

2001

Leah M. Daly v. George F. Daly : Brief of Appellant

Utah Supreme Court

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

LEAH M. DALY, Executrix for
the Estate of Eva Dean Daly,
deceased,

*Plaintiff and
Respondent,*

vs.

GEORGE F. DALY,

*Defendant and
Appellant.*

**BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School**

Case No.

13517

APPELLANT'S BRIEF

Appeal from the Interlocutory Decree and Orders
of the Third Judicial District Court in and for
Salt Lake County, State of Utah, Honorable James
S. Sawaya, Judge, presiding.

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FILED

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE
STATE OF UTAH

LEAH M. DALY, Executrix for
the Estate of Eva Dean Daly,
deceased,

Plaintiff and
Respondent,

vs.

Case No.

GEORGE F. DALY,

Defendant and
Appellant.

13517

APPELLANT'S BRIEF

STATEMENT OF THE NATURE OF CASE

The Appellant, George F. Daly, appeals from the Interlocutory Decree of Divorce granted to the Respondent's predecessor, Eva Dean Daly, deceased, on the 10th day of August, 1973, in the District Court for the Third Judicial

District in and for Salt Lake County, State of Utah, the Honorable James S. Sawaya, Judge, presiding, together with the District Court's Orders of October 11, 1973, denying Defendant's Motion to Dismiss and/or Motion to Modify Decree, and granting Plaintiff's Motion to Amend Decree, along with the District Court's Order of October 26, 1973, declaring the Respondent-Executrix, Leah M. Daly, to be the owner in fee simple of designated real property.

DISPOSITION IN THE LOWER COURT

The above matter came on regularly for a non-jury trial on the 18th day of July, 1973, before the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable James S. Sawaya, Judge, presiding. On the 10th day of August, 1973, the District Court entered its Interlocutory Decree of Divorce pursuant to its Memorandum Decision, Findings of Fact and Conclusions of Law, ordering, inter alia,

that the Plaintiff be awarded a Decree of Divorce from the Defendant, said Decree not becoming final and absolute until the expiration of three months from the date and entry of said Decree; and further, awarding to the Plaintiff the real property of the parties located at 1806 Bryan Avenue, Salt Lake City, Utah, subject to an equitable lien in favor of the Defendant in the amount of \$8,000.00, together with the ordinary life insurance policy on the life of the Defendant.

On October 11, 1973, subsequent to the death of the Plaintiff, occurring September 23, 1973, the District Court denied the Defendant's Motions to Dismiss said action and Motion to Modify Decree so as to award to the Defendant the herein described real property and ordinary life insurance policy. On the 26th day of October, 1973, the District Court granted an Order determining the Respondent's Executrix,

Leah M. Daly, to be the owner in fee simple in said described real property and substituted said Executrix as party-plaintiff herein. The Defendant in the Lower Court is hereinafter referred to as Appellant and the substituted Plaintiff in the Lower Court is hereinafter referred to as Respondent.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the Interlocutory Decree of Divorce granted in the District Court insofar as it awards the real property situated at 1806 Bryan Avenue, Salt Lake City, Utah, and the ordinary life insurance policy to the Respondent, together with reversal of the District Court's Order denying Appellant's Motion to Dismiss and Appellant's Motion to Modify Decree, and said District Court's Order determining the Executrix, Leah M. Daly, to be the fee simple owner of said property, and remanding same to the District Court with

proper instructions to modify said Decree so as to award to the Appellant said real property and ordinary life insurance policy; or in the alternative, dismissing said matter.

STATEMENT OF FACTS

George F. Daly, now 67 years of age, and Eva Dean Daly, deceased, were married the 29th day of December, 1928, at Salt Lake City, Utah. During the course of said marriage, three children were born to the parties, all of whom have attained their majority and are not dependent on either party for support. (R-3) Mrs. Daly worked throughout the marriage and Mr. Daly was regularly employed to the time he was retired on disability from the State of Utah. (R-6, 7 & 8) Subsequent to his retirement, Mr. Daly received and continues to receive the monthly sums of \$227.00 from Social Security and \$77.50 from State Retirement as his sole income. (R-12)

Prior to their separation, the parties

resided together in their home located at 1806 Bryan Avenue, Salt Lake City, Utah. Said home represented the most substantial asset acquired by the parties during their marriage, and for the purchase of which they both, together with contributions from their daughter, Leah M. Daly, devoted their respective earnings. (R-27, 560, 64 & 67) Leah M. Daly, Executrix herein, currently 43 years of age, resided with her parents throughout the marriage and made contribution to the family during said time. (R-6) Said home was purchased by the parties in joint tenancy in 1952 for a purchase price of \$18,500.00. (R-5) A downpayment of approximately \$5,000.00 was made from the equity remaining upon the sale of the prior home of the parties. (R-5 & 24) The payments upon the home were substantially completed at the time of the trial of the above matter.

