately, it was an idea that had not yet reached judicial fruition. The Supreme Court of Illinois upheld the discriminatory classification as legislatively sound because it was based on a rational difference of situation existing in

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the employee leaves any parent, *husband*, or child or children, who at the time of accident were *totally dependent* upon the earnings of the employee, then a sum equal to 9.25 times the average annual earnings of the employee, but not less in any event than \$10,250, and not more in any event than \$18,000.

ILL. ANN. STAT. ch. 48, § 138.7(a), (b) (Smith-Hurd 1969) (emphasis added). In 1973 the Illinois legislature amended the discriminatory classification by extending the operation of paragraph (a) to widowers.

7. It is interesting to note that this approach had worked for the plaintiff in *Miller v. Hotel Savoy Co.*, 228 Mo. App. 463, 68 S.W.2d 929 (1934), but ostensibly only because the exclusive remedy provision of the Missouri act contained the following exception: "[t]he rights and remedies herein granted to an employee, shall exclude all other rights and remedies of such employee, his wife, her husband, . . . at common law or otherwise, . . . *except such rights and remedies as are not provided for by this chapter.*" MO. ANN. STAT. § 287.120 (Vernon 1965) (emphasis added).

the affected class. The court accepted as axiomatic that classifications "based upon the disparate earning power of men and women"<sup>8</sup> were consistent with fourteenth amendment requirements. In a bout of circular reasoning characteristic of the times, the court declared that "[i]t is not unreasonable to compensate according to one's sex, and we find it conforms most realistically to the economic situation present in our society today."<sup>9</sup>

In 1971, the same provision of the Illinois statute again came under attack in *Holiday Inns of America v. Industrial Commission*.<sup>10</sup> Paul Ross, whose wife had been shot during a robbery on her employer's premises, filed a death claim which was denied because he had not proven total dependency on his wife's earnings. Showing a heightened awareness of the statute's constitutional infirmity, the Circuit Court of Logan County on *certiorari* found the provision unconstitutional. However, on appeal, the Supreme Court of Illinois reversed the circuit court and upheld the discriminatory classification. While giving great deference to the legislature, the court at the same time provided a foreshadowing of judicial rethinking by concluding:

The complaint of the claimant is not without force and arguably the legislature ought to have allowed husbands to recover on a showing of less than total dependency. However, we are not persuaded that it is for the courts to say that the omission rendered the legislative schedule unconstitutional. In designing the Act the legislature was not required, at the risk of constitutional condemnation, to have provided for all eligible conditions or for none.<sup>11</sup>

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8. 44 Ill. 2d at 19, 253 N.E.2d at 375, citing *Gruenwald v. Gardner*, 390 F.2d 591 (2d Cir. 1968). In *Gruenwald*, the plaintiff tried to argue that certain provisions of the Social Security Act discriminated against males in the manner in which benefits are computed at age 62. He asserted that the provisions violated the Due Process and Equal Protection Clauses of the Constitution. The Court decided that the favorable treatment given to women was not unconstitutional due to the differences between the physical and economic capabilities of men and women. The objective sought by the classification was found to be to reduce this disparity. Therefore, the provisions were upheld as a valid means to achieve that goal.

9. 44 Ill. 2d at 19-20, 253 N.E.2d at 375.

10. 48 Ill. 2d 528, 271 N.E.2d 884 (1971). The constitutionality of the Workmens' Compensation Act was questioned since it did not allow widowers to recover for the deaths of their wives unless they could prove they were totally dependent on them for support. This was challenged as discrimination on the basis of sex since all widows whose husbands were killed could recover under the Act. The court did not agree with the challenge and ruled that "[a] classification will suffice as a basis for legislation if such classification is based on a rational difference of situation or condition found to exist in the persons or objects upon which the classification rests." Due to the differences between men and women, and since equal protection has not generally been a bar to legislation based on sex, the court upheld the Act. *Id.* at 530, 271 N.E.2d at 886.

