

No. 2007-1546

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# In the Supreme Court of Ohio

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APPEAL FROM THE COURT OF APPEALS  
SECOND APPELLATE DISTRICT  
MONTGOMERY COUNTY, OHIO  
CASE NO. 22000

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

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REPLY BRIEF OF APPELLANT, ALICE E. LEDFORD, APPLICANT FOR  
APPOINTMENT AS GUARDIAN OF THE PERSON OF ALICE I. RICHARDSON,  
AN INCOMPETENT

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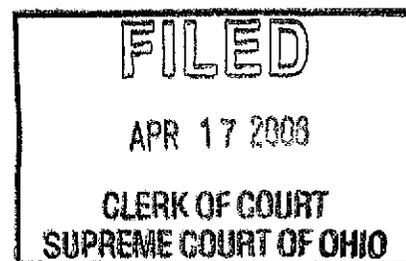
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**TABLE OF CONTENTS**

	<b><u>Page</u></b>
<b>TABLE OF AUTHORITIES</b> .....	ii
<b>I. ARGUMENT</b>	
A. APPELLEES' UNSUPPORTED FACTUAL ASSERTIONS— INCLUSION OF NON-RECORD INFORMATION AND DOCUMENTATION .....	1
B. ASSUMING ARGUENDO THAT THIS COURT MAY CONSIDER THE WEST VIRGINIA ORDER, THE WEST VIRGINIA COURT'S HOLDING ON THE ISSUE OF MRS. RICHARDSON'S COMPETENCY IS OF NO LEGAL MOMENT TO THIS APPEAL .....	3
C. NEXT-OF-KIN ENTITLED TO "NOTICE" OF THE TIME AND PLACE OF HEARING ON A GUARDIANSHIP APPLICATION ARE NOT THEREBY DEEMED "PARTIES" IN THE PROBATE COURT OR APPELLATE COURTS IN OHIO. ....	7
D. THE APPEAL OF THE ALLEGED WARD, ALICE I. RICHARDSON .....	10
E. WHERE LEACH HAD NO STANDING AS A PARTY TO APPEAL AND WHERE MRS. RICHARDSON WAIVED HER RIGHT TO ASSIGN ADOPTION OF THE "AMENDED MAGISTRATE'S DECISION" BY THE MONTGOMERY COUNTY PROBATE COURT AS ERROR ON APPEAL, THE MONTGOMERY COUNTY COURT OF APPEALS ACQUIRED NO JURISDICTION TO HEAR APPELLEES' APPEAL .....	12
<b>II. CONCLUSION</b> .....	13
<b>CERTIFICATE OF SERVICE</b> .....	14
<b><u>REPLY BRIEF APPENDIX</u></b>	<b><u>Appx. Page</u></b>
U.S. Const. art. IV, §1. ....	16
<i>Restatement of the Law, Ssecond, Conflict of Laws</i> (1971), §86 Pendency of Foreign Action, Comment c. ....	17
Ohio Civ. R. 53. ....	18-21

**TABLE OF AUTHORITIES**

	<b><u>Page</u></b>
<b><u>CASES</u></b>	
<i>Cline v. Ohio Bur. of Motor Vehicles</i> (1991), 61 Ohio St.3d 93, 573 N.E.2d 77 .....	8
<i>Commercial Union Insurance Co. v. Wheeling Pittsburgh Corp.</i> (1995), 106 Ohio App.3d 477; 666 N.E.2d 571 (Second App. Dist.) .....	6
<i>Columbia Gas Transmission Corp. v. Levin, Tax Commr.</i> (2008), 117 Ohio St.3d 122; 2008 Ohio 511, P19 .....	8
<i>Doe v. Shaffer</i> (2000), 90 Ohio St.3d 388; 2000 Ohio 186; 738 N.E.2d 1243 .....	10
<i>In Re: Clendenning</i> (1945), 145 Ohio St. 82; 60 N.E.2d 676; 30 Ohio Op. 301 .....	4
<i>In Re: Estate of Haas</i> (1963), 174 Ohio St. 277; 189 N.E.2d 65; 22 O.O.2d 336 .....	10
<i>In Re: Guardianship of Richardson</i> (2007), 116 Ohio St.3d 1437; 2007 Ohio 6518; 877 N.E.2d 989 .....	11
<i>In Re: Guardianship of Richardson</i> (2007), 172 Ohio App.3d 410; 2007-Ohio-3462; 875 N.E.2d 129 (Second App. Dist.) .....	4
<i>In Re: Guardianship of Simmons</i> 2003 Ohio 5416 (Sixth App. Dist.), P48 .....	8
<i>Lamar v. Marbury</i> (1982), 69 Ohio St.2d 274; 431 N.E.2d 1028; 23 Ohio Op.3d 269 .....	2
<i>Lancaster Colony Corp. v. Limbach</i> (1988), 37 Ohio St.3d 198; 524 N.E.2d 1389 .....	8
<i>Noble v. Colwell</i> (1989), 44 Ohio St.3d 92; 540 N.E.2d 1381 .....	11
<i>Princess Lida of Thurn and Taxis v. Thompson</i> (1939), 305 U.S. 456; 59 S. Ct. 275; 83 L. Ed. 285 .....	5, 6

