

IN THE SUPREME COURT OF OHIO

IN RE: GUARDIANSHIP  
OF BESSIE SANTRUCEK

: CASE NO. 2007-1545  
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On Appeal from the Court of  
Appeals of Licking County  
Ohio, Fifth Appellate District  
(No. 06 CA 130)

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MERIT BRIEF OF APPELLANT JENNIE HULL

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William G. Porter, II (0017296)  
(COUNSEL OF RECORD)  
Michael J. Hendershot (0081842)  
Vorys, Sater, Seymour and Pease LLP  
52 East Gay Street, P.O. Box 1008  
Columbus, Ohio 43216-1008  
Telephone: 614-464-5448  
Facsimile: 614-719-4911  
wgporter@vssp.com

and

Paul D. Harmon (0023932)  
964-A North 21<sup>st</sup> Street  
Newark, Ohio 43055  
Telephone: 740-366-7446  
Facsimile: 740-366-1194  
harmonatty@alltel.net

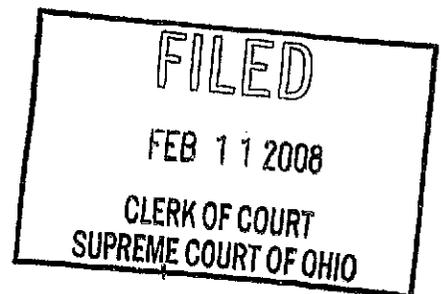
COUNSEL FOR APPELLANT,  
JENNIE HULL

Troy A. Reed (0061282)  
(COUNSEL OF RECORD)  
3860 Raccoon Valley Road NW  
Alexandria, Ohio 43001  
Tel: 740-670-5998

GUARDIAN AD LITEM

William Douglas Lowe (0030106)  
(COUNSEL OF RECORD)  
Russell Suskind (0002914)  
36 North Second Street  
Newark, Ohio 43055  
Telephone: 740-345-3431  
Facsimile: 740-345-7302  
dlowe@rpdem.com

COUNSEL FOR APPELLEE,  
VICTORIA WELLINGTON



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## Introduction

This appeal stems from a disagreement between sisters about how to best care for their 97-year-old mother. As is increasingly common in today's mobile society, each daughter and the mother lived in a different state. One daughter, an Ohio resident, moved the mother from Michigan to Ohio and started probate proceedings here. The non-Ohio-resident daughter challenged the Ohio court's jurisdiction in both the trial court and on appeal. The Fifth District concluded that the out-of-state daughter had no standing to contest jurisdiction. The Fifth District's provincial view of appellate standing is mistaken and has left a daughter who wants to care for her incompetent mother without recourse to challenge a probate court's jurisdiction over her mother.

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. The decision below leaves out-of-state relatives with no avenue to challenge a probate court's assumption of jurisdiction, even though that jurisdiction deprives the relative of the ability to be a guardian to a loved one.

Fighting against the disadvantage of living out of state, Jennie Hull challenged several aspects of the guardianship proceedings that her sister, Victoria Wellington, had initiated in Ohio as to their mother, Bessie Santrucek. This included a challenge to the Ohio probate court's jurisdiction, a motion to disqualify Victoria's counsel (who had notarized her mother's signature by attesting to her sound mind less than one month before initiating the guardianship

proceedings (Supp. 22), and—ultimately—an affidavit to disqualify the probate judge.<sup>1</sup>

Although the probate-level proceedings in this case were contentious and the errors assigned in the trial court were wide ranging, the issue in this court is neither complicated nor should it be contentious. The question for this Court to resolve is whether an out-of-state next of kin to a proposed ward has standing to appeal decisions of the probate court even though the next of kin did not apply to be the guardian. Because a statute prevents the out-of-state next of kin from applying for guardianship, the answer should be yes if the next of kin participates in the probate proceedings by objecting to the probate court's jurisdiction or to the proposed guardian.

### **Statement of Facts**

The principal players in this case are Bessie Santrucek, the 97-year-old mother who lived, until recently, in Michigan; appellee Victoria Wellington, one of Bessie's daughters, who lives in Granville, Ohio; and appellant Jennie Hull, Bessie's other daughter, who lives in Arizona. The disagreement that undergirds this appeal led Victoria to move 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.

The probate-court proceedings began in May, 2006, about six weeks after Victoria moved Bessie to Ohio. (Supp. 1) Jennie, who lives in Arizona, hired an attorney to contest the guardianship proceedings. Within one week of her attorney's appearance in the case, Jennie filed a multi-part motion objecting to the probate proceedings. (Supp. 3, 4) Jennie's primary

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<sup>1</sup> Chief Justice Moyer granted the affidavit disqualifying Judge Hoover from this matter and all other matters where Jennie Hull's counsel appeared. The Chief Justice disqualified Judge Hoover to "make certain that the outcome of this case" would be unaffected by the judge's "very negative" opinion of Jennie's attorney. See *In the Matter of the Guardianship of: Bessie Santrucek*, Supreme Court No. 06-AP-103 (Oct. 20, 2006) (Supp. 55).

objection was that the Licking County Probate Court did not have jurisdiction over the proposed ward. (Supp. 4) Consistent with her position in the Ohio court—and recognizing that an Ohio statute barred her from being appointed guardian by an Ohio court—Jennie filed a parallel action for conservatorship in a Michigan court. (Supp. 9)

Jennie contended that the probate court lacked jurisdiction because her mother had been removed from her home against her wishes. (Supp. 51-54; Trans. 64-67) Victoria disputes that characterization of the move from Michigan to Ohio (Supp. 49-50; Trans. 23-24), but the disagreement between the sisters has tangible legal implications. Probate jurisdiction depends on the ward's residence. R.C. 2111.02(A). As this Court has said, "courts have held that if an apparent change of residence is involuntary, the residence remains the place before the forced move." *State ex rel. Florence v. Zitter*, 106 Ohio St.3d 87, 2005-Ohio-3804, 831 N.E.2d 1003, at ¶25. After a contentious hearing on this and other of Jennie's challenges to the guardianship proceedings, Judge Hoover denied the motion by concluding that the probate court in Licking County had jurisdiction over the ward, Bessie Santrucek. (Appx. 11)

With Jennie's challenges out of the way, the matter went through a second hearing to determine the substantive issues of whether a guardian was needed and whether the applicant—Victoria—would be appointed guardian. After that hearing, Judge Hoover declared Bessie Santrucek incompetent and appointed Victoria Wellington as the guardian of her person and property. (Appx. 10) Following this final judgment, Jennie appealed. In the Fifth District Court of Appeals, she contested the probate court's jurisdiction and the fairness of the probate court's handling of her pretrial motions. (Appellant's Opening Br. in the 5<sup>th</sup> Dist. at 23, 28) The Fifth District declined to review these questions because it concluded that Jennie Hull had no standing to appeal. 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*, No. 06 CA 130, 2007-Ohio-3427, at ¶10. Taking issue with this restricted view of appellate standing, Jennie appealed to this Court, which accepted jurisdiction on December 12, 2007. *In re Guardianship of Santrucek*, 116 Ohio St.3d 1437, 2007-Ohio-6518, 877 N.E.2d 989.

### **Argument in Support of Proposition of Law**

Jennie Hull appealed certain decisions of the probate court because she believes the court lacked jurisdiction over her mother and because she believes the probate court did not conduct a fair hearing. The appellate court did not address these alleged errors because it ruled that Jennie Hull had no standing to challenge the probate court's jurisdiction. That holding is mistaken because a litigant has standing to appeal any error that results in prejudice to that litigant.

**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 by objecting to the court's jurisdiction or to the proposed guardian, and was aggrieved by the probate court's judgment.**

Jennie Hull's desire to fully participate in proceedings that impacted how her 97-year-old mother will live her remaining years was blocked by two events: her sister's unilateral decision to move their mother from her home town in Michigan 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 probate matters from probate proceedings in other states.

**I. Appellate standing extends to those prejudiced by a lower court judgment.**

Ohio statutory law defines the right to appeal broadly. “Every final order, judgment, or decree of a court . . . may be reviewed on appeal . . .” R.C. 2505.03(A). There are, of course, prudential limits on *who* may appeal a final order. The most significant—and the one implicated here—is that “the right to appeal can be exercised only by those parties who are able to demonstrate a present interest in the subject matter of the litigation which has been prejudiced by the judgment of the lower court.” *Willoughby Hills v. C. C. Bar's Sahara, Inc.* (1992), 64 Ohio St.3d 24, 26, 591 N.E.2d 1203; see also *State ex rel. Gabriel v. Youngstown* (1996), 75 Ohio St.3d 618, 619, 665 N.E.2d 209 (“[a]ppeal lies only on behalf of a party aggrieved by the final order appealed from”) (internal quotation marks and citation omitted).

In a traditional plaintiff versus defendant suit, identifying a party aggrieved by a trial court’s judgment is straightforward. Other types of litigation, though, also produce aggrieved parties—and those parties have standing to challenge the judgment in an appellate court. Ohio’s courts have recognized diverse situations of appellate standing. See, e.g., *Midwest Fireworks Mfg. Co. v. Deerfield Twp. Bd. of Zoning Appeals* (2001), 91 Ohio St.3d 174, 743 N.E.2d 894 (appeal by neighboring property owner of home-rule township’s decision to grant zoning permit to another property owner); *Schomaeker v. First Nat’l Bank of Ottawa* (1981), 66 Ohio St.2d 304, 311, 421 N.E.2d 530 (noting that property owner adjacent to bank that received zoning variance had standing to appeal). The principle that someone may be aggrieved by a judgment outside of the usual adversary alignment extends to guardianship cases. See, e.g., *In re Guardianship of Love* (1969), 19 Ohio St.2d 111, 113, 249 N.E.2d 794; (appeal lies on behalf of those “aggrieved”); *In re Guardianship of Rudy*, (Ohio App. 11<sup>th</sup> Dist. Sept. 30, 1993), No. 93-T-4851, 1993 WL 407333, at \*1 (heirs had standing to contest attorney fees paid by ward in contesting guardianship even though heirs were not parties to guardianship contest).

As these cases show, a litigant may be aggrieved by a judgment even when the litigant is not aligned in the traditional plaintiff versus defendant posture.

One particularly good discussion of appellate standing outside of the traditional posture is the Second District's analysis of an adoption matter in *In re Moorehead* (2d Dist. 1991), 75 Ohio App.3d 711, 600 N.E.2d 778. There, the foster parents of a child appealed their unsuccessful motion to review the Montgomery County Children Services Board's permanent custody of the child. The Agency defended the appeal by arguing that the foster parents were not parties to the original custody action. The Second District rejected the Agency's position. Observing that the foster parents' motion was the "only forum" to review the Agency's action, the court was "persuaded" that the parents had standing to appeal because they were "concerned enough about the welfare of [the] child" to pursue "complex litigation" and a subsequent appeal. *Id.* at 719 (reversing trial court). The foster parents in *Moorehead* challenged a decision in the only way available. Here, Jennie challenged the probates court's jurisdiction over her mother in the only way possible, by hiring a local attorney and filing several objections to the probate court's actions. She also initiated similar proceedings in her mother's home state of Michigan. Jennie's participation in—and objection to—the probate proceedings gives her standing to challenge on appeal the probate court's exercise of jurisdiction.

**II. Jennie was aggrieved by the probate court's decision because that judgment binds the world and prevents Jennie from litigating in a state that would allow her to apply for guardianship of her mother.**

From the outset, Jennie Hull has challenged the Licking County Probate Court's jurisdiction over her mother. Jennie is aggrieved by that court's decision to exercise jurisdiction because Ohio places Jennie at a disadvantage relative to her sister in the guardianship proceedings. Because Jennie lives out of state, she may not apply to be her mother's guardian. R.C. 2109.21(C)<sup>2</sup> limits guardians of a ward to "resident[s] of the county" where the ward resides.<sup>3</sup> Because a guardianship judgment "binds all the world,"<sup>4</sup> the combination of the probate court's judgment and the Ohio statute means that Jennie will never be able to press her own case for guardianship over her mother if the decision stands.

Jennie is directly aggrieved by the probate court's ruling and should be entitled to challenge on appeal a judgment that forecloses her ability to compete for the role of her mother's guardian on equal footing with her sister. The fact Jennie happens to live in a state

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<sup>2</sup> "(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).

<sup>3</sup> The probate court has discretion to appoint a guardian who lives outside the county, but may not appoint a guardian who lives out of state. R.C. 2109.21(C).

<sup>4</sup> *In re Clendenning* (1945), 145 Ohio St. 82, 60 N.E.2d 676, paragraph 2 of the syllabus.

other than Ohio should not restrict her ability to challenge a decision with that far-reaching consequence. Yet that is exactly what the Fifth District ruled.

The Fifth District held that Jennie has no appellate standing because she did not apply to be a guardian herself. That conclusion ignores the statute that prevents Jennie from applying to be her mother's guardian in the first instance (R.C. 2109.21(C)) and ignores the difference between a challenge to the identity of an appointed guardian and a challenge to the probate court's jurisdiction. A rule that Jennie could only appeal the probate court's order if she had applied to be a guardian is unfair because a statute prevented Jennie from applying. Moreover, even a rule that required a competing guardianship application in order to challenge a guardianship appointment should not bar a challenge to the probate court's *jurisdiction*.

The Fifth District's holding relied on a Second District opinion that found a ward's nephew had no standing to challenge a guardian's appointment when the nephew himself did not apply to be a guardian. A comparison with that case—*In re Lee*, 2<sup>nd</sup> Dist. No. 02CA3, 2002-Ohio-6194—illustrates both problems with the Fifth District's decision. In *Lee*, the court reasoned that the next of kin suffered no adverse consequences because he did not apply to be guardian. *Id.* at ¶8. The differences with Jennie's situation are obvious.

First, unlike the appellant in *Lee*, Jennie had no opportunity to submit a guardianship application because of Ohio's statute. The *Lee* appellant argued that the court overlooked his status as next of kin even though the appellant could have injected himself into the guardianship determination merely by applying. Jennie could not inject herself into the proceedings any more than she did because a statute bars her from being her mother's guardian.

Second, the *Lee* appellant claimed that the probate court failed to consider him—as a next of kin—before considering the actual applicant. Jennie complains that the probate court

lacked jurisdiction. Even if she could have applied to be a guardian, her application should not have changed the court's calculus about jurisdiction. Jurisdiction is a separate question from who should be appointed guardian. Standing to contest either jurisdiction or guardianship does not rise or fall with standing to contest the other. Cf. Steinman, *Shining a Light in a Dim Corner: Standing to Appeal and the Right to Defend a Judgment in Federal Court* (2004), 38 Ga.L.Rev. 813, 839 ("Unlike standing to sue, which typically attaches to claims, standing to appeal attaches to discrete rulings and issues.") *Lee* has no bearing on whether Jennie should have standing to contest the probate court's orders.

Indeed, the same judge who authored *Lee* recently issued a decision that underscores the differences between *Lee* and this appeal. In *In re Guardianship of Richardson*, the appellants raised almost identical errors with those Jennie raised in the Fifth District: that the probate court lacked jurisdiction and that the probate court improperly limited certain proffered evidence. 172 Ohio App.3d 410, 2007-Ohio-3462, 875 N.E.2d 129, at ¶¶ 20, 46.<sup>5</sup> Judge Grady found that a next-of-kin appellant had standing to raise these errors because she had "an interest in the proceeding concerning her mother." *Id.* at ¶19. Like Jennie, the appellant in *Richardson* did not file a competing guardianship application. *Lee* and *Richardson* are consistent because the nature of the challenge was different. In *Lee* the appellant complained about the appointment without submitting himself as a potential guardian; in *Richardson* the appellants complained that the court was without power to act. In *Lee* the party would have been directly aggrieved if he had applied to be a guardian. Instead, he sat out the probate fight before deciding to join it at the appellate level. *Richardson* and this appeal involve no similar gamesmanship. Neither the *Richardson* appellant nor Jennie Hull complained on appeal that

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<sup>5</sup> *Richardson* is also on appeal to this Court. It is case No. 2007-1546. See 116 Ohio St.3d 1437, 2007-Ohio-6518, 877 N.E.2d 989.

they should have been appointed guardian. Rather, they argued that the wrong court—indeed, the wrong state—was exercising jurisdiction.

