

1981

Government Employees Insurance Company v. William Charles Dennis v. James C. Holder, Et Al. : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

GOVERNMENT EMPLOYEES INSURANCE
COMPANY,

Plaintiff and Appellant,

vs.

WILLIAM CHARLES DENNIS,

Defendant and Respondent,

vs.

JAMES C. HOLDER, BARBARA ANN HOLDER,
and JAMES C. HOLDER, as Guardian Ad
Litem for JEFFERY HOLDER, WENDI
HOLDER, and JUSTIN HOLDER, minors,

Defendants-In-Intervention
and Respondents.

Case No. 17267

BRIEF OF RESPONDENT

From a Judgment of the Third District Court
In and For Salt Lake County
The Honorable Jay E. Banks, Presiding

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Case No. 17267

BRIEF OF RESPONDENT

NATURE OF THE CASE

This is a Declaratory Relief action, filed by Plaintiff-Appellant insurance company, Government Employees Insurance Company (GEICO), seeking a determination as to whether or not William Charles Dennis was a resident of his father's household at the time of an accident, which occurred on February 25, 1978, and hence, an additional insured under the terms of a policy of liability insurance issued to his father. Respondent, Holders, were seriously injured in said accident and hence, intervened in this action.

DISPOSITION IN LOWER COURT

On May 27-28, 1980, a trial was held before the Honorable Jay E. Banks. After the parties rested, the Court, in chambers, stated that only one reasonable inference could be drawn from the evidence and that was that William Charles Dennis was a resident of his father's household at the time of the accident and pursuant thereto, the Court stated that it would grant Respondents' Holders' Motion For A

Directed Verdict, but would give Appellant until the following morning to come up with some new case law. However, the next morning, before Appellant's counsel presented any case law, the Court advised counsel that it had decided to submit the case to the jury. The Court instructed the jury as follows concerning the meaning of the term "resident of the same household" and the evidence necessary for the jury to determine that William Charles Dennis was a "resident of the same household" as the named insured at the time of the accident:

"Instruction No. 14.

In determining whether Defendant, William Charles Dennis, was or was not 'a resident of his father's household' as of the date of the accident, you should use the ordinary meaning of the word 'resident'. In other words, the word 'resident' is to be understood in its plain, ordinary, and common sense usage. The test is what a reasonable person would understand it to mean.

A 'resident of the same household' within an automobile policy extending coverage on a non-owned automobile to any relative who is a resident of the same household as the named insured, means one other than a temporary or transient visitor, who lives together with others in the same house for a period of some duration, although he may not intend to remain there permanently.

Synonyms of the word 'resident' are 'live, abide, sojourn, stay and lodge'.

The intended duration must be determined after a thorough examination of all the relevant facts and circumstances surrounding the relationship. A persons intention at the time in question may be express or implied, or both.

All evidence introduced in this trial, together with the reasonable inferences that may be drawn therefrom, should be considered by you in answering the question submitted to you in the Special Verdict." (Emphasis added).

The above Instruction correctly stated the law with the exception of the second to last paragraph, which incorrectly stated the law by making "intention" an issue for the jury. Based on the testimony of William Charles Dennis that his intentions were to eventually move out of his father's house and return to Florida, although the subject had never been discussed, the jury found that William Charles Dennis was not a resident of his father's household at the time of the accident, February 25, 1978, notwithstanding the uncontroverted fact that William Charles Dennis had lived with his father for three months prior to the

accident and had even got a job during the last month prior to the accident and still continued to live with his father. Pursuant thereto, the Court entered Judgment in favor of the Plaintiff-Appellant insurance company.

Respondent, Holders, filed a Motion For Judgment Notwithstanding The Verdict, which correctly stated the law that in a case such as the one at bar, where a child is living with the named insured parent at the time of the accident and thus, not living apart in a separate household at the time of the accident, "intention" is not relevant or material to a determination of whether the child is a resident of his parent's household at the time of the accident. The Motion was heard on June 16, 1980, and the Court granted the Respondents' Motion For Judgment Notwithstanding The Verdict on July 14, 1980, and entered Judgment in favor of the Respondents to the effect that as a matter of law, the only reasonable inference to be drawn from the uncontroverted facts is that William Charles Dennis was a resident of his father's household at the time of the accident, February 25, 1978, and hence, covered as an additional insured under his father's policy of liability insurance.

RELIEF SOUGHT ON APPEAL

Respondent, Holders, the injured parties in the accident of February 25, 1978, seek to have the Utah Supreme Court affirm the decision of the lower Court.

In a very recent case, Kilpack v. Wignall, 604 P2d 462 (Utah 11/19/79) in which Respondent, Holders' present counsel represented the Defendant-Respondent, Wignalls, the Utah Supreme Court reversed a jury verdict, finding a farmer not to be negligent in a farm accident which severely injured Plaintiff, and held, as a matter of law, that only one reasonable inference could be drawn from the uncontroverted facts and that was that the farmer was negligent. The opinion, written by Justice Stewart, stated the law as follows:

"In determining whether the trial Court properly denied Plaintiff's Motion For Judgment Notwithstanding The Verdict On For A Jury Trial, the court was guided by the following

standards set out in McCloud v. Baum, Utah, 569 P.2d 1125, 1127 (1977):

'In reviewing the trial Court's rulings pertaining to Motions For A Directed Verdict Or Judgment N.O.V., this Court reviews the evidence in the light most favorable to the non-moving party and to afford him the benefit of all inferences which the evidence fairly supports. If reasonable persons could reach differing conclusions on the issue in controversy, a jury question exists and the Motion should be denied.'

Also see Koer v. Mayfair Markets, 19 Utah 2d 339, 431 P.2d 566 (1967)."

After stating that "there is no substantial dispute in the evidence", as in the case at bar, the Utah Supreme Court concluded as follows:

"In Stewart v. Gilmore, 323 F.2d 389, 391 (5th Cir. 1963), the Court stated: 'When the ends of justice require it, a . . . trial Judge has the power and the duty to set aside a jury's verdict, to grant a new trial, or to grant a Judgment Notwithstanding The Verdict. The Appellate Court has a corresponding responsibility.' See also Weeks v. Latter-day Saints Hospital, 418 F.2d 1035 (10th Cir. 1969). Accordingly, our duty requires that we set aside the verdict and the Judgment of no cause of action and direct that Judgment Notwithstanding The Verdict be entered for Plaintiffs on the issue of liability."

In the case at bar, reviewing all "the evidence in the light most favorable to the non-moving party", the Appellant insurance company, and affording it "the benefit of all inferences which the evidence fairly supports", which is relevant and material to a determination of the issue at hand, Respondent, Holders, respectfully submit that, as a matter of law, there is only one reasonable inference that can be drawn from the uncontroverted facts and that is that William Charles Dennis was a resident of his father's household at the time of the accident: February 25, 1978. Based thereon, since "the trial Judge has the power and the duty to set aside the jury's verdict . . ." and "to grant Judgment Notwithstanding The Verdict", the trial Judge was correct in so doing in this case and because "the Appellate Court has a corresponding responsibility", the decision of the trial Court should be affirmed by the Utah Supreme Court.

UNCONTROVERTED DISPOSITIVE FACTS

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The following facts are uncontroverted. GEICO does not dispute these

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facts. (See Appellant's Brief, p. 19).

1. William Charles Dennis lived at his father's home from the latter part of November, 1977, up to and including the day of the accident, February 25, 1978, a period of about three months. (Tr. 465). (On Thanksgiving Day, he left Florida to return home, Tr. 453).

2. During the month prior to and at the time of the accident, he was working for the Bangerter Trucking Company of Centerville, Utah, making about \$600.00 per month as a truck driver, but still living with his father. (Tr. 461 and Appellant's Brief, p. 19).

3. At the time he applied for the job with the trucking company, he used his father's address on the application. (Tr. 466 and Appellant's Brief, p. 19).

4. At the time of the accident, William Charles Dennis gave his address on the police report as that of his father's. (Tr. 468 and Appellant's Brief, p. 19).

5. About one month prior to the accident of February 25, 1978, in early January, 1978, William Charles Dennis was arrested, and he gave to the investigating officer, the address of his father, where he was living at the time, as his address. (Tr. 468). (Appellant did not cite paragraphs 5, 6, and 7 in its Brief).

6. About two months prior to the accident of February 25, 1978, William Charles Dennis moved with his father, mother, and sisters from one residence address (3062 South 1475 West in Ogden, Utah), to the residence address he was living at with his father, mother, and sisters (2518 Pioneer Road, Slaterville, Utah), on the day of the accident, February 25, 1978. (Tr. 468 and 503).

7. During the first three-to-four weeks (Tr. 460 and 508) he was living with his father, he was sick, because of amphetamine addiction. During the second month, he was home living with his father, he worked for Parkinson Dairy, as a dairy-hand. (Tr. 460 and 466). After the close of evidence, Appellant's case was reopened and the parties' stipulated that William Charles Dennis would testify that he didn't

recall working for Parkinson Dairy during this particular three month period of time before the accident. (Tr. 522).

8. William Charles Dennis brought with him from Florida, some personal items, a suitcase, an army foot locker, his car, his dog, and some gifts, including some vases, macramés, and a hand-made stool (Tr. 454, 459, and 503); he ate most of his meals at his father's residence, and he slept there. He had his own room at the house. (Tr. 467 and Appellant's Brief, p. 19).

9. His parents provided him with monetary assistance, including money for toilet articles and other needs and helped tune-up his car, while he was residing with them. In addition, he did not pay any rent while he lived with his parents. (Tr. 467, 502, and Appellant's Brief, p. 19).

10. During the three months that he was living with his father, the question of Mr. Dennis' intentions as to how long he was going to be there and when, if ever, he was going back to Florida, never came up and the subject was never discussed. (Tr. 501 and Appellant's Brief, p. 19).

11. During the three month period of time prior to the accident, when William Charles Dennis was living with his father, he was not looking for another place to live, and he was not living at or maintaining or paying for another or separate residence. (Tr. 468).

12. William Charles Dennis' prior residence before coming to Utah in November, 1977, to live with his father, was an apartment in Florida where he had lived with a female roommate for one month, but he could not even recall the address of the apartment or the roommate's name. (Tr. 450-451 and Appellant's Brief, p. 19). He paid one-half the rent for that month, October, 1977, but he didn't pay any rent in Florida for November or December of 1979, or January or February of 1978. (Tr. 452 and 477). During the three months he resided with his father in Utah, prior to the accident on February 25, 1978, William Charles Dennis made no attempt to locate the address of his prior residence, the apartment where he had stayed in Florida where he had most of his possessions (Tr. 468-471).

