1949

Edward C. Behm v. Alma Gee : Brief of Respondent

Utah Supreme Court

C. Vernon Langlois; Ray S. McCarty; Attorneys for Petitioner and Respondent;

Case No. 7333

IN THE SUPREME COURT
of the
STATE OF UTAH

In the matter of the guardianship of the estates of VENNA JULENE BEHM and CHERYL DARLENE BEHM, minors; EDWARD C. BEHM,

Petitioner and Respondent,

vs.

ALMA GEE,

Guardian and Appellant.

BRIEF OF RESPONDENT

C. VERNON LANGLOIS
RAY S. McCARTY
Attorneys for Petitioner and Respondent

INDEX

Page

Table of Cases Cited

Statutes

IN THE SUPREME COURT
of the
STATE OF UTAH

In the matter of the guardianship of the estates of VENNA JULENE BEHM and CHERYL DARLENE BEHM, minors; EDWARD C. BEHM,

Petitioner and Respondent,

vs.

ALMA GEE,

Guardian and Appellant.

Case No. 7333

BRIEF OF RESPONDENT

STATEMENT

The respondent does not agree with all the arguments, conclusions and extraneous matter contained in appellant's so-called "Statement of Facts".

We will try to disregard all statements that are not pertinent, and present our argument in as little space as possible.

ARGUMENT

On November 24, 1948, the time set for the hearing on Edward C. Behm's petition for removal of Alma Gee as guardian of the minor children, Attorney Shirley P. Jones appeared and filed a motion to dismiss the petition. He also made an oral motion, which was read into the record, stating certain facts (R. 7-12), and he also introduced into evidence the files in the "estate" matter, No. 29077, and also the files in the case against Doctor Holbrook, File No. 80962.

Attorney Jones' statement and motion were taken down by the court reporter. Statements after that were not reported, but are set out in the bill of exceptions (R. 14-17).

The only question to be determined in this appeal is whether or not there was sufficient evidence before Judge Clarence E. Baker to justify his removal of Alma Gee as guardian of the two minors.

The statement of Attorney Jones affirmatively shows:

1. That Alma Gee, as administrator, had taken $11,250.00 belonging to the heirs in the "estate" matter from the bank to his home.

2. That Alma Gee had misappropriated $750.00 of that money (R. 9).

3. That Alma Gee had taken an appeal to the Supreme Court from a judgment which awarded the

$10,500.00 in the following manner: $5,000.00 to each minor, and $500.00 to Behm for his attorneys.

The files in the "estate" matter contain the Findings of Fact, Conclusions of Law, and Judgment of Judge Ellett, wherein Judge Ellett found that Gee, without authority, appropriated $750.00 of said money (Finding No. 7), and that Alma Gee had attempted to conceal from the court the amount of money he had in his possession at the time of the hearing, and that he was wilfully derelict in his duty as representative in the matter, and that he cannot and should not be trusted with the control of that part of said money that would be distributed to said minors, and said money should remain in the custody of the court until proper guardian is appointed to receive the money for the use and benefit of the minors (Finding No. 9).

The files in the "estate" case show that Alma Gee in his petition for distribution had asked for large sums of money, and the file shows that his prayer in that regard was denied and the money was awarded, except for $500.00, to the children, and that Gee was only awarded the $750.00 that he had unlawfully appropriated to his own use, and that he had appealed from this order. The records and files also showed that Alma Gee had never filed a proper and sufficient guardianship bond to protect the money of said minors.

Mr. McCarty made a statement to the court, which was not and could not be denied, to the effect that Mr. Gee had unlawfully appropriated $750.00 of the estate money;

that Mr. Gee had made evasive answers in court as to the amount of money he still had in his possession (R. 14-18).

Section 102-6-1 of *Utah Code Annotated,* 1943, provides:

> "The court may * * * revoke the letters * * * of any executor, administrator or guardian for neglect, mismanagement, waste, embezzlement, incompetency or incapacity or because of his conviction of an infamous crime, or for any other reason deemed sufficient by the court."

The case of *Farnsworth v. Hatch,* 47 U. 62, 151 P. 537, held:

> "Under this section (102-6-1) executors and administrators may be removed on the ground that their interests conflict with those of the estates they represent."

In *Re Howard's Guardianship* (Calif., 1933), 24 P. (2) 482, quotes with approval from *Windsor v. McAtee,* 2 Metc. (59 Ky.) 430, 433, wherein it is said:

> "The law makes it the duty of a guardian to look after and protect all the interests of his ward, and emphatically condemns any act of his, or even the acquirement of any right by him, inconsistent with this duty. His fidelity to his ward forbids it. He cannot serve himself and his ward where their interests conflict. And this principle is applicable to all trusts of this character. Whenever a guardian assumes such an attitude towards his ward, it seems to us he then becomes unsuited

> for a faithful discharge of his trust, and should be removed and another appointed."

It also quotes with approval from *Robertson v. Epperson,* 78 Neb. 279, 110 NW 541, in which it is held that:

> "Where a guardian places himself in a position with respect to the estate which brings his interests in conflict with those of his ward, he should be discharged and his letters revoked."

Without citing any further authority we claim the law is clear that Alma Gee should have been removed.

Now appellant claims that there was no evidence introduced. With this we disagree. All the facts were stated to the court by counsel. What necessity was there to call witnesses to prove the very things that were stated into the record by Mr. Jones, and to prove that in truth and in fact the findings of Judge Ellett were correct?

In *Oscanyan v. Arms Company,* 103 U. S. 261, at page 263, 26 L. Ed. 539, Mr. Justice Field speaking for the court said:

> "In the trial of a cause the admissions of counsel, as to matters to be proved, are constantly received and acted upon. They may dispense with proof of facts for which witnesses would otherwise be called. They may limit the demand made or the set-off claimed. *Indeed, any fact, bearing upon the issues involved, admitted by counsel,* may be the *ground of the court's procedure equally as if established by the clearest proof.*

> And if in the progress of a trial, either by such admission or proof, a fact is developed which must necessarily put an end to the action, the court may, upon its own motion, or that of counsel, act upon it and close the case." (Italics ours.)

See also: *Bias v. Reed,* (Calif.) 145 P. 516; *Scafidi v. Western Loan & Building Co.,* (Calif., 1946) 165 P. (2) 260.

We submit that the judgment of the lower court should be affirmed.

Respectfully submitted,

C. VERNON LANGLOIS

RAY S. McCARTY

Attorneys for Petitioner and Respondent