1983

Donnita Tuom, Widow of Daniel Tuom v. Duane Hall Trucking, State Insurance Fund and Industrial Commission of Utah : Brief of Respondents

IN THE SUPREME COURT

OF THE STATE OF UTAH

DONNITA TUOM, Widow of Daniel Tuom,	:	
Petitioner,	:	Case No. 19162
vs.	:	
DUANE HALL TRUCKING, STATE INSURANCE FUND and INDUSTRIAL COMMISSION OF UTAH,	:	
Respondents.	:	

BRIEF OF RESPONDENTS

WRIT OF REVIEW FROM
THE INDUSTRIAL COMMISSION OF
THE STATE OF UTAH

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BRIEF OF RESPONDENTS

Writ of Review from the Industrial Commission

of the State of Utah

NATURE OF THE CASE

This is a review of a final order of the Industrial Commission of Utah denying petitioner death benefits under Utah's Worker's Compensation Laws.

DISPOSITION BY THE INDUSTRIAL COMMISSION

On March 2, 1983, the Administrative Law Judge entered Findings of Fact, Conclusions of Law and Order denying petitioner's application (R. 144). From petitioner's Objections to the Findings of Fact, Conclusions of Law and Order, Motion to Review and/or Motion to Reconsider (R. 146-148), the Industrial Commission affirmed the

Order of the Administrative Law Judge by a Denial of Motion for Review (R. 153). Plaintiff thereafter filed a Petition for Writ of Review (R. 155-157) and a Writ of Review issued (R. 158) bringing this matter before the Supreme Court.

RELIEF SOUGHT ON APPEAL

Defendants on appeal respectfully ask that the decision of the Industrial Commission of Utah be affirmed.

STATEMENT OF FACTS

Daniel L. Tuom died on September 5, 1981, of multiple injuries sustained from a truck accident on August 26, 1981, in Coalville, Utah. The accident occurred during the course of the decedent's employment with respondent Duane Hall Trucking Company.

Petitioner filed her claim for dependent benefits on March 12, 1982, alleging that she is the surviving and dependent spouse of decedent (R. 2).

Petitioner entered into a common law marriage with Daniel Tuom in Idaho and lived with him from May, 1971 until June, 1980. No children were born as a result of the live-in arrangement (R. 142).

In early 1978, Daniel Tuom met Arlene Browning, dated her a few times in December 1979, and became more involved with her in the Spring of 1980 (R. 142). When petitioner became aware of the seriousness of Daniel Tuom's relationship with Arlene Browning, the petitioner voluntarily left her common-law husband in Oregon on June 13, 1980 and returned to Idaho. In August, 1980, Daniel Tuom began spending several nights a week with Arlene Browning, and finally moved in with Ms. Browning and her two children on December 1980 (R. 103-105, 142-143). Subsegently Daniel and Arlene, with the

family, moved to Utah in March, 1981 (R. 96-97). After a period of no work (and a short-lived employment opportunity), Daniel began working for the respondent Duane Hall Trucking in June, 1981 (R. 96, 143). He continued to live with Arlene during this time and up until his death. According to the petitioner, Daniel Tuom visited her on three occassions between June 1980 and September 1981 (R. 57). The last of these visits supposedly was in March of 1981 (R. 57). Nevertheless, Arlene considered herself married to Daniel, and the Administrative Law Judge found that Daniel never returned to the petitioner (R. 143).

Respondents disagree with one allegation made in the Statement of Facts. of petitioner's Brief. At pages 4 and 5, petitioner's counsel itemizes plaintiff's living expenses, and concludes:

> Mrs. Tuom's sister moved in with her to help offset household costs. At best, this would reduce her own (Petitioner's) requirements, but only as long as she relied upon the charity of her sister. (petitioner's Brief at 5).

Petitioner's own testimony at the hearing before the Administrative Law Judge clearly indicates the petitioner did not rely on her sister for charity (R. 58). After petitioner left Daniel Tuom on June 13, 1980, she immediately went to live with her mother (R. 51), and later moved in with her sister, with whom she continued to share an apartment at the time of the trial (R. 51). While petitioner lived with her sister, the living expenses were shared equally (R. 56).

