

1978

# In The Matter of The Estate of Thomas Milton Moyer, Deceased v. Karla v. Moyer, Mother of The Deceased And Appellant : Appellant's Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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In the matter of the estate of  
THOMAS MILTON MOYER, Deceased

:

:

CASE NO. 15469

vs.

:

Karla V. Moyer, Mother of  
the deceased and Appellant.

:

APPELLANT'S BRIEF

Appeal from the Summary Judgment and Order directing disinterment  
and cremation of the body of the deceased THOMAS MILTON MOYER over the  
objection of his mother, Karla V. Moyer, herein the Appellant. The  
Summary Judgment and Order was entered by the Third Judicial District  
Court for Salt Lake County, State of Utah, Honorable David B. Dee  
residing.

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FILE

NOV 28 1977

Clerk Supreme Court

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This an appeal from the Summary Judgment and Order directing  
disinterment and the cremation of the body of the deceased Thomas  
Milton Moyer over the objection of the mother of the deceased, Mrs.  
Karla V. Moyer. The Summary Judgment and Order was entered in the  
Third Judicial District Court for Salt Lake County, State of Utah,  
Honorable David B. Dee presiding.

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## STATEMENT OF CASE

The appellant Karla V. Moyer appeals from the Order of the Court directing the disinterment and cremation of the body of her son, Thomas Milton Moyer.

## DISPOSITION IN LOWER COURT

Joseph Smart filed a petition for appointment as ancillary representative of the estate of Thomas Milton Moyer, deceased. Petitioner Joseph Smart sought to have the Order of an Arizona Probate Court enforced in order to have the body of Thomas Moyer disinterred from its grave in Utah to thereafter be cremated and the ashes sent to Arizona to a Mr. Raymond Landry a close friend of the deceased and the executor under the purported will. Appellant Karla Moyer is the mother of the deceased Thomas Moyer. She appeared in the Lower Court with her lawyer, Mr. J. Douglas Kinatader and objected to the appointment of Joseph Smart as ancillary administrator and to his petition. Petitioner Smart filed a Motion for Summary Judgment. The Honorable David B. Dee heard oral argument on Petitioner's Motion for Summary Judgment. Judge Dee asked Counsel for Karla Moyer if he would like to make an oral motion to dismiss the petition to be considered with the Motion for Summary Judgment and counsel replied in the affirmative. Counsel for Petitioner did not object to the motion to dismiss being heard at the same hearing. Judge Dee told both counsel that he would take both motions under advisement. Approximately a week later, on September 29th, the 1977 Judge Dee granted the Motion for Summary Judgment of the Petitioner, Joseph Smart and ordered the body disinterred and cremated and delivered to the executor of the estate Raymond Landry. Subsequently a stay in proceedings was obtained pending this appeal.

### RELIEF SOUGHT ON APPEAL

Appellant respectfully requests a reversal of the Lower Court's decision. The Court erred in not granting Appellant's oral motion to dismiss the petition of Joseph Smart. Appellant requests the above Utah Supreme Court to direct the Lower Court to dismiss the said petition of Joseph Smart with prejudice. In the alternative appellant requests that she be permitted to have a trial on the merits to prove whether the executor of the estate, and thereby the ancillary representative, consented to the burial of the decedent the executor and administrative thereby waiving any rights to carry out disinterment and cremation under the will.



## STATEMENT OF FACTS

Mr. Thomas Moyer was a single adult middle-aged male who resided in Phoenix with Mr. Raymond Landry who became the executor of the purported will of Mr. Moyer. The relationship of the two men is not very clear in the record however the two had been close personal friends for a while. Mr. Landry claims the two were also monks in St. Jude's Monastery of the Old Catholic Church in Phoenix.

The will is purported to have been signed by the decedent on the 11th of December, 1977. Two weeks later Thomas Moyer came to Salt Lake with his companion Raymond Landry to be with Moyer's family during the Christmas Holidays. On Christmas day Mr. Moyer suffered a fatal heart attack and died within a few hours. The family's version of the events which followed is referred to in the affidavits of Karla Moyer, the mother and appellant, and a sister of the deceased, Louise Jaeger. According to this version, after the family and Mr. Landry had recovered somewhat from the shock of Mr. Moyer's death either the same Christmas day or the day after, Mr. Landry produced a will and pointed out the language of the will referring to the cremation of the body. Landry stated however, that he would go along with the family. In her affidavit appellant Karla Moyer refers to a compromise between family members and Mr. Landry to the effect that Mr. Landry would permit the burial conditioned upon the family permitting Mr. Landry to dress the body in the ceremonial robes of the Old Catholic Church. The mother was a member of the L. D. S. Church and would have preferred not to have her son buried in the ceremonial robes of another church but

she kept her part of the agreement which was part of the compromise. After the burial the family was at peace until the Arizona probate proceedings were started in April some four months later. These ancillary proceedings were brought in Utah in August of 1977, almost eight months after Mrs. Moyer's son was buried. It is the firm contention of the appellant, Karla Moyer and Louise Jaeger that although Mr. Landry objected once on the day of the burial Mr. Landry gave his full support and consent to the burial of the deceased once the compromise had been reached and that upon reliance of this consent they laid their departed son and brother's body to rest.

