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# Federal Courts--Diversity Jurisdiction of Proceeding Brought by a Nonresident Guardian for a Nonresident Incompetent Minor

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be awarded. In *Tuning v. Tuning*, 90 W. Va. 457, 111 S.E. 139 (1922), the court recognized one of those "special circumstances." In that case, the wife had worked hard for years, and her efforts had helped pay for the farm and had helped support the family. The court stated that under those circumstances the trial court was justified in awarding a gross sum in lieu of alimony, payable in installments, and secured by a lien upon the husband's real estate. The court relied heavily upon the factual situation to find a "special circumstance," but failed to lay down any specific criteria for determining when a "special circumstance" exists. It would therefore seem difficult to ever be completely certain that a West Virginia divorce decree, providing for a lump sum maintenance payment, would be valid insofar as the maintenance payment was concerned.

It is obvious that the inter-relationship between post-nuptial separation agreements and divorce decrees is often rather complicated, and can lead the unwary into unexpected results. It is thus incumbent upon the attorney and the court to proceed with extreme caution when approaching these situations, in order to insure that the decree and agreement are both given the effect desired to the full extent permitted by law.

*Charles Edward Barnett*

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**Federal Courts—Diversity Jurisdiction of Proceeding  
Brought by a Nonresident Guardian for a  
Nonresident Incompetent Minor**

This action against Tennessee residents by a nonresident for a nonresident ward was brought in a federal court sitting in Tennessee. *P*, adult citizen of Florida, brought suit as guardian of her mentally incompetent child against *Ds* contending that under a consent order, entered following a will contest, *Ds* were responsible for the support of their sister, the ward. The action was dismissed in the United States district court for lack of diversity jurisdiction. *Held*, reversed. The district court must look to the law of the state in which the federal court was sitting to determine the competence of the guardian to bring suit in federal court, but the Tennessee statute requiring appointment of a resident guardian as co-plaintiff is inapplicable to a nonresident guardian suing for a

nonresident ward with no estate in Tennessee. Therefore, the district court could properly entertain jurisdiction without the necessity of such appointment which would have destroyed diversity jurisdiction. *Brimhall v. Simmons*, 338 F.2d 702 (6th Cir. 1964).

Historically, the rights and duties of guardians, committees and representatives in general were strictly local in nature. Their legal competence extended only to the state from which their appointment emanated. The old "general rule" that a guardian could not sue or be sued outside the state where he was appointed was firmly entrenched in many states although the rule possessed neither a sound historical basis nor a logical argument to justify its existence. Remnants of that principle of jurisdiction still pervade our courts. In regard to foreign guardians, Story's treatise on conflicts espoused the "general rule," but his view was based on only two cases denying the extraterritorial capacity of a guardian to sue or be sued. There were, however, many decisions in the early and middle nineteenth century recognizing the foreign guardian's capacity in the courts of a state of which he was not a resident. The bases of these holdings seem to be the comity of the courts or simple recognition at the court's discretion. The latter basis was relied upon more often where a father or mother of the ward was the non-resident guardian. Annot., 94 A.L.R.2d 162, 166-67 (1964); 25 AM. JUR. *Guardian & Ward* § 215 (1940).

The needs of our modern mobile society have caused many states to afford recognition to foreign guardians for reasons of expediency. The fear that these guardians would avoid court decrees has since been remedied by requiring bonds. This historic conflict of authority has also been resolved with state-by-state enactments of statutes spelling out the requirements, if any, necessary for a guardian to be a party in each particular state court. These statutes have taken several theories and forms. The simplest type of statute is that which recognizes the right of a foreign guardian to sue. Other forms require recognition of the foreign guardian as the state guardian, and still another class of statutes requires the appointment of a resident guardian as co-plaintiff or co-defendant to assure compliance with the court decrees. The latter form of statute is of the type enacted by Tennessee and in controversy in the principal case.

