1955

Carlton v. Carlton

Utah Supreme Court

White, Arnovitz & Smith; Attorneys for Appellant;

IN THE SUPREME COURT
of the
STATE OF UTAH

IN THE MATTER OF THE GUARDIANSHIP OF FLORENCE S. VALENTINE, ALLEGED INCOMPETENT.

Case No. 8415

BRIEF OF APPELLANTS

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STATEMENT OF POINTS RELIED UPON

The appellant herewith states the following points to be relied upon for the reversal of the orders of dismissal entered by the Honorable C. . Baker and the Honorable Joseph C. Jeppson:

1. That each of the said courts erred in entering an order of dismissal of the petition for the appointment of a guardian in that the original petition filed for the appointment of a guardian sets forth sufficient facts for the appointment of a guardian and that the original petition filed for the appointment of a guardian, together with the proffered amendment to the petition for the appointment of a guardian sets forth sufficient facts for the appointment of a guardian of the property of Florence S. Valentine.

2. That the orders of Dismissal entered by the Honorable C. . Baker and the Honorable Joseph . Jeppson, denying to the petitioner the opportunity to present the evidence in support of the original petition and also in support of the original petition together with the proffered amendment thereto constituted error.

INDEX

Page

CASES CITED

California Employment Commissioner v. Malm, 59 Cal. App. (2) 322, 138 Pac. (2d) 744 13

Denny's Guardianship, In re, 218 P. (2) 792 13

Heath, In re, 102 Utah 1, 126 Pac. (2) 1058 11

Lee, In re, (Cal.) 267 P. (2) 847 12

Miles v. McCallan, 1 Ariz. 491, 3 Pac. 610 13

Tilton, In re, 15 Cal. App. 244, 114 Pac. 594 12

STATUTES CITED

75-13-19 U.C.A. 1953 10

75-13-20 U.C.A. 1953 11

TEXTS CITED

2 Bancroft Code Practice and Remedies, page 2143 13

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BACKGROUND OF THESE PROCEEDINGS FOR APPOINTMENT OF A GUARDIAN OF THE PROPERTY OF FLORENCE S. VALENTINE.

This proceeding for the appointment of a guardian of the property of a guardian of the property of Florence S. Valentine was filed by order of A. H. Ellett, one of the judges of the Third District Court. This order was made when Irwin Arnovitz, who had been acting as Attorney for the minor children of Mrs. Valentine and for the estate of J. Howard Valentine, the deceased husband of Florence S. Valentine, petitioned the court to be relieved from acting in that capacity. In February 1954, Irwin Arnovitz had been employed as an Attorney by

Mrs. Valentine to defend an action brought by the Western States Refining Company against her late husband's estate, her minor children and a corporation known as the Associated Dealers Supply Company, which corporation appeared to be controlled wholly by Mrs. Valentine. This suit had been commenced in May 1953. Mr. Grant Iverson was first employed by Mrs. Valentine to defend the action. She released Mr. Iverson several months later and employed John Snow. Mr. Snow was released in November 1953. From November 1953 to February 1954, Mrs. Valentine was cited into court on several show cause orders and sometimes she could not be served and sometimes she appeared in court on her own behalf. The Attorney for the Western States Refining Company petitioned the court to order Mrs. Valentine to employ counsel so that the action could proceed in an orderly fashion and after she was ordered to employ counsel, Irwin Arnovitz was employed in February 1954. The Western States Refining Company case was tried in April 1954 and in January, 1955 a judgment was entered against Mrs. Valentine for cancellation of 73,311 shares of the capital stock of Western States Refining Company and a money judgment of approximately $135,000.00. Assuming a price of $1.50 per share for the stock, the judgment amounts to approximately $250,000.00 (R. 2).

Another action was brought against Florence S. Valentine by one Sid H. Eliason who sued on an assignment of an option originally obtained by one D. M. Linney. The complaint pleaded that Linney had obtained

an option from Mrs. Valentine to purchase 300,000 shares of the capital stock of the Western Refining Company at $1.00 per share. An answer was filed on Mrs. Valentine's behalf by Samuel W. Stewart, an uncle of Mrs. Valentine and a retired member of the Utah Bar. A day or two before the date upon which the case was to be tried, Mrs. Valentine employed Herbert B. Maw. The court granted a continuance of the trial to May 2, 1955.

