

1954

In the Matter of the Estate of Fred W. Harper : Appellant's Reply to Respondent's Petition

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Chris T. Praggastis; John H. Stone; Attorneys for Contestant and Appellant;

Recommended Citation

Response to Petition for Rehearing, *Harper*, No. 8049 (Utah Supreme Court, 1954).
https://digitalcommons.law.byu.edu/uofu_sc1/2068

This Response to Petition for Rehearing is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

✓
RECEIVED

APR 12 1954

LAW LIBRARY
U. of U.

IN THE SUPREME COURT
OF THE STATE OF UTAH

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

No. 8049

APPELLANT'S REPLY TO RESPONDENT'S
PETITION FOR REHEARING

FILED

APR - 6 1954

CHRIS T. PRAGGASTIS,

JOHN E. STONE,

Attorneys for Contestant
and Appellant.

Clerk, Supreme Court, Utah

TABLE OF CONTENTS

	Page
STATEMENT.....	1
ARGUMENT.....	2
CONCLUSION.....	6

CASES CITED

Cummings v. Nielson, 42 Utah 157 129 P. 619.....	2
Brown v. Pieka rd, 4 Utah 292, 11 P. 512.....	2
Ducheneu v. House, 4 Utah 485, 11 P. 619.....	1,2
Durland v. Durland, 67 Kansas 734 74 P. 274	3
McPherson v. McPherson (Wash. 1939) 93 P 2d 249..	2

TEXTS CITED

30 A. L. R. 1466, 1469.....	2
-----------------------------	---

STATUTES CITED

Utah Code Annotated, 1953 30-3-5.....	3
Com. Statutes Washington (Rem, 1922) Sec. 988-1.....	2
General Statutes of Kansas, 1949 60-1514.....	2

IN THE SUPREME COURT
OF THE STATE OF UTAH

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

Deceased.

REPLY TO PETITION
FOR REHEARING
No. 8049

APPELLANT'S REPLY TO RESPONDENT'S
PETITION FOR REHEARING

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

Honorable Clarence E. Baker, Judge

STATEMENT

Respondent in her Petition for Rehearing listed some eleven points in which she claimed that this court erred in its decision of January 21, 1954. It should be noted that almost all of these points were raised and fully considered by the court in its opinion. It is a fundamental rule that a rehearing will not be granted unless something new and important is offered for the court's consideration, *Ducheneau v. House* 4 Utah

483, 11 Pac. 619; Brown v. Pickard, 4 Utah 292
11 Pac. 512. Respondent's Petition for Rehearing
is in effect a re-argument of the matter originally
briefed and argued to the court. However, we
shall refer to certain arguments raised by
Respondent's Brief.

ARGUMENT

The Washington Case cited by Respondent,
McPherson v. McPherson, (Wash 1939) 93 P. 2d
429, is not in point because there was an appeal
pending. That the appeal abates upon death of
one of the parties during an appeal is certainly
not the majority rule. See 30 A. L. R. 1466,
at page 1469, citing Missouri, California, Oregon,
Kansas, and Maryland cases. In addition, the
statute being construed by the Washington Court
in that case, Rem. Rev. Stat. (Sup) Sec. 988,
cited on page 429 of the case, required the
entry of a final judgment. The only court
that we could find that has a statute similar
to our own in that the finality of the decree
of divorce was deferred for six months and no
further act was necessary was Kansas, Gen. Statutes
of Kansas. 1949. 60-1514 where it was held

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, *Durland v. Durland*, 67 Kan. 734, 74 P. 274.

The argument that the action should abate as to property interests in addition to the marital status because the property award is incidental to the divorce action has certainly been given no weight by the above cited authorities. Respondent's argument that the court's statutory power to dispose of property is a mere incident to the court's authority to dissolve the marriage is without substance. Sec. 30-3-5, U. C. A., 1953, states:

"When a decree of divorce is made the court may make such orders in relation to the children, property and parties...as may be equitable....Such subsequent changes or new orders may be made by the court with respect to the disposal of the children or the distribution of property as shall be reasonable and proper." (Emphasis ours)

There is no question but that the lower court had jurisdiction to make a property award when the divorce decree was made because the marital status was then still extant; but if the existence of said status is a necessary incident, as Respondent argues, where then did the lower court acquire jurisdiction to make the order of June 19, 1950, purporting to set the decree aside? This argument would operate against Respondent rather than in her favor.

Respondent states on page 12 of her brief that the rule adopted by this court would make "serious inroads in the marketability of title to real property and can only further confuse the fee to the expense and harrassment of owners..." Just how this would occur, the Respondent did not bother to state. But the court's attention should be directed to how real property law would be confused by adopting the viewpoint of the Respondent. If death during the interlocutory period automatically set the property interests at large there would be no sales of property at all that came through an

interlocutory decree, even after the interlocutory period had run and the decree had become final. If A's property were awarded to B, and the interlocutory decree became final, an intending purchaser from B would have to ascertain with certainty that A had not died during the period, because under Respondent's viewpoint, the death would automatically vacate the decree and revest the property interests A's heirs. Who, then, would purchase property that was acquired through an interlocutory decree? Also, the present case under consideration shows the difficulty of this court adopting the Respondent's viewpoint. If the death vacated the interlocutory decree as it affected the property interests, how could said vacation recreate the joint tenancy, one of the tenants being dead?

We submit that the effect of an interlocutory decree conveying property is to give the recipient a present interest in that property, a right of occupancy, a right to the rights and profits, and this being the case, an automatic vacation of the decree could not recreate the situation as it

time the decree was made, since the recipient would have dissipated some of the property passing under the decree, particularly if the award were money.

Nor can we be concerned with the Respondent's discussion of the facts, on pages 10-12, of her brief, wherein the divorce action proper was erroneously described as "Ex parte". Whether the interlocutory award in this case was based upon guilt or need or both, the death during the interlocutory period did not alter that fact in the least; both the built and/or need remained. The effect of the Respondent's viewpoint would be to reward the guilty or to take property from the needy.

CONCLUSION

We submit that the court's decision in this case was correct and rests upon sound principles of law regarding the devolution of property and therefore request that the Petition for Rehearing be denied.

Respectfully submitted,
Chris T. Praggastis
John E. Stone,
Attorneys for Appellant.