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Infants' Contracts and Their Enforcement

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INFANTS' CONTRACTS AND THEIR ENFORCEMENT

The growing number of minors having sizable funds of their own to spend, either because of greater earning capacity or larger allowances, combined with concurrent growth in competition for such business,[1] has posed with increasing frequency problems in the area of infant's contracts, rights and liabilities.

Before an adult contracts with a minor, he should consider the minor's limited capacity and the availability of the infancy defense in suits to enforce such contracts. The defense of infancy is, however, subject to common law and statutory limitations which may preserve the adult's contract or property rights. The adult, upon realization that the ordinary rules of contract and procedural law are often modified by the infancy of one party, is well advised to use caution in entering into such contracts.

It is the purpose of this Comment to point out, with special emphasis on Washington law when available, some of the problems in procedure and in the special contract rules applicable to the enforcement of infants' contracts.[2]

CAPACITY TO SUE AND BE SUED

Requirement of a guardian ad litem. When an infant is a party to a suit in Washington he must appear through a guardian. If he has no guardian the court should appoint one. The appointment will be made upon the application of the infant if he is fourteen years or older; if he is under this age, upon the application of a relative or friend.[3]

When the infant is the plaintiff, and no application is made, the defendant must raise the issue in his answer, and if it is not so pleaded the requirement is waived.[4] Once the pleadings are closed the court may not dismiss the action for failure to have a guardian appointed.[5]

When the infant is the defendant, and is under fourteen years, or

[1] Note the new teenage credit accounts being offered by leading stores which, while admittedly not legally enforceable, show an attempt to tap this market.

[2] The scope of this Comment is limited by excluding the problems of an emancipated minor but it should be noted that emancipation does not enlarge capacity to contract. It simply increases the infant's field of necessaries. 2 WILLISTON, CONTRACTS § 225 (3rd ed. 1959). The capacity of an infant to appoint an agent or to become a partner is not considered here.

[3] RCW 4.08.050. A similar provision is made under RCW 12.04.140 for justice courts.

[4] Blumauer v. Clock, 24 Wash. 596, 64 Pac. 844 (1901); Hicks v. Beam, 112 N.C. 642, 17 S.E. 490 (1893); 14 ENC. PL. & PR. 1019 (1899).

[5] Kongsback v. Casey, 66 Wash. 643, 120 Pac. 108 (1912). See RCW 4.72.010(5) and (8), which provide for the vacation of judgments entered against minors.

neglects to apply within thirty days after service of summons, application may be made by a relative or friend or any other party to the action.[6] Failure to have a guardian appointed for the defendant infant results in the court not acquiring jurisdiction over the infant.[7] The foregoing has led one commentator to suggest that failure to appoint a guardian *ad litem* will be reversible error only if the infant is unsuccessful and only at the suit of the infant.[8] Whether prior cases will continue to be effective under Rule 9(a) of the new Washington Rules of Pleading, Practice and Procedure, is not yet apparent.

Ex parte Hollopeter[9] must be mentioned in any discussion regarding the question of the need for a guardian *ad litem* for minors who are parties to a lawsuit. The *Hollopeter* decision is often cited for the broad proposition that marriage emancipates a minor male, at least to the extent that he may sue in his own name. However, the strict holding of the case was only that a minor husband had standing to apply in his own name for a writ of habeas corpus to regain the society of his minor wife who was being restrained by her parents. Whether *Hollopeter* would be extended to dispense with the need for a guardian *ad litem* in all suits where the minor plaintiff is married is doubtful.

Judgments secured for or against an infant entered in a suit in which no guardian was appointed are voidable, enforceable only at the election of the infant.[10]

Service of process. If the infant is under fourteen years of age, summons must be served on him and on his "father, mother, guardian or if there be none in this state, then to any person having the care and control of such minor . . .[11] [or] if . . . a guardian has been appointed for any cause, then to such guardian."[12] The purpose of such summons is to provide notice to the parent or guardian and need not be an exact copy of that served on the minor.[13] When more than one infant having the same guardian is involved in a suit, a single summons served on the parent or guardian is sufficient.[14]

Settlements of claims of minors is specifically covered by Superior Court Rule 93.04W.

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[6] RCW 4.08.050(2). A similar provision is made under RCW 12.04.150 for justice courts.
[7] Mezere v. Flory, 26 Wn.2d 274, 173 P.2d 776 (1946).
[8] Note, 28 WASH. L. REV. 75 (1953).
[9] 52 Wash. 41, 100 Pac. 159 (1909).
[10] Blumauer v. Clock, 24 Wash. 596, 64 Pac. 844 (1901).
[11] RCW 4.28.080(11).
[12] RCW 4.28.080(12).
[13] Kalb v. German Sav. & Loan Soc'y, 25 Wash. 349, 65 Pac. 559 (1901).
[14] Morrison v. Morrison, 25 Wash. 466, 65 Pac. 779 (1901).

