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INTRODUCTION

The sole question in this appeal is whether Appellant, Jennie Hull, has standing to appeal the probate court's judgment appointing Appellee, Victoria Wellington, guardian of their mother, Bessie Santrucek. Since an individual lacks standing to assert the rights of a third party, Appellant cannot maintain an appeal on Ms. Santrucek's behalf. Only Ms. Santrucek, through her representative, has standing to appeal the probate court's appointment; she has chosen not to appeal.

Due to the nature of guardianship proceedings, the effect of the judgment *on the ward* is the key to determining the issue of appellate standing. If the ward does not complain, next of kin and other interested observers cannot complain that they were prejudiced by the judgment. Ms. Santrucek's rights and interests were more than adequately protected and represented by her court-appointed guardian ad litem ("GAL"), her independent counsel, and the guardianship process itself.

Similarly, Appellant lacks any independent right to be appointed Ms. Santrucek's guardian. As an out-of state-resident, Appellant is not even entitled to notice of the proceedings under Ohio law. Accordingly, Appellant simply lacks the requisite interest in the proceedings to be legally aggrieved by the Licking County probate court's judgment. The judgment of the Fifth District Court of Appeals should be affirmed.

STATEMENT OF FACTS

As correctly stated by appellant, there are three principal players in this case: 97-year old Ms. Santrucek, Appellant, one of Ms. Santrucek's daughters, and Appellee, Ms. Santrucek's other daughter. In late 2005, Appellee became concerned about her mother's well-being and her living alone in her home in Michigan. (Transcript, August 23, 2006, 18, hereinafter "AT"). Appellee visited Ms. Santrucek in December 2005 and again in March 2006. (AT 18; Transcript October 9, 2006, 55, hereinafter "OT"). During those visits, Appellee made the following observations about Ms. Santrucek's behavior that were quite out of character: she was using toilet bowl cleaner to wash her dishes; she did not recognize roads within a mile of her residence; she addressed envelopes using the person's telephone number in place of the address; she was using and signing checks out of order; she was repeatedly asking the same questions over and over; and she wore the same clothes for several days in a row; she threw away important documents; and she did not pay her bills on time. (OT 55-63)

In the spring of 2006, Appellee and Ms. Santrucek decided to relocate Ms. Santrucek to Ohio to place her at Alterra Sterling House ("Alterra"), an assisted living facility with individual apartments. (AT 24). Thereafter, Appellee submitted her application for guardianship of Ms. Santrucek in the Licking County probate court and notified Appellant of same. (Appellant's Supp. 1). In order to protect Ms. Santrucek's interests, the court appointed attorney Troy Reed as her GAL. Ms. Santrucek also retained independent counsel, attorney John Obora.

On July 17, 2006, approximately two months after Appellee filed her application, Appellant filed a multi-part motion objecting to the probate court proceedings, arguing

the Licking County court lacked jurisdiction over Ms. Santrucek and that Michigan was the appropriate forum. (Appellant's Supp. 3, 4). Appellant claimed that Ms. Santrucek does not maintain a residence or legal settlement in Ohio because Ms. Santrucek was involuntarily moved to Ohio and did not intend to remain here. (Appellant's Supp. 4). Appellant contemporaneously filed a petition in the Michigan Probate Court to be appointed Ms. Santrucek's conservator. (Appellant's Supp. 9).¹ On August 23, 2006, the court conducted a hearing on Appellant's motion.

At the time of the August 2006 hearing, Ms. Santrucek had lived in Licking County for five months. During that hearing, a number of significant facts were revealed.² Most importantly, the record establishes that the ground upon which Appellant seeks to attack the probate court's jurisdiction *does not exist*. Contrary to Appellant's contentions, Ms. Santrucek was very aware she was moving to Ohio to live at Alterra to see how she liked it. (AT 24, 173) Ms. Santrucek's granddaughter, Debbie Link, went to Michigan with Appellee in order to move Ms. Santrucek. (AT 173) Ms. Link testified that her grandmother brought furniture with her to Ohio, including her china cabinet, and selected other various items to put in her new apartment. (AT 173) When questioned about the circumstances of the move, Appellant acknowledged she was not involved in any discussions and did not know if Ms. Santrucek was "misled" about why she was moving to Ohio. (AT 126)

¹ Appellant also filed a Motion to Disqualify Counsel for Appellee on the ground that a conflict of interest existed. The probate court denied the motion. In addition, Appellant's counsel, Mr. Harmon, filed an affidavit of prejudice seeking to disqualify Judge Hoover from the case. On October 20, 2006, Chief Justice Moyer disqualified Judge Hoover from future proceedings in this case and other future cases involving Attorney Harmon.

² Although these facts are not necessarily dispositive on the issue of standing, Appellant brings up the issue of Ms. Santrucek's move to Ohio.

Further, although Ms. Santrucek *initially* wanted to return to Michigan, by July 2006, Ms. Santrucek indicated her wish to remain at Alterra. Appellant testified she questioned Ms. Santrucek about this specific issue in July, at the time of the originally scheduled hearing, and Ms. Santrucek told Appellant she wanted to stay at Alterra. (AT 117) Appellant's attorney, Mr. Harmon, and Appellant's daughter were present during this exchange. (AT 116-117)

Marge Shawger, the Executive Director of Alterra, also testified at the August hearing. Ms. Shawger stated that Ms. Santrucek wanted to leave Alterra only during the first couple of weeks. Ms. Santrucek had not reiterated such desire for quite some time. (AT 163) Indeed, Ms. Santrucek was well adjusted and very involved in activities at Alterra. (AT 163) GAL Reed stated in two separate reports that Ms. Santrucek did not express to him any desire to return to Michigan. (Appellee's Supp. 2, 10). The critical questions regarding whether Ms. Santrucek voluntarily moved to Ohio and intended to remain are not in dispute.

Importantly, GAL Reed and Mr. Obora actively participated in the probate court proceedings. Had either of them felt that jurisdiction was lacking, both of these individuals had a duty to notify the court; they did not. Accordingly, the probate court denied Appellant's motion and properly determined it had jurisdiction to address Appellee's application. (Appellant's Appx. 11)

On October 9, 2006, the probate court conducted a second hearing to determine the merits of the application. The evidence demonstrated that Ms. Santrucek's condition continued to deteriorate after relocating to Ohio in April. For example, in June 2006, Sally Smith, an employee of Licking County Job and Family Services was called by the

Newark Police to a physical altercation involving Appellant, Appellant's daughter, Appellee, and Ms. Santrucek. Essentially, Appellant arranged for her daughter to wait for Ms. Santrucek outside of a local physician's office, where Ms. Santrucek had an appointment, and attempt to remove Ms. Santrucek to Michigan. In investigating the incident, Ms. Smith met with Ms. Santrucek alone; Ms. Santrucek was unable to identify the date, month, year, or even the season, despite verbal cues from Ms. Smith. (OT 43-44).

Further, despite numerous meetings with GAL Reed, she could not recognize him. (OT 65). On the day of the October hearing, Ms. Santrucek could not answer the probate court's questions regarding the date, the city she was in, the nature of the hearing, and who her independent attorney was despite meeting with Mr. Obora minutes before. (OT 24-25). Appellee, GAL Reed, Attorney Obora, and Attorney Lowe all concurred that Ms. Santrucek was in need of a guardian and that Appellee was a suitable choice. (OT 18; Appellee's Supp. 1-10). The probate court's independent investigator also agreed that Ms. Santrucek needed a guardian.

Notably, when fully competent, Ms. Santrucek indicated her wish to have Appellee handle her personal and financial affairs in numerous documents. For example, in October 1998, Ms. Santrucek designated Appellee as her health care advocate; in November 2001, as Ms. Santrucek's durable power of attorney; in July 2001, as Ms. Santrucek's health care power of attorney in Michigan; in February 2001, as successor trustee to the family trust; in December 2001, as the executor of Ms. Santrucek's estate. (OT 77-81).

Based on the overwhelming evidence before it, the probate court declared Ms. Santrucek incompetent and appointed Appellee as the guardian of Ms. Santrucek's person and property. (Appellant's Appx. 10). Appellant appealed to the Fifth District Court of Appeals which dismissed the appeal after concluding that Appellant lacked standing. *In re: Guardianship of Santrucek*, No. 06 CA 130, 2007-Ohio-3427, at ¶ 10. The Fifth District found that because Appellant's argument consisted of vicarious claims of violations of Ms. Santrucek's rights, Appellant was not the appropriate party to appeal. Appellant appealed to this Court which accepted jurisdiction on December 12, 2007. *In re Guardianship of Santrucek*, 116 Ohio St.3d 1437, 2007-Ohio-6518.

OVERVIEW OF GUARDIANSHIP PROCEEDINGS

Guardianship proceedings are controlled by Ohio Revised Code Chapter 2111, *et seq.* and Chapter 2109, *et seq.* Pursuant to R.C. 2111.02(A), 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 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, * * * has had the opportunity to have the assistance of counsel in the proceeding for the appointment of such guardian." Pursuant to R.C. 2111.04(A)(2), no guardian shall be appointed until at least seven (7) days after the probate court has provided written notice to the alleged incompetent and the next of kin, who are known to reside in the state, that the jurisdiction of the court has been invoked on the question of whether or not a guardian should be appointed. Pursuant to R.C. 2109.21, "[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 the state as guardian of the person, estate, or both, * * *.”

At the time of notice to the alleged incompetent, the probate court must appoint an independent investigator to investigate the circumstances of the alleged incompetent and make a recommendation regarding the necessity for a guardianship or a less restrictive alternative. R.C. 2111.041(A). The court must consider the investigator’s report prior to establishing any guardianship. R.C. 2111.041(B). The court must conduct a hearing on the matter of appointment, at which the proposed guardian must appear, to determine if the prospective ward’s incompetency has been proven by clear and convincing evidence. R.C. 2111.02(C); R.C. 2111.02(C)(3). Pursuant to R.C. 2111.02(C)(7), the alleged incompetent has the following applicable rights: (a) the right to be represented by independent counsel of her choice; (b) the right to have a friend or family member of her choice present; and (c) the right to have evidence of an independent expert evaluation introduced.

If the court appoints a guardian, the guardian must carry out his or her duties in accordance with R.C. 2111.13 and R.C. 2111.14, including filing ongoing reports with the probate court pursuant to R.C. 2111.49. If at any time the court feels it is necessary to intervene, it shall take any action it deems necessary. If the guardian does not carry out his or her duties in accordance with the law and court orders, the guardian is subject to sanctions, including removal, under R.C. 2109.24. The probate court having jurisdiction over the ward remains the superior guardian, while the appointee is deemed an officer of the court subject to the probate court’s continuing supervision and orders. R.C. 2111.50.

Proposition of Law: A person does not possess standing to assert the rights of a third party ward; only the ward may appeal the lower court's judgment.

It is fundamental that an appeal lies only on behalf of the party "aggrieved." *In re Guardianship of Love* (1969), 19 Ohio St.2d 111, 113, 249 N.E.2d 794; *Ohio Contract Carriers Ass'n, Inc. v. Public Utilities Comm'n* (1942), 140 Ohio St. 160, 42 N.E.2d 758 (holding that unless an appellant can show that her rights have been invaded, there can be no error). The party must demonstrate a present interest in the subject matter of the litigation and that she has been prejudiced by the lower court's judgment. *Love*, supra, 19 Ohio St.2d at 113; *Franklin Cty. Regional Solid Waste Management Authority v. Schregardus* (1992), 84 Ohio App.3d 591, 599, 617 N.E.2d 761. The "interest sought to be protected must be within the realm of interests regulated or protected by statute or constitutional right." *In re Guardianship of Miller* (Ohio App. 12th Dist., Aug. 3, 1998), Nos. CA97-09-045, CA97-10-049, 1998 WL 438807, *3, citing *Schregardus*, supra. A person generally does not have standing to assert the rights of a third person. *Warth v. Seldin* (1975), 422 U.S. 490.

