

IN THE SUPREME COURT OF OHIO

07-1546

IN THE MATTER OF THE  
GUARDIANSHIP OF ALICE I.  
RICHARDSON, AN INCOMPETENT

\* On Appeal from the Montgomery  
County Court of Appeals, Second  
Appellate District  
\*  
\* Court of Appeals  
Case No. 22000

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MEMORANDUM OF APPELLANT, ALICE E. LEDFORD, APPLICANT FOR  
APPOINTMENT AS GUARDIAN OF THE PERSON OF ALICE I. RICHARDSON, AN  
INCOMPETENT, IN SUPPORT OF JURISDICTION

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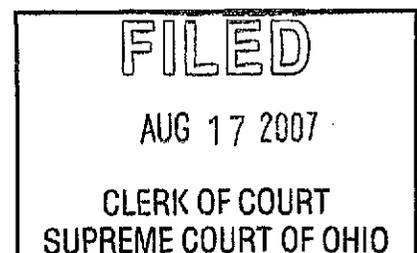


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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC  
OR GREAT GENERAL INTEREST

The primary issue in this appeal concerns whether the probate court's subject matter jurisdiction in a guardianship proceeding, with reference to the residency or legal settlement of the ward in the county, must be established both as to the date of filing application for appointment pursuant to R. C. §2111.02(A) and, as a "condition subsequent", on the date of entry of the probate court's order appointing the guardian.

According to the Appellate Court's holding, the Montgomery County Probate Court's subject matter jurisdiction, established at the time of filing of the application, was divested by the removal of the proposed ward by family members from Ohio to West Virginia, ostensibly for re-settlement purposes, prior to entry of the Probate Court's order appointing the guardian. That holding presents a heretofore unknown and novel theory of law that the acquisition of subject matter jurisdiction in a guardianship proceeding, once gained, may be lost as a result of the extrajudicial activities of those who object to the imposition of a guardianship or appointment of the proposed guardian notwithstanding the pendency of the application for appointment of guardian.

The Court of Appeals' holding that a probate court can be divested of subject matter jurisdiction after the filing of an application for appointment of guardian but before entry of the probate court's order on the application invites the meddling of those opposed to the process by re-settling or attempting to re-settle the prospective ward outside Ohio in order to thwart the probate court's intervention. The prospective ward may therefore be denied the benefits and protection afforded under O.R.C. §2111.02(A).

The divestiture of subject matter jurisdiction, during the pendency of an application for appointment of guardian, facilitates the self-serving purposes of those who may not benefit from the imposition of a guardianship. That may include misguided efforts to self-judge the “competency” of a proposed ward or even to avert a finding of “incompetency” for estate planning purposes. In the Second Appellate District, virtually every pending contested guardianship proceeding can now be successfully opposed, for a myriad of reasons, by removing the prospective ward from Ohio before entry of a final probate court order, ostensibly for re-settlement purposes, to terminate the probate court’s subject matter jurisdiction under the residency/legal settlement requirement of R.C. §2111.02(A).

The decision in the case at bar is an impediment to the orderly administration of guardianship proceedings in the Second Appellate District and Ohio. By its ruling, the Court of Appeals has undermined the practical import of R.C. §2111.02(A) and introduced a non-legislated “condition subsequent” that a prospective ward must not only be resident or have legal settlement in the county at the time of filing of the application but also at the time of the probate court’s appointment of guardian on the application. That holding establishes an illogical and untenable rule which urges haste to judgment in guardianship cases and a race by the interested parties to maintain (or obviate) the jurisdiction of the probate court. Moreover, in cases referred to magistrates, which occurred in the instant case, those who take issue with the magistrate’s findings and conclusions of law have opportunity to “preview” the probate court’s potential final order and take extrajudicial action to divest the probate court of its jurisdiction before appointment of a guardian based on the magistrate’s decision. Objectors in the Second Appellate District have opportunity

under the Court of Appeals' "conditions subsequent" requirement to effectively cancel the magistrate's decision by removing the prospective ward from the jurisdiction before any entry of the court adopting the magistrate's decision. That circumstance can lead, as also occurred in the case at bar, to physical confrontation and the forceful removal of a prospective ward from the jurisdiction prior to the probate court's order on the application for appointment of guardian.

The implications of the decision of the Court of Appeals have the potential to affect many guardianship proceedings in Ohio. The public has an interest in the orderly administration of R.C. §2111.02(A). Families have an expectation that their incompetent loved ones will not be hastily conveyed to a sister state by disgruntled objectors, with a guardianship application pending, for the purpose of avoiding potential findings of incompetency or the appointment of guardians to whom they object.

As implied from the Montgomery County Probate Court case number in the case at bar, the 2006 probate guardianship application of Alice I. Richardson ("Mrs. Richardson") was number 203 as of June 29, 2006. In considering that there are many hundreds of guardianship proceedings filed within the Second Appellate District and thousands across Ohio on a yearly basis, the Court of Appeals' anomalous holding in this case makes it one of broad general significance and of great public interest.

