

1953

In the Matter of the Estate of Fred W. Harper : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

IN THE MATTER OF THE ESTATE)
OF FRED W. HARPER,)
Deceased.)

APPEAL

No. 8049

FILED

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BRIEF OF APPELLANT U.S. Supreme Court, Utah

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IN THE SUPREME COURT
OF THE STATE OF UTAH

IN THE MATTER OF THE ESTATE)	APPEAL
OF FRED W. HARPER,)	
Deceased.)	No. 8049

BRIEF OF APPELLANT

Appeal from the Third Judicial District Court
of the State of Utah

Honorable Clarence E. Baker, Judge

STATEMENT OF FACTS

Zilpha D. Harper, the Petitioner and Respondent, and Fred W. Harper, the deceased, were husband and wife and owned property in joint tenancy in Salt Lake City, Utah. On December 24, 1949, Fred W. Harper was awarded a decree of divorce from Zilpha D. Harper, and he was also awarded the above mentioned property in said decree. Zilpha D. Harper entered her appearance in the action and waived time in which to answer or otherwise plead. She received a copy of plaintiff's

complaint which prayed for the divorce and the award of the property to Fred W. Harper, and consented that the divorce might be entered against her and the matter heard upon the merits at any time without further notice to her. The property and the divorce were awarded to Fred W. Harper, the grounds of the divorce being her desertion (R. 20-26)

Approximately two weeks before the interlocutory period had run and the divorce became final, Fred W. Harper died (June 7, 1950), leaving a son by a former marriage (R. 11, 5). It appears from the record that Zilpha D. Harper on June 19, 1950, approximately a week before the interlocutory period had run, in great haste went into court ex parte and without notice to any to set the divorce decree aside; the petition in this action recited the death of Fred W. Harper, and it was granted and an order was entered setting the divorce decree aside. There was no mention of the property interests in the order (R. 28)

Apparently realizing that her procedure in this

action was defective, the Petitioner brought an action on May 22, 1951, to "Establish Rights and to Terminate Joint Tenancy". At this time notice was given to the son and mother of Fred W. Harper and to the Administrator, the Contestant and Appellant in this action, answered, denying that Zilpha D. Harper had any rights in the property in question and claiming that the property belonged to the Estate of Fred W. Harper (R. 107).

The facts were submitted upon stipulation to the trial court, and the trial court granted the petition to terminate the joint tenancy and held that the estate of Fred W. Harper had no interest in the property, from which decision the Contestant and Appellant now appeals (R. 10-12).

STATEMENT OF POINTS

It was the Respondent's contention in the action to terminate the aforesaid joint tenancy, that the effect of Fred W. Harper's death before the running of the interlocutory period and/or the petition to vacate the divorce decree resulted in the property

award being null and void, which vested the sole ownership of the property in the Respondent by virtue of being being the sole survivor of a joint tenancy.

It is the contention of the Appellant that the death of Fred W. Harper during the interlocutory period did not set the property interests awarded by the interlocutory decree at large; that such property interests were defeasible, if at all, only by proper judicial proceedings, which should have included notice and opportunity to be heard to the heirs and administrator of the Estate of Fred W. Harper. It is the further contention of the Appellant that since notice and opportunity to be heard was not given to the heirs and administrator of the Estate of Fred W. Harper that the property in question remained the property of said estate and that Zilpha D. Harper had no rights therein.

Appellant therefore believes that the trial court erred in terminating the joint tenancy and in holding that the Estate of Fred W. Harper had no interest therein, and in further holding that Zilpha D. Harper was entitled to some right or title or interest therein and relies upon the following points for a

reversal of this decisions

1. THE TRIAL COURT SHOULD HAVE HELD THAT THE DEATH OF A SPOUSE DURING THE INTERLOCUTORY PERIOD DOES NOT SET THE PROPERTY INTERESTS IN THE INTERLOCUTORY DECREE AT LARGE.