In her Merit Brief, Appellant asserts she should have standing to appeal because she "participated in" the proceedings below. Appellant argues she is "prejudiced" by the Licking County probate court's judgment for two reasons: (1) because the probate court improperly exercised jurisdiction over Ms. Santrucek; and (2) as a result of the court exercising jurisdiction, Appellant is forever precluded from applying to act as Ms. Santrucek's guardian. Appellant's contentions are without merit.

Consistent with principles of standing, Appellant cannot assert an alleged violation of Ms. Santrucek's constitutional rights. Ms. Santrucek is the only person, through her representative, with standing to appeal and she has not filed an appeal.

Further, because Appellant lacks the requisite interest in the proceedings, she cannot demonstrate that her rights were adversely affected or that she has otherwise been aggrieved in any legally redressable manner.

I. The key to the issue of standing is the effect of the judgment on the ward; where the judgment does not cause the ward to appeal, a third party has no right to appeal.

To the extent permitted by the Code, the probate court has plenary, exclusive and original jurisdiction in matters involving the appointment and removal of guardians. *In re Coller* (1991), 74 Ohio App.3d 386, 391, 599 N.E.2d 292; *In re Clendenning*, (1945), 145 Ohio St. 82; R.C. 2101.24; R.C. Chapter 2111, *et seq.* Unlike typical *inter partes* or “adversarial” litigation, guardianship proceedings are proceedings *in rem*, and are ordinarily instituted by application made on behalf of and for the benefit of the prospective ward. *Love*, *supra*, 19 Ohio St.2d at 113; *In re Clendenning*, (1945), 145 Ohio St. 82; *In re Reynolds*, (1957), 106 Ohio App.3d 488, 155 N.E.2d 686. The proceedings involve only the Court and the ward, with the Court’s chief focus being to ascertain the best interests of the prospective ward and to act accordingly. *Love*, 19 Ohio St.2d at 113-114 (stating that only the ward and the Court are involved in guardianship proceedings); *In re Estate of Bednarczuk* (1992), 80 Ohio App.3d 548, 551, 609 N.E.2d 1310; *In re Guardianship of Schumacher*, (1987), 38 Ohio App.3d 37, 39, 525 N.E.2d 833.

Consistent with basic standing principles, the nature of guardianship proceedings requires that the effect of the judgment on the ward is the absolute key to determining who may appeal. *Love*, 19 Ohio St.2d at 113; *In re Guardianship of Sechler* (Ohio App. 10th Dist., Dec. 24, 1996), No. 96APF03-359, 1996 WL 745251, appeal not allowed by, *In re Guardianship of Sechler* (1997) 78 Ohio St.3d 1465, 678 N.E.2d 222, citing, *In re*

Guardianship of Collier (1991), 74 Ohio App.3d 386, 390, 599 N.E.2d 292. Where the probate court's judgment does not cause the ward to appeal, a third party does not possess standing to appeal. *Love*, 19 Ohio St.2d at 111, syllabus; *In re Bluthardt*, (Ohio App. 7th Dist., Sept. 9, 1982), Case Nos. 81-B-28, 81-B-29, 81-B-30, 81-B-31, 1982 WL 6181; *In re Lee* (Ohio App. 2d Dist., Nov. 15, 2002), No. 02CA3, 2002-Ohio-6194; *In re Edwards* (Ohio App. 8th Dist., March 19, 1998), No. 72473, 1998 WL 122360, cause dismissed by, *In re Edwards*, (1998), 83 Ohio St.3d 1466, 700 N.E.2d 1291.

For example, in *Bluthardt*, the Seventh District correctly determined that a ward's husband lacked standing to appeal the appointment of a guardian for his wife, other than himself. *In re Bluthardt*, supra. Because the ward did not appeal the probate court's decision, appellant was not prejudiced thereby and could not raise the issue on appeal. *Id.* at *1. Similarly, in *Miller*, supra, the Twelfth District held that the sisters of a ward lacked standing to challenge the court's denial of their motion to move the ward to a different facility where the ward did not appeal. *In re Lee*, supra, at ¶8 (holding that the only person with standing to complain of the guardian appointment was the ward and she did not); *In re Guardianship of Barg* (Ohio App. 12th Dist., May 15, 1989), No. CA88-10-07, 1989 WL 50098, *3, fn.1 (questioning, but not deciding, whether appellant had standing to appeal the denial of his application for guardianship where the court found that no guardianship was necessary).

Further illustrating this principle, a ward's appointed guardian may appeal on behalf of the ward if the judgment adversely affects the ward. In *Collier*, the Court allowed a co-guardian to appeal an order removing her as such because the removal left the incompetent ward without the protection of a guardian over her person. *Collier*, 74

Ohio App.3d at 391. In essence, the removal order adversely affected the ward's rights and best interests. *Id.* at 390-391; *In re Guardianship of Escola* (1987), 41 Ohio App.3d 42, 43, 534 N.E.2d 866 (finding that guardian had standing to appeal removal as it left the incompetent ward without a guardian and unable to pursue legal action).

As guardianship proceedings involve only the court and the ward, Appellant simply cannot vicariously assert a violation of Ms. Santrucek's substantive rights. Had Ms. Santrucek's substantive rights been violated, which they were not, Ms. Santrucek's representative is the *only* party with standing to appeal. Ms. Santrucek was initially represented by Attorney Obora and continues to be represented by GAL Reed, who is also an attorney. Both Mr. Obora and GAL Reed acted in a fiduciary capacity with respect to Ms. Santrucek. R.C. 2109, *et seq.*; *In re Richardson* (2007), 172 Ohio App.3d 410, 415, 875 N.E.2d 129 (noting that a guardian ad litem is a special guardian appointed to protect a ward or prospective ward's interest in the proceedings). Had either of these individuals concluded that the Licking County probate court lacked jurisdiction over Ms. Santrucek because she was involuntarily moved to Ohio, they had a fiduciary obligation to take appropriate action. Neither of them objected to the court's jurisdiction and GAL Reed does not appeal on behalf of Ms. Santrucek. Since Ms. Santrucek does not appeal the jurisdictional issue, Appellant cannot claim prejudice.³

The argument against Appellant's standing is particularly compelling given the facts of this case. The record reveals that Ms. Santrucek's substantive rights were fully

³ Significantly, Appellant did not even file her multi-part motion until nearly two months after Appellee applied for guardianship. The motion wasn't filed until after Appellant and her daughter's attempts to remove Ms. Santrucek to Michigan on their own were thwarted. These relationships are inadequate to provide standing to appeal the results of the legal proceedings.

protected and advocated on her behalf throughout the proceedings below. Ms. Santrucek was properly notified of the proceedings, the probate court's investigator interviewed Ms. Santrucek and recommended a guardian, the probate court appointed GAL Reed to advocate for Ms. Santrucek's best interests, hearings were properly held, and several witnesses testified to Ms. Santrucek's incompetence and the need for a guardian, including Attorney Obara and GAL Reed. (OT 18; Appellee's Supp. 1-10). Appellant had the opportunity to present evidence regarding her opposition to Appellee's application. Appellant's evidence consisted solely of her own testimony which indicated that Appellant did not appreciate the severity of Ms. Santrucek's condition.

Moreover, the probate court retains jurisdiction and supervision over the guardianship and, in actuality, remains the superior guardian of the ward. *Clendinning*, supra, 145 Ohio St. at 92-93; R.C. 2111.50(A)(1). In the unlikely event Appellee demonstrates she is not a suitable guardian for Ms. Santrucek and does not act in her best interests, like any other guardian, Appellee is subject to sanctions, including removal. The guardianship process itself protected the rights Appellant seeks to assert on behalf of Ms. Santrucek.

Recognizing her precarious position, Appellant argues that Ohio has recognized "diverse" situations of appellate standing. In support, Appellant cites *In re Guardianship of Love*, supra; *In re Guardianship of Rudy* (Ohio App. 11th Dist. Sept. 30, 1993), No. 93-T-4851, 1993 WL 407333; and *In re Moorehead*, (1991), 75 Ohio App.3d 711, 600 N.E.2d 778, none of which aid Appellant.

In *Love*, the Court actually found that the removed guardian did *not* have standing to appeal because she lacked the requisite interest in the proceedings. *Love*, 19 Ohio

St.2d at 111, syllabus. The *Love* case clearly supports Appellee's position that Appellant lacks standing. In *Rudy*, the Eleventh District held that appellants had standing to contest attorney's fees paid by the deceased ward in contesting a guardianship. *In re Rudy*, supra, at *1. Notably absent from Appellant's case parenthetical is the fact that the appellants in *Rudy* were the beneficiaries of the last will and testament of the deceased ward. As beneficiaries, appellants had a present interest in the administration of the estate to insure that the assets were not wasted. *Id.* If the fees awarded were not warranted, appellants would be prejudiced by the award. *Id.* Appellant is clearly not similarly situated to the appellant beneficiaries at issue in *Rudy*. *Moorehead*, a child custody case, is unique to the issues set forth in the opinion. *Moorehead*, 75 Ohio App.3d at 716-718. It does not, as Appellant suggests, provide standing to anyone who participates in guardianship proceedings.

II. Appellant lacks the requisite interest in the proceedings to be sufficiently "aggrieved" by the lower court's judgment.

Appellant claims she is prejudiced because she is forever precluded from applying to be guardian. Appellant further claims that the Fifth District's decision dismissing her appeal was based on her failure to apply for guardianship, thereby ignoring the fact that she is precluded from applying under Ohio law. However, *Appellant's* claims ignore the fact that her appeal was dismissed because she cannot vicariously assert a violation of Ms. Santrucek's rights.

Appellant simply lacks the requisite interest in the subject matter of the proceedings since she does not have any independent right to be appointed Ms. Santrucek's guardian. *Love*, supra, 19 Ohio St.2d at 113-114. In *Love*, supra, this Court held that a guardian removed by the probate court, after determining the ward was

restored to competency, lacked standing to appeal the removal order. This Court found that because the proceedings involved only the ward and the probate court, the guardian had “no true interest in the subject matter of the instant proceeding, nor was she prejudiced by the ruling of the Probate Court.” *Love*, supra, 19 Ohio St.2d at 113. Because the guardian had no personal right to continue serving as such, she was not “aggrieved.” *Id.* at 114-115 . In accordance with *Love*, Appellant does not have a “right” to be appointed guardian.

Similarly, in *Edwards*, supra, appellant lacked standing to appeal the denial of his motion to set aside the probate court’s order removing the original guardian and appointing a successor. *In re Edwards*, supra, at *1. After determining that appellant, the ward’s son, was not even entitled to notice of the probate court’s actions, the Eighth District dismissed the appeal. *Id.* In so concluding, the Court found stated that if the substantive rights of the ward are not affected, the substantive rights of the next of kin are not affected. *Id.* Indeed, “[t]he next of kin’s interest in the appointment of a guardian is not a liberty or property interest as defined in constitutional jurisprudence.” *Id.*, citing *In re Guardianship of Bissmeyer* (1988), 49 Ohio App.3d 42, 43, 550 N.E.2d 210; *Miller*, supra.

As in *Edwards*, Appellant is not even entitled to formal notice of the guardianship proceedings because she resides out-of-state. R.C. 2111.04(A)(2)(b). Ohio courts consistently hold the notice provision constitutional. *Bissmeyer*, supra, 49 Ohio App.3d at 43, *In re Edwards*, supra, *2; *In re Furgione* (Ohio App. 8th Dist., Nov. 2, 1995), No. 67715, 1995 WL 643709 (holding that out-of-state daughter of ward was not entitled to notice of the guardianship proceedings under the statute). If Appellant does not have a

“right” to notice of the guardianship proceedings, she certainly cannot claim a right to appeal a decision arising out of those same proceedings.

