

1953

# In the Matter of the Estate of Fred W. Harper : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

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IN THE MATTER OF  
THE ESTATE

OF

FRED W. HARPER, Deceased.

} Case No. 8049

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BRIEF OF RESPONDENT

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FRED L. FINLINSON,  
*Attorney for Respondent*  
312 Kearns Building  
Salt Lake City, Utah.

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## STATEMENT

Respondent, Zilpha D. Harper, defends the judgment of the Judicial District Court of Salt Lake County, Utah, made and entered in the above entitled matter and from which appellant appeals. In the court below respondent initiated by petition an independent proceeding to terminate a joint tenancy under the provisions of Title 104-9-1, UCA 1943, now know as 78-41-1, UCA 1953. (R. 1-3) Appellant answered the petition for termination of the joint tenancy by denying her allegations and alleging that the property was the sole and separate property of the estate of Fred W. Harper, deceased, by reason of a judicial decree adjudicating and awarding

it to him (R. 8) and that as to the disposition of the property rights said decree was final. The matter was submitted to the court upon the facts as stipulated to between the parties. (Said stipulation was not included by the appellant in the Designation of Record on Appeal, but the facts as stipulated were found by the court. See Findings of Fact, R. 10-12.) Perhaps a brief statement of the facts as respondent understands them would be helpful to the court:

Respondent and Fred W. Harper, now deceased, were married at Salt Lake City, Utah, on June 20, 1927. During their marriage they acquired through their joint efforts the property in question as joint tenants with full right of survivorship and not as tenants in common, by a deed of conveyance from Isabella M. Norton and Leslie J. Norton dated May 9, 1931. On December 15, 1949, Fred W. Harper filed in the District Court of Salt Lake County a complaint asking for a divorce from the respondent. The case was given the number 87,837. On December 24, 1949, respondent's appearance and waiver, dated December 16, 1949, was filed in said action, and the matter heard. The court granted Fred W. Harper a divorce and awarded him the property in question. Findings of Fact, Conclusions of Law and an Interlocutory Decree were signed by the Judge and entered on the same day, to-wit, December 24, 1949. (R. 20-26) (The entire divorce file, including respondent's motion to set aside and dismiss the action and the court's order granting said motion is a part of the record on appeal. R. 20-28) The divorce was granted

on the grounds of desertion. The interlocutory decree of divorce, was by its terms and pursuant to provisions of 40-3-6 & 7 U.C.A. 1943, 30-3-6 & 7 U.C.A. 1953, not to become final until the expiration of six months from the date thereof, and that it was to become final after six months from date thereof unless proceedings for a review were pending or the court, upon its own motion or upon the motion of any other person, should otherwise order. (R. 25-26) On June 7, 1950, Fred W. Harper died at Salt Lake City, Utah, (R. 11) and left surviving him in addition to respondent, Anna Lenocho, his Mother and Omar L. Harper of Oakland, California, a son by a prior marriage, (R. 3) and on June 12, 1950, and before the expiration of the interlocutory period, the court, upon the petition of the respondent, duly entered its order vacating and setting aside said interlocutory decree of divorce and dismissed the plaintiff's complaint on file therein. Respondent's petition was heard ex parte and without notice of any kind to the appellant or any other person. The order vacating and setting aside the interlocutory decree of divorce and dismissing the complaint has not been appealed from or otherwise modified. The trial court on said facts as stipulated granted respondent's petition to terminate the joint tenancy, and held that the estate of Fred W. Harper, now deceased, had no interest in the property. (R. 13-14) From that judgment this appeal was taken by appellant.

## ARGUMENT

Appellant contends that the trial court erred in the following particulars:

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 these property interests were defeasible, if at all, only by giving notice and opportunity to be heard to the heirs and administrators 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.

See Appellant's Brief, page 5.

Respondent submits that the questions (alleged errors of the trial court) have been decided by this court and against the appellant in the following cases:

Spencer v. Clark, (1919) 54 Utah 83, 179 P. 741;

Salt Lake City v. Industrial Commission, (1933) 82 Utah 179, 22 P. 2d., 1046;

In re Johnson's Estate, (1934) 83 Utah 168, 35 P. 2d., 305.

In the Spencer case there had been an interlocutory decree of divorce granted to the plaintiff (the wife) and an award to her of certain real property. The

plaintiff (the wife) died before the interlocutory decree became final, and the court thereafter vacated the divorce proceeding on an affidavit and motion of the defendant. In a fight over the real property between the defendant (husband) and the administrator of the estate of the plaintiff (wife), this court only concerned itself with the question of whether the interlocutory decree had been vacated before it became final, and having found that to have been the fact, treated the same as a nullity. In other words, this court in that case held that the interlocutory decree awarding the real property to the deceased spouse having vacated, nullified and set at naught, did not in any wise affect the property therein awarded to the plaintiff (wife). Both the Spencer case, *supra*, and *In re Johnson's Estate* case, *supra*, settled the question raised by appellant's error No. 2, and unequivocally held that, during the interlocutory period and after the death of one of the parties to the divorce action, the court in the divorce action, without notice, on motion or petition of surviving spouse, may vacate the interlocutory decree and dismiss the divorce action. In the Spencer case bear in mind that title to the real property was awarded to the plaintiff in the divorce action and this court did not concern itself with the effect, if any, of the interlocutory decree upon the property interests.