The petition for the appointment of a guardian sets forth the facts respecting this option and this litigation and also sets forth the erratic conduct of Mrs. Valentine in failing to appear on the second day of the trial (R. 5).

Mrs. Valentine has contended that neither judgment should have been entered against her and she has refused to permit counsel in the Western States Refining Company case to take an appeal (R. 32), though she was advised to take such an appeal and in the meantime to enter into a settlement of that case and the Eliason case. A reasonable settlement that would have produced approximately $300,000.00 for her was in prospect (Tr. 3, 21).

This Brief is being written by Irwin Arnovitz and he wishes to inform the court that he is participating in these proceedings out of a desire to protect the financial interests of Mrs. Valentine and her family. He does not desire to participate in the appeal of the Western States Refining Company case or in any action that might be taken in the Eliason case or, indeed, in any of the financial affairs of Mrs. Valentine and her family. He does not request a fee for the services that he has rendered in

protecting Mrs. Valentine's interests and if as a result of these proceedings, it is concluded that Mrs. Valentine requires legal assistance, he would prefer that this court or the District Court appoint that counsel. The only claim which Irwin Arnovitz will assert against Mrs. Valentine is for the sums of money that he became obligated to pay in hiring accountants, witness fees, court costs and miscellaneous items of cash expended in behalf of Mrs. Valentine and the others whom he represented during the course of this litigation.

THE PETITION FOR THE APPOINTMENT OF A GUARDIAN FOR THE ALLEGED INCOMPETENT STATES FACT SUFFICIENT TO AUTHORIZE THE RELIEF PRAYED FOR.

The petition sets forth a brief outline of some of the conduct of Florence S. Valentine since the date of the death of her husband in reference to the oil refinery business which her husband had founded. Casual mention is made of the litigation with the refinery company that followed and similarly causal mention is made of her dealings with the stock in the refining company which she and her children owned and of the resulting controversies. Then follows this allegation (R. 6):

> "That within a few months after the death of her husband, the Board of Directors discharged her from the employment and also voted her out of the Chairmanship of the Board of Directors; that that action brought on a period of antagonism and serious disagreement and arguments between Florence S. Valentine and members of the Board of Directors of said company; that there has been bitterness and recrimination in the conduct of

these negotiations with the members of the Board of Directors; that in the course of the conduct of these negotiations, some person or persons have been attempting to gain control of the Western States Refining Company and deprive Florence S. Valentine of the benefits of her stock holdings with that company; that the resulting controversies and burden of conducting this litigation has so affected her, that by reason thereof, she is unable unassisted to properly manage and take care of her property and by reason thereof, would be likely to be deceived or imposed upon by artful or designing persons; that Florence S. Valentine has already been imposed upon by artful and designing persons as a result of which the aforementioned loss of $75,000.00 has resulted."

As a foundation for introducing the evidence as to the erratic conduct of the litigation in which she was involved, it is pleaded in Paragraph 7 (R. 6):

"That in addition to material loss that has occurred and is likely to continue to occur, as an indication of her liability unassisted to properly manage and take care of her property, she has carried on her discussions, conferences and dealings with her Attorneys in a most unusual manner and has consistently refused to cooperate with her counsel and has, in practically all instances, refused to accept and adopt the advice of her legal counsel.

"That the conduct of the said Florence S. Valentine has thwarted such assistance as counsel might give her; that since the entry of the judgment in the case of Western States Refining Company, Orders to Show cause have been served upon her ordering her to deliver some of the stock of the company for cancellation; that Florence S.

> Valentine has stated that the stock is out of her control and that she is firmly of the opinion that the judgment of the Court cannot effect her property interests and that she has ways and means of preventing the Court from enforcing the judgment that has been entered; that this course of action, if persisted, will cause her to lose the rights and benefits that she has, to appeal to the Courts of this State and that it will result in the eventual dissipation or at the very least, the loss of a considerable portion of the property which she owns and possibly of the loss of some property owned by her children."

The petition (R. 1 to 7) sets forth some of the facts which counsel intended to prove, but just enough facts were set forth to point out to the court, the nature of the litigation and the erratic conduct, from which the court could have a preliminary view prior to the introduction of the evidence.

BASIS OF THIS APPEAL.