11. *Id.* at 533, 271 N.E.2d at 887.

## II. THE CONVOLUTING OF *Kahn v. Shevin*—AMELIORATIVE CLASSIFICATIONS VERSUS ARCHAIC AND OVERBROAD GENERALIZATIONS

Since 1971, equal protection as a vehicle for eliminating discriminatory classifications based on sex has gone into high gear. In its infancy, this area of constitutional challenge created a hybrid standard of judicial scrutiny. Not quite ready to relegate gender-based discrimination to a suspect class, which would require heightened judicial scrutiny to survive constitutional attack, the Supreme Court cautiously applied a "rational scrutiny" standard.<sup>12</sup>

In *Reed v. Reed*,<sup>13</sup> the Court struck down as unconstitutional a gender-based Idaho statute which established a preference for the appointment of males as estate administrators. Administrative convenience for the probate courts was discarded by the Court as an insufficient justification for a preference based on sex, since the classification did not bear a rational relation to the alleged purpose. Similarly, in *Stanley v. Illinois*,<sup>14</sup> the Court held that the statutory denial of fitness hearings for unwed fathers, but not unwed mothers, was violative of equal protection.

Protection against sex discrimination reached a high-water

12. See Gunther, *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 1, 20-24 (1972). Professor Gunther made an analysis of how the Warren Court viewed equal protection. According to him, the Court determined that a law would not violate equal protection if the prescribed means were necessary and less drastic means were not available to achieve that statutory purpose. The Court, through restricting the legal means available, sought to protect interests it saw as fundamental. There must be a rational means-ends relationship to some valid public purpose with the means being a necessary way to accomplish that goal. Gunther mentioned laws affecting classifications such as race and speech freedoms as being those which the Burger Court would be most likely to scrutinize in that same manner, but he did not mention the classification of sex, and predicted that the Burger Court would probably not expand the list of suspect classes.

13. 404 U.S. 71 (1971). The Court ruled that the Constitution does not bar differential treatment of classes, but that equal protection does "deny States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that Statute." Preferring males to females in the administration of an estate was not held to bear a "rational relationship to a state objective." *Id.* at 75-76.

14. 405 U.S. 645 (1972). The Illinois statute was held to violate the fourteenth amendment since it did not allow children to be taken from a divorced parent or unwed mother without going through neglect proceedings; but an unwed father could be denied the custody of his illegitimate children without a fitness hearing. The father did not receive equal protection of the laws due to the state's failure to give him the same hearing which would have been given to a female or a divorced male parent.

mark in *Frontiero v. Richardson*,<sup>15</sup> where four Justices applied a strict scrutiny standard to invalidate a federal statute requiring husbands of servicewomen, but not wives of servicemen, to prove dependency before receiving certain military benefits. However, the tide of judicial opinion has since receded to the middle-tier standard set forth in *Craig v. Boren*<sup>16</sup> and reiterated most recently in *Wengler v. Druggists' Mutual Insurance Co.*; that gender-specific classifications are permissible only when they further important governmental objectives and are substantially related to the achievement of those objectives. Applying that level of scrutiny, the Supreme Court has increasingly struck down statutes which create "archaic and overbroad generalizations" about women.<sup>17</sup>

Anti-gender discrimination fervor was tempered, however, in 1974, by an emerging divergent rationale which upheld so-called "ameliorative" statutes purportedly enacted to redress women for past discrimination. In *Kahn v. Shevin*,<sup>18</sup> the Supreme Court upheld a Florida annual \$500 real estate tax exemption for widows, relying on median income statistics that justified a state tax law's

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15. 411 U.S. 677 (1973). The inequity that was challenged in *Frontiero* was that a serviceman could declare his wife dependent for purposes of receiving benefits whether she was or not, but a servicewoman had to prove her husband was dependent on her for more than one-half of his support. Congress tried to rationalize this law by concluding that males are traditionally the "breadwinners" of the American family and the wife is usually dependent upon them. The Court here did not agree with Congress, but rather went as far as to say that the classification of sex is inherently suspect and should be given close judicial scrutiny. Under this strict scrutiny test, there must be more than a rational relationship to a valid governmental concern to uphold the law. Administrative convenience, the reason given by the service for the differential treatment, was held by the Court not to be a crucial interest that would justify the denial of similar treatment of men and women who are similarly situated in the service.