This cause also presents ancillary issues of public or great general interest pertaining to the jurisdiction of the Court of Appeals to even hear and decide this case. First, neither the ward, Mrs. Richardson, nor her guardian ad litem, Virginia Vanden Bosch, Esq., objected to the magistrate's findings of fact and conclusions of law. Civ. R. 53(D)(3)(b)(iv) provides that a "party" may not claim error on appeal based on the court's

adoption of the magistrate's findings or legal conclusions in that circumstance. The Court of Appeals did not address that issue. Notwithstanding, the Court of Appeals explicitly recognized and ruled upon Mrs. Richardson's assignments of error. Opinion, p. 8.

Second, there is significant issue whether "next-of-kin", as defined under R.C. §2111.01(E), are "parties" pursuant to App. R. 4(A) having "standing" to appeal an order appointing a guardian under R.C. §2111.02(A). There now exists a "conflict" from this case in the Second Appellate District itself on this issue based on its prior decision *In the Matter of the Guardianship of Dorothy Lee*, 2002 Ohio 6194 (Second Appellate District)<sup>1</sup>. Moreover, the holding in the case at bar conflicts with the Fifth Appellate District's July 3, 2007, decision in *In the Matter of: The Guardianship of Bessie Santrucek*, 2007 Ohio 3427. The issue of whether "next-of-kin" have standing to appeal where neither the ward nor her guardian ad litem have objected to the magistrate's findings of fact and conclusions of law presents an issue of great public interest in the context of whether any right of appeal to the court of appeals, vicarious or otherwise, concerning the appointment of a guardian can be preserved by a "next-of-kin".

In sum, this case affects the very fabric of guardianship proceedings where subject matter jurisdiction, based on the residency or legal settlement of the ward, can be maintained or terminated at the whim of persons who object to guardianship proceedings or who, for any reason, wish to subvert, or see subverted, pending guardianship proceedings. Further, the standing of "next-of-kin" to object and appeal from orders

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<sup>1</sup> Conflicts within the same appellate district "create confusion for lawyers and litigants and do not promote public confidence in the judiciary." *In Re J.J.* (2006), 111 Ohio St.3d 205; 2006 Ohio 5484; 855 N.E.2d 851, P18.

imposing guardianships is one of public or great general interest pertinent to virtually every contested guardianship proceeding in Ohio. Accordingly, this Court must grant jurisdiction to hear this case and review the erroneous and untenable precedent now extant in the Second Appellate District.

### STATEMENT OF THE CASE AND FACTS

This case arises from the filing by Alice E. Ledford (“Ledford”) on June 29, 2006, in the Montgomery County Probate Court, of an application pursuant to R.C. §2111.02(A) for appointment as guardian of the person of her 87-year old mother, Mrs. Richardson. Mrs. Richardson began living with Ledford in Montgomery County, Ohio, on July 24, 2005. Mrs. Richardson had undergone surgery in April, 2005, and Ledford “stayed with her until July” at Mrs. Richardson’s home in West Virginia following that surgery. Both before and after July 24, 2005, Ledford assisted Mrs. Richardson in “everything, feeding, cooking, giving her medicines, helping her bathe, doing her hair and makeup, nails.”

Mrs. Richardson suffered from a plethora of physical and mental problems including heart, gastrointestinal and other physical illnesses and Alzheimers-type dementia as described by J. Douglas Aldstadt, M.D., in his June 29, 2006, “Statement of Expert Evaluation” filed with the Probate Court Application for Appointment that date. On June 8, 2006, Dr. Aldstadt examined Mrs. Richardson. He noted at that time that Mrs. Richardson’s mental incapacity was not “reversible”. Dr. Aldstadt also stated that Mrs. Richardson “is demented and is not aware of the consequences of her actions.”

Ledford and her husband modified parts of their home in Montgomery County, Ohio, to accommodate Mrs. Richardson's residence there. Mrs. Richardson's mail and bank statements were directed to her post office box near the Ledfords' home. Mrs. Richardson lived continuously with Ledford from July 24, 2005, until August 12, 2006. Ledford was her "primary caregiver" during that time.

In January or February, 2006, Ledford noted that Richardson ". . . mentally she wasn't functioning the way she should". For that reason, Ledford did not return Mrs. Richardson to West Virginia in the Summer of 2006 ". . . because I had the [family] support here I needed [to cope with Mrs. Richardson's care]."

The Court of Appeals concurred with the Montgomery County Probate Court that Mrs. Richardson had established a "legal settlement" in Montgomery County, Ohio, and that, accordingly, "the subject-matter jurisdiction of the Probate Court attached when Alice E. Ledford filed her guardianship application on June 29, 2006."

On August 12, 2006, one of Mrs. Richardson's sons, James C. Richardson, in a planned confrontation in an Englewood, Ohio, restaurant parking lot, accompanied by others, encountered Ledford and Mrs. Richardson and, without the concurrence or prior knowledge of Ledford, there and then forcefully removed Mrs. Richardson from Ohio to West Virginia.

At the time of Mrs. Richardson's removal from Ohio, Ledford's application for appointment as guardian of the person was pending in the Montgomery County Probate Court. On September 19, 2006, a magistrate of the Probate Court conducted an evidentiary hearing during which James C. Richardson's competing application for appointment as guardian was dismissed on the basis that he was not then a resident of

Ohio. The magistrate also heard evidence, *inter alia*, that Mrs. Richardson had, as of the hearing date, re-established her residence or legal settlement in West Virginia. He thereafter held in his Amended Magistrate's Decision of October 17, 2006, that Mrs. Richardson was incompetent as of June 29, 2006, and recommended the appointment of Ledford as guardian of the person of Mrs. Richardson.

