

1954

In the Matter of the Estate of Fred W. Harper : Petition for Rehearing

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

IN THE MATTER OF THE ES-
TATE OF FRED W. HARPER,
Deceased.

Case No.
8049

PETITION FOR REHEARING

FILED

FEB 27 1954

Clerk, Supreme Court, Utah

FRED L. FINLINSON

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TABLE OF CONTENTS

STATEMENT OF FACTS	1
POINTS RELIED ON	2
ARGUMENT	6

AUTHORITIES CITED

1 Am. Jur., Abatement and Revival, Sec. 110, p. 83.....	7
17 Am. Jur., Divorce and Separation, Sec. 442, p. 366.....	7
Sec. 179, p. 241	7
104 A.L.R. 661	9
Civil Code of California, 1949, Divorce, Sec. 132.....	6

CASES CITED

Bell v. Bell, 181 U.S. 175, 21 S. Ct. 551, 45 L. Ed. 804.....	13
Borg v. Borg, (Cal. App. 1938) 76 P. 2d 218.....	7
Diggs v. Diggs, (Mass. 1935) 196 NE 858.....	7
Green v. Green, (Cal. App. 1944) 151 P. 2d 679.....	7
Hammond v. Hammond, 13 N.Y. Supp. 2d 870.....	7
In Re Johnsons Estate, 84 Utah 168, 35 P. 2d 305.....	6
McElrath v. McElrath, (Minn.) 139 NW 708.....	7
McPherson v. McPherson (Wash. 1939) 93 P. 2d 429.....	10
Rasmussen v. Call, 55 Utah 597, 188 P. 275.....	8
Salt Lake City v. Industrial Commission, 82 Utah 179, 22 P. 2d 1046	5
Spencer v. Clark, 54 Utah 83, 179 P. 741.....	6
Stanhope v. Stanhope (1886) L.R. 11 Prob. Div. (Eng.) 103-C.A.	8

STATUTES CITED

30-3-5, U.C.A. 1953	7
30-3-7, U.C.A. 1953	8
78-41-1, U.C.A. 1953	12

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STATEMENT OF FACTS

On January 21, 1954, this Court rendered an opinion and judgment granting appellant a reversal of a decree of the trial court holding that certain real property vested in respondent as survivor of a joint tenancy. Respondent hereby respectfully applies for a rehearing upon the grounds hereinafter set forth.

POINTS RELIED ON

This Court erred:

1. In failing to recognize that in all divorce actions in this State, the court's statutory power to dispose of property is a mere incident to the court's authority to dissolve the bonds of matrimony.

2. In holding that the order setting aside the interlocutory decrees was void.

3. In holding that the death of the plaintiff did not make a nullity of the interlocutory decree in its entirety.

4. In holding that death of one of the spouses during the interlocutory period terminated the personal relationship and abated the action insofar as the marital relationship was concerned but that such death did not abate the action insofar as property rights were determined by the decree; this in the absence of a property settlement agreement, a contract for, or, a present conveyance of property affected between the parties to the divorce action.

5. In holding that the interlocutory decree of divorce where property rights were incidentally determined remained effective and became final in the same manner and at the same time as a decree between living persons; this in the absence of a property settlement agreement, a contract for, or, a present conveyance of property affected between the parties to the divorce action.

6. In holding that the death of one of the spouses during the interlocutory period was not sufficient cause for the lower court to vacate the interlocutory decree of divorce.

7. In holding that any party other than the plaintiff or the defendant in the divorce action was, or could be, entitled to notice of a motion to vacate the interlocutory decree.

8. In holding that upon the death of Fred W. Harper, during the interlocutory period, title to property held by him in joint tenancy with his surviving spouse, Zilpha Harper, vested in his heirs or devisees.

9. In holding that the heirs or devisees of Fred W. Harper were entitled to notice of the motion of Zilpha Harper, the surviving spouse, made to set aside the interlocutory decree and to dismiss the divorce action.