The cases cited by Appellant do not abrogate Ohio’s well-established standing principles. Appellant cites *In re Guardianship of Meucci* (Ohio App. 12th Dist., Dec. 26, 2000), No. CA2000-03-046, 2000 WL 1875737; *In re Tripp* (1993), 90 Ohio App.3d 209, 628 N.E.2d 139; and *In re Guardianship of Richardson*, (2d Dist. 2007), 172 Ohio App.3d 410, 875 N.E.2d 129, appeal allowed by, *In re Guardianship of Richardson*, (2007), 116 Ohio St.3d 1437, 877 N.E.2d 989.

The opinions in *Meucci* and *Tripp* do not even address the issue of standing. *Richardson* is clearly distinguishable from the case at bar. In *Richardson*, the Court held that the daughter of a proposed ward was a “party” with standing to appeal the appointment of a guardian as the daughter was “next of kin” entitled to notice that the jurisdiction of the court had been invoked. *Richardson*, 172 Ohio App.3d at 415, ¶19; See R.C. 2111.04(A)(2)(b). Unlike the daughter in *Richardson*, Appellant is not entitled to notice under the statute because she chose to reside out-of-state.

III. Significant Policy Reasons Justify Ohio’s Residency Requirement for Potential Guardians.

Citing statutes from several other States, Appellant claims that the Fifth District’s decision will further isolate Ohio from its sister states that do not have residency requirements to be appointed guardian. Appellant further states that although Ohio courts must enforce the residency requirement, such does not mandate a rule that bars out-of-state residents from appealing a probate court proceeding “adverse to them” when the out-of-state resident objects to the probate court’s jurisdiction. (Appellant’s Merit Brief, 13). Despite Appellant’s statement to the contrary, this aspect of Appellant’s argument

demonstrates she is seeking to judicially modify Ohio's residency requirement. R.C. 2109.21(C).

Although the statute discriminates against out-of-state residents, it does not offend constitutional principles. *In re Coller*, 74 Ohio App.3d at 394. The *Coller* Court determined that the proximity requirement was rationally related to a legitimate governmental purpose, namely, to insure the proximity of all involved parties so that the best interests of the ward can be monitored and protected. *Id.* at 394.

Importantly, R.C. 2901.21 was amended in 1981 to allow out-of-state residents to serve as guardians if the ward nominated the individual pursuant to a durable power of attorney or in a specified writing. R.C. 2109.21(C). Prior to that amendment, Ohio had an absolute ban on out-of-state residents as guardians for incompetent adults. Had the legislature wanted to broaden the role of out-of-state next of kin, it would have done so in 1981. The legislature's failure to extend the role of out-of-state residents provides further support that Appellant has not been aggrieved for purposes of appellate standing.

As demonstrated by *Coller*, significant policy reasons justify Ohio's residency requirement under R.C. 2109.21(C). The requirement was not enacted to penalize otherwise suitable applicants for a guardianship; "[r]ather, it was enacted for the benefit of the ward and the court, which is, in reality, the actual guardian of that ward." *Coller*, 74 Ohio App.3d at 394, citing *Clendenning*, 145 Ohio St. at 92-93. The probate court's role is to protect the best interests of the incompetent ward at all times. In order to carry out this purpose and continually monitor and protect the ward, Ohio has reasonably determined that close geographic proximity is needed between the ward, the guardian, and the court. Appellant's arguments fly in the face of this well-established Ohio policy.

CONCLUSION

Guardianship proceedings are conducted in the first instance to protect the ward and only the ward. The effect of the judgment on the ward, not the ward's friends or relatives, is the critical issue in determining appellate standing. Because Ms. Santrucek's rights and interests were more than adequately protected and advocated, Appellant cannot pursue an appeal. In addition, because the probate court's judgment does not adversely affect Ms. Santrucek in any way, it does not adversely affect Appellant. Not only does Appellant lack an independent right to be appointed Ms. Santrucek's guardian, she was not even entitled to formal notice of the guardianship application. Appellant does not have the requisite interest in the proceedings to be sufficiently aggrieved by the probate court's judgment. Accordingly, Appellant does not have standing to appeal.

Respectfully submitted,



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The undersigned certifies that a copy of the foregoing was served by regular U.S. mail this 6 day of March, 2008, upon the following:

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R.C. § 2111.02

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Title XXI. Courts--Probate--Juvenile
 ▣ Chapter 2111. Guardians; Conservatorships (Refs & Annos)
 ▣ General Provisions

→2111.02 Appointment of guardian (later effective date)

<Note: See also version(s) of this section with earlier effective date(s).>

(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.

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 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 no-

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

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- (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 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.

(1996 H 288, eff. 1-14-97; 1989 S 46, eff. 1-1-90; 1988 S 228; 1983 S 115; 129 v 1448; 128 v 76; 1953 H 1; GC 10507-2)

R.C. § 2111.02, OH ST § 2111.02

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Title XXI. Courts--Probate--Juvenile

▪ Chapter 2111. Guardians; Conservatorships (Refs & Annos)

▪ General Provisions

→2111.031 Appointment of physicians or others to examine alleged incompetent

In connection with an application for the appointment of a guardian for an alleged incompetent, the court may appoint physicians and other qualified persons to examine, investigate, or represent the alleged incompetent, to assist the court in deciding whether a guardianship is necessary. If the person is determined to be an incompetent and a guardian is appointed for him, the costs, fees, or expenses incurred to so assist the court shall be charged either against the estate of the person or against the applicant, unless the court determines, for good cause shown, that the costs, fees, or expenses are to be recovered from the county, in which case they shall be charged against the county. If the person is not determined to be an incompetent or a guardian is not appointed for him, the costs, fees, or expenses incurred to so assist the court shall be charged against the applicant, unless the court determines, for good cause shown, that the costs, fees, or expenses are to be recovered from the county, in which case they shall be charged against the county.

A court may require the applicant to make an advance deposit of an amount that the court determines is necessary to defray the anticipated costs of examinations of an alleged incompetent and to cover fees or expenses to be incurred to assist it in deciding whether a guardianship is necessary.

This section does not affect or apply to the duties of a probate court investigator under sections 2111.04 and 2111.041 of the Revised Code.

(1989 S 46, eff. 1-1-90; 1984 H 263)

R.C. § 2111.031, OH ST § 2111.031

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Title XXI. Courts--Probate--Juvenile

▣ Chapter 2111. Guardians; Conservatorships (Refs & Annos)

▣ General Provisions

→2111.04 Notice

(A) Except for an interim or emergency guardian appointed under division (B)(2) or (3) of section 2111.02 of the Revised Code, no guardian of the person, the estate, or both shall be appointed until at least seven days after the probate court has caused written notice, setting forth the time and place of the hearing, to be served as follows:

(1) In the appointment of the guardian of a minor, notice shall be served:

(a) Upon the minor, if over the age of fourteen, by personal service;

(b) Upon each parent of the minor whose name and address is known or with reasonable diligence can be ascertained, provided the parent is free from disability other than minority;

(c) Upon the next of kin of the minor who are known to reside in this state, if there is no living parent, the name and address of the parent cannot be ascertained, or the parent is under disability other than minority;

(d) Upon the person having the custody of the minor.

(2) In the appointment of the guardian of an incompetent, notice shall be served:

(a)(i) Upon the person for whom appointment is sought by personal service, by a probate court investigator, or in the manner provided in division (A)(2)(a)(ii) of this section. The notice shall be in boldface type and shall inform the alleged incompetent, in boldface type, of his rights to be present at the hearing, to contest any application for the appointment of a guardian for his person, estate, or both, and to be represented by an attorney and of all of the rights set forth in division (C)(7) of section 2111.02 of the Revised Code.

(ii) If the person for whom appointment is sought is a resident of, or has a legal settlement in, the county in which the court has jurisdiction, but is absent from that county, the probate court may designate, by order, a temporary probate court investigator, in lieu of a regular probate court investigator appointed or designated under section 2101.11 of the Revised Code, to make the personal service of the notice described in division (A)(2)(a)(i) of this section upon the person for whom appointment is sought.

(b) Upon the next of kin of the person for whom appointment is sought who are known to reside in this state.

(B) After service of notice in accordance with division (A) of this section and for good cause shown, the court may appoint a guardian prior to the time limitation specified in that division.

(C) Notice may not be waived by the person for whom the appointment is sought.

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(D) From the service of notice until the hearing, no sale, gift, conveyance, or encumbrance of the property of an alleged incompetent shall be valid as to persons having notice of the proceeding.

(1989 S 46, eff. 1-1-90; 1975 S 145; 129 v 1448; 127 v 36; 1953 H 1; GC 10507-4)

HISTORICAL AND STATUTORY NOTES

Pre-1953 H 1 Amendments: 121 v 557; 114 v 384

COMPARATIVE LAWS

Minn.--M.S.A. § 525.55.

R.C. § 2111.04, OH ST § 2111.04

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Title XXI. Courts--Probate--Juvenile

▪ Chapter 2111. Guardians; Conservatorships (Refs & Annos)

▪ General Provisions

→2111.041 Investigation of alleged incompetent

(A) At the time of the service of notice upon an alleged incompetent, as required by division (A)(2)(a) of section 2111.04 of the Revised Code, the court shall require a regular probate court investigator appointed or designated under section 2101.11 of the Revised Code or appoint a temporary probate court investigator to investigate the circumstances of the alleged incompetent, and, to the maximum extent feasible, to communicate to the alleged incompetent in a language or method of communication that he can understand, his rights as specified in that division, and subsequently to file with the court a report that contains all of the following:

(1) A statement indicating that the notice was served and describing the extent to which the alleged incompetent's rights to be present at the hearing, to contest any application for the appointment of a guardian for his person, estate, or both, and to be represented by an attorney were communicated to him in a language or method of communication understandable to the alleged incompetent;

(2) A brief description, as observed by the investigator, of the physical and mental condition of the alleged incompetent;

(3) A recommendation regarding the necessity for a guardianship or a less restrictive alternative;

(4) A recommendation regarding the necessity of appointing pursuant to section 2111.031 of the Revised Code, an attorney to represent the alleged incompetent.

(B) The report that is required by division (A) of this section shall be made a part of the record in the case and shall be considered by the court prior to establishing any guardianship for the alleged incompetent.

(1989 S 46, eff. 1-1-90)

R.C. § 2111.041, OH ST § 2111.041

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Title XXI. Courts--Probate--Juvenile

▪ Chapter 2111. Guardians; Conservatorships (Refs & Annos)

▪ Powers and Duties of Guardian

→2111.13 Duties of guardian of person

(A) When a guardian is appointed to have the custody and maintenance of a ward, and to have charge of the education of the ward if the ward is a minor, the guardian's duties are as follows:

(1) To protect and control the person of the ward;

(2) To provide suitable maintenance for the ward when necessary, which shall be paid out of the estate of such ward upon the order of the guardian of the person;

(3) To provide such maintenance and education for such ward as the amount of the ward's estate justifies when the ward is a minor and has no father or mother, or has a father or mother who fails to maintain or educate the ward, which shall be paid out of such ward's estate upon the order of the guardian of the person;

(4) To obey all the orders and judgments of the probate court touching the guardianship.

(B) Except as provided in section 2111.131 of the Revised Code, no part of the ward's estate shall be used for the support, maintenance, or education of such ward unless ordered and approved by the court.

