

Pension—Mothers' Pension—Death.

A husband unheard of for seven years is presumed to be dead and the wife is entitled to a mother's pension unless presumption is overcome.

J. E. McKenna, Esq.,
Deputy County Attorney,
Lewistown, Montana.

December 24, 1928.

My dear Mr. McKenna:

You have requested an opinion whether a mother's pension may be allowed to a woman whose husband deserted her and who has not been heard from for seven years.

Under Section 10480 R.C.M. 1921, one of the conditions precedent to the right to a mother's pension is that the husband be dead. By Subdivision 26 of Section 10606 a person who has not been heard of for seven years is presumed to be dead. This presumption is rebuttable. I believe, however, that under the facts submitted by you this presumption raises a prima facie case entitling the mother to a pension. The fact that the husband in deserting the wife may be termed a fugitive from justice is a fact to be considered by the court in deciding whether the presumption has been overcome.

See the case of Town of Van Buren vs. City of Syracuse, 131 N.Y.S. 345, and the note in 44 L.R.A. 1488.

In other words, I believe that the question of whether the presumption of death has been overcome is a question of fact to be decided by the court, and that if the court sees fit to find that the husband is dead in accordance with the presumption that its finding in that regard would be conclusive, save and except that I believe any taxpayer who might subsequently learn that the husband is alive could have the order of allowance set aside by virtue of the provisions of Chapter 12 of the Laws of 1927, Section 10482 of the supplement to the code.

Very truly yours,
L. A. FOOT,
Attorney General.