INFANT'S CONTRACTS ARE VOIDABLE

The oft-quoted rule that an infant's contract is voidable by him before reaching majority, or within a reasonable time thereafter, is far too broad a statement, especially in Washington.

The source of Washington law on this topic is a statute, RCW 26.28.030, which provides:

> A minor is bound, not only by contracts for necessaries, but also for his other contracts, unless he disaffirms them within a reasonable time after he attains his majority, and restores to the other party all money and property received by him by virtue of the contract, and remaining within his control at any time after attaining his majority.

Necessaries. The first "problem word" in the Washington statute is "necessaries." While the above statute itself provides no definition, assistance may be found in the provisions of the Uniform Sales Act, which defines "necessaries" as "goods suitable to the condition in life of such infant or other person, and to his actual requirement at the time of delivery."[15]

Expenses for emergency medical attention were held to be necessaries in *McAllister v. Saginaw Timber Co.*[16] On the other hand, executory contracts with attorneys are not for necessaries and may be disaffirmed by the minor.[17] However, *after* there has been a recovery the attorney's compensation will be fixed by the court.[18] Moreover, the authority of the guardian *ad litem* is limited to the selection of the attorney and the infant is not bound to pay a specified or contingent fee even though both he and the guardian *ad litem* have signed a contract to that effect, unless the contract has been approved by the court.[19] One exception, however, should be noted. When an infant contracts with an attorney to defend him in a criminal proceeding, the infant becomes liable for reasonable attorney's fees, such defenses being classified as necessaries.[20]

An infant is not liable on an executory contract to buy necessaries, and if the contract is partly executed the infant is liable only for the reasonable value of as much as has been performed.[21]

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[15] RCW 63.04.030(2).

[16] 171 Wash. 448, 18 P.2d 41 (1933). The court stated that a thirteen-year-old boy would be liable for emergency medical expenses rendered him as a result of an automobile accident, even though his mother would also have been liable. But *quaere* this. See 27 AM. JUR., *Infants* § 17 (1940).

[17] Plummer v. Northern Pac. Ry., 98 Wash. 67, 167 Pac. 73 (1917), illustrates dubious limits within which the attorney must act, since neither he nor the parties with whom he deals can be certain that the infant will not rescind this authority before a final determination of the controversy, unless the contract with the attorney has been approved by the court.

[18] *Ibid.*

[19] *Ibid.*

[20] 27 AM. JUR., *Infants* § 21 (1940) and cases there cited.

[21] 2 WILLISTON, CONTRACTS § 238 (3rd ed. 1959).

The liability imposed by RCW 26.28.030 on a minor for his contracts for necessaries is defined by the Sales Act as a quasi contractual obligation requiring the infant to pay only the reasonable value of the goods actually received.[22]

Disaffirmance. It is sometimes stated that the infant's privilege of disaffirmance is for the protection of the minor and not "a sword to be used to the injury of others."[23] Such statements demonstrate a conflict in the theories behind the statutes and cases. While an infant, upon his avoidance, must return all property in his possession which he has received by virtue of the contract,[24] he is not required to make good any portion of the consideration that has been disposed of, lost, or wasted during his infancy.[25] The statement in *Lubin v. Cowell*,[26] that the right or privilege to disaffirm must not be raised as a sword, should be directed to disaffimances precluded by RCW 26.28.040[27] and not to those allowed under RCW 26.28.030.

By the majority rule, a minor's privilege to disaffirm is not conditioned upon a showing of any injustice or unfair bargain.[28] This principle is illustrated, in Washington by the cases of *Snodderly v. Brotherton*[29] and *Hines v. Cheshire*,[30] which allowed the infant to disaffirm even though the contract was fair and the disaffirmance actually resulted in injustice to the innocent adult party. However, a strong minority trend allows the vendor to deduct from the purchase price of the article tendered back any depreciation or loss of value from use. Professor Williston considers this the better rule since it would prevent not only the adult vendor, but the minor as well, from overreaching.[31] However, the purpose of the privilege is to protect the infant from imprudent bargains and since the depreciation of many articles not necessaries could well be almost as great as the total sale price, Williston's conclusion seems open to question.