10. In holding that the lower court's order to vacate the interlocutory decree was subject to collateral attack.

11. In reversing the judgment of the lower court and ordering the case remanded 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.

In addition to the errors hereinabove set forth, the Court speaking through Honorable David T. Lewis, Judge, enunciated certain propositions of law which we

respectfully submit are of grave concern to the members of the bar, the courts of this State and the litigants therein. We direct the Court's attention to the following pronouncements of the opinion.

(a) It is stated:

* * * All the property rights granted Fred W. Harper by the divorce decree vested, upon his death, in his heirs or devisees, subject to the statutory limitations of the decree itself and applicable probate procedures.

And thereafter:

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.

Thus, the opinion has the effect of holding that in an action for divorce, title to real property may vest or be not vested, dependent upon the circumstances peculiarly attendant, not only to the parties but to their heirs or devisees.

(b) Further, the opinion states:

* * * When the death of one of the parties occurs after the entry of a divorce decree and before the decree is final the decree becomes ineffective to dissolve the marriage, death having terminated that personal relationship * * *.

Thus, it is held, or the effect of the holding is, that the surviving spouse is the widow of the deceased hus-

band for all purposes *except* where there is an interlocutory decree of divorce wherein property has been awarded the husband who happens to die before the decree becomes effective to dissolve the marital relationship.

(c) Also:

The reasoning of the Rasmussen case is applicable to the instant case.

We respectfully suggest to the Court that this conclusion is erroneous. In that case, it is to be remembered, the information upon which the trial court apparently acted was *ex parte*, *and was in no way related to or connected with the action for divorce.*

(d) Finally, the opinion holds:

In *Salt Lake City v. Industrial Commission*, 82 Utah 179, 22 P.2d 1046, and *In Re Johnson's Estate*, *supra*, both of which interpret the statutory provisions herein considered, neither the matter of notice nor the disposition of property was directly considered or discussed. However, to the extent the decisions in those cases indicate approval of *ex parte* orders as the basis for vacating divorce decrees affecting property rights we expressly overrule the holdings.

We submit that the decisions in both cases are, based upon the factual situations presented, legally sound and that neither decision should by reason of the problem presented here be disturbed. In *Salt Lake City v. Industrial Commission*, *supra*, both of the parties to the divorce action moved, during their lifetime, to set

aside the interlocutory decree. So far as we are here concerned the holding in that case merely reiterates the rule that an interlocutory decree of divorce may be prevented from becoming absolute and its finality postponed by the filing of a motion to vacate the findings of fact and decree as was previously decided in *Spencer v. Clark*, 54 Utah 83, 179 P. 741. *In Re Johnsons Estate*, 84 Utah 168, 35 P.2d 305, affirms also the holding in *Spencer v. Clark*, supra, and stands squarely for the proposition that the death of a party during the interlocutory decree is sufficient ground for vacating the decree of the divorce, as *no final judgment could be entered against a deceased person and no one could be substituted for a deceased party in such an action.*

(e) May we also suggest to the Court that the California authorities relied upon by the appellant here can and should be distinguished on statutory grounds. There the laws provide:

* * * that the death of either party after the entry of the interlocutory judgment does not impair the power of the court to enter final judgment. Civil Code of California, 1949, Divorce, Sec. 132.

