

1951

H. E. Anderson v. Elvira Magdaline Anderson : Brief of Respondent

Utah Supreme Court

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Case No. 7693

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

FILED

AUG 27 1951

H. E. ANDERSON, also known as
E. H. ANDERSON,

Plaintiff and Respondent,

vs.

ELVIRA MAGDALINE ANDER-
SON,

Defendant and Appellant.

Clerk, Supreme Court, Utah

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
STATEMENT OF FACTS	1
STATEMENT OF POINTS	5
ARGUMENT	6
POINT 1—THE COURT DID NOT CAST THE BUR- DEN ON APPELLANT TO PROVE STANLEY C. FOSSELL DEAD	6
POINT 2—THERE WAS AMPLE PROOF TO SUP- PORT THE COURT'S DECISION AND JUDG- MENT	7
POINT 3—THE DECISIONS OF THE SUPREME COURT OF UTAH SUPPORT THE DECISION AND JUDGMENT	9
POINT 4—THE CASE OF PITCHER V. PITCHER IS NOT APPLICABLE	12
POINT 5—RESPONDENT'S CONTRIBUTIONS TO AP- PELLANT	14
CONCLUSION	15

CASES CITED

In re Dalton's Estate, 109 Utah 503	10, 11 12
Jenkins v. Jenkins, 107 Utah 239	10, 11
Sanders v. Industrial Commission, 64 Utah 372	10

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vs.

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Defendant and Appellant.

Case No.
7693

BRIEF OF RESPONDENT

STATEMENT OF FACTS

Respondent agrees generally with appellant's statement of facts so far as they go, but the statement does not cover all matters before the trial court, a further and additional statement of facts is therefore submitted.

Plaintiff set out in his complaint to vacate the award of alimony that defendant had received far in excess of an equitable distributive share of the property acquired

by plaintiff (paragraph 11 of complaint, p. 3 of Record), and the court found that defendant had received such distributive share (Finding 3, p. 14 of Record). Defendant admitted receipt of such share.

Following appellant's statement of facts (p. 13 of appellant's brief) it is stated that "thereupon the court made its Findings of Fact, etc." The reporter's transcript is at pages 24 to 31 of the Record on Appeal. Appellant's statement of facts is based on the pleadings, findings and this transcript, but there was a further and other hearings which were not reported. Other facts and matters were before the court. On September 29, 1950, counsel for defendant (appellant here) asked for ten days additional time in which to make further effort to determine the actual fact relating to the death of Stanley C. Fossell (Record, p. 28), which was granted (Record, p. 29). On or about October 9, 1950, the hearing was resumed. Respondent's proposed amendments to record on appeal (Record, pages 32 and 33) relate to additional matters before the court, not covered by appellant's statement of facts. No objections or proposed amendments to respondent's proposed amendments were offered or made. The following is from respondent's proposed amendments:

"That upon resuming said hearing on or about October 9, 1950, there was no stenographic report of proceedings and there is no such report available, but that at said time counsel for defendant reported that he had written to Elko,

Nevada, and to the Division of Vital Statistics of the State of Nevada, and that he was informed that there was no record of the death of Stanley C. Fossell.

“That, at said further hearing, James A. Stump, of counsel for plaintiff, reported that he had called the County Clerk of Carbon County, Utah, by telephone, and had him procure the files in the divorce case of Fossell v. Fossell, civil case No. 2754 in the District Court of Carbon County; that said Clerk gave him a statement of all pleadings and papers filed therein; that a copy of summons and complaint had been mailed to the defendant, Stanley C. Fossell, at Elko, Nevada, and that there was no record of the same having been unclaimed, not delivered or returned.

“That references during the trial and proceedings herein were made to the petition and motion of plaintiff, filed February 18, 1950, in case No. 82262 for an order vacating the award of alimony in the original divorce case in the District Court of Salt Lake County, to which petition and motion the defendant filed an answer and amended answer and cross petition; that paragraphs 2 and 3 of said petition in case No. 82262 are identical with paragraphs 2 and 3 of the petition in the proceedings now before the court; that defendant admitted the allegations in said paragraphs 2 and 3 in her answer, but later, on April 18, 1950, filed the amended answer and cross petition, hereinbefore mentioned, in which she admitted paragraph 3, and as to paragraph 2 alleged:

“Answering paragraph 2 of said petition defendant alleges that at the time of the marriage between the parties in Colorado she verily believed they lawfully became husband and wife; that thereafter she was given certain information which created in her mind some uncertainty respecting their marital status and subject to the foregoing allegation defendant denies each and all of the allegations in said paragraph.”