16. 492 U.S. 190 (1976). In *Craig*, the plaintiffs questioned the constitutionality of an Oklahoma statute which allowed females over the age of 18 to purchase 3.2% beer, but prohibited males from purchasing the beer until age 21. The Court found that the statute discriminated against males between the ages of 18 and 20 and violated the Equal Protection Clause. The state argued in favor of the law by claiming its purpose was to protect the males in this category from driving while intoxicated. The Court realized that the law did not further the reasons given for its existence. The law was thus found violative of equal protection and, therefore, unconstitutional, without the Court employing the strict standard of scrutiny given to suspect classes.

17. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643 (1975). In this case, the plaintiff challenged a Social Security provision due to its failure to grant benefits to a deceased husband's wife and minor children while at the same time a deceased wife's children, but not her husband, can recover. The Court ruled this to be in violation of equal protection and called the idea that a female's earnings are not essential to a family's livelihood "archaic and overbroad."

18. 416 U.S. 351 (1974). In *Kahn*, the Court held that "[a] state tax law is not arbitrary although it 'discriminates in favor of a certain class . . . if the discrimination is founded upon a reasonable distinction, or difference in state policy' not in conflict with the Federal Constitution." *Id.* at 355.

attempt to alleviate a "disproportionately heavy burden" upon widows.<sup>19</sup> Predictably, proponents of gender-based statutes thereafter sought the shelter of a *Kahn* compensation rationale as a justification for any statute which, though discriminatory on its face, arguably attempted to ameliorate the disparate earning power of women.<sup>20</sup>

In *Weinberger v. Wiesenfeld*,<sup>21</sup> however, a unanimous Supreme Court rejected the Solicitor General's *Kahn* defense that alleviating job market discrimination was Congress' intent in formulating Social Security "mothers' insurance benefits."<sup>22</sup> More recently, in *Orr v. Orr*,<sup>23</sup> the Court rejected a blanket application of the *Kahn* rationale. In *Orr*, a gender-based classification in Alabama's alimony laws which limited alimony payments to wives only was struck down. The Supreme Court reasoned that a *Kahn* compensation justification was particularly insufficient to sustain gender-based discrimination when a particular statute provides for individualized hearings where financial circumstances are taken into consideration. The Court added:

[S]ince individualized hearings can determine which women were in fact discriminated against vis-a-vis their husbands . . . , Alabama's alleged compensatory purpose may be effectuated without placing burdens solely on husbands. Progress towards fulfilling such a purpose would not be hampered, and it would cost the state nothing more, if it were to treat men and women equally by making alimony burdens independent of sex.<sup>24</sup>

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19. *Id.* at 355.

20. *See, e.g.*, *Califano v. Webster*, 430 U.S. 313 (1977), where the Court upheld a provision of the Social Security Act which gave females who became 62 years old before 1975 greater benefits than males of the same age. This was held not to violate the Equal Protection Clause since the purpose was to compensate women for past unfair treatment. *See also Schlesinger v. Ballard*, 419 U.S. 498 (1975). There, the plaintiff tried to void his discharge from the Navy as unconstitutional because he was dismissed for failure to be advanced in rank under a rule that applied to males only. The Court did not feel the disparate treatment violated equal protection because it found a rational basis in the fact that females have traditionally been advanced in the military at slower rates than males.

21. 420 U.S. 636. *See* note 17 *supra*.

22. The Social Security Act provision questioned in *Wiesenfeld*, 42 U.S.C. § 402(g), gives widows or surviving divorced mothers insurance benefits. *See* note 17 *supra*.