James C. Richardson and Mrs. Richardson's daughter, Norma Louise Leach, objected to the magistrate's findings of fact and conclusions of law. Neither Mrs. Richardson nor her probate court-appointed guardian ad litem, Virginia Vanden Bosch, Esq., objected. On January 23, 2007, the Probate Court filed her "Entry and Decision Modifying the Magistrate's Decision" holding that Mrs. Richardson had established a "legal settlement" in Montgomery County, Ohio, as of the date of filing of the application on June 29, 2006. The Court otherwise adopted the findings of fact and conclusions of law of the magistrate holding that Mrs. Richardson was incompetent and appointing Ledford as guardian of the person.

On January 29, 2007, Mrs. Richardson and her daughter, Norma Louise Leach, as a "next-of-kin", filed an appeal to the Montgomery County Court of Appeals from the January 23, 2007, order of the Montgomery County Probate Court. No appeal was filed by James C. Richardson or the guardian ad litem, Virginia Vanden Bosch, Esq.

The Court of Appeals erred in holding that Norma Louise Leach, as a "next-of-kin" of Mrs. Richardson, had standing as a "party", within the meaning of App. R. 4(A), to appeal. Moreover, the Court of Appeals erred in holding that Mrs. Richardson could assign as error on appeal the order of the Probate Court adopting the magistrate's factual findings and legal conclusions pertaining to her "legal settlement" in Ohio. Further, the

Court of Appeals erred in holding that James C. Richardson, in removing his mother from Ohio to West Virginia on August 12, 2006, during the pendency of Ledford's guardianship application, terminated the Probate Court's jurisdiction in the case.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

**Proposition of Law No. 1: When the probate court's subject matter jurisdiction in a guardianship proceeding is established by the residency or legal settlement of the ward at the time of filing of the application for appointment of guardian under R.C. §2111.02(A), its jurisdiction may not thereafter be divested by the removal of the prospective ward from Ohio during the pendency of the application.**

O.R.C. §2111.02(A) provides, in pertinent part, as follows:

“[W]hen found necessary, the probate court on its own motion or on application by any interested party shall appoint . . . a guardian of the person, the estate, or both, of a minor or incompetent, provided the person for whom the guardian is to be appointed is a resident of the county or has a legal settlement in the county. . . .” (Underlining emphasis added).

The Court of Appeals concurred in the judgment of the Probate Court that Mrs. Richardson had established a “legal settlement” in Montgomery County, Ohio, by the time of filing on June 29, 2006, of Ledford's application for appointment of guardian of Mrs. Richardson. The Court of Appeals further confirmed that “subject-matter jurisdiction of the Probate Court attached when Alice E. Ledford filed her guardianship application on June 29, 2006, pursuant to R.C. §2111.02(A)”. However, the Reviewing Court erred in holding that the removal of Mrs. Richardson from Ohio to West Virginia on August 12, 2006, terminated the Probate Court's jurisdiction.

The Court of Appeals correctly observed at p. 15 of its Opinion that the Probate Court may appoint a guardian for a ward only where the ward “. . . is a resident

of the county or has a legal settlement in the county. . . “ (Underlining emphasis added). However, from that language, the Court concluded that the statutory “present tense” extended the requirement of residency or legal settlement into the future after, *i.e.*, the time of filing of the application for appointment of guardianship until filing of the Probate Court’s order of appointment of guardian. The Court of Appeals further held that the statute created a “condition subsequent” requiring residency or legal settlement in the county, not only when the application was filed but also when the probate court filed its order on the application. In that regard, the Court of Appeals observed that “a period of 164 days” ensued from the time Mrs. Richardson was removed from Ohio on August 12, 2006, until the Court’s final judgment on January 23, 2007, the entire period for which the Probate Court would have been without jurisdiction to rule on the application other than to dismiss it.

It is illogical to conclude under the statutory language of R.C. §2111.02(A) that the Probate Court’s jurisdiction was tentative or subject to divestiture during that period. Although the case of *Shroyer v. Richmond* (1866), 16 Ohio St. 455, cited by the Court of Appeals, states the proposition that proceedings for the appointment of guardians are *in rem*, it does not speak to the interpretation and application of R.C. §2111.02(A) nor does *Shroyer* state or imply that a probate court’s subject matter jurisdiction in a guardianship proceeding is defeasible until such time as it enters a final order.

R. C. §1.43(C) provides that “Words in the present tense include the future.” R.C. §2111.02(A) uses the “present tense” with reference to whether a prospective ward “is a resident or has a legal settlement” in the county. However, the statute does not indicate at what point in time that determination is to be made. In that sense the statute

may be ambiguous. *Cf. Welsh v. Indiana Ins. Co.*, 2003 Ohio 5054 (Fifth App. Dist.) P58.

