

IN THE SUPREME COURT OF OHIO

IN RE: GUARDIANSHIP
OF BESSIE SANTRUCEK

CASE NO.

07-1545

On Appeal from the Court of
Appeals of Licking County
Ohio, Fifth Appellate District
(No. 06 CA 130)

JURISDICTIONAL BRIEF OF JENNIE HULL

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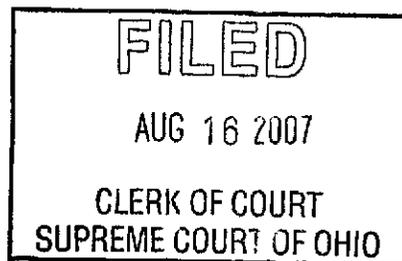
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IN THE SUPREME COURT OF OHIO

IN RE: GUARDIANSHIP
OF BESSIE SANTRUCEK

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**EXPLANATION OF WHY THIS IS A CASE OF
PUBLIC AND GREAT GENERAL INTEREST**

This appeal stems from a disagreement between sisters about how to best care for their ninety-six-year-old mother. As is increasingly common in today's mobile society, each daughter and the mother lived in a different state. Because of a peculiar intersection of the probate code and the appellate court's decisions, out-of-state children of a potential ward can neither petition to serve as guardian nor appeal a decision adverse to the out-of-state child's interest in protecting the ward. By statute, an out-of-state relative may not serve as a guardian for an Ohio relation. By judicial construction (at least that offered by the Fifth District in this case), an out-of-state relative has no standing to contest a probate court's decision unless the relative applied to be a guardian.

This leaves children who happen to live outside Ohio at a severe disadvantage in taking action to care for their parents who are in Ohio. This appeal may be the first to raise the issue to this Court, but it will not be the last. As Ohio's population ages, and children move to other states while their parents remain here, the scenario that played out in this case will recur.

The ability of children to care for their parents is an issue that potentially impacts thousands of Ohio parents. That alone makes it an issue of great general interest. But the issue takes on heightened importance because the judicial standing rule the Fifth District announced disadvantages non-Ohioans vis-à-vis Ohioans by barring an out-of-state daughter from fully participating in legal action to resolve her mother's care. That affects how Ohio is viewed nationwide. And that is a matter of public interest.

This appeal does not challenge the statute limiting guardians to Ohio residents. Instead, it challenges a judicial construct that fails to account for this statute and has failed to keep pace with the realities of modern life, where those interested in the care of an aging parent often find

themselves in states other than Ohio. This Court should accept jurisdiction to consider whether Ohio law recognizes a judicially created standing doctrine that imposes this hardship on out-of-state children.

STATEMENT OF THE CASE AND FACTS

The principal players in this case are Bessie Santrucek, the 96-year-old mother who lived, until recently, in Michigan; Victoria Wellington, the daughter who lives in Granville, Ohio; and appellant Jennie Hull, the daughter who lives in Arizona. The disagreement that undergirds this appeal led Victoria to remove her mother, Bessie, from Michigan to Newark, Ohio and have herself appointed guardian over Bessie. Before that move, Bessie had lived for more than nine decades in the small town of Elsie, Michigan, a hamlet located in the center of the lower peninsula. In the probate court, Jennie objected to the unplanned and clandestine move, pointing out that the court had no jurisdiction over her mother because her mother had been moved to Newark against her will. Jennie could do little more than protest, however, because an Ohio statute prohibits out-of-state relatives from serving as guardians of Ohio wards.

The Licking County Probate Court – after a heated exchange with Jennie’s counsel that led this Court to remove the judge from the case – decided that it had jurisdiction over Bessie. Jennie appealed the ruling, pointing out that Bessie’s desire to remain in Michigan, where she had spent her entire life, coupled with her removal from her hometown under questionable circumstances, meant that the Probate Court erred in asserting jurisdiction. Jennie further explained in her appeal that probate proceedings in Michigan were the appropriate forum to resolve the sisters’ disagreements about how to best care for their mother.

