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Helen D. Oelerich v. Joan Eoelerich : Appellant's Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

FILED

IN THE MATTER OF THE ESTATE AND GUARDIANSHIP OF JOAN OELERICH, Incompetent.

HELEN D. OELERICH,

Petitioner and Appellant,

vs.

JOAN OELERICH,

Respondent.

7 1964

Utah

Case No.
10005

APPELLANT'S REPLY BRIEF

Appeal From a Judgment of the Third District Court
For Salt Lake County
Honorable Stewart M. Hanson, Judge

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APPELLANT'S REPLY BRIEF

This brief is filed after argument, pursuant to the agreement of counsel and the Order of Court made May 12, 1964. It is directed primarily to the arguments made in the respondent's brief to the effect that the order of the trial court in dismissing the action was appropriate because of an alleged agreement by counsel to a dismissal. Point I will demonstrate that there is no basis for dismissal on this ground. Point II will show that reversal of the lower court's order is appropriate because the ruling would be prejudicial to the appellant in the event another petition was filed.

POINT I

IF THE LOWER COURT'S DISMISSAL OF THE PETITION WAS ON THE GROUND THAT IT WAS PURSUANT TO AN OPEN COURT STIPULATION OF THE ATTORNEYS FOR THE PARTIES, THE ORDER WAS ERRONEOUS.

A. An agreement to dismiss is not sustained by the record. In each of the many instances where the respondent contends that the petitioner's counsel agreed in open court that the petition was to be dismissed upon the signing of the Trust Agreement, the reference is to pages 139 and 140 of the record. The record indicates, in these places, that Judge Hanson stated in substance at a hearing held August 26, 1963, that it was his recollection that at a hearing held more than a year earlier, counsel for the parties had stated that if a Trust Agreement was signed, the petition would be dismissed. Neither Mr. Lee, who presently represents the respondent, nor Merlin O. Baker, who was representing the petitioner at the time of the hearing (August 26, 1963) represented the parties at the earlier date. The earlier hearing preceded the execution of the Trust Agreement. It was dated May 8, 1962. The earlier hearing would have been, therefore, at least fifteen months prior to the time when Judge Hanson was remembering it. Judge Hanson stated that no record was made of the prior hearing (R. 139, 140). There was no minute entry. Mr. Baker stated to Judge Hanson that peti-

tioner had never entered into such an arrangement and did not have any such arrangement (R. 140). The petitioner's position was reiterated in a brief filed with Judge Hanson on September 5, 1963 (R. 113, 118) in which it was again made clear that the petitioner denied that there was such representation made to the trial judge.

The reason given for Judge Hanson amounts to his testifying, as a witness who allegedly heard a conversation, that the conversation occurred, and then as a judge, deciding that his own testimony was true. Despite the fact the conversation was denied by counsel for petitioner, she was given no opportunity to be heard on the determination of the critical fact.

It is no disparagement of a trial judge to urge that his recollection of an occurrence in open court might be erroneous. Every lawyer knows that the reason for court reporters is to obtain as great a certainty as possible as to the statements of witnesses, the Court, and counsel in a judicial proceeding. The Rules provide that there should be a hearing to determine the appropriate record when the trial or other proceeding is not stenographically recorded. It is submitted that when a trial judge bases an order upon a statement made to him fifteen months earlier, during argument on a motion, and the judge is notified that one of the litigants disputes his recollection of the events, that at least an opportunity should be afforded to determine the accuracy of the judge's recollection. It is certainly

understandable that any judge having matters before him day after day for fifteen or sixteen months could have a lapse of memory or an inaccurate recollection of the precise statements made by counsel.

The point is that in the instant case, Judge Hanson afforded no opportunity for hearing on the factual question as to whether the petitioner's first attorneys made the kind of statements which were imputed to them. He assumed the existence of a disputed fact without any support in the record.

B. *If there was a stipulation, it failed to comply with the provisions of Section 78-51-32, U.C.A. 1953 as amended.* The statute says:

“An attorney and counsel has authority . . .