2. THE TRIAL COURT SHOULD HAVE HELD THAT THE SE PROPERTY INTERESTS WERE DEFEASIBLE, IF AT ALL, ONLY BY GIVING NOTICE AND OPPORTUNITY TO BE HEARD TO THE HEIRS AND ADMINISTRATOR OF THE ESTATE OF THE DECEASED SPOUSE.

3. THE TRIAL COURT SHOULD HAVE HELD THAT THE SURVIVING SPOUSE HAD NO INTEREST IN THE PROPERTY OF THE DECEASED SPOUSE BECAUSE A DIVISION OF PROPERTY HAD BEEN EFFECTED.

ARGUMENT

1. THE TRIAL COURT SHOULD HAVE HELD THAT THE DEATH OF A SPOUSE DURING THE INTERLOCUTORY PERIOD DOES NOT SET THE PROPERTY INTERESTS IN THE INTERLOCUTORY DECREE AT LARGE. It should be noted at the outset that the Respondent's theory is quite anomalous. She claims all of the property by virtue of being the sole survivor of a joint tenancy. The fragility of a joint tenancy is too well known to require citation.

in all of the property to the husband would be to destroy the joint tenancy. But she asserts that her action in attempting to set the interlocutory decree aside reinstated the joint tenancy. But her husband was then dead. Even if the court desired to do this, how could it make her a joint tenant with a deceased person?

The general rule and the rule followed in Utah as set forth in *Re Johnson's Estate*, 35 P 2d 305, 84 Utah 168, is that where one of the parties to a divorce action dies within the interlocutory period the surviving spouse is still considered to be married to the decedent and has all of the rights of the marital status. The reason usually given is that a divorce action is a purely personal action and abates with death, 76 ALR 284, and cases cited therein. But where property interests are awarded by the decree, the interlocutory decree may speak conclusively. Quoting from 104 ALR 660:

"It has been held that where an interlocutory decree of divorce rendered before the death of one of the parties to the action deals not only with the personal status of the parties, but also with the property rights, it may, if not

vacated in the mode prescribed by law, becomes a final and conclusive decree as to the right of property notwithstanding the death of one of the parties to the action. *Abbot v. Superior Ct.* (1924) 29 Cal. App 660, 232 P. 154; *Klebora v. Klebora* (1931) 118 Cal. App. 313, 5 P. (2d) 965. The court in the latter case said: 'The appellant's five contentions which have been enumerated are really reducible to this--that the death of one of the spouses before the year has run is productive of the same legal consequences as to property rights settled by an interlocutory, as those produced with respect to the marital status; in other words, the death automatically vacates the adjudication and sets the question of property rights at large. Such contentions finds no support in the authorities. The cases, indeed, are all the other way. It may be argued that the Gould case (Cal. *Infra*) is distinguishable because there an agreement formed the basis for the decree. The appellant stresses the point that here there was no agreement; but that can make no difference, for a 'judgment' is a contract, in the highest sense of the term'....Death would not have set at naught an agreement between the spouses. If, then, they could have settled their property rights with finality by contract, it is difficult to perceive, in view of the rule just discussed, how a judgment which does the same thing possesses no such finality, and is of lesser dignity.

So, it was held in *Gould v. Superior Ct.* (1920) 47 Cal. App. 197, 191 P. 56, that while, after the death of one of the parties to a divorce suit, the court which has theretofore entered an interlocutory decree of divorce loses jurisdiction to enter a final decree thereafter dissolving the marriage status, where property rights of the parties have been fixed by an agreement and confirmed by the interlocutory decree, the death of one of the parties does not oust the court of jurisdiction to enter a final decree as to such property rights."

In other words, the reason that the decree

given a different status from the marital relationship is that it is of the nature of a contract, only of a higher dignity, and hence survives the death of a spouse; intrinsic also is the concept that the property rights have been fully litigated; that it is res adjudicata, and that the death of a spouse in itself adds nothing to the fact that the issue has been fully litigated.

