

10-20-1953

Burge v. City and County of San Francisco

Roger J. Traynor

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Recommended Citation

Roger J. Traynor, *Burge v. City and County of San Francisco* 41 Cal.2d 608 (1953).
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[S. F. No. 18876. In Bank. Oct. 20, 1953.]

LYNDLE E. BURGE, a Minor, etc., Appellant, v. CITY AND COUNTY OF SAN FRANCISCO, Respondent.

- [1] **Judgments — Collateral Attack — Presumptions: Motions—Orders—Collateral Attack.**—Ordinarily when an order or a judgment of court of general jurisdiction is collaterally attacked, the only evidence that may be considered in determining whether order or judgment is void is the record in the proceeding in which it was entered, and if the record is silent as to existence of a jurisdictional fact, that fact will be presumed.
- [2] **Id. — Collateral Attack — Presumptions.**—If a proceeding is wholly statutory and unknown to common law the court, even though ordinarily one of general jurisdiction, is a court of special jurisdiction for that proceeding, and if jurisdictional facts do not appear of record in such proceeding, there is no presumption of regularity.
- [3] **Id.—Proof of Judgments—Extrinsic Evidence.**—Where presumption of regularity of proceedings is not applicable in a proceeding which is wholly statutory and unknown to common law, the failure of the record to recite a jurisdictional fact does not make judgment void, because extrinsic evidence is admissible to prove such fact except where some statute makes record the exclusive mode of proof.
- [4] **Infants—Claims—Compromise or Release.**—Without statutory authority a parent, as such, cannot compromise or release his child's cause of action.
- [5] **Id.—Claims—Compromise.**—Whether proceedings under Prob. Code, § 1431, relating to compromise of a minor's disputed claim, are entitled to presumption of regularity need not be decided on collateral attack if jurisdictional facts are established by extrinsic evidence.
- [6] **Id.—Claims—Compromise.**—Under Prob. Code, § 1431, to establish right of mother to compromise a minor's disputed claim, it must be shown, if father is not dead, that father and mother are living separate or apart, that mother has care or custody

[1] See Cal.Jur., Judgments, § 150; Motions and Orders, § 26.

[4] Release or compromise by parent of cause of action for injuries to child as affecting right of child, note 103 A.L.R. 500. See, also, Am.Jur., Parent and Child, § 34.

McK. Dig. References: [1] Judgments, § 297; Motions, § 25; [2] Judgments, § 296; [3] Judgments, § 540; [4-10, 12-14, 17-19] Infants, § 2a; [11] Divorce, § 275; [15, 16] Parent and Child, § 5.

of minor, that compromise has approval of superior court of county where minor resides, and that a verified petition in writing seeking approval of compromise has been filed with such court.

- [7] **Id.—Claims—Compromise.**—Although it would ordinarily be better practice to hold a hearing on mother's petition for approval of compromise of minor's disputed claim, the statute (Prob. Code, § 1431) does not require it. (Disapproving intimation to contrary in *Berry v. Chaplin*, 74 Cal.App.2d 652, 660 [169 P.2d 442].)
- [8] **Id.—Claims—Compromise.**—Amendment of Prob. Code, § 1431, in 1939 so as to provide that claim of minor against third person may be compromised by "his father, or if his father is dead or the parents of said minor are living separate or apart and his mother then has care or custody of said minor then his mother," covers not only case of desertion or abandonment but any case where father and mother are living separate or apart, whether reason therefor be desertion, abandonment, agreement of the parties or divorce.
- [9] **Id.—Claims—Compromise.**—By using word "custody" in 1939 amendment of Prob. Code, § 1431, the Legislature made it clear that if mother and father are living separate or apart, mother has authority to compromise a minor's disputed claim if she has custody of minor, whether she has that custody by virtue of father's abandonment of his family, his inability or refusal to take custody, or by virtue of court order awarding her custody.
- [10] **Id.—Claims—Custody.**—An award of joint custody with father would not be sufficient to give mother authority to compromise a minor's disputed claim.
- [11] **Divorce—Custody of Children—To Whom Awarded.**—A divorce decree that awards parents joint custody of child leaves right to custody as it was during marriage when they were living together and gives neither a greater right than he or she had before divorce.
- [12] **Infants—Claims—Compromise.**—"Custody" as used in Prob. Code, § 1431, relating to compromise of a minor's disputed claim by mother when parents are living apart and mother has care or custody means complete or exclusive custody.
- [13] **Id.—Claims—Compromise.**—Addition of words "care or" before word "custody" in Prob. Code, § 1431, relating to compromise of a minor's disputed claim, indicates a clear legislative purpose not to limit mother's authority to cases in which she has custody.
- [14] **Id.—Claims—Compromise.**—Prob. Code, § 1431, relating to compromise of a minor's disputed claim, no more limits "care"

to some cases of care than it limits "custody" to some cases of custody; it may not be interpreted as giving either "care" or "custody" alternative meanings or to make either controlling in some cases and not in others.