<i>Shroyer v. Richmond</i> (1866), 16 Ohio St. 455, syllabus .....	4, 6
<i>State ex rel. Coles v. Granville</i> (2007), 116 Ohio St.3d 231; 2007 Ohio 6057; 877 N.E.2d 968, P20 .....	3
<i>State ex rel. Willis v. Baird</i> Unreported, Case No. C.A. No. 9467, Ninth Appellate District, 1980 Ohio App. LEXIS 14160 .....	5
<i>Travis v. Public Utilities Comm. of Ohio</i> (1931), 123 Ohio St. 355; 175 N.E. 586; 9 Ohio L. Abs. 443. ....	11

**STATUTES**

R.C. 2111.02 .....	8
R.C. 2111.02 (A) .....	10
R.C. 2111.02(C)(2) .....	10, 11
R.C. 2111.02(C)(7) .....	9
R.C. 2111.04 .....	7
R.C. 2111.04(A) .....	7, 8
R.C. 2111.04(A)(2)(a)(i) .....	8
R.C. 2111.04(A)(2)(b) .....	7, 10
R.C. 2111.04(2)(b) .....	9
R.C. 2111.04(D) .....	7

**RULES**

S. Ct. Prac. R. III, §6(C)(2) .....	10, 13
S. Ct. Prac. V, §1 .....	2
S. Ct. Prac. VI, §2(B)(3) .....	1
App. R. 9(A) .....	2
Civ. R. 12(H) .....	12
Civ. R. 53 .....	9
Civ. R. 53(D)(3)(b)(iv) .....	10, 11, 13
Civ. R. 53(E)(3) .....	9

**CONSTITUTION**

U.S. Const. art. IV §1 .....	6
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**OTHER**

<i>Restatement of the Law, Conflict of Laws (1971)</i> , § Pendency of Foreign Action, Comment c .....	6
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**I. ARGUMENT**

**A. APPELLEES' UNSUPPORTED FACTUAL ASSERTIONS--  
INCLUSION OF NON-RECORD INFORMATION AND  
DOCUMENTATION.**

Appellees' Merit Brief contains, in part, factual assertions not supported in the record, fails to set forth in several passages page references to the Transcript of Guardianship Hearing and Brief Supplements, and incorporates non-record facts and documentation into the Appendix inappropriate to this appeal.

The "Statement of Facts" set forth at pp. 1-5 of the Merit Brief of Appellees, Alice I. Richardson and Norma Louise Leach, contains a recitation of information, in part, only vaguely referenced to the Transcript of Guardian Hearing and Supplements to the Briefs filed in this case. Failure to reference factual assertions and statements of procedural history in the record by page numbers violates S. Ct. Prac. R. VI, Section 2 (B)(3). It also engenders sloppy citations to the "facts" and makes difficult or impractical confirmation of factual and procedural assertions in the record. More insidious, however, is the inclusion in Appellees' "Statement of Facts" at pp. 3-4 of findings of fact and law contained in an August 1, 2007, Order of the Circuit Court of Mercer County, West Virginia, in *Alice I. Richardson, etc. v. George W. Ledford, et al.*, Civil Action No. 06-P-158, a non-record document containing evidence dehors the record. Further, in addition to incorporating into their "Statement of Facts" and "Argument", p. 16, information taken from the West Virginia Order, Appellees have also inserted an unauthenticated "copy" of the August 1, 2007, West Virginia Order into their "Appendix" at pp. 20-29 without leave of this Court to append it to the Record.