In addition to *Richardson*, other Ohio appellate authority shows why the Fifth District's narrow view of appellate standing is not—and should not be—the rule for guardianship appeals. Like this case, *In re Tripp* involved a challenge to the probate court's jurisdiction. (6<sup>th</sup> Dist. 1993), 90 Ohio App.3d 209, 628 N.E.2d 139. The appellant in that case challenged the probate court's jurisdiction, but never applied to be the guardian. The Sixth District considered this question even though the appellant did not himself apply to be the ward's guardian. If the law were as the Fifth District pronounced, that appeal should have been dismissed.

Even more powerful evidence that the law is not as the Fifth District has interpreted it is *In re: Guardianship of Meucci* (Dec. 26, 2000), 12<sup>th</sup> Dist. No. CA2000-03-046, 2000 WL 1875737. The cast of characters in *Meucci* and the basic facts are strikingly similar to this appeal. There, as here, two sisters disagreed about how to care for their ailing mother—one sister lived in Ohio and the other in New Jersey. Also like this appeal, a guardianship proceeding was initiated in another state. Even the allegations of error in the two cases are similar. In *Meucci*, the out-of-state sister challenged the in-state sister's appointment as guardian by arguing that the appellate court lacked jurisdiction over the mother and by contending that the attorney for the guardian sister had a conflict of interest. Without any concern that an out-of-state next of kin raised appellate challenges to a probate court's jurisdiction, the Twelfth District evaluated the out-of-state sister's points of error.

Although standing was not raised directly in either *Tripp* or *Meucci*, “The issue of standing is jurisdictional in nature and may be raised sua sponte by a court.” See *First Natl. Bank v. Randal Homes Corp.*, 4<sup>th</sup> Dist. No. 05CA739, 2005-Ohio-6129, at ¶11 (citing *Buckeye*

*Foods v. Cuyahoga Cty. Bd. of Revision* (1997), 78 Ohio St.3d 459, 460, 678 N.E.2d 917 and *Warren Cty. Park Dist. v. Warren Cty. Budget Comm.* (1988), 37 Ohio St.3d 68, 523 N.E.2d 843). The Sixth and Twelfth Districts did not need to consider the standing issue explicitly. Almost all reported cases skip an explicit discussion of jurisdiction if that jurisdiction is self evident. For the judges who decided *Tripp* and *Meucci*, the appellant's ability to challenge the probate court on appeal did not depend on whether those appellants applied to be a guardian themselves. Because appellate jurisdiction was self evident, the judges did not address it.

The Fifth District's decision below runs counter to decisions like *Tripp* and *Meucci*. By requiring an out-of-state next of kin to do something forbidden by statute to have standing on appeal, the Fifth District has shackled non-Ohioans who want to litigate probate matters involving their Ohio parents. 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. *Zitter*, 2005-Ohio-3804. *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 challenge a probate court's exercise of jurisdiction, especially when that jurisdiction deprives a daughter of the opportunity to serve as her mother's guardian.

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<sup>6</sup> and is consistent with probate practice of allowing testimony from all interested persons.

The General Assembly has made the policy choice to exclude non-Ohioans from being guardians for Ohio wards. That decision is not on appeal. But the General Assembly has not made a policy decision that renders a probate court's decision about jurisdiction unassailable. This Court should not condone a judicially created rule that extends the General Assembly's policy choice to a categorical ban on non-Ohioans challenging Ohio probate courts' exercise of jurisdiction. For Jennie Hull, whether the probate court had jurisdiction will determine whether she is eligible to be her mother's guardian. She is aggrieved because she contends the probate court erroneously decided it had jurisdiction. The Fifth District must be reversed.

**III. The Fifth District's decision threatens to further isolate Ohio from its sister states because other states do not restrict guardianship to in-state residents.**

The Fifth District's decision signals an insensitivity to probate proceedings in other states. Probate fights are increasingly interstate. Both this appeal and the appeal in *Richardson* involve probate activity in Ohio and another state. The rule the Fifth District announced can insulate erroneous exercises of jurisdiction in Ohio. Because Ohio—but not its sister states—denies out-of-state relatives the right to be guardians for in-state wards, the Fifth District's rule threatens Ohio's relationship with other states.

Ohio's policy that prohibits out-of-state guardians of in-state wards is an outlier. Ohio's neighbors—Michigan, Indiana, Kentucky, West Virginia, and Pennsylvania—all allow a

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<sup>6</sup> “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”

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

nonresident to serve as a guardian.<sup>7</sup> States with significant retiree populations, such as California, Arizona, and Florida also permit nonresidents to be guardians of incompetent wards.<sup>8</sup> Moreover, the default rule is to permit nonresident guardians. See *Brimhall v. Simmons* (C.A.6, 1964), 338 F.2d 702, 707 (“In the absence of a statute to the contrary, a nonresident may be appointed guardian of the estate of a resident incompetent.”).

Ohio restricts eligible guardians to in-state residents even though sister states do not. That difference in policy already sets Ohio apart. This Court should not further isolate Ohio from other states by restricting appellate standing in a way that is not mandated by the General Assembly’s policy choices. While Ohio courts must—and do—enforce the General Assembly’s choice to restrict guardians to Ohio residents,<sup>9</sup> that policy does not mandate a judge-made rule that bars out-of-state residents appealing from a probate proceeding adverse to them when the out-of-state resident objects to the probate court’s jurisdiction or to the proposed guardian.

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<sup>7</sup> See Mich. Comp. Laws § 700.5313 (no restriction on residency of guardian); see also Estates and Probate Individuals Code With Reporter’s Commentary, 309 (2007) (“There is no requirement that the guardian reside in Michigan.”); Ind. Code § 29-3-5-1 (no restriction on residency of guardian); Ky. Rev. Stat. §387.605 (no residency restriction on appointment of guardian); W.Va. Code § 44A-1-8 (“Any adult individual may be appointed to serve as a guardian . . .”); Cf. 20 Pa. Cons. Stat. Ann. § 5112 (no residency restriction for guardian of minor).

<sup>8</sup> See Ariz. Rev. Stat. Ann. § 14-5311 (“Any qualified person may be appointed guardian of an incapacitated person . . .”); Fla. Stat. § 744.309(2),(2)(a) (“A nonresident of the state may serve as guardian of a resident ward if he or she is . . . [r]elated by lineal consanguinity to the ward”); Cal. Probate Code §1812 (no residency restriction on conservators); *In re: Guardianship of Brown* (Cal.1976), 546 P.2d 298, 304 (“As there is no statutory bar, a nonresident guardian of an incompetent may be appointed.”).

<sup>9</sup> See, e.g., *In re: Guardianship of Reeder* (Ohio App. 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).

As reflected in *Tripp* and *Meucci*, other Ohio appellate courts do not share the Fifth District's restricted view of appellate standing. The law of other states is another powerful indicator that Ohio law should not move in the direction the Fifth District has pushed it. Ohio has a rather unique limit on who may serve as a guardian. That is a choice the legislature may make. But the judiciary should not exacerbate the restricted pool of guardians by denying review to out-of-state next of kin who challenge an Ohio court's jurisdiction to decide questions of their relatives' competency.

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. Unless the General Assembly says otherwise, out-of-state relatives of Ohio wards should be allowed to appeal probate judgments adverse to the relative.

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.<sup>10</sup> A narrow view of who has the right to challenge decisions about

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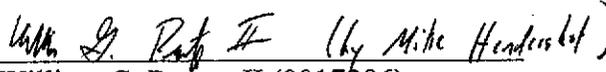
<sup>10</sup> Although this is an unpublished California case (see Cal. App. R. 8.1115), that status does not alter the persuasive value of its observation. This Court recognizes that the distinction between published and unpublished cases has little meaning in an age when all cases are available from online services. See Rep. R. 4 (abolishing distinction between persuasive and controlling authority based on whether opinion is published).

the 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.

### 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 unnecessary 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 their efforts to care for their parents. Finally, the Fifth District's decision signals an insularity that does not respect forums in other states that are more appropriate venues. If an aggrieved out-of-state relative of a putative Ohio ward cares enough to pursue expensive probate and appellate litigation, that relative should certainly have standing to contest a probate court's holding that it has jurisdiction over the ward. Because the Fifth District concluded otherwise, it must be reversed.

Respectfully submitted,

  
William G. Porter, II (0017296)  
(COUNSEL OF RECORD)  
Michael J. Hendershot (0081842)  
Vorys, Sater, Seymour and Pease LLP  
52 East Gay Street, P.O. Box 1008  
Columbus, Ohio 43216-1008  
Telephone: 614-464-5448  
Facsimile: 614-719-4911  
wgporter@vssp.com

and

Paul D. Harmon (0023932)  
964-A North 21<sup>st</sup> Street  
Newark, Ohio 43055  
Telephone: 740-366-7446  
Facsimile: 740-366-1194  
harmonatty@alltel.net

COUNSEL FOR APPELLANT,  
JENNIE HULL

**Certificate of Service**

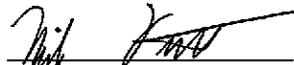
The undersigned certifies that a copy of the foregoing was served by regular U.S. mail  
on the following this 11th day of February, 2008:

William Douglas Lowe (0030106)  
I. Russell Suskind (0002914)  
36 North Second Street  
Newark, Ohio 43055

COUNSEL FOR VICTORIA WELLINGTON

Troy A. Reed (0061282)  
(COUNSEL OF RECORD)  
3860 Raccoon Valley Road NW  
Alexandria, Ohio 43001

GUARDIAN AD LITEM



---

Michael J. Hendershot (0081842)

# **APPENDIX**

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)

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NOTICE OF APPEAL OF APPELLANT JENNIE HULL

---

William G. Porter, II (0017296)  
(COUNSEL OF RECORD)  
Michael J. Hendershot (0081842)  
Vorys, Sater, Seymour and Pease LLP  
52 East Gay Street, P.O. Box 1008  
Columbus, Ohio 43216-1008  
Telephone: 614-464-5448  
Facsimile: 614-719-4911  
[wgporter@vssp.com](mailto:wgporter@vssp.com)

and

Paul D. Harmon (0023932)  
964-A North 21<sup>st</sup> Street  
Newark, Ohio 43055  
Telephone: 740-366-7446  
Facsimile: 740-366-1194  
[harmonatty@alltel.net](mailto:harmonatty@alltel.net)

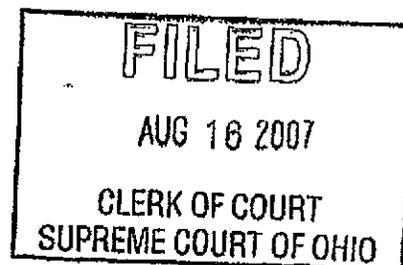
COUNSEL FOR APPELLANT,  
JENNIE HULL

Troy A. Reed (0061282)  
(COUNSEL OF RECORD)  
3860 Racoon Valley Road NW  
Alexandria, Ohio 43001  
Tel: 740-670-5998

GUARDIAN AD LITEM

William Douglas Lowe (0030106)  
(COUNSEL OF RECORD)  
Russell Suskind (0002914)  
36 North Second Street  
Newark, Ohio 43055  
Telephone: 740-345-3431

COUNSEL FOR  
VICTORIA WELLINGTON



**Notice of Appeal of Appellants**

Appellants give notice of their appeal to the Supreme Court of Ohio from the judgment of the Licking County Court of Appeals, Fifth Appellate District, entered in Court of Appeals case No. 06 CA 0130 on July 3, 2007.

This case raises a question of public and great general interest.

Respectfully submitted,

*William G. Porter II / by Mike Hendershot*  
William G. Porter, II (0017296)  
(COUNSEL OF RECORD)  
Michael J. Hendershot (0081842)  
Vorys, Sater, Seymour and Pease LLP  
52 East Gay Street, P.O. Box 1008  
Columbus, Ohio 43216-1008  
Telephone: 614-464-5448  
Facsimile: 614-719-4911  
[wgporter@vssp.com](mailto:wgporter@vssp.com)

and

Paul D. Harmon (0023932)  
964-A North 21<sup>st</sup> Street  
Newark, Ohio 43055  
Telephone: 740-366-7446  
Facsimile: 740-366-1194  
[harmonatty@alltel.net](mailto:harmonatty@alltel.net)

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:

William Douglas Lowe (0030106)  
I. Russell Suskind (0002914)  
36 North Second Street  
Newark, Ohio 43055

COUNSEL FOR VICTORIA WELLINGTON

Troy A. Reed (0061282)  
(COUNSEL OF RECORD)  
3860 Racoon Valley Road NW  
Alexandria, Ohio 43001

GUARDIAN AD LITEM

  
\_\_\_\_\_  
Michael J. Hendershot (0081842)

**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 OH  
GARY R. WALTERS

IN THE MATTER OF:

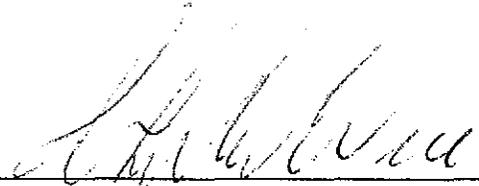
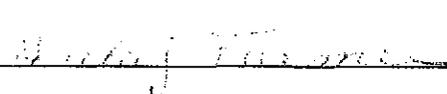
THE GUARDIANSHIP OF  
BESSIE SANTRUCEK

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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

COURT OF APPEALS  
LICKING COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

FILED

2007 JUL -3 AM 9: 50

CLERK OF COURT  
OF APPEALS  
LICKING COUNTY OH  
CARY B. WALTERS

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:

APPEARANCES:

For Appellee Wellington

For Appellant Hull

WILLIAM DOUGLAS LOWE  
36 North Second Street  
Newark, Ohio 43055

PAUL D. HARMON  
964-A North 21st Street  
Newark, Ohio 43055

Guardian Ad Litem

TROY A. REED  
3860 Racoon Valley Road NW  
Alexandria, Ohio 43001

005

SCAN 29/373

Wise, J.

{¶1} 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.

{¶2} 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.

{¶3} 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.<sup>1</sup> 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.

{¶4} 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.

---

<sup>1</sup> 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.<sup>2</sup> "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.

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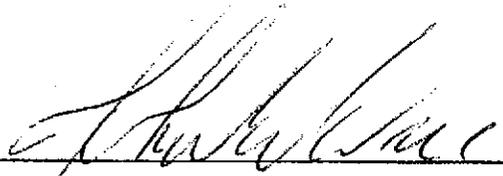
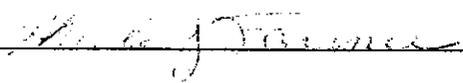
<sup>2</sup> We also note that Bessie retained counsel in August, 2006.

{¶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.

  
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JUDGES

JWW/d 611

PROBATE COURT OF LICKING COUNTY, OHIO

FILED

IN THE MATTER OF THE GUARDIANSHIP OF BESSIE SANTRUCEK

OCT 9 2006

CASE NO. 2006 0367

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

**JUDGMENT ENTRY**  
**APPOINTMENT OF GUARDIAN FOR INCOMPETENT PERSON**  
[R.C. 2111.02]

Upon hearing the application for appointment of guardian herein the Court finds that Bessie Santrucek is incompetent by reason of dementia,  
accelerating mental impairment ~~or~~ Senility and therefore is incapable of taking proper care of her self and her property, and that a guardianship is necessary.

The Court further finds that all persons who were entitled to notice of the hearing thereon were given or waived notice thereof; that the incompetent is a resident of this county or has legal settlement herein; and that this Court has jurisdiction.

It is therefore ordered that a non-limited guardian of the person and estate be appointed.

The Court therefore appoints Victoria Wellington  
a suitable and competent person, non-limited guardian of the person and estate of Bessie Santrucek incompetent, with the powers conferred as described, and limited to those powers contained in the Letters of Guardianship issued by this Court. This appointment is in compliance with R.C. 2111.09.

The Court approves the bond as filed.  
The Court finds a record of the hearing was waived.

The Court orders Letters of Guardianship issued to Victoria Wellington  
as provided by law.

Date October 9, 2006

Robert H. Hoover  
PROBATE JUDGE ROBERT H. HOOVER

(SEAL)

52

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 23<sup>rd</sup> 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  
740/670-5624

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  
 / Paul Harmon, Attorney for Jennie Hull  
 / I. Russell Suskind, Attorney for Victoria Wellington  
 / John Obora, Attorney for Bessie Santrucek  
 / Bessie Santrucek, Alterra Sterling House, 331 Goosepond, Newark, OH 43055  
 / Victoria Wellington, 157 Spring Valley Drive, Granville, OH 43023  
 / Jennie Hull, 14001 Shiloh Way, PO Box 17821, Fountain Hills, AZ 85268-3204

Judge  
 Robert H. Hoover  
 740/670-5624

Courthouse  
 Newark, OH 43055

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 William J. [Signature]

**c**

First Natl. Bank v. Randal Homes Corp.

