

IN THE SUPREME COURT OF OHIO

Frederick R. Nance, : Case No. 06-1137
: :
Appellant, : :
: :
v. : In Re: Guardianship of Walter Hollins,
: Jr.
: On Appeal from the
Mark McLeod, Guardian, : Cuyahoga County Court of Appeals,
: Eighth Appellate District
Appellee. : Nos. 86412; 86574

REPLY BRIEF OF APPELLANT
FREDERICK R. NANCE

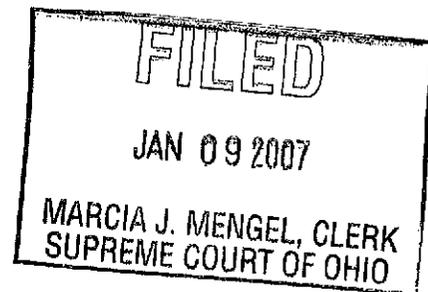
John F. Shelley (0005744) (*Counsel of Record*)
Ellen K. Meehan (0059472)
J. Seth Metcalf (0077996)
SQUIRE, SANDERS & DEMPSEY L.L.P.
4900 Key Tower
127 Public Square
Cleveland, OH 44114-1304
+1.216.479.8500
+1.216.479.8780 (Facsimile)
jshelley@ssd.com

COUNSEL FOR APPELLANT
FREDERICK R. NANCE

Steven D. Rowe (0020475)
Erica Ann Probst (0073486)
KEMP, SCHAEFFER, ROWE & LARDIERE
CO., LPA
88 West Mound Street
Columbus, OH 43215

COUNSEL FOR APPELLEE
MARK MCLEOD, GUARDIAN

-continued-



Geoffrey N. Fieger
FIEGER, FIEGER, KENNEY & JOHNSON
19390 West Ten Mile Road
Southfield, MI 48075-2463

COUNSEL FOR APPELLANT
REGINA HARRIS

Terry H. Gilbert (0021948)
1700 Standard Building
1370 Ontario St.
Cleveland, OH 44113

COUNSEL FOR APPELLANT
WALTER HOLLINS, SR.

Edward S. Jerse (0013155)
Seamus J. McMahon (0077103)
George M. Moscarino (0019447)
William H. Falin (0038839)
MOSCARINO & TREU, LLP
The Hanna Building
1422 Euclid Avenue, Suite 630
Cleveland, OH 44115

COUNSEL FOR APPELLANT
UNIVERSITY HOSPITALS OF CLEVELAND

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

PROPOSITION OF LAW NO. 1

**A Probate Court Retains Subject Matter Jurisdiction
Over Pending Guardianship Affairs After A Ward
Reaches The Age Of Majority In Order To
Effectuate A Proper Accounting And Settlement
Of The Ward's Estate**..... 1

A. STANDING..... 1

In re Estate of Emily Landrum (January 31, 1991) Ross Cty. App.
No. 1645, 1991 Ohio App. LEXIS 488 1

In Re McAuley (1979), 63 Ohio App.2d 5, 408 N.E.2d 697, 17 Ohio Op. 3d 222 (1979) 2

B. EIGHTH DISTRICT COURT OF APPEALS' DECISION..... 2

Revised Code 2101.24(A)(1)(c), (e),and (s) 3

Revised Code 2101.24(C) and (D)..... 3

Revised Code 2111.50 (A) – (C) 3

Revised Code 2109.32(A)..... 3

Revised Code 2109.31(A)..... 3

Revised Code 2109.31(C)(1), (2), (4), and (5) 4

Railway Co. v. Pace (1903), 68 Ohio St. 200, 68 N.E. 490,..... 4

C. ALTOMARE, LAYSHOCK, AND HINERMAN DECISIONS..... 5

In the Matter of Jason Altomare, a Minor (January 23, 2001), Columbiana Cty.
App. No. 99-CO-26, 2001 Ohio App. LEXIS 260 5

In re: The Guardianship of Terry Layshock, Amanda Caro, Julie Miller
(December 28, 2001), Mahoning Cty. App. No. 00-C.A.-198, 2001
Ohio App. LEXIS 5960 5

In the Matter of the Guardianship of Sara E. Hinerman (November 1, 2001),
Lake App. No. 00CA1, 2001 Ohio App. LEXIS 4926 5