Brief mention should be made of the special treatment of infants under the Sales and Negotiable Instrument Acts. Under the Sales Act,[32]

[22] RCW 63.04.030(2). Plummer v. Northern Pac. Ry., 98 Wash. 67, 167 Pac. 73 (1917). See also Note 2 WASH L. REV. 68 (1926-27).
[23] *E.g.*, Lubin v. Cowell, 25 Wn.2d 171, 170 P.2d 301 (1946).
[24] RCW 26.28.030.
[25] Hines v. Cheshire, 36 Wn.2d 467, 219 P.2d 100 (1950); Snodderly v. Brotherton, 173 Wash. 86, 21 P.2d 1036 (1933).
[26] 25 Wn.2d 171, 170 P.2d 301 (1946).
[27] RCW 26.28.040 (precludes disaffirmance when the minor has engaged in business as an adult or has misrepresented his age).
[28] Nor does RCW 26.28.030.
[29] 173 Wash. 86, 21 P.2d 1036 (1933).
[30] 36 Wn.2d 467, 219 P.2d 100 (1950).
[31] 2 WILLISTON, CONTRACTS § 238 (3rd ed. 1959).
[32] RCW 63.04.250.

the purchaser from the infant's vendee is protected from disaffirmance, by the infant and the possible resulting loss of the purchased article. This was not the rule at the common law.[33] Under the Negotiable Instrument Act not only may the infant disaffirm his obligation to pay when he is the maker of the instrument,[34] but he may also disaffirm his obligations as an indorser.[35]

DISAFFIRMANCE PRECLUDED

Misrepresentation. Some protection for an adult dealing with a minor is afforded by RCW 26.28.040. Under this statute a minor is precluded from avoiding his contracts on the grounds of infancy if "on account of the minor's own misrepresentation as to his majority, *or* from his engaging in business as an adult, the other party has good reason to believe the minor capable of contracting." [Emphasis added.] The statute does not require both a misrepresentation and the engaging in business as an adult, to preclude the infant's disaffirmance.[36]

The Washington court has, in at least one case, read out of RCW 26.28.040 the requirement that the other party "had good reason to believe the minor capable of contracting." In *Thosath v. Transport Motor Co.*[37] the trial court had submitted to the jury the issue of whether, in view of the appearance of the infant, his written representation that he was twenty-two years of age gave the vendor's agent "good reason to believe the infant capable of contracting." On appeal, the majority dismissed the infant's action to rescind the contract, holding that the written statement of the minor precluded his avoidance and that under such circumstances there existed no fact issue for the jury to decide. The four judge minority disagreed, contending that the statute required at least reliance on the misrepresentation by the adult vendor. The dissent's position that an estoppel be required to preclude disaffirmance would seem more preferable.

It is questionable whether the *Thosath* case still states good law. Subsequent cases[38] have mentioned the appearance of the infant as a factor in determining whether the misrepresentation as to age alone should preclude disaffirmance. In *Stone v. Knutzen,*[39] wherein both engaging in business and misrepresentation of age were involved, the court stated it was a question of fact for the trial court to decide

[33] Annot., 16 A.L.R.2d 1420 (1951).
[34] BRITTON, BILLS & NOTES § 126 (1943).
[35] RCW 62.01.022.
[36] Thosath v. Transport Motor Co., 136 Wash. 565, 240 Pac. 921 (1925).
[37] *Ibid.*
[38] *E.g.,* Lubin v. Cowell, 25 Wn.2d 171, 170 P.2d 301 (1946); Stone v. Knutzen, 147 Wash. 54, 265 Pac. 161 (1928).
[39] 147 Wash. 54, 265 Pac. 161 (1928).

whether the vendor "had good reason to believe and did believe the infant capable of contracting as an adult." Whether this statement would have been appropriate absent the engaging in business element, hence overruling *Thosath,* remains in doubt.

Virtually every application for credit or purchase order examined by this writer contained a statement similar to the following: "No credit will be extended to any person under 21 years of age, or, persons under 21 years of age must have the signature of an adult. I certify I am ..... years of age." (Followed by a request for the signature of the applicant or purchaser.)[40] Such statements point up the importance of the unanswered question as to the validity of the *Thosath* holding. If an infant certified in such a statement that he was twenty-one or over, would he be precluded from disaffirming? Would the *Thosath* rule be applicable if the infant was fifteen and looked every year that old?[41]

This problem of when misrepresentation by the infant will preclude avoidance has been the subject of considerable analysis.[42] It would seem that in the absence of a statute, the weight of authority is that a minor's misrepresentation as to his age does not prevent his avoiding the contract he has entered. However, the Washington Legislature is not alone in providing that a minor be precluded in such cases. Iowa,[43] Kansas, [44] and Utah[45] have identical statutes. But even so, the courts of Iowa and Kansas have required actual reliance by the adult party to the contract upon the misrepresentation or business activities of the minor to the extent of actual belief that such minor is an adult before disaffirmance is precluded.[46] In other states, absent such statutes, the decisions are in conflict, various tests being applied to determine when a misrepresenting minor may disaffirm.[47]

[40] Applications for credit at a jewelry store, men's shop and two chain department stores; and purchase orders of a new car agency and a used car lot were examined by the writer and each amply informed the applicant or purchaser of the age requirement. Invariably this was done just prior to asking the applicant or purchaser's age. One chain department store did not have such a statement. For examples, see the statements made by *Lubin* and *Thosath.* See also the application form used by the Washington Title Insurance Co.

