

1953

# George S. Ringwood, harold T. Ringwood et al v. Lottie S. Bradford : Plaintiffs' Brief

Utah Supreme Court

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Moreton, Christensen & Christensen; Attorneys for Plaintiffs;

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**IN THE SUPREME COURT  
of the  
STATE OF UTAH**

---

LORETTA EARLEY, for herself and  
on behalf of JoANNE L. McIN-  
TYRE, SHARON McINTYRE and  
CAROL McINTYRE, minor chil-  
dren of JACK J. McINTYRE,  
DECEASED,

*Plaintiffs,*

vs.

INDUSTRIAL COMMISSION OF  
UTAH, T. K. PYM, doing business  
as CERTIFIED DETECTIVE  
AGENCY and CONTINENTAL  
CASUALTY COMPANY,

*Defendants.*

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**PLAINTIFFS' BRIEF**

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**MORETON, CHRISTENSEN &  
CHRISTENSEN,**

**FILED**

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AUG 27 1983

433 Judge Building,  
Salt Lake City, Utah.

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# IN THE SUPREME COURT of the STATE OF UTAH

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LORETTA EARLEY, for herself  
and on behalf of JoANNE L. Mc-  
INTYRE, SHARON McINTYRE and  
CAROL McINTYRE, minor children  
of JACK J. McINTYRE, DE-  
CEASED,

*Plaintiffs,*

— vs. —

INDUSTRIAL COMMISSION OF  
UTAH, T. K. PYM, doing business  
as CERTIFIED DETECTIVE  
AGENCY and CONTINENTAL  
CASUALTY COMPANY,

*Defendants.*

Case No. 8074

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## DEFENDANTS' BRIEF

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### STATEMENT OF FACTS

On September 24, 1951, a person signing himself "J. McIntyre" applied for and obtained employment with the defendant T. K. Pym, doing business as Certified Detective Agency. In his application for employment he listed himself as single, divorced, with no children, and

stated that his father and mother were deceased, and that he had no brother or sister (R. 50). That person was killed in the course of his employment September 29, 1951, four days later (R. 21, 22).

The applicant and plaintiff, Loretta Earley, was married to Jack James McIntyre February 9, 1937 in Reno, Nevada (R. 59), and as issue of this marriage there were born three children, JoAnne, born August 28, 1943, Sharon, born March 17, 1947, and Carol, born February 9, 1948, all at Napa, California (R. 56-58, 33). The correct name of the man married by Mrs. Earley as Jack James McIntyre was Jesse Eugene Connover (R. 37). Why he went under the assumed name does not appear from the record.

Mrs. Earley claims that J. McIntyre employed by T. K. Pym and her husband were one and the same person. The only information she has that her husband is dead is that some ashes from a supposed cremation of a body were sent to Napa and her husband's father told her that they were the ashes of her husband and that he was dead, but the death certificate supposed to be the certificate for the cremated body states that the date of death of Jack James McIntyre was September 9, 1951 (R. 39, 63, 46 and 47). Various photographs were offered and identified by Mrs. Earley as pictures of her husband and she also stated that the signature on the application for employment was her husband's signature, and that the reason it is different than the one on the application for

her marriage license in Reno in 1937 (R. 61) is because he was in a hurry when he signed the application for employment (R. 43). How she knows this does not appear from the record.

For the last ten years of her marriage to McIntyre Mrs. Earley lived with him in Napa, California (R. 43). On May 1, 1951, McIntyre left her and she never saw him again. A month later or on June 1, 1951, her attorney in Napa, California, filed an action seeking a divorce from McIntyre on her behalf on the grounds of desertion (R. 39, 40). She never heard from him again except once from Reno when he wrote asking her to send him some mechanics and carpenter tools, and instead of sending the tools she wrote him concerning the divorce and never received an answer. After May 1, 1951 when McIntyre left home he never sent any support for her or the children (R. 27, 34). Mrs. Earley is a trained psychiatric technician and employed in the County Hospital in Napa, California from December, 1950 continuously, and was still so employed at the time of the hearing before the Utah Industrial Commission (R. 35-38). She started in at a salary of \$180.00 a month and at the time of the hearing she was making \$220.00 a month. She and McIntyre together supported the family after her employment and until he left home, and after he left home and until her remarriage to Mr. Earley, she supported herself and the children, and since her marriage to Earley she and Earley are supporting herself and the children (R. 37-39).

McIntyre's mother asserted that before the remains were sent to Napa the wife remarried. Mrs. Earley was not positive of this because she did not remember the burial date (R. 37), but she did marry Earley October 13, 1951 in Napa, California, about two weeks after September 29 when she claims her husband was killed (R. 36, 62).