The Fifth District Court of Appeals declined to address the Licking County Probate Court’s jurisdiction, ruling instead that Jennie had no standing to appeal the lower court’s decision. The crux of the appellate decision is that Jennie lacked standing because she did not

apply to be her mother's guardian. *In re: Guardianship of Santrucek*, ___ Ohio App.3d ___, 2007-Ohio-3427, ___ N.E.2d ___, at ¶10. Jennie seeks this Court's discretionary review because the decision below does not account for a statute that bars Jennie from being her mother's guardian, fails to account for Jennie's legitimate interest in her mother's care, and does not accord proceedings in sister states the co-equal respect they deserve.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of law: An out-of-state relative of a ward has standing to appeal a probate court decision if the relative participated in the probate proceedings.

Jennie Hull's desire to participate in proceedings that will impact how her 96-year-old mother will live her remaining years has been blocked by two events: her sister's unilateral decision to take their mother from her home town in Michigan and bring her to Ohio and the Fifth District's too-narrow view of appellate standing. This Court cannot do anything about the first event, but it can correct the second. The Fifth District's holding regarding appellate standing is cramped. It is incompatible with Ohio statutes regarding out-of-state children's participation in probate hearings and threatens to isolate Ohio courts from probate proceedings in other states.

Two Ohio statutes bear on Jennie Hull's ability to participate in the Licking County action that determined her mother's future, R.C. 2111.02(C)(7)(b) and 2109.21(C). The first gave Bessie Santrucek the right to ask her daughter Jennie Hull to be present for the guardianship determination.¹ Bessie Santrucek exercised this option and asked Jennie to be in court with her.

¹ "If the hearing concerns the appointment of a guardian or limited guardian for an alleged incompetent, the alleged incompetent has all of the following rights:

...

(b) The right to have a friend or family member of his choice present"

The second statute prevented Jennie Hull from participating more fully because it bars Jennie – a non-Ohioan – from applying to be her mother’s guardian.²

Jennie Hull participated in the probate action to the full extent she could consistent with Ohio law. Yet the appellate court decided that Jennie had no standing to object to the probate court’s erroneous decision to assert jurisdiction because Jennie did not apply to be a guardian. But Jennie could not do what the appellate court criticized her for not doing. The Revised Code prevents the very act that the appellate court required of Jennie Hull to have standing to contest the probate court’s errors.

The ban on out-of-state guardians is the legislatively declared policy of Ohio. Appellate courts enforce that policy, affirming decisions rejecting out-of-state guardians and reversing decisions appointing them. See, e.g, *In re: Guardianship of Reeder* (June 17, 1992), 2d Dist. No. 13005, 1992 WL 136783, at *2 (affirming probate court’s rejection of out-of-state petition); *In re: Guardianship of Collier* (1991), 74 Ohio App.3d 386, 393, 599 N.E.2d 292 (reversing appointment of out-of-state guardian). But it is also the policy of Ohio that a potential ward can ask a relative to attend the guardianship hearings. R.C. 2111.02(C)(7)(b). The Fifth District’s

R.C. 2111.02(C)(7),(b).

² “(C) A guardian shall be a resident of the county, except that the court may appoint a nonresident of the county who is a resident of this state as guardian of the person, the estate, or both; that a nonresident of the county or of this state may be appointed a guardian, if named in a will by a parent of a minor or if selected by a minor over the age of fourteen years as provided by section 2111.12 of the Revised Code; that a nonresident of the county or of this state may be appointed a guardian if nominated in or pursuant to a durable power of attorney as described in division (D) of section 1337.09 of the Revised Code or a writing as described in division (A) of section 2111.121 of the Revised Code; and that a nonresident of the county or of this state may be appointed as a guardian if the nonresident was nominated as a guardian in or pursuant to a durable power of attorney as described in division (D) of section 1337.09 of the Revised Code or a writing described in division (A) of section 2111.121 of the Revised Code.”

