

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2007-SC-0250-DG

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SUPREME COURT

IRA E. BRANHAM; MILLER KENT CARTER and
BRANHAM AND CARTER, P.S.C.

APPELLANTS

VS: ON REVIEW FROM COURT OF APPEALS OF KENTUCKY
CASE NO. 2006-CA-0322-MR
PIKE CIRCUIT COURT - ACTION NO. 04-CI-1190

ELIZABETH STEWART, GUARDIAN OF THE ESTATE
AND THE PERSON OF GARY RYAN STEWART,
AN INCOMPETENT ADULT


APPELLEE

**BRIEF ON BEHALF OF APPELLANTS, IRA E. BRANHAM,
MILLER KENT CARTER AND BRANHAM AND CARTER, P.S.C.**

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CERTIFICATE OF SERVICE

This is to certify that the foregoing was this 26th day of February, 2008, mailed first class to: John J. Mueller, Esq., John J. Mueller, LLC, The Provident Building, Suite 800, 632 Vine Street, Cincinnati, OH 45202-2441, Attorney for Appellee; Michael Lucas, Esq., P.O. Box 852, Pikeville, KY 41502, Attorney for Miller Kent Carter; Samuel Givens, Jr., Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601-9299; and Hon. Eddy Coleman, Judge, Pike Circuit Court, Division No. I, Hall of Justice, Suite 435, 172 Division Street, Pikeville, KY 41501.



David C. Stratton

STATEMENT
CONCERNING ORAL ARGUMENT

Ira E. Branham, Miller Kent Carter and Branham & Carter, P.S.C., welcome the opportunity to address any question the Court may have concerning the facts and issues of this matter and their importance to the citizens of Kentucky.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT CONCERNING ORAL ARGUMENT i

INTRODUCTION..... 1

Restatement of the Law Governing Lawyers 1

STATEMENT OF THE CASE..... 2-4

APPELLATE PROCEEDINGS..... 4-5

Corpus Juris Secundum 4-5

Daugherty v Oberg,
297 Fed. Supp. 635 (Minnesota 1969) 4-5

Martineau v. City of St. Paul,
172 Fed. 2d 777 (8th Cir. 1949) 5

ARGUMENT 5-10

I. THE BEST GUIDELINE FOR ESTABLISHING WHEN,
AND IF, A DUTY IS CREATED BETWEEN ATTORNEY
AND A BENEFICIARY IS SET OUT IN THE *RESTATEMENT*
OF LAW GOVERNING LAWYERS 5-7

Restatement of Law Governing Lawyers..... 5-7

Kentucky Bar Association’s Ethic’s Opinion 401..... 7

II. THE NEED TO EXPAND THE ATTORNEY’S DUTY
FOR A GUARDIAN TO THE BENEFICIARY IS NOT
NECESSARY, IN THAT THE KENTUCKY GENERAL
ASSEMBLY HAS PROVIDED A STATUTORY SCHEME
TO PROTECT THE INTEREST OF MINORS..... 7-9

KRS 387.032 7

KRS 387.070..... 7-8

KRS 387.125..... 8

KRS 387.305.....	8
<i>Black v. Weideman</i> , 254 S.W.2d 344 (1952).....	9
III. ANY NEW STANDARDS CREATED BY THE COURT SHOULD BE APPLIED PROSPECTIVELY AND NOT RETROACTIVELY.....	9-10
CONCLUSION.....	10
APPENDIX	

INTRODUCTION

MAY IT PLEASE THE COURT:

Branham in representing Vicky Backus in her individual capacity, as Administratrix of the Estate of her deceased son, Adam Tyler Stewart, and as Guardian for her surviving infant son, Gary Ryan Stewart (hereafter "Stewart"), did not create an attorney-client relationship with Stewart.

Kentucky law has not created an attorney-client relationship between the attorney and the beneficiary where the attorney additionally represents the guardian, either individually or in some other capacity.