Ohio App. 4 Dist., 2005.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND  
WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Fourth District, Pike County.

FIRST NATIONAL BANK, Plaintiff-Appellee,

v.

RANDAL HOMES CORPORATION, et al., Defendants-Appellants.

**No. 05CA739.**

Decided Nov. 15, 2005.

**Background:** Bank brought replevin action against bankrupt debtor, seeking repossession of vehicles, and individual and other company intervened as defendants. After a bond was posted that allowed debtor to continue using vehicles, bankruptcy trustee intervened, asserting that the vehicles were assets of the bankruptcy estate and that proceeds belonging to bankruptcy estate were used to post bond. The Court of Common Pleas, Pike County, ordered release of the bond funds to trustee. Intervening defendants appealed.

**Holding:** The Court of Appeals, Harsha, J., held that defendants lacked standing to appeal release of bond funds.

Appeal dismissed.

**Appeal and Error 30**  **151(2)**

30 Appeal and Error

30IV Right of Review

30IV(A) Persons Entitled

30k151 Parties or Persons Injured or Aggrieved

30k151(2) k. Who Are “Aggrieved” in General. Most Cited Cases

Defendants that intervened in bank's replevin action against bankrupt debtor, seeking repossession of vehicles, lacked standing to appeal trial court's order releasing bond funds to bankruptcy trustee, which bond protected bank's interest in vehicles while debtor remained in possession of vehicles, where defendants did not post the bond.

Steven E. Hillman, Dublin, for Appellants.

Sara J. Daneman, Gahanna, for Appellee, Chapter 7 Trustee.

*DECISION AND JUDGMENT ENTRY*

HARSHA, J.

\*1 {¶ 1} Randal Homes Corporation, Robert L. Netherton, and R.L. Netherton Enterprises, Inc. appeal from the trial court's order releasing bond funds to the Chapter 7 bankruptcy trustee (the “Trustee”) for Randal Homes Corporation's bankruptcy estate. Appellants contend the trial court should have returned the funds to the party who posted the bond on behalf of Randal Homes Corporation in First National Bank's (“the Bank”) action against the corporation. Appellants argue since the bankruptcy estate has no interest in the bond funds, the trial court should not have turned over the funds to the Trustee. Because appellants lack standing to contest the trial court's order, we dismiss this appeal.

I. Procedural History

{¶ 2} The procedural context of this matter is somewhat convoluted, but is important to the outcome of this appeal. Randal Homes Corporation borrowed over \$500,000 from the Bank, evidenced by the corporation's promissory note signed by Robert L. Netherton person-

ally and as the corporation's president. As collateral for the loan, the corporation executed a security agreement giving the Bank a security interest in several vehicles.

{¶ 3} Approximately one year later, Randal Homes Corporation sought protection from its creditors while it reorganized under Chapter 11 of the Bankruptcy Code. See, Sections 1101 et seq., Title 11, U.S.Code. Upon the filing of the bankruptcy petition, all of the corporation's property became property of its bankruptcy estate. Section 541, Title 11, U.S.Code; *Mtg. Electronics Registration Sys. v. Mullins*, 161 Ohio App.3d 12, 829 N.E.2d 326, 2005-Ohio-2303, ¶ 26, citing *Folz v. BancOhio Natl. Bank* (S.D. Ohio 1987), 88 B.R. 149, 150. The filing of the bankruptcy petition also operated as a stay of any action to obtain possession of "property of the estate," including "all legal or equitable interests of the debtor in property." Sections 541(a)(1) and 362(a), Title 11, U.S.Code.

{¶ 4} Subsequently, the bankruptcy court converted the corporation's Chapter 11 bankruptcy (reorganization) to a Chapter 7 bankruptcy (liquidation). Shortly thereafter, the Bank initiated a replevin action against Randal Homes Corporation, moved for repossession of the vehicles used as collateral for the loan, and obtained relief in the bankruptcy court from a stay of the replevin action. The trial court permitted Robert Netherton and R.L. Netherton Enterprises, Inc. to intervene as party defendants in the replevin action.

{¶ 5} Upon the parties' stipulation on the record, the trial court entered an order allowing Randal Homes Corporation to retain possession of the vehicles upon the posting of a \$21,250 bond to protect the interest of the Bank in the vehicles. The court noted in its order that, based on testimony by Robert Netherton, the funds used for posting the bond were not assets, or derived from assets, of Randal Homes Corporation or Robert Netherton. It is undisputed that Randal Sales and Marketing, which was not a party in this action, posted the bond.

\*2 {¶ 6} After using the vehicles for a period of time, Robert L. Netherton and R.L. Netherton Enterprises, Inc. filed a motion in the trial court to release the bond in exchange for their

agreement to return all the vehicles that were the subject of the replevin action. The Bank opposed a release of the bond until (1) all the vehicles used as collateral were returned to the Bank and (2) the court conducted a hearing to determine whether the Bank has a claim against the bond due to any damage or diminution in value of the vehicles.

{¶ 7} The Trustee moved to intervene in the replevin action, asserting that the vehicles at issue are assets of Randal Homes Corporation's bankruptcy estate, and although the Bank had obtained relief from a stay, the Trustee had not "abandoned" the vehicles. See, Section 554, Title 11, U.S.Code.

{¶ 8} Additionally, the Trustee contended that proceeds belonging to Randal Homes Corporation, and thus its bankruptcy estate, had been placed in a bank account under the name of Randal Sales and Marketing and were used to post the bond. The Trustee requested the trial court to hold the bond pending a determination by the bankruptcy court of whether the bond funds are property of the bankruptcy estate pursuant to Section 541, Title 11, U.S.Code.

{¶ 9} Finding that a dispute exists concerning whether the bond funds are property of the bankruptcy estate, the trial court determined that the bankruptcy court has exclusive jurisdiction to decide the matter. See, Sections 157 and 1334(e), Title 28, U.S.Code; Section 105, Title 11, U.S.Code. The trial court ordered release of the bond funds to the Trustee, to be held in the bankruptcy estate's account until the bankruptcy court resolved the issue.

{¶ 10} In their appeal of the trial court's order releasing the bond funds to the Trustee, appellants present the following assignments of error: (1) "[t]he trial court erred by not granting the defendant R.L. Netherton Enterprises, Inc.'s motion to release the replevin bond" and (2) "[t]he trial court had no authority to order the release of a replevin bond to a non party without a finding of ownership."

## II. Standing

{¶ 11} Before we reach the merits of appellants' assignments of error, we must first address the issue of standing. The question of standing asks whether a litigant is entitled to have a court determine the merits of the issues presented to the court. See *Ohio Contractors Assn. v. Bicking* (1994), 71 Ohio St.3d 318, 320, 643 N.E.2d 1088, citing *Warth v. Seldin* (1975), 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343. The issue of standing is jurisdictional in nature and may be raised sua sponte by a court. See, *Buckeye Foods v. Cuyahoga Cty. Bd. of Revision* (1997), 78 Ohio St.3d 459, 460, 678 N.E.2d 917; *Warren Cty. Park Dist. v. Warren Cty. Budget Comm.* (1988), 37 Ohio St.3d 68, 523 N.E.2d 843.

{¶ 12} It is uncontroverted that Randal Sales and Marketing posted the bond. It is also undisputed that Randal Sales and Marketing is not a party to this action and did not file or join in the motion to release the bond it posted. Instead, the motion for release of the replevin bond was filed solely by Robert Netherton and R.L. Netherton Enterprises, Inc., two of the three party defendants in this action.

\*3 {¶ 13} Only the person or entity who posted a bond has a beneficial interest in its release and standing to maintain an action for release of the bond or to contest the court's disposition of the bond. See, *Walter v. Boes*, Hancock App. No. 5-01-07, 2002-Ohio-2200; *State ex rel. Gaines v. Lake Cty. Clerk of Courts* (Jun. 13, 1997), Lake App. No. 97-L-045.

{¶ 14} Furthermore, only a party aggrieved or prejudiced by a final order may perfect an appeal. *Midwest Fireworks Mfg. Co. v. Deerfield Twp. Bd. of Zoning Appeals* (2001), 91 Ohio St.3d 174, 177, 743 N.E.2d 894; *Ohio Contract Carriers Assn., Inc. v. Pub. Util. Comm.* (1942), 140 Ohio St. 160, 42 N.E.2d 758, syllabus. The burden is on the appellant to establish that he or she is an aggrieved party whose rights have been adversely affected by the order appealed. *State v. Senz*, Wayne App. No. 02CA0016, 2002-Ohio-6464, ¶ 5, citing *Ohio Contract Carriers Assn.*, supra, and *Tschantz v. Ferguson* (1989), 49 Ohio App.3d 9, 13, 550 N.E.2d 544.

{¶ 15} Although appellants make a general claim that the trial court denied them due process in ordering that the bond funds be given to the Trustee, appellants have not stated, let alone demonstrated, specifically how they have been injured or prejudiced by the trial court's order releasing the bond funds to the Trustee. See, *Walter*, supra, citing *Ahrns v. SBA Communications Corp.* (Sept. 28, 2001), Auglaize App. No. 2-01-13 (requiring a party to demonstrate an injury in fact to maintain standing).

{¶ 16} Because appellants did not post the bond at issue and have not demonstrated either how they have suffered injury in fact or how their rights have been adversely affected by the trial court's disposition of the replevin bond, appellants lack standing to appeal the trial court's order releasing the bond to the Trustee. Accordingly, we dismiss the appeal in this case for lack of jurisdiction to decide the merits of the appeal.

APPEAL DISMISSED.

#### *JUDGMENT ENTRY*

It is ordered that the APPEAL BE DISMISSED and that Appellee recover of Appellants costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Pike County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

ABELE, P.J. and MCFARLAND, J.: concur in judgment and opinion.

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

Ohio App. 4 Dist.,2005.

First Natl. Bank v. Randal Homes Corp.

Not Reported in N.E.2d, 2005 WL 3078511 (Ohio App. 4 Dist.), 2005 -Ohio- 6129

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(Cite as: Not Reported in Cal.Rptr.3d)



In re D.L.

Cal.App. 2 Dist.,2005.

Only the Westlaw citation is currently available.

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b).

This opinion has not been certified for publication or ordered published for purposes of rule  
977.

Court of Appeal, Second District, Division 7, California.

In re D.L., a Person Coming Under the Juvenile Court Law.

Los Angeles County Department of Children and Family Services, Plaintiff and Respondent,

v.

Annie A., Appellant.

No. B177209.

(Los Angeles County Super. Ct. No. CK51842).

Not Reported in Cal.Rptr.3d, 2005 WL 2078338 (Cal.App. 2 Dist.)  
(Cite as: **Not Reported in Cal.Rptr.3d**)

Aug. 30, 2005.

APPEAL from orders of the Superior Court of Los Angeles County. Sherri S. Sobel, Referee.  
Affirmed.

Sharon S. Rollo, under appointment by the Court of Appeal, for Appellant.

Ray G. Fortner, Jr., County Counsel, Larry Cory, Assistant County Counsel, and Judith A. Luby, Senior Deputy County Counsel, for Plaintiff and Respondent.

JOHNSON, J.

\*1 Annie A. appeals from an order of the juvenile court revoking its previous order allowing her visitation with her great niece, D.L, a dependent child of the court. We affirm.

#### **FACTS AND PROCEEDINGS BELOW**

D.L. is a two year old girl who was born 13 weeks premature due to her mother's drug use.

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While no drugs were found in D.L.'s system, the early birth created a number of serious medical conditions. D.L. suffers from liver failure, a chronic lung disease, a hole in her heart, bleeding in her brain, and other medical issues likely to lead to permanent disabilities including mental retardation, cerebral palsy, deafness, and blindness. The Clinical Social Worker (CSW) stated in her medical evaluation, "We are talking about a severely ill baby, who, if she survives, will require an exceptionally *reliable* caretaker." After D.L.'s premature birth the juvenile court removed her from her mother's care because of the mother's drug use and inability to provide proper care for the child, citing Welfare & Institutions Code section 300, subdivision (b).<sup>FN1</sup> In accordance with her mother's wishes, D.L. has been in a care facility which provides 24 hours a day medical care.

FN1. All statutory references are to the Welfare & Institutions Code unless otherwise indicated.

D.L.'s father and mother are known to the court but neither parent has shown any ability or interest in caring for this child. From the time D.L. was placed in the care of the state, the Department of Children and Family Services (DCFS) has actively searched for a home which could accommodate her special needs. The primary problem with placement has been that no

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family member has had a suitable home and obtained proper medical training to care for D.L.

This appeal arises from orders made during proceedings on July 7, 2004 and August 4, 2004 relating to appellant Annie A., the great aunt of D.L. At the July hearing, Annie A. told the court she wished to have D.L. placed with her. She felt she had been ignored by the DCFS and had been unable to obtain proper medical training. The court had been under the impression Annie A. was not interested in having D.L. placed with her because of statements she had made to the DCFS months before this hearing. In response to Annie A.'s appearance, the court ordered the DCFS to meet with her prior to the August hearing to determine how she wanted to proceed and ordered her back to court on August 4. The court also ordered the DCFS to provide Annie A. with referrals for medical training and granted visitation rights to Annie A.

The CSW eventually made contact with Annie A. on July 19, 2004, after spending nearly two weeks calling, messaging, and mailing her. Annie A. indicated she desired guardianship of D.L. and stated her daughter Renee A. would take care of the child while she was at work. The DCFS proceeded, in accordance with the court's orders, to prepare a report which looked into Annie A.'s suitability as a guardian and began to search for someone who could provide her with the medical training necessary to care for D.L.

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\*2 This report, presented to the court at the August 4 hearing, brought to light a number of incidents which had occurred months before involving Annie A.'s adult daughter, Renee A. The care facility had called the police on two separate occasions to remove Renee A. after she struck her own daughter, Chelsea, and screamed at the staff. In addition, the report stated Renee A. refused to take proper medical precautions before handling D.L. During a separate meeting at the care facility Renee A. reportedly stated, “[D.L.] is not sick, [D.L.] will die when her time comes.”

The court responded to this report at the August 4 hearing by revoking Annie A.'s visitation rights. The court also stated in the proceeding “the relative preference is gone.” While this could have been interpreted as an order in other situations, it was not transcribed into the minute order. Additionally the referee appeared to make this statement out of frustration with the situation and subsequently withdrew the statement at a hearing on November 3, 2004, making the relative preference issue moot.<sup>FN2</sup>

FN2. At the hearing on November 3, 2004 the court withdrew its prior statement removing relative preference, “As long as [D.L.] is a special needs baby and we're not sure where she's going, that it doesn't hurt to look at the relatives again.”

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## DISCUSSION

### **I. ANNIE A. HAS STANDING TO APPEAL THE COURT'S DECISION REVOKING HER VISITATION RIGHTS.**

The liberal nature of juvenile dependency proceedings sometimes makes it difficult to determine the appellate rights of those who are not typical parties to such proceedings. In general, standing to appeal has been reserved for a “party aggrieved,”<sup>FN3</sup> however, the emotional nature of dependency proceedings makes this a potentially broad category. To make a proper determination of standing we look to statutory and common law and especially the child's best interests. While grandparents and aunts have been granted limited rights in some juvenile dependency proceedings these rights have usually been reserved for parents, de facto parents, guardians, present caregivers, and pre-adoptive parents.<sup>FN4</sup>

FN3.Code of Civil Procedure section 902.

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FN4. Section 658. California Rules of Court, rules 1401(a)(8), 1407(a)(5), 1407(e), 1435(b).