In the instant case the court of appeals considered two questions of law: "(1) Under rules 17(b) and 17(c) of the Federal Rules of

Civil Procedure, is the capacity of the guardian to maintain this action to be determined by Tennessee law? (2) If so, does T.C.A. § 35-610 deprive the district court of jurisdiction in this case?" Before the adoption of the procedure rules it was well established in federal courts that capacity to sue was determined by the law of the state in which the district court was sitting. *Erie R. R. v. Tompkins*, 304 U.S. 64 (1938); *Mexican Central Ry. v. Eckman*, 187 U.S. 429, 434 (1903); *New Orleans v. Gaines's Adm'r*, 138 U.S. 595, 606 (1891). The more apparent than real ambiguity of rules 17(b) and 17(c) caused when Rule 17(c) is read alone has raised a question as to whether state law is still controlling. *Fallot v. Gouran*, 220 F.2d 325, 328 (3d Cir. 1955). Rule 17(c) provides that whenever an infant or incompetent person has a representative, such as a general guardian, the representative may sue or defend for the ward. However, Rule 17(b) provides that capacity of representatives "shall be determined by the law of the state in which the district court is held." There is little dispute under the rules when a minor or incompetent has no representative and requires such. In this event the federal court appoints a guardian ad litem. *Travelers Indemnity Co. v. Bengsten*, 231 F.2d 263 (5th Cir. 1956). For another case which was inconsistent and overruled see: *Board of Supervisors of L.S.U. v. Tureaud*, 226 F.2d 714 (5th Cir. 1955); *vacated in* 228 F.2d 895 (5th Cir. 1956); *cert. denied* 351 U.S. 924 (1956). When an incompetent has a guardian, as before mentioned, some doubt still exists as to whether state law is still controlling. Several authorities have reaffirmed the control of state law which existed before the Federal Rules and have stated that nothing has changed on this particular point. *Travelers Indemnity Co. v. Bengsten*, *supra*; *Southern Ohio Savings Bank & Trust Co. v. Guaranty Trust Co.*, 27 F. Supp. 485 (S.D. N.Y. 1939); *Hurlburt v. Eno*, 17 F.R.D. 230 (D. Vt. 1955); 2 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 488 (1961). The conflicting view which deems guardians solely under federal law in diversity actions rests on a construction of Rule 17(c) by itself. *Montgomery Ward & Co. v. Callahan*, 127 F.2d 32 (10th Cir. 1942). The construction favoring the continued application of state law seems the more consistent view, as well as the view supported by the greater weight of authority.

In the principal case the court also agreed with the majority view and found that state laws were still to be looked to in that circuit to determine his capacity where a nonresident guardian was suing

in federal court. This requirement of looking toward state law is not peculiar to guardians, and it is generally the law for executors and other representatives. *Citizens' Fidelity Bank & Trust Co. v. Baese*, 136 F. Supp. 683 (M.D. Tenn. 1955). The more favored construction of Rule 17(c) rests upon its being read in conjunction with 17(b). See generally, *Lumbermen's Mutual Casualty Co. v. Elbert*, 348 U.S. 48 (1954); *City of Detroit v. Blanchard*, 13 F.2d 13, 15 (6th Cir. 1926). The court in the principal case held as a result that the first sentence of Rule 17(c) does not authorize a guardian to maintain a suit in any district court irrespective of his capacity in the state where the district court is sitting. cf. *Vroom v. Templin*, 278 F.2d 345 (4th Cir. 1960); CYCLOPEDIA OF FEDERAL PROCEDURE § 21.51 (3d ed. 1951). It followed that P's capacity to maintain this action was governed by Tennessee law as interpreted by the federal court. *Corabie v. Auto Racing, Inc.*, 264 F.2d 784, 785 (3d Cir. 1959); *Citizens Fidelity Bank & Trust Co. v. Baese*, supra. For an annotation on Rules 17(b) and 17(c) see Annot., 68 A.L.R.2d 752-53 (1959).

