1968

Robert Ottley v. Lois R. Hill : Respondent's Petition For Rehearing and Brief In Support Thereof

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IN THE SUPREME COURT OF THE STATE OF UTAH

ROBERT T. OTTLEY,
Plaintiff and Appellant,
— vs. —
LOIS R. HILL,
Defendant and Respondent.

Case No. 11112

Respondent's Petition for Rehearing and Brief in Support Thereof

PETITION FOR REHEARING

Respondent, Lois R. Hill, respectfully petitions the Court for a rehearing and reargument of the above entitled case upon the following grounds:

POINT I

The Court's decision disregards the precise issue presented by respondent for consideration on appeal, viz., whether the proceeds of various insurance policies, under which a deceased minor child is an insured, for

hospital, medical and burial expenses, constitutes an estate of said minor.

POINT II

The Court's decision disregards long established decisional law to the effect that before appellant may recover for hospital, medical and burial expenses in a wrongful death action it must be shown that the estate of decedent is insolvement and unable to pay such expenses and that appellant has paid them or entered into a legally enforceable obligation to do so.

WHEREFORE, respondent prays that the judgment and opinion of the Court be recalled and a reargument be permitted of the entire case.

A brief in support of this position is filed herewith.

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Attorneys for Respondent

D. Gary Christian hereby certifies that he is attorney for respondent petitioner herein, and that in his opinion there is good cause to believe the decision of the Court is erroneous and that the case should be reheard and reargued, as prayed for in said petition.

Dated this 5th day of ~~October~~ November, 1968.

D. GARY CHRISTIAN

BRIEF IN SUPPORT OF PETITION FOR REHEARING

POINT I

THE COURT'S DECISION DISREGARDS THE PRECISE ISSUE PRESENTED BY RESPONDENT FOR CONSIDERATION ON APPEAL, VIZ., WHETHER THE PROCEEDS OF VARIOUS INSURANCE POLICIES, UNDER WHICH A DECEASED MINOR CHILD IS AN INSURED FOR HOSPITAL, MEDICAL AND BURIAL EPENSES, CONSTITUTES AN ESTATE OF SAID MINOR.

At the time of the death of Trent Lee Ottley, the deceased minor child of plaintiff, three policies of insurance were in force and effect. All of the policies had been applied for and the premiums thereon paid by plaintiff; however, under each of the policies (a Blue Cross policy, a Blue Shield policy and automobile liability insurance policy) the deceased minor child was an insured by the terms thereof. For example, the minor child was a member of the Plan under both the Blue Shield and Blue Cross policies and as such member was entitled to all the benefits provided for him thereunder. Under the policy of automobile insurance issued by State Farm Mutual Automobile Insurance Company to plaintiff, the minor was an insured and as such, personally entitled to all the rights provided for him thereunder. It is unquestioned and unquestionable that in the event of the death of the insured minor child his personal representative would be entitled to the same rights that the child had

while he lived, i.e., payment of the hospital and medical expenses resulting from his injury. There can be little question that the insured's estate has a right to the benefits under the automobile liability insurance policy because it provides for payment of the funeral expenses of the insured. (See Limit of Liability — Coverage M, automobile liability insurance policy.)

The assets of a decedent's estate may be real, personal or equitable. Equitable assets are rights or interests in either real or personal property requiring the aid of equity for their subjection, *Agee* v. *Saunders*, 127 Tenn. 680, 157 S.W.64, and are different from legal assets. *Backhouse* v. *Patton,* 5 Pet (U.S.) 160, 8 L.Ed. 82. The equity of redemption of a mortgage, forfeited in the lifetime of the mortgagor, is an equitable, and not a legal asset. So, too, is property subject to a general power of appointment executed by decedent. 31 *Am. Jur.* 2d, Executors and Administrators, Sec. 193.