In interpreting a legislative enactment, the Court's first duty is to "determine whether it is clear and unambiguous. 'If it is ambiguous, we must then interpret the statute to determine the General Assembly's intent. If it is not ambiguous, then we need not interpret it; we must simply apply it.'" *State v. Hairston*, 101 Ohio St.3d 308; 2004 Ohio 969; 804 N.E.2d 471, P13. *Sherwin-Williams Co. v. Dayton Freight Lines, Inc.*, 112 Ohio St.3d 52; 2006 Ohio 6498; 858 N.E.2d 324 at P15.

"The paramount goal in the interpretation or construction of a statute ensue ascertain and give effect to the legislature's intent in enacting the statute."

*Featzka v. Millcraft Paper* (1980), 62 Ohio St.2d 245; 405 N.E.2d 264.

A common sense reading of R.C. 2111.02(A) indicates that the General Assembly likely did not intend that the jurisdiction of the probate court could be divested by reason of a change of the prospective ward's residency or legal settlement after filing but during the pendency of the application for appointment of guardian. Even though the statute does not specify the time at which the residency/legal settlement requirement should attach, there is no indication in the statute that the probate court need conduct a two-step "condition subsequent" inquiry, including one just prior to or on the date of entry of an appointment of guardian, with reference to the ward's then-current residence or legal settlement.

There is issue whether the residency/legal settlement requirement is jurisdictional. Assuming, as the Court of Appeals assumed in this case, that residency/legal settlement under the statute is jurisdictional, jurisdiction once attained may not be defeated by the extrajudicial activities of others after an application for appointment

of guardian is filed. Moreover, given Dr. Aldstadt's June 29, 2006, declaration that Mrs. Richardson "is demented and is not aware of the consequences of her actions" and because her mental incapacity was not "reversible", it can be hardly said that Mrs. Richardson voluntarily changed her residence or legal settlement from Ohio to West Virginia on August 12, 2006.<sup>2</sup> *State ex rel Florence v. Zitter* (2005), 106 Ohio St.3d 87; 2005 Ohio 3804; 831 N.E.2d 1003, P21, P25.

**Proposition of Law No. II: Absent filing of her own competing application for appointment as guardian under O.R.C. §2111.02(A), a "next-of-kin" under O.R.C. §2111.01(E) has no standing under App. 4(A) to appeal the probate court's order appointing a guardian for the ward.**

Mrs. Richardson's daughter, Appellee, Norma Louise Leach ("Leach"), was an appellant, along with Mrs. Richardson, in the Court of Appeals. However, Leach had not filed a competing application for appointment as guardian of Mrs. Richardson. Therefore, notwithstanding that Leach is Mrs. Richardson's daughter and "next-of-kin", under O.R.C. §2111.01(E), Leach had no standing as a "party" under App. R. 4(A) to appeal on her own behalf or vicariously on behalf of Mrs. Richardson in this case.

This issue was most recently addressed in a case on virtually "all fours" to the case at bar in *In the Matter of: The Guardianship of Bessie Santrucek*, Unreported, 2007 Ohio 3427 (Fifth App. Dist.) decided July 3, 2007, which held at P9 as follows:

"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, 1979 Ohio App. LEXIS 12150, the Tenth District Court of Appeals cited *In Re Guardianship of Love* (1969), 19 Ohio St.2d 111, 249 N.E.2d 794 for [HN1] the following "basic

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<sup>2</sup> Dr. Aldstadt's opinions/information constituted the only expert evidence before the Probate Court concerning Mrs. Richardson's physical and mental health.

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.*”

In the *Santrucek* case, the Appellate Court held that the ward’s daughter, who was not a competing applicant for appointment as guardian, was not “prejudiced” by the Probate Court’s appointment of the Guardian and was, therefore, without standing to appeal under the circumstances . . . “ *Id.* at P11.

The Court in *Santrucek* cited *In the Matter of the Guardianship of Dorothy Lee*, 2002 Ohio 6194 (Second App. Dist.) with approval on the proposition that a “next-of-kin” lacks standing to appeal where the “next-of-kin”, the ward’s nephew in the *Lee* case, had filed no application for appointment as guardian himself and, therefore, “suffered no consequences adverse to his interests. . . .” *Id.* at P8. On July 6, 2007, in the case at bar, the Second Appellate District overruled *sub silentio* its holding in the *Lee* case stating that “However, as a next-of-kin who is entitled by R. C. 2111.04(B)(2)(b) to notice of the guardianship application that Alice E. Ledford filed, Norma Leach has an interest in the proceeding concerning her mother that confers on Norma Leach the status of a ‘party’ for purposes of App. R. 4(A). Therefore, she does not lack standing to appeal.”<sup>3</sup> Opinion p. 8.

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<sup>3</sup> Appellant in the case at bar was unaware of the rendition on July 3, 2007, of *In the Matter of the Guardianship of Bessie Santrucek*, 2007 Ohio 3427 (Fifth App. Dist.), prior to expiration of the time for filing a motion to certify a conflict, etc., under App. R. 25(A). Notwithstanding, the Fifth Appellate District and Second Appellate District are in “conflict” on this “standing” issue.

The Second District Court of Appeals did not follow the “basic principles” of standing as set forth *In the Matter of Hunt*, supra, which was cited *In Re: Guardianship of Love* (1969), 19 Ohio St.2d 111; 249 N.E.2d 794. Despite the fact that Leach “suffered no consequences adverse” to her interests and was not, therefore, “prejudiced” by the appointment of Ledford as guardian, the Court of Appeals erroneously granted Leach standing to appeal in this case. Leach should not have been permitted to assert claims as an appellant on her own behalf or vicariously on behalf of Mrs. Richardson in this case.