This appeal is based upon the refusal of Judge Baker and of Judge Jeppson to hear the evidence upon the question of incompetency. Judge Baker held that the original petition did not state facts sufficient to authorize the relief prayed for (R. 40). Two orders were signed on that same date by Judge Baker. Counsel does not know the order in which they were signed. The one that appeared at R. 39 recites, "Testimony having been taken," after which the court enters an order dismissing the petition. The fact is, that no testimony was taken. Judge Jeppson held that the amendment to the petition (R. 41 and 42) did not allege any additional facts which would

be grounds for the appointment of a guardian. A recital is made that the facts stated in the petition and the statement of petitioner in open court as to what he proposes to prove, did not constitute grounds upon which a guardian should be appointed. There was no attempt made by counsel to set forth all of the facts which he intended to prove. There was a very brief argument as to the propriety of filing the amendment to the petition and probably a few sentences as to a few of the facts in the amendment, but nothing more.

STATEMENT OF THE PROCEEDINGS ON THE DATE SET FOR THE TRIAL.

On the date of the hearing, the court invited counsel to proceed (R. 10, Line 3). Mr. Arnovitz stated, "The matter requires some little statement. I would like to make this outline to the court." Counsel outlined the nature of the legal proceedings in which the alleged incompetent had been involved and some brief reference to her conduct of those proceedings and in the course of that statement, counsel stated, "There will be facts presented to show that during the time that this proceeding has been going on, and since the death of Mr. Valentine, there has been a running, shall we call it a running battle, to keep away from service of process by the officers of this Court. There has been disregard of advice given by counsel, for example in my own situation." (R. 22). In response to the following question by the Court, "and what do you intend to show regarding her incompetency," counsel stated, "We are going to show that she is unable, alone to carry on her business affairs,

which under our statute comes under the definition of incompetency." (Tr. 26). At Record 27 counsel stated, "We propose to show by some substantial evidence . . ." (The Reporter follows this statement with words "and sit down." I do not think that that phrase was used.) "I have given a statement of what is involved in the matter. I think there ought to be such an interrogation of the party that this Court will be able to determine this matter on evidence, and if it should decide to assign it to a full hearing, that this court or whoever would hear it, would be able to observe and see the demeanor of the party and note the facts that will be adduced." Counsel indicated that he wished to present the evidence to enable the court to pass upon the question of incompetency. The request to be permitted to introduce the evidence was made several times during the proceeding. It was never acknowledged that this matter should be disposed of on the basis of the facts set forth in the petition, without the presentation of the evidence. Counsel for the petitioner stated, "I think it should be gone into, that evidence should be taken and determine whether these facts as I have stated them are correct and whether this party is entitled to the protection of this court. I think she ought to have it . . ." (R. 28). Further at R. 28, "Whether a person is incompetent, he would have to be judged incompetent after the facts are proved at the trial" and at R. 29, "That it was for the court to observe the witnesses."

Again at R. 29, counsel urged the court to proceed with the taking of evidence and stated to the Court, "Your

Honor, please, there is the allegation of incompetency, I think that matter should be explored. Your Honor may raise that question at the conclusion of the hearing, but the rules of law are, that evidence should be taken to determine that fact. That is all we ask the court to do. We think evidence should be taken and the facts set forth so that we may prove incompetency and then we are to take evidence and see if the evidence sustains that. All we ask is to present evidence to have it properly adjudicated and presented to the court. If this court reached the opinion at the conclusion, it doesn't justify, that will be the decision of the court, but those facts should be presented to the court, that is all we ask is the opportunity to present that."

Counsel referred the court to the case in 218 Pac. (2d) 792 which holds "that the interested party is entitled to the right to present his proof and that judicial discretion cannot be fully exercised when the interested party is denied the right to present his proof." (R. 31).

At (R. 31) counsel for the petitioner stated, "All we desire is the opportunity to present that proof. I don't think it lies in the mouths of these gentlemen to say that this court should not receive that proof. They are the ones who stand to benefit and profit by leaving these decisions just where they are and it seems to me that Mrs. Valentine ought to welcome this proceeding and this proceeding should go forward in the proper manner and that during the hearing, there should be proper opportunity for observation and a proper basis for this court to exercise its judgment and we think it should not

lie in the mouths of these two men, both of whom represent adverse interests of Mrs. Valentine and will profit by this being dismissed."