STATEMENT OF THE APPLICABLE LAW TO THE UNCONTROVERTED
DISPOSITIVE FACTS

In a recent 1979 Annotation at 93 ALR 3d 420-465, entitled 'Who Is 'Resident Or Member' Of Same 'Household' Or 'Family' As Named Insured, Within Liability Insurance Provision Defining Additional Insureds', the author, after reviewing all of the decided cases on this subject, concludes that where a child is living with his named insured parent at the time in question, as in the case at bar, all of the decided cases have found that the child was a resident of his parents' household at the time in question. There is not one case to the contrary. Thus, in the case at bar, as a matter of law, William Charles Dennis, 'who had lived with his father for three months prior to and including the day of the accident', was a resident of his father's household at the time of the accident.

In addition, the author concludes that the 'Intentions' of the alleged insured 'may be an important consideration' only where the child, at the time in question, "is living apart from the named insured" in a separate household. If the child is not living apart in a separate household at the time in question, the parties' "intentions" are not material or relevant. Thus, in the case at bar, as a matter of law, since William Charles Dennis was not living apart in a separate household at the time of the accident, his "intentions" as to moving from his father's residence and returning to Florida are not material or relevant and it was error for the trial Court to have made his "intentions" an issue for the jury to resolve.

Finally, the author recognizes that the Courts have determined that the term "resident" is ambiguous and as a result, in cases where an alleged insured is attempting to be included as an insured under the policy, the term "resident" should be interpreted liberally in favor of coverage, and further, that in exclusion cases where the insurance company seeks to exclude an alleged insured from coverage if he is found to be a resident of the named insured's household, the term "resident" should be strictly or narrowly interpreted. Although the case at bar is an inclusion case, where a liberal interpretation should be applied to

the term "resident", the Appellant, GEICO, cites and relies on four living apart inclusion cases and three exclusion cases in an attempt to create a jury issue as to the alleged insured's intentions and to have the Court apply a strict or narrow interpretation to the term "resident". Because the case at bar is a living with inclusion case, where the alleged relative insured was living with the named insured at the time of the accident, the living apart inclusion cases and the exclusion cases where the alleged insured's "intentions" may be relevant and material and create a jury issue, are not relevant or applicable to the case at bar.

OTHER FACTS WHICH ARE NOT RELEVANT OR MATERIAL

The other facts which are cited by Appellant insurance company in its Brief on pages 16-18, relate to the "intentions" of William Charles Dennis and his father concerning how long William Charles Dennis intended to stay with his father (Appellant's Brief, p. 17(2) and (3)) and the "intentions" of William Charles Dennis with respect to returning to Florida. (Appellant's Brief, page 18(11) and (12)). Notwithstanding what the "intentions" of William Charles Dennis and his father may have been as to how long he planned to live with his father or as to his desire to return to Florida, subjects which the Appellant admits never came up and were never discussed (Tr. 501 and Appellant's Brief, p. 19), in a case such as the one at bar, where a child is living with the named insured parent at the time in question and thus, not living apart in a separate household at the time in question, the "intentions" of the child, William Charles Dennis, and the named insured, his father, are not material or relevant and do not create an issue for the jury to resolve as to the determination of whether the child is a resident of his father's household.

Appellant insurance company cites other undisputed facts, which do not conflict with the undisputed dispositive facts set forth above. However, the facts cited by Appellant are too remote or are not material or relevant to a determination of whether William Charles Dennis was a resident of his father's household at the time of the accident. February 25, 1976 these facts relate to what

William Charles Dennis was doing during the six years preceding his return to Utah to live with his father (Appellant's Brief, p. 16(1) and 17(4), (5), (6), (7), and (8)) and what possessions he left in Florida and what possessions he brought with him to Utah (Appellant's Brief, p. 17(9) and 18(10) and (12)), together with certain other facts involving his driver's license, his prior residence in Florida, his prior non-use of his father's automobile, and his father's application to renew his insurance policy. (Defendant's Brief, p. 18(14), (15), (16), and (17)).

ARGUMENT

THE LOWER COURT CORRECTLY DETERMINED THAT, AS A MATTER OF LAW, THE ONLY REASONABLE INFERENCE TO BE DRAWN FROM THE UNCONTROVERTED FACTS WAS THAT WILLIAM CHARLES DENNIS WAS A RESIDENT OF HIS FATHER'S HOUSEHOLD AT THE TIME OF THE ACCIDENT AND HENCE, AN ADDITIONAL INSURED UNDER HIS FATHER'S POLICY OF LIABILITY INSURANCE

On February 25, 1978, William Charles Dennis was driving an automobile belonging to Sandra Freestone, who was a passenger in the front seat, when said automobile, which, at the time, was on the wrong side of the road, collided with a motor vehicle driven by James Holder, in which his pregnant wife and two children were riding as passengers. As a result of the collision, Sandra Freestone was killed and the Holders suffered severe and permanent injuries, for which they later obtained Judgment on August 1, 1980, against William Charles Dennis for \$355,101.44. No appeal was filed on this Judgment. The policy of insurance issued to William Charles Dennis' father by Appellant, GEICO, has policy limits of \$50,000.00 per person and \$100,000.00 per accident. The parties, in the case at bar, stipulated, prior to the Declaratory Relief trial, that at the time of the accident, February 25, 1978, William Charles Dennis was driving a non-owned private passenger automobile with the permission of the owner of said automobile and as a result, the only question remaining for determination was whether or not William Charles Dennis was a resident of his father's household at the time of the accident, February 25, 1978. In this regard, the pertinent part of the policy in question, states as follows:

"Persons Insured: The following are insureds under Part I:"

* * * * *

- "b. With respect to a non-owned automobile,
(1) the named insured,
(2) any relative, but only with respect to a private passenger automobile or trailer . . ."

The term "relative" is defined by the policy as follows:

"'Relative' means a relative of the named insured, who is a resident of the same household."

Thus, the sole issue in this lawsuit was whether the definition of "relative" applied to William Charles Dennis. In other words, was William Charles Dennis a resident of his father's household at the time of the accident, February 25, 1970?

In the recent Annotation at 93 ALR 3d, 420-465, entitled "Who Is 'Resident' Or 'Member' Of Same 'Household' Or 'Family' As Named Insured, Within Liability Insurance Provision Defining Additional Insureds", the author states as follows:

"Counsel seeking to prove that a particular individual was a 'resident' of the same 'household' as the named insured may find it helpful to make the point, recognized by numerous Courts, that such terms are ambiguous and should, therefore, be construed in accordance with general principles of insurance law, in such a manner as to favor policy coverage. The point has also been made that since the terms are to be construed so as to favor coverage, the cases which have focused upon those terms in the context of policy clauses excluding liability coverage of an individual found to be a 'resident' of the named insured's 'household' are of little value as precedents in applying clauses extending coverage to those to whom the terms apply. Counsel for an alleged insured may, therefore, find it helpful, where such cases are cited as authority by opposing counsel, to emphasize the tendency of Courts, in attempting to construe the relevant terms in such a manner as to favor coverage, to apply those terms narrowly, as opposed to the manner in which the same terms would be applied if occurring in inclusionary policy clauses." (Emphasis added).

The cases cited by Appellant, GEICO, in its Brief, are not living with exclusion cases, as is the case at bar, but are either living apart inclusion cases or exclusion cases, and hence, of "little value as precedents in apply clauses extending coverage to whom the term resident applies."

It is vitally important, therefore, at the outset to ascertain whether the cases being cited are living with inclusion cases, living apart inclusion cases, or exclusion cases. An inclusion case is one where a person is attempting to "include" himself as a resident of the named insured's household and hence, an additional insured under the policy, as in the case at bar; whereas, an exclusion case is one where the insurance company is attempting to "exclude" from coverage a person who is a relative resident of the named insured's household, so that such a person cannot sue the named insured or other relative residents of his household. Appellant, GEICO, uses the same policy definition for the term "resident of the named insured's household" for both situations, inclusion and exclusion. Naturally, insurers would prefer to have the term narrowly interpreted in inclusion cases and broadly interpreted in exclusion cases, as Appellant argues in the case at bar. Notwithstanding the insurance company's preference, since, the insurance company selected the terminology "resident of the named insured's household", which almost all Courts have said is ambiguous, the Courts have construed said term "in accordance with general principles of insurance law, in such a manner as to favor policy coverage".¹

Consequently, in the "inclusion" cases, the questioned term is broadly interpreted, while, in the "exclusion" cases, the term is given a much more restricted interpretation. Such a dichotomy is necessary, because in both situations, the Courts prefer the interpretation in favor of coverage. Indeed, one Court has stated:

"The Courts have uniformly held that where the clause is one of inclusion, it should be broadly construed for the benefit of the insured, while in exclusion cases, the same clause is given a more restricted interpretation. This is necessary because in both situations

¹The Utah Supreme Court has stated:

"We recognize the validity of the rule that if an insurance policy is ambiguous or uncertain, so that it is fairly susceptible of different interpretations, any doubt should be resolved in favor of insurance coverage." American Casualty Company v. Redding, Pennsylvania v. Eagle Star Insurance Company, 568 P.2d 731 (1977).

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the Courts favor an interpretation in favor of coverage. The touchstone is that the phrase 'resident of the same household' has 'an absolute or precise meaning, and, if doubt exists as to the extent or fact of coverage, the language used in most policies will be understood in its most inclusive sense.'²

In this same regard, the California Supreme Court, in Hardware Mutual Casualty Company v. Home Indemnity Company, 50 Cal. Rptr. 608, 241 C.A. 2d 303, (1966), stated:

"These quoted terms ('resident' and 'household') have no absolute meaning . . . 'Insofar as the cases involve insurance policies, they can be roughly divided into cases involving policies excluding from coverage of the policies, members of the insured's household, and those extending coverage to such persons. Both attempt to apply the rules of construction above discussed. As a result, in the extension cases, the questioned terms are broadly interpreted, while in the exclusion cases, the same terms are given a much more restricted interpretation. This is necessary, because in both situations, the Courts favor an interpretation in favor of coverage.' Finally, after a discussion of a number of cases, our opinion concluded: 'These cases illustrate that the interpretation of the terms involved is not fixed, but varies according to the circumstances of the case. They also demonstrate that most Courts will interpret the terms so as to extend the coverage if this can be done under any reasonable interpretation of the facts.'"

