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Courts--Jurisdiction to Vacate Order of Adoption after Term (Comment on Recent Cases)

Bernard C. Gavit
Indiana University School of Law - Bloomington

decision of points (1) and (2) should be welcome. As a corollary to point (2) it may be asked: If T, domiciled in Pennsylvania, bequeaths specific stock in an Ohio corporation to A, domiciled outside of Pennsylvania, and, by the laws of Ohio, such a bequest is effective irrespective of the laws of Pennsylvania, can Pennsylvania levy any tax upon the bequest? Or, perhaps, in the case of any specific bequest of foreign stock, would not this be true, as of foreign chattels, even though the law of Ohio recognizes the succession law of Pennsylvania to the same extent as in the case of chattels?

JAMES PARKER HALL.

COURTS—JURISDICTION TO VACATE ORDER OF ADOPTION AFTER TERM.—[Indiana] *A* filed a petition in *B* County for the adoption of a minor child.[1] The petition alleged that the child's mother was dead, but that an adoptive father was still living. The written consent of the adoptive father was filed as required by the statute. The court entered an order of adoption. Two weeks later and within the term at which the order of adoption was made, *C*, the guardian of the child, filed a verified application asking leave to appear as amicus curiae for the purpose of presenting certain facts which he believed would lead the court to vacate the order of adoption. The court entered an order that notice be given to *A* of the filing of the petition by *C*, and that the court would hear the petition on the first day of the next term of the court. *A* appeared on the first day of the next term and filed a motion to strike from the files the petition of *C*. This motion was over-ruled and *C* was then given leave to appear as amicus curiae. *A* refused to introduce any evidence. After considering the facts alleged in the petition of *C*, and on a reconsideration of the evidence originally given, the court found the facts set forth in the application of *C* to be true, and vacated the order of adoption: *held*, that the judgment vacating the order of adoption was void for the reason that the petition of *C* was not sufficient to keep the matter in fieri, and the court lost jurisdiction of the proceedings at the close of the term.[2]

A judgment rendered at one term of court can not be modified or vacated at a subsequent term of court, unless the proceedings are kept in fieri by the filing of a motion for a new trial or a motion to modify or vacate the judgment.[3]

The instant case holds that the guardian was not a proper or necessary party to the adoption proceedings,[4] and that, therefore, the filing by him of a petition to be heard as amicus curiae was not sufficient to keep the proceeding in fieri so as to give the court jurisdiction of the matter at a subsequent term.

On the principal point, Nichols, J., dissented, upon the ground that the court should, under the circumstances of the case, hold that the filing of the petition by the guardian was sufficient to keep the petition in fieri. The peculiar circumstances of the case to

1. (1914) Under Burns' Ann. Ind. Stat., secs. 868-872.
2. In re *Perry* (Ind. App.) 148 N. E. 163.
3. *McClellan* et al. v. *Binkley* 78 Ind. 502.
4. Following *Shirley* v. *Grove et al.* 51 Ind. App. 17, 98 N. E. 874.

which the dissenting judge refers are the facts alleged in the petition of the guardian, which were not controverted, to the effect that he had been duly appointed guardian by the Probate Court of *M* County; that he had no notice or knowledge of the adoption proceedings until *A* had demanded the possession of the child; that *A* had no permanent home other than a boarding house and she intended to place the child in a home in Chicago among strangers to the court; that the adoptive father was a resident of *G* County, Indiana, and that his consent to the adoption was procured by the payment of money.

It is submitted that on the principal point the minority opinion is correct, although the reasons given are not very convincing. It is curious that neither the majority nor the minority opinion cites the Indiana statute, the interpretation of which must necessarily control the decision of the case. The statute is very inclusive and provides that *any matters* pending at the end of the term of any court *which are undetermined,* shall stand continued until the next term.[5]

The question as to whether or not the court shall enter an order of adoption is largely within the discretion of the court,[6] and at any time within the term the court might have vacated the order of adoption for any reason which came to its attention.[7]

It would seem, therefore, that the filing by the guardian of the petition to appear as amicus curiae to present certain facts to the court for the proper determination of the matter and the order of the court issuing a notice to the parties fixing the date of hearing, put before the court the question as to whether or not the judgment should be allowed to stand, and that the question, although presented in an informal manner, was a matter which was undisposed of at the end of the term, and which was, therefore, continued to the following term within the meaning of the statute. That is, the petition of the amicus curiae is in effect the petition of the court.

There is a peculiar force to this in view of the fact that the judge himself was the only person who could effectually remonstrate against the order of adoption, and it is not stretching the facts to say that by ordering a hearing on the petition, the court took under advisement the review of his prior discretionary decision.

The majority of the court goes on to decide that the trial court had jurisdiction of the adoption proceedings and that, therefore, the original order of adoption was valid. This was decided in answer to the guardian's argument, as amicus curiae in the Appellate Court, that the original order was void.

Having decided that the guardian was not a necessary or proper party to the adoption proceedings, and could only act as amicus curiae either in the trial court or the Appellate Court, it is difficult to see how that particular question was presented to the Appellate

5. (1914) Burns' Ann. Ind. Stat., sec. 1447.
6. (1914) Burns' Ann. Ind. Stats., sec. 870; *Leonard* v. *Honisfager* 43 Ind. App. 607, 88 N. E. 91.
7. *McClellan* et al. v. *Binkley* 78 Ind. 503.