The California Supreme Court addressed the issue of standing in *In re B.G.*, stating “[t]he simple fact that a person cares enough to seek and undertake to participate goes far to suggest that the court would profit by hearing his views as to the child's best interests; if the participant lacks a close relationship with the child, that fact will undoubtedly emerge during the proceedings.”<sup>FN5</sup> While *B.G.* involved a de facto parent requesting standing in a juvenile dependency proceeding the court's reasoning has been broadened to parties with an extended familial relationship seeking appellate standing. *Charles S. v. Superior Court* held “the rationale underlying the holding in *In re B.G.* is equally applicable to persons occupying Charles' status.”<sup>FN6</sup> Charles S., grandfather to the minor, appealed the decision of the juvenile court denying him standing to participate in the section 366.25 proceedings and the decision terminating his visitation rights. Charles S. was not a de facto parent, because, like D.L., the minor had been placed under the care of the state since birth, but he had attended all of the proceedings and waited all day to address the court.<sup>FN7</sup> The appellate court held that Charles S. had standing to appeal the juvenile court's decision removing standing in the juvenile court proceeding and the decision terminating visitation rights with the minor.<sup>FN8</sup>

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FN5.*In re B.G.* (1974) 11 Cal.3d 679, 692, footnote 18.

FN6.*Charles S. v. Superior Court* (1985) 168 Cal.App.3d 151, 156.

FN7.*Charles S. v. Superior Court, supra*, 168 Cal.App.3d at pages 153, 156.

FN8.*Charles S. v. Superior Court, supra*, 168 Cal.App.3d at page 153.

\*3 Since the California Supreme Court's decision in *B.G.* the appellate courts have further developed *B.G.*'s concept of participation in *Cesar V.* and *Miguel E.* In *Cesar V.* the court held grandparents had standing to appeal and in *Miguel E.* the court held they did not.<sup>FN9</sup>The parties to the present appeal have argued these decisions were based on de facto parent status or misinterpretation of a statute, but these were not the foundations for their holdings.<sup>FN10</sup>In *Cesar V.* the paternal grandmother had sought placement of the minor in her home, but the Social Services Agency (SSA) "did not make significant efforts to gather the required information before deciding Elvia was unsuitable and abandoning the assessment. Furthermore, the social worker began looking for another foster family before Elvia had even received SSA's forms."<sup>FN11</sup>She appealed the decision of the juvenile court to uphold the SSA's placement assessment of the grandmother pursuant to section 361.3. The grandmother "had almost daily

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contact with the children before the dependency proceedings were initiated,”<sup>FN12</sup> and she was joined by the presumed father, who no longer had standing himself but had “extensively litigated the issue below.”<sup>FN13</sup> The court in *Cesar V.* granted standing because of the grandmother's significant relationship with the children prior to the juvenile dependency proceeding and the legally recognized relationship which was protected under section 361.3.  
FN14

FN9. *In re Miguel E.* (2004) 120 Cal.App.4th 521, *Cesar V. v. Superior Court* (2001) 91 Cal.App.4th 1023.

FN10. Annie A. contends section 395 should be read broadly to allow an appeal by a party aggrieved. Section 395 states in part, “A judgment in a proceeding under Section 300 may be appealed from in the same manner as any final judgment, and any subsequent order may be appealed from as from an order after judgment...” Annie A. argues section 395 is in direct conflict with Rule of Court 1435(b), “In proceedings under section 300, the petitioner, child, and the parent or guardian each has the right to appeal from any judgment, order, or decree specified in section 395,” because the rule specifically lists the child, parent, and guardian as those who can appeal a juvenile court

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order or judgment. Therefore, she argues the broader scope of section 395 should apply and provide standing. The argument is flawed for a number of reasons. Section 395 and Rule of Court 1435(b) are not inconsistent. There is nothing in rule 1435(b) which exclusively reserves the ability to appeal to those parties listed. Additionally, the “Judicial Council does not have power to restrict the statutory right of appeal in promulgating rules of court.”(*In re Aaron R.* (2005) 130 Cal.App.4th 697, 704.) “As a general rule, section 395 reflects a legislative intent to make appealable any order of a juvenile court after judgment which affects the substantial rights of the minor,” and does not address the issue of standing. (*In re Eli F.* (1989) 212 Cal.App.3d 228, 233.) Thus 1435(b) is not an impediment for Annie A.'s claim of standing, and section 395 is of no additional assistance.

FN11.*Cesar V. v. Superior Court, supra*, 91 Cal.App.4th at page 1033.

FN12.*Cesar V. v. Superior Court, supra*, 91 Cal.App.4th at pages 1029-1030.

FN13.*Cesar V. v. Superior Court, supra*, 91 Cal.App.4th at page 1035.

FN14.*Cesar V. v. Superior Court, supra*, 91 Cal.App.4th at pages 1030, 1035.

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The court in *Miguel E.*, on the other hand, found the grandparents did *not* have standing to appeal the court's decision removing the children from their home even though they had the requisite contact with the child to later qualify as de facto parents.<sup>FN15</sup> The grandparents in *Miguel E.* had been present at the juvenile dependency proceedings but “they did not ask to address the court,” and “did not seek to participate in the proceedings below.” “Thus, they were merely relatives, not parties.”<sup>FN16</sup> The court denied appellate standing because they did not become a party by “tak[ing] the appropriate steps to become a party of record in the proceedings,” the grandparents never spoke in the juvenile dependency proceeding even though they were present.<sup>FN17</sup>

FN15. *In re Miguel E.*, *supra*, 120 Cal.App.4th at page 539, footnote 21.

FN16. *In re Miguel E.*, *supra*, 120 Cal.App.4th at page 539.

FN17. *In re Miguel E.*, *supra*, 120 Cal.App.4th at page 539, citing *In re Joseph G.* (2000) 83 Cal.App.4th 712, 715.

These cases were decided, not by the relatives' status, but on the basis of the appellant's

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relationship with the child, the appellant's involvement in the juvenile dependency proceeding, whether the appellant was being considered for placement, legally recognized interests, and the best interests of the child.<sup>FN18</sup>

FN18. *In re Miguel E.*, *supra*, 120 Cal.App.4th at page 541. *Cesar V. v. Superior Court*, *supra*, 91 Cal.App.4th at pages 1034,1035.

Annie A. has never had significant contact with the child, visiting her only a few times a month. However, this infrequent contact is not necessarily reflective of what is in the best interests of the child. D.L. is medically fragile and has never had the opportunity to develop a close relationship with anyone other than the staff at the care facility. While Annie A. had visitation rights, she was limited to visiting only during certain hours, making it difficult to form any sort of coherent relationship. Given the circumstances of this case this factor should not weigh against her.

\*4 While Annie A. has not participated in the juvenile court proceedings as much as others,<sup>FN19</sup> she has attended at least one proceeding and addressed the court. By addressing the court in that proceeding Annie A. moved a step beyond the grandparents in *Miguel E.*, who only

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attended the hearings.<sup>FN20</sup> More importantly, Annie A. sought to be the caretaker of D.L.

FN19. See *Charles S. v. Superior Court, supra*, 168 Cal.App.3d at page 156 [grandparent attended all of the juvenile court proceedings and spent a day in court waiting to speak].

FN20. *In re Miguel E., supra*, 120 Cal.App.4th at page 539.

The best interests of the child, of course, are the paramount concern. Given D.L.'s medical conditions, she will likely need assistance the rest of her life. The fact Annie A. has come to court seeking medical training and guardianship for this medically sensitive child goes a long way to suggest it is in the best interest of D.L. to grant Annie A. appellate standing to raise issues concerning D.L.'s future care. While Annie A.'s mere participation in the juvenile dependency proceeding does not mandate we grant standing, D.L.'s serious medical conditions lead us to allow Annie A. to have her appeal heard.

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## II. ANNIE A. WAIVED HER RIGHT TO CHALLENGE INSUFFICIENT NOTICE AND IN ANY EVENT THERE WAS NO PREJUDICE.

On July 7, 2004 the juvenile court conducted a review hearing. The court continued the hearing to August 4, 2004 and ordered Annie A. and the CSW to return on that date. While Annie A. never received any written or further oral notice of the time and location of the hearing, she had many opportunities while in court to ask for clarification. She missed the subsequent hearing, held at the same time and by the same referee. Annie A. states in her notice of appeal she showed up “10 min late with a negative judgment against me.”<sup>FN21</sup>

FN21. This statement was not made under oath.

The notice requirements for individuals in Annie A.'s situation have not been clearly determined. Neither Annie A. nor the DCFS have cited cases regarding adequacy of notice in a continued juvenile dependency review hearing. The grandparents in *Miguel E.* never received oral or written notice of the initial dependency hearing. The court in *Miguel E.* found appellants were entitled to written notice because of their prior status as caregivers,<sup>FN22</sup> pursuant to Rule of Court 1407(d) and (e)(4)(C).<sup>FN23</sup> Annie A. holds no such status for two reasons. First, she

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never cared for D.L. on a day-to-day basis as did the grandparents in *Miguel E.* Second, Annie A. was present at the initial hearing and received oral notice to return for a continued review hearing on a specific date, the date the continued hearing was held.

FN22.*In re Miguel E., supra*, 120 Cal.App.4th at page 540.

FN23.Rule of Court 1407(e) states “The clerk shall cause the notice and attached copy of the petition to be served on each of the following: (4) The following persons, if applicable and if their addresses are known to the clerk before the hearing: (C) The child’s present caregiver ...”

In the case at hand, the juvenile court went beyond the facts of *Miguel E.*, and ordered Annie A. to return to continue the review hearing. At the time of Annie A.’s first appearance in court on July 7, 2004, she was not entitled to any form of notice because there was no statutory obligation and she had made no effort to become a party. Nor does she complain of any lack of notice for that hearing since she was present in court and participated in the proceedings. Annie A. argues she was entitled to notice of the continued review hearing. However, even where there is a right to further notice regarding the initial hearing, that doesn’t necessarily mean one

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has a right to notice of a continued hearing on a later date when one is present at the initial hearing and is told to return on a specific date.

\*5 Even assuming the trial court erred in not giving Annie A. adequate notice of the time of the hearing, she cannot show prejudice. Annie A. contends if she had attended the hearing she could have prevented the court from revoking her visitation by claiming the court improperly linked her daughter Renee's actions to herself. As we explain below, the court not only had sound reasons for considering Renee's behavior in assessing Annie A.'s suitability but also possessed other valid grounds for revoking the visitation order.

The juvenile court is a more appropriate venue to first raise issues of improper or inadequate notice because these often are fact intensive questions. Raising the issue in the trial court also affords the judge an opportunity to cure the problem if notice was deficient in some way. Here Annie A. does not even claim nor does she document any attempt to advise the juvenile court the notice was inadequate, either when she allegedly arrived shortly after the hearing ended or at any other time. While we do address the issue whether the juvenile court abused its discretion when removing Annie A.'s visitation rights we find that she "waived any right to challenge the lack of [adequate] notice by failing to do so in the juvenile court."<sup>FN24</sup>

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FN24.*In re Miguel E., supra*, 120 Cal.App.4th at page 540, relying on *In re B.G., supra*, 11 Cal.3d 679, 689).

### III. THE COURT DID NOT ABUSE ITS DISCRETION IN REVOKING ANNIE A.'S VISITATION RIGHTS.

In July 2004 the court granted Annie A. “unmonitored regular visitation ... as long as she is interested in having the child in her home.” At the next dependency proceeding in August 2004 FN25 the court revoked her visitation rights after reading a new report prepared by the CSW which brought to the court's attention Renee A.'s inappropriate behavior at D.L.'s care facility. The court stated “if even half of what ... [is in the report] is accurate [Annie A.'s home] is not an appropriate place for this child at all, period ... and the only viable relative that's left intends to leave this very involved child with the absolutely nonviable relative while she goes to work.” Annie A. argues the court inappropriately linked the actions of her daughter Renee A. to her and speculated about her ability to provide medical care for D.L. FN26

FN25. Annie A. was not present at this hearing and argues that she received insufficient

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notice. See Part II, *ante*.

FN26. Annie A. argues she was not given proper medical training which would allow her to be considered for placement. It is unclear from the record whether Greg H., director of the care facility, offered her medical training and Annie ignored the offer. The court ordered the CSW to provide a referral for the required training. The CSW has gone beyond the requirements of the court order and has been searching for someone to give Annie A. medical training.

When the court granted visitation to Annie A. it did so only for “as long as she is interested in having the child in her home.” Thus the court impliedly reserved the right to terminate those rights if the child could not be placed in her home. As we explain below the court had sufficient evidence to determine Annie A.’s home would be an inappropriate placement for D.L. Annie A.’s contention the court incorrectly lumped Renee A.’s actions with her own is unfounded.

Section 361.3 sets out a number of factors the court should consider when determining placement of a minor. Specifically section 361.3(a)(5) states the court should consider “the good moral character of the relative and any other adult living in the home, including whether any individual residing in the home has a prior history of violent criminal acts or has been

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responsible for acts of child abuse or neglect.”Annie A. had stated Renee A. would be the primary caregiver of D.L. during the daytime when she was at work which gave the court the right to consider Renee A. when determining placement. Renee A.'s actions and words have shown an indifference and lack of care for D.L.'s serious medical conditions and her own daughter's well being.

\*6 Moreover, while the court did reference Renee's action when determining placement and visitation rights there were alternative grounds on which the court could have made its decision. Section 361.3 sets out additional factors for determining placement which include the parents' wishes, the relationship between the relative seeking placement and the child, the ability to provide a safe environment, and the ability to provide the necessities of life.<sup>FN27</sup>The court had sufficient evidence to find placement inappropriate because of the mother's expressed wish that D.L. remain at the care facility and the lack of a close relationship between Annie A. and D.L.

FN27. Section 361.3, subdivision (a) states, “In determining whether placement with a relative is appropriate, the county social worker and court shall consider, but shall not be limited to, consideration of all of the following factors: (1) The best interest of the child, including special physical, psychological, educational, medical, or emotional

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needs. (2) The wishes of the parent, the relative, and child, if appropriate. [¶] ... [¶]  
(5) The good moral character of the relative and any other adult living in the home, including whether any individual residing in the home has a prior history of violent criminal acts or has been responsible for acts of child abuse or neglect. (6) The nature and duration of the relationship between the child and the relative, and the relative's desire to care for, and to provide legal permanency for, the child if reunification is unsuccessful. (7) The ability of the relative to do the following: (A) Provide a safe, secure, and stable environment for the child. (I) Arrange for appropriate and safe child care, as necessary.

### DISPOSITION

The order is affirmed.

We concur: PERLUSS, P.J., and WOODS, J.

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Not Reported in N.E.2d, 2000 WL 1875737 (Ohio App. 12 Dist.)  
(Cite as: **Not Reported in N.E.2d**)

▷

In re Guardianship of Meucci

Ohio App. 12 Dist., 2000.

Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND  
WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Twelfth District, Butler County.

In the Matter of Guardianship of Elizabeth Reed MEUCCI.

No. CA2000-03-046.

Dec. 26, 2000.

James G. Keys, Jr., West Chester, OH, for appellee, Barbara J. Reisen.

Wood & Lamping, Mark S. Reckman and Timothy A. Garry, Jr., Cincinnati, OH, for appellant,

Not Reported in N.E.2d, 2000 WL 1875737 (Ohio App. 12 Dist.)  
(Cite as: Not Reported in N.E.2d)

Donna C. Meucci.

*OPINION*

POWELL.

\*1 Appellant, Donna C. Meucci, appeals a decision of the Butler County Court of Common Pleas, Probate Division, denying her Civ.R. 60(B) motion to set aside the trial court's entry appointing Barbara Reisen ("Reisen") the legal guardian of the women's mother, Elizabeth Meucci ("Meucci"). The decision of the trial court is affirmed.

Meucci lived most of her life in Uniontown, Pennsylvania with her husband. When her husband died in 1998, her three children agreed that she should not live alone. Meucci executed a power of attorney which named appellant her attorney in fact and Meucci went to live with Reisen in California. After several months, Meucci left California and went to live with appellant in New Jersey. In June 1999, she went to live with Reisen in Butler County, Ohio.

In September 1999, Reisen learned that appellant had used her authority as attorney in fact to combine all of Meucci's remaining funds into a joint and survivor certificate of deposit in the

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name of both Meucci and appellant. Reisen also had concerns about appellant's use of their mother's funds to maintain Meucci's former home in Pennsylvania, which had been deeded to appellant some years earlier. Meucci executed a new durable power of attorney which revoked appellant's authority as attorney in fact, and appointed Reisen as Meucci's attorney in fact.

On November 24, 1999, appellant filed a motion in Fayette County, Pennsylvania requesting the appointment of a guardian for Meucci. However, the Fayette County court was unable to obtain personal service on Meucci and accordingly lacked jurisdiction to hear the matter.