## ARGUMENT

### POINT I

THE REMAINS OF THE DECEASED BELONG TO HIS FAMILY AND  
THE BODY WAS NOT PART OF THE ESTATE.

At early common law no rights of property in a corpse were recognized. For a general discussion of the subject see 7ALR 3d P 747 and 54 ALR 3d 1037. There appear to be no Utah cases on the point so it can be assumed that Utah has not by case nor by statute modified the common law rule. The Honorable David B. Dee in his Memorandum Decision in the Lower Court referred to 26-26-1 Utah Code Ann. (1953) or the Anatomical Gift Act yet that statute exists for the limited purpose of enabling one to donate parts of his or her body for medical or humanitarian reasons. Thus section 26-26-2 limits the class of donees to (a) a licensed physician or surgeon, (b) a hospital, (c) a medical school, college or university engaged in medical education and research, (d) blood banks and (e) certain other physicians. Section 26-26-8 states the act was intended for medical, humanitarian, and scientific purposes.

In Enos V. Snyder, (1900) 131 Cal 68, 63 P 170, the California Supreme Court held that the corpse of the testator was not part of the estate and that the directions in the will were of no effect and the Court held that the family of the decedent, and not his executrix, was entitled to the body, despite the express wishes of the will. A subsequent California case, though it did not overrule Enos. V. Snyder, did undercut the doctrine that the corpse was not testamentary property. In Re Henderson's Estate 13 Cal App 2d 449, 57 P2d 212, (1936) where the deceased had created

an expensive trust for a mausoleum desiring that she be interred in the mausoleum and that her son, husband, father and mother be disinterred from another plot of ground to be reinterred with her, the Court said in effect that each case must be decided on its merits and that the trial court erred in taking the dicta of Enos V. Snyder so literally. The review court reversed ordering the deceased to be interred in the mausoleum and the son and husband reinterred. As to the reinterment of the father and mother of the deceased the Court ordered a new trial to determine that issue. The Supreme Court stated that as between a suit among relatives the doctrine of Enos V. Snyder was not a sweeping prohibition against the enforcement of the testator's expressed wishes. The Court stressed examining each case in light of its particular circumstances.

. . . . it is now held universally in this country that whenever a dispute arises as to the manner or place of burial of a body as between relatives of the deceased as expressed by him in his will or otherwise, there is presented a proper subject for judicial determination, which will be decided by the courts on the merits in accordance with the principles of equity and such consideration of propriety and justice as arise out of the particular circumstances of each case.

In Re Henderson's Estate  
57 P2d 212, at 214.  
(emphasis added)

## POINT II

THE ANCILLARY REPRESENTATIVE AND THE EXECUTOR ARE BOTH ESTOPPED FROM DISINTERRING THE REMAINS OF THE DECEASED BECAUSE THE EXECUTOR CONSENTED TO AND PARTICIPATED IN THE BURIAL AND IT WOULD BE UNCONSCIONABLE TO DISINTERR THE REMAINS AFTER THE EXECUTOR AND THE ANCILLARY DELAYED SO LONG.

Great discretion was permitted the Executor under the purported will. The Executor was permitted to dispose of any of the personal effects

of the deceased among the relatives. Though the request was intended to be in writing, still the spirit or intention of the deceased according to the will was to give broad discretion to the Executor pertaining to the desires of family members. Appellant argues that if the Courts may construe a corpse to be property and therefore disposable through a will then such "property" is a personal effect left to the discretion of the Executor according to the will. Appellant argues that the Executor exercised his discretion when he consented to the burial of the deceased by the family. However, regardless as to whether the Executor had the discretion according to the will he and his assignees of the action should be estopped from prosecuting this action where he gave his consent to the burial, and, appellant believes at least she is entitled to a trial on the merits as to whether the Executor did give his consent where he now announces that he did not consent. The family laid their son and brother to rest and they are now entitled to be protected from having the body dug up, cremated and then sent to lie in a jar in St. Jude's Monastery.

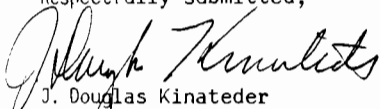
In Guerin V. Cassidy, 38 N. J. Super 454, 119 A2d 780, 7ALR 3d 747, the court in also holding that the body was not part of the estate also stressed the fact that the body had already been interred in consecrated ground. This is another way of saying that after months of interment bodies should be left at rest and families be permitted their peace.

# CONCLUSION

Appellant respectfully requests that the Summary Judgment and Order of the Lower Court be reversed and that an order be entered restraining the petitioner from removing or in any way disturbing the remains of the deceased Thomas Milton Moyer. In the alternative Appellant requests that she be permitted to present to a trial court evidence that the Executor Raymond Landry did knowingly give his full approval and consent to the burial of the deceased by his family and why after these many months since the burial it would be unconscionable and inequitable to disinter the body of Appellant's son.

Dated this 26th of November, 1977.

Respectfully submitted,



J. Douglas Kinateder  
Attorney for Appellant

I certify that I hand delivered two copies of this brief of Appellant to Mr. Brian Barnard, attorney for Respondent-Petitioner at 214 East Fifth South, Salt Lake City, Utah on this 28th day of November, 1977.



J. DOUGLAS KINATER