(C) A guardian of the person may authorize or approve the provision to the ward of medical, health, or other professional care, counsel, treatment, or services unless the ward or an interested party files objections with the probate court, or the court, by rule or order, provides otherwise.

(D) Unless a person with the right of disposition for a ward under section 2108.70 or 2108.81 of the Revised Code has made a decision regarding whether or not consent to an autopsy or post-mortem examination on the body of the deceased ward under section 2108.50 of the Revised Code shall be given, a guardian of the person of a ward who has died may consent to the autopsy or post-mortem examination.

(E) If a deceased ward did not have a guardian of the estate, the estate is not required to be administered by a probate court, and a person with the right of disposition for a ward, as described in section 2108.70 or 2108.81 of the Revised Code, has not made a decision regarding the disposition of the ward's body or remains, the guardian of the person of the ward may authorize the burial or cremation of the ward.

(F) A guardian who gives consent or authorization as described in divisions (D) and (E) of this section shall notify the probate court as soon as possible after giving the consent or authorization.

(2006 H 426, eff. 10-12-06; 2000 H 538, eff. 9-22-00; 1989 S 46, eff. 1-1-90; 1984 H 263; 1953 H 1; GC 10507-16)

HISTORICAL AND STATUTORY NOTES

R.C. § 2111.13

Pre-1953 H 1 Amendments: 114 v 387

Amendment Note: 2006 H 426 rewrote division (E), which prior thereto read:

"(D) A guardian of the person of a ward who has died may consent to an autopsy or post-mortem examination upon the body of the deceased ward under section 2108.50 of the Revised Code and, if the deceased ward did not have a guardian of the estate and the estate is not required to be administered by a probate court, may authorize the burial or cremation of the deceased ward. A guardian who gives consent or authorization as described in this division shall notify the probate court as soon as possible after giving the consent or authorization."

Amendment Note: 2000 H 538 added division (D) and made changes to reflect gender neutral language.

R.C. § 2111.13, OH ST § 2111.13

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Title XXI. Courts--Probate--Juvenile

▣ Chapter 2111. Guardians; Conservatorships (Refs & Annos)

▣ Powers and Duties of Guardian

→2111.14 Duties of guardian of estate

In addition to his other duties, every guardian appointed to take care of the estate of a ward shall have the following duties:

(A) To make and file within three months after his appointment a full inventory of the real and personal property of the ward, its value, and the value of the yearly rent of the real property, provided that, if the guardian fails to file the inventory for thirty days after he has been notified of the expiration of the time by the probate judge, the judge shall remove him and appoint a successor;

(B) To manage the estate for the best interest of the ward;

(C) To pay all just debts due from the ward out of the estate in his hands, collect all debts due to the ward, compound doubtful debts, and appear for and defend, or cause to be defended, all suits against the ward;

(D) To obey all orders and judgments of the courts touching the guardianship;

(E) To bring suit for the ward when a suit is in the best interests of the ward;

(F) To settle and adjust, when necessary or desirable, the assets that he may receive in kind from an executor or administrator to the greatest advantage of the ward. Before a settlement and adjustment is valid and binding, it shall be approved by the probate court and the approval shall be entered on its journal. The guardian also shall have the approval of the probate court to hold the assets as received from the executor or administrator or to hold what may be received in the settlement and adjustment of those assets.

No guardian appointed to take care of the estate of a ward may open a safety deposit box held in the name of the ward, until the contents of the box have been audited by an employee of the county auditor in the presence of the guardian and until a verified report of the audit has been filed by the auditor with the probate court, which then shall issue a release to the guardian permitting the guardian to have access to the safety deposit box of the ward.

(1992 H 427, eff. 10-8-92; 1969 S 42; 1953 H 1; GC 10507-15)

HISTORICAL AND STATUTORY NOTES

Pre-1953 H 1 Amendments: 114 v 387

R.C. § 2111.14, OH ST § 2111.14

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Title XXI. Courts--Probate--Juvenile

² Chapter 2111. Guardians; Conservatorships (Refs & Annos) ² Miscellaneous Provisions

→ 2111.49 Guardian's report; court intervention; hearing

(A)(1) Subject to division (A)(3) of this section, the guardian of an incompetent person shall file a guardian's report with the court two years after the date of the issuance of the guardian's letters of appointment and biennially after that time, or at any other time upon the motion or a rule of the probate court. The report shall be in a form prescribed by the court and shall include all of the following.

- (a) The present address of the place of residence of the ward;
 - (b) The present address of the guardian;
 - (c) If the place of residence of the ward is not the ward's personal home, the name of the facility at which the ward resides and the name of the person responsible for the ward's care;
 - (d) The approximate number of times during the period covered by the report that the guardian has had contact with the ward, the nature of those contacts, and the date that the ward was last seen by the guardian;
 - (e) Any major changes in the physical or mental condition of the ward observed by the guardian;
 - (f) The opinion of the guardian as to the necessity for the continuation of the guardianship;
 - (g) The opinion of the guardian as to the adequacy of the present care of the ward;
 - (h) The date that the ward was last examined or otherwise seen by a physician and the purpose of that visit;
 - (i) A statement by a licensed physician, licensed clinical psychologist, licensed independent social worker, licensed professional clinical counselor, or mental retardation team that has evaluated or examined the ward within three months prior to the date of the report as to the need for continuing the guardianship.
- (2) The court shall review a report filed pursuant to division (A)(1) of this section to determine if a continued necessity for the guardianship exists. The court may direct a probate court investigator to verify aspects of the report.
- (3) Division (A)(1) of this section applies to guardians appointed prior to, as well as on or after, the effective date of this section. A guardian appointed prior to that date shall file the first report in accordance with any applicable court rule or motion, or, in the absence of such a rule or motion, upon the next occurring date on which a report would have been due if division (A)(1) of this section had been in effect on the date of appointment as guardian, and shall file all subsequently due reports biennially after that time.

(B) If, upon review of any report required by division (A)(1) of this section, the court finds that it is necessary to

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intervene in a guardianship, the court shall take any action that it determines is necessary, including, but not limited to, terminating or modifying the guardianship.

(C) Except as provided in this division, for any guardianship, upon written request by the ward, the ward's attorney, or any other interested party made at any time after the expiration of one hundred twenty days from the date of the original appointment of the guardian, a hearing shall be held in accordance with section 2111.02 of the Revised Code to evaluate the continued necessity of the guardianship. Upon written request, the court shall conduct a minimum of one hearing under this division in the calendar year in which the guardian was appointed, and upon written request, shall conduct a minimum of one hearing in each of the following calendar years. Upon its own motion or upon written request, the court may, in its discretion, conduct a hearing within the first one hundred twenty days after appointment of the guardian or conduct more than one hearing in a calendar year. If the ward alleges competence, the burden of proving incompetence shall be upon the applicant for guardianship or the guardian, by clear and convincing evidence.

(1996 S 223, eff. 3-18-97; 1989 S 46, eff. 1-1-90)

HISTORICAL AND STATUTORY NOTES

Amendment Note: 1996 S 223 substituted "licensed independent social worker, licensed professional clinical counselor," for "or licensed clinical social worker" in division (A)(1)(i); and made changes to reflect gender neutral language and other nonsubstantive changes.

R.C. § 2111.49, OH ST § 2111.49

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▪ Miscellaneous Provisions

→2111.50 Probate court powers over guardianship

(A)(1) At all times, the probate court is the superior guardian of wards who are subject to its jurisdiction, and all guardians who are subject to the jurisdiction of the court shall obey all orders of the court that concern their wards or guardianships.

(2)(a) Subject to divisions (A)(2)(b) and (c) of this section, the control of a guardian over the person, the estate, or both of his ward is limited to the authority that is granted to the guardian by the Revised Code, relevant decisions of the courts of this state, and orders or rules of the probate court.

(b) Except for the powers specified in division (E) of this section and unless otherwise provided in or inconsistent with another section of the Revised Code, the probate court may confer upon a guardian any power that this section grants to the probate court in connection with wards.

(c) For good cause shown, the probate court may limit or deny, by order or rule, any power that is granted to a guardian by a section of the Revised Code or relevant decisions of the courts of this state.

(B) In connection with any person whom the probate court has found to be an incompetent or a minor subject to guardianship and for whom the court has appointed a guardian, the court has, subject to divisions (C) to (E) of this section, all the powers that relate to the person and estate of the person and that he could exercise if present and not a minor or under a disability, except the power to make or revoke a will. These powers include, but are not limited to, the power to do any of the following:

- (1) Convey or release the present, contingent, or expectant interests in real or personal property of the person, including, but not limited to, dower and any right of survivorship incident to a survivorship tenancy, joint tenancy, or tenancy by the entireties;
- (2) Exercise or release powers as a trustee, personal representative, custodian for a minor, guardian, or donee of a power of appointment;
- (3) Enter into contracts, or create revocable trusts of property of the estate of the person, that may not extend beyond the minority, disability, or life of the person or ward;
- (4) Exercise options to purchase securities or other property;
- (5) Exercise rights to elect options under annuities and insurance policies, and to surrender an annuity or insurance policy for its cash value;
- (6) Exercise the right to an elective share in the estate of the deceased spouse of the person pursuant to section 2107.45 of the Revised Code;

(7) Make gifts, in trust or otherwise, to relatives of the person and, consistent with any prior pattern of the person of giving to charities or of providing support for friends, to charities and friends of the person.

(C) Except for the powers specified in division (D) of this section, all powers of the probate court that are specified in this chapter and that relate either to any person whom it has found to be an incompetent or a minor subject to guardianship and for whom it has appointed a guardian and all powers of a guardian that relate to his ward or guardianship as described in division (A)(2) of this section, shall be exercised in the best interest, as determined in the court's or guardian's judgment, of the following:

(1) The person whom the probate court has found to be an incompetent or a minor subject to guardianship;

(2) The dependents of the person;

(3) The members of the household of the person.

(D) If the court is to exercise or direct the exercise, pursuant to division (B) of this section, of the power to make gifts in trust or otherwise, the following conditions shall apply:

(1) The exercise of the particular power shall not impair the financial ability of the estate of the person whom the probate court has found to be an incompetent or a minor subject to guardianship and for whom the court has appointed a guardian, to provide for his foreseeable needs for maintenance and care;

(2) If applicable, the court shall consider any of the following:

(a) The estate, income, and other tax advantages of the exercise of a particular power to the estate of a person whom the probate court has found to be an incompetent or a minor subject to guardianship and for whom the court has appointed a guardian;

(b) Any pattern of giving of, or any pattern of support provided by, the person prior to his incompetence;

(c) The disposition of property made by the will of the person;

(d) If there is no knowledge of a will of the person, his prospective heirs;

(e) Any relevant and trustworthy statements of the person, whether established by hearsay or other evidence.

(E)(1) The probate court shall cause notice as described in division (E)(2) of this section to be given and a hearing to be conducted prior to its exercise or direction of the exercise of any of the following powers pursuant to division (B) of this section:

(a) The exercise or release of powers as a donee of a power of appointment;

(b) Unless the amount of the gift is no more than one thousand dollars, the making of a gift, in trust or otherwise.

(2) The notice required by division (E)(1) of this section shall be given to the following persons:

(a) Unless a guardian of a ward has applied for the exercise of a power specified in division (E)(1) of this section, to the guardian;

R.C. § 2111.50

- (b) To the person whom the probate court has found to be an incompetent or a minor subject to guardianship;
 - (c) If known, to a guardian who applied for the exercise of a power specified in division (E)(1) of this section, to the prospective heirs of the person whom the probate court has found to be an incompetent or a minor subject to guardianship under section 2105.06 of the Revised Code, and any person who has a legal interest in property that may be divested or limited as the result of the exercise of a power specified in division (E)(1) of this section;
 - (d) To any other persons the court orders.
- (F) When considering any question related to, and issuing orders for, medical or surgical care or treatment of incompetents or minors subject to guardianship, the probate court has full parens patriae powers unless otherwise provided by a section of the Revised Code.