The Appellees seek to extend the attorney-client relationship in Kentucky in an area which has heretofore never been done, based upon several out of state cases. However, the best interest of Kentuckians are served by following the *Restatement of the Law Governing Lawyers*, which sets forth the circumstances when a lawyer representing a guardian would have some duties to a beneficiary. But, as the Court will see, none of the conditions which are prerequisite under the *Restatement of Law Governing Lawyers* for the attorney's duty to flow to the beneficiary are applicable in this matter. For these reasons and others, the Court should reverse the holding of the Court of Appeals and reinstate the summary judgment of the Trial Court finding that Branham is not liable to Stewart on the basis that no attorney-client relationship was established and therefore no duty was breached.

STATEMENT OF THE CASE

On July 21, 1997, Gary Stewart while traveling with his two minor children, Adam Tyler Stewart and Gary Ryan Stewart, was involved in an automobile accident. As the result of this accident Gary Stewart, as well as his son, Adam Tyler Stewart died. Gary Ryan Stewart, suffered multiple injuries.

At the time of the accident, Gary Stewart was divorced from the boys' mother, Vicky. Vicky was married to Marty Backus, Jr., at the time of the accident. Marty, Vicky, Adam and Gary Ryan resided in the state of Arkansas. The children were visiting their father in Pike County, Kentucky, at the time of the accident.

After the accident, Vicky Backus (hereafter "Backus"), retained Ira Branham, Branham and Carter, P.S.C., ("Branham") to represent her. Branham represented Backus in three different capacities. He represented Backus individually, as Administratrix of the Estate of Adam Tyler Stewart, and as Next of Friend of Gary Ryan Stewart.

Prior to the settlement of the claims, Backus converted her fiduciary relationship with Gary Ryan Stewart from next of friend to that of Guardian. The Pike District Court required Backus to post a \$5,000 bond, but did not require a surety of her.

Subsequently, Branham was able to settle the different claims brought by Backus individually, as Administratrix and as Guardian for 1.3 Million Dollars which represented all the insurance money available. The money was divided equally between Backus as Guardian on behalf of Gary Ryan Stewart, and half individually and as administratrix of the estate of Adam Tyler Stewart. As the result of the settlement, Backus on behalf of Stewart recovered \$650,000. Of this amount \$150,000 was set aside for medical bills,

leaving \$500,000 to Stewart. Out of the \$500,000, \$300,000 was put into an annuity for Stewart, which he ultimately received. From the remaining \$200,000, attorney fees were deducted and the balance was paid to Backus as Guardian on her son's (Stewart) behalf. Branham did not charge any cost to Stewart for the prosecution of the claim, and all costs were taken out of Vicky Backus's portion of the money recovered by her individually and as Administratrix to the estate of Adam Tyler.

Following the settlement between the parties, Backus asked the Pike District Court to approve the settlement of Stewart's claims. Branham prepared the petition and the Court conducted a Hearing to review the proposed settlement, which it approved. The District Court did not place an additional bond on Backus as the Court was personally familiar with her. At no time did the Court place a surety on the bond of Backus.

Branham was able to negotiate the medical bills down to less than \$150,000 and the balance was paid over to Backus, as Guardian for Stewart.

Following the settlement, Backus and her husband returned to the state of Arkansas with Stewart. He was 15 years of age at the time of the accident. After reaching the age of majority, he graduated from high school, attended college and married Elizabeth Stewart on July 22, 2000. Stewart and his wife have had two children together, whom he has worked to support.

On June 23, 2003, Stewart filed suit against his mother and step father in his own name, in the state of Arkansas, alleging that they had failed to properly convey to him all the money awarded to him in the Kentucky car accident case. As the result of that suit Stewart has received money from his mother and step-father but less than the full amount

awarded by the Court.

Approximately five months after the Arkansas suit was initiated by Stewart in his own capacity, his wife, Elizabeth Stewart, filed a petition to declare him incompetent on November 11, 2003. An order declaring Stewart incompetent to handle his own affairs was not entered until July 14, 2005.

On August 26, 2004, Elizabeth Stewart, on behalf of her fiduciary Gary Ryan Stewart filed this civil action against Branham alleging that while he represented Vicky Backus in her fiduciary relationship with her son, that Branham was also Stewart's attorney and that he breached certain duties to Stewart. Specifically, that Branham had a conflict of interest in representing Backus and Stewart, that he did not divide the money between the two properly, and he failed to safeguard the money given to Backus on Stewart's behalf. The Pike Circuit Court entered Summary Judgment finding Branham did not have an attorney-client relationship with Stewart.