In truth, the West Virginia Order has been inserted into Appellees' Merit Brief and paraphrased in their "Statement of Facts" in an attempt to unfairly influence the outcome of this appeal by introducing to this Court non-record facts otherwise inappropriate for consideration on the merits in this case.<sup>1</sup>

It is axiomatic that appellate review is confined to the record and includes only what occurred in the trial court. App. R. 9(A) describes the composition of the record on appeal in the court of appeals. *Lamar v. Marbury* (1982), 69 Ohio St.2d 274, 277; 431 N.E.2d 1028; 23 Ohio Op. 3d 269. The Record on Appeal in this Court is described in S. Ct. Prac. R. V, Section 1. The West Virginia Order, and the information contained therein, are not includable within the rule descriptions of the "record" in either the Montgomery County Court of Appeals or this Court.

The "duty of faithfulness to the record is paramount, superseding even loyalty to the appellate client." Evan J. Langbein, *"The Record, Counsel, Just the Record"—A Matter of Professionalism, IX (3) THE RECORD at 7* (2001). No doubt, there could be non-record facts that might, for example, moot an appeal and ought to be brought to this Court's attention. However, in the case at bar, the Appellees don't argue mootness or any other basis as cause for inclusion of the West Virginia Order in their Brief. Therefore, neither the West Virginia Order nor the information contained within it have a place in the consideration of this appeal.

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<sup>1</sup> The West Virginia Order recites, inter alia, that the Court ". . . specifically finds that the Petitioner [Alice I. Richardson] is competent", Merit Brief of Appellees, Appendix 2. However, that Order, in fact, is not final and is pending appeal filed January 24, 2008, in *George W. Ledford, Individually, Alice E. Ledford, Individually, John E. Richardson, Individually, and George W. Ledford and/or John Richardson, Alleged Successor Trustees of the Alice I. Richardson 2001 Trust v. Alice I. Richardson, aka Isabella Richardson*, Case No. 080211, Supreme Court of Appeals of West Virginia.

The Appellant, Alice E. Ledford (“Ledford”) respectfully requests that this Court disregard and strike the August 1, 2007, West Virginia Order and references thereto in Appellees’ Merit Brief “Statement of Facts”, pp. 1-5, “Argument”, p. 16, and “Appendix”, p. 20-29.

**B. ASSUMING ARGUENDO THAT THIS COURT MAY CONSIDER THE WEST VIRGINIA ORDER, THE WEST VIRGINIA COURT’S HOLDING ON THE ISSUE OF MRS. RICHARDSON’S COMPETENCY IS OF NO LEGAL MOMENT TO THIS APPEAL.**

The Guardianship Application underlying this appeal was filed June 29, 2006, in the Montgomery County Probate Court. (Ledford Supp. 5). According to the West Virginia Order, Alice I. Richardson “filed the present Petition” on August 17, 2006, thus initiating West Virginia litigation pertaining to her mental competency and concomitant property rights. (Merit Brief of Appellees, Appendix 23).<sup>2</sup> The West Virginia Court acknowledged that the “Ohio Probate Court determined that Mrs. Richardson was incompetent” (Merit Brief of Appellees, Appendix 24-25) but noted that the Montgomery County Court of Appeals “reversed and vacated the Probate Court’s appointment of Ledford as Guardian. . . on the grounds that the Probate Court lacked subject-matter jurisdiction.” (Merit Brief of Appellees, Appendix 26-27). There is no indication in the August 1, 2007, West Virginia Order that the West Virginia Court considered that the July 6, 2007, opinion and judgment of the Montgomery County Court of Appeals, which reversed and vacated the Montgomery County Probate Court’s Order, was not yet “final”. In fact, Ledford perfected her appeal of the July 6, 2007, judgment of the Montgomery County Court of Appeals on August 17,

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<sup>2</sup> Although this Court has not been requested by Appellees to take judicial notice, which Ledford opposes, of the West Virginia Order or proceedings, “A court may take judicial notice of a document filed in another court, ‘not for the truth of the matters asserted therein, but rather to establish the fact of such litigation and related filings.’” [Citations omitted.] *State ex rel. Coles v. Granville* (2007), 116 Ohio St.3d 231; 2007 Ohio 6057; 877 N.E.2d 968, P20.