Mr. Daly was retired from the State of Utah

owing to back difficulties (R-30) and at the time of the trial herein suffered from diabetes, a heart condition, and prostate ailments. (R-21 & 22) Owing to his condition of health, Mr. Daly is physically unable to undertake employment for his support.

On September 23, 1973, 43 days following the making and entry of the Interlocutory Decree of Divorce herein and within the three-month interlocutory period, Mrs. Daly died of natural causes. Upon this change of circumstances, on the 27th day of September, 1973, Mr. Daly duly moved the District Court to dismiss the divorce action filed herein, or in the alternative, to modify the Decree so as to award to him the real property of the parties herein mentioned and said ordinary life insurance policy. On October 11, 1973, the District Court denied both Motions and on October 26, 1973, entered its Order allowing the Executrix, Leah M. Daly,

to be substituted as party-plaintiff herein, and further determining said Leah M. Daly to be the owner in fee simple of said real property. Appellant-Defendant, George F. Daly's, Notice of Appeal to this Honorable Court was filed November 26, 1973.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN FAILING TO GRANT DEFENDANT'S MOTIONS TO DISMISS AND/OR MODIFY THE INTERLOCUTORY DECREE OF DIVORCE IN LIGHT OF CHANGED CIRCUMSTANCES.

The law is clear in the State of Utah, that following the entry of a divorce decree, the court shall have continuing jurisdiction to alter or modify such decree with respect to the support and maintenance of the parties or division of property as may be provided therein as shall to the court be reasonable and necessary. Utah Code Annotated (1953), Section

30-3-5 (1973 Supp.), specifically provides:

When a decree of divorce is made, the court may make such orders in relation to the children, property, and parties, and the maintenance of the parties and children, as may be equitable. The court shall have continuing jurisdiction to make such subsequent changes or new orders with respect to the support and maintenance of the parties, the custody of the children and of their support and maintenance, or the distribution of the property as shall be reasonable and necessary.

Generally, to justify such a modification with respect to the division of property, a party must demonstrate a change in circumstances from those existing at the time the decree was entered. Cody v. Cody, 47 Ut. 456, 154 P. 952 (1916). The determination as to what shall constitute a sufficient change of circumstances, as well as the original distribution of property itself, rests largely within the sound discretion of the trial court, though such may not be exercised arbitrarily. Pinney v. Pinney, 66 Ut. 612, 245 P. 329 (1926); Stewart v. Stewart,

66 Ut. 366, 242 P. 947 (1926). Such discretion has been in fact held to be wider and more liberal where, as here, a modification is sought during the interlocutory period. Alley v. Alley, 67 Ut. 316, 247 P. 301 (1926). For example, sufficient changes in circumstances to justify modifications have been found where a party experiences a substantial increment in earnings, Harrison v. Harrison, 22 Ut.2d 180, 450 P.2d 456 (1969), or a change in the health of a party, King v. King, 25 Ut.2d 163, 478 P.2d 492 (1970). With respect to the division of property, this Honorable Court in Foreman v. Foreman, 111 Ut. 72, 176 P.2d 144 (1946), detailed the following elements to be determined by the trial court:

- (1) The amount and kind of property owned by each of the parties;
- (2) Whether the property was his before coverture or accumulated jointly;
- (3) The ability and opportunity of each to earn money;
- (4) The financial condition and necessities of each party;

- (5) The health of the parties;
- (6) The standard of living of the parties;
- (7) The duration of the marriage;
- (8) What the wife gave up by the marriage;
and
- (9) What age they were when married.