Reisen then filed an application for the appointment of a guardian for Meucci in Butler County, Ohio. Reisen was represented by attorney James Keys in the action, as was Meucci. On December 29, 1999, Reisen was appointed Meucci's guardian. On January 18, 1999, appellant filed a "motion to set aside entry appointing guardian, dismiss the guardianship, and recuse appellant's counsel based upon a conflict of interest." The trial court treated appellant's motion as a Civ.R. 60(B) motion to set aside judgment. The trial court denied the motion. Appellant appeals raising a single assignment of error:

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR RELIEF FROM JUDGMENT/MOTION TO SET ASIDE ENTRY APPOINTING GUARDIAN,

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DISMISS THE GUARDIANSHIP, AND RECUSE APPLICANT'S COUNSEL BASED UPON  
A CONFLICT OF INTEREST.

Civ.R. 60(B) states in pertinent part:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under 59(B); (3) fraud \* \* \*, misrepresentation or other misconduct of an adverse party; (4) \* \* \* it is no longer equitable that the judgment should have prospective application; (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken.

\*2 A party bringing a motion under Civ.R. 60(B) may prevail only upon demonstrating the following three elements: (1) a meritorious defense or claim to present if relief is granted; (2) entitlement to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) timeliness of the motion. *GTE Automatic Electric, Inc. v. ARC Industries* (1976), 47 Ohio St.2d

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146, paragraph two of the syllabus.

It is within the trial court's discretion to decide whether or not to grant a party's Civ.R. 60(B) motion to set aside a judgment. *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 20. Accordingly, a trial court's decision granting or denying a Civ.R. 60(B) motion will not be disturbed absent an abuse of discretion. *GTE* at 148. More than an error of judgment or law, an abuse of discretion indicates that the trial court's decision was unreasonable, arbitrary and unconscionable. *Edwards v. Toledo City School Dist. Bd. of Edn.*(1995), 72 Ohio St.3d 106, 107

Appellant's motion was filed on January 8, 2000, within three weeks of the appointment of the guardian and well within the timeliness requirement of Civ.R. 60(B). Appellant has likewise stated several meritorious defenses which she would present if the Civ.R. 60(B) motion were granted. Accordingly, our focus lies with whether she is entitled to relief under one of the grounds enumerated in Civ.R. 60(B)(1)-(5).

After stating this court's standard of review, appellant presents four additional subissues under her assignment of error. Although she does not state to which prong of the *GTE* test these subissues supposedly are relevant, we will assume that they are intended to indicate her alleged

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grounds for relief under Civ.R. 60(B)(1)-(5). Appellant further fails to identify under which subsection of Civ.R. 60(B) she is entitled to relief. Nonetheless, we will address each of the subissues in turn to determine whether appellant is entitled to relief under Civ.R. 60(B).

Appellant first contends that the trial court's jurisdiction was improperly obtained. Appellant argues that Meucci's residency in Ohio was acquired by the unlawful restraint of Meucci by Reisen, a criminal misdemeanor in violation of R.C. 2905.03(A). Appellant concludes that only Pennsylvania has jurisdiction to properly decide the matter. However, there is nothing in the record to indicate that Reisen was charged with or convicted of the criminal activity alleged by appellant. We accordingly find this argument to be without merit.

Next, appellant argues that the probate court had no jurisdiction over Meucci because she was not a resident of Butler County, Ohio. The probate court is a court of limited jurisdiction, possessing authority to hear actions only as conferred upon it by the Ohio Constitution and the Ohio General Assembly. Section 4(B), Article IV, Ohio Constitution; *Corron v. Corron* (1988), 40 Ohio St.3d 75, 77. R.C. 2111.02(A) provides in 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, the estate, or both, of a minor or incompetent, provided that the person for whom the guardian is to be appointed is a resident of

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the county or has a legal settlement in the county \* \* \*.

\*3 “Residence” has been defined by its ordinary meaning as “a place of dwelling.” *In re Fore* (1958), 168 Ohio St. 363, 371. Residence requires the actual physical presence at some abode coupled with an intent to remain at that place for some period of time. *In re Fisher* (1993), 91 Ohio App.3d 212, 215 (citations omitted). A “legal settlement” connotes living in an area with some degree of permanency greater than a visit lasting a few days or weeks. *Id.* at 216.

At the time of the hearing, Meucci had resided in Butler County for approximately seven months. Although Meucci had lived most of her life in Pennsylvania, she no longer owned property there, and there was no evidence to indicate that she ever intended to return to Pennsylvania. Rather, the parties agreed that she could not live alone, and that Meucci would have to live in either Ohio or New Jersey with one of her daughters.

Although there was some evidence which indicated Meucci's desire to visit appellant in New Jersey, nothing in the record indicates that Meucci intended to live anywhere other than Butler County. Meucci's home in Pennsylvania had been deeded to appellant several years earlier. Meucci's only remaining assets in Pennsylvania were several bank accounts. Meucci has

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physicians in Butler County and has been in treatment in Butler County for her dementia. She also receives at least some of her mail in Butler County.

Upon review of the record, we find no abuse of discretion by the trial court in finding that Meucci was a resident of Butler County, and that she had a legal settlement in Butler County.

Appellant also contends that it was improper for Reisen's attorney to also represent Meucci in the guardianship proceeding. The purpose of the guardianship hearing was to determine whether Meucci indeed required a guardian and to make the appointment if necessary. R.C. 2112.02(A) requires that the person for whom a guardian is to be appointed have "the opportunity to have the assistance of counsel in the proceeding for the appointment of such guardian." During the guardianship proceeding, Meucci was represented by the same attorney who represented Resien.

In addressing this portion of appellant's Civ.R. 60(B) motion, the trial court found that appellant's claim of conflict of interest was rendered moot since the parties stipulated that Meucci required a guardian. We agree. Meucci's attorney advocated that a guardian be appointed for her benefit, a position agreed to by the parties. The attorney advocated on Meucci's behalf for the appointment of a guardian, and we find that there was no conflict of

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interest in the dual representation.

Appellant next contends that the trial court should have suspended the guardianship upon learning that a prior application for guardianship had been filed in Pennsylvania. In support of this contention, appellant cites R.C. 3109.24(A), which prohibits an Ohio court from exercising jurisdiction over a child custody matter if a parenting proceeding regarding the child is pending in a court of another state, exercising substantially similar jurisdiction.

\*4 While appellant has provided an accurate statement of Ohio child custody law, Ohio's guardianship statute does not set forth the jurisdictional prohibition contained in the custody statute cited by appellant. Appellant has failed to cite to any authority which indicates that R.C. 3109.24(A) is applicable in a guardianship proceeding. Rather, as stated above, we find no abuse of discretion in the trial court's determination that Meucci is a Butler County resident. Accordingly, it was appropriate for the trial court to exercise its jurisdiction over the matter.

Appellant lastly argues that the trial court's decision should be set aside because she did not receive notice that an application for guardianship had been filed. R.C. 2111.04(A)(2)(b) requires that notice be served on "the next of kin of the person for whom appointment is sought who are known to reside in this state." Appellant resides in New Jersey, not Ohio, and therefore,

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pursuant to statute, she was not entitled to notice of the guardianship proceeding.

We find that appellant has failed to demonstrate that she is entitled to relief under one of the grounds stated in Civ.R. 60-(B)(1) through (5). Accordingly, we find no abuse of discretion by the trial court in overruling appellant's motion to set aside the entry appointing a guardian. The assignment of error is overruled.

Judgment affirmed.

YOUNG and VALEN, JJ., concur.

Ohio App. 12 Dist., 2000.

In re Guardianship of Meucci

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(Cite as: Not Reported in N.E.2d)

**C**

Matter of Guardianship of Reeder

Ohio App. 2 Dist., 1992.

Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND  
WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Second District, Montgomery County.

In the Matter of the GUARDIANSHIP OF Ester REEDER, an Alleged Incompetent.

**No. 13005.**

June 17, 1992.

Ralph L. Marzocco, Dayton, for Alleged Incompetent/appellant.

Sheldon A. Strand, Middletown, for First National Bank of Southwestern Ohio/appellee.

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Not Reported in N.E.2d, 1992 WL 136783 (Ohio App. 2 Dist.)  
(Cite as: **Not Reported in N.E.2d**)

*OPINION*

BROGAN, Judge.

\*1 This matter originated with the filing of an Application for the Appointment of a Guardian for Esther Reeder, allegedly an incompetent, with the Montgomery County Probate Court. The application was filed on January 31, 1991, by William J. Bendel, Jr. According to the application, Bendel, as the executor of the Estate of John J. Reeder, Esther's late husband, was disqualified from being appointed guardian pursuant to R.C. 2111.09 and therefore, Bendel nominated Bank One Trust Ohio, of Dayton, Ohio to be appointed guardian of Esther's estate.

At the time that the application was filed, Esther resided at 316 Monarch Road in Centerville, Montgomery County, Ohio. The Investigator's Report of Service indicated that Esther was served at this address and that A.G. and Ruby Erwin, her nephew and niece and Ralph L. Marzocco, Esther's attorney, were present at the time of service.

Two additional applications for appointment as guardian of Esther Reeder were subsequently filed. On April 30, 1991, First National Bank of Southwestern Ohio filed its application listing its address as Middletown, Butler County, Ohio. It did so at Bendel's request after Bendel learned that Bank One Trust Ohio had withdrawn its application for guardianship

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of Esther's estate. Bank One Trust Ohio had so withdrawn its application after learning that it was being contested. The second application was filed on June 10, 1991, by Ruby Erwin who listed her address as North Shore, Kentucky.

A hearing was conducted on April 30, 1991, to determine Esther's competency. Testimony was presented by Dr. James B. Evans and it was ultimately adjudged that Esther was, in fact, incompetent and in need of a guardian.

On July 2, 1991, after receiving several motions and cross-motions concerning the proposed guardians, a Referee's Report and Recommendation was issued finding that the objection of Esther's attorney to the fact that First National was not a resident of Montgomery County was without merit; that Ruby Erwin was not a relative of Esther's and did not live in Ohio; and that the power of attorney submitted with Ruby Erwin's application made no nomination of a guardian. The referee concluded by recommending that the application of Ruby Erwin be dismissed and that First National be appointed guardian of the estate of Esther Reeder.

On the same day, the court filed its judgment entry finding Esther incompetent and in need of a guardian. The court also found that Esther was a resident of Montgomery County and that all persons who were entitled to notice were so notified. In addition, the court approved and

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adopted the referee's report and recommendation and thus, ordered that Bendel's original application be withdrawn and that First National be appointed guardian of the estate and that Letters of Guardianship be issued to First National.

Thereafter, on July 16, 1991, Esther's attorney filed three objections to the referee's report. The objections were made in reference to: (1) the referee's recommendation that Erwin's application be dismissed; (2) the recommendation that the motion, filed by Esther's attorney, to dismiss the application of First National, be dismissed; and (3) the issuance of Letters of Guardianship to First National. These objections were found to be without merit and were overruled on July 22, 1991. These are the judgments from which appellant now appeals.

\*2 In her appeal, appellant raises five assignments of error. Before addressing these assignments of error, it must first be noted that in the absence of an abuse of discretion, the appointment of a guardian for an incompetent will not be set aside by an appellate court. See *In re Harris* (1954), 73 Ohio Law Abs. 97.

In the first assignment of error, appellant contends that it was error for the trial court to overrule the objection to the Referee's Report recommending that Ruby Erwin's application to be appointed guardian of the estate of Esther be dismissed.

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It is appellant's contention that the durable power of attorney, which was signed in 1989 prior to any alleged incompetence and which named Ruby Erwin as Esther's attorney in fact, also purported to name Erwin as Esther's guardian in the event of any "disability, incapacity, or adjudged incompetence." R.C. 2109.21(C) states, in pertinent part:

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; \* \* \* *and 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 [2111.12.1] of the Revised Code. (Emphasis added.)*

R.C. 1337.09(D) provides the following:

In a durable power of attorney as described in division (A) or (B) of this section, a principal may nominate the attorney in fact or any other person to be the guardian of his person, estate, or both. The nomination is for consideration by a court if proceedings for the appointment of a guardian for the principal's person, estate, or both are commenced at a later time.

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Pursuant to R.C. 1337.09, the principal has a duty to expressly state that he/she is nominating a guardian and to name the guardian. A review of the durable power of attorney, executed by Esther, fails to demonstrate that she made such a nomination. As clearly stated in R.C. 2109.21(C), the guardian must be a resident of the state unless one of three exceptions, enumerated in the section, applies: (1) the guardian is named in a will by the parent of a minor child, (2) the guardian is chosen by a minor over the age of fourteen, or (3) the guardian is nominated in or pursuant to a durable power of attorney or other writing. Thus, the court properly overruled Erwin's objection to the dismissal of her application based on the fact that she was not an Ohio resident as required by R.C. 2109.21(C) and as such, was not qualified to serve as Esther's guardian. Appellant's first assignment of error is overruled.

In appellant's second assignment of error, she raises the contention that the court erred in overruling the objection to the Referee's Report recommending that the motion to dismiss the application made by a nonresident of the county to be appointed guardian of the estate of an alleged incompetent be dismissed. Appellant argues that: (1) First National failed to meet the residency requirements as set forth in R.C. 2109.21(C); (2) First National had no standing in the guardianship proceeding pursuant to R.C. 2111.02; (3) the bank failed to notify all interested parties of the proceedings; and (4) the bank failed to appear at the hearing as required by R.C. 2111.02(C)(1).

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\*3 In addressing the first argument, it must again be noted that R.C. 2109.21(C) clearly states that 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, estate, or both;* ” Pursuant to R.C. 2109.21(C), the court was within its discretion to appoint First National as Esther's guardian since the bank met the residency requirements.

Appellant next argues that First National had no standing in the guardianship proceeding because it was not an interested party as required by R.C. 2111.02 and thus, was without authority to apply for appointment as Esther's guardian. This argument fails for the reason that the court has authority under R.C. 2111.02 “*on its own motion* or on application by any interested party” to appoint a guardian of the person, the estate, or both of an incompetent. This authority is subject to the limitations set forth in R.C. 2109.21(C) and 2111.121(B) [2111.12.1(B) ].R.C. 2109.21(C) sets forth the residency requirements for the guardian and R.C. 2111.121(B) [2111.12.1(B) ] discusses the procedure to be followed by the court when there has been a nomination of a guardian in a durable power of attorney. In the instant case, neither section limited the court's ability to appoint First National as guardian.

Appellant's third argument raises the question of whether the bank failed to properly notify all the interested parties. Appellant has failed to present any evidence that there was a failure

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on the part of the bank to use due diligence to notify the interested parties and therefore, the argument must fail.

Finally, appellant argues that the bank failed to appear for the hearing as mandated by R.C. 2111.02(C)(1):

(C) Prior to the appointment of a guardian or limited guardian under division (A) or (B)(1) of this section, the court shall conduct a hearing on the matter of the appointment. The hearing shall be conducted in accordance with all of the following:

(1) The proposed guardian shall appear at the hearing and, if appointed, shall swear under oath that he has made and will continue to make diligent efforts to file a true inventory in accordance with section 2111.14 of the Revised Code and find and report all assets belonging to the estate of his ward and that he faithfully and completely will fulfill the other duties of guardian, including the filing of timely and accurate reports and accountings;

However, once again, appellant has failed to present evidence to support this allegation and as appellee points out, the record does, in fact, contain the signed Oath of Guardian which was signed in the presence of the referee on the 20th day of May, 1991.

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(Cite as: Not Reported in N.E.2d)

Based on the above disposition of appellant's arguments, the second assignment of error is overruled.

In the third assignment of error, appellant contends that the court erred in overruling the objection to the Letters of Guardianship appointing a nonresident of the county as guardian of the estate of an alleged incompetent. It is appellant's contention that the court committed reversible error by adopting the Referee's Report and Recommendation on the same day it was filed by the referee in contravention of Civ. R. 53. However, Civ. R. 53(E)(7) states:

\*4 Permanent and interim orders. The court may enter judgment on the basis of findings of fact contained in the referee's report without waiting for timely objections by the parties, but the filing of timely written objections to the referee's report shall operate as an automatic stay of execution of that judgment until the court disposes of those objections and thereby vacates, modifies, or adheres to the judgment previously entered.