2007, with the filing of her Notice of Appeal in this Court. (Merit Brief of Ledford, Appendix 22).

In *Shroyer v. Richmond* (1866), 16 Ohio St. 455, syllabus, this Court held, *inter alia*, as follows:

“ . . . .

4. Plenary and exclusive original jurisdiction is given by law to the Probate Courts of this state, in the matter of the appointment of guardians, and that jurisdiction attaches in any given case, whenever application is duly made for its exercise therein.

5. Such proceedings are not *inter partes*, or adversary in their character. They are, properly, proceedings *in rem*; and the order of appointment, made in the exercise of jurisdiction, binds all the world. The actual presence of the ward is not essential to the jurisdiction; unless, by reason of his right to choose a guardian, or for other cause, the statute so require.

6. The Probate Courts of this state are, in the fullest sense, courts of record; they belong to the class whose records import absolute verity, that are competent to decide on their own jurisdiction, and to exercise it to final judgment, without setting forth the facts and evidence on which it is rendered.

7. Hence, an order appointing a guardian, made by a Probate Court, in the exercise of jurisdiction, cannot be, collaterally, impeached. The record showing nothing to the contrary, it will be *conclusively presumed*, in all collateral proceedings, that such order was made upon full proof of all the facts necessary to authorize it.”

The foregoing 1866 characterization of guardianship proceedings in Ohio as *in rem* has been approved and adopted in *In Re: Clendenning* (1945), 145 Ohio St. 82, 89-90; 60 N.E. 2d 676; 30 Ohio Op. 301, and cited as seminal authority by the Second Appellate District in *In Re: Guardianship of Richardson* (2007), 172 Ohio App. 3d 410; 2007-Ohio-3462; 875 N.E.2d 129, P40-41, the case now on appeal here.

Since Mrs. Richardson's guardianship proceeding was commenced first in time in Ohio, prior to inception of the West Virginia litigation, and this Ohio proceeding is not final, the Courts of Ohio retain the unfettered right to maintain and exercise their jurisdiction to finality to rule upon this guardianship to the exclusion of other federal and sister state courts. On this point, the guiding principle to be applied here, in the context of *in rem* proceedings, was enunciated in *Princess Lida of Thurn and Taxis v. Thompson* (1939), 305 U.S. 456, 466; 59 S. Ct. 275; 83 L. Ed. 285, concerning the concurrent jurisdiction of Pennsylvania state and federal courts, as follows:

“ . . .

[F]or it is settled that where the judgment sought is strictly in personam, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as res judicata in the other. On the other hand, if the two suits are in rem, or quasi in rem, so that the court, or its officer, has possession or must have control of the property which is the subject of the litigation in order to proceed with the cause and grant the relief sought the jurisdiction of the one court must yield to that of the other. We have said that the principle applicable to both federal and state courts that the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other, is not restricted to cases where property may have been actually seized under judicial process before a second suit is instituted, but applies as well where suits are brought to marshall assets, administer trusts, or liquidate estates and in suits of a similar nature where, to give effect to its jurisdiction, the court must control the property.

. . . “

(Underlining emphasis added.)

See also *State ex rel Willis v. Baird*, Unreported, Case No. C.A. No. 9467, Ninth Appellate District, 1980 Ohio App. LEXIS 14160 indicating, at pp. 5-6 that:

“It is the law of Ohio that, as between courts having concurrent jurisdiction, the court which first acquires jurisdiction over the parties and the subject matter thereby assumes the authority to litigate the

issues and determine the rights of the parties therein to the exclusion of all other tribunals. 44 O. Jur. 2d, Prohibition, §27 (1960). Often termed the ‘priority principle’, this recognition of exclusive and prior jurisdiction as between federal and state courts is said to apply only to actions involving property rights rather than strictly personal rights. This would seemingly include cases involving jurisdiction quasi in rem, a term frequently used to designate an action in personam where a res is indirectly affected by the decision. [Citing *Princess Lita of Thurn and Taxis v. Thompson*, supra, at 466.]

