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Frank V. Colombo, Jr. v. Walker Bank and Trust Company : Brief of Appellant

Utah Supreme Court

Parsons, Behle and Latimer; James B Lee; Edward J. McCarthy; Attorneys for Appellant.
Thorit Hatch; Attorney for Respondant.

IN THE

SUPREME COURT
OF THE
STATE OF UTAH

FRANK V. COLOMBO, JR., a minor, by VIRGINIA VON STORCH, as Guardian of his Person and Estate,
Plaintiff-Appellant,

vs.

WALKER BANK AND TRUST COMPANY, a Utah corporation,
Defendant-Respondent.

Case No. 12292

BRIEF OF APPELLANT

Appeal from the Judgment of the Seventh District Court for Carbon County, State of Utah, Allen B. Sorensen, Judge

PARSONS, BEHLE & LATIMER
James B. Lee
Edward J. McCarthy
of and for
520 Kearns Building
Salt Lake City, Utah 84101
Attorneys for Appellant

Thorit Hatch
155 South Main Street
Helper, Utah
Attorney for Respondent

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AUTHORITIES CITED

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STATEMENT OF THE NATURE OF THE CASE

This action was instituted by plaintiff to seek reversal of the rejection of a creditor's claim against the Estate of Frank V. Colombo, Sr., by respondent Walker Bank and Trust Company.

DISPOSITION IN LOWER COURT

The lower Court entered a Decree of no cause of action.

RELIEF SOUGHT ON APPEAL

Petitioner seeks a determination by this Court that the Decree of the lower Court was erroneous and should be reversed.

STATEMENT OF FACTS

1. On the 15th day of February 1969, Frank V. Colombo died intestate at Freeport, Grand Bahamas, Bahamas (Judgment Roll, page 1).

2. On March 4, 1969, the District Court in and for Carbon County, duly entered its Order appointing Walker Bank and Trust Company Administrator of the Estate of Frank V. Colombo, Deceased, and Letters of Administration were duly issued to Walker Bank and Trust Company on that date (Judgment Roll, page 1).

3. By Order of said Court, on March 26, 1969, the plaintiff herein was duly appointed as Guardian of the Person and of the Estate of Frank V. Colombo, Jr., a minor child of Frank V. Colombo, Deceased, and the plaintiff herein. Letters of Guardianship were duly issued and the plaintiff herein has since that date and now is the Guardian of the Person and the Estate of Frank V. Colombo, Jr. (Judgment Roll, page 1).

4. On the 15th day of November, 1966, by virtue of a Decree of Divorce, Civil No. 9231, entered in the District Court of Carbon County, State of Utah, plaintiff was awarded Judgment against defendant Frank V. Colombo, Deceased, for the support and maintenance of the minor child of the parties, Frank V. Colombo, Jr., in the sum of $150.00 per month to commence with the month of November 1966 and to continue until further Order of the Court (Defendant's Exhibit 1, paragraph 3).

5. Under the terms of the Decree, Frank V. Colombo, Deceased, paid plaintiff support money for Frank V. Colombo, Jr., his son, up to and including the month of his death, February 1969 (TR-20).

6. On the 12th day of May 1969, plaintiff duly presented to defendant a claim of $15,150.00, but defendant refused to allow the same, and on the 10th day of July 1969, rejected the claim (Defendant's Exhibit 3).

ARGUMENT

POINT I.

THE LOWER COURT ERRED IN FAILING TO FIND THAT AN OBLIGATION OF CHILD SUPPORT PROVIDED FOR IN A DECREE OF DIVORCE GRANTING CHILD SUPPORT UNTIL "FURTHER ORDER OF THE COURT" SURVIVES AS A CLAIM AGAINST THE ESTATE OF DR. FRANK V. COLOMBO, DECEASED.

It is well settled by a long line of decisions throughout the United States that the liability of a father is not terminated by his death and that a Divorce Court has the power to make child support a continuing obligation which shall survive against his estate as to subsequently accruing installments. 24 Am. Jur. 2d, Divorce & Separation §856, page 972; 27B C. J. S. Divorce §323(f), page 729; *Newman* v. *Burwell,* 15 P. 2d 511 (Calif. 1932); *Taylor* v. *George,* 212 P. 2d 505 (Calif., 1949).

A provision in the Decree of Divorce against a father for the payment of a certain sum monthly "until further Order of the Court" creates a non-dischargeable obligation against the estate of the deceased father. 24 Am. Jur. 2d Divorce & Separation §856, page 972, 18 A. L. R. 2d, pages 1133-1135.