Based on Civ. R. 53(E)(7), the court committed no error. Furthermore, the cases cited by appellant in support of her argument pre-date Civ. R. 53(E)(7) and are therefore, inapplicable to the case before us.

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Appellant next asserts that the Referee's Report failed to contain the necessary factual information to support the findings and recommendations made. A review of the Referee's Report does not support appellant's argument. We find that there were sufficient facts contained within the report to support the findings and recommendations of the referee. Appellant's third assignment of error is overruled.

In appellant's fourth assignment of error, the argument is made that the court erred in assuming jurisdiction of the person and the estate of the alleged incompetent. It is the contention of the appellant that Esther was no longer a resident of Montgomery County at the time the proceedings were commenced. However, it is uncontroverted that service was made on Esther at her residence at 316 Monarch Road, Centerville, Montgomery County, Ohio in the manner prescribed by R.C. 2111.04 and 2111.041 and that her attorney was present at the time of service. Thus, at the time the guardianship proceedings were commenced, Esther was a resident of Montgomery County and the Montgomery County Probate Court, therefore, had proper jurisdiction over the matter. Appellant's fourth assignment of error is overruled.

In the final assignment of error, appellant contends that the court erred in adjudicating Esther incompetent and finding that a guardianship was necessary.

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As we have no transcript of the proceedings below, we cannot determine whether there was clear and convincing evidence to establish that Esther was incompetent. It is well settled that absent a record of the proceedings or facts to the contrary, there is a presumption that the court's proceedings were conducted according to the law. See App. R. 9(B) and *Ostrander v. Parker-Fallis* (1972), 29 Ohio St.2d 72. Appellant's fifth assignment of error is overruled.

Having overruled all five assignments of error, the judgment of the trial court will be Affirmed.

WILSON and KERNS, JJ., concur.

Honorable Joseph D. Kerns, Retired from the Court of Appeals, Second Appellate District,  
Sitting by Assignment of the Chief Justice of the Supreme Court of Ohio.

Ohio App. 2 Dist., 1992.

Matter of Guardianship of Reeder

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(Cite as: Not Reported in N.E.2d)

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Not Reported in N.E.2d, 1993 WL 407333 (Ohio App. 11 Dist.)  
(Cite as: **Not Reported in N.E.2d**)

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In re Guardianship of Rudy

Ohio App. 11 Dist., 1993.

Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND  
WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Eleventh District, Trumbull County.

IN RE: The Guardianship of Margaret Rudy, Deceased.

**No. 93-T-4851.**

Sept. 30, 1993.

John J. Chester, Eugene B. Lewis and Richard A. Talda, Columbus, OH.

Joseph J. Vukovich, Youngstown, OH.

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Not Reported in N.E.2d, 1993 WL 407333 (Ohio App. 11 Dist.)  
(Cite as: Not Reported in N.E.2d)

Douglas J. Neuman, Niles, OH.

James A. Fredericka, Warren, OH.

Robert J. Vesmas, Warren, OH.

Michael D. Rossi, Warren, OH.

Before Donald R. FORD, P.J., Judith A. CHRISTLEY and Robert A. NADER, JJ.

#### MEMORANDUM OPINION

NADER.

\*1 Appellee Lloyd Tompkins has moved this court to dismiss the appeal of appellants Peter Burns and Delbert Strawder for lack of standing. We decline to do so.

Appellants are the beneficiaries of the last will and testament of Margaret S. Rudy. Appellants filed an appeal in this court from award of attorney fees by the probate court. These fees arose from an appeal instituted by Ms. Rudy to challenge the appointment of a

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guardian for her. In the process of that appeal, Ms. Rudy died. The attorney fees, amounting to \$45,575.54 would be taken from the estate of Ms. Rudy. Appellees filed a motion to dismiss the appeal of the award of attorney fees claiming that appellants were not interested parties and therefore did not have standing to appeal.

An appeal will not lie if the appellant is not an aggrieved party. *In re Guardianship of Love* (1969), 19 Ohio St.2d 111. An appellant must demonstrate a “present interest in the subject matter of the litigation and that he has been prejudiced by the judgment of the lower court.” *Id.* citing *Ohio Contract Carriers Assn., Inc. v. Pub. Util. Comm.* (1942), 140 Ohio St. 160.

We hold that appellants are interested parties and thus have standing to appeal. In *Ollick v. Rice* (1984), 16 Ohio App.3d 448, the court held that where the majority of assets in an estate would form the *res* of a trust to which appellants were the beneficiaries, appellants had an interest in the administration of the estates. Similarly, appellants are the beneficiaries of Ms. Rudy's will, which disposes of her estate. As such, appellants have a present interest in the administration of that estate, to insure that its assets are not wasted. If unwarranted attorney fees are awarded from Ms. Rudy's estate, appellants will have been prejudiced by the lower court's decision. Thus, appellants are interested parties and may maintain their appeal.

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Appellee's motion to dismiss is overruled.

Robert A. NADER, FORD, P.J. and CHRISTLEY, J., concur.

Ohio App. 11 Dist., 1993.

In re Guardianship of Rudy

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In re Guardianship of Lee

Ohio App. 2 Dist.,2002.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND  
WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,Second District, Miami County.

In the Matter of The GUARDIANSHIP of Dorothy LEE.

No. 02CA3.

Nov. 15, 2002.

Attorney petitioned to be appointed guardian of aunt's person and estate. The Probate Court, Miami County, granted petition. Nephew appealed. The Court of Appeals, Grady, J., held that: (1) statute governing appointment of a guardian creates no preference for the prospective ward's next of kin, nor does statute require their approval before a person who is not a next of kin files an application, and (2) nephew lacked standing to challenge appointment on appeal.

So ordered.

West Headnotes

[1] **Guardian and Ward 196** ⇨13(8)

196 Guardian and Ward

196II Appointment, Qualification, and Tenure of Guardian

196k13 Proceedings for Judicial Appointment

196k13(8) k. Review. Most Cited Cases

Aunt's nephew lacked standing to challenge on appeal trial court's appointment of attorney as

guardian of aunt's estate and person, where nephew did not file an application for appointment and suffered no consequences adverse to his interests as a result of court's appointment of attorney. R.C. §§ 2111.02.

**[2] Executors and Administrators 162 ⇌ 17(2)**

162 Executors and Administrators

162II Appointment, Qualification, and Tenure

162k17 Right to Appointment as Administrator

162k17(2) k. Heirs and Next of Kin, or Their Representatives, in General. Most Cited Cases

**Guardian and Ward 196 ⇌ 10**

196 Guardian and Ward

196II Appointment, Qualification, and Tenure of Guardian

196k10 k. Persons Who May Be Appointed. Most Cited Cases

Statute governing appointment of persons to administer the estate of a decedent creates a preference for appointment of next of kin, however, it has no application to appointment of a guardian. R.C. § 2113.06.

**[3] Guardian and Ward 196 ⇌ 10**

196 Guardian and Ward

196II Appointment, Qualification, and Tenure of Guardian

196k10 k. Persons Who May Be Appointed. Most Cited Cases

Statute governing appointment of a guardian creates no preference for the prospective ward's next of kin, nor does statute require their approval before a person who is not a next of kin files an application. R.C. § 2111.02.

Civil Appeal from Probate Court.

Albert Scott, Sidney, OH, appellant, pro se.

Charles T. Cromley, Troy, OH, appellee.

GRADY, J.

\*1 {¶ 1} This is an appeal from an order of the Probate Court finding Dorothy Lee incompetent and appointing Charles Cromley, an attorney, guardian of her person and estate. The appeal is brought by Albert Scott, Dorothy Lee's nephew. He and two of her siblings lived with Lee when Cromley filed his application to be appointed Lee's guardian.

[1] {¶ 2} Scott presents two assignments of error. First, he argues that Cromley should have obtained the permission of Lee's next of kin before he filed his guardianship application. Second, Scott argues that the probate court was required to find him and Lee's other next of kin unsuitable for the appointment before it appointed Cromley.

{¶ 3} Notice of Cromley's application was served on Scott and Dorothy Lee's other next of kin. They appeared at the hearing on the application, and Scott testified.

{¶ 4} The court found Dorothy Lee incompetent, and that finding is not disputed by Scott. Instead, he argues that the court was required by R.C. 2113.06 to give preference for the appointment to him and others of Lee's next of kin, and could appoint a stranger such as Cromley only if the court first found Dorothy Lee's next of kin unsuitable.

{¶ 5} The court made no finding that Dorothy Lee's next of kin were unsuitable for the appointment. It found Cromley qualified and suitable. The court also noted that Cromley's was the only application before it.

[2] {¶ 6} R.C. 2113.06, on which Scott relies, governs appointment of persons to administer the estate of a decedent. It creates a preference for appointment of next of kin. However, it has no application to appointment of a guardian.

[3] {¶ 7} R.C. 2111.02 governs appointment of a guardian. It creates no preference for the

prospective ward's next of kin. Neither does it require their approval before a person who is not a next of kin files an application. The person who applies and is appointed need only be an "interested party." Cromley is an interested party. He is an attorney who filed and prosecuted the application as an officer of the court. Cromley acted at the urging of another of Dorothy Lee's brothers, Clifford Lee, who was concerned that his sister's needs were not being met.

{¶ 8} Scott lacks standing to complain that the trial court erred or abused its discretion when it appointed Cromley. The only person who might complain is 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.

{¶ 9} The assignments of error are overruled. The judgment of the trial court will be affirmed.

BROGAN and YOUNG, JJ., concur.

Ohio App. 2 Dist., 2002.

In re Guardianship of Lee

Not Reported in N.E.2d, 2002 WL 31528725 (Ohio App. 2 Dist.), 2002 -Ohio- 6194

END OF DOCUMENT

R.C. § 2109.21

▷

BALDWIN'S OHIO REVISED CODE ANNOTATED

TITLE XXI. COURTS--PROBATE--JUVENILE

CHAPTER 2109. FIDUCIARIES

QUALIFICATIONS AND MISCELLANEOUS PROVISIONS

**→2109.21 Residence qualifications of fiduciaries; nonresidents subject to conditions**

(A) An administrator, special administrator, administrator de bonis non, or administrator with the will annexed shall be a resident of this state and shall be removed on proof that the administrator is no longer a resident of this state.

(B)(1) To qualify for appointment as executor or trustee, an executor or a trustee named in a will or nominated in accordance with any power of nomination conferred in a will, may be a resident of this state or, as provided in this division, a nonresident of this state. To qualify for appointment, a nonresident executor or trustee named in, or nominated pursuant to, a will shall be an individual who is related to the maker of the will by consanguinity or affinity, or a person who resides in a state that has statutes or rules that authorize the appointment of a nonresident person who is not related to the maker of a will by consanguinity or affinity, as an executor or

## R.C. § 2109.21

trustee when named in, or nominated pursuant to, a will. No such executor or trustee shall be refused appointment or removed solely because the executor or trustee is not a resident of this state.

The court may require that a nonresident executor or trustee named in, or nominated pursuant to, a will assure that all of the assets of the decedent that are in the county at the time of the death of the decedent will remain in the county until distribution or until the court determines that the assets may be removed from the county.

(2) In accordance with this division and section 2129.08 of the Revised Code, the court shall appoint as an ancillary administrator a person who is named in the will of a nonresident decedent, or who is nominated in accordance with any power of nomination conferred in the will of a nonresident decedent, as a general executor of the decedent's estate or as executor of the portion of the decedent's estate located in this state, whether or not the person so named or nominated is a resident of this state.

To qualify for appointment as an ancillary administrator, a person who is not a resident of this state and who is named or nominated as described in this division, shall be an individual who is related to the maker of the will by consanguinity or affinity, or a person who resides in a state that has statutes or rules that authorize the appointment of a nonresident of that state who is not

## R.C. § 2109.21

related to the maker of a will by consanguinity or affinity, as an ancillary administrator when the nonresident is named in a will or nominated in accordance with any power of nomination conferred in a will. If a person who is not a resident of this state and who is named or nominated as described in this division so qualifies for appointment as an ancillary administrator and if the provisions of section 2129.08 of the Revised Code are satisfied, the court shall not refuse to appoint the person, and shall not remove the person, as ancillary administrator solely because the person is not a resident of this state.

The court may require that an ancillary administrator who is not a resident of this state and who is named or nominated as described in this division, assure that all of the assets of the decedent that are in the county at the time of the death of the decedent will remain in the county until distribution or until the court determines that the assets may be removed from the county.

(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

R.C. § 2109.21

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. A guardian, other than a guardian named in a will by a parent of a minor, selected by a minor over the age of fourteen years, or nominated in or pursuant to such a durable power of attorney or writing, may be removed on proof that the guardian is no longer a resident of the county in which the guardian resided at the time of the guardian's appointment, and shall be removed on proof that the guardian is no longer a resident of this state.

(D) Any fiduciary, whose residence qualifications are not defined in this section, shall be a resident of this state, and shall be removed on proof that the fiduciary is no longer a resident of this state.

(E) Any fiduciary, in order to assist in the carrying out of the fiduciary's fiduciary duties, may employ agents who are not residents of the county or of this state.

Current through 2007 File 45 of the 127th GA (2007-2008),  
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R.C. § 2111.02

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BALDWIN'S OHIO REVISED CODE ANNOTATED

TITLE XXI. COURTS--PROBATE--JUVENILE

CHAPTER 2111. GUARDIANS; CONSERVATORSHIPS

GENERAL PROVISIONS

**+2111.02 Appointment of guardian**

(A) When found necessary, the probate court on its own motion or on application by any interested party shall appoint, subject to divisions (C) and (D) of this section and to section 2109.21 and division (B) of section 2111.121 of the Revised Code, 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 and, except in the case of a minor, has had the opportunity to have the assistance of counsel in the proceeding for the appointment of such guardian. An interested party includes, but is not limited to, a person nominated in a durable power of attorney as described in division (D) of section 1337.09 of the Revised Code or in a writing as described in division (A) of section 2111.121 of the Revised Code.

## R.C. § 2111.02

Except when the guardian of an incompetent is an agency under contract with the department of mental retardation and developmental disabilities for the provision of protective services under sections 5123.55 to 5123.59 of the Revised Code, the guardian of an incompetent, by virtue of such appointment, shall be the guardian of the minor children of the guardian's ward, unless the court appoints some other person as their guardian.

When the primary purpose of the appointment of a guardian is, or was, the collection, disbursement, or administration of moneys awarded by the veterans administration to the ward, or assets derived from such moneys, no court costs shall be charged in the proceeding for the appointment or in any subsequent proceedings made in pursuance of the appointment, unless the value of the estate, including the moneys then due under the veterans administration award, exceeds one thousand five hundred dollars.

(B)(1) If the probate court finds it to be in the best interest of an incompetent or minor, it may appoint pursuant to divisions (A) and (C) of this section, on its own motion or on application by an interested party, a limited guardian with specific limited powers. The sections of the Revised Code, rules, and procedures governing guardianships apply to a limited guardian, except that the order of appointment and letters of authority of a limited guardian shall state the reasons for, and specify the limited powers of, the guardian. The court may appoint a limited guardian for a definite or indefinite period. An incompetent or minor for whom a limited

R.C. § 2111.02

guardian has been appointed retains all of the incompetent's or minor's rights in all areas not affected by the court order appointing the limited guardian.

(2) If a guardian appointed pursuant to division (A) of this section is temporarily or permanently removed or resigns, and if the welfare of the ward requires immediate action, at any time after the removal or resignation, the probate court may appoint, ex parte and with or without notice to the ward or interested parties, an interim guardian for a maximum period of fifteen days. If the court appoints the interim guardian ex parte or without notice to the ward, the court, at its first opportunity, shall enter upon its journal with specificity the reason for acting ex parte or without notice, and, as soon as possible, shall serve upon the ward a copy of the order appointing the interim guardian. For good cause shown, after notice to the ward and interested parties and after hearing, the court may extend an interim guardianship for a specified period, but not to exceed an additional thirty days.