Although the doctrine of judicial comity appears to be the underlying motive behind application of the priority principle, it appears to be the legal duty of a court to abide by it. Moreover, the rationale for such a duty is to minimize the potential for conflicts in the exercise of concurrent jurisdiction involving the same subject matter, the same parties, and the same issues, resulting perhaps in contradictory decisions.

Notwithstanding that the West Virginia Court has failed to give deference to the Ohio in rem proceeding on the issue of Mrs. Richardson’s competency pending final judgment of the Ohio courts, nonetheless, under Ohio law, the West Virginia proceeding, to the extent it has rendered an as yet non-final contradictory order with respect to Mrs. Richardson’s competency, is of no legal moment with regard to this Ohio appeal. Since this Ohio proceeding is first in time, the Ohio final judgment “binds all the world” under *Shroyer v. Richmond*, supra, syllabus ¶5. Cf. *Commercial Union Insurance Co. v. Wheeling Pittsburgh Corp.* (1995), 106 Ohio App.3d 477, 487; 666 N.E.2d 571 (Second App. Dist.) wherein the Court stated that “. . . [I]n view of the full faith and credit cause of the Federal Constitution [U.S. Const. art. IV, §1], once the proceeding on the same case has been finally adjudicated by the court of a sister state, res judicata effect must be given to it by the court of the forum state. (Reply Brief Appx. 16). See also *Restatement of the Law, Second, Conflict of Laws* (1971), §86 Pendency of Foreign Action, Comment c. (Reply Brief Appx. 17).

**C. NEXT-OF-KIN ENTITLED TO “NOTICE” OF THE TIME AND PLACE OF HEARING ON A GUARDIANSHIP APPLICATION ARE NOT THEREBY DEEMED “PARTIES” IN THE PROBATE COURT OR APPELLATE COURTS OF OHIO.**

The Ohio Revised Code is replete with “notice” requirements to persons or entities in a variety of circumstances. Generally speaking, a person or entity entitled to “notice” is not ipso facto a “party” to the proceeding. That is particularly true with respect to the “notice” provided to Leach under R. C. 2111.04(A)(2)(b).

The statutory language of R.C. §2111.04(A) does not itself suggest the purpose of “notice” “upon the next-of-kin of the person for whom appointment is sought who are known to reside in this state.” R.C. §2111.04(D) does, however, describe the purpose of notice of appointment as follows:

“(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.”

There is no suggestion in the Ohio Probate Code that “notice” under R.C. 2111.04 is intended to confer “party” status upon next-of-kin.

R.C. 2111.04 requires notice upon an alleged incompetent ward with the following detailed notice form requirements:

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

(a) (1) 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 all of the rights set forth in division (C)(7) of section 2111.02 of the Revised Code.”

(Underlining emphasis added).

In contrast, that same statute only requires “notice” to the next-of-kin in an abbreviated manner without suggesting the same or similar rights conferred upon the alleged ward, as follows:

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

This Court recently recited the rules of statutory construction applicable here as follows:

“The first rule of statutory construction is to look at the statute’s language to determine its meaning. If the statute conveys a clear, unequivocal, and definite meaning, interpretation comes to an end, and the statute must be applied according to its terms. *Lancaster Colony Corp. v. Limbach* (1988), 37 Ohio St.3d 198, 199, 524 N.E.2d 1389. Courts may not delete words used or insert words not used. *Cline v. Ohio Bur. of Motor Vehicles* (1991), 61 Ohio St.3d 93, 97, 573 N.E.2d 77.”

*Columbia Gas Transmission Corp. v. Levin, Tax Commr.* (2008), 117 Ohio St.3d 122; 2008 Ohio 511, P19.