Revised Code 3109.015, 6

D. THIS COURT’S <i>HARDS</i> DECISION.....	7
<i>State ex rel. Estate of Hards v. Klammer</i> , 110 Ohio St.3d 104, 2006-Ohio-3670, 850 N.E.2d 1197.....	7
E. CONSTITUTIONAL ISSUE.....	8
Section 1, Article IV, United States Constitution.....	8
CERTIFICATE OF SERVICE	10

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>In the Matter of Jason Altomare, a Minor</i> (January 23, 2001), Columbiana Cty. App. No. 99-CO-26, 2001 Ohio App. LEXIS 260	5
<i>State ex rel. Estate of Hards v. Klammer</i> , 110 Ohio St.3d 104, 2006-Ohio-3670, 850 N.E.2d 199	7
<i>In the Matter of the Guardianship of Sara E. Hinerman</i> (Nov. 1, 2001), Lake App. No. 00CA1, 2001 Ohio App. LEXIS 4926	5
<i>In re Estate of Emily Landrum</i> (January 31, 1991) Ross Cty. App. No. 1645, 1991 Ohio App. LEXIS 488	1
<i>In re: The Guardianship of Terry Layshock, Amanda Caro, Julie Miller</i> (December 28, 2001), Mahoning Cty. App. No. 00-C.A.-198, 2001 Ohio App. LEXIS 5960	5
<i>In Re McAuley</i> (1979), 63 Ohio App.2d 5, 408 N.E.2d 697, 17 Ohio Op. 3d 222 (1979)	2
<i>Railway Co. v. Pace</i> (1903), 68 Ohio St. 200, 68 N.E. 490,.....	4
 <u>Statutes</u>	
Section 1, Article IV, United States Constitution	8
Revised Code 2101.24(A)(1)(c), (e), and (s)	3
Revised Code 2101.24(C) and (D).....	3
Revised Code 2109.31(A).....	3
Revised Code 2109.31(C)(1), (2), (4), and (5)	4
Revised Code 2109.32(A).....	3
Revised Code 2111.50(A)-(C).....	3
Revised Code 3109.01	5,6

PROPOSITION OF LAW NO. 1

A Probate Court Retains Subject Matter Jurisdiction Over Pending Guardianship Affairs After A Ward Reaches The Age Of Majority In Order To Effectuate A Proper Accounting And Settlement Of The Ward's Estate

A. STANDING

Appellant Nance has standing to pursue this Appeal. Once the Cuyahoga County Probate Court removed McLeod as Hollins' guardian, Nance was appointed by the probate court as the successor guardian in this case. Appellee's assertion that a successor guardian was never appointed in this case (Appellee Merit Brief at 12, footnote 3.) is simply not true. The Cuyahoga County Probate Court case number – GDM 66205 – has remained the same. For Nance's appointment, the use of the prefix of 2005 instead of 2002, and the added suffix of B on the probate court's records were functions of the court's case management computer system reflecting that a successor fiduciary was appointed in 2005.

As successor guardian, Nance filed his Guardian's Inventory and his Inventory was approved. Nance filed a Notice of Appearance in the appellate proceeding. He obeyed the Eighth District's Local Rule 3 that co-appellants with common interests should refrain from filing duplicative briefs where possible. Fully satisfied with the comprehensive brief submitted by co-appellee, University Hospitals of Cleveland, Nance felt no need to clutter the Eighth District's chambers with duplicative arguments because he respected judicial economy.

Nance filed a Motion for Reconsideration from the appellate court's decision. When McLeod filed a Motion to Strike Nance's Motion for Reconsideration, arguing that Nance was not properly a party, McLeod's Motion to Strike was denied.

McLeod relies on *In re Estate of Emily Landrum* (January 31, 1991), Ross Cty. App. No. 1645, 1991 Ohio App. LEXIS 488, for the proposition that merely appearing in an action and

making a statement does not make one a party who can appeal. (Appellee's Merit Brief at 15.) *Landrum* does so hold. However, in *Landrum*, the appellant was a beneficiary of a trust and it was hoped that the trust would receive proceeds from an estate. In the instant case, Nance was an appointed party - the successor guardian for Hollins - charged with protecting his ward's best interest. He has not merely appeared in the action as Appellee would have this Court believe.

McLeod similarly relies on the case of *In Re McAuley* (1979), 63 Ohio App.2d 5, 408 N.E.2d 697, 17 Ohio Op. 3d 222, for the proposition that merely being allowed to appear in an action and submit a brief in court, does not make the party a real party in interest to the proceedings. (Appellee's Merit Brief at 15.) However, McLeod fails to mention that this proposition was contained in the dissent opinion and, therefore, does not constitute the holding of that court.