Once having decided in favor of applying state law, the court decided the second issue of the case: Did the Tennessee statute deprive the federal court of jurisdiction by reason of its requirement of a state resident guardian's appointment as co-plaintiff? The court found that the statute did not divest the federal court's jurisdiction for it was inapplicable to a nonresident guardian for a nonresident ward with no estate in Tennessee. The court would express no opinion as to whether the statute applied to a nonresident guardian of a nonresident ward who did have an estate in Tennessee. The judges felt the statute was aimed at protection of wards residing in Tennessee. If the statute were to apply, P would have seemingly no way to use the federal courts for the court would lack jurisdiction in every such matter in which a resident representative was required to be appointed by state statute. Such a result was reached in another circuit where a Texas statute forbade an action by any nonresident representative. *Felchlin v. American Smelting & Refining Co.*, 136 F. Supp. 577 (S.D. Cal. 1955). It has been held that a state statute cannot give exclusive control to certain courts of the state to maintain presentment against an estate. *Hurlburt v. Eno*, supra. It seems that allowing state courts to divest federal courts of jurisdiction in diversity proceedings is an infringement on the latter's proper duties. There

would be no question in the principal case as to the right of the federal court to hear the proceeding if the nonresident ward had been capable of prosecuting her own claims. If the court had applied the Tennessee statute, the result would have been to bar an incompetent from the federal courts merely because she needed a guardian. The court further stated that if a state statute purported to affect nonresidents as in the principal case, they would favor a construction preserving federal jurisdiction rather than destroying it. *Memphis Street Ry. v. Moore*, 243 U.S. 299 (1917), also interpreted the Tennessee statute where a nonresident executor was involved in favor of federal jurisdiction. This case was decided before the amendment was added which extended the statute to guardians. The court of appeals in the present decision therefore held that pursuant to Tennessee law (in the absence of any applicable statute to the contrary) a nonresident guardian could act in Tennessee in the capacity of guardian of the estate of a nonresident ward. 25 AM. JUR. *Guardian & Ward* § 33 (1940); Annot., 15 A.L.R.2d 432 (1951). This decision is in conformity with earlier Tennessee decisions before any statute was enacted on the subject. *Hickman v. Dudley*, 70 Tenn. (2 Lea) 375 (1879); *Clanton v. Wright*, 2 Tenn. 342 (1875); *McClelland v. McClelland*, 66 Tenn. (7 Bast.) 210 (1874); *Case of Andrew's Heirs*, 22 Tenn. (3 Humph.) 592 (1842). These cases seem to have recognized foreign guardians at the court's direction.

West Virginia has two statutes dealing with rights and duties of nonresident guardians. The first provision, W. VA. CODE ch. 44, art. 5, § 3 (Michie 1961), as far as it concerns the issues of the principal case, is as follows: "Notwithstanding any other provision of law, no person not a resident of this state . . . shall be appointed or act as executor, administrator, curator, guardian or committee, . . . except that for the guardian of an infant who is a nonresident of the state there may be appointed the same person who was appointed guardian at the domicile of the infant." This act is somewhat more liberal in regard to nonresident guardians acting for nonresident wards than most such statutes. It does not require the appointment of a West Virginia guardian as does the Tennessee statute. If the minor is a resident of West Virginia, it appears that a nonresident guardian cannot act in this state. Where the minor is a nonresident and has an estate in West Virginia, there is no indication as to how the court would decide by this statute. There is, how-