Even though “next-of-kin” must be served with “notice” of the time and place of hearing, their appearance or non-appearance is discretionary. And, notwithstanding that “compliance with the notice provisions as set forth in [R.C. §2111.04(A)] assures that those affected by the proposed guardianship are given the opportunity to be heard and afforded their right to due process”, *In Re Guardianship of Simmons*, 2003 Ohio 5416 (Sixth App. Dist.), P48, nevertheless, next-of-kin are not thereby anointed as “parties”. That distinction is emphasized by inclusion of the detailed notice language requirements cited above, on the one hand, for alleged wards in R.C. 2111.04(A)(2)(a)(i), and the brief, succinct requirement only of “notice” for next-of-kin as set forth

in R.C. §2111.04(2)(b). Moreover, an alleged incompetent is specifically vested with even more “rights” as enumerated under R.C. 2111.02(C)(7)<sup>3</sup> none of which extend to next-of-kin.

The Appellee, Norma Louise Leach (“Leach”), appeared at the September 19, 2006, Guardianship Hearing and gave testimony as a witness. (Ledford Supp. 27-28; Appellee’s Supp. 93-106). Appellees’ counsel in this Court, Lee C. Falke, represented only James Richardson, the competing applicant for appointment as guardian at the Guardianship Hearing (Ledford Supp. 29-34). Lee C. Falke did not represent, or purport to represent, Mrs. Richardson or Leach at the September 19, 2006, Guardianship Hearing. Moreover, at no time during the September 19, 2006, Guardianship Hearing, did Leach request to be made a party to the proceeding. Not until the filing of “Written Objections Pursuant to Civ. R. 53(E)(3) [sic] to Amended Magistrate’s Decision issued on October 17, 2006, by Magistrate Joseph S. Gallagher” on October 31, 2006, did Lee C. Falke and Falke & Dunphy, L.L.C., “appear” as “attorneys for Norma Louise Leach and Jim Richardson” in the Montgomery County Probate Court (Ledford Supp. 45-58).<sup>4</sup>

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<sup>3</sup> “(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:

- (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.” (Underlining emphasis added).

<sup>4</sup> Not to be disregarded is the fact that Mrs. Richardson’s Probate Court Guardian Ad Litem, Virginia Vanden Bosch, Esq., made no Civ. R. 53 objections to the October 17, 2007, “Amended Magistrate’s Report” filed in the Montgomery County Probate Court. (Merit Brief of Ledford, Appendix 36-40).

While Leach was an “interested party” under R.C. 2111.02(A), was entitled to “notice” under R.C. 2111.04(A)(2)(b) as next-of-kin, made a discretionary appearance at the September 19, 2006, Guardianship Hearing and gave testimony as a witness at the Hearing, she was only collaterally interested in the proceeding and was not a party to the proceeding. Accordingly, she had no right to appeal from the January 23, 2007, Entry and Decision of the Montgomery County Probate Court (Merit Brief of Ledford Appendix 31-35). Cf. *In Re Estate of Haas* (1963), 174 Ohio St. 277; 189 N.E.2d 65; 22 O.O.2d 336, syllabus (holding that a person not a party to a prior probate court proceeding has no right to appeal).

**D. THE APPEAL OF THE ALLEGED WARD, ALICE I. RICHARDSON**

The Appellees characterize Ledford’s request that this Court should “enter judgment summarily” reversing and dismissing Mrs. Richardson’s appeal, as made “out of abject necessity” and “astonishing”. (Merit Brief of Appellees, 14). However, this Court has authority in discretionary appeals under S. Ct. Prac. R. III, §6(C)(2), to:

“(2) Grant jurisdiction to hear the case on the merits, excepting the appeal, and either order the case or limited issues in the case to be brief and heard on the merits or enter judgment summarily.”

Indeed, this Court’s authority to review and determine the issue concerning Mrs. Richardson’s waiver of her appeal under Civ. R. 53(D)(3)(b)(iv) and R.C. 2111.02(C)(2) is functionally no different than this Court’s authority to review and rule upon summary judgment rulings de novo. (Reply Brief Appx. 18-21). *See e.g. Doe v. Shaffer* (2000), 90 Ohio St.3d 388, 390; 2000 Ohio 186; 738 N.E.2d 1243.