(1989 S 46, eff. 1-1-90)

R.C. § 2111.50, OH ST § 2111.50

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R.C. § 2109.24

C

Baldwin's Ohio Revised Code Annotated Currentness

Title XXI. Courts--Probate--Juvenile

Chapter 2109. Fiduciaries (Refs & Annos)

Qualifications and Miscellaneous Provisions

→2109.24 Resignation or removal of fiduciary

The probate court at any time may accept the resignation of any fiduciary upon the fiduciary's proper accounting, if the fiduciary was appointed by, is under the control of, or is accountable to the court.

If a fiduciary fails to make and file an inventory as required by sections 2109.58, 2111.14, and 2115.02 of the Revised Code or to render a just and true account of the fiduciary's administration at the times required by section 2109.301, 2109.302, or 2109.303 of the Revised Code, and if the failure continues for thirty days after the fiduciary has been notified by the court of the expiration of the relevant time, the fiduciary forthwith may be removed by the court and shall receive no allowance for the fiduciary's services unless the court enters upon its journal its findings that the delay was necessary and reasonable.

The court may remove any fiduciary, after giving the fiduciary not less than ten days' notice, for habitual drunkenness, neglect of duty, incompetency, or fraudulent conduct, because the interest of the property, testamentary trust, or estate that the fiduciary is responsible for administering demands it, or for any other cause authorized by law.

The court may remove a testamentary trustee upon the written application of more than one-half of the persons having an interest in the estate controlled by the testamentary trustee, but the testamentary trustee is not to be considered as a person having an interest in the estate under the proceedings; except that no testamentary trustee appointed under a will shall be removed upon such written application unless for a good cause.

(2006 H 416, eff. 1-1-07; 2001 H 85, eff. 10-31-01; 1992 H 427, eff. 10-8-92; 1953 H 1; GC 10506-53)

UNCODIFIED LAW

2001 H 85, § 6: See Uncodified Law under 2109.12.

2001 H 85, § 7: See Uncodified Law under 2109.11.

HISTORICAL AND STATUTORY NOTES

Pre-1953 H 1 Amendments: 119 v 394, § 1; 114 v 375

Amendment Note: 2006 H 416 rewrote the third and fourth paragraph, which prior thereto read:

"The court may remove any such fiduciary, after giving the fiduciary not less than ten days' notice, for habitual drunkenness, neglect of duty, incompetency, or fraudulent conduct, because the interest of the trust demands it, or for any other cause authorized by law.

R.C. § 2109.24

"The court may remove a trustee upon the written application of more than one-half of the persons having an interest in the estate controlled by the trustee, but the trustee is not to be considered as a person having an interest in the estate under the proceedings; except that no trustee appointed under a will shall be removed upon such written application unless for a good cause."

Amendment Note: 2001 H 85 substituted "2109.301, 2109.302, or 2109.303" for "2109.30" in the second paragraph; and made changes to reflect gender neutral language.

R.C. § 2109.24, OH ST § 2109.24

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R.C. § 2109.21

This document has been updated. Use KEYCITE.

Baldwin's Ohio Revised Code Annotated Currentness

Title XXI. Courts--Probate--Juvenile

▣ Chapter 2109. Fiduciaries (Refs & Annos)

▣ Qualifications and Miscellaneous Provisions

→ 2109.21 Residence qualifications of fiduciaries; nonresidents subject to conditions (later effective date)

<Note: See also version(s) of this section with earlier effective date(s).>

(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 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 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; 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 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 or state in which the guardian resided at the time of the guardian's appointment.

(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.

(2008 S 157, eff. 5-14-08; 1996 H 288, eff. 1-14-97; 1990 H 346, eff. 5-31-90; 1988 S 228; 1983 S 115; 1982 S 247; 1975 S 145; 1953 H 1; GC 10506-65)

UNCODIFIED LAW

1990 H 346, § 3, eff. 5-31-90, reads, in part: (A) Sections 1 and 2 of this act shall apply only to the estates of decedents who die on or after the effective date of this act.

HISTORICAL AND STATUTORY NOTES

Pre-1953 H 1 Amendments: 123 v 460; 114 v 378

Amendment Note: 2008 S 157 rewrote division (C), which prior thereto read:

"(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. 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

R.C. § 2109.21

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."

Amendment Note: 1996 H 288 inserted "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" in division (C); and made changes to reflect gender neutral language and other nonsubstantive changes.

LEGISLATIVE SERVICE COMMISSION

1975:

Current law requires an administrator to be a resident of this state. The probate court may also refuse to allow an executor or trustee named in a will to be a nonresident. Under the bill, an administrator, would still be required to be a resident of the state but the provision that permits the probate court to refuse to allow a nonresident executor or trustee would be repealed, and any other executor, except a surviving spouse or next of kin, would also have to be a resident of the state.

OSBA PROBATE AND TRUST LAW SECTION

1983:

See the comment for 1983 following Sec. 2111.121 and Sec. 2113.05.

R.C. § 2109.21, OH ST § 2109.21

Current through 2008 File 51 of the 127th GA (2007-2008),
apv. by 2/29/08, and filed with the Secretary of State by 2/29/08.

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Guardianship of Sechler v. Market
Ohio App. 10 Dist., 1996.
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, Tenth District, Franklin
County.
In the Matter of the GUARDIANSHIP Of Judith A.
SECHLER, Incompetent, Appellee,
v.
Rita MARKET, Appellant.
No. 96APP03-359.

Dec. 24, 1996.

APPEAL from the Franklin County Court of Com-
mon Pleas, Probate Division.

Emens, Kegler, Brown, Hill & Ritter, and R.
Douglas Wrightsel, Columbus, for appellee.
Brenda B. Alleman, Columbus, for appellant.

OPINION

BRYANT, Judge.

*1 Appellant, Rita Market, guardian of the per-
son of Judith Sechler, appeals from three separate
judgments of the Franklin County Court of Com-
mon Pleas, Probate Division: (1) an August 8, 1995
entry awarding attorney fees to counsel for the
former successor guardian; (2) a September 5, 1995
entry approving the appointment of a separate
guardian of the estate; and (3) a February 21, 1996
entry not only finding appellant lacked standing to
bring exceptions to the accounting of the former
successor guardian, but also quashing appellant's
subpoena on the former successor guardian's attor-
ney. Appellant also appeals the probate court's fail-
ure to rule on the next of kin's motion to intervene.

A substantial procedural history underlies this

appeal. The guardianship at issue began in 1990
with the appointment of Thomas Ingledue as guard-
ian of the person and estate of Judith Sechler
("ward"). In October 1991, Anne Robbins was ap-
pointed successor guardian of the ward's estate and
person. Thereafter, Robbins filed a concealment of
assets action against Lorraine Furtado, attorney
for Ingledue.

Robbins resigned as guardian on July 28, 1995.
Appellant applied for appointment as successor
guardian of the ward's estate and person. At the
hearing on appellant's application, a probate court
magistrate found a conflict among appellant, the
ward's family members, and Lorraine Furtado, re-
sulting from the concealment action. As a result, the
magistrate recommended, and the probate court ap-
proved, appellant's appointment as the guardian of
the person only; the court appointed attorney R.
Douglas Wrightsel to act as guardian of the estate.

On November 20, 1995, appellant filed
"Objections to Final Accounting and Other Ac-
countings" of successor guardian Robbins. She fur-
ther caused a subpoena to issue compelling George
Sheehan to produce bank records from the ward's
accounts, along with time sheets for hours expen-
ded in his role as attorney for successor guardian
Robbins. Following a hearing held on January 17,
1996, a probate court magistrate quashed the sub-
poena, concluding appellant lacked standing to
make exceptions to the successor guardian's ac-
counting. The probate court entered judgment ap-
proving the magistrate's decision on February 21,
1996. Appellant appeals to this court, assigning the
following errors:

"I. THE TRIAL COURT ABUSED ITS DIS-
CRETION AND PREJUDICED THE WARD
WHEN IT FAILED TO RULE ON THE MOTION
OF THE WARD'S NEXT OF KIN TO INTER-
VENE, FILED AUGUST 5 [*sic*], 1995.

"II. THE TRIAL COURT ABUSED ITS DIS-
CRETION AND PREJUDICED THE WARD
WHEN IT WITHOUT EVIDENCE GRANTED

FORMER SUCCESSOR GUARDIAN OF THE WARD ANNE ROBBINS' ATTORNEY FEES IN THE AMOUNT OF \$4,319.55.

"III. THE TRIAL COURT ACTED CONTRARY TO LAW, ABUSED ITS DISCRETION, AND PREJUDICED THE WARD WHEN IT ADOPTED THE MAGISTRATE'S PROPOSED DECISION AND APPOINTED WRIGHTSEL GUARDIAN OF THE ESTATE WITHOUT PROVIDING THE WARD WITH THE REQUIRED NOTICE AND REQUISITE HEARING.

*2 "IV. THE TRIAL COURT ABUSED ITS DISCRETION, ACTED CONTRARY TO LAW AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, AND PREJUDICED THE WARD WHEN IT ADOPTED THE MAGISTRATE'S REPORT AND CONCLUDED '... THAT IN THIS CASE THE GUARDIAN OF THE PERSON DOES NOT HAVE STANDING TO BRING EXCEPTIONS TO THE ACCOUNT OF THE FORMER FIDUCIARY'.

"V. THE TRIAL COURT ABUSED ITS DISCRETION, COMMITTED REVERSIBLE ERROR, AND PREJUDICED THE WARD WHEN IT GRANTED SHEEHAN HIS MOTION TO QUASH THE SUBPOENA PROPERLY SERVED UPON HIM BY THE SUCCESSOR GUARDIAN OF THE PERSON OF THE WARD."

Through her first assignment of error, appellant in effect requests the ward's next of kin be permitted to intervene. On August 7, 1995, the ward's next of kin filed a motion to intervene "so as to protect their interests in the assets of the guardianship which are not being adequately protected." (Motion to Intervene, p. 3.) The probate court never ruled on the next of kin's motion. However, when a trial court fails to rule upon a motion, it is treated as though the court overruled it. *State ex rel. Cassels v. Dayton City School Dist. Bd. of Edn.* (1994), 69 Ohio St.3d 217, 223; see, also, *Stover v. Wallace* (Feb. 15, 1996), Franklin App. No. 95APE06-743, unreported (1996 Opinions 524, 529). Thus, appellant essentially is claiming error in the denial of the next of kin's motion to intervene.

"It is a general principle that a fiduciary may not appeal a judgment which does not affect him prejudicially in his representative capacity." *Boulger v. Evans* (1978), 54 Ohio St.2d 371, 375. Thus, a guardian has standing to appeal where a judgment adversely affects the ward. See *In re Guardianship of Collier* (1991), 74 Ohio App.3d 386, 390, citing *First Natl. Bank v. Rawson* (1936), 54 Ohio App. 285; *In re Guardianship of Escola* (1987), 41 Ohio App.3d 42, 43. "[T]he effect of the judgment on the ward is the key to the issue of standing." *In re Collier, supra*, at 391. In the instant case, neither appellant in her representative capacity, nor her ward has been adversely affected by the trial court's denial of the motion. Because the next of kin's expressly stated purpose for seeking intervention was to protect *their own interests*^{FN1} (see Motion to Intervene, pp. 3, 6), they are the only ones to have been adversely affected when their motion was denied. The record thus fails to provide any evidence that denial of the motion negatively impacted the ward, and appellant does not have standing as a fiduciary to appeal denial of the motion. Appellant's first assignment of error is overruled.