In the instant case, it must expressly be noted that the parties' marriage (since 1928) was of long duration; that the earnings of each went largely into the purchase of their home at 1806 Bryan Avenue, Salt Lake City, Utah; that said home represented the only substantial asset and savings of the parties; that all children of the parties are of majority and independent of the parties; that the Appellant is of advanced years and in ill health and without employment or appreciable income; and perhaps most importantly, that the Plaintiff's spouse became deceased during the interlocutory period. Indeed, it would be most difficult to envision a greater change of circumstances subsequent to the entry of a divorce decree than the demise of one of the parties; again bearing in mind

the absence of any minor children requiring support. Under such a factual situation, it must be respectfully submitted, that the Honorable Trial Court abused its discretion in failing to modify the Decree so as to award to the Appellant the interest of the parties in the home, whose need of same is no less than compelling; together with the herein mentioned ordinary life insurance policy.

Moreover, there is ample authority for the proposition that the Honorable Trial Court should well have dismissed the divorce action and vacated any award of property made pursuant thereto, where under circumstances as presented herein, a party becomes deceased during the interlocutory period. As stated by this Court in the case of In Re Johnson's Estate, 84 Ut. 168, 25 P.2d 305 (1934):

The entry of the decree ... does not at once terminate the marriage relationship and give to the parties the status of single persons. That

relationship is dissolved when the decree becomes final. Id. at 306.
(Emphasis added) (Citing with approval Sanders v. Industrial Commission, 64 Ut. 372, 230 P. 1026 (1924); Utah Fuel Company v. Industrial Commission, 65 Ut. 100, 234 P. 697 (1925); Spencer v. Clark, 54 Ut. 83, 179 P. 741 (1919); Salt Lake City v. Industrial Commission, 22 P.2d 1046 (Ut. 1933)).

This Court, in Johnson's Estate, furthered:

Under the doctrine of these cases and under the plain language of the statute, [the predecessor to Utah Code Annotated (1953) Sections 30-3-6 & 30-3-7 (1973 Supp.)], the court had jurisdiction to vacate the interlocutory decree at any time before it became final and thus prevent the decree from becoming final. The death of the defendant before the decree became final would be sufficient ground for vacating the decree of divorce, as no final judgment could be entered against a deceased person and no one could be substituted for him in such an action. Id. at 306 (Emphasis added).

Upon the foregoing authorities, it must be indisputable that the Appellant became widowed upon the death of the Respondent's predecessor in this action; that the divorce never did nor could become final and effective, being moot

upon Mrs. Daly's death as a matter of law; and that as Decedent's surviving husband and joint tenant to the property in question, Appellant became the fee simple owner of same by operation of law. Indeed, as stated by the Court in Johnson's Estate, the district court was without authority to substitute the Decedent Executrix as party-plaintiff herein, least yet declare her to be the owner of said real property in fee simple. As specifically held by the Court in Johnson's Estate:

Since the plaintiff was the wife of ... [the deceased] at the time of his death, it would naturally follow that she became vested with every right which the law grants to the surviving spouse. Id. at 307 (Emphasis added).

In the case of In Re Johnson's Estate, supra, involving a factual situation substantially similar to the case at bar, where the husband died during the interlocutory period, the Court held the surviving wife to have letters of administration of the deceased's estate issued

to her as a matter of right. Similar to the governing statute in the authorities heretofore cited, Utah Code Annotated (1953), Sections 30-3-6 & 30-3-7 (1973 Supp.), provide:

If after the hearing of any action for divorce the court renders a decree of divorce for either party, the decree shall specifically provide, that it shall not become absolute until the expiration of three months from the day it is signed by the court and entered by the clerk in the register of actions, or until such other time as the court may specifically designate, but not more than six months thereafter.

... the decree of divorce shall become absolute at the expiration of three months from the entry thereof; unless an appeal or other proceedings for review are pending, or the court, before the expiration of said period for sufficient cause, otherwise orders. The court, upon application or on its own motion for good cause shown, shall have the authority to waive, alter, or extend the period of time before the decree shall become absolute, but not to exceed six months from the signing and entry of the decree.

Pursuant to such authority, the District Court in the instant case specifically condition

the Decree of Divorce to provide:

That said decree shall not become final and absolute until the expiration of three months from the date of entry of said decree, that upon the expiration of three months from the date of entry of said decree, the decree shall become final and absolute, dissolving the bonds of matrimony existing between the plaintiff and defendant and restoring them to the status of single unmarried persons.

In the case of Spencer v. Clark, 54 Ut. 83, 179 P. 741 (1919), an action regarding real property brought by a surviving husband against the executor of his wife's estate, where as here, the latter died prior to the expiration of an interlocutory decree of divorce, the Court specifically overturned the trial court's ruling that the interlocutory decree had become absolute. Interestingly, in the divorce action giving rise to the litigation in Spencer, the trial court dismissed same after the death of the plaintiff on motion of the defendant. This procedure was similarly followed with approval in the later case of In Re Johnson's Estate,

supra, wherein Spencer was cited with approval. See In Re Johnson's Estate, 84 Ut. 168, 25 P.2d 305, 306 (1954).