At page 34 of the Record, counsel made the following statement: "Mrs. Valentine is of the opinion that the judgment rendered by Judge Jeppson is wholly erroneous, she is firmly convinced that the case should have been decided the other way, and when a person is firmly convinced that the case should be decided the other way, there should be an appeal to ascertain that matter." To which the court made this statement, "That is no sign of incompetency or competency." And counsel continued, "That may not be, but when a person is convinced a case should be decided the other way and when counsel indicates, and I think I have some firm basis for judging the case, it can be reversed some of the way if not in toto, I will appeal. I think I have received a bad judgment, the two things are wholly inconsistent. I am of the opinion that the matter is of such moment, that this sort of matter ought not be left fall on the presentation of the opening statement by counsel, but counsel should have ample opportunity to present his witnesses and give the court the benefit of the testimony in rendering judgment and being able to observe the individual and after that determine the matter, after those matters are presented, then the court should be able to make determination."

LAW

Section 75-13-19 reads in part,

> "The district court of each county, when it appears necessary, may appoint guardians for

the persons and estate of persons who are . . . from any cause mentally incompetent to manage their property."

Section 75-13-20 reads,

> "The words 'incompetent', 'mentally incompetent' and 'incapable', as used in this title, shall be construed to mean any person who, though not insane, is, by reason of old age, disease, weakness of mind, or from any other cause, unable, unassisted, to properly manage and take care of himself or his property, and by reason thereof would be likely to be deceived or imposed upon by artful or designing persons."

As a basis for the appointment of a guardian, it must be made to appear that such an appointment is necessary. This fact can be made to appear to the court only after the presentation of evidence. If the petition sets forth the alleged incompetency in the words of the statute, then the complaint is sufficient. *In re Heath,* 102 Utah 1, 126 Pac. (2d) 1058 which states at page 1062:

> "Appellants contest the jurisdiction of the trial court on the ground that respondents' petition did not state facts sufficient to authorize the relief prayed for. Appellants filed a general and special demurrer to the petition, which demurrer was overruled. Sections 102-13-19 and 102-13-20, Revised Statutes of Utah 1933, require an allegation of residence and an allegation of incompetency such as renders alleged incompetent unable, unassisted to properly manage himself or his property so that he would be likely to be deceived by artful or designing persons. Respondents' petition recites Heath's residence in Salt Lake County, sets forth his advanced age, and alleges that 'he has been in ill health to such extent that now his

> mind has become impaired from the effect thereof . . . and that he is unable, unassisted, to properly manage . . . himself or his property and by reason thereof would be likely to be deceived or imposed upon by artful or designing persons.' "

See also *In re Lee Guardianship,* 267 Pac. (2d) 847, decided March 16, 1954, a California case. At page 850 the court states, "as stated in 13 California Jurisprudence, Page 162: 'The filing of the petition gives the court jurisdiction of the subject matter. The petition is not subject to tests given to complaints in actions of law. If enough is stated to inform the court that it should interfere, the petition is sufficient and the duty then devolves upon the court to inform itself and take such action as may seem proper.' "

The court also refers to the case of *In re Tilton,* 114 Pac. 594 as authority for the same proposition. At 267 P. (2d) 852 the court concludes with the following statement:

> "Is is clear that appellant was entitled to a hearing upon the merits of her petition for appointment of a guardian, and that there was no hearing upon the merits. It may well be that if there had been such a hearing and the evidence introduced was substantially the same as set forth in the affidavits, the court could have determined, under the authorities hereinbefore cited, that it was not 'necessary or convenient' that a guardian be appointed or that the Ohio courts have a more substantial interest in the custody of said minor than do the courts of California. These, however, are matters that could only be determined after a hearing upon the merits of the petition itself, and the court was in error when it granted re-

spondent's motion to dismiss the petition for appointment of a guardian without such a hearing."

To the same effect, see *In re Denny's Guardianship,* 218 Pac. (2d) 792. The court there holds,

> "Under section 1405 of the probate code, a guardian of a minor is to be appointed 'whenever necessary or convenient.' The petitioner was entitled to make such proof but he was denied that right. The granting of the petition is to some extent discretionary, judicial discretion cannot be fairly exercised when the interested party is denied the right to present his proof. The petitioner should be permitted to show that the appointment of a guardian of the minor was either necessary or convenient . . ."

NO EVIDENCE WAS TAKEN AND THERE ARE NO FINDINGS OF FACT.