Notwithstanding the fact that the case at bar is a living with inclusion case and the terms "resident of the named insured's household" should receive a liberal interpretation, all of the cases cited by Appellant in its Brief in support of its contention that "intention" is relevant and material and creates an issue for the jury to resolve, are either living apart inclusion cases, where the alleged insured was not living with the named insured at the time of the accident, but living in a separate household, or exclusion cases, where the Courts have applied a very strict interpretation to the term "resident of the named insured's household". In the "exclusion" cases, the Courts have held that before the insurance company can "exclude" a person from coverage as a relative resident of

²Buddin v. Nationwide Mutual Insurance Company, 250 S.C. 332, 157 S.E. 2d 633 (1967).

the named insured's household, the insurance company must prove that such a person was not "a resident of the named insured's household" under a restricted interpretation where such a person would be a resident of the named insured's household, only if such persons "intended duration was likely to be substantial, where it is consistent with the informality of the relationship and from which it is reasonable to conclude that the parties would consider the relationship in contracting about such matters as insurance or in their conduct in reliance thereon".³

In the case at bar, an inclusion case, the Appellant, GEICO, attempted to have the Court apply a restrictive interpretation on the term "resident of the named insured's household", as set forth in Maca, Pamperin, and Granillo, supra. While Appellant did not fully succeed, Appellant was successful to the extent of making the "intentions" of William Charles Dennis and his father an issue for the jury by having the Court add the following language to Instruction No. 14:

"The intended duration must be determined after a thorough examination of all the relevant facts and circumstances surrounding the relationship. A person's intention at the time in question, may be express or implied or both." (Emphasis added).

This part of the Instruction was contrary to the Court's earlier observation that the only time a person's intention may be probative or material in an inclusion case, is where the person is living apart from the named insured in a separate residence at the time of the accident; however, where the person is living with the named insured at the time of the accident, as in the case at bar, then as the

³ See National Farmers Union Property & Cas. Co. v. Maca, 26 Wisc. 2d 399, 132 N.W. 2d 517 (1965), an exclusion case; Pamperin v. Milwaukee Mutual Insurance Company, 55 Wis. 2d 27, 197 1W 2d 783 (1972), an inclusion case, which followed Maca, which is one of the few cases in which the Court expressed the view that the terms "resident" and "household" are unambiguous and that it makes no difference whether the policy used the terms to include persons as insureds or to exclude persons from coverage; and Nationwide Mutual Insurance Company v. Granillo, 573 P2d 80 (Arizona, 1977), an exclusion case, which followed Pamperin and Maca.

over the age of majority. Section 5, infra." (Emphasis added).

The cases cited under Section 5 are classified under the heading: "Child Living With Named Insured". In every case cited where a child was living with the named insured at the time of the accident, including where the child had separate living arrangements during a prior period or whether the child was over the age of majority, the Court found that the child was a resident of the named insured's household. In the case at bar, which also involves a child living with the named insured father, where the child was over the age of majority, age 23, the Court correctly determined, as a matter of law, that the only reasonable inference to be drawn from such facts was that William Charles Dennis was a resident of his father's household at the time of the accident, February 25, 1978, and hence, an additional insured under his policy of liability insurance.

Notwithstanding the fact that the case at bar is a living with inclusion case, GEICO, cites four living apart inclusion cases and three exclusion cases in support of its position. Appellant fails to cite one living with inclusion case, because there are none that support its position, and Appellant fails to alert the Court as to the type of case involved, or as to the facts of the case. Respondents submit that it is important for the Court to know the type of case and the facts of each case before the Court can determine its value as a precedent. To assist the Court in this regard, Respondents have prepared the following chart, which divides the cases cited by the parties into living with inclusion cases, living apart inclusion cases, and exclusion cases, gives the name, state, and date of the case, a brief statement of the facts, states whether or not the case is one that involves a child or relative living with the named insured or whether the child was living apart in a separate household at the time in question and whether or not the Court considered intention as an issue and sets forth the decision of the case:

LIVING WITH AND LIVING APART INCLUSION CASES

(Liberal Interpretation Of Resident)

(Jury Question And Intent An Issue Only If Living Apart In A Separate Household At Time Of Accident)

Case	Facts	Jury Question And Intent	Decision
Dennis (Utah) 1980	Son <u>living with</u> father for <u>three months</u> before accident.	Not a jury question. Intended duration an issue, (but should not have been an issue). <u>Not living apart</u> in separate household at time of accident.	Jury, not a resident. Trial Court granted Judgment N.O.V. <u>RESIDENT</u>
1 Buddin (South Carolina) 1967	Nephew <u>living with</u> uncle for <u>two months</u> before accident.	Not a jury question. Intended duration <u>NOT</u> an issue. <u>Not living apart</u> in separate household at time of accident.	Jury, not a resident. Appellate Court held trial Court should grant Judgment <u>RESIDENT</u>
2 Hardware (California) 1966	Nephew <u>living with</u> uncle for <u>one month</u> before accident.	Not a jury question. Intended duration <u>NOT</u> an issue. <u>Not living apart</u> in separate household at time of accident.	No jury. <u>RESIDENT</u>
3 Jamestown (North Carolina) 1966	29-year-old divorced son <u>living with</u> father for <u>two weeks</u> before accident.	Not a jury question. Intended duration <u>NOT</u> an issue. <u>Not living apart</u> in separate household at time of accident.	No jury. <u>RESIDENT</u>
4 Miore (Colorado) 1974	19-year-old daughter left home to live with fiancée. Father directed insurer to take daughter off policy before accident.	No jury was requested. Intent of daughter to terminate residency at father's was an issue. <u>Living apart</u> in separate household at time of accident.	No jury. <u>NOT A RESIDENT</u>
5 Hardesty (Oklahoma) 1966 1967	Father had two separate households, one where sisters lived and raised his son, and one where he lived. Was Father resident of sisters' household? Was son resident of father's household?	Jury question. Intended duration <u>NOT</u> an issue. <u>Living apart</u> in separate household at time of accident.	Can be resident of separate households. Jury, not a resident. Reversed. <u>RESIDENT</u> . No jury, not a resident. Reversed, jury question.

LIVING WITH AND LIVING APART INCLUSION CASES CONTINUED

(Liberal Interpretation Of Resident)

(Jury Question And Intent An Issue Only If Living Apart In A Separate Household At Time Of Accident)

Case	Facts	Jury Question And Intent	Decision
Means (Oklahoma) 1967	Married minor son living in apartment at school, who was supported by father who had room at father's house and kept clothes there	Jury question. Intent as to which household he was a resident of was an issue. <u>Living apart</u> in separate household at time of accident.	Jury, <u>RESIDENT</u> of father's household. Jury question.
Walker (Utah) 1971	21-year-old daughter, living in apartment who's father augmented income and who had room at father's house. Agent told father she was resident and covered by father's policy.	No jury requested. Intent as to which household she was a resident of was an issue. <u>Living apart</u> in separate household at time of accident.	No jury, <u>RESIDENT</u> of father's household.

↖ LIVING APART INCLUSION CASES ↗

EXCLUSION CASES

(Strict Interpretation Of Term "Resident")

Case	Facts	Intent An Issue	Decision
Granillo (Arizona) 1977 Relied on Pamperin	Married daughter lived with parents. Going to move to an apartment (wanted to sue brother). Been there <u>one month</u> before accident.	Intended duration an issue. Not a resident if early termination highly probable. Resident only if stay is long enough that parties would take relationship into consideration in contracting for insurance.	No jury, <u>NOT A RESIDENT</u> . (She could sue brother).
Pamperin (Wisconsin) 1972 Inclusion case, but relied on aca, an exclusion case.	Single niece stayed with uncle to care for children from end of Summer session to beginning of Fall session. Been there <u>10 days</u> before accident.	Intended duration an issue. Not a resident if early termination highly probable. Resident only if stay is long enough that parties would take relationship into consideration in contracting for insurance.	Jury, resident, reversed, <u>NOT A RESIDENT</u> .
Naca (Wisconsin) 1965	32-year-old son lived with father on a farm (wanted to sue father for farm accident). Been there <u>five months</u> before accident.	Intended duration an issue. Not a resident if early termination highly probable. Resident only if stay is long enough that parties would take relationship into consideration in contracting for insurance.	No jury, <u>NOT A RESIDENT</u> . (He could sue father).

A review of the foregoing chart clearly shows that under the facts of the case at bar, an "inclusion" case, where a child, William Charles Dennis, was living with his named insured father at the time of the accident and not living apart in a separate household at the time of the accident, that "intention" is not relevant or material, and hence, there are no issues for a jury to resolve, and that in all cases, with facts similar to the case at bar, the Courts have held, as a matter of law, that the child or relative was a resident of the named insured's household.

It is also clear that Appellant, GEICO, has improperly attempted to have this Court, as it did the trial Court, apply to the case at bar, the law of "exclusion" cases, where a strict interpretation is applied to the term "resident of the same household". As the author of the Annotation pointed out, "exclusion" cases "are of little value as precedents in applying clauses extending coverage to those to whom the term applies". 93 ALR 3d 427.

In addition, it is clear that Appellant, GEICO, has improperly attempted to have this Court, as it did the trial Court, apply to the case at bar, the law of "inclusion" cases where the child or relative was "living apart" from the named insured in a separate household at the time of the accident, which is contrary to and different from the facts in the case at bar. While in such "living apart" case the "alleged insureds' intention in living separately from the named insured may be an important consideration in determining such persons status as a 'resident' of the named insured's household" (93 ALR 3d 427) and hence, create an issue to be resolved by a jury, the case at bar is not a "living apart" case and thus, "intention" is not relevant or material and hence, there are no issues for the jury to resolve. Under the uncontroverted facts of the case at bar, as the trial Court initially observed, "it doesn't make any difference whether the alleged insured intended to go some place else at some future time or not". (Tr. 427).

The cases set forth on the chart are now discussed, in detail, in the following pages.

1. In Buddin, a living with inclusion case, which is directly in point, a nephew, who, being unemployed, moved into the home of his bachelor uncle and lived there from August, 1965, until the accident of October 10, 1965, a period of about two months, who received money from his uncle to purchase food and clothing when he needed it and help from him to find a job, who, when employed, made token weekly contributions toward household expenses, who was not restricted to any part of the house, and was not looking for another place to live, was found by a jury not to be a "resident of the same household", as his relative uncle and thus, not entitled to liability coverage as an additional insured under his uncle's automobile insurance policy. The nephew's Motion For A Directed Verdict was denied, as was his Motion For Judgment Notwithstanding The Verdict. The Supreme Court reversed the jury verdict and Judgment, holding as follows:

"The insured policy here included Horace E. Buddin as the named insured and as an additional insured 'any relative resident of the same household'. Any person qualifying as a resident of the same household of the insured is an additional insured under the policy. The policy here is one that extends coverage and includes as an insured, any relative resident of the same household and is not a clause excluding from coverage a relative resident of the same household. The Courts have uniformly held that where the clause is one of inclusion, it should be broadly construed for the benefit of the insured, while in exclusion cases the same clause is given a more restricted interpretation. Jamestown Mutual Insurance Company v. Nationwide Mutual Insurance Company, 266 N.C. 430, 146 S.W. 2d 410. This is necessary because in both situations, the Courts favor an interpretation in favor of coverage. The touchstone is that the phrase 'resident of the same household' has no absolute or precise meaning, and, if doubt exists as to the extent or fact of coverage, the language used in most policies will be understood in its most inclusive sense. American University Insurance Company v. Thompson, 62 Wash. 2d 595, 384 P.2d 367."