**Proposition of Law No. III: In a proceeding under O.R.C. §2111.02(A), the failure of the ward and her guardian ad litem to object to the magistrate’s decision constitutes a waiver of the ward’s right under Civ. R. 53(D)(3)(b)(iv) to assign as error on appeal the adoption by the probate court of the magistrate’s factual findings and legal conclusions.**

Civ. R. 53 provides, in pertinent part, as follows:

“Civ. R. 53(D) Proceedings in Matters Referred to Magistrates.

▪ ▪ ▪

(3) Magistrate’s decision; objections to magistrate’s decision.

▪ ▪ ▪

(b) Objections to magistrate’s decision.

(i) Time for filing. A party may file written objections to a magistrate’s decision within fourteen days of the filing of the decision, whether or not the court has adopted the decision during that fourteen-day period as permitted by Civ. R. 53(D)(4)(e)(i) . . . .

▪ ▪ ▪

(iv) Waiver of right to assign adoption by court as error on appeal. Except for a claim of plain error, a party shall not

assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ. R. 53(D)(3)(a)(ii), unless the party has objected to that finding or conclusion as required by Civ. R. 53(D)(3)(b)." (Underlining emphasis added.)

Neither Mrs. Richardson nor her guardian ad litem, Virginia Vanden Bosch, Esq., objected to the October 17, 2006, "Amended Magistrate's Decision". Mrs. Richardson's arguments in the Court of Appeals "derived directly from the conclusions of law contained in the Magistrate's decision." *State ex rel v. Booher v. Honda of American Manufacturing, Inc.* (2000), 88 Ohio St.3d 52; 2000 Ohio 269; 723 N.E.2d 571, at p. 53. However, neither Mrs. Richardson nor her guardian ad litem timely objected to those conclusions as Civ. R. 53(D)(3)(b) mandated. Since Civ. R. 53(D)(3)(b)(iv) requires that ". . . a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion unless the party has objected to that finding or conclusion under that rule," Mrs. Richardson should have been precluded from assigning error in the Court of Appeals from Probate Court's order appointing Ledford as guardian. *Id.*<sup>4</sup> R.C. §2111.02(C)(2).

### CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest. The Appellant requests that this Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

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<sup>4</sup> This Court in *Booher* cited to Civ. R. 53(E)(3)(b) under the Rule effective July 1, 1996. The analogous Rule controlling here, effective July 1, 2006, is Civ. R. 53(D)(3)(b)(iv).

Respectfully submitted,

  
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JOHN E. BREIDENBACH

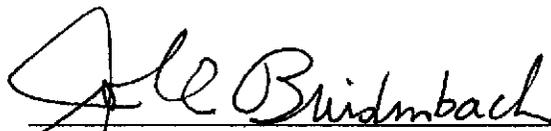
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CERTIFICATE OF SERVICE

I certify that a copy of this Memorandum in Support of Jurisdiction was sent by ordinary U.S. Mail to counsel for Appellees, Lee C. Falke, Falke & Dunphy, LLC, 30 Wyoming Street, Dayton, Ohio 45409, on August 17, 2007.

  
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CLERK OF COURTS  
IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO  
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IN THE MATTER OF THE :  
GUARDIANSHIP OF :  
ALICE I. RICHARDSON, : C.A. CASE NO. 22000  
An Incompetent : T.C. CASE NO. 06GRD00203  
:

.....  
OPINION

Rendered on the 6<sup>th</sup> day of July, 2007.  
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GRADY, J.:

This is an appeal from an order of the Probate Court  
appointing a guardian for the person and estate of an  
incompetent person pursuant to R.C.2111.02.

On June 29, 2006, Alice E. Ledford filed an application  
pursuant to R.C. 2111.03, asking the Probate Court to appoint

her guardian of the person of her mother Alice I. Richardson. The application alleged that Mrs. Richardson was then eighty-seven years of age, that she is mentally incompetent, and that she "resides or has a legal settlement at 791 Old Springfield Road, Vandalia, Ohio 45377," the same address listed on the application as the address of Alice E. Ledford.

Two documents were attached to the guardianship application. One identified Mrs. Richardson's next of kin, who are her four children: Alice E. Ledford, the applicant; Norma L. Leach, of Dayton Ohio; James C. Richardson of Englewood, Ohio; and Johnnie E. Richardson of Pine Mountain, Georgia.

The other document attached to the application was a statement of expert evaluation by J. Douglas Aldstadt, M.D., a licensed physician. Dr. Aldstadt opined that Mrs. Richardson is both mentally and physically impaired and stated his reasons for those opinions. Dr. Aldstadt also recommended that a guardianship for Mrs. Richardson be established.

On July 21, 2006, a competing application for guardianship of Mrs. Richardson was filed by her son, James C. Richardson. The application contained specifications similar to the application filed by Alice E. Ledford, and it likewise

relied on Dr. Aldstadt's evaluation of Mrs. Richardson.