R.C. 2109.21(C).

decision below thwarts the policy of R.C. 2111.02(C)(7)(b) by requiring an act that – for out-of-state residents – is impossible under R.C. 2109.21(C).

Not all appellate courts share the Fifth District's limited view of appellate standing. In *In re: Guardianship of McHaney*, 9th Dist. No. 22088, 2004-Ohio-5956, the Ninth District reversed an appointment of an in-state guardian where that appointment conflicted with the ward's nomination of an out-of-state guardian. The appellate court implicitly recognized the out-of-state son's ability to appeal the probate court's improper appointment of the in-state guardian. In *In re Tripp* (6th Dist. 1993), the Sixth District considered an appeal about the same question presented to the Fifth District – the probate court's jurisdiction. The Sixth District considered this question even though the appellant did not himself apply to be the ward's guardian. 90 Ohio App.3d 209, 628 N.E.2d 139.

Finally, and most directly, the Twelfth District considered an appeal that raised the same issues that Jennie Hull raised to the Fifth District – lack of probate jurisdiction and conflict of interest on the part of an attorney who represented both the ward and the prospective in-state guardian. Without questioning a New Jersey resident's standing to challenge the probate court's orders, the Twelfth District considered the merits. *In re: Guardianship of Meucci* (Dec. 26, 2000), 12th Dist. No. CA2000-03-046, 2000 WL 1875737.

The Fifth District's decision leaves no options for an out-of-state child to challenge a probate court's erroneous assumption of jurisdiction over her parent in a guardianship proceeding. This Court has made plain that appeal – not prohibition – is the proper route to challenge a probate court's jurisdiction. *State ex rel. Florence v. Zitter*, 106 Ohio St.3d 87, 2005-Ohio-3804, 831 N.E.2d 1003. *Zitter* bars a writ-based challenge to jurisdiction and the Fifth District's decision bars an appeal-based challenge. One avenue must remain open to

contest wrongful exercises of probate court jurisdiction over potential wards who are in Ohio temporarily or against their will.

The solution – as implicitly recognized in cases like *Meucci* – is to allow out-of-state relatives of the ward to appeal a probate court’s jurisdictional decisions. This is consistent with the statutory recognition that the ward has a right to nominate a relative to be present at the hearing and is consistent with probate practice of allowing testimony from all interested persons. This solution is also consistent with what the Sixth District has recognized, that “the effect of the judgment on the ward is the key to the issue of standing.” *Coller*, 74 Ohio App.3d 386, 391. Here, as in other like cases, the effect of the Fifth District’s decision is to deny a voice to an interested party, a party that the ward herself nominated to be present during the hearings. Leaving that person without a voice on appeal affects the ward by discounting the ward’s decision to have that person in the courtroom.

Guardianship proceedings are difficult times for families. A circumscribed view of appellate standing is inappropriate where statutory law recognizes the ward’s right to have out-of-state relatives participate. As a California appellate court recently observed in the equally charged atmosphere surrounding visitation rights, “In general, standing to appeal has been reserved for a ‘party aggrieved,’ however, the emotional nature of dependency proceedings makes this a potentially broad category.” *In re D.L.* (Cal.App. Aug. 30, 2005), No. B177209, 2005 WL 2078338, at *2.³ A narrow view of who has the right to challenge decisions about the

³ Although this is an unpublished California case (see Cal. App. R. 8.1115), that status does not alter the persuasive value of its observation. This Court recognizes that the distinction between published and unpublished cases has little meaning in an age when all cases are available from online services. See Rep. R. 4 (abolishing distinction between persuasive and controlling authority based on whether opinion is published).

future care of their parents is wrong. A narrow view coupled with a statute that prevents out-of-state relatives from full participation in guardianship proceedings is unconscionable.

