

27 June 1947

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ARIZONA ATTORNEY GENERAL

Mr. Spencer Thompson  
Veterans' Service Offices  
409 Arizona State Building  
Phoenix, Arizona

Dear Mr. Thompson:

In your letter of June 13, 1947, you ask us for an opinion on the Arizona law on this subject:

On whom does the burden rest in attacking a second marriage on the grounds that one of the parties was previously married and never freed from that union by legal process?

The Arizona law is the majority rule on the subject, and is found in the case of Sanders v. Sanders, 52 Arizona 156. It is to the effect that the burden rests upon the attacking party, in view of the strong presumption that the second marriage is a valid marriage. The rule is set out in the following language in the case above:

"The next question for our consideration is in regard to the sufficiency of the evidence to sustain the finding of the jury that when H. C. Sanders married defendant he was not an unmarried man. We have had a somewhat analogous question before us in the cases of McCord v. McCord, 13 Ariz. 377, 114 Pac. 968, and Kolombatovich v. Magma Copper Co., 43 Ariz. 314, 318, 30 Pac. (2d) 832. In the last-named case we said (page 834):

' . . . Both the law and public policy favor matrimony and when it is once shown that a marriage has been celebrated, the contract, the parties' capacity to enter into it, and in fact every act necessary to its validity,

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will be presumed, in the absence of proof to the contrary. The presumption that it was legal and valid in all respects is one of the strongest known to the law, and while it is true that the marriage relation when once proven is presumed to continue, yet this presumption attaches with full force to the second or latest marriage, and the reason for this is that the 'presumption of innocence, morality and legitimacy will counterbalance and preponderate against the presumption of the continuance of the former relations'. 18 R.C.L. 417.

'There seems to be no division of authority on the proposition that where one contracts a second marriage during the lifetime of the first spouse the presumption that the first marriage was legally dissolved prevails and the one who asserts that the second marriage is invalid has the burden of showing that there has been no divorce. The following excerpts show this:

'When a marriage has been consummated in accordance with the forms of law, it is presumed that no legal impediments existed to the parties entering into such marriage, and the fact, if shown, that either or both of the parties have been previously married, and that such wife or husband of the first marriage is still living, does not destroy the prima facie legality of the last marriage. The presumption in such a case is that the former marriage has been legally dissolved, and the burden that it has not rests upon the party seeking to impeach the last marriage.' 18 R.C.L. 417

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"Mere proof of a prior marriage and that one party had not obtained a divorce is not sufficient, for the other might have obtained such divorce and left him or her free to contract the second marriage." 18 R.C.L. 420.

'In the case of conflicting marriages of the same spouse, the presumption of validity operates in favor of the second marriage. Accordingly the burden of showing the validity of the first marriage is on the party asserting it, and even where this is established it may be presumed in favor of the second marriage that at the time thereof the first marriage had been dissolved either by a decree of divorce or by the death of the former spouse, so as to cast the burden of adducing evidence to the contrary on the party attacking the second marriage.' 38 C. J. 1328, 1329."

Hoping this answers your inquiry, we remain

Very truly yours,

JOHN L. SULLIVAN  
Attorney General

WILLIAM P. MAHONEY, Jr.  
Assistant Attorney General

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