In Utah, the leading and most recent case directly in point is *Murphy* v. *Moyle*, 17 Utah 113, 53 P. 1010, 1011 (Utah, 1898), in which the court stated:

> "Whether or not the divorced wife and minor children, or any of them, are entitled to have the payment of alimony or money for their support continue after the death of the deceased, depends on the nature and terms of the Decree allowing the same.
>
> . . . . . .
>
> The children during their minority had no other recourse against their father or his estate for support than that provided in the Decree unless by the Order of the Court."

At page 1012, the Court quoted the applicable statute. Section 2606, Comp. Laws Utah, 1888:

> "Provided, further, that when it shall appear to the Court at a future time, that it would be for the interest of the parties concerned that a change should be effected in regard to the former disposal of children or distribution of property, the Court shall have power to make such change as will be conducive to the best interests of all parties concerned."

This statute bears close similarity to the currently applicable Utah statute, Section 30-3-5, Utah Code Annotated, 1953:

> "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."

In discussing Section 2606, the Court stated at page 1012:

> "The Court may make such order respecting the property and the support and maintenance of the wife and children, as is just and equitable, and such Order or Decree may be made to continue in force after his decease; and the Court may afterwards, if occasion shall require it, make such change in any Decree as 'will be conductive to the best interest of all parties concerned.' "

The Court concluded by stating:

> "We cannot sanction appellants' contention. It is unsound as being at variance not only with the Decrees of the Court and the law, but also with justice; for it is the solemn duty of every husband and father to support his wife during life, and his children during their minority, suitably to their station in life, and if he fails to do so, every principle of justice demands that they be thus supported out of his estate."

The doctrine of *Murphy* v. *Moyle,* that a claim against a deceased parent's estate for continuing child support can be maintained, has been cited in many decisions in other states.

In a leading California case, *Newman* v. *Burwell,* 15 P. 2d 511 (Calif., 1932), the court stated at page 512:

> "Decedent's obligation to pay this particular sum during his lifetime arose out of . . . the Decree of

> Divorce . . . Upon the death of decedent this portion of plaintiff's claim when duly presented or filed became a charge upon the estate payable out of the assets thereof."

The Court went on to state at 512 that:

> "They, (*Murphy* case and others) . . . indubitably establish that a father's obligation to support his minor child . . . survives his death . . . and that an action . . . may be brought to establish the same as a valid claim . . . against the father's estate. It is true that in certain of the cited cases, the father's obligation was to pay the designated sum monthly during the minority of the child, thus tending to irrefutably indicate that it was to survive the father, whereas the obligation here imposed was to continue 'until further order of the Court'. However these same authorities recognize that in the absence of an expressed intention to limit such obligation to the lifetime of the father, the same will, and does, survive his death, even under a Decree imposing the same until 'further order of the Court.'"

The California courts again interpreted similar provisions in *In Re Goulart's Estate,* 32 Cal. Rpt. 229, 231 (D. C. 1st Dist., Calif., 1963), wherein the court in quoting from *Taylor* v. *George,* 212 P. 2d 505 (Calif., 1949), said:

> "In California the rule is that the obligation of a father to support his minor child which is fixed by Divorce Decree . . . does not cease upon the father's death, but survives as a charge against his estate."

In *Hill* v. *Matthews,* 416 P. 2d 144 (N. M., 1966), the Supreme Court of New Mexico was faced with this question for the first time and in referring to *Murphy* v. *Moyle* and other decisions, they concluded at page 146:

> "We conclude that where a father has been ordered by a court of competent jurisdiction to make child support payments until his child reaches majority, in accord with a stipulation such as was present in this case, and thereafter the father dies while the child is yet a minor, that a claim may be successfully prosecuted in the probate court against the estate of the father to enforce the payment."

In *Edelman* v. *Edelman,* 199 P. 2d 840 (Wyo., 1948), the court noted at page 843, that the Decree of Divorce stipulated that the defendant:

> "Should contribute the sum of $30.00 per month for the maintenance and support of said minor child *until further order of this court.*" (Emphasis ours.)

The same language, "until further Order of the Court" was used in the instant Decree of Divorce (Defendant's Exhibit 1).