“That in each of said answers to plaintiff’s petition in case No. 82262 defendant had an alternative prayer asking for a disclosure of the full amount and nature of the estate accumulated by the parties while they lived together as husband and wife, and that an equitable distribution thereof be made to defendant under the decision in *Jenkins v. Jenkins*, 107 Utah 239.

“That the foregoing matters were before the court at the hearings and proceedings in the present action on appeal.”

For the convenience of the court we set out paragraphs 2 and 3 above referred to.

“2. That at the time plaintiff commenced said action and at the time defendant filed her said counterclaim, and at the time of the entry of the decree of divorce in said action, both plaintiff and defendant verily believed that they were husband and wife, and plaintiff, your petitioner, has continued to believe that said relation of husband and wife so existed until a comparatively recent date, when he was informed and advised that the relation of husband and wife never at any time existed between plaintiff and defendant.

"3. That this court found in said action that plaintiff and defendant intermarried at Grand Junction, Colorado, on July 14, 1926; that said parties did go through a ceremony at said time and place, but at said time defendant had a husband, viz., Stanley C. Fossell, from whom she had obtained an interlocutory decree of divorce in the District Court of Carbon County, Utah, in civil case No. 2754, by decree dated May 15, 1926, but not filed until May 27, 1926; that in said last mentioned action defendant herein appeared as Elvira M. Fossell, plaintiff; that a true and correct copy of said decree in said case No. 2754, marked Exhibit "A", is hereto attached and made a part hereof; that what purported to be a marriage between plaintiff and defendant at Grand Junction, Colorado, as aforesaid, was null and void and of no force and effect, and your petitioner and Elvira M. Fossell, also known as Elvira Magdaline Anderson, never were husband and wife, and by reason thereof there was no proper or any basis for the award of alimony in the above entitled action in this court."

STATEMENT OF POINTS

1. The court did not cast the burden on appellant to prove Stanley C. Fossell dead.
2. There was ample proof to support the court's decision and judgment.
3. The decisions of the Supreme Court of Utah support the decision and judgment.

4. The case of *Pitcher v. Pitcher* is not applicable.
5. Respondent's contributions to appellant.

ARGUMENT

1. *The court did not cast the burden on appellant to prove Stanley C. Fossell dead.*

On page 15 of appellant's brief it is stated that appellant places her entire reliance upon the case of *In re Pitcher's Estate, Pitcher v. Pitcher* (Utah), 197 P. 2nd 143. It is claimed that the trial court cast the burden upon appellant to prove that on July 14, 1926, the date of the marriage ceremony of appellant and respondent at Grand Junction, Colorado, Stanley C. Fossell, from whom appellant obtained an interlocutory decree of divorce at Price, Utah, on May 27, 1926, was dead. Respondent contends that the court did not cast such burden on appellant. The day before the trial in District Court appellant filed an amendment to her answer setting up an affirmative and additional defense (Record, p. 10), alleging on information and belief that Stanley C. Fossell died about the year 1920. Yet, in that same amendment alleged that after the year 1920 she and her child went to Price, Utah, from Elko, Nevada, where she had been residing, and that during about a year after she arrived at Price, Utah, she heard from and communicated with her said husband, Stanley C. Fossell. Fossell must have been living about 1922, and didn't die about 1920. On September 29, 1950,

counsel for appellant asked for ten days time in which to make further effort to determine the actual fact relating to the death of Stanley C. Fossell, which the court granted. Upon resuming the hearing counsel reported that he had written to Elko, Nevada, and to the Division of Vital Statistics of the State of Nevada, and that he was informed there was no record of the death of said Stanley C. Fossell. The court did not require counsel for appellant to make inquiry as to Fossell's death, counsel requested time apparently in order to try and substantiate his affirmative defense set up in his last minute amendment. Copy of summons and complaint in appellant's divorce action was mailed to her husband Stanley C. Fossell, at Elko, Nevada, and there was no record of the same being unclaimed, not delivered or returned. The presumption would be that they were received.