ARGUMENT

I. PETITIONER IS NOT THE SURVIVING SPOUSE OF DECEDENT.

Respondents do not refute the fact that petitioner and

Daniel Tuom (hereinafter "the deceased") once enjoyed a legal common law marriage in Idaho. The Administrative Law Judge agrees "they did have a common law marriage and . . . were never formally divorced" (R. 142). Respondents do contend that no evidence suggests this relationship was continuing at the time of the deceased's death of September 5, 1981.

Petitioner cites Schurler v. Industrial Commission, 43 P. 696 (Utah 1935) as recognizing "the possibility that a common law marriage, consumated in a state where such marriages are valid, would in fact be valid in the State of Utah." (Petitioner's Brief at 7). But Schurler's dicta certainly must have contemplated possible Utah recognition of such a marriage only if the couple continued to live together in Utah. Petitioner never lived with the deceased in Utah, and petitioner's own testimony indicates the deceased never contributed to petitioner's support while the deceased lived in Utah with another woman (R. 42-43).

Furthermore, Utah should not recognize a marital relationship where the parties have shown by their actions that they wish to terminate their relationship in the same simple way they entered into it. . . . apparent mutual consent. Petitioner quotes at length from Hilton v. Roylance, 69 PAC. 660 (Utah 1902) for the proposition that "no dissolution of the (marital) status can be effected simply by the mutual consent or agreement of the parties." (Petitioner's Brief at Hilton concerned a marriage consummated under Utah law. Besides, great majority of marriages in 1902 fulfilled the promise "till do us part." Society then looked with severe disfavor on [illegible] marriages, and could hardly imagine the popularity of [illegible] arrangements. People at the turn of the century were expected to marry once and stay together. This type of binding relationship [illegible]

contemplated in Hilton; however, times have changed. In 1900 the marriage rate in the United States was 9.3 per 1,000 as opposed to a divorce rate of .7 per 1,000; and in 1981, the same rates were 10.6 and 5.3 respectively. See The World Almanac & Book of Facts, 1983 (Newspaper Enterprise Association Inc., New York), page 955. Not only has the divorce rate increased over 750% the past 81 years, many people are now choosing common law marriages over the fanfair of formal marriages. Obvious reasons for the popularity of common law marriages include the following:

1. They give the appearance of more independence for the parties;

2. Obligations between the parties are minimized, especially in light of the trend towards smaller families and the intention of common law marriage partners--as in the instant case (R. 143)-- not to have any children at all;

3. They are indicitive of the increasing acceptance of extra marital relationships and emphasis on individual freedom in today's society.

This court should follow cases much more recent than Hilton, and allow the apparent mutual consent of the parties to terminate common law marriages not continued within Utah. In Farrow v. Hopkins, 453 SW 2d 785 (Tenn. 1970), a woman claiming to be the widow of an employee killed in an industrial accident was denied death benefits because the husband and wife were separated for a long time and, although the parties saw each other occassionally, never discussed separation or reconciliation. The Tennessee Supreme Court found that "(t)he deceased did not support the wife.

She asked for no support nor expected any." Id. at 788. Similar facts are found in the case at bar. And in Brezickyj v. Eastern Railroad Builders Inc., 59 A.D. 2d 578, 397 NYS 2d 452 (1977), the New York Supreme Court, Appellant Division, denied death benefits to the purported widow claimant, even after an involuntary separation, because the separation continued by apparent mutual consent.

Likewise, plaintiff herein and the deceased mutually consented to continue their separation indefinitely. Petitioner purchased a home with her sister, which purchase the petitioner characterized as an investment (R. 56). And, in spite of his common law marriage to petitioner, the deceased was uninhibited from exploring extra-marital relationships in 1978, 1979, and 1980. The deceased later entered into a live-in arrangement with Arlene Browning, and even took care of Arlene's children for several weeks while she was away (R. 143). The petitioner and the deceased filed separate federal tax returns beginning in 1980 (R. 53, 62) and the deceased took out accident insurance showing Arlene as his wife (R. 128). All actions of the deceased and the petitioner showed they contemplated ending their common law marriage.

II. PETITIONER IS NOT A DEPENDENT OF THE DECEDENT BY OPERATION OF LAW.

The question of dependency of a surviving spouse under the Utah Worker's Compensation Act is controlled by Utah Code Annotated § 35-1-71 which provides, in pertinent part, as follows:

> The following persons shall be presumed to be wholly dependent for support upon a deceased employee:
>
> (2) For purposes of payments to be made under

> subsection (2)(b)(i) of Section 35-1-68, a surviving husband or wife shall be presumed to be wholly dependent upon a spouse with whom he or she live at the time of the employee's death.

