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1. SERVICE OF SUMMONS—PROBATE COURT CASES—MINOR OVER 14 YEARS OF AGE—MUST BE MADE UPON BOTH THE MINOR AND HIS GUARDIAN, FATHER, MOTHER, OR THE PERSON HAVING THE CARE OF SUCH MINOR OR WITH WHOM HE LIVES—SECTION 2703.13, R. C.—WHERE MINOR IS UNDER 14 YEARS OF AGE—SERVICE NEED BE MADE ONLY UPON PERSON AUTHORIZED TO ACT FOR HIM—SECTION 2101.29 (A), R. C.
2. SERVICE OF SUMMONS—PROBATE COURT CASES—CANNOT BE WAIVED BY A MINOR—FIDUCIARY, GUARDIAN, ETC., MAY WAIVE SERVICE UPON HIMSELF—SECTION 2101.29, R. C.

SYLLABUS:

1. Service of summons upon a minor over fourteen years of age in probate court cases must be upon the minor personally and also upon his guardian or father, mother, the person having the care of such minor, or the person with whom he lives, as provided by Section 2703.13 Revised Code, but where the minor is under fourteen years of age, such service need only be made upon the persons authorized to act for him as provided by Section 2101.29 (A) Revised Code.

2. Service of summons in probate court cases cannot be waived by a minor. The fiduciary, guardian, father, mother, person having the care of the minor, or the person with whom he lives, may waive service as to themselves as provided by Section 2101.29 (E) Revised Code.

Columbus, Ohio, July 24, 1956

Hon. Marvin E. Young, Prosecuting Attorney
Warren County, Lebanon, Ohio

Dear Sir:

Your request for my opinion as to proper service on minors in probate court cases and the right to waive such service, reads as follows:

“Section 2101.27 of the Revised Code provides how service of *notice* to persons under disability shall be made, and 2101.28 of the Revised Code provides that in certain cases a waiver of the service of notice can be made. Concerning the service and

waiver of notice, the law is apparently quite clear that if the minor is over 14 that service must be made upon the minor and the guardian, father, mother, or other person; also the adult may waive the service.

“However as to the service of summons a distinction is made by Section 2101.29 of the Revised Code, and this section is set forth as an exception to Section 2703.13 of the Revised Code. This last section provides that when the defendant is a minor, that the service must be upon him, and also upon the guardian, or father or if neither can be found, upon the mother, or other person, etc. I can find no provision under this section for the waiver of the necessary service upon the guardian, father, mother, etc. However, the exception 2101.29 provides that if the defendant is a minor under 14 years of age that the service of summons need not be made upon the minor, and also provides that the service necessary upon the adult person, can be waived in writing.

“The question we are concerned with is in the event that it is necessary to serve summons upon a minor, and the minor is over 14 years of age, is it necessary in that event that the adult be served or can that adult waive the service of summons, the same as he could if the minor was under 14 years of age. Also in the event that service of summons is necessary upon a minor under 14 years of age, does the sheriff actually make a service, and his return show that he served the parent or necessary person by handing to that person a copy of the summons for the adult, and another copy for the minor.

“Also in the event it calls for service of summons and the minor is over 14 years of age, is the service made on the adult party even though the adult has signed and filed a waiver?”

A brief retrospect into the legal history of Ohio in its early days will disclose that it has been the general practice in this state not to make service on infants. A very loose mode of transacting such business prevailed to an extent that the practice of every court constituted the law of that court. Realizing that service on infants was a necessary means to apprise their relatives of the institution of suits against them and thus put them into power to protect the interests of the infants, the Supreme Court adopted the English practice of serving infants with process, which is now embodied in the statutes of Ohio. *Massie's Heirs v. Donaldson*, 8 Ohio Reports, 377; *Moore v. Starks*, 1 Ohio St., 369 at 377.

Currently, there are two separate and distinct statutes which govern the service of process upon minors. One relates to service in civil actions

under the general provisions of Chapter 2703, Revised Code; the other deals with service under the provisions of the Probate Code. As to service of summons on minors under the General Provisions, Section 2703.13, Revised Code, provides:

“When the defendant is a minor the service of summons must be made upon him, and also upon his guardian or father or, if neither can be found, upon his mother, or the person having the care of such infant, or with whom he lives. The manner of service must be the same as in the case of adults, and shall be made on such persons in the order named in this section.”

It should be noted that Section 2703.13 was originally Section 5047 of the Revised Statutes, which provided different modes of service upon minors, those who are under and those over fourteen years of age. Although still carried so in the Probate Code, the words “under the age of fourteen” have been eliminated in later codifications and service under said section as currently appearing is required to be upon the infant personally, the same as in the case of adults, and also upon the person caring for him as specified in the statute.

On the other hand provisions for the service of summons on minors in probate court cases differ from those provided by Section 2703.13, Revised Code. The provisions of Section 2101.29, Revised Code, read as follows:

“All sections of the Revised Code with reference to summons and actual and constructive service, in the court of common pleas, shall apply to the probate court, except that :

“(A) when the defendant is a minor under fourteen years of age, service of summons need not be made upon him, but shall be made upon his guardian, father, mother, the person having the care of such minor, or the person with whom such minor lives, in the order named. Such service shall constitute service of summons upon such minor.”