On the granting of Letters Testamentary or of Administration, all choses in action in favor of the decedent that survive his death pass to the executor or administrator, *Re Nash's Estate* (D. C. Virgin Islands), 255 F. Supp. 270; *Kennedy* v. *Davis,* 171 Ala. 609, 55 So.104; *Ainsworth* v. *California Bank,* 119 Cal. 470, 51 P.952; *Buchanan* v. *Buchanan,* 75 N. J. Eq. 274, 71 A.745. Among the various choses in action the legal title of which passes to the executor or administrator are notes, *Cooper* v. *Hayward,* 71 Minn. 174, 74 N.W.152; *McBride* v. *Vance,* 73 Ohio St. 258, 76 N.E. 436; and other promises to pay money, *Re Nash's Estate,* Supra; *Millard* v. *Brayton,*

177 Mass. 533, 59 N.E. 436; or judgments, indebtedness of distributees, and rights to damage for the injury to property where the cause of action accrued in the lifetime of the testator or intestate. 31 *Am. Jur.* 2d *op. cit.* Sec. 198.

The proceeds of a life insurance policy made payable to a named beneficiary are not assets of the estate of the insured, but belong to the beneficiary under the policy; however, it is generally held that where a policy is payable to the insured or his executor, administrator, assigns or legal representatives, without designation of other beneficiaries, the proceeds thereof are payable to the estate of the decedent insured and such proceeds constitute general assets of the estate. 31 *Am. Jur, op. cit.* Sec. 200.

In the instant case the facts show that plaintiff applied for and received policies of insurance providing for medical, hospital and burial expenses for himself and his family. Plaintiff paid the premiums on the policies but in each case not only the deceased minor child, Trent Lee Ottley, but plaintiff's wife and each of his children, were insureds in their own right under each of the policies. The only thing required for them to remain insureds was that plaintiff pay the premium on each policy when it became due, which he did. The minor in question then was an insured under the terms of and pursuant to three third party beneficiary contracts.

The rule of law in almost all American jurisdictions is that a third person may, in his own right and

name, enforce a promise made for his benefit even though he is a stranger both to the contract and to the consideration. It is not necessary that any consideration move from the third party and it is enough if there is sufficient consideration between the parties who make the agreement for the third party. 17 *Am. Jur.* 2d Contracts, Sec. 302.

It is generally held that where two persons make a contract for the benefit of a third person, by which the promisor agrees to perform a specific obligation which the promisee owed to such third person, who is shown by the contract to be its intended beneficiary, the third person may maintain a suit or action directly against the promisor to enforce the contract. *Phez Co.* v. *Salem Fruit Union,* 103 Ore. 514, 201 P.222 reh. den. 103 Ore. 547, 205 P.970.

It is clear that the purpose usually moving the promisee to exact the provision from the promisor is to relieve himself of a debt or a duty, rather than to confer a benefit upon the third person, but nevertheless, according to most courts, the fact that performance of the contract would benefit the promisee in addition to the third person does not preclude the third person from enforcing the contract. *Fidelity and D. Co.* v. *Rainer,* 220 Ala. 262, 125 So.55; *Carson Pirie Scott & Co. v. Parrett,* 346 Ill. 252, 178 N.E.498; *Ochs* v. *M. J. Carnahan Co.,* 42 Ind. App. 157, 76 N.E.788, 80 N.E.163; See also *Williston,* Contracts 3d Ed. Secs. 361, 378 and 81 ALR 1286, 1288; 148 ALR 359.

Addressing itself to the question of a child as the beneficiary to a contract between two other parties, 17 *Am. Jur.* 2d, Contracts, Sec. 310, states in part as follows:

> In some American decisions the early English cases have been cited in support of the proposition that near relationship, such as that existing between father and child, may be taken to supply the place of a strictly legal right in the third person.[8] On this view, moreover, seems to be founded the rule that the privilege of naming a child may be waived by its parents and bestowed upon another; and when so bestowed in a contract with a third person for the benefit of the child, it rests on such privity between the parent and child as to enable the child to ratify the transaction and enforce the contract,[9] although the child's right to enforce the contract may be sustained on the ground that it has an interest in the name which it shall bear analogous to the interest which a child has in its own services.[10] More broadly, it has been held that a child may recover in his own name where a promise is made to a near relative of the child as the child's agent, for the benefit of the child, and upon a consideration which virtually affects the welfare and interest of the child himself, so that the consideration may be said to move in part from the child.[11]