In addition, the Fifth District's decision to deny standing to an out-of-state child of a ward telegraphs an insensitivity to courts in other states where guardianship proceedings may include all interested parties. This case is illustrative. The main complaint Jennie lodged against the decision of the Licking County Probate Court is that it did not have jurisdiction to consider the guardianship of her mother. Jennie contends that Elsie, Michigan, is the proper forum for that decision. Bessie Santrucek spent her entire life in Elsie (a life stretching back before the First World War), she owns property in Elsie, and she has lifelong friendships and affiliations in Elsie. Bessie's removal from Elsie was so unexpected and so misunderstood that she did not even say goodbye to friends she had as far back as the Franklin D. Roosevelt administration.

A Michigan case was initiated to decide questions about Bessie Santrucek's final years. That court, in deference to the Ohio case, has stayed its hand. The Fifth District's decision has the consequence of declining to return the favor because it refuses to oversee a probate court that wrongfully assumed jurisdiction despite the Michigan proceeding. The Fifth District's minimalist view of appellate standing means that Ohio probate courts that wrongfully exercise jurisdiction over guardianship matters that belong in other states will go largely unchallenged. That is not a message that Ohio courts should send to sister jurisdictions. This Court should accept jurisdiction to review the Fifth District's unjustifiably restricted vision of appellate standing in probate matters.

CONCLUSION

Jennie Hull wants what is best for her mother. Her residence in Arizona should not inhibit that desire any more than the Revised Code requires. The Fifth District's limited vision of who has standing to appeal guardianship decisions gives unintended breadth to R.C.

2109.21(C). The Fifth District's decision also sends an unwelcoming message to out-of-state children of Ohio parents that Ohio's courts are not receptive to out-of-state children's desire to have a voice in their parents' care. Finally, the Fifth District's decision signals an insularity that does not respect forums in other states that are more appropriate venues. The Fifth District's decision will have far-reaching effects. This Court should accept jurisdiction to consider whether the Fifth District's narrow view of appellate standing is an accurate statement of Ohio law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was served by regular U.S. mail on the following this 16 day of August, 2007:

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APPENDIX

EXHIBIT 1

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

FILED

2007 JUL -3 AM 9: 50

CLERK OF COURT
OF APPEALS
LICKING COUNTY, OH
GARY R. HULL, JR.

IN THE MATTER OF:

JUDGES:

Hon. W. Scott Gwin, P. J.
Hon. Sheila G. Farmer, J.
Hon. John W. Wise, J.

THE GUARDIANSHIP OF

Case No. 06 CA 130

BESSIE SANTRUCEK

OPINION

CHARACTER OF PROCEEDING:

Civil Appeal from the Court of Common
Pleas, Probate Division, Case No. 06 367

JUDGMENT:

Dismissed

DATE OF JUDGMENT ENTRY:

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Wise, J.

{11} Appellant Jennie Hull appeals the decision of the Licking County Court of Common Pleas, Probate Division, which appointed Appellee Victoria Wellington the guardian of the person and estate of Bessie Santrucek, a ninety-six year-old incompetent adult. The relevant facts leading to this appeal are as follows.

{12} Bessie Santrucek, the elderly mother of appellant and appellee, formerly resided in Clinton County, Michigan. Appellee Wellington periodically made trips from the Granville, Ohio area to Michigan to visit Bessie. During such visits in December 2005 and March 2006, appellee became concerned about Bessie's uncharacteristic behaviors, such as repeatedly asking identical questions and failing to orderly maintain her financial and tax paperwork. In mid-March 2006, appellee arranged to have Bessie reside at the Alterra Sterling House in Newark, an assisted-living facility.

{13} In May 2006, appellee filed an application in the Licking County Court of Common Pleas, Probate Division, to be named as Bessie's guardian, pursuant to R.C. 2111.02. Appellant, a resident of Arizona, thereafter filed an eight-branch pre-trial motion, but did not herself apply to named Bessie's guardian.¹ On August 25, 2006, the trial court issued a judgment entry finding, inter alia, in response to appellant's motion, that it had jurisdiction and venue to hear the guardianship application, and that the case should not be removed to Michigan.

{14} On October 9, 2006, following a final hearing, the trial court issued a judgment entry appointing appellee as the guardian of Bessie's person and estate.