Although we have found no Utah case exactly in point, there is a strong inference in *In Re Johnson's Estate*, supra, that Utah follows the majority rule.

In that case it is held:

"It is further contended by appellant that, since the decree of divorce provided for the payment of alimony in the sum of \$10.00 per month, this was such a property settlement between the parties to the decree as to preclude the plaintiff from having any interest in the estate of her deceased husband, and, having no interest in his personal estate, she could be disqualified from administering his estate under Com. Laws Utah 1917 Sec. 7596, now Rev. St. Utah 1933, Sec. 102-4-1. The decree itself is silent on the matter of property settlement or division. The awarding of alimony in the decree in this case cannot be said to be an adjudication of property rights so as to preclude plaintiff from having an interest in the deceased husband's estate as his widow.... Whether an award of alimony may not be considered as a property division under any circumstances, we do not decide. We simply hold

That the award involved in this case did not constitute a property division." (emphasis our own).

In the case under consideration we definitely do have an adjudication of property rights, a division of property based upon the degree of guilt. Hence, if we follow the inference of the Johnson Case, supra, and the general rule as established in other states, we must conclude that the decree speaks finally as to those property rights adjudicated. We further contend that under the Utah rule where property rights are adjudicated in the divorce decree, the wife (or other spouse) is precluded from further sharing in the estate of the deceased spouse.

We also maintain that this rule is founded upon strong and compelling equitable considerations and is not merely spun from the fabric of metaphysical legal logic. The innocent and moving party in a divorce action is usually awarded a larger portion, if not all, of the property. In such circumstances, if the rule were otherwise, it would be the guilty party, not the innocent party, who would attack the decree; and it would be the guilty party who would profit from a different rule.

rule of Durland v. Durland, 67 Kan. 734, 74 P 274, where under similar circumstances it was held (see 76 ALR 291) that the provisions of the divorce statute in accordance with which the decree was rendered were intended to prevent a marriage by either party within six months after the decree and that as to that matter only the decree was not final, every other result was a complete dissolution of the marriage following at once. See also to the same effect is Jacobs v. Gaskill, 69 Kan. 872, 77 P 550.

2. THE TRIAL COURT SHOULD HAVE HELD THAT THESE PROPERTY INTERESTS WERE DEFEASIBLE, IF AT ALL, ONLY BY GIVING NOTICE AND OPPORTUNITY TO BE HEARD TO THE HEIRS AND TO THE ADMINISTRATOR OF THE ESTATE OF THE DECEASED SPOUSE. It will be recalled that under the hybrid theory of the Respondent that she claims all of the property by virtue of being the sole survivor of a joint tenancy. Since the trial court entering the order setting the decree aside could not make her a joint tenant with a deceased person, and since no order was entered transferring the entire property to her, the only theory under which this contention could be sustained is that the interlocu-

tory award of the property had no effect whatsoever, and that the joint tenancy in existence before the decree in fact continued throughout the interlocutory period notwithstanding the court's interlocutory award of the property to her husband. In other words, from the standpoint of theory, the court would have to hold not only that the decree set the property interests at large but that the interlocutory award of the property had no effect whatsoever.

The property interests established by the interlocutory decree are not so vapid as to disintegrate upon the death of one of the spouses during the interlocutory period. The rule in Utah seems quite clear. There is substantial authority to the effect that the property interests established by the interlocutory decree are vested subject only to divestment by proper judicial proceedings. It should also be recalled that under our practice no further act is required to complete the divorce; it becomes final automatically upon the expiration of the interlocutory period, and it is not necessary as it is in some states to file a final decree.

the wife secured a divorce from the husband, and the husband before the interlocutory period had run came in ex parte and without notice to the wife and had the court on its own motion vacate the decree. The husband argued that the court could vacate the decree upon its own motion by virtue of Com. Law 1917, Section 2002 (now, unchanged, Utah Code Annotated, 1943, 40-3-7). This court held, quoting from page 276:

"True, in section 2002, supra, proceedings to review the decree upon the court's own motion are mentioned; but it was not within the contemplation of the Legislature that sufficient cause could be determined to exist without an opportunity given to the parties interest to be heard in defense of any rights granted by the interlocutory decree. 'Sufficient cause' means legal cause. To deprive plaintiff of the rights given her by the interlocutory decree without notice and opportunity to be heard is not due process of law; in fact, it is without any process."