(2) to bind his client in any of the steps or action of a proceeding by his agreement filed with the clerk or entered upon the minutes of the court *and not otherwise.*” (Emphasis supplied.)

Respondent admits that this provision of the statute was not satisfied. It is interesting that there is in the file a typed form of agreement to the effect that the petition would be dismissed. This piece of paper, however, dated the “.... day of May, 1963,” and prepared for signature of Mr. Lee and Mr. Baker, is not signed by anyone and there is no indication as to the person who prepared it or the purpose that it was to serve (R. 102, 103). Certainly there is no minute entry or written agreement signed by anybody which complies with the provisions of the statute.

In construing the statute, the Court said, in *McWhirter v. Donaldson et al* (1909) 36 Ut. 293, 104 P. 737:

“The stipulation in question was neither filed with the clerk nor otherwise made a matter of record; therefore appellant cannot claim anything for the stipulation because, under the foregoing provisions of the statute, neither he nor his counsel had any legal right to rely upon it.”

The Utah court cited the California case of *Borkheim v. N.B. & M. Ins. Co.*, 38 Cal. 623, and quoted with approval the following language:

“It declares such agreements null and void unless they are in writing and filed with the clerk or have been entered in the minutes of the court. Of such agreement, therefore, there can be no specific performance. To allow the court to enforce them, as was done in this case, against the will or without the consent of the parties, is to allow the court to work the precise mischief which the statute was designed to prevent. Instead of being nullified in that way, the statute ought to be strictly adhered to, for it is the dictation of wisdom. Without it the court would be frequently annoyed by disputes between counsel concerning their agreements, and thus forced to try innumerable side issues more perplexing than the case itself, attended, also, with delay to its business, and the detriment to the public service.”

As in the *Borkheim* case, failure to follow the statute results in the very mischief which it was designed to prevent. Unless it is followed, the trial courts will inevitably be led to trying side issues which might be

more perplexing than the case in chief. Particularly where the court below was advised that counsel disputed the court's recollection of the alleged stipulation, failure to apply the provisions of the statute was clearly erroneous. Judge Hanson indicated that he believed that the agreement would have been binding under the statute (R. 140). It is submitted that this is clearly an erroneous assumption, particularly under the circumstances of this case. The general rule is that an attorney does not have implied authority to have an action discontinued or dismissed where such a continuance or dismissal may operate as a bar to the institution of a new action. See annotation *Authority of Attorney to Dismiss or Otherwise Terminate Action*, 56 ALR (2d) 1290, particularly at pages 1291, 1292. Respondent cites *Gagnon Co. v. Nevada Desert Inn*, 45 Cal (2d) 448, 289 P (2d) 466. (Respondent's brief, 7-8). But even in that case, the Court stated that the apparent conflict in the cases could "be reconciled on the theory that there is a rebuttal presumption that he had such authority." Even if Judge Hanson was to indulge the presumption that counsel was authorized to dismiss the proceeding, he was put on notice that the client had never entered into any such agreement and that if any such statements were made by counsel, they were not authorized (R. 140). An opportunity should have been afforded to the petitioner to present evidence to rebut the presumption which Judge Hanson thought existed. This is particularly true where the alleged stipulation clearly fails to comply with the statutory requirement.

C. *The conduct of the parties does not indicate that any stipulation for dismissal existed.* The Trust Agreement with the Chicago bank was executed May 8, 1962 (R. 76). Mr. Lee was retained as counsel for the respondent in September, 1962 (R. 139). For at least three or four months immediately prior to the filing of the motion to dismiss (July 10, 1963, R. 73, 90) Mr. Lee and Mr. Baker were engaged in settlement negotiations involving a possibility of dismissing the action if the respondent would submit to a mental examination (R. 141). Certainly Mr. Lee would have been advised by prior counsel of a stipulation to dismiss if one would have been thought to be in existence. No purpose would have been served by his continuing to negotiate for three or four months after he made an appearance in the case if he believed that the petitioner was obligated to dismiss it under a prior agreement.