* * * * *

"In our opinion, under the cases cited, there were no factual issues in this case for the jury to resolve. The evidence here is susceptible of only one reasonable inference this being one the Court should have deci-

ded the issue as a matter of law and given to the inclusion clause contained in the policy here in question a broad and liberal construction. He should have held that the only reasonable inference to be drawn from the testimony was that Alton Buddin, Jr., was a relative resident of the same household as was Horace Buddin, his uncle. It follows that Alton Buddin, Jr., was an additional insured under the policy issued by the Respondent to Horace Buddin.

The Judgment of the lower Court is reversed and this case remanded thereto for entry of Judgment in favor of the Appellants in accordance with their Motion For A Directed Verdict." (Emphasis added).

In Buddin, the Plaintiff insurance company argued that there were factual issues for the jury's determination, to wit: (1) the issue of payment of rent and board while the nephew was in his uncle's household, (2) whether the uncle exercised any degree of control over his nephew, and (3) that there was a lack of a permanent living arrangement between the persons alleged to be residents of the same household. Appellant, GEICO, in the subject case, made this same argument with respect to "the lack of a permanent living arrangement and the subjective or declared intent with respect thereto". In the Buddin Court's opinion, these were not proper issues for the jury's determination in deciding whether the nephew was a relative resident of the same household as his uncle. Although there had been testimony concerning the fact that the nephew had "no intentions of moving", the Court did not consider it material or relevant. Specifically, in response to Plaintiff insurance company's argument relative to intent, the Court stated as follows:

"The fact that there was a lack of a permanent living arrangement between the persons alleged to be residents of the same household is not determinative of the issue. Newcomb v. Great American Insurance Co., 260 N.C. 402, 133 S.E. 2d 3; Hardware Mutual Casualty Company v. Home Indemnity Co., 241 Cal. App. 2d 303, 50 Cal Rptr. 508; and Jamestown Mutual Insurance Company v. Nationwide Mutual Insurance Co., 266 N.C. 430, 146 S.E. 2d 410. In the Hardware Mutual Casualty Company case, it appears that a nephew was living with his aunt and uncle in the same household on the day of the accident and had been for a substantial period of time before and after it. The Court in holding that the nephew was an additional insured under the policy issued to his uncle and aunt, said:

"We think that a resident of the same household is one other than a temporary or transient visitor,

who lives together with others in the same house for a period of some duration, although he may not intend to remain there permanently."

The Buddin Court cited and relied upon the very language which the trial Court used in Instruction No. 14, to instruct the jury concerning the definition of the word "resident", to wit:

"A 'resident of the same household' within an automobile policy extending coverage on a non-owned automobile to any relative who is a resident of the same household as the named insured means one, other than a temporary or transient visitor, who lives together with others in the same house for a period of some duration, although he may not intend to remain there permanently."

The Buddin Court ruled therefore, that, based upon the above law, which the trial Court also used as the law and so instructed the jury, the subjective or declared intent of the relative is "not a proper issue for the jury's determination in deciding whether (the relative) was a resident of the same household as (the named insured)".

2. The above language, as to the definition of the word "resident", was first cited in Hardware Mutual, *supra*, a living with inclusion case. There, the Court held that a nephew, who was living with his aunt and uncle in the same household on the day of the accident, was a relative "resident of the same household" and thus, an additional insured under the policy issued to the uncle and aunt. There, the nephew, himself, testified that he was not living with his aunt and uncle at the time of the accident and that he actually had lived in an apartment with his cousin from early 1960, until June 15, 1961, a period of about a year and a half. His cousin, however, testified that although he shared the apartment with the nephew beginning in early 1960, he did not see much of the nephew during June, 1961, because the nephew was staying with his aunt and uncle. The cousin also stated that the nephew had some clothes with him when he started staying with his aunt and uncle in June, 1961, although he still had some of his clothes in the apartment. Thus, the most type nephew would be considered to have lived with his aunt and uncle

prior to the accident, was a little less than one month (June, 1961). However, when arrested and when treated at the hospital, the nephew gave, as his address, that of his aunt and uncle. Also, he used his aunt and uncle's address on his driver's license and car registration. Under such facts, the Court held, as a matter of law, that the nephew was a resident of his uncle's household at the time of the accident.

3. In Jamestown Mutual, a living with inclusion case, the Court held, as a matter of law, that the named insured's 29-year-old son, who had been living with his father for about two weeks at the time of his involvement in a motor vehicle collision, who was separated from his wife, had no home of his own, ate his meals at his father's house, slept there, had his laundry done with the family laundry, had the run of the house and paid no board, was a "resident of the same household" as his father, despite the fact that the son had previously lived in other places and had returned to his father's home with the intention of ultimately finding a room in a boarding house. The Court pointed out that:

"the word 'resident' has many shades of meaning, ranging from mere temporary presence to the most permanent abode, and that when an insurer uses a 'slippery' word to designate those who are insured by the policy, it is not the Court's function 'to sprinkle sand upon the ice' by construing the term strictly."

Thus, in the Buddin case, where the relative had lived with the named insured for about two months, in the Hardware Mutual case, where the relative had lived with the named insured for about one month, and in the Jamestown Mutual case, where the relative had lived with the named insured for only two weeks, each Court held, as a matter of law, that because the relative or child was living with the named insured at the time of the accident and not living apart in a separate household, the relative or child was a resident of the named insured's household. The holding of each case was based upon the same definition of the word "resident" as was used to instruct the jury in the case at bar (excluding the part which improperly

instructed the jury to determine Dennis' intended duration). In the case at bar, the child had lived with the named insured for about three months prior to the accident, which is longer than the time spent in the Buddin, Hardware Mutual, or Jamestown Mutual cases.

In Words And Phrases, 1979 Cumulative Annual Pocket Part, the term "resident of the same household" is listed, whereas in the permanent volume, the term "resident of the same household" is not listed. Thus, the 1979 Cumulative Annual Pocket Part gives all the cases cited under this term. It should be noted that all three living with inclusion cases referred to above, Buddin, Hardware Mutual, and Jamestown Mutual are cited thereunder.

Appellant, GEICO, takes a position contrary to that of the living with inclusion cases of Buddin, Hardware Mutual, and Jamestown Mutual and relies on four living apart inclusion cases and three exclusion cases in support of its position that the subjective or declared intent of William Charles Dennis was a factual issue for the jury's determination in deciding whether or not William Charles Dennis was or was not a resident of his father's household. The four living apart inclusion cases are United Services Automobile Association v. Mione, 528 P2d 420 (Colo., 1974), Hardesty v. State Farm Mutual Automobile Insurance Company, (CA 10 Okla.) 382 F2d 564 (1967) and 361 Fed. 2d 176 (1966), Aetna Casualty & Surety Company Of Hartford, Conn. v. Means, 382 F2d 26 (1967), and American States Insurance Company, Western Pacific Division v. Walker, 26 Utah 2d 161, 486 P2d 1042 (1971), and the three exclusion cases are Nationwide Mutual Insurance Company v. Granillo, 573 P2d 80 (Arizona, 1977), Pamperin v. Milwaukee Mutual Insurance Company, 197 N.W. 2d 783 (Wis., 1972), and National Farmers Union Property & Casualty Company v. Maca, 132 N.W. 2d 517 (1965).

4. In Mione, a living apart inclusion case, on November 8, 1971, the relative, Jean Mione, then 19 years of age, left her parents home following a family dispute to live at her fiancée's apartment until their marriage. At the time, Jean gave to her father, the keys to the house and did not return, except

to pick up some personal belongings. She was employed while living with her parents and continued her employment thereafter. On November 17, 1971, her father directed his insurer, the Plaintiff, to exclude Jean from the policy and this was done effective November 19, 1971. On November 21, 1971, Jean was driving her fiancée's automobile, when she was involved in an accident. Because Jean was living apart in a separate household at the time of the accident, the Court stated:

"Important factors (to determine if one may be considered the resident of a household) are the subjective or declared intent of the individual, the relationship between the individual and the members of the household, the existence of a second place of lodging and the relative permanence or transient nature of the individual's residence in the household."

The Court held that "Jean intended to and did, in fact, terminate her residency in her parent's home prior to the accident". The matter of intent arose primarily in connection with the question of whether or not Jean had terminated her residency with her parents. There is no such question in the subject case.

5. In Hardesty, a living apart inclusion case, the question was whether or not a son was a resident of his father's household at the time of the accident. The son resided at 6827 North Trenton and the policy recited that the named insured father's residence was also 6827 North Trenton, but the father maintained and frequently occupied another house nearby. The father had two unmarried sisters, who lived at 6827 North Trenton, who raised his son from his youth. The utilities were in the name of the father, and he paid all the bills. The father was registered to vote from that address, received his mail there, and was listed in the telephone book there. He ate meals there or at a restaurant. The Tenth Circuit reversed a jury verdict that found the father was not a resident of 6827 North Trenton at the time of the accident, because of an improper jury instruction that stated a person could be a member of more than one household, provided each household has a single head and single management. The Court said the jury was left with the unmistakable inference that there could be but one household at 6827 North Trenton.

which was erroneous. The Court held the father could have had a separate household at 6827 North Trenton.

On remand, the Court held, as a matter of law, that the son was a resident of the household of the two sisters at 6827 North Trenton and not the father's household there. Again, the Tenth Circuit reversed, this time stating as follows:

"We must again reverse. In Aetna Casualty And Surety Company v. Means, 382 F. 2d 26, 1967, this Court held that a son might be a resident of two households stating that the words 'resident of the same household' as contained in an insurance policy, do not constitute a term of art which would dictate a particularized legal inference to be drawn from family relationships."

The Court held that the matter should be submitted to a jury, because the following facts were such that different permissible inferences could be drawn therefrom:

"Ennis, Jr., was the minor son of Ennis, Sr., and in his legal custody by virtue of a Divorce Decree; Ennis, Jr., resided in a house where Ennis, Sr., maintained a household and had been allowed to drive a car belonging to his father both before and after the accident; father and son took their meals together; Ennis, Sr., had, from time to time, contributed in part to the cost of food at Trenton Street; had provided his son with small amounts of spending money and occasionally helped to provide clothing; and had exercised some parental control over his son". All those facts supported the proposition that the son was a resident of his father's household, which was contrary to the Court's ruling.

Based on the holding in the Hardesty case, William Charles Dennis could have had two residences for insurance purposes, the one in Utah, where he lived with his father during the three month period prior to the accident, and the one with the unknown address in Florida, where he had lived with his unknown girlfriend for the one month period prior to his return to Utah.

