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Acquiring Jurisdiction of Infant Defendants under the Indiana Law

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COMMENTS

ACQUIRING JURISDICTION OF INFANT DEFENDANTS UNDER THE INDIANA LAW

The problem of getting infant defendants into court and binding them by judgments and decrees has seemed to puzzle members of the bar and *nisi prius* courts in Indiana from the early period of our judicial history up to the present time. It is, of course, elementary that an infant cannot defend in person or by attorney but only by a guardian ad litem. The power to appoint such guardians for infant defendants inheres in all courts of justice.[1] In addition the authority is expressly conferred by statute in Indiana. Section 266, Burns' R. S. 1926, provides that:

"An infant defendant shall appear and defend by guardian appointed by the court or chosen by such infant with the consent of the court."

It is also provided by Section 3423, Burns' R. S. 1926, that:

"All courts shall have power to appoint a guardian ad litem to defend the interests of any minor impleaded in any suit, and to permit any person, as next friend, to prosecute any suit in any minor's behalf."

A guardian ad litem is properly appointed although the infant has a regular guardian appointed by the same court and living in the same jurisdiction.[2] However, the regular guardian may appear and defend, and if so no guardian ad litem need be appointed.[3]

From *Hough v. Canby* (1846)[4] to *Voyles v. Hinds* (1916)[5] persistent attempts have been made to dispense with service of summons for minor defendants by the expedient of having a guardian ad litem appointed, who has proceeded either to waive service upon his ward, or to file an answer ignoring the lack of service. There seems to have been some sanction for such a procedure in the earlier English Chancery Practice, at least where no personal judgment against the infant was sought.[6] All

[1] *Gibbs v. Potter*, 166 Ind. 471, 475; *Mackey v. Grey*, (1807) 2 Johns (Sup. Ct. N. Y.) 192; Co. Litt. 89n, 16; Field, Law of Infants, p. 153.

[2] *Alexander v. Frary*, 9 Ind. 481.

[3] *Makepeace v. Bronnenberg*, 146 Ind. 243; *Garrigus v. Ellis*, 95 Ind. 598; *Hughes v. Sellers*, 34 Ind. 337; *Harrison v. Western Construction Co.*, 41 Ind. App. 6.

[4] 8 Blackf. 301.

[5] 186 Ind. 38.

[6] *Sloane v. Martin*, 24 N. Y. S. 661, aff. 40 N. E. 217.

such attempts under our practice, however, have proved abortive and it has uniformly been held that the courts have no jurisdiction to appoint a guardian ad litem until the infant has been brought into court by the service of process upon him in some manner known to the law.[7] Such appointments and judgments rendered which are based thereon are nullities and ineffective for any purpose.

Service of process upon the infant being a necessary step, the question is what service is necessary. Many states have distinct statutory requirements for service of process upon infants. Some require service upon the father, mother, or general guardian in addition to service upon the infant. Some require personal service as distinct from substituted or constructive service. There is no Indiana statute concerning service differentiating between infant and adult defendants. Section 333, Burns' R. S. 1926, provides that:

"The summons shall be served, either personally on the defendant or by leaving a copy thereof at his usual or last place of residence . . . . "

The word "defendant" is certainly broad enough to include infants. Nevertheless the idea is prevalent among members of the bar that an infant must be served personally, and that service by leaving a copy is invalid. There is no Indiana decision justifying such a contention.[8] Bu neither is there any decision which satisfactorily answers it.

There are a number of Indiana decisions which state that process must be served on infants in the same manner as if they were adults.[9] Examination of these authorities discloses that in none of them did the court have under consideration the manner of serving process upon infants. They are all cases where

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[7] *Hough v. Canby* (1846), *supra; Robbins v. Robbins* (1850), 2 Ind. 74; *Babbitt v. Doe* (1853), 4 Ind. 355; *Doe v. Anderson* (1854), 5 Ind. 33; *Peoples v. Stanley* (1855), 6 Ind. 410; *Wells v. Wells* (1855), 6 Ind. 447; *Martin v. Starr* (1855), 7 Ind. 224; *Pugh v. Pugh* (1857), 9 Ind. 126; *Alexander v. Frary* (1857), 9 Ind. 481; *Grey v. Pierson* (1863), 21 Ind. 18; *Abdil v. Abdil* (1866), 26 Ind. 287; *Hawkins v. Hawkins* (1867), 28 Ind. 66; *De La Hunt v. Holderbaugh* (1877), 58 Ind. 285; *Carver v. Carver* (1878), 64 Ind. 194; *Roy v. Rowe* (1883), 90 Ind. 54; *Voyles v. Hinds* (1916), *supra; Holiday v. Miller* (1901), 28 Ind. App. 121; *Harrison v. Western Construction Co.* (1907), 41 Ind. App. 6.

[8] Watson's Rev. of Works Pr. and Forms, Vol. 1, Section 890.