In Salt Lake City v. Industrial Commission, 22 P.2d 1046 (Utah 1933), this Court, in affirming an award of the Industrial Commission to the widow where, as in the case at bar, the husband died during an interlocutory period, similarly noted that the trial court had set aside and dismissed the divorce action.

Admittedly, in the more recent case of In Re Harper's Estate, 1 Ut.2d 296, 265 P.2d 1005 (1954), this Court expressly overruled Salt Lake City v. Industrial Commission, supra, and In Re Johnson's Estate, supra, "[T]o the extent the decisions in those cases indicate approval of ex parte Orders as the basis for vacating divorce decrees affecting property rights...." Harper's Estate, supra, at 1007. The facts presented in Harper's Estate are essentially

identical to those herein. There, the surviving widow during the interlocutory period obtained an ex parte dismissal of the divorce action and brought an action against the administrator seeking a decree vesting her with title to property of the parties as the surviving joint tenant. This Court, on appeal, reversed the trial court's order vesting title in the widow, but remanded same "with directions to dismiss the petition without prejudice and allow the parties to be heard upon the merits in the divorce action should they so desire". Harper's Estate at 1007. There, the Court noted without necessarily so holding stated:

However, the occurrence of death does not abate the action itself and to the extent that property rights are determined by the decree, it remains effective and becomes final in the same manner and at the same time as between living persons.

However, it must be observed that the Court's prime concern in Harper's Estate and, indeed

its holding, was simply the voiding of an ex parte order of dismissal where, unlike the instant case, an opportunity was not given to interested parties to be heard in defense of any rights granted by the interlocutory decree. See Rasmussen v. Call, 55 Ut. 597, 188 P. 275 (1920), (quoted with approval in Harper's Estate). In the case at bar, Appellant's Motion to Dismiss and his Motion to Modify Decree were not sought ex parte, but rather all interested parties through their counsel were given notice and represented. In the words of the Court:

This statutory power [of Utah Code Annotated (1953), Section 30-3-7 (1973 Supp.)] does not allow the court to vacate a decree without legal cause nor without giving all persons whose rights are involved an opportunity to be heard. In Re Harper's Estate, supra, at 1006.

Notwithstanding, the court did specifically find:

The death of a party before the decree becomes absolute may under some circumstances be sufficient cause to vacate

the decree in its entirety. Other factors, such as the welfare of minor children, may in some instances warrant a different disposition of property. In each case the court must give each person whose rights are involved the opportunity to be heard. Id. at 1007 (Emphasis added).

Accordingly, Harper's Estate can be cited only for the proposition that in granting the dismissal of an interlocutory decree or a modification thereof, all factors must be considered and all interested persons given an opportunity to be heard. Under the facts of the instant case, the interests of all were represented and the equities clearly prepondered in favor of Appellant. This being so, the Honorable Trial Court abused its discretion in failing to grant to Appellant a dismissal or a modification of the decree. In the language of the statute, the awarding to the Appellant upon the death of his wife, being not only the most "equitable" distribution of property, is indeed and unquestionably both "reasonable and

necessary". Utah Code Annotated (1953), Section 30-3-5 (1973 Supp.).

CONCLUSION

It is, therefore, submitted that upon the basis of the foregoing authorities, the drastic alteration in the circumstances of the parties occasioned by the death of Mrs. Daly, and the compelling equities of the case as evidence by the necessitous condition of the Appellant, that the Trial Court erred and abused its discretion in failing to grant Appellant's Motion to Dismiss or his Motion to Modify the Decree so as to award to him the home of the parties, together with the ordinary life insurance policy.

Respectfully submitted,

DAVID J. KNOWLTON

HORACE J. KNOWLTON
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CERTIFICATE OF MAILING

Two copies of the above and foregoing Brief of Appellant were posted in the U.S. mail postage prepaid and addressed to the Attorney for the Respondent, Grant McFarland, at 725 Union Pacific Building, Salt Lake City, Utah 84101, and copies thereof were delivered to the Clerk of the Supreme Court, State Capitol Building, Salt Lake City, Utah, on this ____ day of July, 1974.

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