Indiana Law Journal

Volume 14 | Issue 4 Article 7

4-1939

Guardian and Ward-De Facto Guardian

GUARDIAN AND WARD—DE FACTO GUARDIAN.—While East Chicago State Bank was legal guardian of a certain minor child, insurance moneys belonging to the ward were collected by the guardian and held in trust. Upon expiration of the charter of East Chicago State Bank, a new bank was organized. The latter bank took over all assets and assumed all liabilities of the former including a deposit in the trust department of East Chicago State Bank as property of the ward. The reorganized bank, although never judicially appointed guardian, continued to act in fact as guardian of said ward, subsequently filing an inventory and appraisement of property belonging to the ward, in which it designated itself as guardian, and later a guardian's account current with the Superior Court. The reorganized bank was taken over by the Department of Financial Institutions of the State of Indiana and at time of closing had on hand a fund belonging to said ward. Appellant is legal guardian, and in a liquidation proceeding by the state, filed a petition based upon Chapter 167 of the Acts of 1931, which gave preference to any property held in a fiduciary capacity, to have the claim of guardian allowed as preferred. Lower court disallowed the preference but allowed a general claim. Held, reversed with instruction that claim be allowed as preferred. *Bank of Whiting, etc. v. The East Chicago State Bank* (Ind. 1938), 17 N. E. (2d) 491.

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[12] McCleary v. Lourie (1922), 80 N. H. 389, 117 A. 730; Hille v. Nill (1929), 58 N. D. 536, 226 N. W. 635; David v. Griswald (1913), 23 Cal. App. 189, 137 P. 619; Nave v. City of Clarendon (Tex. Civil App. 1919), 216 S. W. 1110.

[13] In Bennett v. Seibert (1894), 10 Ind. App. 369, 378, 35 N. E. 35, the Court said, "If one owning lands lays out a town thereon, and makes and exhibits a map or plan thereof, with spaces marked public squares, parks, etc., and sells lots with reference to such map or plan (though unrecorded) the purchasers of lots in such town acquire, as appurtenant thereto, every easement privilege which the map or plan represents as a part of the town, . . .". The actual controversy before the court concerned the apportionment of street assessments between a purchaser and the city. See also; Rhoades v. Town of Brightwood (1896), 145 Ind. 21, 43 N. E. 942 (action to quiet title by grantor. Held, where lots are sold with reference to a plat rights of both public and purchasers of lots intervene so there is an irrevocable dedication); Pittsburgh, Cincinnati, Chicago and St. Louis Ry. Co. (1897), 148 Ind. 101, 47 N. E. 332 (action for damages caused by obstruction of public highway. The Court says that secret intentions cannot prevail against conduct upon which the public or those dealing with a person have relied [p. 107] and also recognizes that landowners have rights distinct from rights in the public [p. 108].)

[1] See discussion in Martin's Admr. v. Fielder (1887), 82 Va. 455, 4 S. E. 602.

The doctrine of constructive guardian has long been a part of the law of guardian and ward,[1] and has been rejected by only two cases.[2] The situation arises where one assumes to act as a guardian or enters upon an infant's estate, who has not been regularly appointed a guardian. It may result from a voluntary assumption of the duties,[3] a void appointment by a court without jurisdiction,[4] or acts performed by one who was by himself and other parties concerned, considered an "accomodation guardian."[5] Recognition of the need for protection of the infant resulted in giving the infant an election to treat such a person as a wrongdoer or as a guardian.[6] In the latter case a relation similar to that of trustee and cestui que trust is established,[7] and the guardian *de son tort* may be compelled to account as a guardian. Being subject to all the duties attaching to a legally constituted guardian, he will be held accountable for the principal and interest of the estate,[8] and for the care of the ward's person.[9] As a general proposition, he is deprived of the rights of a legal guardian, having no authority to act so as to bind the estate as a guardian[10] or to act so as to bind the person of the ward as by consenting to its adoption.[11] The one exception is found where the de facto guardian or one claiming under him has been allowed to recover for services from the ward or his estate what would be reasonable had he been acting as guardian of the ward.[12] The relation of guardian de

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[2] Bell v. Love (1883), 72 Ga. 125; Burch v. State (1832), 4 Gill & J. (Md.) 444 which confined the doctrine to Chancery.

[3] Kies v. Brown (1936), 222 Iowa 54, 268 N. W. 910. Ward's father assumed guardian's duties after his death.

[4] Zeideman v. Molasky (1906), 118 Mo. App. 106, 94 S. W. 754.

[5] See In re Cuffe's Estate (1922), 63 Mont. 399, 207 P. 640, stating that such a guardian cannot and does not exist.