The court says on page 276: "The effect of the interlocutory decree being to vest in plaintiff certain personal and property rights, it necessarily follows that the existence of those rights denies to any court the authority or right to take the same from her, except upon legal proceedings in which plaintiff, as the interested party, has an opportunity to be heard in disproof of any attacks upon such rights, and to establish the fact that she is justly entitled to the rights sought to be taken from her." (emphasis our own)

It follows that if the property interests established by the interlocutory decree are vested in the spouse

so that the absence of notice and opportunity to be heard would violate due process requirements that the same requirement extends to the heirs and the administrator of the estate of the deceased spouse.

In 17 Am. Jur. 375, Section 457, it is held:

"Persons whose interests will be adversely affected by the vacation of the judgment or decree must be made parties defendant to the proceedings, and must be served with process....Where the husband at whose instance the divorce was procured dies leaving both real and personal estate in which the surviving wife would have had an interest except for the divorce, both the personal representatives and the heirs of the husband are proper parties to proceedings by the wife to vacate the judgment or decree."

See also *Morris v. Propst*, 55 P 2d 944 (Colorado, 1936) where the court says:

"A divorce action is a purely personal action which does not survive the death of either party. A seeming exception, apparent only, arises when such an action involves an issue of property. In that event, of course, the administrator must not merely be noticed into court, but he must be proceeded against as a party, either by proper substitution or in a separate action; and, where the property issue is thus made, the persons interested as heirs or otherwise must be made parties and given their day in court."

We submit therefore that the court entering the order setting the decree aside had no jurisdiction to do so, so far as it concerned the property interests

of the heirs and the Estate of Fred W. Harper.

III. THE TRIAL COURT SHOULD HAVE HELD THAT THE SURVIVING SPOUSE HAD NOT INTEREST IN THE PROPERTY OF THE DECEASED SPOUSE BECAUSE A DIVISION OF PROPERTY HAD BEEN EFFECTED. It follows that if the above two propositions propounded by the Appellant are correct, that the property in question belongs to the estate of the deceased spouse. The next question for consideration is whether the surviving spouse should share as an heir or otherwise in the estate of the deceased spouse. If this Court should chose to follow the rule in the Kansas cases, supra, or the inference in the Johnson Case, supra, there is no question that the surviving spouse in the instant case would be precluded from sharing further in the estate of the deceased spouse. There is no question that in the case under consideration a division of property was made, and the property was awarded to the innocent party.

However, in any event, it should be remembered that the grounds for the divorce in the present case were desertion. Although the general rule in the case of desertion is that the dower of the deserting

spouse is not barred, she is barred from asserting her distributive share, 71 ALR 285.

CONCLUSION

To recapitulate, we submit that the effect of the interlocutory decree was to vest in the deceased spouse the property rights awarded by the decree; that these interests were defeasible, if at all, only by proper judicial proceedings, by giving notice and opportunity to be heard to the heirs and the administrator of the estate of the deceased spouse; that such proper judicial proceedings were not had; and that since a division of property had been effected, the surviving spouse was not entitled to share in the property, which remained property of the estate of the deceased spouse, either as an heir or otherwise.

We therefore respectfully request that the decision of the trial court be reversed and that the property in question is the property of the estate of Fred W. Harper and that Zilpha D. Harper has no rights or interests therein.

Respectfully submitted,

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