APPELLATE PROCEEDINGS

The Court of Appeals reversed the Trial Court's Summary Judgment finding that an attorney-client relationship did not exist between Branham and Stewart, and held that such an attorney-client relationship did exist. The Court of Appeals did not rely upon a single Kentucky case to support its holding. The Court of Appeals' reliance on *Corpus Juris Secundum* was misplaced.

Corpus Juris Secundum states: "However, even though the suit is brought by the guardian, the infant remains the real party in interest." That statement is supported by footnote 16, page 237 which cites *Daugherty v Oberg*, 297 Fed. Supp. 635 (Minnesota

1969) and *Martineau v. City of St. Paul*, 172 Fed. 2d 777 (8th Cir. 1949). Both of those cases deal with which Court has jurisdiction to hear a matter in which a non-resident guardian was appointed for the ward.

In each case, the Court held where a non-resident guardian was not connected with or acquainted with the ward or her parents, all of whom were residents of a foreign state, and were appointed for the sole purpose of creating diverse parties necessary to invoke jurisdiction in federal court, such appointment was improper in view of the state providing that the District Court shall not have jurisdiction of civil matters in which any party, by assignment or otherwise has been improperly or inconclusively made or joined, to invoke jurisdiction of such Court.

Neither of the cases cited in the treatise dealt with the issue of attorney-client relationship being extended to a ward when the attorney otherwise represents the guardian. The Court of Appeals relied on *the dictum* of these cases to support its opinion. The Court of Appeals failed to set forth any explanation of why a duty was created nor did the Court explain the extent of the duty created.

ARGUMENT I

THE BEST GUIDELINE FOR ESTABLISHING WHEN, AND IF, A DUTY IS CREATED BETWEEN ATTORNEY AND A BENEFICIARY IS SET OUT IN THE *RESTATEMENT OF LAW GOVERNING LAWYERS*.

The *Restatement of Law Governing Lawyers*, Section 51, deals with the duty of care to certain non-clients, Sub-Section 4 states:

“to a non-client when to an extent that:

a) the lawyer’s client is a Trustee, Executor or Fiduciary acting primarily

- to perform similar functions for the non-client;
- b) the lawyer knows that the appropriate action by the lawyer is necessary with respect to a matter within the scope of the representation to prevent or rectify the breach of a fiduciary owed by the client to the non-client, where (i) the breach is a crime or fraud or (ii) the lawyer has assisted or is assisting breach;
- c) the non-client is not reasonably able to protect its rights; **and**,
- d) such a duty would not specifically impair the performance of the lawyer's obligations to the client."

The *Restatement* goes on to state, on page 363:

"A lawyer representing a client in the client's capacity as a fiduciary (as opposed to a client's personal capacity) may in some circumstances be liable to a beneficiary for failure to use care and to protect the beneficiary. The duty should be recognized **only** when the requirements of §4 are met and when action by the lawyer would not violate the appropriate professional rules."

(emphasis added).

Therefore, in order for a duty to exist, all four sub-sections must be applicable, which is not the case in this matter. Section d is not met because it is undisputed that Branham's client was Vicky Backus. She was his client for her individual claim and her claim as Administratrix of the Estate of Adam Tyler Stewart. If the Court creates a duty to Stewart by Branham it would create a conflict of interest for Branham. This conflict would impair his obligations to Backus. Therefore, pursuant to the *Restatement* no duty to Stewart is created.

The *Restatement* specifically sets forth a similar analysis when it states in Section 51, page 365:

"A lawyer owes no duty to a beneficiary if recognizing such duty would create conflicting or inconsistent duties that might significantly impair the lawyer's performance of obligation to the lawyer's client in the circumstances of the representation. Such impairment might occur, for

example, if the lawyer were subject to liability for assisting the fiduciary in an open dispute with beneficiary or for assisting fiduciary in exercise of its judgment that would benefit one beneficiary at the expense of another. For similar reasons, a lawyer is not subject to liability to a beneficiary under Sub-Section 4 in representing a fiduciary in a dispute or negotiation with the beneficiary with respect to a matter affecting the fiduciaries interest.”

Stewart claims in this suit that Branham did not divide the money properly between his mother and himself. Clearly, because there was a limited amount of money and the money had to be divided, there was the possibility of an open dispute with the beneficiary in regard to how to divide the money. Therefore, Branham did not owe a duty to Stewart.

