

Saskatchewan King's Bench, Chambers

[1927] 2 W.W.R. 607, [1927] 3 D.L.R. 1087

In re Nakauchi Estate

Taylor, J.

Judgment: June 14, 1927

Counsel: *H.J. Schull, K.C.*, for administrator.
W. Robinson, for official guardian.

Taylor, J.:

1 Application for advice and directions as to payment of infants share of father's estate to mother who is about with infants to return to Japan to live with relatives there.

2 I think the learned counsel are in error in assuming that sec. 28¹ of *The Infants Act*, R.S.S., 1920, ch. 155, applies to the natural guardian. It refers to "a guardian appointed or constituted by this Act." At common law the father was the natural guardian of his children. From time to time statutory alterations in this rule, now too numerous to mention, have been made, and we for the present turn to secs. 23 and 24 of *The Infants Act* as amended 1925-26, ch. 42, for the last declaration of the respective rights of father and mother to the guardianship of their infant children. But neither this amending Act nor any of the prior enactments "appointed or constituted" the parent or parents guardians "by virtue of the Act." The language is not apt to describe the relationship of parent and child; the guardianship thus arising is not a relationship constituted or established by "virtue of the Act." It is unnecessary and inadvisable in these applications to determine what is meant by the wording of this sec. 28. But I am quite satisfied that it has no application to "natural guardians," and the natural guardian is not entitled to avail himself or herself of the benefits or subject to the onerous responsibilities conferred and imposed in sec. 28. The rights and duties of the natural guardian must be ascertained independently of that section. Mr. Schull observed that the powers conferred in sec. 28 on a guardian so appointed or constituted is in conformity with the form of order of guardianship in use in England. So long as I have had to do with this practice in Saskatchewan any order for guardianship that ever came before me appointed the applicant guardian *simpliciter* without defining the duties of the office, Under the Rules of the Supreme Court of 1911, Rule 766, "letters of appointment may be obtained as in the case of letters of administration." See now sec. 22 of R.S.S., 1920, ch. 155. The purpose of sec. 29 is, I take it, to particularly define the duties of the office of the guardian thus appointed or constituted where the order or letters of guardianship contain no limitation thereof. It would be improper, it would seem to me, to attach to the Legislature the intention to make such an upsetting change in well-established principles of law by inference from such general and inappropriate language. See also judgment of Ross, Sur. Ct. J., in *In re Sherwin Estate*, *infra*, p. 609.

3 I think therefore that the law is still as stated in *Simpson on Infants*, 1926, 4th ed., p. 129 that:

If a legacy be given to an infant, the executor or trustee cannot discharge himself by paying to the father [or mother], as guardian, unless the Court allows it under special circumstances.

4 *Simpson* refers to a case of *Walsh v. Walsh* (1852) 1 Drew 64 (61 E.R. 375) in which Sir R.T. Kindersley, V.C., made an

order for the payment of a small legacy, £100, to a father to enable him and the infant daughter to emigrate from Ireland to Australia to better themselves. But the facts are not apposite to this instance, and I think much more must be shown than is before the Court on this application to justify an order for payment to the mother about to remove with the infants to Japan; something to indicate firm surety that the infants' money will remain available for them on majority. Leave will be given to submit further material and reset the matter down for rehearing in Chambers if desired. If not the applicant must be advised in accordance with the above opinion. Costs out of the estate.

Footnotes

¹ Unless where the authority of a guardian appointed or constituted by virtue of this Act is otherwise limited, the guardian so appointed or constituted during the continuance of his guardianship:

(a) shall have authority to act for and on behalf of the infant;

(b) may appear in any court and prosecute or defend any action or proceedings in his name;

(c) shall have the charge and management of his estate, real and personal, and the custody of his person and care of his education.