With all of the above in mind, we present to the Court the following:

ARGUMENT

An action for divorce is of a purely personal nature, in which nothing is sought to be affected but the marital status of the parties as husband and wife. The distri-

bution of property in such an action is merely incidental, and it is clearly incontestable that on the death of either party before the decree, the subject of the controversy is eliminated and the action abates, unless a statute provides to the contrary. 1 Am. Jur., Abatement and Revival, Sec. 110, page 83. Under our statute, 30-3-5, U.C.A. 1953, the power of the court to determine property rights is dependent upon the granting of a divorce to one of the parties. Under the particular facts in this case, did the court below, after the death of Fred W. Harper, have such power? We think it apparent that the court did not, since that personal relationship no longer existed. The trial court did have the power to determine and did in fact determine *that at the time of the interlocutory decree*, Fred W. Harper was *entitled* to a divorce on the grounds of desertion from Zilpha D. Harper. The interlocutory decree did not dissolve the marriage. *Borg v. Borg*, 76 P.2d 218 (Cal. App. 1938); *Green v. Green*, 151 P.2d 679 (Cal. App. 1944). The death of Fred W. Harper left Zilpha D. Harper his widow with rights as such with regard his estate. *Hammond v. Hammond*, 13 N.Y. Supp. 2d. 870; *Diggs v. Diggs*, 196 NE 858 (Mass. 1935). The status of the proceedings after the entry of the interlocutory decree remained that of a pending action and the action abated upon the death of Fred W. Harper so that the decree could never become final, automatically or otherwise. 17 Am. Jur., Divorce and Separation, Sec. 442, page 366; see also, Sec. 179, page 241. The state no longer had an interest in the proceedings. *McElrath v. McElrath*, 139 NW 708 (Minn.). Could now the order of

the lower court which vacated the decree be absolutely void? Reason tells us that the order was proper to set aside the decree of divorce since the marriage relationship was not terminated in that manner. But, says this Court, citing *Rasmussen v. Call*, 55 Utah 597, 188 P. 275, the court had no statutory power to set aside the decree, under Sec. 30-3-7, U.C.A. 1953, without giving all persons whose rights are involved notice and an opportunity to be heard. In that case neither party to the action for divorce was deceased and they were the only parties proper to the action to divorce. Such is not here the case: we are concerned with a situation wherein appellant sought a decree of divorce from this respondent but the cause failed because death intervened. When the court was without power to grant a divorce, it was powerless also to enter any other order in that cause, except to vacate the action, since the right of the court to determine property rights was statutorily dependent upon the right to decree a divorce. The interlocutory decree, it must be remembered, in this case dealt only with the rights of the parties to the action and by no stretch of the imagination could any third party have intervened in that action. It was a personal action for divorce only and the distribution of property therein attempted was merely incidental to the purpose of the action.

The rule this Court has now adopted is certainly not the rule at common law.

In *Stanhope v. Sanhope* (1886) L.R. 11 Prob. Div. (Eng.) 103—C.A., it was held that, where plaintiff in a divorce suit had obtained a decree

nisi and died before the expiration of the time after which such decree could be made final, his personal representative could not revive the suit for the purpose of having the decree made absolute. As against the contention that the suit should be allowed to be revived, and that the decree nisi should be permitted to be made absolute, because making it absolute would affect property rights, the court said: "It may do so in many cases, as, for instance, by enabling children to get a settlement altered. The object of the suit, however, is not to alter rights of property, though it may have that effect, as by depriving a woman of a legacy given to her by the description of the husband's widow. Such a result, however, is only incidental; it is not the object of the suit, but results incidentally from the putting an end to the marriage."

Nor is it the rule adopted by the New York court.

* * * the court In *Re Crandall* (1909) 196 N.Y. 127, 89 N.E. 578, 134 Am. St. Rep. 830, 17 Ann. Cas. 874, conceding that in some jurisdictions a party defeated by a judgment in a divorce action, and thereby deprived of property rights, may prosecute an appeal after the death of the other party, observed that it had never been held that an interlocutory judgment entered in a divorce action may be made final after the death of the plaintiff, because incidentally it might take away property rights from the other party, and that the contrary has been held.