Court for decision; that is, unless it was conceded by the court and all of the parties that in the event the original order of adoption was void, the court had power at a subsequent term to vacate the void order. There appears to be no Indiana case upon this exact point, but undoubtedly that is the law.[8]

Courts also have inherent power to vacate judgments after the term if fraud was practiced in their procurement;[9] although there are cases to the contrary.[10]

There is an Indiana case which would seem to be almost conclusive upon the last proposition and which is not cited by the court.[11] This case holds that the point of fraud in the procurement of an adoption can be raised in a habeas corpus proceeding for the possession of the child, and that after several years have elapsed, the court is bound to vacate the order of adoption. This particular case had to do with fraud in the publication of notice against a mother whose residence was in fact known to the adoptive parent, but it would seem that the fact alone that the consent of the adoptive parent in the instant case was obtained by money, would likewise be a fraud upon the court.

The guardian's argument was that since the fact of residence by the minor in the county in which the petition is filed was jurisdictional, the original order was void, for it appeared on the face of the proceedings that the residence of the child was in *G* County with its adoptive father and not in *B* County with the guardian. The court held that in view of the fact that the original petition alleged that the child "was in the care and custody of *C*, as guardian, at this home in *B* County," it was presumed that the petitioner, at the time of the hearing for adoption, introduced evidence sufficient to justify the court in finding that the residence of the guardian was the residence of the child. The case of *Shirley* v. *Grove*[12] is cited as authority for this proposition, but that case was one where the petition expressly alleged that the minor was a resident of the county in which the proceedings were started, and where the court held that the attack on the proceedings was collateral.

But the instant case does hold that the facts required by the statute to be alleged in the petition of adoption are jurisdictional and must appear upon the face of the petition.[13] It is submitted that the allegation of the petition to the effect that the child was in the care and custody of her guardian at his home in *B* County, is wholly insufficient as an allegation that her residence was in *B* County when it also appeared on the face of the petition that an adoptive father lived in *G* County.

8. *Bronson* v. *Schulten* 104 U. S. 410, 26 U. S. (L. ed.) 797; *Bank of United States* v. *Moss* 6 How. 31, 12 U. S. (L. ed.) 331; *Wetmore* v. *Karrick* 205 U. S. 141, 51 U. S. (L. ed.) 745.

9. *Edson* v. *Edson* 108 Mass. 590, 11 Am. Rep. 393.

10. *Sharp* v. *Danville* etc. 105 N. C. 308, 11 S. E. 530, 19 Am. St. Rep. 533.

11. *Glausman* v. *Ledbetter* 190 Ind. 505, 130 N. E. 230.

12. 51 Ind. App. 17, 98 N. E. 874.

13. Citing *Watts* v. *Dull* 184 Ill. 86, 56 N. E. 303, 75 Am. St. Rep. 141; *Kennedy* v. *Borah* 226 Ill. 243, 80 N. E. 767.

An adoptive parent requires the same control over a child which a natural parent has,[14] and the domicil or residence of a minor is that of his adoptive father.[15] As between the father and the guardian, the Indiana statute says:

"Every guardian so appointed shall have the custody and tuition of such minor—provided that the father of such minor (or if there be no father, the mother, if suitable persons respectively) shall have the custody of the person and the control of the education of such minor."[16]

To reach its conclusion the court must presume, first, that the guardian's home in *B* County was his residence; and, second, that the minor was in the care and custody of the guardian by reason of an order of a competent court awarding the care and custody of the minor to the guardian as against her adoptive father, because the father was not a suitable person. But the law is, that no presumptions are indulged in favor of the court's jurisdiction; the facts necessary to establish it must appear on the face of the record.[17]

A man may have more than one home in the common sense of the word and still not be a resident of a particular county within the meaning of the statutes using that word.[18] This fact does not seem to have troubled the court, nor does it say anything about the further question as to the right of the guardian to change the residence or domicil of the minor from the county in which he was appointed guardian. *Hiestand* v. *Kuns*[19] holds that the power of the guardian to change the domicil of his ward is not unlimited.[20]
Hammond, Ind.

BERNARD C. GAVIT.

INSURANCE—PROVING WAIVER OF PROOF OF LOSS UNDER AN ALLEGATION OF PERFORMANCE OF CONDITIONS PRECEDENT.—[Illinois] In accordance with the general tendency to treat contracts of insurance as things apart, certain courts have relaxed the strict rules of common law pleading in dealing with them. *German Fire Insurance Company* v. *Grunert*[1] has long been cited as enunciating the rule that in insurance cases, proof of a waiver of a condition precedent could be made under an allegation of performance of that condition. In *Hart* v. *Carsley Manufacturing Co.*,[2] decided several years later, the Illinois Supreme Court had before it a question of much the same nature, but in a building contract case. Instead of

14. (1914) Burns' Ann. Ind. Stats., sec. 871.
15. *Miller* v. *Bode* (Ind. App.) 139 N. E. 456.
16. (1914) Burns' Ann. Ind. Stats., sec. 3065.
17. *Watts* v. *Dull* 184 Ill. 86, 56 N. E. 303, 75 Am. St. Rep. 141; *Furgeson* v. *Jones* 17 Ore. 204, 20 Pac. 842, 11 Am. St. Rep. 808, 3 L. R. A. 620.
18. *Estopinal* v. *Michael* 121 La. 879, 46 So. 907, 19 L. R. S. (N. S.) 759.
19. 8 Blackf. (Ind.) 345, 46 Am. Dec. 481.
20. See also 12 Rul. Case Law p. 1121 sec. 22.

1. (1884) 112 Ill. 68; 1 N. E. 113. It should be noted that certain proofs of loss were actually furnished, although their insufficiency was urged by the insurer. Some cases make a distinction between situations where no proofs are furnished, and where there are insufficient proofs.
2. (1906) 221 Ill. 444; 77 N. E. 897.