There are no findings of fact in this action and indeed there could not be, because no evidence was taken. There can be no Findings of Fact where the judgment is upon the pleadings. *Miles v. McCallan,* 3 Pac. 610 1 Arizona 491. Also *California Employment Commission v. Malm,* 138 Pac. (2d) 744, 59 California Appellate 2d, 322, which states, "A finding of fact is a determination by a court, found on the evidence of facts averred by one party and denied by the other. The statements of a Judge as to the reasons for his decision constitute neither findings of fact or conclusions of law, nor do the preliminary remarks that ordinarily precede formal findings and conclusions." *Bancroft Code Practice and Remedies,* Vol. 2, Page 2143.

The lower court has entered an order dismissing the proceeding but it has not made a finding of any facts upon which to base a conclusion that no appointment of a guardian was necessary. Before the court can make a finding of necessity or lack of necessity for an appointment of a guardian, evidence must be taken. This proceeding should be sent back to the lower court for the taking of evidence.

CONCLUSIONS

There has been no determination of the single fact question, namely incompetency. The court cannot do as Judge Baker undertook to do, that is to listen to an unsworn statement of an alleged incompetent and then promptly conclude, "I think she is competent as far as that goes." (R. 34). It would seem especially so when a part of the statement made by the alleged incompetent is the following (R. 32):

> "My final decision is there has been no appeal, there are about three reasons: this case never should have gone to trial in the first place; Mr. Arnovitz got photostats of the original documents wherein the Statute of limitations had run its course, he was given the documents to substantiate this amount of money, he talked about those documents on file in public places, stating it was a bona fide option wherein a lot of money was involved on this lien on this stock, and Mr. Valentine's commissions, which was in the file in the court all during the trial of this matter and everything, and this case, if handled properly, should not have come to trial, and ever given to Mr. Arnovitz.
>
> "And I had one item in the file, three attor-

neys refused to present to the Court, where it was recorded September 3rd, 1953, wherein this stock was tranferred April 1953 and suit was filed June 1953 not April 1953, as Mr. Arnovitz stated, this stock was all transferred and left the hands of Valentine in April and action was filed in June.

"Another reason: there was no demand before the Board of Directors, Mr. Cummings retracted his demand. And one thing Mr. Arnovitz had it marked as an exhibit, came back and left it on the table, I don't know whether he didn't offer them, whether they didn't go in or Judge Jeppson kept them out. I know if they had been duly considered it would have been different.

"And there was a statement given Mr. Arnovitz, Western States at the death of Mr. Valentine, when he died, and there is public record of $16,000.00 the company owed Mr. Valentine in excess of that.

"These children have been harrassed because of the horrible things written about their father, who is dead, and now their mother, alieniating their affections because of their mother — this estate had $20,000.00 in it, and $140,000.00, my insurance, he had paid on his life and he spent his life building the Western Refining and why I won't take the filthy lucre — there are other things besides the money."

At the conclusion of this statement Judge Baker made the foregoing comment, "I think she is competent as far as that goes." Judge Baker has never heard any evidence in the case and no determination of competency or incompetency can be made by the court until all the evidence is presented. Acts in and of themselves may not

be incongruous, but when the circumstances are related, the acts may become wholly incongruous. It is common knowledge that even psychiatrists may differ as to whether one is competent or not and for that reason, a Judge should not attempt to do what a trained psychiatrist cannot do. Therefore, to reach a conclusion of competency or incompetency without a careful study of the alleged incompetent and without knowing all of the facts concerning the alleged erratic conduct is improper. The trained psychiatrist would want to know the complete course of conduct and the history of the individual. Aside from the practical aspect of this medical approach, from the view point from which we are here concerned, namely the legal view point, there can be no finding of competency or incompetency until all of the facts are presented in an orderly trial. Once incompetency is suggested a court should look into the matter carefully.

At times, in order to make this proceeding appear to be vicious in so far as the alleged incompetent is concerned, the word "insane" has been bandied about by counsel who are representing the parties with interests adverse to Mrs. Valentine. In this proceeding, it is suggested only, that on account of the course of events that have been distressing to a widow with five children and on account of the mental suffering that a person inexperienced in business undergoes under such circumstances, that she is from these causes, unable to alone, unassisted to properly manage and take care of her property and by reason thereof, would likely be deceived or imposed upon by artful or designing persons.

We ask this court to order the District Court to grant a hearing so that the evidence may be fully presented and the issue fully investigated and determined. Courts are jealous of their power to protect persons who need the protection of the law. In the opinion of counsel, this is such a case.

Respectfully submitted,

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