104 A.L.R. 661.

Or of the State of Washington:

It is the general rule, concurred in by respondent, that an action for divorce proper, being purely a personal action based upon the personal relationship and status of marriage,

terminates with the death of either spouse, not only because of its personal character, but because the marriage is ipso facto dissolved by death. But, contends respondent, where, as in the instant case, the interlocutory decree settled the property rights of the parties, the action does not abate, in so far as the property rights are concerned, but such decree may be reviewed by this court, to the extent that it involves such rights. There is much authority from other jurisdictions to sustain this contention of respondent, but we are of the opinion that, under our decisions, the interlocutory decree, in its entirety, abates and becomes a nullity, upon the death of one of the parties, whether before or after the interlocutory decree is entered. We stated in *Dwyer v. Dolan*, 40 Wash. 459, 82 P. 746, 747, 1 L.R.A., N.S., 551, 111 Am. St. Rep. 919, 5 Ann. Cas. 890: "It will not be gainsaid that an action for divorce is a purely personal action. Nothing is sought to be affected by the marital status of the husband and wife. *The distribution of property in such an action is incidental, and it is clearly incontestable that upon the death of either party, whether before or after the decree, the subject of the controversy is eliminated.* 93 P. 2d 429, *McPherson v. McPherson*, (Wash. 1939.)

The facts in the instant case, reduced to the bare essentials are that the Harpers were married and acquired real property which the title thereto they held in joint tenancy. Thereafter, unhappy circumstances and differences arising between them, the wife departed their home and went to California where she chose to remain. The husband, after the expiration of a year,

brought suit for divorce and the wife entered her waiver to the proceedings thereon. The interlocutory decree entered but the husband died before a final decree, by operation of statute, became effective. The wife, learning of the death of her husband, then, without notice to the husband's heirs or administrators, petitioned the court to set aside the interlocutory decree. The court, having lost jurisdiction over one of the parties by reason of the Lord having assumed it, was then confronted with a lawsuit having a defendant but no longer a plaintiff in an action purely personal to the parties and there being no statutory right of succession and no possibility for a substitution of parties; this certainly insofar as the primary object of the suit was concerned, i.e., the matter of divorce. Incidental only to the purpose of the suit was the statutory authority of the court, if he could decree a final divorce, to make disposition of property. We ask, whom could he have ordered service be had upon?

Will the court give further consideration to the wife's consent and waiver in this case? The wife consented to the husband's right to the divorce, and she chose to let him thus acquire title to the property rather than return and contest the action. From this, can we go further and conclude that it was her intention, should her husband die during the marriage relationship, to waive her right of survivorship in the property. We heartily contend that this Court can indulge in no such presumption. What would have been the result had no suit for divorce be filed? By orderly legal process, exactly as the wife

availed herself of in this case (Sec. 78-41-1, U.C.A. 1953) she would have established her right to title and ownership of the property. It is admitted that Zilpha was Fred's widow; can we now distinguish her legal rights in this situation by saying that based upon an ex parte interlocutory decree of divorce she was the guilty party in a marriage still existing because she chose to leave her husband's bed and board. To draw such a fine distinction is to make possible the error of greater wrongs and to materially weaken the status of the marriage relationship.

We do not here contend that the rule adopted by this Court in this decision would be void of legal reason had the situation involved a contract, property settlement agreement, or conveyance. In such case third parties and strangers to the divorce action would have their legal remedy as against the surviving spouse without the infringement upon the divorce action in which they could have no personal status.

It is our further contention that the rule adopted makes serious inroads into the marketability of the title to real property and can only further confuse the fee to the expense, and harrassment of owners and/or purchasers within this jurisdiction.

In remanding this case the Court said, in part:

* * * and allow the parties to be heard upon the merits in the divorce action * * *.

We ask for clarification. Death terminated the marriage relation, and no power can dissolve a marriage

which has already been dissolved by act of God. *Bell v. Bell*, 181 U.S. 175, 21 S. Ct. 551, 45 L. Ed. 804. Who would appear for the deceased?

We respectfully submit that a rehearing should be granted for the correction of the manifest errors in the Court's decision.

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