2. There was ample proof to support the courts decision and judgment.

There was ample before the trial court to sustain the findings of fact, conclusions of law and judgment. In both her answer and amended answer to plaintiff's petition in case No. 82262 appellant admitted all of paragraph 3 hereinbefore set forth, and in her alternative prayer asked for a disclosure of the full amount and nature of the estate accumulated by the parties while they lived together as husband and wife, and that an equitable distribution thereof be made to her,

relying on the decision in *Jenkins v. Jenkins*, 107 Utah 239. This equitable distribution she admits she received. She at no time prior to filing her amendment to answer on September 28, 1950, in the case at bar, claimed or intimated that Fossell was dead. Not only is this the fact, but in her amended answer to paragraph 2 of respondent's petition in case No. 82262, she alleged:

“* * * that at the time of the marriage between the parties in Colorado she verily believed they lawfully became husband and wife; that thereafter she was given certain information which created in her mind some uncertainty respecting their marital status * * *.”

What was the information she received which created in her mind some uncertainty respecting their marital status? It couldn't have been that Fossell was dead at the time of the marriage on July 14, 1926, at Grand Junction, Colorado. Had that been the information she would have known that the marriage was valid. We strongly suspect that the information she received was that since she married again in less than two months after obtaining her interlocutory decree of divorce in the District Court of Carbon County her Grand Junction marriage was not valid. It is quite clear that appellant didn't think Fossell was dead then, yet, that was after the divorce and after July 14, 1926.

Now just a word regarding the last amendment filed on September 28, 1950, setting up that a mutual friend that told her that Fossell was dead. It is stated on page

9 of appellant's brief that the Carbon County divorce had been obtained on advice of counsel and of the Judge presiding in said court, Judge Christensen, to clarify her marital status. We submit that if a mutual friend had told her that Fossell had died, and we are lead to believe at Elko, Nevada, the former home, that the reasonable and common sense thing to have done was to write to Elko, where she had resided, and verify the report concerning his death, and not call upon the District Judge (if she did in fact call on him) for advice, and then go to the trouble and expense of getting a divorce. If appellant did see Judge Christensen and tell him what she now claims, we cannot understand why Judge Christensen didn't advise her to verify what she had heard regarding Fossell's death. Appellant had lived in Elko and must have known residents of that city. The expense would have been very small, a few letters and postage stamps would have sufficed.

Respondent offered to testify that he never heard of the claim that Fossell was dead until appellant's last amendment was filed just before the trial.

Appellant's admissions by pleadings, together with her acts and attendant circumstances, refute what she now claims. With all these admissions and circumstances how could the trial court find or believe that Fossell was dead on July 14, 1926?

3. The decisions of the Supreme Court of Utah support the decision and judgment.

Utah decisions.

The question of the validity of marriages entered into in less than six months after obtaining a decree of divorce has been before this court in a number of cases and the law would appear to be well settled. We shall refer to three cases only, viz., *Sanders v. Industrial Commission*, 64 Utah 372, *Jenkins v. Jenkins*, 107 Utah 239, and *In re Dalton's Estate, Miller v. Dalton*, 109 Utah 503.

In the *Sanders* case Ruby Sanders was divorced from one, Sam Saris, in Utah, on April 25, 1923. She married O. R. Sanders at Evanston, Wyoming, on June 16, 1923, 52 days later. In the instant case the marriage was 48 days later. This court in the *Sanders* case said:

"The marriage was a nullity from its inception, was void ab initio, and that was simply a fact which had been presented to the Industrial Commission which could not possibly validate the marriage or in any way effect it. No other decree of court nor finding of any other body was needed to determine that the Wyoming marriage was a nullity and could not be ratified or validated in Utah, as claimed by plaintiff. Holding each other out as husband and wife, believing in good faith that they were legally married * * * all these things are of no avail in this state, where common law marriages are not valid, and where marriages to be valid must be solemnized

as by statute provided. * * * Sanders was under neither legal nor moral obligation to support his alleged wife."

This court in the *Jenkins* case said:

"In view of the fact that the plaintiff had only an interlocutory decree of divorce from her prior marriage, and the decree had not yet become final, she was still married at the time of her purported marriage to defendant, and the trial court correctly held that the purported marriage was void ab initio."

The court later in its opinion stated that the wife is entitled to an equitable division of the property accumulated by the parties where they lived together as husband and wife, although not such.