Appellee suggests that Nance himself has no interest in this case (Appellee's Merit Brief at 16.) In a limited sense this is true; in his individual capacity, Nance has no legal interest in the case. But Nance was appointed as a fiduciary in this case and in all filings with this Court and the Eighth District, Nance has been acting in his fiduciary capacity as successor guardian of Walter Hollins, Jr. As such he indeed has an interest in this case, that of protecting the best interest of his ward.

B. EIGHTH DISTRICT COURT OF APPEALS' DECISION

Appellee states that the Eighth District's holding "simply indicates that the probate court no longer had the authority to approve a minor's settlement because the ward had turned 18." (Appellee's Merit Brief at 16.) This interpretation is convenient for Appellee's position but not true. The Eighth District's majority unambiguously ruled that "once the ward turned 18 on January 29, 2005, the probate court was without jurisdiction to issue *any* orders."

This ruling effectively eviscerates many Ohio statutes that grant the probate court authority to control the conduct of its guardians. The basic statutory framework for the probate court's authority is set forth in R.C. §§ 2101.24 and 2111.50. Under R.C. §§ 2101.24(A)(1)(c), (e), and (s), the probate court has exclusive jurisdiction to appoint and remove guardians, to direct and control the conduct of guardians, to settle guardians' accounts, and to act for and issue orders pursuant to R.C. 2111.50. Under R.C. 2111.50, the probate court is made the superior guardian of wards who are subject to its jurisdiction. This section enumerates specific powers of the probate courts, including the authority to control guardians, confer powers upon them, and limit or deny their authority, all to be exercised in the best interest of the ward. R.C. 2111.50(A)-(C).

Finally, the probate court has exclusive and plenary power to dispose of matters properly before it, unless that power is expressly limited or taken away by another section of the Revised Code. Revised Code 2101.24(C) and (D) provide: "The probate court has plenary power at law and in equity to dispose fully of any matter that is properly before the court, unless that power is expressly otherwise limited or denied by a section of the Revised Code" and "The jurisdiction acquired by a probate court over a matter or proceeding is exclusive of that of any other probate court, except when otherwise provided by law." Appellee has cited to no section of the Revised Code that limits the probate court's jurisdiction in this case. Indeed, there is none.

Additional statutory framework governing the conduct of guardians is found in R.C. 2109.32(A) which provides that once a final account has been filed, the court holds a hearing on the account, and if the guardian neglects or refuses to file an account, the probate court may issue a reproofing citation. R.C. 2109.31(A). Further statutory authority is granted to the probate courts if a guardian continues to disobey. The probate court can order removal, deny the

fiduciary compensation, fine the fiduciary, or hold the fiduciary in contempt. R.C. 2109.31(C)(1),(2),(4), and (5).

Appellee suggests that even after a ward attains age eighteen, the probate court continues to have certain authorities relating to the approval of final accounts and performance of other tasks associated with winding-up a guardianship. (Appellee's Merit Brief at 26.) Yet Appellee also suggests that the probate court is stripped of all authority to issue any other orders that are properly before the court. (Appellee's Merit Brief at 26.) In other words, Appellee would have this Court uphold certain statutory authorities, such as those found in sections 2109.31-32 of the Revised Code, while striking others, specifically the authority found in R.C. 2101.24(C) to "dispose fully of any matter that is properly before the court." Appellee cannot have his cake and eat it, too. Appellee is asking this Court to recognize and uphold certain statutes while simultaneously ignoring and denying the probate courts the use of others. The Eighth District's ruling at least was consistent in this respect. It found that the probate court lost jurisdiction to issue *any* orders.

Upholding the Eighth District's decision will render many of the statutory authorities cited above null and void. Thus the Eighth District's decision must be overturned because it renders valid statutes, on which the general public and the courts have long relied, obsolete. This Court, in *Railway Co. v. Pace* (1903), 68 Ohio St. 200, 205, 68 N.E. 490, holds that reconciliation should be sought where possible: "It is to be inferred that a code of statutes relating to one subject was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions." Proposition of Law No. 1 harmonizes the statutes, as case law and statutory construction demand: though a ward may attain majority age, the probate court retains subject matter jurisdiction over pending guardianship matters.