ever, a provision for such a situation in the other West Virginia statute on the subject of guardians. The above quoted provision allows the appointment of the foreign resident as guardian in our courts or, if he is already the guardian of the nonresident minor, allows him to act in that capacity. The Code only mentions an infant's guardian as being capable of suing in courts of this state. This omission raises the question of whether a guardian of a nonresident mental incompetent would be afforded the same courtesy as the guardian of an infant. There is no case in point in this jurisdiction and few cases interpreting the statute. By dicta, the Fourth Circuit has interpreted the section regarding the courtesy appointment of a nonresident guardian. The court was deciding whether an administrator appointed in Indiana could maintain an action in West Virginia under our wrongful death statute. The court answered in the negative. It was held that W. VA. CODE ch. 44, art. 5, § 3 (Michie 1961) was controlling and refused to allow the action in federal court. The court added that where such clear-cut exceptions were present, as in the Code, the legislative bodies must have meant to exclude all other representatives from use of our courts by the maxim of "Expressio unius est exclusio alterius." *Rybolt v. Jarrett*, 112 F.2d 642, 646 (4th Cir. 1940). Judge Dobie, who delivered the opinion of the court favored a liberal rule permitting such action in federal courts but spoke of the quoted West Virginia statute as "rigid" and "unrelenting" in defeating such an attempt. He said that all criticisms must be directed to the West Virginia Legislature for aid rather than to the judiciary. *LeMay v. Maddox*, 68 F. Supp. 25, 26 (W.D. Va. 1946); *Smith v. Bevin*, 57 F. Supp. 765 (D. Md. 1944); Annot., 132 A.L.R. 474 (1941). Assuming that the court in the *Rybolt* case was correct in its interpretation, nonresident committees for mental incompetents will also be denied entrance to our courts and correspondingly denied entrance to federal courts. This conclusion seems to point to a serious oversight on the part of our legislature. It seems that by W. VA. CODE ch. 48, art. 5, § 3 (Michie 1961), a foreign guardian may maintain the action in federal courts for his nonresident infant ward. In this respect at least the West Virginia law would seem to be in conformity with the holding in the principal case. Without the presence of the Code provision, it appears that no foreign executor, guardian, etc., could maintain a suit in this state unless specifically authorized by some other statute. *Winning v. Silver Hill Oil Co.*, 89 W. Va. 70, 108 S.E. 593 (1921). The *Winning* case is the best

of scant authority on the law in West Virginia. The fact that a non-resident guardian is from a foreign country does not affect his rights to bring suit under the Code provision allowing such. *Cicerello v. Chesapeake & Ohio R.R.*, 65 W. Va. 438, 443, 64 S. E. 621 (1909). Accordingly the federal courts sitting in West Virginia which look to state law in questions regarding nonresident guardians could decide in accord with the principal decision. This conformity would rest on the fact that Mrs. Brimhall's daughter was an infant, as well as mentally incompetent. If she were only mentally incompetent the West Virginia holding might be contra. If W. VA. CODE ch. 44, art. 5, § 3 (Michie 1961) were the only statute in point, an interpretation of our law would be much easier. There is, however, another statute. W. VA. CODE ch. 44, art. 11, § 3 (Michie 1961). This section deals with transfers of property or money belonging to a nonresident infant or insane person to a foreign guardian or committee. The foreign guardian or committee is authorized to petition the circuit court wherein the West Virginia guardian resides, or if there be no such guardian, he may petition the circuit court wherein the property or money is being maintained. The court will hear the case on the merits, and if the money or property is properly transferable, the guardian may sue if the property or money is not released. In *Fidelity Trust Co. v. Davis Trust Co.*, 74 W. Va. 763, 769, 83 S.E. 59, 61 (1914), the West Virginia Supreme Court held, in referring to a nonresident guardian under this statute, that he possessed all the powers of a resident guardian. How the later 1931 Code provision affected this decision remains unanswered. A special conflict is present in regard to a committee for an incompetent under the "transfer of property" section and the 1931 provision which allows no such representative the use of our courts. Whether the meaning of property or money would extend to damages brought for breach of contract is mere speculation. The only cases available are not of recent origin. In *VanWart v. Jones*, 295 F.2d 287 (4th Cir. 1924), the court found that where West Virginia trustees hold a fund for a minor from another state, on petition of a duly appointed guardian of that state, the court should direct the trustee to pay over the income to such guardian, especially where he was the father of the minor and a suitable person. The court found that in the absence of some statute affording such recognition a foreign guardian's authority was restricted to the state of his appointment. This view conflicts somewhat with the federal court's interpretation of Tennessee common law. That court found