FN1. The next of kin claim an interest here, as heirs and beneficiaries of their mother's estate, resulting from a \$10,000 loan their mother made to the ward in 1979. They further claim that the ward improperly expended approximately \$12,000 in 1989 while the ward had a power of attorney for their mother. Finally, the ward's sister claims an interest in the ward's estate based on a \$10,000 loan to the ward made in order to save ward's home from foreclosure.

In her second assignment of error, appellant asserts that the trial court erred in granting attorney fees to counsel for the former successor guardian. Fees were awarded to former successor guardian Robbins on August 8, 1995. Appellant filed her notice of appeal on March 20, 1996, some seven months after the judgment entry awarding fees.

Pursuant to App.R. 4(A), appellant was required to file a notice of appeal within thirty days of the judgment entry or order appealed, or service of notice of the same. "Failure to file a timely notice of appeal *** is a jurisdictional defect." *State ex rel. Boardwalk Shopping Center, Inc. v. Court of Appeals for Cuyahoga Cty.* (1990), 56 Ohio St.3d 33, 36; *Americare Corp. v. Misenko* (1984), 10 Ohio St.3d 132, 135. Because appellant failed to file notice of appeal within thirty days of the August 8, 1995 entry, this court is without jurisdiction to address appellant's second assignment of error.

*3 Appellant's third assignment of error asserts the trial court erred in appointing a separate guardian of the estate, absent the requisite notice and hearing. R.C. 2111.04(A)(2)(a)(i) requires that a guardian of the estate or of the person shall not be appointed until seven days after the allegedly incompetent person receives written notice of the hearing on the proposed guardian's application:

**** [C]ompliance with the provisions of Section 2111.04, Revised Code, with respect to personal service is mandatory before the court acquires jurisdiction, and that a judgment declaring such person incompetent and the appointment of a guardian for his person and estate are void for lack of due process when such person has not been personally served with notice."

In re Guardianship of Reynolds (1956), 103 Ohio App. 102, 106, citing *In re Koenigshoff* (1954), 99 Ohio App. 39, 44. See, also, *In re Guardianship of Corless* (1981) 2 Ohio App.3d 92, 93. While appellant concedes the ward received proper notice regarding the hearing on appellant's application, appellant contends the notice was insufficient because it did not advise the ward that a separate guardian of the estate may be appointed. Thus, resolution of this issue depends upon the meaning of "notice" in R.C. 2111.04.

Under the statutory precursor to R.C. 2111.04(A)(2)(a)(i),^{FN2} virtually identical to the current provisions at issue in all relevant aspects, the requirements of the statute were deemed met if

an alleged incompetent was put on notice that the jurisdiction of the court had been invoked on the question of whether or not a guardian should be appointed. *Bireley v. Plessinger* (1944), 41 Ohio Law Abs. 604, 606, citing, *In re Joyce* (1940), 32 Ohio Law Abs. 553, 556. In *Bireley*, plaintiff, an incompetent, received notice that a hearing on a guardianship application was planned. After notice was sent to plaintiff, a second application was made for the guardianship and, after the scheduled hearing, the second applicant was appointed guardian. Although plaintiff received notice of the hearing on the first application, plaintiff alleged error because she was not given notice of the second application, with the possibility the second applicant might be appointed. The court held the notice provided was sufficient since plaintiff was made aware of an appointment hearing; the failure to give further notice upon receipt of the second application was not such an irregularity so as to invalidate the appointment. *Bireley, supra*, at 606.

FN2. Sec. 10507-4 GC provided: "No guardian of the person, or of the estate or of both, shall be appointed until at least three days after the Probate Court has caused written notice, setting forth the time and place of the hearing, to be served upon the following person: *** 1. Personal service of such written notice upon the person for whom such appointment is sought."

Here, the ward received notice of the hearing on appellant's guardianship application; she thus was on notice the jurisdiction of the probate court had been invoked in order to appoint a guardian. Further, the notice separately mentioned the position of guardian of the estate and guardian of the person. Although appellant, her counsel, and counsel for former successor guardian Robbins were all present at the hearing, nothing in the record before us suggests any of them asserted lack of notice at the hearing when Wrightsel was appointed guardian of the estate. Given the foregoing, the failure of the probate court to give further notice before appoint-

ing Wrightsel as guardian of the estate was not such an irregularity as to invalidate his appointment. Appellant's third assignment of error is overruled.

*4 Appellant's fourth assignment of error contends the trial court erred in finding appellant lacked standing to file exceptions to the accounting of former successor guardian Robbins. R.C. 2111.13 lists the duties of a guardian of the person: to protect and control the person of the ward, and to provide suitable maintenance for the ward when necessary, which is paid out of the estate of the ward on order of the guardian of the person. In contrast, R.C. 2111.14 outlines the distinct duties of a guardian of the estate, which encompass matters relating to the assets and financial security of the ward, and require the guardian of the estate to manage the estate for the best interests of the ward.

R.C. 2109.33 provides that any "interested person" may file exceptions to an accounting. While the statute does not define "interested person," generally one must have a "direct pecuniary interest" in the estate in order to have standing to file exceptions to an accounting. *In re Guardianship of Dougherty* (1989) 63 Ohio App.3d 289; *In re Estate of Matusoff's* (1965), 10 Ohio App.2d 113. Here, while appellant is charged with the maintenance of the ward, she is not charged with maintenance of financial assets necessary to maintain the ward; her pecuniary interest is indirect, not direct. Indeed, to find appellant has a direct pecuniary interest here would so obscure the distinction in the roles of the guardian of the person and the guardian of the estate as to leave both guardians uncertain of their respective duties.

As a result, appellant, as guardian of the person, lacks standing to file exceptions to the accounting at issue; her fourth assignment of error is overruled.

In her final assignment of error, appellant asserts the trial court erred in quashing the subpoena served at her request on the attorney for former successor guardian Robbins. Served in conjunction

with the exceptions appellant filed, the subpoena sought to compel the production of materials relevant solely to the exceptions appellant filed. Because the probate court properly determined appellant lacked standing to file exceptions to the accounting, appellant's fifth assignment of error is moot. See App.R. 12(A)(1)(c).

Absent jurisdiction, we may not rule on appellant's second assignment of error. Appellant's first, third and fourth assignments of error are overruled; her fifth assignment of error is rendered moot. Accordingly, the September 5, 1995 and February 21, 1996 judgments of the probate court are affirmed.

Judgment affirmed.

BOWMAN and LAZARUS, JJ., concur.
Ohio App. 10 Dist., 1996.
Guardianship of Sechler v. Market
Not Reported in N.E.2d, 1996 WL 745251 (Ohio App. 10 Dist.)

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In re Guardianship of Barg
Ohio App., 1989.
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, Clermont County.
In re GUARDIANSHIP of Frederick Henry BARG.
No. CA88-10-077.

May 15, 1989.

Walker, Bradford & Hill, Allen L. Burreson,
Batavia, for appellee.
Luke Leonard, Cincinnati, for appellant.

MEMORANDUM DECISION AND JUDGMENT
ENTRY

PER CURIAM.

*1 This cause came on to be heard upon an appeal, transcript of the docket, journal entries and original papers from the Clermont County Court of Common Pleas, Probate Division, and the briefs and arguments of counsel.

Now, therefore, the assignment of error having been fully considered, is passed upon in conformity with App.R. 12(A) as follows:

This is an appeal by appellant, Frederick William Barg, from the judgment of the Clermont County Court of Common Pleas, Probate Division, which denied his application for the appointment of a guardian for his father, appellee Frederick Henry Barg.

On December 24, 1987, appellant filed an application asking that a guardian be appointed for appellee because he had become incompetent due to advanced age and mental disability. On January

7, 1988, appellee was examined by Dr. Edward Fisher, Jr. for a court-ordered psychiatric assessment. Following that assessment, Fisher prepared a written report in which he concluded:

"It is my professional opinion with reasonable medical certainty that there is [*sic*] insufficient signs and symptoms to state that this gentlemen [*sic*] is incompetent. Although his current psychosocial situation may benefit from assistance from others, I cannot definitively [*sic*] state that he is in need of a guardian. * * *

Dissatisfied with Fisher's conclusion, appellant, on March 14, 1988, moved the court to order further psychological testing of appellee. Specifically, appellant moved the court to order appellee to submit to a "battery of psychological tests and examinations" by Dr. Michael Harting to test Fisher's opinion. The court overruled this motion on May 5, 1988 stating, *inter alia*, it had complied with R.C. 2111.031 and that to grant appellant's motion for further testing would only subject appellee to additional inconvenience and possible harassment.

On September 15, 1988, appellant's application came on for a hearing. After hearing the evidence, (including testimony from appellee himself), the probate court orally announced from the bench that appellant had failed to demonstrate appellee's incompetence by clear and convincing evidence and, accordingly, his application was dismissed. Upon the filing of a written judgment entry confirming the court's oral pronouncement, the instant appeal was perfected.^{FN1}

In his brief before this court, appellant presents a single assignment of error which states:

"The trial court erred when it overruled Appellant's motion for an order requiring the Appellee to submit to psychological testing and then holding Appellant to prove his allegations by clear and convincing evidence."

In support of his sole assignment of error, appellant recognizes he was required by our decision in *In Re Guardianship of Corless* (1981), 2 Ohio App.3d 92, at 96, to prove appellee was incompetent by clear and convincing evidence. However, he submits he was unable to meet this burden because the probate court refused to order appellee to disclose his mental state to any expert but Fisher.

*2 R.C. 2111.031 empowers a probate court to appoint physicians and others to assist it in determining the need for a guardianship. It provides:

"In connection with an application for the appointment of a guardian for an alleged incompetent, the court may appoint physicians and other qualified persons to examine, investigate, or represent the alleged incompetent, to assist the court in deciding whether a guardianship is necessary."

Civ.R. 35(A), which is quoted in pertinent part below, sets forth the procedure a court may use in the exercise of its discretion to order a mental or physical examination. It provides:

"*Order for Examination.* When the mental or physical condition (including the blood group) of a party * * * is in controversy, the court in which the action is pending may order the party to submit himself to a physical or mental examination * * *. The order may be made only on motion for good cause shown and upon notice to the person to be examined and * * * shall specify the time, place, manner, conditions, and scope of the examination, and the person or persons by whom it is to be made."

In addressing a controversy similar to the one now before us in *In re Guardianship of Johnson* (1987), 35 Ohio App.3d 41, at 43, the Franklin County Court of Appeals held that the granting or denial of a Civ.R. 35 motion in a guardianship proceeding lies within the sound discretion of the probate court and that two burdens must be met to warrant the granting of such a motion. First, the mental or physical condition of a party must be in contro-

versy, and second, the movant must be able to establish good cause for the examination.

The first predicate to a Civ.R. 35(A) examination was clearly satisfied in this case. Appellee's mental condition was placed in issue by appellant's guardianship application. Consequently, we turn to appellant's showing of good cause.

In determining whether appellant demonstrated good cause for a second competency examination, we have balanced appellant's contention that he was denied his constitutionally guaranteed right (pursuant to Section 16, Article I, Ohio Constitution) to present his application to the court below against the fundamental purpose of incompetency proceedings. After doing so, we find we are not persuaded the probate court abused its discretion when it failed to find good cause to order a second competency examination of appellee.

We begin by recognizing that an incompetency proceeding is not truly adversarial, *In re Guardianship of Clendenning* (1945), 145 Ohio St. 82; *In re Guardianship of Schumacher* (1987), 38 Ohio App.3d 37, at 39, but is instead an action *in rem*. *Shroyer, Gdn. v. Richmond* (1866), 16 Ohio St. 455, paragraph five of the syllabus, in which the chief focus is not on winning or losing but upon ascertaining the best interests of the putative ward and acting accordingly. *Schumacher, supra*, at 39.