In the *Salt Lake City v. Industrial Commission* case, *supra*, the court even went further and held that the court, on its own motion and without notice and without application by anyone and on facts within its own



knowledge, could order that the interlocutory decree "shall not become final" until a date long after the original six months' interlocutory period had expired. Under our statute, 40-3-7, UCA 1943, now 30-3-7, UCA 1953, the court may vacate an interlocutory decree *ex parte* and on its own motion. Hence, it is submitted that appellant cannot complain that the order vacating the interlocutory decree here was a nullity because made *ex parte* and without notice to the heirs and personal representatives of Fred W. Harper. Furthermore, if appellant could complain, he cannot attack such order vacating the interlocutory decree in this independent action brought by the respondent, since such an attack would be a collateral attack and not permissible. This court so held in the *Salt Lake City v. Industrial Commission* case, *supra*, when the court, speaking through Justice Folland, said:

"A judgment or decree of divorce, not void on its face, may not be impeached collaterally. *Corbett v. Corbett*, 113 Cal. App. 595, 298 P. 819. The same must be true as to an order or judgment of dismissal or *annulment of a divorce decree*. The burden to establish invalidity is on the party making a collateral attack, and *every presumption will be indulged in support of the order*. 34 C.J. 537; 19 C.J. 175; 1 Black on Judgment, Sec. 270."

Appellant cites some authorities tending to show that marital rights may be changed by order vacating an interlocutory decree, but not property rights. Such authorities generally apply to situations where the parties entered into formal agreements where specific performance might be resorted to for enforcement. As in

the Colorado case *Morris v. Propst*, 55 P. (2d) 944. Appellant attempts to attribute an interpretation of dicta in *In re Johnson's estate*, *supra*, as reflective of this court's attitude in the matter if the point were ever raised. Sufficeth to say, this point has been raised and settled in the *Salt Lake City v. Industrial Commission* case, *supra*, since the Commission's award to the wife *was an award of a property* arising out of injuries sustained by the husband, and appellant, if logical, would have to contend that such an award would go to Harper's estate since the interlocutory decree definitely and permanently settled property rights of the parties for all time. The fact of the matter is that this valuable property right, which would have given the husband continuing disability benefits had he lived and would have been paid to him personally, has been affirmed in the wife by said decision. The Spencer case is even stronger, since in that case real property was awarded to the wife in the interlocutory decree. In the case at bar respondent contends under the facts and the law as follows:

1. That the interlocutory decree of divorce between respondent and Fred W. Harper had not become final on June 7, 1950, the date of the death of Fred W. Harper.

2. That by its own terms and under the statute, 104-59-1, UCA 1943, now known as 78-41-1, UCA 1953, it would not become final until six months had expired from the date of its entry.

3. That on June 12, 1950, after the death of the

spouse, Fred W. Harper, and before the interlocutory period had expired, the court on the petition of an interested party, to-wit, Zilpha D. Harper, the surviving spouse, entered its order setting aside the interlocutory decree of divorce and dismissed the complaint of the plaintiff, Fred W. Harper.

4. That the order setting aside the interlocutory decree of divorce is not only fair on its face, but is valid in every respect, and that respondent's motion to set aside the same and the ex parte hearing thereon without notice was proper and lawful.

5. That the order setting aside the interlocutory decree and dismissing plaintiff's complaint was not appealed from or otherwise modified, and that the same is not subject to a collateral attack in this proceeding.

6. That said order setting aside the interlocutory decree and dismissing the plaintiff's complaint nullified and set at naught not only the interlocutory decree severing the bonds of matrimony, but also in every other particular, including awarding the property to Fred W. Harper.

7. That the interlocutory decree of divorce having been set aside, vacated and nullified, the title (joint tenancy) to the real property was not affected thereby and that the joint tenant, Fred W. Harper, having died, title to the same vested in the surviving joint tenant, the respondent.

## CONCLUSION

In conclusion, respondent submits that the case at bar is controlled by the decisions of this court in the three cases above cited, that the order vacating the interlocutory decree of divorce is valid in every respect and had the effect of nullifying and setting at naught said interlocutory decree, with the result that the title to the property in question was not affected in any way thereby. It is respectfully submitted that the judgment should be affirmed.

Respectfully submitted,

FRED L. FINLINSON,  
*Attorney for Respondent*  
312 Kearns Building  
Salt Lake City, Utah.

Received two copies of the foregoing Brief this  
.....day of October, 1953.

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Attorney for Appellant