U.C.A. §35-1-71 (2) (1953, as amended 1979).

Petitioner charges it was manifest error of law for the Administrative Law Judge and the entire Commission not to give cause or effect to Section 35-1-68 (2)(b)(iv), which provides in pertinent part:

> (b)(iv) For purposes of any dependency determination, a surviving spouse of a deceased employee shall be conclusively presumed to be wholly dependent for a six year period from the date of death of the employee.

U.C.A. § 35-1-68 (2)(b)(iv) (1953, as amended 1979).

But the dependency determination test in the above statute applies only to surviving spouses. In other words, before Section 35-1-68 (2)(b)(iv) can be applied to the facts of this case, it must be clearly shown that the petitioner is the surviving spouse of the deceased. According the to Utah Supreme Court's decision in Utah Apex Mining Company v. Industrial Commission, 66 Utah 529, 44 PAC. 656 (1926), where a claimant is living apart from the deceased at the time of the death, the claimant has the burden of proof to show this dependency. The Commission found that the deceased "provided no support for the petitioner nor was there any indication that he intended to provide any support for her since the time of his separation" (R. 144). Therefore, irrespective of the surviving spouse question, petitioner failed to carry her burden of dependency.

Petitioner submits that "living with" standard imposed

by § 35-1-71 (2), represents a duty or restraint upon her "freedom of action" under Basin Flying Service v. Public Service Commission, 531 P.2d 1303, 1305 (Utah 1975), and therefore, § 35-1-71 should apply because it is "more consistent with a liberal construction of the Worker's Compensation Act. . . " (See Petitioner's Brief at 7). Two points refute petitioner's broad interpretation of the above authorities. First, Basin was narrowly written to apply to the Public Service Commission, which has no inherent regulatory powers except "those which are expressly granted. . . ." Id. Petitioner herein is not being restricted from any action, nor is she being given an additional duty by applicantion of § 35-1-71 (2) instead of § 35-1-68. Rather, she is simply being made to prove she was dependent upon the deceased because the relationship existing between the two at the time of the fatal accident is, at best, unclear. Second, a liberal construction of the Worker's Compensation Act should not overlook the fact that "(t)he concept of marriage under Worker's Compensation Statutes is not special, but follows the ordinary domestic relations law" of each State. Gamez v. Industrial Commission, 114 Arizona 179, 181, 559 P.2d 1094, 1096 (1977), citing 2 Larson, Workmen's Compensation Law, § 62.21 (1976).

If, as petitioner argues, an inconsistency exists between subsections 71(2) and 68, respondents agree judicial construction should give greater weight to the more recent and more specific pronouncement of the legislature. Osuala v. Aetna Life and Casualty, 608 P.2d 241 (Utah 1980); J. Sutherland, Statutes and Statutory Construction, §§ 4703, 5201, 5204 (3rd Edition 1943). Such construction favors § 35-1-71 (2), not subsection 68. Subsection 71(2) was amended in

1979, as was subsection 68; therefore, the more specific pronouncement between the two should prevail. Subsection 71(2) goes beyond 68 by requiring cohabitation, and thus it is the most specific. In this action, Commission properly overlooked the dependency presumption afforded spouses under subsection 68 because subsection 71(2) was intended to qualify application of the former statute. In other words, no spousal dependency presumption can apply, under Utah law, unless the petitioner is living with the employee at the time of the employee's death or the surrounding circumstances indicate some consistent economic dependency by the claimant on the deceased. Where it is unclear who the deceased employee was married to at the time of his death, as here where the actions of the parties contradict the self-serving testimony of the claimant (or even question whether the deceased was legally married at all), justice and fairness demand a look at actual dependancy. Otherwise, as stated in Brezickyj, supra, "(t)o find the claimant herein eligible for death benefits is to provide support for her, which decedent had not done" for over fourteen months. 59 A.D. 2d at 580, 397 NYS 2d and 454. If the deceased employee had maintained relationships with several people, and each of them claimed death benefits, it could be very confusing for the Court to determine which is the real spouse without first examining all the circumstances surrounding each relationship.

