

No. 85-66

IN THE SUPREME COURT OF THE STATE OF MONTANA

1985

IN THE MATTER OF THE ESTATE AND
GUARDIANSHIP OF FRANK R. SCHULTZ, JR.,
a minor.

APPEAL FROM: District Court of the Second Judicial District,
In and for the County of Silver Bow,
The Honorable Mark P. Sullivan, Judge presiding.

COUNSEL OF RECORD:

For Appellant:

Hooks & Budewitz, Townsend, Montana

For Respondent:

Daniel R. Sweeney, Butte, Montana

Submitted on briefs: July 25, 1985

Decided: September 26, 1985

Filed: SEP 26 1985

Ethel M. Harrison

Clerk

Mr. Justice John C. Sheehy delivered the Opinion of the Court.

Frank Shultz, Jr. appeals from an order of the District Court, Second Judicial District, Silver Bow County, granting summary judgment to respondent Frank Shultz, Sr. We remand to the District Court.

This is an action to set aside the Decree of Settlement and First and Final Account and to compel the guardian to make a correct accounting. In 1969, Frank Shultz, Jr., then 17 years old, was injured in an automobile accident. Suit was brought on his behalf against the driver of the car in which he was a passenger. The suit was settled for \$25,000. On December 8, 1970, the District Court appointed Frank, Sr. as guardian of his son, Frank, Jr. On March 30, 1973, the father filed his First and Final Account. The account showed \$24,900 had been received in settlement of the claim and a balance of .43 remained. The account contained no vouchers or receipts. The matter was set for hearing before the District Court on April 24, 1973. The son, who was then 21, was not personally notified of the hearing. Notice was posted in three places in Silver Bow County. At the hearing, the District Court entered a decree of settlement and discharged the father from further duties as guardian.

On July 26, 1976, the son hired counsel to investigate the whereabouts of the guardianship funds. On September 9, 1976, Frank, Jr. joined the Marine Corps and except for occasional leaves, he was out of the state until 1981. Gradually, the son became dissatisfied with the efforts of his counsel to obtain relief, and in October 1979 while on leave in Montana, he hired a different attorney. The new

attorney filed a petition to set aside the decree of settlement of the First and Final Account and to compel the guardian to make a correct and complete accounting on February 8, 1980.

The District Court granted summary judgment for Frank Shultz, Sr. on the basis that the petition was not filed within the two-year statute of limitations for actions based on fraud. Section 27-2-203, MCA states:

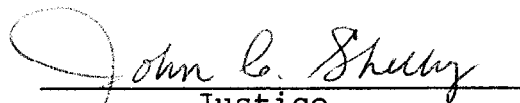
The period prescribed for the commencement of an action for relief on the ground of fraud or mistake is within 2 years, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake.

The District Court held the son became aware of the fraud either in 1976 when he retained legal counsel or in 1977 when he received a copy of the status of the account, thus he had until 1978 or 1979 to commence proceedings.

However, the District Court did not take into account the effect of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. § 525 (1982). It states:

The period of military service shall not be included in computing any period now or hereafter to be limited by any law . . . for the bringing of any action or proceeding in any court . . . by or against any person in military service . . . whether such cause of action or the right or privilege to institute such action or proceeding shall have accrued prior to or during the period of such service. . . .

It appears that Frank, Jr. joined the service on September 9, 1976. The record does not disclose when he left the service. We remand this case to the District Court for reconsideration in light of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. § 525 (1982).


Justice

We Concur:

J. A. Turnage
Chief Justice

[Signature]

R. C. Pulbrandon.

William Edwards
Justices