23. 440 U.S. 268 (1979). *Orr* involved a challenge to Alabama's gender-based alimony law which was struck down for violating equal protection. The statute required husbands, but not wives, to pay alimony upon divorce. The Court ruled that classifications of gender must be scrutinized for an important governmental concern in order to justify the differential treatment. This alimony law was not found to be redressing women for past discrimination since Alabama provided for hearings where the parties' financial situations were considered.

24. *Id.* at 281-82.



### III. DISCRIMINATORY DETERMINATION OF DEPENDENCY IN WORKERS' COMPENSATION STATUTES

As women entered the work force in record numbers in the late 1970's, no better forum to test the equal protection waters of gender-based statutes had emerged than the administrative body of law designed for the protection of the worker injured on the job. Workers' compensation laws have been permeated since their early twentieth century enactment with gender-based language and classifications. The most obvious were the dependency provisions, which in several jurisdictions provided a conclusive presumption of total dependency for the widow upon her husband's compensable death, but which required a widower to prove actual dependency, incapacity, or the like.<sup>25</sup>

Curiously, these provisions survived denunciations of gender-based statutory provisions in both *Frontiero v. Richardson* and *Orr v. Orr* without succumbing to legislative repeal or revision. However, in 1976, the Supreme Court of New York, Appellate Division, in *Passante v. Walden-Printing Co.*,<sup>26</sup> struck down New York's workers' compensation statutory presumption of dependency for widows as violative of equal protection. Relying on *Frontiero* and *Wiesenfeld*, and specifically refusing to follow the *Kahn* rationale argued by the respondents, the court held that the statute clearly discriminated against the working woman, who as part of her employment benefits did not receive the security of knowing that in the event of her work-related death, her widower and family would not suffer the loss of her entire income. Rather than being a benefit to remedy the effects of past discrimination as in *Kahn*, the dependency statute was viewed by the court as merely using past discrimination as a justification for continuing to burden the class of working women "simply because the statute arbitrarily classifies the husband as bread-winner and consequently categorizes the wife's work as unimportant."<sup>27</sup> Instead of invalidating the presumption entirely, the court in *Passante* remedied the constitutional defect by extending the presumption of dependency to widowers also.

Similarly, the following year, the Supreme Court of California

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25. See note 3 *supra*.

26. 53 A.D.2d 8, 385 N.Y.S.2d 178 (1976). In *Passante*, a widower appealed a workmens' compensation board finding that he was not dependent upon his deceased wife's earnings and, therefore, was not entitled to death benefits under New York law. The law granted death benefits to all widows, but only to those widowers who could demonstrate their dependence upon their wives' earnings.

27. *Id.* at 12, 385 N.Y.S.2d at 181. The court further stated that "section 16 of the Workmens' Compensation Law thus compels dissimilar treatment both for surviving husbands and working wives, respectively, vis-a-vis widows and working males. Such a sex-based differentiation cannot be sustained." *Id.*

in *Arp v. Workers' Compensation Appeals Board*<sup>28</sup> found that the California workers' compensation dependency presumption for widows denied equal protection both to widowers and to employed women. Again, specifically rejecting the *Kahn* rationale in the sphere of workers' compensation dependency legislation, the court determined that the classification never had ameliorative legislative intent. Instead, the court noted that "[t]he presumption [of dependency of a widow] is the relic of an era in which the majority of persons—certainly the majority of those in positions of power—accepted as axiomatic that 'the God of nature made woman frail, lovely and dependent. . . .'"<sup>29</sup> Admonishing that such a philosophy is clearly outmoded at a time when both marital partners are relied upon financially to combat the ravages of inflation and spiraling costs of living, the court concluded that the statute was neither necessary to the realization of a compelling state goal nor justified by a fair and substantial relation to the supposedly solicitous object of the legislation. Accordingly, in contrast to the remedy fashioned by the New York court in *Pas-sante*, the conclusive presumption was invalidated and the surviving spouse was required to show need in order to recover death benefits.