Utah Supreme Court decisions have uniformally determined spousal dependency questions in light of all surrounding circumstances. One such circumstance is whether the claiming spouse was living with the employee at the time of the accident. For example, in Roller Coaster Company v. Industrial Commission, 112 Utah 532, 189 P.2d 709 (1948),

the Utah Supreme Court said dependency must be determined from all circumstances, including the amount of any support being received at the time of the fatal injury. And in Combined Metals Reduction Co. v. Industrial Commission, 74 Utah 247, 254, 278 P 1019, 1021 (1929), the court set forth a test for compensation, to be determined from all of the evidence: "(I)t must be made to appear as a fact that they were dependent upon (the employee) at the time (the employee) was fatally injured." In Apex Mining, Supra, the following outstanding facts were deemed controlling:

> First, that the parties were living separate and apart for a considerable period of time; second, that the husband during that period made no contributions whatsoever towards the support of his wife; and third, that the wife was able to and did support herself.

Id. at 535, 244 PAC. at 659.

These facts are present in the instant matter. Petitioner and the deceased had been living separate and apart for over 14 months prior to the death. No evidence suggests the petitioner relied on or ever received any significant or even partial support from the deceased since the June 1980 separation. At all times during the deceased's absence, petitioner was able to and did support herself. Indeed, petitioner continues to provide for her own support, and is uninhibited from doing so.

On similar facts, the Utah Supreme Court in Apex Mining concluded:

> The natural presumption from these facts is against dependency. Of course that presumption might be overcome by proof explaining the separation and non-support as temporary, and indicating a mutual purpose and intent to live together again and be supported by the husband. But here the explaination indicates the very contrary.

Id.

Similarly, petitioner here should be required to overcome a presumption against dependency because no evidence suggests that she would ever have joined the deceased after she left him, or that she could have reasonably expected any support thereafter. In the alternative, if Apex Mining is no longer controlling, petitioner at least should be required to show actual dependency. Utah authorities are in agreement that dependency is a question of fact for the Commission to decide. Thus the Commission's decision, like a jury's verdict, is conclusive as to the facts unless no substantial evidence supports the judgment. The Commission's uncontroverted findings that the petitioner was not living with the deceased at the time of the accident, and that the petitioner was not in any way dependent upon the deceased, lends substantial support for the Commission's conclusions.

The Administrative Court was justified in examining dependency because certainly no proven marriage between petitioner and the deceased existed at the time of the fatal accident.

Even though common law marriages are not recognized as spousal relationships in Utah (Utah Code Ann. § 30-1-2(3)) (1953 as amended 1977)), the Administrative Law Judge looked to Utah Code Ann. § 35-1-71(2) to determine if the relationship that existed between the petitioner and the deceased could by itself afford dependancy status to the applicant. The Industrial Commission was bending over backwards to avoid simply dismissing the petioner's claim for lack of any spousal relationship, which they could have done based upon strong Utah Case law (see Schurler v. Industrial Commission, supra,), persuasive public policy and the aforementioned section 30-1-2(3), all of which oppose any recognition of a marriage

between petitioner and the deceased in Utah. But in an effort to give the petitioner every opportunity to qualify as a dependant, the Commission examined the living arrangements of the petitioner and the deceased at the time of the accident. Only when the petitioner was found to be living apart from the deceased, and the deceased found to be living with another woman, did the Commission deny benefits.

III. PETITIONER WAS NOT CONSTRUCTIVELY "LIVING WITH" DECEDENT AT THE DATE OF DEATH.

Although the Utah Supreme Court has given liberal construc to the meaning of the phrase "living with" in Section 35-1-71(2) in Diaz v. Industrial Commission, 80 Utah 77, 13 P.2d 307, 311 (1932), the liberality ends where the wife no longer looks to the husband f support. Since petitioner no longer looked to the deceased for her support and had not "become a public charge" in the absence of his financial assistance. Even a liberal construction of "living with" still defeats the peitioner's claim. Id, 13 P.2d at 313.