¹ Appellant has sought to be named Bessie's conservator in the Michigan courts.

{15} On November 1, 2006, appellant filed a notice of appeal. She herein raises the following two Assignments of Error:

{16} "I. THE TRIAL COURT'S DECISION TO EXERCISE JURISDICTION OVER THE GUARDIANSHIP OF BESSIE SANTRUCEK WAS CONTRARY TO THE FACTS AND THE LAW.

{17} "II. THE TRIAL COURT ABUSED ITS DISCRETION BY PREVENTING JENNIE HULL FROM HAVING A FULL AND FAIR HEARING BY SHUTTING OUT AND FAILING TO CONSIDER EVIDENCE RELEVANT TO HER PRETRIAL MOTIONS."

I, II.

{18} In her First Assignment of Error, appellant challenges the trial court's exercise of jurisdiction over Bessie's guardianship. In her Second Assignment of Error, appellant contends the trial court abused its discretion in declining to hear certain evidence in ruling on her multi-branch pretrial motion.

{19} As an initial matter, we address appellee's responsive argument that appellant lacks standing to appeal. In *In the Matter of Hunt* (Feb. 15, 1979), Franklin App. No. 78AP-568, the Tenth District Court of Appeals cited *In Re Guardianship of Love* (1969), 19 Ohio St. 2d 111 for the following "basic principles" of standing in a guardianship appeal: "(1) [T]here can be no conflict of interest between the ward and the guardian prospective or otherwise, (2) *** guardianship proceedings are non-adversary *in rem* matters, only involving the Probate Court and the ward, and (3) the standard rule that to take an appeal a party must have a present interest in the subject matter at hand and be prejudiced in that interest by the decision under appeal." *Id.*

{¶10} In *In re Guardianship of Lee*, Miami App.No. 02CA3, 2002-Ohio-6194, the Second District Court addressed an analogous situation. In that case, a ward's nephew, who had not filed an application for appointment, was found to lack standing on appeal to challenge the trial court's appointment of an attorney as guardian of his aunt's estate and person. The Court concluded: "[Nephew] Scott lacks standing to complain that the trial court erred or abused its discretion when it appointed [Attorney] Cromley. The only person who might complain is [ward] Dorothy Lee, but she has not. Scott would have standing to complain that the court erred when it failed to appoint him had he filed an application for appointment. He didn't, and he therefore suffered no consequences adverse to his interests in this action as a result of the court's appointment of Cromley. Consequently, there is no relief this court can offer Scott in this appeal." *Id.* at ¶ 8.

{¶11} Furthermore, much of appellant's argument in the case sub judice consists of vicarious claims of violations of Bessie's rights, even though the trial court appointed for Bessie a guardian ad litem, who has not chosen to appeal the guardianship decision on behalf of the ward.² "It is a well established principle that no one can complain of error unless [he or she] is prejudiced thereby." *In re Guardianship of Bluthardt* (Sept. 9, 1982), Belmont App.Nos. 81-B-28, 81-B-29, 81-B-30, 81-B-31, citing 5 Ohio Jurisprudence 3d 88, Appellate Review Section 535. Accordingly, we hold appellant is without standing to appeal under the circumstances of this case. We therefore lack jurisdiction to address Appellant's First and Second Assignments of Error.

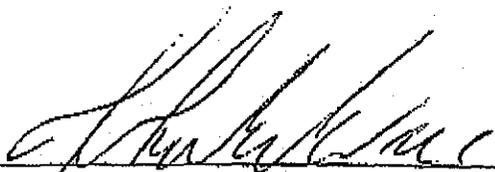
² We also note that Bessie retained counsel in August, 2006.

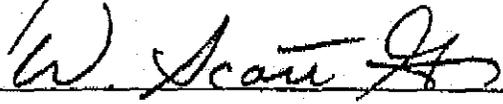
{¶12} For the reasons stated in the foregoing opinion, the appeal of the judgment of the Court of Common Pleas, Probate Division, Licking County, Ohio, is hereby dismissed.

By: Wise, J.