- [15] **Parent and Child—Custody.**—Custody embraces sum of parental rights with respect to the rearing of a child, including its care; it includes right to child's services and earnings (Civ. Code, § 197) and right to direct his activities and make decisions regarding his care and control, education, health and religion.
- [16] **Id.—Custody.**—When parents are living separate or apart a court may conclude that best interests of child and due regard for interests of parents require that one or other be given complete custody, or it may award "legal custody" to one or both parents and "physical custody" to one parent with or without right of visitation by other parent, or physical custody may be awarded to a third person, usually a relative.
- [17] **Infants — Claims — Compromise.**—In using words "care or custody" in Prob. Code, § 1431, relating to compromise of a minor's disputed claim, the Legislature by "custody" meant complete custody or all rights involved in custody, and by "care" meant what has commonly been called "physical custody" or custodial rights involved in physical care and control of child.
- [18] **Id.—Claims—Compromise.**—If parents are living separate or apart and mother has care or physical custody of child, she may compromise his claims even though she may or may not have his complete custody.
- [19] **Id. — Claims — Compromise.**—Where parents under divorce decree have "joint custody and control" of child but mother has "personal custody," award of personal custody gives her physical custody and care of child and she therefore has authority under Prob. Code, § 1431, to compromise disputed claim of child.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. I. L. Harris, Judge. Affirmed.

Action for damages for personal injuries. Judgment for defendant affirmed.

John F. O'Sullivan, Millington, Dell'Ergo, Weeks & Morrissey for Appellant.

Dion R. Holm, City Attorney, and Clayton W. Horn, Deputy City Attorney, for Respondent.

TRAYNOR, J.—Plaintiff Lyndle E. Burge, a minor, by his father as guardian ad litem, brought this action against defendant city and county of San Francisco to recover damages for personal injuries suffered by him while he was a passenger on a street-railway car operated by defendant. Defendant filed an answer pleading as a special defense that plaintiff's claim had previously been compromised by his mother in a proceeding under section 1431 of the Probate Code. The issue so raised was tried separately pursuant to section 597 of the Code of Civil Procedure. The court concluded that the order approving the compromise was not subject to collateral attack and entered judgment in favor of defendant. Plaintiff appeals. He concedes that the attack is collateral but contends that the court had no jurisdiction to approve the compromise on the grounds that the petition for approval of the compromise and the order approving it were fatally defective in failing to recite jurisdictional facts and that even if these facts could be proved in the present proceeding the record therein discloses that his mother was without authority to compromise his claim. We have concluded that this contention cannot be sustained and that the judgment must therefore be affirmed.

Plaintiff was 14 years old at the time of the accident. His father and mother had previously been divorced. The interlocutory decree provided that "plaintiff [father] and defendant [mother] have joint custody and control of the said minor children, with personal custody in the defendant, and the plaintiff has the right and privilege to visit said minor children and take them out at all reasonable times." Plaintiff was one of the minor children mentioned in the decree and lived with his mother after the divorce.

All negotiations leading to the compromise were conducted between plaintiff's mother and defendant. Plaintiff's father knew that the accident had occurred and that a claim had been filed, but he did not participate in the compromise proceedings or become aware of the compromise until after it had been made. Plaintiff's mother agreed to release his claim against defendant upon the payment of \$500. She filed with the superior court a verified petition seeking approval of the compromise, and it was approved. Defendant paid the \$500 and plaintiff's mother executed a release. The present action was brought before plaintiff reached majority.

consent statute did not allow maintenance of the action. The statements in *Melvin v. State, supra*, 121 Cal. 16, 22, indicating that the State Agricultural Society engages in governmental activities only in conducting the state fair are inconsistent with the foregoing cases and are disapproved.

The judgment is reversed.

Gibson, C. J., Edmonds, J., Carter, J., Schauer, J., and Spence, J., concurred.