So far as the record discloses she made no effort to contact her husband, made no demands upon him for support for herself or children, and adequately supported the children and herself. There is no evidence whatever that either she or the children received, or expected to receive, or needed to receive any financial help or assistance from her absent husband. So far as is disclosed by the record, Mrs. Earley adequately supported herself and the children from May 1, 1951 until her marriage to Earley, and since that time she and Earley are supporting the children and herself. McIntyre, her former husband, just disappeared from her life, and so far as appears from the record she was content to allow him to do so, and never sought any support from him, even in her attempted divorce case.

## ARGUMENT

Before the Industrial Commission defendants, Pym and Continental Casualty Company, took the position that the person employed by Pym was not the husband or father of the applicants, and that in any event they were not his dependents at the time of his death.

The record is not very satisfactory. The death certificate shows a death September 9, 1951, fifteen (15) days before the employee went to work for us. The applicant, Loretta Earley, doesn't even know that her husband is dead except that she received some of his personal effects and some ashes, supported by the death certificate stating death occurred September 9, which were buried at Napa, California, presumably as those of her husband. It does not appear how the deceased's father learned of his death or how anyone knew that the person killed and cremated in South Dakota was or could be identified as Loretta Earley's former husband. Certainly no one learned of it through us because we didn't know that our employee was married or had a father or mother or any children. He was hired by us as a single man without any dependents or relatives of any kind. He was with another of our employees at the time of his accident and so far as we know this employee knows no more about him than we did. His widow says she had no knowledge of his whereabouts and yet promptly the deceased's ashes are sent to her at Napa, California, when neither we nor his associate at the time of his death knew anything about his Napa background.

Likewise, the record is silent as to why McIntyre left home apparently for no reason after fifteen (15) years of allegedly happy married life. His wife immediately begins divorce upon the ground of desertion, not non-support, makes no effort to contact him, makes no demand upon him for support for herself or her children,



apparently neither seeking nor desiring such support, and hardly is the deceased cold in his grave, and probably even before his ashes are received at Napa, she marries a man employed at the place where she is working and has been working for five (5) months prior to the departure of the deceased from his home. The question naturally arises as to whether or not Mr. Earley was the cause of McIntyre's leaving home, and the reason why Mrs. McIntyre was content to let him go and sought no support from him. In any event, by bringing her divorce action one month after McIntyre left home and by remarrying probably even before his supposed ashes reached Napa, she clearly indicated that she was through with McIntyre and that Earley had replaced him in the lives of herself and her children. The record is clear and without dispute that neither she nor the children depended on McIntyre or expected anything from him after May 1, 1951. The record is also clear that prior to May 1, 1951, and at least from the preceding December, she and the children were at least partially supported by her on earnings from the Napa County Hospital.

In this state of the record, the Industrial Commission found that our deceased employee was the former husband of Loretta Earley and the father of the minor applicants. How it could do so with the death certificate reading September 9, 1951, fifteen (15) days prior to the employment of McIntyre by us is unexplained. The

Commission also found that there was no actual dependency upon McIntyre by either Mrs. Earley or her children.

Assuming that the law of California is the same as the law in Utah as to the obligation for support, we contend that the Industrial Commission is right, and that applicants were not dependents of our employee at any time during his employment by us.

In September of 1951, *Section 42-1-67, U. C. A. 1943*, was in effect. It is identical with the present *Section 35-1-71 UCA, 1953*, and provides as follows:

“The following persons shall be presumed to be wholly dependent for support upon a deceased employee:

(1) A wife upon a husband with whom she lives at the time of his death.

(2) Children under the age of eighteen years or over such age, if physically or mentally incapacitated, upon the parent, with whom they are living at the time of the death of such parent, or who is legally bound for their support.

“In all other cases, the question of dependency, in whole or in part, shall be determined in accordance with the facts in each particular case existing at the time of the injury resulting in the death of such employee, but no person shall be considered as dependent unless he is a member of the family of the deceased employee, or bears to him the relation of husband or wife, lineal descendant, ancestor, or brother or sister. The word

‘child’ as used in this title shall include a posthumous child, and a child legally adopted prior to the injury. Half brothers and half sisters shall be included in the words ‘brother or sister’ as above used.”

Plaintiffs apparently make the contention that Subdivision (1) is not exclusive, and that a wife who is not living with her husband at the time of his death may be shown to be a dependent, but that paragraph (2) is exclusive, and that children are dependents of the parent who is legally bound for their support regardless of the facts. As we read the statute and under the interpretations given it by this court, neither (1) nor (2) is exclusive or conclusive.

A presumption either of fact or law, is always rebuttable. *Buhler v. Maddison*, 105 U. 39, 140 P. 2d, 933, 109 U. 245, 166 P. 2d, 205. *Chamberlain v. Larsen*, 83 Utah 420, 29 P. (2) 355. By using the word “presumed” in the statute, without the word “conclusive,” the legislature merely made it unnecessary for an applicant to offer proof as to children under 18 years of age, except the fact that the parent legally bound for their support was killed or injured by accident arising out of or in the course of his employment. That fact alone is sufficient in the absence of any other evidence to allow a recovery. However, the presumption, as in the presumption of sanity or innocence or title to real estate, whether it be one of law or fact, is always rebuttable.