6. In Means, a living apart inclusion case, where a minor son was living apart from the named insured at the relevant time, maintaining a separate residence in an apartment with his wife, while attending school and who had not lived at his

father's home since his marriage, but who was supported by his father giving him \$150.00 per month and who had a room in his father's home, which was always available to him and kept clothes in the closet of his room, the question was whether or not the son was a resident of his father's household at the time of an accident. Notwithstanding the fact that the father and the son both testified that the son was not a resident of the father's household, the jury found that the son was a resident of the father's household. The Tenth Circuit held, as it had previously done in the Hardesty case, supra, that:

"an insured under an automobile liability policy could legally maintain more than one household. So, we think a married son might be a member of his father's household and at the same time, be the head of his own household."

In accordance therewith, the Court affirmed the jury verdict and the decision of the lower Court denying the Motion For Judgment Notwithstanding The Verdict. The Court pointed out that:

"There are many cases where a contract of insurance may be construed as a matter of law and the question of liability vel non decided as such by the Court. There are other cases where there is a conflict in the evidence or where different inferences are permissible under uncontroverted evidentiary facts. In the latter kind of situations, the issue is a fact issue and one which is properly submitted to the jury."

Appellant insurance company, GEICO, has structured its argument and Brief, as if the facts of the case at bar presented a situation similar to the decision in the Means case, where the Court set forth, in one column, "the evidence favoring the position of the Plaintiff" insurance company (that Means was not a resident of his father's household, but of a household where he lived with his wife) and in another column, "the evidence favoring the position of the Defendants (the injured Claimants, that Means was a resident of his father's household), just as Appellant insurance company has done in the case at bar. In the Means case, the Court determined that "there are factors in this case, pointing each way") and hence, affirmed the decision of the trial Court that "the question

as to the inferences to be drawn presented a fact issue" and thus, "it was properly submitted to the jury". What Appellant insurance company, GEICO, fails to point out is that in the Mears case, unlike the case at bar, the alleged insured, a minor son, who had not lived with his father since his marriage, was living apart from his father in a separate household with his wife, while he was attending school, at the time of the accident. The injured Claimants attempted to show that he was a resident of his father's household at the time of the accident, because he was being supported by his father, and he had a room available to him at his father's house and had clothes in the closet of that room. Because the case involved a child who was living apart from the named insured father, in a separate household, at the time of the accident, the Court received testimony of the parties' intention, which was to the effect that neither the father or the son considered the son to be a resident of the father's household. The jury determined that the son was a resident of his father's household at the time of the accident.

The case at bar does not involve a son living apart in a separate household, or even maintaining a separate household at the time of the accident. Nevertheless, Appellant insurance company, GEICO, lists two columns of evidentiary facts as if the one column sets forth the evidence favoring Appellant's position that William Charles Dennis was a resident of the apartment in Florida, where William Charles Dennis lived for one month before returning to Utah, and as if the other column sets forth the evidence favoring Respondent's position that William Charles Dennis was a resident of his father's household, where he had lived for the three months prior to the accident. Hence, Appellant, GEICO, argues it was a jury question as to which household he was a resident of at the time of the accident and since the jury determined he was not a resident of his father's household at the time of the accident, he must have been a resident of the apartment household in Florida. This argument is fallacious for the following reasons: First, since William Charles Dennis was not living at the apartment in Florida at the time of

the accident, but living with his father, it can be decided, as a matter of law, that William Charles Dennis was a resident of his father's household at the time of the accident. Under such facts, the parties' intention is not relevant or material and hence, there is no issue for the jury to resolve. As the Court stated in Means:

"There are many cases where a contract of insurance may be construed as a matter of law . . ."

Second, it does not follow logically that William Charles Dennis could be a resident of the Florida apartment where he had lived for only one month before returning to Utah and not be a resident of his father's household where he had lived for three months prior to the accident and where he was living on the day of the accident. Again, as the Court stated in Means:

"An insured under an automobile liability policy could legally maintain more than one household. So, we think, a married son might be a member of his father's household and, at the same time, be the head of his own household."

Thus, since a person can be a resident of two separate households for insurance coverage purposes, even assuming arguendo that William Charles Dennis was living at or maintaining the Florida apartment at the time of the accident, which he was not, he could have been a resident of his father's household, as well as the apartment in Florida. But since he was not living at or maintaining the Florida apartment at the time of the accident, William Charles Dennis could only be a resident of his father's household at the time of the accident.

7. In Walker, a Utah living apart inclusion case, which involves a daughter living apart in a separate household in Utah at the time of the accident, the Utah Supreme Court applied a very liberal definition to the words "resident of the same household" in order to sustain the trial Court's ruling that a 21-year-old daughter was a resident of her father's household in Idaho, notwithstanding the fact that at the time of the accident, she was living in an apartment in Utah, and prior thereto had lived at a hospital in Utah for four months, all which

training to be an x-ray technician. The Court noted that she had returned home to Idaho after each college school year, that her parents augmented her income, that she kept some furniture, books, and clothing in her father's home, that she had an Idaho driver's license, voted in the Idaho general election, and filed her income tax return in Idaho, and that she considered herself to be a resident of Idaho and a resident of her father's household. In attempting to apply a liberal definition to an inclusion case to the words "resident of a household" to justify the lower Court's decision that she was a resident of her father's household in Idaho, even though she was living in Utah at the time of the accident, the Court stated as follows:

"A resident of a household is one who is a member of a family who live under the same roof. Residence emphasizes membership in a group rather than an attachment to a building. It is a matter of intention and choice rather than one of geography.

Ordinarily, when a child is away from home attending school, he remains a member of the family household, and the question of when he ceases to be such is one which must be determined from all of the facts and circumstances as revealed by the evidence."

The Court further noted that the daughter's father had asked his insurance agent whether an additional insurance policy should be taken out to cover her when she left Idaho for training in Utah and "the agent told them she would be covered by her father's policy". As was pointed out by the author of the Annotation 93 ALR 3d 420, at 427, the only reason the daughter's intention was probative and relevant, was because the case involved a situation where the "alleged insured was living apart from the named insured at the relevant time".

Based on the Walker case, it is respectfully submitted that the Utah Supreme Court should apply a liberal interpretation to the term "resident of the same household" and follow the law, as set forth in the living with inclusion cases of Buddin, Hardware Mutual, and Jamestown Mutual, which are all cited in Words And Phrases under the definition "resident of the same household", and further, that the Utah Supreme Court should not apply a strict interpretation to the

term "resident of the same household", as used in the exclusion cases.

Appellant, GEICO, also argues that the exclusion cases support its position that whether an individual is a resident member of the family household depends upon the transitory or permanent nature of his stay there and specifically, claims that where he has intentions of moving on, an issue of fact is created, which must be submitted to the jury. In support of this claim, Appellant, GEICO, relies on the Granillo, Pamperin, and Maca cases.

8. The Granillo case involved an exclusion, meaning that the Court applied a strict definition to the words "resident of the same household", rather than an inclusion, as the case at bar, meaning that the Court should apply a liberal definition to the words "resident of the same household". There, the Court fashioned a strict definition and concluded that a married daughter, who, with her two children, lived with her parents from mid or late July, 1975, until the accident of August 16, 1975, a period of about one month, was not a resident of her parents' household, and thus, she could sue her brother, who was driving the car at the time of the accident and was a resident of her parents' household. The married daughter had previously lived with her husband in army-provided housing and in addition, the married daughter's intent was to look for a job, find a house to rent it as soon as she could afford to do so. She planned to be relocated before her army husband left for Korea in November, 1975. The strict definition of the words "resident of the same household", which the Court fashioned was stated as follows:

"Nationwide stresses that no specific time was stated for Mary Jean to leave her parents' home and that she could have stayed there as long as she liked. Living together under one roof as a family, however, is neither the sole nor the controlling test in determining whether a person is a member of a household. If one . . . comes under the family roof for a definite short period or for an indefinite period under such circumstances that an early termination is highly probable' then one is not a 'member of the same household'. Pamperin v. Milwaukee Mutual Insurance Company, 55 Wis. 2d 27, 197

SH 2133 at 37 (1973)
that phrase implies a more enduring relationship than was here manifested. If a relative lives in the home

on a temporary basis, she does not become a member of the household within the meaning of the exclusionary provision in Nationwide's policy.

The intended duration of the relationship is a fact to be considered. Pamperin, supra. "The intended duration should be . . . long enough so that it is reasonable to expect the parties to take the relationship into consideration in contracting about such matters as insurance or in their conduct in reliance thereon." National Farmers Union Property & Casualty Company v. Maca, 26 Wis. 2d 399, 132 N.W. 2d 517 at 521 (1965)." (Emphasis added).

The above strict definition of the words "resident of the same household" is the very definition which Appellant, GEICO, sought to impose on William Charles Dennis in the case at bar. To the extent that intent was incorporated into the Court's instructions to the jury relative to the words "resident of the same household", Appellant, GEICO, succeeded, as previously discussed, supra. The strict definition of the words "resident of the same household", which was used in the exclusion case of Granillo, was taken from the Wisconsin case of Pamperin, which extracted the strict definition from the Wisconsin case of Maca, which is also an exclusion case.

9. In Pamperin, a 20-year-old single woman, after a Summer session at college, went to stay with her uncle and to take care of his children due to an illness in the family. She moved into the house, planning to return to school in the Fall. About 10 days after moving in, the woman was involved in an automobile accident driving a car owned by her mother. The jury found the woman was a resident of her uncle's household, but the Wisconsin Supreme Court reversed, holding that, as a matter of law, the woman was not a resident of the household. As previously discussed and pointed out by the author of 93 ALR 420 at 427, Pamperin, infra, "is one of the few cases in which the Court expressed the view that the terms 'resident' and 'household' are unambiguous, and that in applying those terms it makes no difference whether the policy used the terms to include persons as insureds, or to exclude persons from coverage".

10. In Maca, an exclusion case where a 22-year-old son had been living
10. Special Collections, S.J. Quinlan Library, University of Utah, provided by the National Library of Medicine and Library Services and Technology Act, administered by the Utah State Library.
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with his father on a farm, which was a requirement of his employment there, for a period of five months prior to the accident, the Court applied a strict interpretation to the term "resident of the same household" and held that since an early termination of the son's living with his father was highly probable and because the son's intended duration was not long enough for the parties to take the relationship into consideration in contracting about such matters as insurance, the son was not a resident of his father's household, so the son was not excluded from insurance coverage, and he could sue the father for the injuries he received as a result of an accident on his father's farm.