In re Dalton's Estate, 109 Utah 503, was decided April 6, 1946. In its opinion this court referred to the *Sanders* case and said:

"This court, after pointing out that a decree of divorce does not become absolute for six months after its entry, and that any marriage contracted by a party to a divorce proceeding within the time allotted for an appeal from such final decree, shall be null and void, stated that the marriage was void ab initio, and no decree of court was needed to determine that the marriage ceremony was a nullity."

Then the court said:

"This is the same situation in the present case."

Dalton had obtained a decree of divorce on December 18, 1940, from his wife, Mildred Jolley Dalton. On January 14, 1941, he went through a marriage ceremony with Valhalla Dalton.

This court continuing said:

“On January 14, 1941, Orin Dalton could not marry Valhalla Dalton because he was on that date a married man. The ceremony on January 14, 1941, was a nullity, and Valhalla Dalton was not and did not become Orin Dalton’s wife.”

4. *The case of Pitcher v. Pitcher is not applicable.*

The facts and circumstances in the *Pitcher* case were so different from the facts and circumstances in the instant case. There wasn’t a Utah divorce decree entered less than 50 days before the new marriage to consider. We can well understand how the presumption of validity could apply in the *Pitcher* case. Here we have the interlocutory divorce decree admitted. The Carbon County District Court found Elvira M. Fossell (appellant) and Stanley C. Fossell to be husband and wife, and dissolved the bonds of matrimony, the decree to become final in six months from date of entry, which would be on November 27, 1926. Appellant married again on July 14, 1926. We contend that under the Utah decisions, herein quoted from, there is no presumption of the validity of the marriage on July 14, 1926, between appellant and respondent. It must be

borne in mind that appellant, in two pleadings, admitted she had a husband, Stanley C. Fossell, when she went through the marriage ceremony with respondent. To us it seems that appellant's last minute affirmative defense attempting to make it appear that Fossell was dead when she went through the marriage ceremony with respondent is a clear case of grasping at the last straw. We have no idea Fossell was dead, and apparently the trial court thought the same. We do not think the court was required to recognize any presumption under the facts and circumstances and Utah decisions. If there was a presumption it was clearly disputed and rebutted by facts and circumstances.

In appellant's brief, at page 17, it is stated that the court was required to recognize a presumption in favor of appellant that at the time of the marriage ceremony in Grand Junction she was a widow or that her former husband had divorced her, and on page 18 states that if Fossell had been before the trial court to testify that he had never divorced appellant, then there might be some justification in the trial court's decision. We answer this by stating that the admissions and matters in appellant's pleadings, hereinbefore referred to, and the fact that she brought an action for divorce in the District Court of Carbon County, and that court found appellant and Stanley C. Fossell to be husband and wife, overcome any such presumption. Appellant undoubtedly knew Fossell hadn't divorced her, else she wouldn't have sued him for a divorce.

5. *Respondent's contributions to appellant.*

One more matter before concluding. The court must not be mislead into thinking that respondent and appellant lived together as husband and wife for approximately 22 years prior to the divorce in 1948. In paragraph 6 of the complaint (Record, p. 2) respondent alleges:

"6. That said defendant from about the year 1936 refused to live with plaintiff in the capacity and relationship of husband and wife, as they thought themselves to be, and did not contribute to the usual companionship of husband and wife; that notwithstanding defendant's attitude toward plaintiff since the year 1936, he worked and provided for her until she obtained said decree of divorce, and has since paid alimony regularly under said decree."

Note that respondent contends that there were 12 of the 22 years that appellant refused to live with him in the capacity of husband and wife and that she did not contribute to the usual companionship of husband and wife. Yet, he worked and provided for her until she was granted the divorce, after which he paid alimony regularly, and in addition appellant has had an equitable share of all property accumulated during the 22 year period, in fact has received practically all respondent ever accumulated. The equitable division referred to in *Jenkins v. Jenkins* has long since been made.

CONCLUSION

In conclusion we submit :

1. The trial court did not cast any burden of proof on defendant and appellant.

2. Assuming that the burden of proving Stanley C. Fossell's death was erroneously placed on defendant and appellant, that plaintiff and respondent did in fact sustain the burden of proving the marriage entered into at Grand Junction, Colorado, on July 14, 1926, void; that the proof sustained the findings of fact, conclusions of law and judgment, and the error, if any, of the trial court in misconceiving the burden of proof, was not prejudicial.

3. That the court's decision was right and is supported by appellant's admissions, the facts and circumstances, and the decisions of this Honorable Court.

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