On August 16, 2006, before any hearings on the competing applications were held, Alice E. Ledford filed an application for appointment of an emergency guardian pursuant to R.C. 2111.02 (B) (3). The application and a supporting affidavit of Alice E. Ledford alleged that, five days earlier, James C Richardson forcibly removed Alice I. Richardson from the care of Alice E. Ledford, who had been Mrs. Richardson's caregiver and who held her power of attorney for health care. The application further alleged that as a result Mrs. Richardson lacks the medications she needs and is at risk of suffering a stroke.

On August 23, 2006, the Probate Court appointed Virginia Vanden Bosch to act as guardian ad litem for Alice I. Richardson. The court further ordered James C. Richardson to cooperate with the guardian ad litem in allowing her access to Alice I. Richardson.

For most of the past thirty years, Alice I. Richardson resided in Princeton, West Virginia. In April of 2005, Mrs. Richardson underwent hip surgery, and subsequently returned to her home in Princeton under the care of her daughter, Alice E. Ledford. In July of 2005, Alice E. Ledford persuaded Mrs. Richardson to come to Ledford's home in Dayton for her

continuing care, until she more fully recovered. Mrs. Richardson moved to Dayton, and the Ledfords made modifications in their home to accommodate Mrs. Richardson's needs.

It appears that approximately one year later, in the summer of 2006, Mrs. Richardson expressed a desire to return to her home in West Virginia. The move was supported by her son, James C. Richardson, but opposed by Alice E. Ledford. Frictions between them on the matter developed, and soon they became more acute. Mrs. Richardson's other daughter, Norma L. Leach, became involved, and both she and James C. Richardson were denied access to Mrs. Richardson by Alice E. Ledford and her husband, George Ledford. These conflicts produced the competing applications for guardianship of Mrs. Richardson that Alice E. Ledford filed on June 29, 2006, and that James C. Richardson filed on July 21, 2006.

Pursuant to her appointment, the guardian ad litem, Virginia Vanden Bosch, filed a report to the Probate Court. The guardian ad litem confirmed that on August 12, 2006, as Alice E. Ledford and Mrs. Richardson were leaving a restaurant, they were approached by James C. Richardson and Don Leach, husband of Norma Leach, and that Mrs. Richardson left with the two men to return to her home in West Virginia.

Alice E. Ledford reported to police that her mother had been kidnapped. The matter was investigated the next day by police in West Virginia, who according to the guardian ad litem "determined that all was well."

The guardian ad litem further reported that, two days after Mrs. Richardson arrived at her home in West Virginia, a notice procured by George Ledford was posted on the door of Mrs. Richardson's home. The notice stated that, acting as Mrs. Richardson's trustee, George Ledford was preparing to sell the house and that Mrs. Richardson must vacate the premises. Subsequently, a West Virginia court ordered that Mrs. Richardson may continue to live in the home and that George Ledford must continue to make payments on it. The West Virginia court also ordered an evaluation of Mrs. Richardson and appointed a guardian ad litem for her. Virginia Vanden Bosch further reported that James C. Richardson had moved to West Virginia to care for his mother.

The several guardianship applications were referred to a magistrate of the Probate Court, who held hearings on September 19, 2006. In his written decision, the magistrate found that Alice E. Ledford is a suitable and competent person to be appointed a guardian, and is therefore ordered appointed. The magistrate filed findings of fact and

conclusions of law in support of the decision. An amended decision was filed on October 17, 2006, in response to a request for findings and conclusions.

James C. Richardson and Norma Leach filed objections to the magistrate's decision on October 31, 2006. They objected: (1) that the magistrate abused his discretion in excluding evidence of events that occurred after Alice E. Ledford filed her guardianship application; (2) that the magistrate erred in finding that Alice I. Richardson is a resident of Ohio and/or has a legal settlement in Ohio; and (3) that the magistrate abused his discretion in finding that Alice I. Richardson is in need of a guardianship. Alice E. Ledford filed a memorandum contra the objections.

The objections were considered by the Probate Court, and on January 23, 2007, the court overruled the objections and adopted the magistrate's decision and entered its judgment pursuant to Civ.R. 53(D)(4). In addition to adopting the magistrate's decision, the Probate Court dismissed the guardianship application of James C. Richardson on a finding that he is no longer a resident of Ohio.

On January 29, 2007, a joint notice of appeal from the judgment of the Probate Court was filed by Alice I. Richardson and Norma Leach. The case is before us on review of the error

they assign.

Alice E. Ledford has moved to dismiss the appeal. She argues that, because she has been found incompetent and a guardian for her has been appointed, Alice I. Richardson lacks standing to appeal, either directly or through Norma Leach as her next of kin. Alice E. Ledford argues that any appeal from the Probate Court's judgment must be filed by the guardian ad litem the court appointed to represent Mrs. Richardson.

App.R. 4(A) states that a notice of appeal from a final order or judgment authorized by App.R. 3 may be filed by a "party" to the action in which the judgment or order was entered. In order to be a party, and have standing to appeal, the prospective appellant must have a present interest in the litigation and be prejudiced by the order or judgment from which the appeal is taken. *Ohio Savings Bank v. Ambrose* (1990), 56 Ohio St.3d 53.