Since the case at bar is a living with inclusion case, a liberal definition should be applied to the words "resident of the same household" and the law as set forth in the living with inclusion cases of Buddin (relative lived with named insured for two months), Hardware Mutual (relative lived with named insured for one month), and Jamestown Mutual (relative lived with named insured for two weeks), where the Courts respectively determined that a relative, who had lived with the named insured for a two-month period, a one-month period, and a two-week period, were each more than "a temporary or transient visitor" and each had lived in the same house "for a period of some duration", even though there was no "intent to remain there permanently", and thus, each Court held, as a matter of fact that intent didn't matter, since the relative was not living apart in a separate household at the time of the accident and thus, each relative was a resident of the named insured's household and covered by the named insured's policy of automobile insurance. A fortiori, if a relative is a resident of the named insured's household when he has lived there for two weeks, one month, and two months prior to the accident, as a matter of law, then certainly a child, such as William Charles Dennis, who is living with the named insured father at the time of the accident and who has lived there with his named insured father for three months prior thereto was a resident of his father's household at the time of the accident and covered as an additional insured under his father's automobile

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insurance policy.

Under Utah law, William Charles Dennis was a "resident" for divorce purposes, the requirement being "three months next prior to commencement of the action". 30-3-1, Utah Code Annotated, 1953, as amended. He was also a resident for purposes of the Utah Driver's License Statute, since he had sojourned in Utah for a period of 60 days. 41-21-1(b), Utah Code Annotated, 1953, as amended. He was also a "resident" for voting purposes. 20-2-14, Utah Code Annotated, 1953, as amended. Thus, if William Charles Dennis is a legal resident of the State of Utah for divorce, driver's license, and voting purposes, and the only place he has lived in Utah during the three months he has been in Utah prior to the accident is at his father's household, then, a fortiori, he was a resident of his father's household at the time of the accident.

CONCLUSION

Now that the foregoing applicable case law has been fully disclosed by Respondents, Holders, (1) as to the nature of the case, whether a living with inclusion case, a living apart inclusion case, or an exclusion case, and (2) as to the facts of each case, such as whether the child or relative was living with the named insured at the time of the accident, or living apart in a separate household at the time of the accident, the value and applicability of each case as a precedent for deciding the case at bar can now be determined. In this regard, Respondent, Holders, submit the following:

1. Appellant, GEICO, has improperly attempted to have this Court, as it did the trial Court, apply to the case at bar, the law of "exclusion" cases, where a strict interpretation is applied to the term "resident of the same household". As the author of the Annotation pointed out, "exclusion" cases "are of little value as precedents in applying clauses extending coverage to those to whom the term applies". 93 ALR 3d 427.

it did the trial Court, apply to the case at bar, the law of "inclusion" cases where the child or relative was "living apart" from the named insured in a separate household at the time of the accident, which is contrary to and different from the facts in the case at bar. While in such "living apart" cases, the 'alleged insureds' intention in living separately from the named insured may be an important consideration in determining such persons status as a 'resident' of the named insured's household" (93 ALR 3d 427) and hence, create an issue to be resolved by a jury, the case at bar is not a "living apart" case and thus, "intention" is not relevant or material and hence, there are no issues for the jury to resolve. Under the uncontroverted facts of the case at bar, as the trial Court initially observed, "it doesn't make any difference whether the alleged insured intended to go some place else at some future time or not". (Tr. 427).

3. Since the case at bar is a living with inclusion case, where a child was living with his named insured father at the time of the accident, the living with inclusion cases are the only cases that have value as precedents in determining whether or not the trial Court correctly held, as a matter of law that William Charles Dennis was a resident of his father's household at the time of the accident and hence, an additional insured under his father's policy of liability insurance. Under all of the cases cited "where such child was staying with the named insured during a period that included the date of the accident, . . . Courts have held, under a variety of circumstances, that the child qualifies as a 'resident' or 'member' of the named insured's 'household'. Such results have been reached despite circumstances that included the child's separate living arrangements during a prior period, and the child's status as an individual over the age of majority." 93 ALR 3d 425. There is not one case, with similar facts to the contrary. 93 ALR 3d 438-440.

Is 'Resident' Or 'Member' Of Same 'Household' Or 'Family' As Named Insured, Within Liability Insurance Provision Defining Additional Insureds", a copy of the pertinent pages, including those cited by Appellant and Respondents, has been attached as an Exhibit.

Based on the uncontroverted dispositive facts that this is a living with inclusion case, where the child, William Charles Dennis, was living with his named insured father at the time of the accident and had been living with his father for a period of about three months prior to the accident and was not living apart from his named insured father in a separate household at the time of the accident, Respondents, Holders, respectfully submit that under such uncontroverted facts, there were no factual issues for the jury to resolve. William Charles Dennis' intentions were not material or relevant and there was only one reasonable inference to be drawn from such uncontroverted facts and that was that William Charles Dennis was a resident of his father's household at the time of the accident and hence, an additional insured under his father's policy of liability insurance.

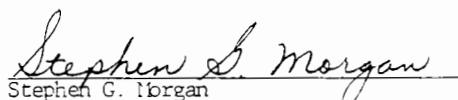
Thus, it is not difficult to see how the trial Court was initially misled by Appellant, GEICO, in insisting that there was case law in support of its position that William Charles Dennis' "intention" created an issue of fact, which should be submitted to the jury and why the trial Court improperly added to what otherwise would have been a correct instruction, the language which stated that William Charles Dennis' "intended duration must be determined" (Instruction No. 14). However, once the trial Court had an opportunity to study, reflect, and become fully advised as to the law, Appellant, GEICO's attempted deception was discovered. William Charles Dennis' intentions did not create an issue of fact, which should have been submitted to the jury, because the case at bar was a living with inclusion case, where intention is not relevant or material, and not a living apart inclusion case or an exclusion case, where intent may create an issue of fact, which should be submitted to the jury. In accordance therewith and now being fully advised in the premises, the trial Court is based on the applicable law and

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the uncontroverted dispositive facts, granted Judgment to Respondents, notwithstanding The Verdict. This was in accord with the law, as recently stated by the Utah Supreme Court that "when the ends of justice require it, a trial Judge has the power and the duty to set aside a jury's verdict and . . . grant a Judgment Notwithstanding The Verdict."⁴ Since "the Appellate Court has a corresponding responsibility"⁵, Respondents, Holders, respectfully submit that "the ends of justice require" that the Utah Supreme Court affirm the decision of the trial Court.

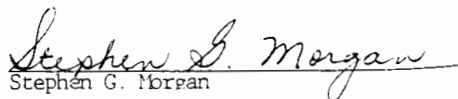
Respectfully submitted,

MORGAN, SCALLEY & DAVIS


Stephen G. Morgan
Attorney for Defendants-In-Intervention
and Respondents, Holders

CERTIFICATE OF MAILING

I hereby certify that I mailed two true and correct copies of the foregoing Brief Of Respondent to David H. Epperson, Attorney for Plaintiff-Appellant, 175 South West Temple, No. 650, Salt Lake City, Utah, 84101, and to Joseph C. Fratto, Sr., Attorney for Defendant-Respondent, William Charles Dennis, 431 South 300 East, Suite 101, Salt Lake City, Utah, 84111, postage prepaid, this 13 day of February, 1981.


Stephen G. Morgan

⁴Kilpack v. Wignall, supra, at 466.

⁵Ibid, supra, at 466.

ANNOTATION

WHO IS "RESIDENT" OR "MEMBER" OF SAME "HOUSEHOLD" OR "FAMILY" AS NAMED INSURED, WITHIN LIABILITY INSURANCE PROVISION DEFINING ADDITIONAL INSUREDS

by

David B. Harrison, J.D.

I. PRELIMINARY MATTERS

- § 1. Introduction:
 - [a] Scope
 - [b] Related matters
- § 2. Summary and comment:
 - [a] Generally
 - [b] Practice pointers

II. SPOUSE OF NAMED INSURED

- § 3. Where living with named insured

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

- 7 Am Jur 2d, Automobile Insurance §§ 80, 98, 107; 43 Am Jur 2d, Insurance §§ 251-253, 315; 44 Am Jur 2d, Insurance § 1408
- 3 Am Jur Pl & Pr Forms (Rev), Automobile Insurance, Forms 71, 76, 151, 151.05, 151.1, 156, 157, 157.1, 157.2; 14 Am Jur Pl & Pr Forms (Rev), Insurance, Form 352
- 3 Am Jur Legal Forms 2d, Automobile Insurance §§ 32:66-32:68
- 13 Am Jur Proof of Facts 2d 681, Resident of Household of Named Insured
- US L Ed Digest, Insurance §§ 304-306
- ALR Digests, Insurance §§ 836, 837, 845, 849, 879, 881
- L Ed Index to Annos, Domicil or Residence; Insurance
- ALR Quick Index, Additional Insured; Automobile Insurance; Domicil or Residence; Family or Household; Insurance
- Federal Quick Index, Automobile Insurance; Domicil or Residence; Insurance

Consult **POCKET PART** in this volume for later cases

- § 4. Where living apart from named insured:
- [a] Held "resident" or "member"
 - [b] Held not "resident" or "member"

III. CHILD OF NAMED INSURED

A. STATUS WHERE NAMED INSURED IS ALIVE WHEN ALLEGED ADDITIONAL INSURED'S CLAIM OF COVERAGE ARISES

- § 5. Child living with named insured
- § 6. Child living with named insured's former spouse or spouse having separate residence:
- [a] Held "resident" or "member"
 - [b] Held not "resident" or "member"
- § 7. Child living apart from named insured while serving in Armed Forces
- § 8. Child living apart from named insured while attending educational institution
- § 9. Child living apart from named insured under other circumstances:
- [a] Held "resident" or "member"
 - [b] Held not "resident" or "member"

B. STATUS WHERE NAMED INSURED IS DECEASED WHEN ALLEGED ADDITIONAL INSURED'S CLAIM OF COVERAGE ARISES

- § 10. Held not "member" of "household"

IV. OTHER RELATIVES OF NAMED INSURED

- § 11. Held "resident" or "member"
- § 12. Held not "resident" or "member"

V. PERSONS NOT RELATED TO NAMED INSURED

- § 13. Held not "resident" or "member"

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| Apartment, coverage as affected by moving, §§ 9(a), 13 | Comment and summary, § 2 |
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Since relevant statutory provisions are discussed herein only to the extent that they are reflected in the reported cases falling within the scope of this annotation, and since the scope and wording of liability policies have frequently been the subject of legislation, the reader is advised to consult the latest enactments in the jurisdiction of interest.

[b] Related matters

Who is "named insured" or "designated as named insured" within meaning of automobile insurance coverage. 91 ALR3d 1280.

Validity, construction, and application of provision of automobile liability policy excluding from coverage injury or death of member of family or household of insured. 46 ALR3d 1024.

Automobile insurance: coverage as extending beyond death of named insured. 30 ALR3d 1047.

Liability insurance: insurable interest. 1 ALR3d 1193.

Exclusion from "drive other cars" provision of automobile liability insurance policy of other automobile owned, hired, or regularly used by insured or member of his household. 86 ALR2d 937.

What is a "non-owned" automobile within the meaning of the coverage clause of an automobile liability policy. 83 ALR2d 926.

Who is member of insured's "family" or "household" within coverage of property insurance policy. 1

ALR2d 561.