In the case of *People v. Fitzgerald*, 58 P. 2d 718, the California Court points out that under the code of civil procedure a presumption not declared by law to be conclusive may be controverted by other evidence. See also *Honrath v. New York L. Ins. Co.*, 275 N.W. 258 (N. D.) So far as we know the law is uniform.

Plaintiffs in their Brief cite an Idaho Case, *Larson v. Independent School District*, 22 P. 2d 299, which illustrates the significance of the distinction between our statute and Idaho. The Idaho Statute says: "The following persons and they only shall be deemed dependents." No other persons are dependents, and by the use of the word "deemed" instead of "presumed", the Idaho Legislature created a conclusive presumption. To this effect is the California case of *Irwin v. Pickwick Stages System*, 25 P. 2d, 998, where the California Court said that a conclusive presumption is created by the words "shall be deemed".

Our Legislature did not use the word "deemed", but used the word "presumed", so that while the Idaho Statute means conclusively presumed, our statute permits the presumption to be rebutted.

We have found no decision in this court holding or even implying that the presumption of dependency is conclusive and not rebuttable.

In the case of *Campton v. Industrial Commission of Utah*, 106 U. 571, 151 P. 2d 189, cited by plaintiffs, Judge Larson did say in his concurring opinion that he thought that these presumptions of dependency "are not rebuttable, and the defense cannot be made that the husband or father did not in fact support them and thus escape the statutory payments." He, however, was the only Judge who even intimated that the presumption was not rebuttable. The decision itself in effect rebuts the presumption. In that case the father of the minor children was alive. No effort was made to require him to support them, although he was legally bound to do so. The children were members of the family of a man not their father with whom their mother was living at the time he was killed. Contrary to the claim of the applicants in this case that Subdivision (2) of the statute is exclusive, this court held that the children might recover under the last paragraph of the statute as members of the family of Campton regardless of the fact that they had living a father who was legally bound for their support. So actually the presumption was rebutted, and the way was open for a recovery against one not the father of the dependents. In its effect, that case is squarely against each of the contentions of the plaintiffs here. The presumption was rebutted and a recovery was allowed against someone other than the person legally bound for the support of the children.

We have no quarrel with any of the cases cited by the plaintiffs. Those from other states are controlled by their statutes and decisions. We have indicated in the case of Idaho there is a difference from our own. In addition to the Campton case, the plaintiff cites

*Diaz v. Industrial Commission of Utah*, 80 U. 77, 13 P. 2d, 307;

*Hancock v. Industrial Comm.* (Utah) 58 Utah 192, 198 Pac. 169;

*Jones v. Louisville Gas & Elec. Co.* (Ky.) 209 Ky. 643, 273, S.W. 494;

*Larson v. Independent School District* (Idaho) 22 Pac. (2d) 299;

*Llewelyn v. Industrial Comm.* (Utah) 202 Pac. (2d) 160;

*McGarry v. Industrial Comm.* (Utah) 53 Ut. 81, 222 Pac. 592;

*McGarry v. Industrial Comm.* (Utah) 64 Ut. 592, 232 Pac. 1090;

*Nordmark v. Indian Queen Hotel* (Pa.) 104 Pa. Super. 139, 159 A. 200;

*Utah Fuel Co. v. Industrial Comm.*, 80 Ut. 301, 15 Pac. (2d) 297;

*Utah Galena Corp. v. Industrial Comm.* (Utah) 78 Ut. 495, 5 Pac. (2d) 242;

*Wilson v. Hill*, (Del. Super) 71 A. 2d 425.

The Diaz case has no application here. As pointed out by Judge Wolfe in *Llewelyn v. Industrial Commission*, supra, cited by plaintiffs:

“The case of *Diaz et al. v. Industrial Commission*, 80 Utah 77, 13 P. 2d 307, is not in point. While there was ample evidence of dependency, even though the husband and wife lived apart because of conditions other than any revealed fault of either spouse, the case was decided on the ground that the husband’s death by pneumonia was not due to any injury received in his employment. Therefore, the discussion by Mr. Justice Straup on the question as to whether under the facts there was dependency was dicta.”

In the *Llewelyn* case all this court did was to say that an award to a wife for separate maintenance indicated dependency even though the husband had not paid the award. No such situation is present in the case at bar.