We agree that a guardian ad litem appointed for purposes of a guardianship proceeding by the Probate Court has standing to appeal on the ward's behalf from a final judgment appointing a guardian for the ward. A guardian ad litem is a "special guardian" appointed for purposes of a lawsuit, to protect a ward or prospective ward's interest in the

proceeding. In re Guardianship v. Bowen (April 22, 1993), Pickaway App. No. 92CA45. However, that appointment does not necessarily divest the ward or prospective ward of the right to appear and act on his own behalf, against the claims of an adverse party that affect the interests of the ward that are at issue.

The fact that a guardian ad litem was appointed for Alice I. Richardson does not deprive her of the status as a "party" to the guardianship proceeding; her present interest in that litigation and that she was prejudiced by the order appealed from are beyond dispute. Her joint Appellant, Norma Leach, is not likewise situated. However, as a next of kin who is entitled by R.C. 2111.04(B)(2)(b) to notice of the guardianship application that Alice E. Ledford filed, Norma Leach has an interest in the proceeding concerning her mother that confers on Norma Leach the status of a "party" for purposes of App. R. 4(A). Therefore, she does not lack standing to appeal. The motion to dismiss is overruled.

FIRST ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED IN DETERMINING THAT THE ALLEGED WARD HAD A RESIDENCE OR A LEGAL SETTLEMENT IN MONTGOMERY COUNTY, OHIO."

R.C. 2111.02(A) provides, in pertinent part:

"When found necessary, the probate court on its own motion or on application by any interested party shall appoint . . . a guardian of the person, estate, or both, of a minor or incompetent, provided the person for whom the guardian is to be appointed is a resident of the county or has a legal settlement in the county . . ."

For purposes of R.C. 2111.02(A), "residence" requires an actual physical presence at some abode coupled with an intent to remain at that residence for some period of time. In re *Guardianship of Fisher* (1993), 91 Ohio App.3d 212. The term "legal settlement" connotes one living in an area with some degree of permanency greater than a visit lasting a few days or weeks. *Id.*

R.C. 2111.02(A) sets up the requirements of residence or legal settlement in the alternative. Relevant to that matter, the magistrate made the following findings of fact:

"I find that in July of 2005 Alice I. Richardson left her home in West Virginia to take up permanent residence in Ohio at the home of her daughter, Alice Ledford.

"I find that Alice I. Richardson made the decision to come to Ohio in order to allow her daughter, the applicant, Alice Ledford, to care for her on a daily basis.

"I find that for several years prior to moving her mother

to Ohio, the applicant, Alice Ledford, would travel to her mother's home in West Virginia and visit and care for her mother on all holidays and would spend her summer vacations with her mother.

"I find that in July of 2005 after an extended illness of over three months Alice I Richardson made the decision to permanently leave her home in West Virginia and establish her new residence in Ohio at the home of her daughter, Alice Ledford.

"I find that Alice I. Richardson traveled to Ohio with her daughter, Alice Ledford, by automobile and that she found the trip to be exhausting and difficult.

"I find that Alice I. Richardson told Alice Ledford that she felt she could make the trip from Ohio to West Virginia again by automobile.

"I find that Alice I. Richardson brought with her to Ohio her clothes, medicines, personal items and her cat.

"I find that in July 2005 Alice I. Richardson came to Ohio with the intention of making Ohio her permanent residence and had no intention of returning to West Virginia to live by herself.

\* \* \*

"I find that on August 12, 2006 James Richardson, without

the consent of Alice Ledford took control of his mother, Alice I. Richardson and spirited her out of the state to her former home in West Virginia."

In overruling the objections to the magistrate's findings, the Probate Court stated: "Legal settlement connotes living in an area with some degree of permanency greater than a visit lasting for a few days or weeks. It is obvious from the facts that Richardson had a legal settlement as she had been in Ohio for over a year before (James C. Richardson) took her to West Virginia." (Entry and Decision, January 23, 2007, Dkt. 20, at p.3).

Appellants point to Alice E. Ledford's testimony that she and her mother planned to continue to spend the summer months in Mrs. Richardson's home in West Virginia, and that although Alice E. Ledford had her mother's mail and bank statements forwarded to a post office box in Montgomery County, Mrs. Richardson continued to use her bank in West Virginia. Further, Appellants point to evidence that, beginning in the summer of 2006, Mrs. Richardson began to express a desire to return to her home in West Virginia. Appellants contend: "There is no evidence in the record that Alice I. Richardson ever committed or gave her approval to the concept that she was moving to Ohio to live there beyond the spring of 2006."

(Brief, p.8).

While these contentions may preponderate against the magistrate's finding that Mrs. Richardson established a residence in Montgomery County, Ohio, they do not undermine the trial court's finding that Mrs. Richardson established a legal settlement in Montgomery County, having lived there for approximately one year, from July of 2005 until she returned to West Virginia on August 12, 2006, after the application for guardianship of Alice E. Ledford was filed on June 29, 2006.

Nevertheless, R.C. 2111.02(A) governs orders appointing of guardians, and the section provides that the Probate Court may appoint a guardian "provided the person for whom the guardian is to be appointed is a resident of the county or has a legal settlement in the county . . ." (Emphasis supplied). R.C. 2111.04(A) therefore requires a finding that either alternative exists when the guardian is appointed. When the Probate Court appointed Alice E. Ledford her mother's guardian on January 23, 2007, Mrs. Richardson had been gone from Montgomery County, Ohio since August 12, 2006, a period of 164 days.