[6] Anderson's Admr. v. Smith (1904), 102 Va. 697, 48 S. E. 29; Patrick v. Woods (1808), 4 Ky. (1 Bibb) 223; and see Bibb v. McKinley (Ala. 1839) 9 Port. 636 holding the rule inapplicable to one holding as an executor without his consent.

[7] Zeideman v. Molasky (1906), 118 Mo. App. 106, 94 S. W. 754; Neblett v. Valentino (1936), 127 Tex. 279, 92 S. W. 2d 432. Distinction is that guardian does not have title to ward's property but has only custody and management. In Davis v. Harkness (1844), 6 Ill. (1 Gillman) 173, 41 Am. Dec. 184, it was pointed out that it would be a strange rule of equity which did not protect the infant as well "against the violence of the wrongdoer as against the peculations of the appointed guardian."

[8] Schouler, Marriage, Divorce, Separation and Domestic Relations, (6th ed. 1921) 823.

[9] Starke v. Storm's Executor (1913), 115 Va. 651, 79 S. E. 1057; In re Harris' Guardianship (1915), 17 Ariz. 405, 153 P. 422, (Master not de facto guardian as to infant servant).

[10] Aldrich v. Willis (1880), 55 Cal. 81; Stephens v. Hewitt (1899), 22 Tex. Civ. App. 303, 54 S. W. 301; Young v. Downey (1899), 150 Mo. 317, 51 S. W. 751. In the latter case, the court stated, "Nor did the fact she was within a few days thereafter duly appointed and qualified as his guardian confirm what she had theretofore done without authority".

[11] Ex Parte Martin (1916), 29 Idaho 716, 161 P. 573; Smith v. Cameron (1909), 158 Mich. 174, 122 N. W. 564.

[12] In re Gambastiani's Estate (1934), 1 Cal. App. 2d 639, 37 P 2d 142; Patrick v. Woods (1808), 4 Ky. (1 Bibb) 223.

facto and ward probably ceases upon majority and a mere agency relation exists,[13] although some courts have held that it continues.[14]

The two Indiana cases upon which the decision in the principal case is based[15] establish that an infant may consider any person entering upon his land and receiving proceeds thereof as his "guardian, bailiff or trustee" and compel him to account for them in a court of equity. Consistency with decisions of other jurisdictions, with logic and justice necessarily requires that the same rule apply to personal property of the ward (treated in the same way.)[16] Further support is given the decision in the principal case by another Indiana decision which holds that since a ward is incapable of choosing a theory or representative, of waiving a right or doing any act that would operate as an estoppel, his guardian likewise can do none of these things for him, to his detriment. The failure of The East Chicago State Bank, in whose position the receiver now stands, which acted and was recognized by the court as guardian, can thus not amount to an estoppel to defeat the present guardian's claim.

The decision appears sound as an application of the de facto guardian principle, a rule of justice and fairness, to the policy of the controlling statute.[18]

W. A. V.

TORTS—DUTY OWED BY RAILROAD TO HABITUAL TRESPASSERS.—In a suit against the engineer of a train, the railroad company, and its receiver, appellant sought damages for personal injuries received when, through the alleged negligent operation of the train, appellant, a boy of twelve, riding between two cars, lost his balance, and caught his foot in the coupling. Appellant had climbed on the train during switching operations, when it stopped on a track which lay within one-hundred feet of a public playground. Evidence was introduced that children long had been accustomed to leave the playground and ride on trains switching on the nearby tracks without serious objection from railroad employees, but with their knowledge. It was shown that those in charge of the train had not seen the boy get on, and that they could not have seen him after he had taken his position between the cars. The parties stipulated that appellant was a trespasser. Held: affirmed for defendants. Assuming that appellees were burdened with constructive knowledge of the appellant's presence on the train, appellees owed

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[13] Martin's Admr. v. Fielder (1887), 82 Va. 455, 4 S. E. 602.

[14] Parmentier v. Phillips (1816), 4 N. C. (2 Car. Law Reps.) 294; Chaney v. Smallwood (1843), 1 Gill (Md.) 367.

[15] Grimes et. al. v. Wilson et. ux., (1837), 4 Blackf. 332; Breeding v. Shinn (1856), 8 Ind. 125.

[16] Van Epps v. Van Deusen (1833), 4 Paige (N. Y.) 64, 25 Am. Dec. 516, (money and profits of services of a slave); Chaney v. Smallwood (1843), 1 Gill (Md.) 367, (profits from services of slaves).

[17] McCord v. Bright (1909), 44 Ind. App. 275.

[18] Note, however, that the statute involved in this case was amended as part of the Financial Institutions Act of 1933. The present applicable provision precludes the result of the instant case by providing for the conveyance to a new trustee or guardian of property held by the bank in any fiduciary capacity *under the appointment of any court.* Burns' Ind. Stat. (1933), § 18-321.