St. John's Law Review

Volume 25, December 1950, Number 1 Article 26

Wills--Effect of Death of Distributee in Act of Suicide by Testatrix (Meyer v. Ritterbush, 196 Misc. 551 (Sup. Ct. 1949))

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commercialization [10] and does not want to encourage outsiders to invade family privacy in search of facts sufficient to support a cause of action.[11]

On the other hand, it may be argued: [12] No policy of the state is served by granting immunity to the tortfeasor when the tort was committed outside the scope of parental authority. The criminal or custodial powers of the state do not always afford adequate redress to the injured child. When death or a tort, *malo animo,* has put an end to the family relation, it is pointless to talk of preserving "family peace." Moreover, family harmony or the family exchequer will not be impaired when the real party in interest is the insurance company.

Finally, since the courts have entertained actions involving property rights between parent and child for centuries,[13] why should they not allow certain tort actions? If the maintenance of actions, such as conversion, between parent and child have not yet destroyed the peace of society, why assume that a personal injury action would be more destructive?

The instant holding is in accord with the modern tendency to limit the rule of a parental immunity. But it is submitted that the emphasis upon a "willful" tort in the principal case will lead to confusion because the term cannot be satisfactorily defined. A modification is offered which, although not free from difficulties, serves the needs of society while recognizing the dignity and human worth of the minor child: An unemancipated minor child cannot maintain an action against his parent for a tort *committed within the scope of parental authority and without malice.*

WILLS—EFFECT OF DEATH OF DISTRIBUTEE IN ACT OF SUICIDE BY TESTATRIX — PROSPECTIVE RIGHTS — CONSTRUCTIVE TRUST THEORY.—Plaintiff's intestate, an infant, died as a result of gas asphyxiation by reason of the suicide of his mother. It was not possible to establish that the infant had survived the mother. Since

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[10] *See* Miller v. Pelzer, 159 Minn. 375, 199 N. W. 97, 98 (1924), 9 MINN. L. REV. 76.

[11] *See* Luster v. Luster, 299 Mass. 480, 13 N. E. 2d 438, 439 (1938).

[12] It is to be noted, however, that every critic recognizes, at least by implication, that the family is still the fundamental unit of society and that therefore parents, charged with prime responsibility for the proper rearing of tomorrow's men and women, must of necessity be accorded certain privileges and immunities.

[13] McCurdy, *Torts Between Persons in Domestic Relations,* 43 HARV. L. REV. 1030 at p. 1058 (1930), traces this right to bring an action involving property to a Year Book case decided in 1308.

he was the sole beneficiary under his mother's will[1] and since his legacy was deemed to have lapsed,[2] the parents of the mother, defendants here, were about to receive the estate as in intestacy.[3] Plaintiff brought this action, contending (1) the infant son had been wrongfully deprived of his right to his mother's estate and it would be inequitable to allow defendants to profit from this wrong; (2) the infant's estate has a cause of action for wrongful death. This is a motion by defendants to dismiss the complaint for insufficiency.[4] *Held,* motion to dismiss the first cause of action granted. The court stated: "The right of Douglas H. Meyer to inherit from his mother was prospective only. He was not an heir until she died. (*Riggs v. Palmer,* 115 N. Y. 506.) Hence that he might be deprived of something he might never receive gives him, or his estate, no legal rights." [5] Thus, in effect, they held that no cause of action existed because the son's interest was purely hypothetical. Motion to dismiss the second cause of action (with which we are not here concerned) was granted with leave to amend the complaint. *Meyer v. Ritterbush,* 196 Misc. 551, 92 N. Y. S. 2d 595 (Sup. Ct. 1949), *aff'd mem.,* 276 App. Div. 972, 94 N. Y. S. 2d 620 (2d Dep't 1950).

In holding the interest of this plaintiff insufficient to support a cause of action, the court seems to have overlooked the decision of the Court of Appeals of New York in *Latham v. Father Divine.*[6] In that case the court held as sufficient a complaint which in ultimate effect was legally identifiable with that of the principal case. The testatrix in the *Latham* case had expressed a desire to execute a new will benefiting the plaintiffs. She was restrained from so doing by the unlawful acts of the defendants, legatees of her executed will. The Appellate Division dismissed the plaintiffs' complaint because it found ". . . their sole interest is purely hypothetical." [7] It based its conclusion on the fact that, even under the intended will, plaintiffs' interest was a mere expectancy since it too might have been revoked by the testatrix prior to her death. However, the Court of Appeals in reversing the decision specifically refuted the reasoning of the lower court as set forth above and held that the plaintiffs' interest *was* sufficient to support their cause of action. They found it error

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[1] N. Y. DECEDENT ESTATE LAW § 89, subd. 1, provides: "Where the title to property or the devolution thereof depends upon priority of death and there is no sufficient evidence that the persons have died otherwise than simultaneously, the property of each person shall be disposed of as if he had survived, except as otherwise provided in this section."

[2] The New York Decedent Estate Law § 29 is inoperative since the son died without leaving a child or decedent surviving the testatrix.

[3] N. Y. DECEDENT ESTATE LAW § 83, subd. 2.

[4] N. Y. R. CIV. P. § 106, subd. 5.

[5] 196 Misc. 551, 553, 92 N. Y. S. 2d 595, 597 (Sup. Ct. 1949).

[6] 299 N. Y. 22, 85 N. E. 2d 168 (1949).

[7] 274 App Div. 226, 228, 81 N. Y. S. 2d 681, 683 (4th Dep't 1948).

to have ruled as a matter of law that a constructive trust [8] could not be impressed in such circumstances.

For consideration on a motion to dismiss, the interest of the plaintiff in the principal case cannot be said to have less force than that of the plaintiffs in the *Latham* case. We are not here concerned with the underlying factual differences in the two cases, nor are we considering the cases on their respective merits. The court in the principal case expressed no such concern, simply stating, in direct opposition to the Court of Appeals holding, that the plaintiff had no interest on which a court could act because the son was neither an heir nor legatee of the mother.

It should be noted, therefore, that the *Meyer* case does not represent New York law on the issue involved. The opinion is at best a superficial treatment of the case. There is more involved in a case such as this than the law in *Riggs v. Palmer* encompasses.

[8] 4 POMEROY, EQUITY JURISPRUDENCE 1053 (5th ed., Symons, 1941) states: "In general, whenever the legal title to property, real or personal, has been obtained through . . . circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never perhaps have had any legal estate therein; and a court of equity has jurisdiction to reach the property either in the hands of the original wrong-doer, or in the hands of any subsequent holder . . . ." Cited in Moore v. Crawford, 130 U. S. 122, 128 (1888); Beatty v. Guggenheim Exploration Co., 225 N. Y. 380, 386, 122 N. E. 378, 380 (1919).