At the same time, in New Jersey, widower-claimant Vincent Tomarchio was challenging that state's similarly worded dependency statute in *Tomarchio v. Township of Greenwich*.<sup>30</sup> That statute was declared unconstitutional by the Judge of Compensation at the outset of Tomarchio's action. Following an appeal by the deceased worker's employer, the Supreme Court of New Jersey, on its own motion, certified the appeal of the case which was pending in the Appellate Division. *Kahn* was once again distinguished as not controlling for the reason that it concerned a state tax law, an area where states had traditionally been given "large leeway."<sup>31</sup> As further proof of the fact that this type of stat-

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28. 19 Cal. 3d 395, 563 P.2d 849, 138 Cal. Rptr. 293 (1977). Here, a widower appealed a decision which denied him the benefit of the conclusive presumption of total dependency afforded to widows in CAL. LAB. CODE § 3501 (West 1971).

29. *Id.* at 404, 563 P.2d at 854, 138 Cal. Rptr. at 298.

30. 75 N.J. 62, 379 A.2d 848 (1977). In *Tomarchio*, a widower's dependency claim for workers' compensation death benefits was denied due to failure to show dependency upon his deceased wife's earnings.

31. *Id.* at 67, 379 A.2d at 852. The court also distinguished *Kahn* on the grounds that *Kahn* found the "gender-based classification in the tax statute was remedial, designed to rectify past discrimination visited upon women generally

ute could not fall into the “ameliorative” niche carved out by *Kahn*, the New Jersey court pointed out that the decedent as a wage earner had in fact been denied a benefit of her employment, and “[i]t was just this kind of ‘heaping additional economic disadvantages’ upon the female wage earner which prompted the Supreme Court’s rejection” of *Kahn* in *Weinberger v. Wiesenfeld*<sup>32</sup> and *Califano v. Goldfarb*.<sup>33</sup> Pending legislative revision, the New Jersey Supreme Court, as in *Passante*, extended the conclusive presumption to widows and widowers alike.

Missouri, however, in *Wengler v. Druggists’ Mutual Insurance Co.*,<sup>34</sup> failed to follow the trend set by New York, California, and New Jersey. Although the Missouri circuit court in *Wengler* relied upon equal protection grounds to reverse the Workers’ Compensation Referee’s finding of no dependency, the Supreme Court of Missouri reversed the circuit court and upheld the statute. Citing eight-year-old earning statistics and applying a rather loose-fitting substantial relationship test, the court declined to follow the precedent established by *Passante*, *Arp*, and *Tomarchio*. The court maintained that the “substantive difference in the economic standing of working men and women justifies the advantage that [the dependency provision] administratively gives to a widow.”<sup>35</sup> Justice Donnelly, concurring in result, heralded imminent United States Supreme Court review when he pointed out that “no identifiable ‘Supreme Law of the Land’ exists by which we may adju-

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and that its benign purpose was not a subterfuge or method for indirectly visiting additional economic disadvantages on women.” *Id.*

32. 420 U.S. 636 (1975). In *Wiesenfeld*, a wife, whose earnings as a teacher were the principal source of support during the couple’s marriage, died in childbirth. Under 42 U.S.C. § 402, the husband received social security survivors’ benefits for his son, but not for himself. Social Security Act benefits based on the earnings of a deceased husband and father covered by the Act were payable, with some limitations, both to the widow and the couple’s minor children. However, such benefits based on the earnings of a deceased wife were only payable to the minor children and not to the widower. The Court, relying on *Reed v. Reed*, 404 U.S. 71 (1971), held that the challenged statute violated the Due Process Clause since it provided dissimilar treatment for men and women who were similarly situated.

33. 430 U.S. 199 (1976). In *Califano*, the Court held unconstitutional the requirement that a widower could receive survivors’ benefits only if he had been receiving at least one-half of his support from his deceased wife, whereas such benefits based on the earnings of a deceased husband were payable to his widow without qualification.

