IN THE SUPREME COURT OF OHIO

IN RE: GUARDIANSHIP OF BESSIE SANTRUCEK	:	**CASE NO. 2007-1545**
	:	**On Appeal from the Court of Appeals of Licking County Ohio, Fifth Appellate District (No. 06 CA 130)**

VICTORIA WELLINGTON'S MEMORANDUM IN OPPOSITION TO JURISDICTION

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GUARDIAN AD LITEM

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EXPLANATION OF WHY THIS CASE IS NOT OF GREAT PUBLIC OR GENERAL INTEREST

Appellant's disclaimer notwithstanding, what she is really asking is for this Court to judicially modify O.R.C. 2109.21. As pointed out by Appellant, Ohio law can prevent an out-of-state child from fully participating in legal proceedings regarding a parent's care. However, that limitation reflects long standing, codified, law in Ohio and is not the creation of the Fifth Appellate District.

Prior to 1981, Ohio had an absolute ban on out-of-state residents serving as guardians for incompetent adults. However, the Ohio legislature amended the law to allow out-of-state residents nominated by the ward pursuant to a durable power of attorney or in a specified writing to serve as guardians. O.R.C. Section 2109.21(C). Pursuant to expressio unius est exclusio alterius, the expression of one item in a class implicitly excludes other items of that class. *Smith v. Friendship Village of Dublin, Ohio, Inc.* (2001), 92 Ohio St. 3d 503, 506. Had the Ohio legislature wanted all out-of-state residents to have the right to participate in guardianship proceedings, it could have said so. Additionally, prior to that amendment, the ban on nonresident guardians had been strictly enforced by the courts and "a legislative body in enacting amendments is presumed to have in mind prior judicial constructions of the section." *State ex rel., County Bd. of Education, Huron County v. Howard* (1957), 167 Ohio St. 93, 96. Thus, the legislature's failure to broaden the inclusion of out-of-state residents is clear evidence of its intentions.

Additional evidence of the legislature's intent to limit the role of out-of-state residents in guardianship proceedings except in very limited circumstances can be found in O.R.C. Section 2111.04 (A)(2)(b). Pursuant to that section, it is not even necessary that out-of-state next of kin such

as Appellant be notified of the application for appointment of a guardian. (As an aside, if Appellee was really trying to prevent her sister from being informed about their mother, she would not have served Appellant with the guardianship petition, something she clearly was not required to do.)

Given that it has been more than twenty-five years since there has been even the very limited expansion of the role of nonresidents in guardianship proceedings, how then can it be argued that there is a great public interest in doing so? Even if there were, the proper place to raise that issue is before the body that enacted the law, the Ohio General Assembly.

STATEMENT OF FACTS

As she has done throughout this proceeding, Appellant sets forth "facts" that have absolutely no evidentiary support. The move to Ohio was not a unilateral decision made by Victoria Wellington; it was a decision with which Bessie Santrucek agreed. There is virtually no evidence that Ms. Santrucek was not allowed to say goodbye to her friends much less that these friends dated to the administration of Franklin D. Roosevelt. While Appellant once again is claiming her mother was "moved against her will," she conveniently fails to acknowledge that she admitted under oath both that: (1) she had no idea what the discussions between her mother and Appellee regarding the move to Ohio were and (2) her mother had indicated to her, in the presence of the guardian ad litem, that her mother wished to remain in Ohio.

The appointment of Victoria Wellington as the guardian of her mother was simply a reflection of Ms. Santrucek's often expressed sentiments. In virtually every document in which Ms. Santrucek gave an indication of who she wished to handle her personal and financial affairs, she designated that Appellee be the one to do so. Ms. Santrucek nominated Appellee as:

1. her attorney in fact pursuant to a durable general power of attorney;

2. her Michigan Health Care Advocate;

3. her Michigan Health Care Power of Attorney;

4. as the successor trustee for the trust Ms. Santrucek created (Ms. Santrucek serving as the initial trustee); and

5. as the executor of her estate.

Notably absent were any such similar powers or appointments in favor of Appellant.

Appellant also seems to imply that Ms. Santrucek requested Appellant be present during the hearing to protect Ms. Santrucek's rights. Nothing could be further from the truth. Ms. Santrucek had both her own attorney and a very active guardian ad litem to protect her rights. Appellant only decided to become involved in the legal process after her efforts at self-help proved ineffective. Appellant admitted that on June 15, 2006, she was fully aware a guardianship action was pending. Despite that fact, on that day Appellant arranged to have her daughter (who also lives in Arizona) waiting outside the office of a local Newark, Ohio, physician with whom Ms. Santrucek had an appointment. As Ms. Santrucek left that appointment, Appellant escorted Ms. Santrucek to Appellant's daughter's car with the express intention of removing her mother to Michigan. When Appellee protested this course of action, Appellant assaulted her, leading to injuries which required medical attention. It was only after Appellee's efforts were thwarted through the intervention of two Newark Police Officers and a case worker from Licking County Adult Protective Services, that Appellant suddenly became interested in participating in the legal process.

Appellant also misstates the status of the proceedings below and in Michigan. Appellant did not pursue an appeal from the Licking County Probate Court's ruling that Appellee's counsel did not have a conflict of interest. Additionally, the Michigan Court did not simply stay its hand, it dismissed Appellant's petition in its entirety. Thus, far from failing to accord proceedings in a sister

state the respect they deserve, there were no proceedings pending at the time the Fifth District issued its decision.

LAW AND ARGUMENT

Proposition of Law: Only a Party Whose Rights Have Been Prejudiced Has Standing to Appeal.