As the Court said in its opinion in this case, "it was the duty of the plaintiff to support his son, if he is able to do so, and that duty is imposed by Statute in this State. The duty of support includes the duty of furnishing medical care and treatment." It is obvious, however, from the law cited herein, that plaintiff-appellant can

enter into a contract with another to relieve himself of the duty imposed on him, viz., he may take out a Blue Cross, Blue Shield and automobile liability insurance policy whereby the various companies agree to pay any hospital, medical and burial expenses that might relate to his minor child, Trent Lee Ottley. This, of course, is exactly what plaintiff did. There is also no question that the said, Trent Lee Ottley, or his estate could enforce the obligation to pay for such medical, hospital and burial expenses as imposed on the insurance companies under the various policies.

The rights of the deceased minor child are then an asset of his estate out of which hospital, medical and burial expenses must be paid, if the estate is able to pay them. In the instant case the value of this particular asset of the decedent's estate was sufficient to pay in full the items of expenses referred to. Hence, plaintiff should not be entitled to recover those items as damages against defendant herein since these amounts have already been paid by decedent's estate or the obligor of decedent's estate.

POINT II

THE COURT'S DECISION DISREGARDS LONG ESTABLISHED DECISIONAL LAW TO THE EFFECT THAT BEFORE APPELLANT MAY RECOVER FOR HOSPITAL, MEDICAL AND BURIAL EXPENSES IN A WRONGFUL DEATH ACTION IT MUST BE SHOWN THAT THE ESTATE OF DECEDENT IS INSOLVENT AND UNABLE TO PAY SUCH EXPENSES AND THAT APPELLANT HAS PAID THEM OR ENTERED INTO A LEGALLY ENFORCEABLE OBLIGATION TO DO SO.

It seems clear that the Court based its decision in this case on the collateral source rule. Respondent does not argue with the validity of that rule, but does contend that it is not applicable to the insant case. The collateral source rule would have application in this case only if the deceased infant left no estate; and it is respondent's contention that decedent did leave an estate even though it consisted of only a contract right. If, in fact, the right of the deceased minor child or his personal representative to compel payment of the hospital, medical and burial expenses for his last illness and burial does constitute an estate then the law as heretofore prescribed by this Court would come into play, thus obviating the applicability of the collateral source rule.

Respondent again cites the following cases in support of is position herein.

Morrision v. *Parry,* 104 Utah 151, 140 P.2d 772 (1943) holding that before plaintiff may recover for fu-

neral expenses in an action under the wrongful death statute, he must show that the estate is insolvent and unable to pay such funeral expenses, and that plaintiff or one of the heirs has paid or that he has entered into a legally enforceable obligation to pay them.

In re Behm's Estate, ... Utah ....., 213 P.2d 657 (1950) following the rule, established in *Morrison* v. *Perry,* supra, that from proceeds realized under a claim for wrongful death, plaintiff husband, was entitled to recover the amount expended on his wife's last illness and burial where the wife left no estate and the husband proved that he paid said amount.

The case of *Douzat* v. *Great American Indemnity Company, et al,* 130 So.2d 805 (1961) supports the position taken by respondent both on the argument of this case on appeal and in its petition for a rehearing of this matter.

CONCLUSION

The Court's decision which respondent seeks to have reargued and reheard ignores the question presented to the Court for disposition and disregards decisional law of this and other states which logically and necessarily support respondent's position. As the decision is presently constituted it is of no assistance to the trial court that made the initial ruling of the question presented nor does it help counsel involved other than to tell counsel for plaintiff he can have his money. The real question of whether the contractual obligation of an insurance

company to one of its insured's to pay for his funeral expenses is an asset of the insured's estate upon his death out of which the funeral expenses must be paid remains unanswered. If so, under the law as presently constituted in this state, plaintiff cannot recover those expenses from defendant. If not, plaintiff may recover from defendant.

Upon reflection and upon analysis of the decision referred to as it relates to prior cases of the Court, the decision should be recalled, the case reargued and, upon such event, the judgment of the trial court affirmed.

Respectfully submitted

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