C. ALTOMARE, LAYSHOCK, AND HINERMAN CASES

Appellee argues that the cases of *In the Matter of Jason Altomare, a Minor* (January 23, 2001), Columbiana Cty. App. No. 99-CO-26, 2001 Ohio App. LEXIS 260, *In re: The Guardianship of Terry Layshock, Amanda Caro, Julie Miller* (December 28, 2001), Mahoning Cty. App. No. 00-C.A.-198, 2001 Ohio App. LEXIS 5960, and *In the Matter of the Guardianship of Sara E. Hinerman* (November 1, 2001), Lake App. No. 00CA1, 2001 Ohio App. LEXIS 4926 are controlling and dispositive of the issue before this Court (Appellee's Merit Brief at 17-18).

In *Altomare*, Jason Altomare was injured in an automobile accident while a minor. A guardian was never appointed to represent Jason's interests in a subsequent personal injury case; his father, as his legal guardian, merely acted on Jason's behalf. Jason attained the age of majority prior to a hearing regarding the disbursement of funds from the personal injury case. At all times, Jason was competent. The appellate court ruled that R.C. 3109.01 was dispositive of the case. That statute provides, in pertinent part, that "all persons of the age of eighteen years or more, who are under no legal disability, are capable of contracting and are of full age for all purposes." The appellate court found that Jason's age, and the lack of any evidence that he was under any type of disability, precluded him from qualifying as a ward or a minor. The appellate court acknowledged that Jason, at the time of the hearing, was an adult no longer requiring the assistance of a guardian, and, therefore, finding that R.C. 3109.01 was controlling, ruled that the probate court lacked authority to rule on the disbursement of the funds. *Altomare* at *5.

The facts before this Court are vastly different. Here, contrary to *Altomare*, not one but several hearings had already been conducted prior to Walter, Jr.'s eighteenth birthday. Jason was competent; whereas evidence was before the probate court that Walter Hollins, Jr. was not.

Revised Code 3109.01 was controlling in *Altomare*, but that statute cannot possibly be invoked here. Appellee's reliance on *Altomare* is erroneous.

Likewise, Appellee's reliance on *Layshock* is also misplaced. Terry Layshock, too, was the victim of an automobile accident while a minor. A guardian was appointed to represent Terry in the settlement of her personal injury claim. A hearing was held and then Terry attained the age of majority. The guardian asked the probate court to terminate the guardianship because Terry was an adult. The probate court terminated the guardianship but believed it retained jurisdiction to rule on the settlement claim. The appellate court ruled that once the guardianship was terminated, the probate court lost subject matter jurisdiction over Terry and her settlement proceeds. It ruled that Terry had the power and ability, as a competent adult, to negotiate and enter into a settlement of her case. *Layshock* at *8. Once again, as in *Altomare*, the Seventh District Appellate Court relied on R.C. 3109.01 for authority.

Unlike *Layshock*, the Cuyahoga County Probate Court did not terminate Hollins' guardianship, knowing full well that Walter, Jr. would require a guardian for the remainder of his lifetime. The guardianship in *Layshock* was voluntarily terminated and, because Terry was an adult and under no legal disability, R.C. 3109.01 was clearly applicable and controlling. This is certainly not true here and Appellee's reliance on *Layshock* is, again, erroneous.

Finally, Appellee cites to *Hinerman* as dispositive of this case. *Hinerman* did involve the dual issues of minority and incompetency, as are present here. However, the *Hinerman* guardianship was continued for five years after the ward reached majority without the objection of the parties. The facts do not reflect that any matters were pending before the *Hinerman* probate court on the ward's eighteenth birthday that would invoke the court's subject matter jurisdiction. Many years after the ward attained majority, at a routine hearing, the probate

court's subject matter jurisdiction was first questioned. It then became clear that, due to the passage of time and the ward's relocation to another state, the probate court had lost its jurisdiction.

Here, Nance is not asking for the probate court's jurisdiction to continue "ad infinitum" as happened in *Hinerman*. Nance asks that the probate court's jurisdiction does continue after January 29, 2005 for the purpose of issuing orders on pending guardianship matters that were properly before it during the minority of Hollins, Jr., in an effort to effectively settle the ward's estate.

D. THIS COURT'S *HARDS* DECISION

This Court's recent decision in *State ex rel. Estate of Hards v. Klammer* (2006), 110 Ohio St.3d 104, 2006-Ohio-3670, 850 N.E.2d 1197 is applicable here. It held that the probate court has continuing jurisdiction over guardianship matters to settle a ward's estate, even after the death of the ward. *Hards* at ¶12. At issue was the probate court's authority to determine and approve fees sought by a court-appointed special master commissioner. The master commissioner had rendered services to the ward prior to her death, but did not apply to the probate court for his fees until after the ward died – a time when the guardianship would otherwise have technically terminated.