While not binding, the thought process advocated by the *Restatement* is adopted by the Kentucky Bar Association’s Ethic’s Opinion 401. KBA Ethic’s Opinion 401 states: “A lawyer who represents a fiduciary ... stands in a lawyer-client relationship with the fiduciary and not with respect to the fiduciary’s estate.”

ARGUMENT II

THE NEED TO EXPAND THE ATTORNEY’S DUTY FOR A
GUARDIAN TO THE BENEFICIARY IS NOT NECESSARY, IN
THAT THE KENTUCKY GENERAL ASSEMBLY HAS PROVIDED A
STATUTORY SCHEME TO PROTECT THE INTEREST OF MINORS.

KRS 387.032 provides that a District Court in appointing a guardian shall appoint a person who would be in the best interest of the minor taking into consideration the ability of the person to manage and preserve the minor’s estate, taking into consideration the person to be nominated.

KRS 387.070 provides that a guardian shall be bonded and the bond shall be

approved by the District Court. No surety shall be required unless the District Court deems it imprudent not to.

KRS 387.125 provides a guardian may institute or defend actions, claims or proceedings in any jurisdiction for the protection of wards of the state. A guardian may settle or compromise the action, claim or proceeding on behalf of the ward. Upon approval of the settlement, or compromise, a guardian may execute a release on behalf of the ward. A guardian shall receive all proceeds of a settlement for management in accordance with the provisions of the statute.

The District Court is bound with authority to approve all settlements over \$10,000.

Because of these statutory protections, minors are adequately protected in Kentucky. In the case at hand, Vicky Backus, Gary Ryan Stewart's mother, was appointed Guardian. Stewart's father was dead and his mother was the logical choice. In this case, the Pike District Court did not require surety on the bond for the guardian. The Court was personally familiar with the family and had no problem in not requiring a surety. While this may have been imprudent in hindsight, if it was a mistake it's a mistake that the attorney for the guardian should not bear. After all, the Pike District Court did not feel the need to assume the natural mother would breach the trust to her son. Likewise, the Court did not find the amount of the settlement to be unfair to Stewart.

While not applicable to the facts of this case, the Kentucky Statutes also provide additional protection for minors through the appointment of a Guardian Ad Litem pursuant to KRS 387.305. This issue is discussed in this appeal because if this Court

should find that Branham had a duty toward Stewart, then the Court needs to consider the problems that could arise if such duty is created for future cases.

Kentucky Courts have held that a Guardian Ad Litem is both a fiduciary and a lawyer for the infant and in a special sense a representative of the Court to protect the minor. *Black v. Weideman*, 254 S.W.2d 344 (1952). Thus, in the event a Guardian Ad Litem is appointed in a matter and there are duties by the attorney for the guardian toward the minor, the minor would then in fact have two lawyers. If the minor has two lawyers, what if there is a dispute between the two lawyers as to the reasonableness of the settlement. If a guardian insists a case be tried and the attorney for the guardian recommends a settlement but the Guardian Ad Litem prefers the case be tried, who would have the final say. If the case is tried and an unreasonable verdict is obtained, is the attorney responsible to the beneficiary years after the fact. To extend the attorney-client relationship to the beneficiary would truly open Pandora's box, especially in a case where a Guardian Ad Litem is also appointed.

The creation of a duty to the beneficiary as desired by Stewart in this case would create a chilling effect on lawyers taking these types of cases because the attorney will always be subject to being second guessed for a bad result years after the fact. It is for these reasons Kentucky should not expand the attorney-client relationship in this case.

ARGUMENT III

ANY NEW STANDARDS CREATED BY THE COURT SHOULD BE APPLIED PROSPECTIVELY AND NOT RETROACTIVELY.

It is Branham's belief that in the event this Court chooses to extend for the first

time the attorney-client relationship, that the duty not be applied retroactively to this case.

This is a case of first impression and it is not equitable to hold Branham liable for the breach of a duty that did not exist at the time in question.

CONCLUSION

For all the reasons stated herein Branham asks the Court to reverse the Court of Appeals and reinstate the Summary Judgment entered by the Trial Court.

Respectfully submitted,



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