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Guardian Ad Litem—Right of Alleged Incompetent to Contest Appointment

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The net result in Washington is that a trial judge is not always sure what standard he must apply. The safest solution appears to be that this evasive class of evidence must be pigeon-holed in battered compartments if at all possible. Consequently, tortured instructions follow. For example, in *State v. Shay*, 186 Wash. 154, 57 P. 2d 401 (1936) the defendant was convicted of grafting by attempting to bribe jurors and prior similar acts were shown. The only instruction as to the use of the evidence was, "This evidence is admitted only to be considered by you insofar as it may throw light upon the transaction . . . alleged in the information, by showing scheme or system or guilty knowledge." (Brief for Appellant, p. 109). How far does such an instruction go in preventing improper use of the evidence? Scheme or system is an element of no crime but only a medium through which an inference may be made that a necessary element is present. Then the supreme court is forced to decide not only whether the evidence was relevant enough to be admitted but also whether the instructed use was proper. These problems will be less frequent if the Washington Supreme Court is taken at its word in the *Goebel* case when it says that the five common exceptions are not exhaustive, and that the true test is relevancy to the issues.

DALE RIVELAND

Guardian Ad Litem—Right of Alleged Incompetent to Contest Appointment. In an action brought by an ex-husband to enjoin an ex-wife's privilege of visiting their children, the trial court on the motion and evidence of incompetency offered by P appointed a guardian *ad litem* for D. The appointment was resisted by D. On application for a writ of prohibition to prevent appointment of guardian *ad litem*, Held: D is entitled to a full and fair hearing and an opportunity to defend against the appointment of a guardian *ad litem*. *Graham v. Graham*, 40 Wn. 2d 64, 240 P. 2d 564 (1952).

Although there have been seventeen reported cases concerning guardians *ad litem* in Washington, this is the first case involving an objection to the appointment. The point rarely arises because the normal situation concerns either a minor or a person admittedly insane or incompetent. It is the purpose of this note to analyze the Washington cases and show their relation to the principal case.

The first group of Washington cases poses the problem of when failure to appoint a guardian *ad litem* constitutes reversible error. The purposes of such guardian is to protect the interests of a party to an action when, in the opinion of the court, that party is incapable of so doing himself. A minor is legally presumed to lack the capacity to look after his own interests. Therefore the statutory provision for the appointment of a guardian *ad litem* is mandatory, and any adjudication adverse to the interests of such unrepresented minor is reversible error. *Kongsbach v. Casey*, 66 Wash. 643, 120 Pac. 108 (1912); *Mesere v. Flory*, 26 Wn. 2d 274, 173 P. 2d 776 (1946). The failure to appoint a guardian *ad litem* is not reversible error if the minor party was successful, and the adverse party did not object until after the pleading on the merits. *Blumauer v. Clock*, 24 Wash. 596, 64 Pac. 844 (1901); see also *Hale v. Crown Columbia Pulp and Paper Co.*, 56 Wash. 236, 105 Pac. 480 (1909). Reversal will also result if an adjudication is obtained against one *non compos mentis* by default when such party is known to be incompetent and is not represented by a guardian *ad litem*. *Townsend v. Price*, 19 Wash. 415, 53 Pac. 668 (1898). However a failure to appoint a guardian *ad litem* where an insane person is represented by a general guardian who actively defends in the action will not affect the award. In re *DeNisson*, 197 Wash. 265, 84 P. 2d 1024 (1938).

A second group of cases involves the issue of the propriety of appointing a guardian *ad litem* when the party is already under the control of a general guardian. The prob-

lem usually arises where the general guardian and the minor or incompetent person are adversely interested in the outcome of the litigation. In such cases it is both proper and essential that a guardian *ad litem* be appointed. *Ponti v. Hoffman*, 87 Wash. 137, 151 Pac. 249 (1915) (partition proceedings); *Rupe v. Robison*, 139 Wash. 592, 247 Pac. 954 (1926) (divorce).

A third group of Washington cases questions whether, after such appointment, the party was properly represented. The trial court's answer to this question is usually conclusive, as that court has plenary power to revoke the appointment and substitute another if, in its judgment, the guardian *ad litem* is not fulfilling his duty to the party. See *State ex rel. Bernard v. Superior Court*, 74 Wash. 559, 134 Pac. 172 (1913); *Crockett v. Crockett*, 27 Wn. 2d 877, 181 P. 2d 180 (1947). In *Koloff v. Chicago Milwaukee and Puget Sound Railway*, 71 Wash. 543, 129 Pac. 398 (1913) it was held that minor children under the age of fourteen were properly represented in an action for wrongful death of their father when the widow authorized the personal representative to bring the action. In *Shannon v. Consolidated Tiger and Poorman Mining Co.*, 24 Wash. 119, 64 Pac. 169 (1901) the court held that a guardian *ad litem* need not fulfill the qualification of a general guardian; hence it is not necessary for him to be a property holder in the state, and need not post a bond, as required of general guardians.

Guardians *ad litem* are appointed for the benefit of and to protect the best interests of minors and incompetent persons. An adjudication against a person so represented who has had his day in court is valid and enforceable. *Mood v. Mader*, 162 Wash. 83, 298 Pac. 329 (1931).

The principal case rounds out the case law in this state. The former cases have brought out when a guardian *ad litem* is necessary for a minor or for an insane person. Those cases have illustrated the breadth of the trial court's discretion in the appointment and revocation of appointment, because of the court's determination of whether the guardian *ad litem* properly represents such a party in an action. The principal case brings out the rule that a party who objects to an appointment, on grounds that he is not incompetent, is entitled to a full hearing on that issue before the appointment can be made operative.

It is submitted that the result of the principal case is sound and is in accordance with the few jurisdictions that have been confronted with the same problem. In *re Haynes Will*, 82 Misc. 228, 143 N.Y.S. 570 (1913); *Borough of East Patterson v. Karkus*, 136 N.J. Eq. 286, 41 A. 2d 332 (1945).

JAMES F. McATEER

Charitable Trust—Termination by Judicial Decree. *P*, as administrator of settlor's estate, brought an action to terminate a trust. Trial court dismissed the action. *Held*: Reversed. The failure of the trustees to administer the trust according to the provisions of the will and the failure to meet the deadline set by the court in a prior hearing of the same case justified termination of the trust. *McLaren v. Schalkenbach Home for Boys*, 141 Wash. Dec. 111, 206 P. 2d 345 (1952).

The subject matter of the appeal in the principal case originated in a prior action brought by the administrator to terminate the trust establishing a home for orphaned or abandoned boys between the ages of twelve and sixteen years who were trying to make their own living. Prior to World War II, the trustees had established and operated a home meeting the requirements of the settlor's will, but with the court's permission had closed the home during the war period. The trial court decided adversely to appellant. Upon appeal, the Supreme Court in *Townsend v. Schalkenbach Home for Boys*, 33 Wn. 2d 255, 205 P. 2d 345 (1949) found that there was sufficient evidence for