Appellant's constitutional argument is unpersuasive because guardianship proceedings are not like the typical adversary action in which a party puts his or her condition in issue by means of the claims in that party's complaint. Instead, the ward's physical or mental condition is involuntarily placed in controversy by another person. Because of this unusual procedure and the fact that a guardianship proceeding is one which can serve to deprive a person of all but the most meaningless legal or financial decisions, *In re Guardianship of Corless, supra*, at 94, we conclude a probate court owes a putative ward the obligation of remaining vigilant to the potential for harassment, unnecessary incon-

venience, and unwarranted personal privacy invasions which such a proceeding might produce. Additionally, because of the unusual nature of guardianship proceedings, we are persuaded the normal Civ.R. 35 discovery practice typically associated with truly adversarial proceedings is not warranted. See Civ.R. 1(C)(7).

*3 In the case *sub judice*, the probate court, although not required by R.C. 2111.031 to do so, appointed an expert, whose qualifications have not been challenged, to examine appellee's competence. That expert provided the court with a written report. As appellant has aptly pointed out, the reliability of that report and its conclusion are subject to question because of the methodology which produced it. However, we are not persuaded that simply because Fisher's competency examination was not as reliable or as in-depth as it might have been, that it was an abuse of discretion not to order a second competency exam. Clearly, the line between the putative ward's right to privacy and the court's obligation to inquire must be drawn somewhere.

Because we are not persuaded the trial court abused its discretion by refusing to force appellee to attend a second competency examination, we overrule appellant's sole assignment of error.

The assignment of error properly before this court having been ruled upon as heretofore set forth, it is the order of this court that the judgment or final order herein appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Clermont County Court of Common Pleas for execution upon this judgment.

Costs to be taxed in compliance with App.R. 24.

And the court, being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further ordered that a certified copy of this Memorandum Decision and Judgment Entry shall constitute the mandate pursuant to App.R. 27.

To all of which the appellant, by his counsel, excepts.

JONES, P.J., and HENDRICKSON and KOEHLER, JJ., concur.

FN1. Appellee has not challenged appellant's standing in this appeal. In light of the fact that a guardianship proceeding is considered to be an action *in rem*, *In re Clendenning*, (1945), 145 Ohio St. 82, paragraph two of the syllabus, and in light of the fact that the probate court found that no guardianship was necessary to preserve the putative ward's property, we believe a serious question of appellant's standing to appeal exists. However, since we have not been asked to examine appellant's standing, we decline to do so *sua sponte*.

Ohio App., 1989.

In re Guardianship of Barg

Not Reported in N.E.2d, 1989 WL 50098 (Ohio App. 12 Dist.)

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BLUTHARDT.
Ohio App., 1982.
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, Seventh District, Bel-
mont County.

IN RE: THE GUARDIANSHIP OF MARTHA
MARIE BLUTHARDT, AN INCOMPETENT
PERSON.

CASE NO. 81-B-28, 81-B-29, 81-B-30, 81-B-31.
81-B-28, 81-B-29, 81-B-30, 81-B-31
September 9, 1982.

Jean R. Sustersic, Bridgeport, Ohio for Applicant-
Appellant.
Frank A. Fregiato, Bridgeport, Ohio for Guardian-
Appellee.

OPINION

Before Hon. John J. Lynch, Hon. Joseph E. O'Neill,
Hon. Joseph Donofrio, JJ.
O'NEILL, J.

*1 On June 19, 1981, Betty L. Mitchell, daugh-
ter of the ward, Martha Marie Bluthardt, filed her
"Application for Appointment of and as Guardian"
in the Probate Division of the Court of Common
Pleas of Belmont County, Ohio.

A hearing regarding the same was scheduled
for July 8, 1981. In accordance with local court
procedures, when it was determined that there was
to be a contest, the matter was continued to July 28,
1981.

On July 28, 1981, the hearing on Betty L.
Mitchell's application began. In addition to Mrs.
Mitchell, the other daughter and three sons of the
ward were present. The husband appellant was also

present. All were represented by appellant's present
counsel who was also present and referred to
throughout the proceedings as "counsel for the ob-
jectors."

Martha Marie Bluthardt, the ward, was of
course also present throughout the entire proceed-
ings.

At the request of appellant, the hearing was not
completed that day and continued to September 3,
1981.

During the course of the September 3, 1981,
hearing on Mrs. Mitchell's application, Probate
Judge C. Kenneth Henry made it known that the
husband had also filed his application. Said applica-
tion dated September 2, 1981, (over one month
after the first hearing on Mrs. Mitchell's applica-
tion) contained sworn statements by the ward's hus-
band, present appellant, that Martha Marie
Bluthardt was "incompetent" and was "incapable of
taking proper care of herself or her property." He
also swore in that application that a guardian was
necessary for her and her property. There was no
service of the same on Mrs. Bluthardt.

The hearing concluded that day on Mrs.
Mitchell's application and Mr. Bluthardt's applica-
tion.

On September 4, 1981, the Court ordered Mrs.
Mitchell appointed guardian, but that Martha Marie
Bluthardt could remain at the home of her husband
provided "the health and safety problems and haz-
ards of said property are corrected." The official
"Letters of Guardianship" were issued October 5,
1981, after Mrs. Mitchell had filed her bond and
otherwise duly qualified.

The "condition" of Judge Henry's September 4,
1981, order regarding the safety problems and haz-
ards not having been met, Judge Henry again set
the matter down for hearing.

That final hearing was held on October 15, 1981, with, again, all parties present and represented by counsel, and with each side having retained their own expert witnesses. At the conclusion of the presentation of all the evidence, the condition that the ward be required to remain at the home of her husband was removed.

The first assignment of error argues that various statutes of Ohio dealing with incompetents are unconstitutional, were resorted to by the trial court and denied due process to the ward. This appeal was not brought by the ward, it was brought by a person who had applied to be appointed guardian of the ward. His application in the trial court was filed pursuant to some statutes which he now contends are unconstitutional not because of any effect which they have on him but rather as to the effect on the ward. The appellant is not prejudiced thereby and may not raise such an issue on appeal. It is a well established principle that no one can complain of error unless he is prejudiced thereby. 5 Ohio Jurisprudence 3d 88, Appellate Review Section 535.

*2 "In order to justify the reversal of a judgment or decree upon error, the record must show affirmatively, not only that error intervened, but that it was to the prejudice of the party seeking to take advantage of it." *Ohio Life Insurance and Trust Co. v. Goodin and others* (1860), 10 Ohio St. 557, Syllabus 1. See also *Smith v. Flesher* (1967), 12 Ohio St. 2d 107.

The second assignment of error complains that various statutes (Sections 2111.02, .03, and .04) are constitutionally overbroad and defective in permitting the judge to have unfettered discretion in determining competency. Again, this assignment complains not about the court's refusal to appoint the appellant as guardian but argues about the rights of the ward. We must find, once again, that if the mentioned statutes are defective, they operate only to the prejudice of the ward and not to this appellant. In the trial court, this appellant did not argue the validity of these statutes but rather attempted under the provisions of such statutes to gain appointment

as guardian.

In his third assignment of error, the appellant argues that the trial judge made no specific declaration which would justify appointment of a guardian. The notice of appeal which was filed by appellant was directed to the judgment entered on the 15th day of October, 1981. That entry read, in part, "* * * the Court finds that said Martha Marie Bluthardt is an incompetent, and, therefore, is incapable of taking care of and preserving her property." The assignment goes on to argue that no evidence was presented in the trial court which would justify a finding of competency. Once again, this appellant takes a position before this court which is inconsistent with his stance in the trial court. On September 3, 1981, the appellant filed an application in the trial court in which he alleged that the ward was incompetent and incapable of taking care of herself or her property. Since the appellant is also the husband of the ward, it can be presumed that some weight was attached to this allegation. To now argue that the court had no evidence upon which to base his finding is inconsistent as a matter of fact and law.

"The theory upon which a case was submitted and argued in the trial court cannot be discarded and a new and contradictory theory be substituted on appeal." *Holm v. American Ship Building Company* (1960), 85 Ohio Law Abs. 65, Syllabus 1.

Regardless, we have reviewed the evidence and we find it to be supportive of the trial court's conclusion. Under this assignment, the appellant argues that the judgment of the lower court "was a complete abrogation" of the ward's rights and liberties. Note should again be made of the fact that the ward has not appealed this action. She has not suffered by the action of the trial court. For years the daughter who was appointed guardian has also been named as a co-owner of the ward's savings account (Tr. 15). A year prior to appointment the guardian was given a power of attorney over the assets of the ward (Tr. 2) (PX-B). This is not a case where with little reason, a person is stripped of management of

Not Reported in N.E.2d
Not Reported in N.E.2d, 1982 WL 6181 (Ohio App. 7 Dist.)
(Cite as: Not Reported in N.E.2d)

her own affairs. Clearly and convincingly we find that the court acted for the best interest of the ward and did not prejudice the appellant.

*3 Judgment affirmed.

Lynch, P.J., concurs.
Donofrio, J., concurs.
Ohio App., 1982.
Bluthardt
Not Reported in N.E.2d, 1982 WL 6181 (Ohio App. 7 Dist.)

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

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

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

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C

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. §§

[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

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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.

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 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.

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

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

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Matter of Furgione
Ohio App. 8 Dist., 1995.
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, Eighth District,
Cuyahoga County.
In the Matter of Joseph FURGIONE.
No. 67715.

Nov. 2, 1995.

Civil Appeal from Probate Court, No. 1098737.

Lana J. Shockey, Phillippi, WV, pro se.
Albert E. Fowerbaugh, Cleveland, for appellee
Louis R. Bragg.

JOURNAL ENTRY and OPINION

PATRICIA ANN BLACKMON, Judge:

*1 Appellant, Lana Shockey, appeals a decision from the trial court appointing Appellee, Louis Bragg, as guardian for Shockey's father, Joseph Furgione. Although they are not separately defined in her brief, Shockey's arguments set forth the following errors:

I. JOSEPH FURGIONE WAS NOT REPRESENTED BY LEGAL COUNSEL AS PRESCRIBED BY LAW.

II. NO TRANSCRIPT OF HEARING WAS KEPT OR RECORDING OF HEARING.

III. NO INDEPENDENT EVALUATION MEDICALLY OR PSYCHIATRICALY.

IV. NEXT OF KIN WAS NOT DULLY (sic) NOTIFIED OR SENT COPIES OF REFEREE'S DECISION IN TIME TO APPEAL THE DECISION, OR NEVER SENT COPY OF JUDGMENT ENTRY WITH JUDGE'S NAME ON IT SIGNED UNTIL TOO LATE TO APPEAL THE DECISION.

V. NEXT OF KIN NOT IN ALL THE HEAR-

INGS: FIRST 15 MIN. REFEREE'S HEARING WAS KEPT OUT.

VI. AN INCOMPETENT PERSON CANNOT WAIVE HIS RIGHT TO A LAWYER, AND BE HIS OWN LAWYER, PRO SE, AS HE IS INCOMPETENT TO BEGIN WITH.

VII. JUDGE CORRIGAN WAS [FURGIONE'S] JUDGE ON A ASSAULT AND BATTERY AND SENTENCED HIM TO 6 MONTHS IN JAIL WHICH [HE] SPENT IN THE INFIRMARY. THERE IS A CONFLICT OF INTEREST OF THIS JUDGE BEING THE PROBATE JUDGE IN THIS HEARING, AND ALREADY TRIED JOSEPH FURGIONE IN THE PAST.

For the reasons set forth below, we affirm the decision of the trial court. The apposite facts follow.