For these purposes, "residency" requires an actual physical presence, and "legal settlement" contemplates living in an area. *Fisher*. Neither condition existed when the

Probate Court appointed Alice E. Ledford the guardian of the person and estate of Alice I. Richardson. Therefore, the Probate court erred when it made the appointment.

Appellants are situated on the same side as James C. Richardson against Alice E. Ledford in this litigation, and it may seem unjust to allow Appellants to prevail because of the conduct of James C. Richardson in removing his mother from Ohio to West Virginia while Alice E. Ledford's guardianship was pending, preventing the court from exercising its jurisdiction.

In *Shroyer v. Richmond* (1866), 16 Ohio St. 455, the Supreme Court wrote:

"Proceedings for the appointment of guardians, are not *inter partes*, or adversary in their character. They are properly proceedings *in rem*; they are instituted, ordinarily, by application made on behalf of the ward, and for his benefit; and the order of appointment binds all the world. In such a proceeding, plenary and exclusive jurisdiction of the subject-matter, has been conferred by statute on the probate court, and that jurisdiction attaches, whenever application is duly made to the court for its exercise in a given case. It is not essential to the jurisdiction, that the ward be actually before the court, unless, by reason of his right to choose a

guardian, or for other cause, the statute so require. And when jurisdiction has attached, the court has full power to hear and determine all questions which arise in the case, whether in regard to the status of the ward or otherwise; and no irregularity in the proceedings, or mistake of law in the decision of the questions arising in the case, will render the order of appointment void, or subject it to impeachment collaterally. All questions necessarily arising in the case, becomes *res adjudicatae*, by the final order of appointment, which binds all the world, until set aside or reversed by a direct proceeding for that purpose." *Id.*, at 456-466. (Emphasis supplied).

The subject-matter jurisdiction of the Probate Court attached when Alice E. Ledford filed her guardianship application on June 29, 2006. That jurisdiction is conferred by R.C. 2111.02(A), pursuant to the constitutional authority of the General Assembly to establish the jurisdiction of the court of common pleas and its divisions. Article IV, Section 4(B), Ohio Constitution.

*Shroyer* recognizes that the in rem jurisdiction conferred on the Probate Court, being plenary, does not require that the ward "be actually before the court" for that jurisdiction to exist, "unless, by reason of his right to choose a guardian,

or for other cause, the statute so require(s)." To "be actually before the court" means to be within the court's territorial jurisdiction. R.C. 2111.02(A) imposes such a limitation by requiring that the Probate Court may make the appointment requested, "provided the person for whom the guardian is to be appointed is a resident of the county of has a legal settlement in the county . . ." By couching that requirement in the present tense, the statute imposes it not only for jurisdiction to attach, when the application is filed, but also when the jurisdiction which R.C. 2111.02(A) confers is exercised by the Probate Court in granting the application.

When jurisdiction is in rem, due process requires the res of the action to be within the court's territorial jurisdiction in order for subject matter jurisdiction to exist. The jurisdiction that Alice E. Ledford invoked pursuant to R.C. 2111.02(A) when she filed her application for guardianship, which required allegations of residency and/or legal settlement, is subject to a condition subsequent; a showing that one or both of those conditions exist. Unless that showing is made, the court lacks the subject-matter jurisdiction conferred by R.C. 2111.02(A) to grant the application, as the Probate Court did.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED IN LIMITING THE EVIDENCE AS TO ALICE I. RICHARDSON'S MENTAL STATUS TO THE DATE OF FILING THE APPLICATION FOR APPOINTMENT OF GUARDIAN."

This error assigned is rendered moot by our decision sustaining Appellants' first assignment of error. Therefore, we decline to decide it. App.R. 12(A)(1)(c).

Conclusion

Having sustained the first assignment of error, we will reverse and vacate the Probate Court's appointment of Alice E. Ledford as guardian of the person and estate of Alice I. Richardson.

FAIN, J. And WALTERS, J., concur.

(Hon. Sumner E. Walters, retired from the Third Appellate District, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

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Hon. Alice O. McCollum



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COURT OF APPEALS  
IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO



IN THE MATTER OF THE	:	
GUARDIANSHIP OF	:	
ALICE I. RICHARDSON,	:	C.A. CASE NO. 22000
	:	
An Incompetent	:	T.C. CASE NO. 06GRD00203
	:	
	:	<u>FINAL ENTRY</u>

Fursuant to the opinion of this court rendered on the  
6<sup>th</sup> day of July, 2007, the judgment of the trial  
 court is Reversed and Vacated. Costs are to be paid as  
 provided in App.R. 24.

*Mike Fain*  
 \_\_\_\_\_  
 MIKE FAIN, JUDGE

*Thomas J. Grady*  
 \_\_\_\_\_  
 THOMAS J. GRADY, JUDGE

*Sumner E. Walters*  
 \_\_\_\_\_  
 SUMNER E. WALTERS, JUDGE (BY ASSIGNMENT)

(Hon. Sumner E. Walters, retired from the Third Appellate District, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

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