Petitioner cites Ranger Insurance Company v. Industrial Commission, 115 Ariz. App 45, 485 P.2d 69 (1971), as granting death benefits to a wife even though the wife and husband were separated, if the separation is due to the husband's misconduct. In Ranger Insurance Co., however, the wife attempted to return to her husband but was threatened with death by the husband's new companion if she ever saw her husband again. Id. 485 P.2d at 471. The petitioner herein voluntarily left the deceased, and has n to rejoin him. In fact, petitioner testified the deceased call more than she called him (R. 41).

Petitioner was free to leave the decedent, and did so

voluntarily. Petitioner made no effort to return to the deceased and rarely spoke to him, if at all. These facts show an apparent abandonment of the relationship. Based on Brezickyj and Farrow, supra, petitioner should be denied benefits not only because she was not constructively living with the deceased at the time of death but also because the separation continued by mutual consent.

IV. PETITIONER WAS NOT ACTUALLY DEPENDENT ON DECEDENT AT THE TIME OF DEATH.

The Administrative Law Judge found that the decedent "provided no support for the applicant, nor was there any indication that he intended to provide any support for her since the time of her separation" (R. 143-144). Petitioner states in her brief that for the Administrative Judge to have found the above, he must have arbitrarily and capriciously disregarded her testimony at trial. (Petitioner's Brief at 17) Petitioner testified that her dependency on the deceased was genuine because the decedent gave her $350.00 after she left him, $250.00 of which was for replacing the top of petitioner's car (R. 41-42). Even if this testimony was believed, by the Administrative Judge, receiving $100.00 for the necessities of life over 14 months cannot possibly afford dependency status to petitioner. And in light of petitioner's self serving testimony on the subject, reasonable minds will certainly agree with the Administrative Judge that there was no indication that deceased intended to provide any support for petitioner.

In Ranger Insurance Co. v. Industrial Commission, supra, Arizona Appellant Court said the Industrial Commission alone may determine whether a witnesses testimony will impact upon the findings of fact:

> (T)he determination of the credibility to be accorded . . . testimony . . . is the type of determination

> routinely made by the Commission, and an ultimate finding of fact based upon such a credibility determination cannot be challenged.

Id. 485 P.2d at 871.

The Utah Supreme Court is in agreement that only on very rare occassions should the Commission's findings be overruled. In Harrison v. Industrial Commission, 578 P.2d 510, 511 (Utah 1978), this court stated that it is "for the Industrial Commission to weigh the evidence before it and to determine the facts of the case." The Harrison court added: "Our statute (35-1-85) provides that the findings of fact by the Commission are final and shall not be subject to review." Id. at 512. More recent authority is found in Kaiser Steel Corporation v. Monfredi, 631 P.2d 888, 890 (Utah 1981), as follows:

> (T)he reviewing court's inquiry is whether the Commission's findings are "arbirary and capricious" or "wholly without cause" or contrary to the "one (inevitable) conclusion from the evidence" or without "any substantial evidence to support them." Only then should the Commission's findings be displaced. (Bracketed language in original).

No substantial testimony or evidence refutes the Commission findings in this case. Unlike McGarry v. Industrial Commission, 63 Utah 81, 222 PAC. 592, 594 (1923), (cited in Petitioner's Brief), petitioner was in no way deperdent upon the deceased. No evidence suggests that petitioner's life style changed at all following the death of her former common law husband. Petitioner states that the deceased was earning $700.00 per week, and therefore, he would have been required to pay alimony in the event of a divorce. This simply has no basis, in light of the deceased's fluctuating and seasonal employment and the proven ability of the petitioner to bear her own living expenses. At all times after her leaving the deceased,

the petitioner's living expenses were apportioned between her and either her mother or sister (R. 51). For these reasons, and in light of all evidence, the Commission's finding that petitioner was not dependent upon the deceased is correct.

CONCLUSION

Respondents respectfully submit that the Industrial Commission properly found that the decedent provided no support to the petitioner since the date of their separation. Petitioner never attempted to return to the decedent and, by her actions and those of the deceased, the separation continued by a mutual consent. The weight of evidence indicates at all times subsequent to separation, petitioner and the deceased held themselves out as no longer being married. Therefore, petitioner was not the surviving spouse of the deceased at the time of death. Accordingly, the Commission's order denying death benefits to the petitioner should be affirmed.

RESPECTFULLY SUBMITTED THIS 31 Day of August, 1983.

BLACK & MOORE

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MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing BRIEF was sent this 31st day of August, 1983, to the following:

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