"A preliminary inquiry in all legal claims is the issue of standing." *State ex rel. Ohio General Assembly v. Brunner* (2007), ___ Ohio St. 3d _____, 2007-Ohio-3780 (quoting from *Cuyahoga Cty. Bd. of Commrs. v. State* (2006), 112 Ohio St. 3d 59.) "It is a well established principle that no one can complain of an error unless he is prejudiced thereby." *In re: the Guardianship of Bluthardt* (Belmont Co. 1982), 1982 Ohio App. LEXIS 13364.

Appellant's argument that the Fifth District erred in holding she had no standing through failing to file an application which she was not qualified to file, is flawed for two reasons. First, as demonstrated above, the Ohio legislature has made it very clear that out-of-state residents, relatives or not, are not even entitled to notice of guardianship proceedings. Certainly, it is no stretch to find that such a limitation makes it clear that nonresidents, absent being nominated as a guardian pursuant to O.R.C. Section 2109.21(C), are not seen as being active participates in the appeal process.

Secondly, the Fifth District's decision was not limited to Appellant's lack of application to be appointed guardian. As the Fifth District pointed out, Appellant's argument in large part "*consists of vicarious claims of violations of Bessie's rights,* even though the trail court appointed for Bessie a guardian ad litem, who has not chosen to appeal. . ." *In the Matter of the Guardianship of Bessie Santrucek* (Licking Co. 2007), 2007 Ohio App. LEXIS 3137 (page 4 of the opinion, emphasis added.) Certainly, "basic to the establishment of standing is that the challenged action

has caused, or will cause, the appellant injury in fact." *Franklin County Regional Solid Waste Management Authority v. Schregardus* (Franklin Co. 1992), 84 Ohio App. 3d 591, 599. The Fifth District went on to note that Ms. Santrucek had also retained counsel in the guardianship proceedings.

In *Bluthardt, supra*, the ward's husband appealed the appointment of a guardian for his wife, claiming that the guardianship statute was unconstitutional. The court held that he lacked standing to raise such an issue as, even if true, his wife was the one prejudiced, not he. A similar conclusion was reached in *In the Matter of the Guardianship of Lee* (Miami Co. 2002), 2002 Ohio App. LEXIS 6037, another case in which someone other than the ward appealed the appointment of a guardian. The court found that only the ward had standing to appeal such a decision.

The case of *In the Matter of the Guardianship of Miller* (Madison Co. 1998), 1998 Ohio App. LEXIS 3519 involved an appeal by the ward's family members, but not the ward, of the probate court's refusal to move the ward to a different care facility. The Twelfth Appellate District held that the only person whose rights were arguably invaded were the ward's. Thus, the family lacked standing to appeal. Finally, in *In the Matter of Edwards* (Cuyahoga Co. 1998), 1998 Ohio App. LEXIS 1066, the court held that as the appellant was not entitled to notice of the proceeding, he clearly had no interest in the subject matter that conferred standing upon him to appeal. In all of the foregoing cases, the appellant lacked standing because they were complaining of an alleged violation of the ward's rights, not their own. That is precisely what Appellant did in her appeal to the Fifth District.

The cases relied upon by Appellant do not abrogate this well established doctrine. *In the Matter of Guardianship of Meucci* (Butler Co. 2000), 2000 Ohio App. LEXIS 6094, involved an

appeal of the denial of appellant's own motion, a motion which claimed that *appellant's* rights had been violated. *In the Matter of the Guardianship of McHaney* (Summit Co. 2004), 2004 Ohio App. LEXIS 5388, also involved an appeal of an alleged violation of the appellant's rights, in that instance the probate court's refusal to acknowledge his qualification as an out-of-state guardian who had been expressly nominated pursuant to O.R.C. Section 2109.21(C). As for *In re Tripp* (Wood Co. 1993), 90 Ohio App. 3d. 209, it does not appear as if the issue of standing was ever raised. .

It is also noteworthy that while Appellant is now arguing that *Meucci*, *McHaney* and *Tripp* are in conflict with the Fifth District's decision in this case, she made no such claims, nor even any reference to these cases, in her Motion to Certify a Conflict. That motion has been overruled by the Fifth District.

CONCLUSION

Appellate wishes this Court to modify both long standing code sections strictly limiting the role of out-of-state residents in guardianship proceedings and the well established principal that only the person whose rights have been violated has standing to appeal. As to the former, if the public truly wishes that to occur, the legislature is the entity to make such a change. As to the latter, it is hard to see how the public could possibly be interested in opening the court house doors to even more litigation, something that is virtually certain to occur if persons are free to appeal the alleged violations of others' rights. Is not the parent concerned about, and to some extent effected by, the outcome of his adult child's divorce or personal injury case? Are not employees concerned with the outcome of litigation to which their employer is a party? Are not minor children effected by the criminal conviction of their parent? Should each of them have standing to appeal what they perceive as an adverse outcome?

This Court should not accept jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was duly served upon Paul Harmon, Esq., Attorney for Appellant Jennie C. Hull, 964 N. 21st Street, Newark, Ohio 43055; Troy A. Reed, Esq., 3860 Racoon Valley Road, Alexandria, Ohio 43001 and William G. Porter, II, Esq., Vorys, Sater, Seymour and Pease LLP, 52 East Gay Street, P.O. Box 1008, Columbus, Ohio 43216-1008 by regular U. S. mail, postage paid, on this 4th day of September, 2007.

_____
Wm. Douglas Lowe