We have no objection to the definition of “dependency” from the case of *Hancock v. Industrial Commission*, *supra*. However this court in another case cited by plaintiffs, *Utah Galena Corporation v. Industrial Commission of Utah*, *supra*, quotes from Honnold, *Workmen’s Compensation*, a more complete definition as follows:

“It may be said in general terms that a ‘dependent’ is one who looks to another for support, one dependent upon another for the ordinary necessities of life for a person of his class and position,” \* \* \*

“It follows that dependency does not depend on whether the alleged dependents could support themselves without decedent’s earnings, or so re-



duce their expenses so that they would be supported independent of his earnings, but on whether they were in fact supported in whole or in part by such earnings, under circumstances indicating an intent on the part of the deceased to furnish such support."

The same case quoted from 28 *R.C.L.* pages 770 and 771 as follows :

"As a very general proposition it may be said that a dependent is one who looked to or relied on the decedent for support and maintenance. Reliance must have been placed upon the deceased employee to provide the applicant for compensation, in some measure or to some extent, with his or her future living expenses. \* \* \* The purpose of the statute is to provide the workman's dependent in future with something in substitution for what has been lost by the workman's death, and, consequently, to establish dependency the applicant for compensation must show that he or she had reasonable grounds to anticipate future support from the decedent. This reasonable expectation of continuing or future support and maintenance seems to be the true criterion as to who are dependents."

In the Galena case there was actual proof of dependency on the part of the minors sufficient to sustain an award in their favor.

The two *McGarry* cases both denied compensation. The first one because there were no facts showing dependency and the second because of procedural matters.



In the case at bar, the presumption of dependency is eliminated by the testimony of Mrs. Earley herself. Not only was there no reasonable expectation of continuing or future support, but her evidence shows that neither she nor the children lost anything by reason of the death of McIntyre. There is no evidence that they had any reasonable ground to expect future support. In fact, the evidence is all the other way; that so far as they were concerned he had passed out of their lives. Nor would it serve any purpose of the compensation law to make an award against us in this case. None of the applicants lost anything by reason of the employment of McIntyre by us. We employed him as a single man. At that time he was completely out of touch with his family, furnishing them no support, and they were expecting none from him. Apparently another (Earley) had taken his place. The expeditiousness with which the former Mrs. McIntyre married Earley indicates a close prior association. McIntyre was only employed by us for four days. We didn't take anything away from his wife or children. Any value he was to them was lost before he came to work for us.

In the case of *Utah Fuel Company v. Industrial Commission*, supra, compensation was denied. The court through Judge Folland uses this language:

“There is no proof that deceased had contributed anything to the support of the minors since the separation from his wife, and there is no competent evidence in the record as to the financial condition of the minors or their mother nor how or by whom they had been supported.”

In the case at bar there is competent evidence in the record that neither the wife nor the children relied upon the deceased for support at the time of his death, and there is evidence in the record as to how they were supported. So far as the record shows all of them were amply supported without any contributions from the deceased.

Judge Folland further in the opinion says:

“There is, however, in evidence not anything shown on which to rest a finding that this right (of support) is of practical value or that it is reasonably probable that the obligation of the father would be fulfilled. *The mere fact that the father is legally and morally bound to support his children does not necessarily establish that they were partly or wholly dependent on him.*” (Italics added)

After that case our statute was amended so that proof of the relationship alone would eliminate the necessity of the applicant supplying further proof to make a prima facie case, but when the applicant herself establishes that there is no dependency in fact, those facts overcome the presumption and there is no course other than to deny compensation.

The plaintiffs assert that even if our statute is not conclusive the record compels a finding of dependency both for the wife and the children. As we have already pointed out to establish dependency, absent the presumption, there must be a reasonable expectation of support

either upon legal or moral grounds or from past experience. There is not a word of evidence in this record that either the wife or her children ever looked to the deceased for future support or expected any from him. He had passed completely out of their lives until Mrs. Earley supposed she saw an opportunity to secure compensation on account of the death of the deceased. She is looking to herself and Earley for support of herself and the children and she neither sought nor expected any support from McIntyre.

The very fact that Mrs. Earley and McIntyre had lived together for 15 years and then without any given reason he picks up and leaves, she immediately files for a divorce on the ground of desertion, and most expeditiously after his supposed death enters into a marriage with Earley with whom she has been employed for a period before the departure of her husband, and that she makes no effort whatever to hold her husband to his legal responsibilities, at least indicates a reason for her hasty remarriage and her failure to assert her rights against McIntyre.

Upon the record in this case there could not even have been an award for partial dependency. There is no evidence at all that the children or the wife were expecting or needed anything from McIntyre. If there could be no award for partial dependency, of course, there could be no award for total dependency.

## CONCLUSION

It appears to us that even if it can be asserted that our employee was the husband of Mrs. Earley and the father of her children, in spite of the unsatisfactory record and the unexplained death certificate, that the record also shows beyond a doubt that neither Mrs. Earley nor her children were actual or legal dependents of our employee at the time of his employment or at the time of his death. The Industrial Commission should be sustained.

Respectfully submitted,

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