Gwin, P. J., and

Farmer, J., concur.







JUDGES

JWW/d 611

EXHIBIT 2

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FILED
IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT 2007 JUL -3 AM 9: 50

CLERK OF COURT
OF APPEALS
LICKING COUNTY, OHIO
GARY R. WILSON

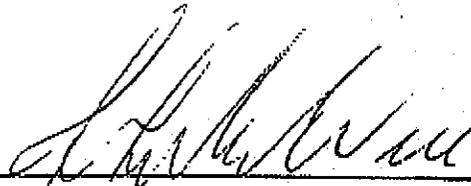
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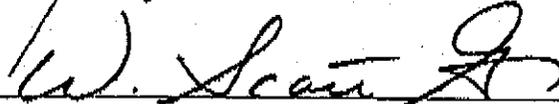
THE GUARDIANSHIP OF
BESSIE SANTRUCEK

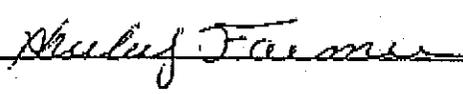
JUDGMENT ENTRY
Case No. 06 CA 130

For the reasons stated in our accompanying Memorandum-Opinion, the appeal of the judgment of the Court of Common Pleas, Probate Division, Licking County, Ohio, is dismissed.

Costs to appellant.







JUDGES

EXHIBIT 3

In The Court of Common Pleas, Licking County, Ohio

PROBATE DIVISION

FILED
AUG 25 2006

JUDGE ROBERT H. HOOVER
LICKING COUNTY PROBATE COURT
NEWARK, OH

In the Matter of the Guardianship of:

Bessie Santrucek

Case No. 2006-0367

JUDGMENT ENTRY

This case came before the Court this 23rd day of August, 2006 for an oral hearing on the multi-branch motion filed by Jennie Caroline Hull on July 17, 2006. As to Branch One, the Court DENIES the movant's request to dismiss the guardianship petition for lack of jurisdiction. The Court finds that Jennie C. Hull has failed to establish that she is entitled to the relief requested. The Court specifically finds that it has jurisdiction and venue to hear the instant case. The Court specifically finds that Bessie Santrucek was and is a resident of Licking County, Ohio and that Bessie Santrucek has legal settlement in Licking County, Ohio. This was true as of an uncertain date in April, 2006. This was true at the time of the filing of the guardianship application. This was true at the time of the instant hearing on the multi-branch motion.

As to Branch Two of the motion, this Court finds that the movant, Jennie C. Hull has failed to establish that she is entitled to the relief requested that this case should be litigated in Clinton County, Michigan and that, therefore, the instant proceeding should be terminated and the Court yield to a Michigan court.

As to Branch Three of the motion, this Court finds that that request is moot because the previously scheduled hearing in July was, in fact, continued and the Court has not yet conducted a full evidentiary hearing on the underlying guardianship application.

Similarly, the Court finds that Branch Four of the motion, is moot. Bessie

Judge
Robert H. Hoover
740/570-5624

Courthouse
Newark, OH 43055

Santrucek is now represented by attorney John Obora of Newark, Ohio.

As to Branch Five of the motion, the Court finds that no party at any time has entered any objection to Bessie Santrucek procuring an independent evaluation of her physical and psychological condition.

As to Branch Six of the motion, the Court finds that the movant, Jennie C. Hull, has failed to establish that she is entitled to the relief which she has requested, i.e. that the Court order that Bessie Santrucek be permitted to return to the State of Michigan. The Court notes that Bessie Santrucek's daughter, Jennie C. Hull, resides in the State of Arizona.

As to Branch Seven of the motion, the Court finds that this portion of the motion is moot. Bessie Santrucek has hearing aids.

As to Branch Eight of the motion, the Court finds that the movant, Jennie C. Hull, has failed to establish that she is entitled to the relief requested.



Judge Robert H. Hoover

- cc: /Troy Reed, GAL
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Judge
Robert H. Hoover
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Newark, OH 43055

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