After an extensive review of the cases in point, including the *Moyle* decision, the Wyoming court determined at page 848 that:

> "The same will, and does, survive his death, even under a Decree imposing the same 'until further order of the Court.' "

In *Bailey* v. *Bailey,* 471 P. 2d 220 (Nev., 1970), the Nevada Supreme Court was faced with the same problem and took cognizance of the *Moyle* decision in arriving at its conclusion. At page 222, the court stated:

> "Other courts have permitted child support decrees to be enforced against a decedent's estate without his consent. In *Murphy* v. *Moyle* . . . a decision to that effect was grounded in a divorce statute giving

> the court power to make such provision for the children 'as may be just and equitable' ".

The court also looked at *Newman* v. *Burwell,* infra, and stated:

> "We decline, however to follow the lead of California and Utah and hold that an order granting child support until further order of the Court or during minority is such an exercise of discretion."

The Nevada court recognized that *Murphy* v. *Moyle,* infra, is still the law in Utah, but based its decision on the theory that if a judicial decree is to be held to impose upon the father a greater duty of child support than that required by common law, the decree must specifically state that such obligation is to survive the death of the obligor.

The most recent interpretation of the *Moyle* decision in Utah is found in *Callister* v. *Callister,* 261 P. 2d 944, 947 (Utah, 1953), where the Court held:

> "It is true that in that case (Moyle) the claim made against the deceased husband's estate was for support of a minor child, but the opinion expressed as to the power of the court under the statute to award alimony to continue after the death of the husband appears to be supported by the weight of judicial authority."

Although this case dealt with alimony as opposed to child support, it reiterated the basic proposition of *Moyle* that an obligation based upon a Decree of Divorce whether for alimony or for child support, survives as a claim against the deceased's estate.

POINT II.

THE LOWER COURT ERRED IN CONCLUDING THAT CIRCUMSTANCES HAVE MATERIALLY CHANGED IN FAVOR OF FRANK V. COLOMBO, JR., SINCE THE DECREE OF DIVORCE.

There is absolutely no evidence in the record as to the extent and amount of any social security support payments currently being made to Virginia Von Storch as Guardian of the Person and Estate of Frank V. Colombo, Jr.

In addition, there is absolutely no evidence in the record as to whether Frank V. Colombo, Jr., received the Columbine Coal Company stock referred to in the Judgment Roll, page 42. Mr. LeFevre stated that he did not have any record that showed that Dr. Colombo ever distributed the stock to Frank V. Colombo, Jr. (TR-17).

POINT III.

THE LOWER COURT ERRED IN CONCLUDING THAT THE LIFE INSURANCE POLICY WITH FRANK V. COLOMBO, JR. AS BENEFICIARY WAS SUFFICIENT REASON TO TERMINATE DR. FRANK V. COLOMBO'S DUTY TO SUPPORT HIS SON AFTER DEATH.

The Decree of Divorce stipulated in paragraph 4:

> "Defendant is now carrying a life insurance policy on his own life in the face amount of $20,000.00 with Frankie Colombo as beneficiary thereunder.

> Defendant shall continue to keep said policy in force with said Frankie Colombo as the beneficiary until such time as said child has completed his college or other educational training."

Dr. Colombo, prior to the divorce, was maintaining the policy on his life for his son's benefit and the Divorce Decree merely stipulated that he must continue to do so. The Decree further set forth a specific time limit for the maintenance of this policy, i.e., through the completion of his college or other eduactional training. It seems clear that the purpose of the life insurance policy was to insure that Frankie V. Colombo, Jr. would have sufficient funds to complete his advanced education should his father die before it was completed. The District Court's reasoning becomes even more apparent when considering the fact that Dr. Colombo's other children had completed their college educations (TR-22).

Finally, there is nothing in the Decree which would indicate that this policy would be in lieu of monthly support payments, but rather it appears to be in addition to monthly support payments.

CONCLUSION

We submit that the evidence in the record, as well as the foregoing cases and authorities, support the position that Frank V. Colombo has a valid claim against the estate of his deceased father, Frank V. Colombo, and that he must receive, in the alternative (1) the sum of $150.00 per month from February 1969 to June 1977 when Frank V. Colombo, Jr. reaches his majority, or (2) the sum

of $11,872.04, the present value of $15,150.00 invested at the legal rate of six percent (6%) over the period of one hundred and one (101) months (Judgment Roll, pages 12-15).

Respectfully submitted,

James B. Lee

Edward J. McCarthy
of and for
PARSONS, BEHLE & LATIMER
520 Kearns Building
Salt Lake City, Utah 84101

Attorneys for Appellant