Couch, *Cyclopedia of Insurance Law*, 2d Ed.

Woodroof, Fonseca, and Squillante, *Automobile Insurance and No-Fault Law*.

§ 2. Summary and comment

[a] Generally

A review of the cases construing or applying the particular policy terms that are the subject of the present annotation reveals a wide variety of factual considerations upon which the courts have focused in their determinations of whether a particular person was a "resident" or "member" of the same "household" or "family" as the named insured at a particular time. Those factual considerations not only relate to the respective individual's physical presence in, or absence from, the named insured's home during the period that included the date of a particular occurrence, but also relate to such matters as the relationship (if any) of the individual to the named insured, the circumstances of such person's presence in or absence from the named insured's home, the individual's living arrangements during earlier time periods, and the individual's intention at various times with regard to his place of residence. Such factual considerations have become particularly significant in view of the express recognition by courts, in numerous cases appearing throughout the annotation, that some or all of the respective policy terms are ambiguous or devoid of any fixed meaning.⁷

the named insured or an additional insured while such person is operating a vehicle which is not described in the policy but which is owned or furnished for the regular use of a "resident" or "member" of the named insured's "household."

throughout the annotation, have adopted a dictionary definition applying the term "household" to a group of persons "dwelling" under the same roof as a "family." In most of those cases, however, the courts have weighed a number of factors in determining whether a particular individual was part of the named in-

7. Several courts, in cases appearing 424

A significant portion of the cases focusing upon one or more of the policy terms under consideration have involved a child of the named insured. Where such child was staying with the named insured during a period that included the date of the accident or other occurrence giving rise to the controversy concerning the child's status, courts have held, on the basis of a variety of circumstances, that the child qualified as a "resident" or "member" of the named insured's "household." Such results have been reached despite circumstances that included the child's separate living arrangements during a prior period, and the child's status as an individual over the age of majority.⁹

Where the child was living apart from the named insured while attending school, such child's absence has not prevented courts from determining, under the circumstances of several cases, that the child remained during his absence a "resident" of the named insured's "household."¹⁰ The courts in such cases have emphasized a variety of factors, including the circumstances that (1) the child continued to use the named insured's mailing address for various purposes, (2) the child left his possessions at the named insured's home, and (3) the child considered his dwelling place at school to be merely temporary.

Similarly, a child's absence while serving in the military has been held under the circumstances of numerous

cases not to interfere with his "residence" in the named insured's "household," the courts in such cases focusing upon factors such as the child's presence under the named insured's roof prior to his entry into the service, and his lack of choice concerning the location of his military station.¹⁰

Varying results have been reached by courts considering the situation where the named insured and his spouse were divorced or separated, and a child of the named insured was staying with the spouse (or former spouse) for a period including the date of the occurrence giving rise to the litigation concerning such child's status. Under the circumstances of some of the cases, the child was held to be a "resident" of the named insured's "household" despite his absence from the named insured's home,¹¹ while under the circumstances of other cases, the child was held not to be a "resident" or "member" of the named insured's "household" at the relevant time.¹²

The status of a child living apart from the named insured under circumstances other than those related to such child's military service or education, or the divorce (or separation) of his parents, has been the subject of several other cases within the scope of the present annotation. Based upon the circumstances of some of those cases, the respective child was held to be a "resident" of the insured parent's "household,"¹³ while under the circumstances of other cases, the

named insured's "family," or whether such individual could be considered to have been "dwelling" with that "family."

8. § 5, *infra*.

9. § 8, *infra*.

10. § 7, *infra*.

11. § 6(a), *infra*.

12. § 6(b), *infra*.

13. § 9(a), *infra*.

child was held to have failed to qualify as such a "resident."¹⁴

Litigation concerning the status of the named insured's spouse as a "resident" or "member" of the same household as the named insured has focused primarily upon the situation in which the spouse was living apart from the named insured due to domestic difficulties or other reasons. Referring to circumstances such as the spouse's long period of absence prior to the date of the particular occurrence giving rise to the suit, and the spouse's intention never to return to the named insured's home, some courts have held that the spouse's "residence" or "membership" in the named insured's household was terminated prior to the particular occurrence.¹⁵ However, courts under other circumstances have determined that the spouse remained a "resident" of the named insured's "household" despite such spouse's absence from the named insured's dwelling place during the period that included the date of the respective occurrence.¹⁶ Factors such as the temporary nature of the particular separation have been deemed significant in cases of the latter variety.

Where the named insured and his spouse were living under the same roof during a period which included the date of the occurrence giving rise to the controversy concerning the spouse's status, it was held, on the basis of the particular circumstances, that the spouse was at the time of such occurrence a "member" of the named insured's "household."¹⁷

Relatives other than the named insured's spouse or child have also

been the subject of cases within the scope of the present annotation. The courts under the circumstances of some of those cases have determined that the respective relative was a "resident" or "member" of the named insured's "household."¹⁸ But under the circumstances of other cases the courts have denied the particular individual's status as a "member" or "resident" of the named insured's "household" or "immediate family."¹⁹

Under the circumstances of the small number of cases involving claims that a person who was not related by blood or marriage to the named insured was at a particular time a "resident" of the named insured's "household," the courts have held that the status of "resident" of the "household" could not extend to the particular nonrelative.²⁰

In a number of instances, the courts have considered the circumstance that at the time a particular individual was allegedly living as a "member" of the named insured's "household," the named insured was deceased. Such cases have generally involved persons claiming to have been operating an insured automobile with the permission of the named insured's child, who was alleged to be an "adult member" of the named insured's "household," within the meaning of a policy provision extending liability coverage to persons operating an insured vehicle with the permission of such an "adult member." Under the circumstances of each of the cases where the issue has arisen, however, the courts have denied the child's status as an "adult member" of the "household," and have ex-

14. § 9[b], *infra*.

15. § 4[b], *infra*.

16. § 4[a], *infra*.

17. § 3, *infra*.

18. § 11, *infra*.

19. § 12, *infra*.

20. § 13, *infra*.

pressed the view that the death of the named insured terminated the existence of his "household."²¹

[b] Practice pointers

Counsel seeking to prove that a particular individual was a "resident" of the same "household" as the named insured may find it helpful to make the point, recognized by numerous courts,²² that such terms are ambiguous and should therefore be construed, in accordance with general principles of insurance law, in such a manner as to favor policy coverage.²³ The point has also been made that since the terms are to be construed so as to favor coverage, the cases which have focused upon those terms in the context of policy clauses excluding liability coverage of an individual found to be a "resident" of the named insured's "household" are of little value as precedents in applying clauses extending coverage to those to whom the terms apply.²⁴ Counsel for an alleged insured may therefore find it helpful, where such cases are cited as authority by opposing counsel, to emphasize the tendency of courts, in attempting to construe the relevant terms in such a manner as to favor coverage, to apply those terms narrowly, as opposed to the manner in which the same terms would be applied if occurring in inclusionary policy clauses.

Counsel for an alleged insured may also find it helpful to draw the attention of the trier of fact to any policy language from which an inference might be drawn as to the intention of the insurer and the named insured with respect to the application of the policy clauses referring to such phrases as "resident of the named insured's household." In this connection, at least one court has seized upon the term "family," appearing in the policy title ("Family Automobile Policy"), and has inferred from that word an intention to protect all members of a particular family as long as a family relationship legally existed (and even though the person claiming coverage was separated from her insured husband and had filed for divorce).²⁵

In cases involving an alleged insured who was living apart from the named insured at the relevant time, such alleged insured's intention in living separately from the named insured may be an important consideration in determining such person's status as a "resident" of the named insured's "household." Where the alleged insured had at the time of separation formed an intention never to return, counsel for the party seeking to exclude such individual from cov-

21. § 10, *infra*.

22. See, for example, *Crossett v. St. Louis Fire & Marine Ins. Co.* (1972) 289 Ala 598, 269 So 2d 869, *infra* § 8; *Aetna Casualty & Surety Co. v. Miller* (1967, DC Kan) 276 F Supp 341 (applying Kansas law); *Mazilli v. Acci. & Casualty Ins. Co.* (1961) 35 NJ 1, 170 A2d 800, both *infra* § 4[a].

23. But see *Pamperin v. Milwaukee Mut. Ins. Co.* (1972) 55 Wis 2d 27, 197 NW2d 783, *infra* § 12, which is one of the few cases in which the court expressed the

view that the terms "resident" and "household" are unambiguous, and that in applying those terms it makes no difference whether the policy used the terms to include persons as insureds or to exclude persons from coverage.

24. See, for example, *Crossett v. St. Louis Fire & Marine Ins. Co.* (1972) 289 Ala 598, 269 So 2d 869, *infra* § 8.

25. *Aetna Casualty & Surety Co. v. Miller* (1967, DC Kan) 276 F Supp 341, *infra* § 4[a].

erage may find it beneficial to bring that circumstance to the attention of the trier of fact.²⁶ The alleged insured's intention that his or her absence from the named insured's dwelling place was to be merely temporary, or such person's lack of an intention to permanently live apart from the named insured, is a factor which counsel for the alleged insured would ordinarily be well advised to bring out.²⁷

Although the cases considering an individual's status as a "resident" of a particular "household" generally focus upon the individual's status at the time of the occurrence from which the conflicting claims of coverage arose, the courts have in some instances considered circumstances existing after the respective incidents as having a bearing upon the question of the particular individual's status at the time of the incident. Where the named insured and his or her spouse were, because of marital problems, living separately prior to the spouse's involvement in an accident with respect to which liability coverage is claimed, counsel for such alleged insured might find it helpful, where warranted by the evidence,²⁸ to attempt to bring out the parties' subsequent reconciliation as bearing upon the spouse's intention at the time of the particular incident.

26. See, for example, *Firemen's Ins. Co. v Burch* (1968, Tex. Civ. App.) 426 SW2d 306, *aff'd in part and vacated in part on other grounds* (Tex.) 442 SW2d 331, *infra* § 4[b], in which the court's decision denying liability coverage to the named insured's wife was based in part upon the observation that from the time she had become separated from her husband, she never intended to resume living with him.

27. As an example of a case in which such factors were deemed to be significant, see *Hawaiian Ins. & Guaranty Co. v Federated American Ins. Co.* (1975) 13 Wash. App. 7, 534 P2d 48, 93 ALR3d 407, *infra* § 4[a].

II. Spouse of named insured

§ 3. Where living with named insured

Under the following circumstances it was held that the named insured's spouse, who was living under the same roof as the named insured on the day of an occurrence giving rise to the spouse's claim of coverage under the named insured's liability policy, was at the time of the occurrence a "member" of the named insured's "household."