(3) If a minor or incompetent has not been placed under a guardianship pursuant to division (A) of this section and if an emergency exists, and if it is reasonably certain that immediate action is required to prevent significant injury to the person or estate of the minor or incompetent, at any time after it receives notice of the emergency, the court, ex parte, may issue any order that it considers necessary to prevent injury to the person or estate of the minor or incompetent, or may appoint an emergency guardian for a maximum period of seventy-two hours. A written

## R.C. § 2111.02

copy of any order issued by a court under this division shall be served upon the incompetent or minor as soon as possible after its issuance. Failure to serve such an order after its issuance or prior to the taking of any action under its authority does not invalidate the order or the actions taken. The powers of an emergency guardian shall be specified in the letters of appointment, and shall be limited to those powers that are necessary to prevent injury to the person or estate of the minor or incompetent. If the court acts ex parte or without notice to the minor or incompetent, the court, at its first opportunity, shall enter upon its journal a record of the case and, with specificity, the reason for acting ex parte or without notice. For good cause shown, after notice to the minor or incompetent and interested parties, and after hearing, the court may extend an emergency guardianship for a specified period, but not to exceed an additional thirty days.

(C) Prior to the appointment of a guardian or limited guardian under division (A) or (B)(1) of this section, the court shall conduct a hearing on the matter of the appointment. The hearing shall be conducted in accordance with all of the following:

(1) The proposed guardian or limited guardian shall appear at the hearing and, if appointed, shall swear under oath that the proposed guardian or limited guardian has made and will continue to make diligent efforts to file a true inventory in accordance with section 2111.14 of the Revised Code and find and report all assets belonging to the estate of the ward and that the

R.C. § 2111.02

proposed guardian or limited guardian faithfully and completely will fulfill the other duties of guardian, including the filing of timely and accurate reports and accountings;

(2) If the hearing is conducted by a referee, the procedures set forth in Civil Rule 53 shall be followed;

(3) If the hearing concerns the appointment of a guardian or limited guardian for an alleged incompetent, the burden of proving incompetency shall be by clear and convincing evidence;

(4) Upon request of the applicant, the alleged incompetent for whom the appointment is sought or the alleged incompetent's counsel, or any interested party, a recording or record of the hearing shall be made;

(5) Evidence of a less restrictive alternative to guardianship may be introduced, and when introduced, shall be considered by the court;

(6) The court may deny a guardianship based upon a finding that a less restrictive alternative to guardianship exists;

(7) If the hearing concerns the appointment of a guardian or limited guardian for an alleged

R.C. § 2111.02

incompetent, the alleged incompetent has all of the following rights:

- (a) The right to be represented by independent counsel of his choice;
  - (b) The right to have a friend or family member of his choice present;
  - (c) The right to have evidence of an independent expert evaluation introduced;
  - (d) If the alleged incompetent is indigent, upon his request:
    - (i) The right to have counsel and an independent expert evaluator appointed at court expense;
    - (ii) If the guardianship, limited guardianship, or standby guardianship decision is appealed, the right to have counsel appointed and necessary transcripts for appeal prepared at court expense.
- (D) When a person has been nominated to be a guardian of the estate of a minor 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, the person nominated has preference in appointment over a person selected by the minor. A person who has been nominated to be a guardian of the person of a minor in or pursuant to a durable

R.C. § 2111.02

power of attorney or writing of that nature does not have preference in appointment over a person selected by the minor, but the probate court may appoint the person named in the durable power of attorney or the writing, the person selected by the minor, or another person as guardian of the person of the minor.

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apv. by 1/23/08, and filed with the Secretary of State by 1/23/08.

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R.C. § 2505.03

**c**

BALDWIN'S OHIO REVISED CODE ANNOTATED

TITLE XXV. COURTS--APPELLATE

CHAPTER 2505. PROCEDURE ON APPEAL

FINAL ORDER

**-2505.03 Final order may be appealed; determination of which procedural rules will govern appeal**

(A) Every final order, judgment, or decree of a court and, when provided by law, the final order of any administrative officer, agency, board, department, tribunal, commission, or other instrumentality may be reviewed on appeal by a court of common pleas, a court of appeals, or the supreme court, whichever has jurisdiction.

(B) Unless, in the case of an administrative-related appeal, Chapter 119. or other sections of the Revised Code apply, such an appeal is governed by this chapter and, to the extent this chapter does not contain a relevant provision, the Rules of Appellate Procedure. When an administrative-related appeal is so governed, if it is necessary in applying the Rules of Appellate Procedure to such an appeal, the administrative officer, agency, board, department,

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R.C. § 2505.03

tribunal, commission, or other instrumentality shall be treated as if it were a trial court whose final order, judgment, or decree is the subject of an appeal to a court of appeals or as if it were a clerk of such a trial court.

(C) An appeal of a final order, judgment, or decree of a court shall be governed by the Rules of Appellate Procedure or by the Rules of Practice of the Supreme Court, whichever are applicable, and, to the extent not in conflict with those rules, this chapter.

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**Rule 4. “Controlling” and “Persuasive” Designations Based on Form of Publication**

**Abolished; Use of Opinions.**

(A) Notwithstanding the prior versions of these rules, designations of, and distinctions between, “controlling” and “persuasive” opinions of the courts of appeals based merely upon whether they have been published in the Ohio Official Reports are abolished.

(B) All court of appeals opinions issued after the effective date of these rules may be cited as legal authority and weighted as deemed appropriate by the courts.

(C) Unless otherwise ordered by the Supreme Court, court of appeals opinions may always be cited and relied upon for any of the following purposes:

(1) Seeking certification to the Supreme Court of Ohio of a conflict question within the provisions of sections 2(B)(2)(f) and 3(B)(4) of Article IV of the Ohio Constitution;

(2) Demonstrating to an appellate court that the decision, or a later decision addressing the same point of law, is of recurring importance or for other reasons warrants further judicial review;

(3) Establishing *res judicata*, estoppel, double jeopardy, the law of the case, notice, or sanctionable conduct;

(4) Any other proper purpose between the parties, or those otherwise directly affected by a decision.

#### Commentary (May 1, 2002)

- a. Designations of, and distinctions between, “controlling” and “persuasive” opinions of the courts of appeals are abolished.
- b. All courts of appeals opinions issued after the effective date of these rules may be cited as legal authority and weighted as considered appropriate by the courts.
- c. Unless otherwise ordered by the Supreme Court, court of appeals opinions may always be cited and relied upon for any of the following reasons:
  - (1) To seek certification of a conflict question;
  - (2) To demonstrate to an appellate court that the decision, or a later decision addressing the same point of law, is of recurring importance or otherwise warrants further judicial review;
  - (3) To establish *res judicata*, estoppel, double jeopardy, the law of the case, notice, or sanctionable conduct;
  - (4) For any other purpose as to those directly affected by the decision.

A.R.S. § 14-5311

**c**

ARIZONA REVISED STATUTES ANNOTATED

TITLE 14. TRUSTS, ESTATES AND PROTECTIVE PROCEEDINGS

CHAPTER 5. PROTECTION OF PERSONS UNDER DISABILITY AND THEIR PROPERTY

ARTICLE 3. GUARDIANS OF INCAPACITATED PERSONS

**-§ 14-5311. Who may be guardian; priorities**

- A.** Any qualified person may be appointed guardian of an incapacitated person, subject to the requirements of § 14-5106.
- B.** The court may consider the following persons for appointment as guardian in the following order:
1. A guardian or conservator of the person or a fiduciary appointed or recognized by the appropriate court of any jurisdiction in which the incapacitated person resides.
  2. An individual or corporation nominated by the incapacitated person if the person has, in the opinion of the court, sufficient mental capacity to make an intelligent choice.
  3. The person nominated in the incapacitated person's most recent durable power of attorney.
  4. The spouse of the incapacitated person.
  5. An adult child of the incapacitated person.
  6. A parent of the incapacitated person, including a person nominated by will or other writing signed by a deceased parent.
  7. Any relative of the incapacitated person with whom the incapacitated person has resided for more than six months before the filing of the petition.

8. The nominee of a person who is caring for or paying benefits to the incapacitated person.

9. If the incapacitated person is a veteran, the spouse of a veteran or the minor child of a veteran, the department of veterans' services.

10. A fiduciary, guardian or conservator.

**C.** A person listed in subsection B, paragraph 4, 5, 6, 7 or 8 may nominate in writing a person to serve in that person's place. With respect to persons who have equal priority, the court shall select the one the court determines is best qualified to serve.

**D.** For good cause the court may pass over a person who has priority and appoint a person who has a lower priority or no priority.

Current through End of the Forty-Eighth Legislature,  
First Regular Session (2007)

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West's Annotated California Codes Currentness

California Rules of Court (Refs & Annos)

▣ Title 8. Appellate Rules (Refs & Annos)

▣ Division 5. Publication of Appellate Opinions (Refs & Annos)

→ **Rule 8.1115. Citation of opinions**

**(a) Unpublished opinion**

Except as provided in (b), an opinion of a California Court of Appeal or superior court appellate division that is not certified for publication or ordered published must not be cited or relied on by a court or a party in any other action.

**(b) Exceptions**

An unpublished opinion may be cited or relied on:

- (1) When the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel ; or
- (2) When the opinion is relevant to a criminal or disciplinary action because it states reasons for a decision affecting the same defendant or respondent in another such action.

**(c) Citation procedure**

A copy of an opinion citable under (b) or of a cited opinion of any court that is available only in a computer-based source of decisional law must be furnished to the court and all parties by attaching it to the document in which it is cited or, if the citation will be made orally, by letter

within a reasonable time in advance of citation.

**(d) When a published opinion may be cited**

A published California opinion may be cited or relied on as soon as it is certified for publication or ordered published.

CREDIT(S)

(Formerly Rule 977, adopted, eff. Jan. 1, 2005. Renumbered Rule 8.1115 and amended, eff. Jan. 1, 2007.)

Current with amendments received through December 15, 2007

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**Effective: January 1, 2002**West's Annotated California Codes CurrentnessProbate Code (Refs & Annos)Division 4. Guardianship, Conservatorship, and Other Protective Proceedings (Refs & Annos)Part 3. Conservatorship (Refs & Annos)▣ Chapter 1. Establishment of Conservatorship▣ Article 2. Order of Preference for Appointment of Conservator**→ § 1812. Order of preference for appointment as conservator**

(a) Subject to Sections 1810 and 1813, the selection of a conservator of the person or estate, or both, is solely in the discretion of the court and, in making the selection, the court is to be guided by what appears to be for the best interests of the proposed conservatee.

(b) Subject to Sections 1810 and 1813, of persons equally qualified in the opinion of the court to

appointment as conservator of the person or estate or both, preference is to be given in the following order:

(1) The spouse or domestic partner of the proposed conservatee or the person nominated by the spouse or domestic partner pursuant to Section 1811.

(2) An adult child of the proposed conservatee or the person nominated by the child pursuant to Section 1811.

(3) A parent of the proposed conservatee or the person nominated by the parent pursuant to Section 1811.

(4) A brother or sister of the proposed conservatee or the person nominated by the brother or sister pursuant to Section 1811.

(5) Any other person or entity eligible for appointment as a conservator under this code or, if there is no person or entity willing to act as a conservator, under the Welfare and Institutions Code.

(c) The preference for any nominee for appointment under paragraphs (2), (3), and (4) of subdivision (b) is subordinate to the preference for any other parent, child, brother, or sister in that class.

CREDIT(S)

(Stats.1990, c. 79 (A.B.759), § 14, operative July 1, 1991. Amended by Stats.2001, c. 893 (A.B.25), § 16.)

Current with all 2007 laws and all propositions which will appear on the Feb. 5, 2008 ballot

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**Effective: July 1, 2004**

West's Florida Statutes Annotated Currentness

Title XLIII. Domestic Relations (Chapters 741-759)

▣ Chapter 744. Guardianship (Refs & Annos)

▣ Part IV. Guardians

**→ 744.309. Who may be appointed guardian of a resident ward**

**(1) Resident.--**

(a) Any resident of this state who is sui juris and is 18 years of age or older is qualified to act as guardian of a ward.

(b) No judge shall act as guardian after this law becomes effective, except when he or she is related to the ward by blood, marriage, or adoption, or has maintained a close relationship with the ward or the ward's family, and serves without compensation.

**(2) Nonresident.**--A nonresident of the state may serve as guardian of a resident ward if he or she is:

(a) Related by lineal consanguinity to the ward;

(b) A legally adopted child or adoptive parent of the ward;

(c) A spouse, brother, sister, uncle, aunt, niece, or nephew of the ward, or someone related by lineal consanguinity to any such person; or

(d) The spouse of a person otherwise qualified under this section.

**(3) Disqualified persons.**--No person who has been convicted of a felony or who, from any incapacity or illness, is incapable of discharging the duties of a guardian, or who is otherwise unsuitable to perform the duties of a guardian, shall be appointed to act as guardian. Further, no person who has been judicially determined to have committed abuse, abandonment, or neglect against a child as defined in s. 39.01 or s. 984.03(1), (2), and (37), or who has been found guilty of, regardless of adjudication, or entered a plea of nolo contendere or guilty to, any offense prohibited under s. 435.03 or under any similar statute of another jurisdiction, shall be appointed to act as a guardian. Except as provided in subsection (5) or subsection (6), a person who provides substantial services to the proposed ward in a professional or business capacity, or a

creditor of the proposed ward, may not be appointed guardian and retain that previous professional or business relationship. A person may not be appointed a guardian if he or she is in the employ of any person, agency, government, or corporation that provides service to the proposed ward in a professional or business capacity, except that a person so employed may be appointed if he or she is the spouse, adult child, parent, or sibling of the proposed ward or the court determines that the potential conflict of interest is insubstantial and that the appointment would clearly be in the proposed ward's best interest. The court may not appoint a guardian in any other circumstance in which a conflict of interest may occur.

**(4) Trust company, state bank or savings association, or national bank or federal savings and loan association.**--A trust company, a state banking corporation or state savings association authorized and qualified to exercise fiduciary powers in this state, or a national banking association or federal savings and loan association authorized and qualified to exercise fiduciary powers in this state may act as guardian of the property of the ward.

**(5) Nonprofit corporate guardian.**--A nonprofit corporation organized for religious or charitable purposes and existing under the laws of this state may be appointed guardian for a ward. If the nonprofit corporate guardian charges fees against the assets or property of the ward for its services, the corporation must employ at least one professional guardian.

**(6) Health care provider.**--A provider of health care services to the ward, whether direct or indirect, may not be appointed the guardian of the ward, unless the court specifically finds that

there is no conflict of interest with the ward's best interests.

CREDIT(S)

Laws 1974, c. 74-106, § 1; Laws 1975, c. 75-222, § 8; Laws 1979, c. 79-221, § 4; Laws 1981, c. 81-27, § 7; Laws 1983, c. 83-139, § 2; Laws 1989, c. 89-96, § 26; Laws 1990, c. 90-271, § 14; Laws 1996, c. 96-184, § 1; Laws 1996, c. 96-354, § 5. Amended by Laws 1997, c. 97-102, § 1781, eff. July 1, 1997; Laws 1998, c. 98-280, § 48, eff. June 30, 1998; Laws 1998, c. 98-403, § 159, eff. Oct. 1, 1998; Laws 2000, c. 2000-135, § 8, eff. July 1, 2000; Laws 2000, c. 2000-349, § 110, eff. Sept. 1, 2000; Laws 2002, c. 2002-195, § 4, eff. April 29, 2002; Laws 2004, c. 2004-267, § 31, eff. July 1, 2004.

Current through Chapter 339 and S.J.R. 2D (End) of the 2007 Special D Session of the Twentieth Legislature

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IC 29-3-5-1

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WEST'S ANNOTATED INDIANA CODE

TITLE 29. PROBATE

ARTICLE 3. GUARDIANSHIPS AND PROTECTIVE PROCEEDINGS

CHAPTER 5. PROCEEDINGS FOR APPOINTMENT OF GUARDIAN OR TO PROCURE A  
PROTECTIVE ORDER

**-29-3-5-1 Petition for appointment of guardian; requirements; notice and  
hearing; presence of alleged incapacitated person; exceptions; conduct of hearing**

Sec. 1. (a) Any person may file a petition for the appointment of a person to serve as guardian for an incapacitated person or minor under this chapter or to have a protective order issued under IC 29-3-4. The petition must state the following:

(1) The name, age, residence, and post office address of the alleged incapacitated person or minor for whom the guardian is sought to be appointed.

(2) The nature of the incapacity.

IC 29-3-5-1

(3) The approximate value and description of the property of the incapacitated person or minor, including any compensation, pension, insurance, or allowance to which the incapacitated person or minor may be entitled.

(4) If a limited guardianship is sought, the particular limitations requested.

(5) Whether a guardian has been appointed or is acting for the incapacitated person or minor in any state.