[41] What would be the result in the case of a minor who applied for a credit card with an oil company by mailing the application form often used to "blanket" a neighborhood? An examination of two different oil company application forms failed to disclose a statement informing the applicant of an age requirement. One did not even ask the applicant's age.

[42] Annot., 90 A.L.R. 1441 (1934); Annot., 18 A.L.R. 520 (1922); Annot., 6 A.L.R. 416 (1920).

[43] 3 IOWA CODE ANN. c. 599 § 3 (1946).

[44] KAN. GEN. STAT. ANN. c. 38, art. 1, § 03 (1949).

[45] UTAH CODE ANN. tit. 15, c. 2, § 3 (1953).

[46] McClure Motor Co. v. Irwin, 137 Kan. 528, 21 P.2d 403 (1933); Friar v. Rae-Chandler Co., 192 Iowa 427, 185 N.W. 32 (1921); Szwed v. Morris & Co., 187 Mo. 510, 174 S.W. 146 (1915).

[47] *Compare* La Rose v. Nichols, 92 N.J.L. 375, 105 Atl. 201 (1918), *with* Sonntag v.

Engaging in business as an adult. Just what amount of "engaging in business as an adult" is required in order to preclude disaffimance is hard to determine from the cases. In *Gill v. Parry,*[48] the court stated that where the minor lived with his mother, but prior to the transaction in question had been employed in various occupations in Oregon and Washington, and had accumulated $800 out of his wages, paid his own expenses, and did his own banking, such activity prevented avoidance.

In *Russell v. First Nat'l Bank* [49] the court, in refusing to allow a disaffirmance of a contract, relied on the minor's many transactions with the bank and on his personal appearance as giving the adult party good reason to believe him capable of contracting.

In *Stone v. Knutzen,*[50] the court noted that the minor had been working sporadically, had a joint checking account with his father on which he had drawn checks, had previously purchased a car on a conditional sales contract, and had generally engaged in business as an adult, and, therefore, was bound by his contract.

In *Snodderly v. Brotherton,*[51] the court pointed out that regardless of the minor's former business activities, the fact that the vendor knew, or at least his agent knew, that the minor was not in fact of age made such business activities immaterial. Similarly, in *Hines v. Cheshire,*[52] the fact that the minor had for several months been dealing with the vendor did not preclude his disaffirmance when the vendor knew he was not of age.

While there has been apparently no case where the question was squarely presented, it should be safe to suggest that as to the business activities of the minor, an actual estoppel is required in that the activities of the infant must be such as would normally be carried on by an adult. Further, the adult party must have known of such activities and thereby formed an actual belief in the capacity of the minor to contract.

It might be justifiably said that a distinction exists between the misrepresentation cases and those involving business activities, since only in the former is the infant guilty of fraudulent conduct. But when analyzed from the standpoint of upon what the adult party may reasonably rely in concluding the infant capable of contracting, the distinction

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Heller, 97 N.J.L. 462, 117 Atl. 638 (1922). For what would appear to be an equitable result see Doenges-Lang Motors Inc. v. Gillen, 138 Colo. 31, 328 P.2d 1077 (1958). See also 43 C.J.S., *Infants* § 27 (1945).

[48] 114 Wash. 19, 194 Pac. 797 (1921).
[49] 169 Wash. 430, 14 P.2d 14 (1932).
[50] 147 Wash. 54, 265 Pac. 161 (1928).
[51] 173 Wash. 86, 21 P.2d 1036 (1933).
[52] 36 Wn.2d 467, 219 P.2d 100 (1950).

fails. If there is such a distinction the *Thosath* case[53] may be supported; if not, it is submitted that the court or the legislature should take steps to require an actual estoppel in the misrepresentation cases. The basis for this conclusion is that where the misrepresentation or the business activity alone would not lead a reasonable man to believe the other party is of legal age, it would seem preferable to require that the vendor make the same investigation into the age of the prospective vendee that he would make into any credit rating or other matter pertinent to the contract. Moreover, the effect of the denial of the disaffirmance privilege in these cases is to hold the infant to full performance of the contract rather than to require him to pay a reasonable price for the consideration he has received, as is done in the necessaries contracts. When considering the underlying principle behind the privilege of disaffirmance which the common law gave the infant, any statute in derogation of the common law should be strictly construed.