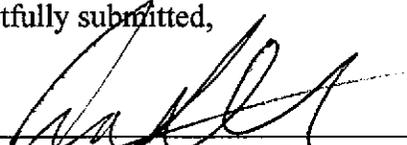
Here, McLeod applied to the probate court for approval of his settlement with University Hospitals, for approval of attorney fees properly payable, and direction regarding the disbursement of the remaining settlement proceeds. The settlement proceeds are an asset of Hollins' estate and fees for attorney's services in guardianship matters are routinely reviewed by probate courts. The Cuyahoga County Probate Court's January 31, 2005 Order was journalized on the first business day after the ward became an adult. McLeod argues that the probate court's

subject matter jurisdiction over Hollins' guardianship terminated as a result of the ward's eighteenth birthday. McLeod argues that the probate court does retain some authorities, but not others. It is Nance's position that since the settlement of the ward's assets, including an award of attorney fees, was properly before the court, it retains jurisdiction to issue an order approving the settlement and directing the disbursement of the funds. It is also Nance's position that the probate court retains jurisdiction to approve the final account and issue orders as are necessary to assure that a ward's assets are protected, even though the legal effect of the guardianship has ended due to the ward attaining adulthood. The *Hards* decision grants certainty in the case of a ward's death; Nance asks for the same certainty where a ward reaches majority.

E. UNITED STATES CONSTITUTION

Appellee correctly notes that Section 1, Article IV of the United States Constitution provides that "[F]ull faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." (Appellee's Merit Brief at 27.) Nance acknowledges this. The Cuyahoga County Probate Court journalized an Order on January 31, 2005 in a matter that was properly before the court: the settlement with University Hospitals. Nance asks this Court to uphold the probate court's authority to issue such Order. Pursuant to Section 1, Article IV of the United States Constitution, the Michigan Probate Court will be bound by the Order issued in Cuyahoga County.

Respectfully submitted,



John F. Shelley (0005744) (*Counsel of Record*)

Ellen K. Meehan (0059472)

J. Seth Metcalf (0077996)

SQUIRE, SANDERS & DEMPSEY L.L.P.

4900 Key Tower, 127 Public Square

Cleveland, OH 44114-1304

Telephone: +1.216.479.8500

Fax: +1.216.479.8780

E-mail: jshelley@ssd.com

COUNSEL FOR DEFENDANT-APPELLANT

FREDERICK R. NANCE

CERTIFICATE OF SERVICE

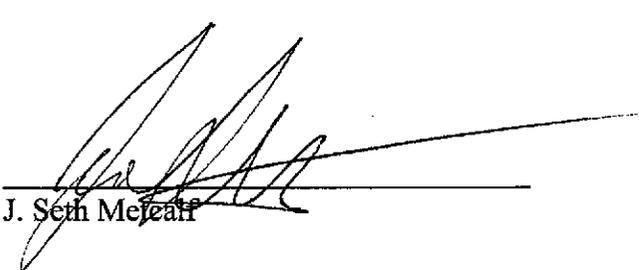
I hereby certify that a true copy of this Reply Brief of Appellant Frederick R. Nance was served this 9th day of January, 2007, by regular U.S. mail, to the following:

Steven D. Rowe, Esq.
KEMP, SCHAEFFER, ROWE & LARDIERE CO., LPA
88 West Mound Street
Columbus, OH 43215
COUNSEL FOR APPELLEE
MARK MCLEOD, GUARDIAN

Geoffrey N. Fieger
FIEGER, FIEGER, KENNEY & JOHNSON
19390 West Ten Mile Road
Southfield, MI 48075-2463
COUNSEL FOR APPELLANT
REGINA HARRIS

Terry H. Gilbert
1700 Standard Building
1370 Ontario St.
Cleveland, OH 44113
COUNSEL FOR APPELLANT
WALTER HOLLINS, SR.

William H. Falin
MOSCARINO & TREU, LLP
The Hanna Building
1422 Euclid Avenue, Suite 630
Cleveland, OH 44115
COUNSEL FOR APPELLANT
UNIVERSITY HOSPITALS OF CLEVELAND



J. Seth McFarland