Similar provisions are also contained in the Probate Code with respect to the service of notice upon minors. Section 2101.27, Revised Code, provides:

“Service of notice of any proceeding in the probate court upon persons under disability shall be made as provided in section 2106.26 of the Revised Code by serving the following persons:

“(A) When a person to be served with notice is a minor over fourteen years of age, service of such notice shall be made

upon him and also upon his guardian, father, mother, the person having the care of such minor, or the person with whom he lives, in the order named.

“(B) When the person to be served with notice is a minor under fourteen years of age, service need not be made upon him, but service of such notice shall be made upon his guardian, father, mother, the person having the care of such minor, or the person with whom such minor lives, in the order named. Such service shall constitute service of notice upon such minor.”

The combined effect of these statutory provisions as I analyze them leads me to the following conclusions:

Service of summons upon minors in probate court cases is governed by the general provisions of the Revised Code relating to service in the Court of Common Pleas, except where otherwise provided by statute. When affecting minors under fourteen years of age, service need not be upon the minor personally but only upon his guardian, father, mother, the person having the care of such minor or with whom he lives, as provided by Section 2101.29 Revised Code. In cases where the minor is over fourteen years of age such service must be upon the minor personally, and also upon the persons authorized to act for him as provided by Section 2703.13 Revised Code. Service of notice upon minors in probate cases is governed by the provisions of Section 2101.27 Revised Code, and when involving minors over fourteen years of age such notice must be served upon the minor and also upon the persons authorized to act for him or upon the latter alone when the minor is under fourteen years of age, unless waived as provided by Section 2101.28 Revised Code.

An example of proper service upon a minor where dual service is required will be found in the Mahoning County case of *Paulin v. Sparrow*, 91 Ohio St., 279, involving a land case in which an infant was made a party defendant. Personal service was made upon Emma S. Davidson, a minor, and also upon Mary J. Davidson, her mother, with whom the minor resided. Sustaining the sufficiency of the service as against exceptions to the return the court said:

“The return upon the summons is as follows: ‘I personally served the within named defendant, Emma S. Davidson by delivering to her a true and certified copy thereof with indorsements thereon. I also left a like copy with Mary J. Davidson with whom the minor child resides.’ This service of the summons in this case upon the minor defendant Emma S. Davidson was in

direct conformity with the statute providing for service of summons upon minors under fourteen years of age."

This opinion still controls dual service wherever it is made mandatory despite the elimination of the split infancy provisions in Section 2703.13 Revised Code.

On the question of waiver of service by an infant, I find it authoritatively stated that in every jurisdiction where the question has been raised, including Ohio, it has been held that an infant can neither acknowledge nor waive the regular service upon him. 121 A. L. R., 957, 27 Am. Jur., 859, Sec. 140. In *Feigi v. Lopartkovich*, 38 Ohio App., 338, the headnote reads:

"In Ohio, in a suit against a minor, jurisdiction over the person of the minor can be acquired only by service of process in the manner provided by the statutes, and the minor cannot waive compliance with said statutes."

The Supreme Court has gone further and extended the rule to make it applicable to a guardian of the minor. In *Roberts v. Roberts*, 61 Ohio St., 96, it held:

"A guardian of a minor has no authority to waive the issuing and serving of summons on his ward in an action affecting the ward's rights nor to dispense with a guardian ad litem, unless authorized so to do by statute."

To like effect is the appellate case of *Templeman v. Hester*, 65 Ohio App., 62. The *Roberts* case was decided in 1899, and in order to overcome the effect of that decision but heeding its mandate, the General Assembly in 1931 (114 O. L., 326) amended the Probate Code by adding Section 105-24 to the General Code, which now forms Section 2101.29 (E) of the Revised Code. It reads in part:

"Service may be waived in writing by any person not under disability, including any fiduciary, the guardian, father, mother, person having the care of a minor, or the person with whom he lives * * * No person under disability may waive service."

A similar provision is contained in Section 2101.28, Revised Code, which authorizes such waiver of service with respect to notices.

As to your question on the manner of service as affected by the different minority periods, I wish to direct your attention to the provisions

of Section 2703.13 Revised Code, which requires the service of summons upon a minor where dual service is required to be the same as in the case of adults, namely, each to be served with a copy of the summons. Where, however, the minor is under fourteen years of age, service need only be by substitution, namely, upon the person having the care of the minor in the order named in the statute, without the need of service upon the minor personally, as provided by Section 2101.29 Revised Code. Such course was followed by the court in *Harvey v. Sampson*, 25 O. O., 250, where said section was considered.

The return of the officer serving summons in a probate court case involving minors should state all the necessary facts showing compliance with statutory requirements governing the service of process upon minors. And where, for example, service is made upon the mother of a minor under the age of fourteen, and the return upon the summons fails to state that the father was dead and no legal guardian had been appointed, such return will be deemed defective unless the omitted facts actually existed and could be added to the return by an amendment thereof. See *Paulin v. Sparrow*, *supra*.

Accordingly, in specific answer to your questions it is my opinion that:

1. Service of summons upon a minor over fourteen years of age in probate court cases must be upon the minor personally and also upon his guardian or father, mother, the person having the care of such minor, or the person with whom he lives, as provided by Section 2703.13 Revised Code, but where the minor is under fourteen years of age, such service need only be made upon the person authorized to act for him as provided by Section 2101.29 (A) Revised Code.

2. Service of summons in probate court cases cannot be waived by a minor. The fiduciary, guardian, father, mother, person having the care of the minor, or the person with whom he lives, may waive service as to themselves as provided in Section 2101.29 (E) Revised Code.

Respectfully,
C. WILLIAM O'NEILL
Attorney General