34. 583 S.W.2d 162 (Mo. 1979). As with the California, New York, and New Jersey workers’ compensation statutes, the Missouri law afforded a conclusive presumption of dependency for widows, but not for widowers like the plaintiff, who were required to prove actual dependency to receive benefits.

35. *Id.* at 168. The Missouri Supreme Court concluded that “the widower is not deprived of death benefits upon the compensable death of his wife but is entitled to the same upon proof of dependency.” *Id.*

dicating a claim of alleged gender-based discrimination."<sup>36</sup>

It was against this precedential backdrop that the United States Supreme Court decided *Wengler*. Justice White, delivering the majority opinion over a lone dissent by Justice Rehnquist, held that such a statute discriminated against women as well as against men who lost their employed wives in work-related accidents. The Court found that the discriminatory means employed in the statute did not substantially serve the alleged governmental objective of providing for needy spouses. The Court added that the double-edged discrimination fostered by the Missouri statute could be avoided and the governmental ends served just as completely "either by paying benefits to all members of both classes or by paying benefits only to those members of either class who can demonstrate their need."<sup>37</sup>

Following *Wengler*, the Supreme Courts of Georgia and Tennessee invalidated their similarly worded dependency provisions.<sup>38</sup> As a result of this trend, most jurisdictions' dependency statutes today no longer allude to gender. However, six workers' compensation statutes still continue to show no reported change in their gender-based dependency provisions.<sup>39</sup> *Wengler* has additionally been expanded to disengage the notion of romantic paternalism in the areas of social security and bankruptcy.<sup>40</sup>

36. *Id.* Interestingly, it was Justice Donnelly who, after *Wengler* itself became the "identifiable supreme law," on remand, accused the United States Supreme Court of abrogating the covenant of federalism and rejoined in with Senator Moynihan's query: "What do you do when the Supreme Court is wrong?" 601 S.W.2d 8, 10 (Mo. 1980).

37. 446 U.S. at 151.

38. See notes 41-42 *infra* and accompanying text.

39. GA. CODE ANN. § 114-414 (Supp. 1980) (the Georgia General Assembly met after *Ins. Co. of N. Am. v. Russell*, 246 Ga. 269, 271 S.E.2d 178 (1980), and revised certain provisions of the Workers' Compensation Act, but left the dependency provision intact); IND. CODE ANN. § 22-3-3-19 (Burns Supp. 1980); MICH. STAT. ANN. § 17.237(331) (Supp. 1980); MISS. CODE ANN. § 71-3-25 (Supp. 1980); PA. STAT. ANN. tit. 77, § 562 (Purdon Supp. 1980); P.R. LAWS ANN. tit. 11, § 3(5) (Supp. 1979).

40. *Mertz v. Harris*, 497 F. Supp. 1134 (S.D. Tex. 1980) (provision of Social Security Act allowing survivors' insurance benefits to remarried widows, but not remarried widowers, held unconstitutional); *In re Crist*, 632 F.2d 1226 (5th Cir. 1980) (section of Bankruptcy Act providing benefit of nondischargeability of debts for alimony and support owed to widow held unconstitutional). See also *Novak v. Harris*, 504 F. Supp. 101 (E.D.N.Y. 1980).

#### IV. THE CONCLUSIVE DEPENDENCY PRESUMPTION— EXTENSION VS. INVALIDATION

The determination of whether the discriminatory defect should be remedied by extending the presumption of dependency to widowers, or by eliminating it for widows, was a matter which the Supreme Court in *Wengler* felt would be properly left to the Missouri Supreme Court. Meanwhile, the Missouri General Assembly enacted legislation which extended the presumption of dependency to widowers. Consequently, on remand, claimant *Wengler* was allowed to recover benefits for the loss of his wife.