(6) The residence and post office address of the proposed guardian and the proposed guardian's relationship to the alleged incapacitated person.

(7) The names and addresses, as far as known or as can reasonably be ascertained, of the persons most closely related by blood or marriage to the person for whom the guardian is sought to be appointed.

(8) The name and address of the person or institution having the care and custody of the person for whom the guardian is sought to be appointed.

(9) The names and addresses of any other incapacitated persons or minors for whom the

IC 29-3-5-1

proposed guardian is acting if the proposed guardian is an individual.

(10) The reasons the appointment of a guardian is sought and the interest of the petitioner in the appointment.

(11) The name and business address of the attorney who is to represent the guardian.

(b) Notice of a petition under this section for the appointment of a guardian and the hearing on the petition shall be given under IC 29-3-6.

(c) After the filing of a petition, the court shall set a date for hearing on the issues raised by the petition. Unless an alleged incapacitated person is already represented by counsel, the court may appoint an attorney to represent the incapacitated person.

(d) A person alleged to be an incapacitated person must be present at the hearing on the issues raised by the petition and any response to the petition unless the court determines by evidence that:

(1) it is impossible or impractical for the alleged incapacitated person to be present due to the alleged incapacitated person's disappearance, absence from the state, or similar circumstance;

IC 29-3-5-1

(2) it is not in the alleged incapacitated person's best interest to be present because of a threat to the health or safety of the alleged incapacitated person as determined by the court;

(3) the incapacitated person has knowingly and voluntarily consented to the appointment of a guardian or the issuance of a protective order and at the time of such consent the incapacitated person was not incapacitated as a result of a mental condition that would prevent that person from knowingly and voluntarily consenting; or

(4) the incapacitated person has knowingly and voluntarily waived notice of the hearing and at the time of such waiver the incapacitated person was not incapacitated as a result of a mental condition that would prevent that person from making a knowing and voluntary waiver of notice.

(e) A person alleged to be an incapacitated person may present evidence and cross-examine witnesses at the hearing. The issues raised by the petition and any response to the petition shall be determined by a jury if a jury is requested no later than seventy-two (72) hours prior to the original date and time set for the hearing on the petition. However, in no event may a request for a jury trial be made after thirty (30) days have passed following the service of notice of a petition.

IC 29-3-5-1

(f) Any person may apply for permission to participate in the proceeding, and the court may grant the request with or without hearing upon determining that the best interest of the alleged incapacitated person or minor will be served by permitting the applicant's participation. The court may attach appropriate conditions to the permission to participate.

Current through 2008 Public Laws approved and effective through 11-21-07.

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KRS § 387.605

**c**

BALDWIN'S KENTUCKY REVISED STATUTES ANNOTATED

TITLE XXXIII. ADMINISTRATION OF TRUSTS AND ESTATES OF PERSONS UNDER  
DISABILITY

CHAPTER 387. GUARDIANS; CONSERVATORS; CURATORS OF CONVICTS

GUARDIANSHIP AND CONSERVATORSHIP FOR DISABLED PERSONS

**→387.605 Qualifications for court to consider when appointing a guardian or  
conservator**

The court shall give preference to people who meet the following qualifications when  
appointing a person as guardian or conservator:

- (1) Kinship to respondent;
- (2) Education and business experience of applicant;
- (3) Capability to handle financial affairs; and

KRS § 387.605

(4) Ability to carry out the requirements set forth in KRS 387.660 to 387.710 and 387.750.

Current through end of 2007 legislation

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M.C.L.A. 700.5313

**c**

MICHIGAN COMPILED LAWS ANNOTATED

CHAPTER 700. ESTATES AND PROTECTED INDIVIDUALS CODE

ESTATES AND PROTECTED INDIVIDUALS CODE

ARTICLE V. PROTECTION OF AN INDIVIDUAL UNDER DISABILITY AND HIS OR  
HER PROPERTY

PART 3. GUARDIANS OF INCAPACITATED INDIVIDUALS

**→700.5313. Choice of guardian; designated by individual; related to the  
individual; preference; any competent person suitable and willing to serve**

Sec. 5313. (1) The court may appoint a competent person as guardian of a legally incapacitated individual. The court shall not appoint as a guardian an agency, public or private, that financially benefits from directly providing housing, medical, mental health, or social services to the legally incapacitated individual. If the court determines that the ward's property needs protection, the court shall order the guardian to furnish a bond or shall include restrictions in the letters of guardianship as necessary to protect the property.

(2) In appointing a guardian under this section, the court shall appoint a person, if suitable and

M.C.L.A. 700.5313

willing to serve, designated by the individual who is the subject of the petition, including a designation made in a durable power of attorney. If a specific designation is not made or a person designated is not suitable or willing to serve, the court may appoint as a guardian a person named as attorney-in-fact through a durable power of attorney.

(3) If a person is not designated under subsection (2) or a person designated under subsection (2) is not suitable or willing to serve, the court may appoint as a guardian an individual who is related to the individual who is the subject of the petition in the following order of preference:

(a) The legally incapacitated individual's spouse. This subdivision shall be considered to include a person nominated by will or other writing signed by a deceased spouse.

(b) An adult child of the legally incapacitated individual.

(c) A parent of the legally incapacitated individual. This subdivision shall be considered to include a person nominated by will or other writing signed by a deceased parent.

(d) A relative of the legally incapacitated individual with whom the individual has resided for more than 6 months before the filing of the petition.

M.C.L.A. 700.5313

(e) A person nominated by a person who is caring for the legally incapacitated individual or paying benefits to the legally incapacitated individual.

(4) If none of the persons as designated or listed in subsection ( 2) or (3) is suitable or willing to serve, the court may appoint any competent person who is suitable and willing to serve, including a professional guardian as provided in section 5106.

Current through P.A.2007, No. 221

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20 Pa.C.S.A. § 5112

**c**

**Effective: [See Text Amendments]**

PURDON'S PENNSYLVANIA STATUTES AND CONSOLIDATED STATUTES

TITLE 20 PA.C.S.A. DECEDENTS, ESTATES AND FIDUCIARIES

CHAPTER 51. MINORS

SUBCHAPTER B. APPOINTMENT OF GUARDIAN

**→§ 5112. Persons not qualified to be appointed by the court**

The court shall not appoint as guardian of the estate of a minor any person who is:

(1) Under 18 years of age.

(2) A corporation not authorized to act as fiduciary in the Commonwealth.

(3) A parent of the minor, except that a parent may be appointed a co-guardian with another fiduciary or fiduciaries.

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20 Pa.C.S.A. § 5112

Current through Act 2007-56

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W. Va. Code, § 44A-1-8

**c**

*WEST'S ANNOTATED CODE OF WEST VIRGINIA*

CHAPTER 44A. WEST VIRGINIA GUARDIANSHIP AND CONSERVATORSHIP ACT

ARTICLE 1. DEFINITIONS AND GENERAL PROVISIONS

**→§ 44A-1-8. Persons and entities qualified to serve as guardian or conservator**

(a) Any adult individual may be appointed to serve as a guardian, a conservator, or both, upon a showing by the individual of the necessary education, ability and background to perform the duties of guardian or conservator and upon a determination by the court that the individual is capable of providing an active and suitable program of guardianship or conservatorship for the protected person: Provided, That the court may, after first determining it to be in the best interest of the protected person, appoint coguardians, coconservators, or both: Provided, however, That the individual is not employed by or affiliated with any public agency, entity or facility which is providing substantial services or financial assistance to the protected person. Any person being considered by a court for appointment as a guardian or conservator shall provide information regarding any crime, other than traffic offenses, of which he or she was convicted. The court shall consider this information in determining the person's fitness to be appointed a guardian or conservator.

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W. Va. Code, § 44A-1-8

(b) Any nonprofit corporation chartered in this state and licensed as set forth in subsection (c) of this section or a public agency that is not a provider of health care services to the protected person may be appointed to serve as a guardian, a conservator, or both: Provided, That the entity is capable of providing an active and suitable program of guardianship or conservatorship for the protected person and is not otherwise providing substantial services or financial assistance to the protected person.

(c) A nonprofit corporation chartered in this state may be appointed to serve as a guardian or conservator or as a limited or temporary guardian or conservator for a protected person if it is licensed to do so by the secretary of health and human resources. The secretary shall propose legislative rules, for promulgation in accordance with the provisions of chapter twenty-nine-a of this code, for the licensure of nonprofit corporations and shall provide for the review of the licenses. The rules shall, at a minimum, establish standards to assure that any corporation licensed for guardianship or conservatorship:

(1) Has sufficient fiscal and administrative resources to perform the fiduciary duties and make the reports and accountings required by this chapter;

(2) Will respect and maintain the dignity and privacy of the protected person;

W. Va. Code, § 44A-1-8

- (3) Will protect and advocate the legal human rights of the protected person;
  - (4) Will assure that the protected person is receiving appropriate educational, vocational, residential and medical services in the setting least restrictive of the individual's personal liberty;
  - (5) Will encourage the protected person to participate to the maximum extent of his or her abilities in all decisions affecting him or her and to act in his or her own behalf on all matters in which he or she is able to do so;
  - (6) Does not provide educational, vocational, residential or medical services to the protected person; and
  - (7) Has written provisions in effect for the distribution of assets and for the appointment of temporary guardians and conservators for any protected persons it serves in the event the corporation ceases to be licensed by the department of health and human resources or otherwise becomes unable to serve as guardian.
- (d) A duly licensed nonprofit corporation that has been appointed to serve as a guardian or as a conservator pursuant to the provisions of this article is entitled to compensation in accordance with the provisions of section thirteen of this article.

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W. Va. Code, § 44A-1-8

(e) Except as provided in section thirteen of this article, no guardian or conservator nor any officer, agent, director, servant or employee of any guardian or conservator may do business with or in any way profit, either directly or indirectly, from the estate or income of any protected person for whom services are being performed by the guardian or conservator.

(f) Any bank or trust company authorized to exercise trust powers or to engage in trust business in this state may be appointed as a conservator if the court determines it is capable of providing suitable conservatorship for the protected person.

(g) The secretary of the department of health and human resources shall designate a division or agency under his or her jurisdiction which may be appointed to serve as a guardian, but an appointment may only be made if there is no other individual, nonprofit corporation or other public agency that is equally or better qualified and willing to serve: Provided, That when any sheriff was initially appointed as guardian for the person, the department may not refuse to accept the guardianship appointment. If the department has been appointed as conservator, it may petition the circuit court to be released as conservator.

(h) The sheriff of the county in which a court has assumed jurisdiction may be appointed as a conservator but the appointment may only be made if there is no other individual, nonprofit corporation or other public agency that is equally or better qualified and willing to serve:

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W. Va. Code, § 44A-1-8

Provided, That when the department of health and human resources was initially appointed as conservator for the person, the sheriff may not refuse to accept the conservatorship appointment. If the sheriff has been appointed as guardian, he or she may petition the circuit court to be released as guardian.

(i) Other than a bank or trust company authorized to exercise trust powers or to engage in trust business in this state, a person who has an interest as a creditor of a protected person is not eligible for appointment as either a guardian or conservator of the protected person.

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# Estates and Protected Individuals Code

With Reporter's Commentary  
by John H. Martin

Reporter for the EPIC Drafting Committee,  
Council of the Probate and Estate Planning Section,  
State Bar of Michigan

With Probate Court Rules

2007 Edition

**THE INSTITUTE OF CONTINUING LEGAL EDUCATION**  
**1020 GREENE STREET**  
**Ann Arbor, Michigan 48109-1444**  
**Toll-free (877) 229-4350; Toll-free fax (877) 229-4351**  
**[www.icle.org](http://www.icle.org)**

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PUBLICATIONS STAFF

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700.5313

*EPIC with Reporter's Commentary*

showing that the individual is an incapacitated individual, the court may exercise the power of a guardian, or appoint a temporary guardian with only the powers and for the period of time as ordered by the court. A hearing with notice as provided in section 5311 shall be held within 28 days after the court has acted under this subsection.

(2) If an appointed guardian is not effectively performing the guardian's duties and the court further finds that the legally incapacitated individual's welfare requires immediate action, the court may appoint, with or without notice, a temporary guardian for the legally incapacitated individual for a specified period not to exceed 6 months.

(3) A temporary guardian is entitled to the care and custody of the ward, and the authority of a permanent guardian previously appointed by the court is suspended as long as a temporary guardian has authority. A temporary guardian may be removed at any time. A temporary guardian shall make reports as the court requires. In other respects, the provisions of this act concerning guardians apply to temporary guardians.

*As amended by 2000 PA 54 (eff. Apr 1, 2000).*

**Reporter's Comment**

Section 5312 substantively is the same as RPC §453, MCL 700.453. The comparable UPC provision is UPC §5-308.

**Reporter's Supplemental Comment—2005**

There is a very limited opportunity to appoint a temporary guardian pending the hearing on the petition to appoint a full or limited guardian. There must be an emergency and no one with authority to act. If a temporary guardian is appointed, he or she has only the powers listed by the court and only for a stated period of time. As an alternative to appointing a temporary guardian, the court may directly exercise the power of a guardian to accomplish some specific task. In any event, there must be a hearing within 28 days of the appointment of a temporary guardian or the court's exercise of the power of a guardian.

If a guardianship is already in place, i.e., there has been the hearing and determinations of incapacity and the need for a guardian, the court may appoint a temporary guardian to serve for up to six months if the incumbent guardian is not performing duties effectively and if the ward's welfare requires immediate action. The appointment of a temporary guardian suspends the authority of the incumbent.

**Court Rule Reference**

*See also* MCR 5.403.

**700.5313 Who may be appointed guardian**

Sec. 5313. (1) The court may appoint a competent person as guardian of a legally incapacitated individual. The court shall not appoint as a guardian an agency, public or private, that financially benefits from directly providing housing, medical, mental health, or social services to the legally incapacitated individual. If the court determines that the ward's property needs protection, the court shall order the guardian to furnish a bond or shall include restrictions in the letters of guardianship as necessary to protect the property.

*Article V: Individual Under Disability*

700.5314

(2) In appointing a guardian under this section, the court shall appoint a person, if suitable and willing to serve, designated by the individual who is the subject of the petition, including a designation made in a durable power of attorney. If a specific designation is not made or a person designated is not suitable or willing to serve, the court may appoint as a guardian a person named as attorney-in-fact through a durable power of attorney.

(3) If a person is not designated under subsection (2) or a person designated under subsection (2) is not suitable or willing to serve, the court may appoint as a guardian an individual who is related to the individual who is the subject of the petition in the following order of preference:

(a) The legally incapacitated individual's spouse. This subdivision shall be considered to include a person nominated by will or other writing signed by a deceased spouse.

(b) An adult child of the legally incapacitated individual.

(c) A parent of the legally incapacitated individual. This subdivision shall be considered to include a person nominated by will or other writing signed by a deceased parent.

(d) A relative of the legally incapacitated individual with whom the individual has resided for more than 6 months before the filing of the petition.

(e) A person nominated by a person who is caring for the legally incapacitated individual or paying benefits to the legally incapacitated individual.

(4) If none of the persons as designated or listed in subsection (2) or (3) is suitable or willing to serve, the court may appoint any competent person who is suitable and willing to serve, including a professional guardian as provided in section 5106.

*As last amended by 2000 PA 463 (eff. June 1, 2001).*

**Reporter's Comment**

Section 5313 substantively is the same as RPC §454, MCL 700.454, with several noticeable differences. Under subsection (1), as required by an amendment in 2000 PA 312, if the ward has property that needs protection (and the guardian will act with respect to it), the guardian must post bond or the letters of authority must be restricted as necessary to protect the ward's property. Subsection (2) confirms that a nomination of a guardian may be made in a durable power of attorney previously signed by the incapacitated individual. Subsection (4) expressly allows the appointment of a professional guardian. The comparable UPC provision is UPC §5-305.

**Reporter's Supplemental Comment—2005**

The restriction against appointing as guardian an agency that furnishes housing, medical, mental health, or social services to the ward is intended to prevent conflicts of interest. There is no requirement that the guardian reside in Michigan. Residence elsewhere, at some distance from the ward, could make the person unsuitable as a guardian. The priorities and preferences stated in this section are all subject to a finding of suitability.

**700.5314 Powers and duties of guardian**

Sec. 5314. Whenever meaningful communication is possible, a legally incapacitated individual's guardian shall consult with the legally incapacitated individual before