that in the absence of a statute forbidding recognition a foreign guardian could sue in Tennessee. The distinction between the two cases probably lies in the fact that in Tennessee prior to the enactment of its statute the courts were (at their discretion) recognizing foreign guardians; whereas, in West Virginia, the courts would not recognize foreign representatives. The split of authority once again traces its way back to the two historic views regarding the capacity of foreign guardians. In the *Van Wart* decision, the court applied only the Code provision on "transfer of property" and not W. VA. CODE ch. 44, art. 5, § 3 (Michie 1961). The latter Code provision affording use of West Virginia courts to nonresident guardians and excluding certain other foreign representatives such as committees, etc., was not enacted until 1931. W. VA. CODE ch. 44, art. 5, § 3 (Michie 1961); W. VA. CODE ch. 44, art. 5, § 3 (1931); W. VA. CODE ch. 85, § 4 (Barnes 1923). It appears to have been the practice in most circuit courts in the state not to appoint nonresident representatives of any kind and the above statutes were only a codification of this practice — the notable exception of course being a nonresident guardian of a nonresident ward. The West Virginia statutes all conform to the earlier *Van Wart* decision in that respect.

Apparently the two West Virginia statutes must be read together. The provision which does not recognize any nonresident but a guardian for a nonresident ward was enacted subsequent to the statute dealing with the transfer of a ward's property. It could be argued then that the legislature by inserting the phrase, "Notwithstanding any other provision of law," must have contemplated other sections of the Code which were relevant. Whether it contemplates that the two sections are to be read together or that the quoted provision is controlling on all other provisions is not apparent. Any prediction of a decision under these two statutes would be mere conjecture.

It must be remembered that the statute requiring an in-state guardian's appointment does not divest the complainant of any remedy; it simply forces the use of state courts by foreign guardians. Historically, the federal courts tend to protect their jurisdiction by liberal interpretations whenever possible. The principal case is evidence of this tendency. Where statutes like that in West Virginia exist, their rigid mandates sometimes interfere with the desire of the federal court to retain jurisdiction. The tendency of the states seems to be toward a loosening of the restrictions placed on foreign

guardians, at least if their wards are nonresidents as well. Some statutes have been patched together similar to West Virginia's resulting in the admittance of guardians and the turning away of other representatives such as committees for incompetents. The principal case followed the trend of decisions, and as such, it espouses the more liberal view. In continental Europe the courts have no problems in admitting foreign guardians into their courts, basing this practice on a theory of comity. The American courts seem headed in that direction. *Clarke v. Clarke*, 178 U.S. 186 (1900).

Larry Lynn Skeen

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### Torts—A Comparison of Unauthorized Embalming and Unauthorized Autopsy

*P*'s husband died and the body was delivered to *D*'s funeral home. *D*'s employees immediately embalmed the body and prepared it for burial without the knowledge or permission of *P*. Upon learning that *D* had possession of her husband's body, *P* had the body removed to another funeral home. *P* brought an action against *D* for mental anguish caused by the unauthorized embalming of her husband's body. The lower court sustained a demurrer to the complaint. *P* appealed. *Held*, affirmed. The unauthorized embalming of a dead body did not in itself constitute such mishandling or mutilation of a body as would support a cause of action by the surviving spouse for mental anguish. *Parker v. Quinn-McGowen Co.*, 138 S.E.2d 214 (N.C. 1964).

A sharp distinction can be drawn between unauthorized embalming and unauthorized autopsy. Embalming is the treatment of a dead body with specific preparations, such as aromatic oils or arsenic in order to preserve it from decay. *Commonwealth v. Markmann*, 114 Pa. Super. 29, 174 Atl. 6 (1934). Autopsy is the inspection and partial dissection of a dead body which has been opened to expose important organs either to ascertain the cause of death, the exact nature of the disease or any other abnormalities present. *In re Disinterment of Body of Jarvis*, 244 Iowa 720, 58 N.W.2d 24 (1953). The court in the principal case stated that recovery has generally been allowed for mental anguish as a result of an unauthorized autopsy because of the extreme aversion by many people to an autopsy; but an unauthorized embalming has