Moreover, the motion filed by Mr. Lee was not upon the ground that the petitioner was bound by a prior stipulation; it was, instead, on the ground that petitioner had not been diligent in proceeding and that the Trust Agreement protects the property of the respondent from artful or designing persons (R. 74, 75). The inadequacy of these grounds was demonstrated in appellant's main brief. If counsel had believed that there was an agreement along the lines which Judge Hanson referred to in his testimony, it is reasonable to believe that the motion would have been filed on that ground.

These circumstances belie the existence of an understanding between the parties.

POINT II.

THE ORDER OF THE TRIAL COURT SHOULD BE REVERSED BECAUSE IT IS A FINAL APPEALABLE ORDER.

At the oral argument on May 12, the question was raised as to whether Judge Hanson's ruling was an appropriate subject for an appeal because petitioner may, presumably, at any time, file a new petition asserting incompetence.

Respondent has referred to cases concerning the authority of attorneys where a dismissal was entered without prejudice (Respondent's brief, pp. 6-13). It is clear, however, that these cases are not applicable to the present case because by virtue of Rule 41(b) of the Rules of Civil Procedure, the instant case was dismissed with prejudice.

It is clear, as the respondent points out in her brief, that the Rules of Civil Procedure are applicable in determining whether or not the instant case is appealable. While the Rules do not apply to uncontested guardianship proceedings, Rule 41(b) makes them applicable upon joinder of issue. Neither the record nor the order itself supports respondent's contention that the dismissal was under Rule 41(a). Plaintiff's own brief argues that it is a dismissal under Rule 41(b),

at least with respect to that part of the order that dismissed for failure to prosecute (Respondent's brief, pp. 22-27). Even if one concedes the highly questionable existence of an agreement to stipulate to dismissal, it is inconceivable that the attorneys for the alleged incompetent would have entered into a stipulation that gave them only the assurance of a dismissal without prejudice which would permit the petitioner to at any time commence another proceeding.

It is abundantly clear that the Court's order was made under Rule 41(b) with respect to both grounds. It is apparently based on failure to prosecute and that the Trust Agreement negated a right to relief.

Respondent's own argument (Respondent's brief, pp. 22-27) supports the view that, in part at least, the order was made under Rule 41(b); Respondent urges that the order was proper because it was for failure to prosecute diligently. The Rule provides that any dismissal under this subsection 41(b) or any other dismissal other than one granted under 41(a) operates as an adjudication on the merits unless the court otherwise specifies. Respondent concedes, and the court's order affirms that the court did not otherwise specify (Respondent's brief, p. 7). This conceded dismissal under Rule 41(b) operated as an adjudication on the merits or a dismissal with prejudice, and as such, it became an appealable final order under Sec. 78-2-2, U.C.A. 1953, which provides for appellate review of all final orders and decrees in guardianship proceedings.

A petitioner who is denied appointment as a guardian of an alleged incompetent by virtue of a court order is entitled to appeal such an order. *People v. O'Connell* (1941) 38 N.E. (2d) 40, 378 Ill. 346.

While there does not appear to be any case law on the question as to whether a petitioner who has had a petition dismissed on the merits can immediately file another petition without showing a change in circumstances, it seems highly questionable that such rule would prevail. To allow indiscriminate filing of petitions of guardianship for alleged incompetency would seem to open the door to the very kind of harrassment that the respondent seems to fear. It is suggested that, upon filing of a second petition, respondent would argue that a change in circumstances or mental condition should be shown or alleged. Appeal is the proper remedy for a petitioner who has been denied a petition of guardianship by a dismissal which was necessarily with prejudice.

Even though there was no hearing on the merits of the petition, the errors inherent in failure to allow presentation of the issues on the merit are manifestly prejudicial.

CONCLUSION

The order of the District Court was erroneous upon each of the grounds discussed in appellant's opening brief, and upon the further ground that no open

stipulation
court stipulated it. The ruling was prejudicial to petitioner and appealable under the rules. This court should reverse the order and reinstate the petition.

Respectfully submitted,

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May 26, 1964