On March 15, 1994, Louis Bragg filed an Application for Appointment of Guardian of Alleged Incompetent. In his application, Bragg alleged that seventy-four year old Joseph Furgione was incompetent due to dementia. In a statement of expert valuation, Dr. Shila Matthew also concluded that Furgione suffered from senile dementia. According to Dr. Matthew, Furgione had been exhibiting bizarre, agitated, and violent behavior since Summer 1993. Furgione was described as unable to care for himself and "a danger to self and others in an unsupervised setting." A court investigator found the condition of Furgione's home "deplorable" and described his personal hygiene as "extremely poor."

A competency hearing was held on May 18, 1994. According to the report of referee Alan Shankman, the hearing was attended by Joseph Furgione and his wife, Eloise, Louis Bragg and his attorney, Albert Fowerbaugh, Attorney Cheryl Gregerson for Lana Shockey, and Debra White of Adult Protective Services. In his June 21, 1993 report, the referee concluded that Furgione was mentally incompetent, that his in-court demeanor evidenced inadequate judgment ability, and that his

wife was incapable of taking care of him. The application for guardianship was granted. This appeal followed.

In his first and sixth assignments of error, Shockey argues that Furgione was not represented by legal counsel as prescribed by law. Although the referee's report indicates that Furgione waived his right to counsel in open court, Shockey maintains that Furgione, as an incompetent, could not waive his right to a lawyer.

Under R.C. 2111.02(C)(7)(a), an alleged incompetent has the right to be represented by independent counsel of his choice. However, a party may waive his right to counsel. Shockey gives us no evidence indicating that Furgione did not understand the proceedings or that he was unable to make an intelligent waiver of his right to counsel. We also find no such evidence in the App.R. 9 statement of proceedings. Absent such evidence, we overrule Shockey's first and sixth assignments of error.

*2 Shockey also argues that the probate court erred in not transcribing the competency hearing. R.C. 2111.02(C)(4) provides as follows:

Upon request of the applicant, the alleged incompetent for whom the appointment is sought or his counsel, or any interested party, a recording or record of the hearing shall be made.

(Emphasis added.)

In this case, there is no evidence of a request for a transcript of the competency hearing. Absent such a request, we find that the probate court did not err in failing to transcribe the competency hearing. Shockey's second assignment of error is overruled.

In her fourth and fifth assignments of error, Shockey argues that she was not properly notified of the competency hearing. R.C. 2111.04(2)(b) provides that in the appointment of a guardian for an incompetent, notice shall be given to the next of

kin of the alleged incompetent who are known to reside in the state of Ohio. The statute makes no provision for notice to next of kin who reside outside the state. See *In re Guardianship of Bissmeyer* (1988), 49 Ohio App.3d 42 (provision that notice need only be given to next of kin who reside in same state found not to violate due process, equal protection, or privileges and immunities). At the time of the hearing, Lana Shockey was a resident of West Virginia. Consequently, we overrule Shockey's fourth and fifth assignments of error.

Shockey next argues that the probate court erred in failing to order an independent medical or psychiatric evaluation of Furgione. R.C. 2111.03.1 authorizes the court to appoint physicians and other qualified persons to examine the alleged incompetent in order to determine whether a guardianship is necessary. Our review of the record reveals that Furgione was evaluated by a licensed physician and by a Probate Court investigator. Reports were prepared and submitted to the probate court for consideration. Shockey's third assignment of error is overruled.

In her seventh assignment of error, Shockey argues that a conflict of interest existed which should have precluded Judge John E. Corrigan from deciding Furgione's case. According to Shockey, Judge Corrigan presided over an assault and battery case against Furgione in which he was sentenced to six months in jail and should not have handled Furgione's competency hearing.

R.C. 2701.03 sets forth the procedure for disqualifying a judge. Under the statute, a party seeking to disqualify a judge for bias or prejudice may file an affidavit of prejudice with the clerk of the supreme court within three days of the hearing in the pending action. In this case, Shockey does not argue and the record does not reveal that any such affidavit was filed. This court has no jurisdiction either to order the disqualification or to void the trial court's judgment. *Kondrat v. Ralph Ingersoll Publishing Co.* (1989), 56 Ohio App.3d 173, 174. Shockey's seventh assignment of error is without

merit.

Judgment affirmed.

It is ordered that Appellee recover of Appellant its costs herein taxed.

*3 The Court finds there were reasonable grounds for this appeal.

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

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

Exceptions.

PATTON, C.J., and JAMES D. SWEENEY, J.,
concur.

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

Ohio App. 8 Dist., 1995.
Matter of Furgione
Not Reported in N.E.2d, 1995 WL 643709 (Ohio App. 8 Dist.)

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Matter of Edwards
Ohio App. 8 Dist., 1998.
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, Eighth District,
Cuyahoga County.
In the Matter of Eddie Mae EDWARDS, (Appeal
by Keith Edwards Next of Kin)
No. 72473.

March 19, 1998.

Civil Appeal from the Court of Common Pleas Pro-
bate Court Division, No. 1072570.

Nelli Johnson, Cleveland, Ohio, for plaintiff-ap-
pellee.
Keith Edwards, Leavittsburg, Ohio, for defendant-
appellant pro se.

JOURNAL ENTRY AND OPINION

DYKE, Presiding J.

*1 Appellant, Keith Edwards, next of kin of
Eddie Mae Edwards, is appealing the decision of
the Cuyahoga County Court of Common Pleas, Pro-
bate Division, denying his Motion to Set Aside the
Appointment of the Successor Guardianship (sic)
and Reconsideration of Removal of Succeeded
Guardian and Return of Ward to the Estate. For the
following reasons, we dismiss this appeal.

Eddie May Edwards was found incompetent
and her son, Jordan Edwards, was appointed guard-
ian. Appellant, Keith Edwards, another son of Ed-
die May Edwards, was duly notified of the applica-
tion for guardianship.

The County Department of Senior and Adult
Services moved to remove Jordan Edwards as

guardian, for the reason of neglect of the ward. The
sheriff served Jordan with notice of this motion and
the scheduled hearing date, September 5, 1996.

According to the referee's report dated March
31, 1997, the following occurred: Jordan appeared
before the magistrate on September 5, 1996. The
matter was reset for October 9, 1996, to give Jordan
an opportunity to find nursing home placement for
his mother. On October 9, all the parties agreed to
reset the hearing to October 18, 1996. Jordan did
not appear at the October 18 hearing.

The court's journal entry, dated October 18,
1996, ordered that Jordan Edwards be removed as
guardian. The journal entry stated that two indi-
viduals, a registered nurse and a social worker, tes-
tified that the ward was receiving inadequate care
and the ward was in a life-threatening situation. On
October 25, 1996, the court appointed Nelli John-
son as successor guardian.

On January 8, 1997, Jordan Edwards filed his
motion to Set Aside the Appointment of the Suc-
cessor Guardianship and Reconsideration of Re-
moval of Succeeded Guardian and Return of Ward
to the Estate (hereinafter referred to as "motion to
set aside"). All five of the next of kin, including ap-
pellant, filed similar motions. These motions ar-
gued that Jordan Edwards, appellant and the other
next of kin did not receive notice of (1) the hearing
to remove the guardian or (2) the appointment of a
successor guardian.

Keith Edwards also moved to stay the proceed-
ings of the Complaint of Guardian of Authority to
Sell Real Estate.

On April 21, 1997, the trial court denied the
motions to set aside and the motion to stay the pro-
ceedings. Appellant's notice of appeal only appeals
the order denying the motion to set aside.

Appellee, Nelli Johnson, the guardian, filed a
motion to dismiss this appeal. She argued that the

order denying the stay was not a final appealable order. Appellant did not appeal the order denying the stay. In any case, we agree with appellee that the order denying the stay was not a final appealable order. See R.C. 2505.02.

Appellee asserts that the appeal should be dismissed because appellant lacks standing to appeal the denial of his motion to set aside. Every appellant must have an interest in the subject matter of the litigation, which interest is immediate and pecuniary. A remote consequence, a future, contingent or speculative interest is not sufficient. *Ohio Contract Carriers v. Public Utilities Com.* (1942), 140 Ohio St. 160, 42 N.E.2d 758. To have standing to appeal, an appellant must show his rights are adversely affected. *Tschantz v. Ferguson* (1989), 49 Ohio App.3d 9, 550 N.E.2d 544.

*2 Appellant did not have a right to notice of the proceedings to remove the guardian and appoint a successor guardian. R.C. 2109.24 states:

The court may remove any such fiduciary, after giving the fiduciary not less than ten days' notice, for ... neglect of duty ...

Neither R.C. 2109.24 nor any other section of the Revised Code mandates that the next of kin receive notice of proceedings to remove a guardian. See *In re Trust of Marshall* (1946), 78 Ohio App. 1, 65 N.E.2d 523 (Notice to the trustee of removal proceedings was required, but notice to the remaindermen was not).

Neither was appellant entitled to notice of the appointment of a successor guardian. See *In re Guardianship of Wisner* (1951), 154 Ohio St. 578, 97 N.E.2d 36.^{FN1} Appellant asserts that R.C. 2111.04 entitles him to such notice. R.C. 2111.04(A) states:

FN1. Appeal not allowed for want of a debatable constitutional question. Headnote states that notice is not required when appointing a successor guardian to replace a deceased guardian.

... no guardian of the person, estate or both shall be appointed until at least seven days after the probate court has caused written notice, setting forth the time and place of the hearing, to be served as follows:

(2) In the appointment of the guardian of an incompetent, notice shall be served:

(b) Upon the next of kin of the person for whom the appointment is sought who are known to reside in this state.

The requirements of R.C. 2111.04 are met if notice is given that the jurisdiction of the court has been invoked on the question of whether or not a guardian should be appointed. *In re Guardianship of Bireley* (1944), 59 N.E.2d 69, 41 Ohio Law Abs. 601, 606, *In the Matter of Sechler* (Dec. 24, 1996), Franklin App. No. 96APF03-359, unreported, *In re Metzenbaum* (July 31, 1997), Cuyahoga App. No. 72052, unreported. Notice need not be given that a second person has applied for the position of guardian, even if the second person is appointed guardian. *Bireley, supra*. The identity of the appointee does not effect the substantive rights of the ward. *Bireley, Sechler, Metzenbaum, supra*. If the substantive rights of the ward are not effected, the substantive rights of the next of kin are not effected either.

Furthermore, the probate court does not lose jurisdiction upon removal of a guardian, and the court retains jurisdiction to appoint a successor guardian. See *Netting v. Strickland* (1899), 18 O.C.C. 136, 9 Ohio Cir. Dec. 841, 53 Ohio Jurisprudence 3d (1984 Supp.1997) Guardian and Ward, Sections 33 and 202. R.C. 2109.26, which provides for the appointment of successor guardians, does not require notice to the next of kin. No other section of the Revised Code requires such notice. Ohio law does not require that notice be given to the next of kin of the appointment of the successor guardian.

Appellant asserts that he has a right under the Fourteenth Amendment of the U.S. Constitution to notice of the removal proceedings, and notice of the

appointment of a successor. The next of kin's interest in the appointment of a guardian is not a liberty or property interest as defined in constitutional jurisprudence. *In re Guardianship of Bissmeyer* (1988), 49 Ohio App.3d 42, 550 N.E.2d 210.

*3 We conclude that appellant had no right to notice of the removal proceedings or to notice of appointment of a successor guardian. This appeal is dismissed for lack of standing.

It is ordered that appellee recover of appellant, its costs herein taxed.

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

MCMONAGLE and CORRIGAN, JJ., concur.
Ohio App. 8 Dist., 1998.
Matter of Edwards
Not Reported in N.E.2d, 1998 WL 122360 (Ohio App. 8 Dist.)

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