Following *Wengler*, two states' presumptive dependency statutes for widows were invalidated. In *Insurance Co. of North America v. Russell*,<sup>41</sup> the Supreme Court of Georgia affirmed the order of the superior court which had, just months before the United States Supreme Court decision in *Wengler*, declared unconstitutional the Georgia Workers' Compensation presumption of dependency for widows. On appeal, the Supreme Court of Georgia eliminated the conclusive presumption for widows and required a showing by either spouse of actual dependency or need, thus following the rationale set forth in *Arp*.<sup>42</sup>

More recently, in *Davis v. Aetna Life & Casualty Co.*,<sup>43</sup> the same fate befell the Tennessee conclusive presumption of depen-

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41. 246 Ga. 269, 271 S.E.2d 178 (1980). Following the death of his wife, which resulted from gunshot wounds sustained during a robbery at her place of employment, the husband filed for workers' compensation benefits. However, under Georgia law, recovery was dependent upon proof by the surviving spouse of total or partial dependency. In contrast, the law also conclusively presumed total dependency on the part of a surviving wife. The administrative law judge found that the husband had not been partially dependent and, thus, declined to rule on the constitutionality of the conclusive presumption regarding widows. When the superior court sustained the husband's challenge to the law's constitutionality, the deceased wife's employer and its insurer appealed to the Georgia Supreme Court.

42. By merging the offending statutory language into wording curiously suggestive of a "rebuttably conclusive" presumption (the result of labeling what is actually a legislative enactment of a positive rule of substantive law as a "conclusive presumption" dependent on proof of evidentiary facts) the court stated:

For clarity in the administration of our workers' compensation law, until the General Assembly provides otherwise, as a result of this decision subparagraphs (a) and (b) of Code § 114-414 should be read together, as follows: "The following persons shall be conclusively presumed to be the next of kin wholly dependent for support upon the deceased employee: (a,b) A surviving spouse upon a deceased spouse if the survivor was wholly or partially dependent for support upon the deceased or was in need of such support."

246 Ga. at 273, 271 S.E.2d at 182.

43. 603 S.W.2d at 718 (Tenn. 1980). The questions presented in *Davis* were (1) whether widowers were entitled to the same "conclusive presumption" of dependency upon their deceased spouses as were widows, and (2) whether widowers were restricted to 20% of the weekly wage of their deceased spouses as provided by statute, as compared with 50% of the average weekly wage of deceased husbands which the statute granted to widows.

dency for widows. The widower-claimants' wives had been killed in the armed robbery of the bank in which they worked. Not only was the question of entitlement couched in discriminatory terms, but the amount of the death benefit was substantially less for a surviving dependent husband than for a widow. Applying *Wengler*, the Supreme Court of Tennessee invalidated the statute. After the case arose, the Tennessee legislature revised the statute by extending the conclusive presumption, as well as the amount of widows' benefits, to widowers.

Although more jurisdictions have chosen to extend the conclusive presumption rather than to invalidate it, the approach which appears to be more soundly based on precepts of equal protection is that followed by California and Georgia, which requires a showing of dependency or need by either spouse rather than applying a blanket presumption.

Workers' compensation statutes are characteristically remedial in nature and are, therefore, to be liberally construed in favor of the claimant. Placed in this perspective, it is apparent that a burden on a survivor-claimant to show some need would be relatively easy to meet. At the same time, this would preserve the legislature's intent to provide for needy dependents of work-related casualties. Further, at least under the Georgia rationale, once some showing of dependency or need has been made, whether partial or total, the survivor-claimant will be deemed totally dependent for purposes of recovery.

The point to remember is that while the legislative intent may be to provide for needy spouses, it cannot be stated that the intent is to establish state life insurance programs subsidized by employers and workers' compensation insurance carriers irrespective of need. The threshold issue of entitlement to dependency benefits should not hinge solely on marital status per se, any more than it should be predicated upon gender-based discrimination. Rather, entitlement to such benefits should flow from a demonstrated need, however slight, shown by the deceased worker's surviving spouse.

