

1980

# Utah State Department of Social Services v. Salvador P. Toscano, Sr : Appellant'S Newly Uncovered Cases

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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UTAH STATE DEPARTMENT OF  
SOCIAL SERVICES,

Plaintiff-Respondent,

vs.

SALVADOR P. TOSCANO, SR.,

Defendant-Appellant.

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Case No. 16777

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APPELLANT'S NEWLY UNCOVERED CASES

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Appeal from the Judgment of the Second  
Judicial District Court of Weber County,  
the Honorable Calvin Gould, Judge Pre-  
siding.

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For Appellant, additional authorities to support the interpretation of home "occupancy" as including home ownership while travelling away from the home, intending to return to it, to the exclusion of others' use and occupancy, to be inserted in the Reply Brief of Appellant at p.5, line 3:

Occupancy does not necessarily include residence, but is having or holding possession.  
Twiggs v. State Board of Land Comm'rs, 27 Utah 241, 75 P. 729, 731 (1904).

Where the owner left his dwelling closed up and went to a distant state, leaving his household goods stored in one room, the house was occupied, actual corporeal presence being unnecessary for occupancy.  
Davidson v. State, 86 Tex.Cr.R. 243, 216 S.W. 624, 625 (1919).

Occupancy may be by means other than actual residence.  
Walters v. People, 21 Ill. 178 (1859).

Occupancy is holding possession and does not necessarily include residence.  
Kornhauser v. National Surety Co., 114 Ohio St. 24, 150 N.E. 921, 923 (1926).

Constant physical presence is not a sine qua non to occupancy.  
Lang v. Weaver, 156 N.Y.S.2d 632, 634, 7 Misc.2d 533 (1956).

Occupancy is retaining property in one's power or control.  
Nathan v. Diersson, 146 C. 63, 79 P. 739, 740 (1905).  
Iler v. Miller, 78 Neb. 675, 111 N.W. 589, 590 (1907).

Occupancy of a dwelling house implies use of a house as a dwelling place, but it does not follow that the presence of the occupant in the building should be continuous and uninterrupted; the necessity of absences on business is recognized.  
Shackelton v. Sun Fire Office, 55 Mich. 288, 21 N.W. 343, 344 (1884).

A dwelling house, to be in a state of occupancy, need not have absolute, continuous, uninterrupted presence, but must be the place of usual return; temporary absence, from accident or for business purposes, cannot make a dwelling unoccupied.  
Morgan v. Illinois Ins. Co., 130 Mich. 427, 90 N.W. 40, 41 (1902).

Occupancy implies use of a house as a dwelling place not absolutely continuous, but as a place of usual return.  
Harper v. Stoddard County Mut. Fire Ins. Co., 51 S.W.2d 534, 536 (1932).

Occupancy implies use by some person according to the purpose for which it was designed and does not imply that someone shall remain in a building without interruption for a length of time.

Southern Nat. Ins. Co. v. Cobb, 180 S.W. 155, 156 (1915).  
Washington Fire Ins. Co. v. Cobb, 163 S.W. 608, 612 (1914).

Occupancy refers to possession and the exclusion of everyone else from possession and does not necessarily include residence.  
Paulson v. Rogis, 247 Iowa 893, 77 N.W.2d 33, 35 (1956).

To "occupy" means to possess.  
People v. Ines, 90 Cal.App.2d 495, 203 P.2d 540, 542 (1949).  
Freygang v. Borough of Verona, 146 N.J.Super. 310, 369 A.2d 959, 963 (1977).  
Paulson, supra.  
Kinneer v. Southwestern Mut. Fire Ass'n, 118 Pa.Super. 312, 179 A. 800 (1935).

To "occupy" means to hold in possession.  
Missionary Soc. of M.E. Church v. Dalles City, 107 U.S. 336 (1882).  
Blanc v. People ex rel. Wilcoxson, 94 Colo. 10, 28 P.2d 801, 804 (1933).  
Paulson, supra.  
Grillo v. State, 209 Md. 154, 120 A.2d 384, 388 (1956).  
U.S. v. Burleson, 127 F.Supp. 400, 404 (E.D.Tenn. 1954).

To "occupy" means to hold or keep possession of.  
Herman v. Katz, 101 Tenn., 47 S.W. 86, 87 (1897).

To "occupy" means to keep in possession.  
Thieme v. Niagara F. Ins. Co., 91 N.Y.S. 499, 501, 100 App.Div. 278 (1905).

To "occupy" means to hold or keep for use.  
Missionary Soc., supra.  
People v. Ines, supra.  
Blanc, supra.  
Grillo, supra.  
J. & S. Operating Corp. v. Swine Appliance Co., 85 N.Y.S.2d 164, 168, 192 Misc. 173 (1948).  
Thieme, supra.  
U.S. v. Burleson, supra.

To "occupy" does not mean to be personally present, but only to use as a residence, though the family is temporarily absent.  
Handy v. State, 46 Tex.Cr.R. 40, 80 S.W. 526 (1904).

DATED this 10<sup>th</sup> day of November, 1980.

Respectfully submitted,

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By LMM Billings  
LUCY BILLINGS

CERTIFICATE OF MAILING

I DO HEREBY CERTIFY that a true and correct copy of the foregoing Appellant's Newly Uncovered Cases was mailed, postage prepaid, to Stephen G. Schwendiman, Esq., Assistant Attorney General, 150 West North Temple, Salt Lake City, Utah 84103, this 10<sup>th</sup> day of November, 1980.

LMM Billings