[9] *Hough v. Canby* (*supra*); *Babbitt v. Doe, supra; Doe v. Anderson, supra; Peoples v. Stanley, supra; Martin v. Starr, supra; Pugh v. Pugh, supra; Alexander v. Frary, supra; Abdil v. Abdil, supra; Hawkins v. Hawkins, supra; De La Hunt v. Holderbaugh, supra; Harrison v. Western Construction Co., supra.*

there was no service of any kind upon the infants, and the foregoing statement taken with the background which appears in the cases, can be given no stronger meaning than that infant defendants as well as adults must be served with process. No authority in Indiana passes upon the question of whether infants can be served by leaving a copy at their last and usual places of residence. Authorities elsewhere, however, clearly suggest the answer.

In *Bryan v. Kennet,*[10] it was contended that the statute authorizing notice to defendants by publication did not include infants. The court held that since the statute did not by its terms except infants, it applied to them as well as to adult defendants. In *Steinhardt v. Baker,*[11] in determining whether the provision of the statute for substituted service was applicable to infants, the court said:

"The words 'any defendant' were certainly broad enough to include infants, and, as the statute made no exception as to them, we think it applied to infants as well as adults."

Other authorities have construed similar statutory provisions in the same way.[12] So far as the "due process" requirement is concerned it has been said that:

"Notice in some form to an infant is essential to confer jurisdiction upon a court to bind his property. But the legislature may prescribe that it be constructive, instead of actual; and proceedings in conformity with such a statute will be valid and bind the infant."[13]

Under the language of our statute and the rule of construction adopted by these authorities, there seems to be no question but that service by copy upon infants is valid in every respect.

The infant having been properly brought into court by the service of summons, a guardian ad litem can be appointed and the matter proceed in the regular way. A further question is raised, however, by the frequent practice of having a guardian ad litem appointed as soon as summons is served and the proceeding completed before the return day. Is a judgment so secured binding upon the infant? There is little authority directly in point and none in Indiana.

In *Rice v. Bolton,*[14] it appeared that in a prior action a guardian ad litem had been appointed and a judgment rendered

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[10] 113 U. S. 179, 288, Ed. 908.

[11] (N. Y.) 57 N. E. 629.

[12] *Taylor v. Lovering* (Mass.), 30 N. E. 612; *Hale v. Hale* (Ill.), 33 N. E. 858; *Cohen v. Portland Lodge,* 152 N. W. 357.

[13] *Smith v. Reid* (N. Y.), 31 N. E. 1085.

[14] (Ia.) 100 N. W. 634.

against the infant after service of summons, but the day before the return day. It was held that the judgment was not void and was impervious to collateral attack. No direct authority was cited, but the court reasoned that jurisdiction of the person of the minor was acquired by service of the summons, and that since the failure to appoint a guardian ad litem at all is merely an irregularity and does not invalidate the judgment, and since the entry of judgment by default after service but before the time allowed for appearance is also regarded as an irregularity, the appointment of a guardian ad litem and the rendering of judgment before the return day was merely irregular. The court said:

"The same rule is applicable to a judgment against an infant. It might have been corrected during the term by any person who chose to interest himself in the infants' behalf on the day or thereafter during the term he was required to appear by a friend, or possibly by an *amicus curiae*. Nothing of the sort was done, and the record was subsequently approved. It cannot now be attacked collaterally."

The analogies upon which the Iowa court relied are recognized by the Indiana decisions. It has been held several times that the failure to appoint a guardian ad litem for an infant who has been actually served with process does not invalidate the judgment so as to render it open to collateral attack but is only an irregularity.[15]

It has also been held where there has been service of summons, a judgment rendered by default before the return day is merely irregular and not void.[16]

It seems clear in view of these decisions that the Iowa case would be followed in Indiana, and that a judgment against a minor secured upon the appointment of a guardian ad litem before the return day could not be attacked collaterally. Doubtless such a judgment would be set aside and the infant permitted to defend as a matter of course, as suggested in the Iowa case, if he or someone in his behalf sought to have it done during the term. Under what circumstances could a direct attack be made thereafter? Any later direct attack would be governed by Section 423, Burns' R. S. 1926, which provides that:

"The court shall relieve a party from a judgment taken against him through his mistake, inadvertence, surprise or excusable neglect on complaint filed and notice issued, as in an original action, within two years from and after the date of the judgment."

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[15] *Blake v. Douglass*, 27 Ind. 416; *McBride v. State*, 130 Ind. 525; *Cohee v. Baer*, 134 Ind. 375.

[16] *Essig v. Lower*, 120 Ind. 239; *Friebe v. Elder*, 181 Ind. 597.

Under this section minors have two years after coming of age to make application to be relieved from judgments so taken.[17] In order that a plaintiff may avail himself of this proceeding, however, it is essential that a meritorious defense be shown in addition to excusable neglect.[18] If excusable neglect, etc., exists together with a meritorious defense, the regularity of the proceeding does not prevent it from being set aside. On the other hand in the absence of a meritorious defense the irregularity alone would not be a ground for setting aside the judgment.[19]

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[17] *Macy v. Lindley*, 54 Ind. App. 175; *Wiser v. Mast*, 149 Ind. 177.

[18] *Macy v. Lindley, supra.*

[19] *Cohee v. Baer, supra.*