An interesting problem, for which no solution is offered, is posed by purchases completely consumed by the infant. Under the statute[54] the infant need only tender back any property he has retained in his possession. The cases heretofore discussed clearly hold that the destruction or loss of the purchased articles will not prevent the minor's disaffirmance of the contract nor preclude his suit for the return of the purchase price. But what of contracts under which the infant has received the full benefit comtemplated, such as contracts for insurance? May an infant disaffirm after the insured term has expired and demand back the premiums? If he can, the proverbial "sure thing" gamble has been discovered. If he cannot, why is this different from an obligation not a necessary, such as a gasoline bill at the local service station? Is the fact that the insurance contract is aleatory in nature sufficient reason for a distinction?[55]

DISAFFIRMANCE OF LAND CONTRACTS AND CONVEYANCES

It is often said that an infant's conveyances of realty may be avoided only after reaching majority.[56] The reason given is that since an infant may not effectively ratify until majority, neither should he be able to

[53] 136 Wash. 565, 240 Pac. 921 (1925).
[54] RCW 26.28.030.
[55] To the effect that the infant may disaffirm and recover back the premiums, see Simpson v. Prudential Ins. Co., 184 Mass. 348, 68 N.E. 673 (1903). But for a holding that the infant may not recover more than the cash surrender value see Johnson v. Northwestern Mut. Life Ins. Co., 56 Minn. 372, 59 N.W. 992 (1894). The majority of the cases in this country hold that the infant may recover all the premiums, Annot., 94 A.L.R. 965 (1935), but the rule is otherwise in England, 6 ENG. RUL. CAS. 55 (1902).
[56] 2 WILLISTON, CONTRACTS § 235 (3rd ed. 1959).

upset titles until that time. Application of this rule is thought to make realty titles more stable, an admitted policy of the law. There are, however, many jurisdictions[57] which do not follow the above rule and instead treat realty contracts and conveyances the same as other contracts which may be disaffirmed during minority.[58] The Washington court has not passed precisely upon the point, but an inference may be drawn from the language of the court in *Kline v. Galland* [59] that a minor may disaffim an executed deed prior to majority. The court said: "He [the infant] knew all the facts before reaching his majority. He had executed a deed to . . . [the transferee] which he failed to promptly repudiate." The strength of such inference is weakened by the fact that the possibility of laches barring the infant's action, because of his delay in bringing suit *after* reaching hs majority, was also in issue. It is difficult to tell whether the court referred to the failure to repudiate promptly after making the deed or after reaching majority.[60]

A distinct act is required for a disaffirmance, and mere failure to ratify on reaching majority is not effective as an avoidance.[61] Any act inconsistant with disaffirmance will amount to ratification,[62] but the ratification may not be effective until the infant reaches his majority.[63]

CONCLUSION

To summarize briefly: First, the capacity of a minor to sue and to be sued is governed by statutes which indirectly require that for an orderly and effective judgment, an infant must be represented by a guardian. Second, under Washington law, an infant who has misrepresented his age or engaged in business, thereby deceiving an adult party as to his contractual capacity, may not disaffim his contracts. Other obligations of minors may be enforced only for a reasonable value under a *quantum meruit* theory *if* they are classified as necessaries. Finally, while it appears settled in Washington that a minor may disaffirm his contracts for personalty, the ability to disaffirm as to realty before reaching majority is still an open question. R. TED BOTTIGER

[57] 27 AM. JUR., *Infants* § 39 (1940). See also cases cited in 2 WILLISTON, CONTRACTS § 235, nn. 6, 7, & 8 (3rd ed. 1959).
[58] Lubin v. Cowell, 25 Wn.2d 171, 170 P.2d 301 (1946).
[59] 53 Wash. 504, 102 Pac. 440 (1909). *But see* Johnson v. Gerry, 34 Wash. 524, 76 Pac. 258, *aff'd* 77 Pac. 503 (1904).
[60] Consider RCW 7.28.090 which allows an infant three years after reaching majority to recover real estate adversely held during his minority.
[61] 2 WILLISTON, CONTRACTS § 234 (3rd ed. 1959).
[62] Plummer v. Northern Pac. Ry., 98 Wash. 67, 167 Pac. 73 (1917).
[63] 27 AM. JUR., *Infants* § 76 (1940).