Construing a garage liability policy clause providing coverage with respect to certain of the named insured's automobiles when used for nonbusiness purposes by a "member of the household" of the named insured, the court in *Universal Underwriters Ins. Co. v Johnson* (1961, ND) 110 NW2d 224, held that the named insured's wife, who was living with her husband at the time of her involvement in an accident while driving an automobile owned by him, qualified at the time of the accident as a "member" of her husband's "household." That there could be no doubt as to the wife's status was, in the court's view, a conclusion that was warranted by (1) judicial authority supporting the proposition that the term "household" applied to persons dwelling together as a family, and (2) a dictionary definition applying the term to a family, a domestic

cant, see *Hawaiian Ins. & Guaranty Co. v Federated American Ins. Co.* (1975) 13 Wash. App. 7, 534 P2d 48, 93 ALR3d 407, *infra* § 4[a].

28. As an example of a decision in which a subsequent reconciliation was taken into consideration in determining whether a separation was intended to be temporary or permanent, see *Hawaiian Ins. & Guaranty Co. v Federated American Ins. Co.* (1975) 13 Wash. App. 7, 534 P2d 48, 93 ALR3d 407, *infra* § 4[a].

III. Child of named insured

A. Status where named insured is alive when alleged additional insured's claim of coverage arises

§ 5. Child living with named insured

The status of the named insured's child as a "resident" or "member" of the named insured's "household" has been an issue both in cases construing policy provisions extending liability coverage to a "resident" of the named insured's "household," and cases dealing with policy language extending liability coverage to one operating an insured automobile with the permission of an "adult member" of the named insured's "household." Despite evidence of such matters as the separate living arrangements that the particular child had on previous occasions, or the child's attainment of the age of majority, the courts under the circumstances of the following cases held either that (1) a child living under the same roof as his insured parent on the date³¹ of the accident or other occurrence giving rise to the suit was at the time of such occurrence a "resident" or "member" of the named insured's "household," or that (2) there was sufficient evidence to support the conclusion that a child living under the named insured's roof on the relevant date was such a "resident."

Focusing upon that portion of an automobile liability policy's non-owned automobile clause extending coverage to a "resident" of the same "household" as the named insured, the court in *Travelers Ins. Co. v. Mixon* (1968) 118 Ga App 31, 162

SE2d 830, held that a finding that the son of the named insured was not a "resident" of his father's "household" at the time of the son's involvement in a motor vehicle collision was not required as a matter of law where there was evidence indicating, *inter alia*, that although the son had, during the 6-month period prior to the accident, lived and worked in a separate city from that of his father, he had returned to his father's house on most weekends during that period and was returning from what had apparently been a weekend at his father's house when the accident occurred. The court referred to various other matters, including, *inter alia*, evidence that (1) for 3 or 4 months following his graduation from high school the son had continued to live in his father's home, until he found work in the other city, (2) when he returned to his father's house on weekends, his mother did his laundry and prepared food for him to take back, and (3) he had a room in his father's house where he left some of his clothes. The court added that the judicial authorities did not indicate that residing at another place for a part of the time prevented a relative from being a resident of the household under an extension of coverage provision. Moreover, the court noted that the insurer could have employed terminology such as "resident exclusively" or "resident for a greater part of the time" if it had wished to so limit the coverage.

Applying automobile liability policy language providing coverage for those driving the insured automobile with the permission of the named

³¹ For purposes of the present section, even if the child was on his way to another dwelling at the time of the particular occurrence, such child is deemed to have been living under the named in-

sured's roof "on the date of" the occurrence if the child was staying with the named insured for a period that included both the day prior to the occurrence and a part of the day of the occurrence.

insured or an "adult member" of his "household," the court in *Ocean Acci. & Guaranty Co. v Schmidt* (1931, CA6 Ky) 46 F2d 269, held, in a decision apparently applying Kentucky law, that the named insured's 24-year-old son, who at all relevant times lived, ate his meals, slept, and had his washing done in the home of his father, was an "adult member" of his father's "household," even though he was not dependent upon his father for support. The court noted that the term "household" had such dictionary definitions as (1) a domestic establishment, (2) the members of a house collectively, and (3) those who dwell under the same roof and compose a family. The court concluded that in view of those definitions, it had no doubt as to the status of a son who has reached majority and supports himself, but who lives under his parents' roof.

Construing liability policy language defining the term "insured" to include relatives of the named insured if "residents of his household," the court in *Miller v United States Fidelity & Guaranty Co.* (1974) 127 NJ Super 37, 316 A2d 51, held that a divorced couple's 9-year old son, who set fire to the plaintiffs' barn after having been brought to his father's home for a weekend visit, was at the time of the incident not only a "resident" of the "household" of his father, with whom he stayed on weekends, but was also a "resident" of the "household" of his mother, with whom he lived during the week. In an opinion pertaining to coverage under policies issued by both the father's and the mother's insurers, the court stated that the term "household" is not confined within universally accepted limits, and that members of a family need not in all cases reside under a common roof in order to be

deemed part of a "household." The court also stated that "residence" does not involve the elements of permanency, continuity, and kinship with physical, social, cultural, and political attributes that are inherent in a "home" (in the sense of a domicile), and that while a person could have only one true domicile, he could have more than one residence. The court rejected the argument, that the controlling factor in determining the household of which the boy was a resident was a decree awarding custody to the mother and mere visitation rights to the father. The court stated that one of the purposes of the extended coverage provision of the policies was to assist the named insured in complying with his moral and legal obligation to maintain and support his family, and that the practice under which the boy stayed with his mother during the week and his father on each weekend indicated that a substantially integrated family relationship existed between the boy and his mother on the one hand and the boy and his father on the other. In the court's opinion, the boy's intention to be a part of each household was clearly manifested by the fact that when he was asked who he lived with, he replied "My dad and my mom."

Construing automobile liability policy language which extended coverage (with respect to the operation of non-owned automobiles) to any relative of the named insured qualifying as a "resident of the same household" as the named insured, the court in *Jamestown Mut. Ins. Co. v Nationwide Mut. Ins. Co.* (1966) 266 NC 430, 146 SE2d 410, held that the named insured's 29-year-old son, who had been living with his father for about 2 weeks at the time of his involvement in a motor vehicle collision, was a "resident of the same

household" as his father despite the fact that the son had previously lived in other places and had returned to his father's home with the intention of ultimately finding a room in a boarding house. The court pointed out, *inter alia*, that the word "resident" has many shades of meaning, ranging from mere temporary presence to the most permanent abode, and that when an insurer uses a "slippery" word to designate those who are insured by the policy, it is not the court's function "to sprinkle sand upon the ice" by construing the term strictly. That the son was "a resident of the same household" as his father was, in the court's view, clearly shown by the circumstances that (1) the son, who had become separated from his wife, had no home of his own, (2) when he came back to his father's house, he carried with him all his possessions, (3) the son had intended to remain at his father's house until quarters more convenient to his employment could be found, (4) he ate at his father's house, slept there, had his laundry done with the family laundry, and had the run of the house, and (5) he paid no board.

Despite the circumstance that the named insured's son had quit high school and left his father's community prior to the son's involvement in an automobile accident, the court in *Travelers Indem. Co. v Mattox* (1961, **Tex Civ App**) 345 SW2d 290, writ *ref n re*, held that there was sufficient evidence to support the jury's finding that the son, who was staying with his parents at the time of the accident, was at that time a "resident of the same household" as the named insured (his father), within the meaning of an automobile liability policy clause extending coverage to those of the named insured's relatives who qualified as such "residents". The

court pointed out that the domicile of a minor child is as a matter of law that of his father, and that since "residence" is a lesser included element within the technical definition of the broader term "domicile," it followed that if the young man had his domicile in the house of his father, he had a residence there also, even though he may have had other residences at the same time. The court further stated that if he had a residence at his father's house, then he was a "resident of the same household," within the meaning of the policy. Moreover, the court pointed out that whether or not the son's residence was in "the same household" as his father was a factual matter, and the court referred, as supporting its conclusion, to the circumstances that (1) when the son left his father's community to go to work for a brother in another town, he carried only his work clothes, leaving all of his other personal belongings at his father's house, and (2) before the son quit school and left, his father had talked to him about finishing school, and it was his father's opinion that the boy would return to school the following year if a change of teachers were made.

But see *Indemnity Ins. Co. v Sanders*, (1934) 169 **Okla** 378, 36 P2d 271, *infra* § 12, in which the court, although focusing upon the question whether the named insured's son-in-law was a member of his father-in-law's household, stated in dictum that the named insured's daughter, who was spending a few days with her parents because of marital problems, was not a "member" of the "household" of her father.

To the same effect (and arising from the same accident) as *Indemnity Ins. Co. v Sanders* (1934) 169 **Okla** 378, 36 P2d 271, *supra*, is *Indemnity*

IN THE SUPREME COURT OF THE STATE OF UTAH

FILED

GOVERNMENT EMPLOYEES INSURANCE
COMPANY,

Plaintiff and Appellant,

vs.

WILLIAM CHARLES DENNIS,

Defendant and Respondent,

vs.

JAMES C. HOLDER, BARBARA ANN HOLDER,
and JAMES C. HOLDER, as Guardian Ad
Litem for JEFFERY HOLDER, WENDI
HOLDER, and JUSTIN HOLDER, minors,

Defendants-In-Intervention
and Respondents.

OCT 14 1981

Clerk Supreme Court, Utah

RESPONDENTS' ADDITIONAL AUTHORITY
PURSUANT TO RULE 75(p)(3) U.R.C.P.

Claim No. 17267

COMES NOW Defendants-In-Intervention and Respondents, Holders, pursuant
to Rule 75(p)(3) Utah Rules Of Civil Procedure, and submit as additional authority
the following cases, which are listed in Shepherds Citations citing Buddin v. Nation-
wide Mutual Insurance Company as authority:

State Farm Mutual Automobile Insurance Company v. Borg, 396 F2d. 740 (8th
Cir. Minn. 1968).

Alabama Farm Bureau Mutual Insurance Company v. Pigott 393 So.2d 1379 (Ala
1981).

Peninsula Insurance Company v. Knight 255 A2d. 55(Md. 1969).

These cases were referred to in Respondents' Argument and parts of the

Borg case were read verbatim to the Court. The cases should be included in the
"Argument" section of Respondents' Brief.

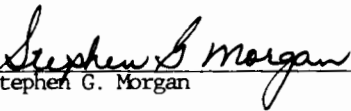
DATED this 14th day of October, 1981.

MORGAN, SCALLEY & DAVIS

Stephen S. Morgan
Stephen S. Morgan

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Respondents' Additional Authority Pursuant To Rule 75(p)(3) U.R.C.P. to David H. Epperson, Attorney for Plaintiff and Appellant, 175 South West Temple, No. 650, Salt Lake City, Utah 84101, and to Joseph C. Fratto Sr., Attorney for Defendant and Respondent, 431 South 300 East, Suite 101, Salt Lake City, Utah, 84111, postage prepaid, this 14th day of October, 1981.



Stephen G. Morgan