The issue of Mrs. Richardson’s waiver of her right to appeal from the Montgomery County Probate Court’s January 23, 2007, “Entry and Decision Modifying the Magistrate’s

Decision” to the Montgomery County Court of Appeals was clearly and definitively raised and briefed in the “Brief of Appellee-Guardian, Alice E. Ledford” (Ledford Supp. 78-80). However, the Montgomery County Court of Appeals failed to address that issue in its July 6, 2007, Opinion (Merit Brief of Ledford, Appendix 26-30).

Mrs. Richardson is now 88 years old. Although the Montgomery County Probate Court ruled that she was in need of a guardian of her person as of early 2007, she now lives without benefit of the protection of a guardianship to which she may otherwise be entitled while this litigation moves on. A reversal by this Court on “Proposition of Law No. II” may justify a remand to the Montgomery County Court of Appeals on the issue of Mrs. Richardson’s waiver of the right to appeal under Civ. R. 53(D)(3)(b)(iv) and R.C. 2111.02(C)(2). However, given Mrs. Richardson’s advanced age and the prior (but reversed and vacated) Montgomery County Probate Court judgment appointing a guardian, should this Court reverse on the issue of Leach’s standing to appeal, there exists good cause for this Court to “summarily” rule on the issue of Mrs. Richardson’s waiver of her appeal. Should this Court decline in that circumstance to rule upon or remand on the validity of Mrs. Richardson’s appeal, it will be left only to “declare principles or rules of law which cannot affect the matter at issue in the case before it.” *Travis v. Public Utilities Comm. of Ohio* (1931), 123 Ohio St. 355; 175 N.E. 586; 9 Ohio L. Abs. 443, para. 2 of the syllabus.<sup>5</sup>

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<sup>5</sup> Ledford recognizes that the issue of Mrs. Richardson’s waiver under Civ. R. 53(D)(3)(b)(iv) of her right to appeal (Proposition of Law III) arguably does not involve a “novel” question of law or procedure or present an issue pertinent to this Court’s “collective interest in jurisprudence.” *Noble v. Colwell* (1989), 44 Ohio St.3d 92, 94; 540 N.E.2d 1381; *In Re Guardianship of Richardson* (2007), 116 Ohio St. 3d 1437; 2007 Ohio 6518; 877 N.E.2d 989. However, the issue of Leach’s “standing” does present such a “novel” question of law but cannot be effectively addressed without also ruling upon or remanding the issue of the validity of Mrs. Richardson’s appeal.

**E. WHERE LEACH HAD NO STANDING AS A PARTY TO APPEAL AND WHERE MRS. RICHARDSON WAIVED HER RIGHT TO ASSIGN ADOPTION OF THE “AMENDED MAGISTRATE’S DECISION” BY THE MONTGOMERY COUNTY PROBATE COURT AS ERROR ON APPEAL, THE MONTGOMERY COUNTY COURT OF APPEALS ACQUIRED NO JURISDICTION TO HEAR APPELLEES’ APPEAL.**

Appellees correctly observe that “[T]he lack of subject matter jurisdiction may be raised at any point during the proceedings by the parties. Civ. R. 12(H)” and that “Lack of subject matter jurisdiction may be raised *sua sponte* by the court at any stage in the proceedings and may be raised for the first time on appeal.” [Citations omitted]. However, Appellees have either ignored or failed to comprehend Ledford’s submission in this appeal that the jurisdiction of the Montgomery County Court of Appeals had not been properly invoked by Leach (“lack of standing”) and Mrs. Richardson (“waiver”). Thus, the Montgomery County Court of Appeals has not been conferred with appellate authority to hold that the Montgomery County Probate Court lacked subject matter jurisdiction or rule on any assignment of error. As suggested in Ledford’s Merit Brief at p.14, since Leach had no “standing”, her notice of appeal was a “nullity” and did not confer appellate jurisdiction for review of the Montgomery County Probate Court’s Order. Similarly, Mrs. Richardson’s waiver of her right to assign adoption by the Montgomery County Probate Court of the “Amended Magistrate’s Decision” as error on appeal has nullified her appeal on the Appellees’ Assignments of Error in the Montgomery County Court of Appeals.<sup>6</sup>

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<sup>6</sup> “FIRST ASSIGNMENT OF ERROR

The Trial Court erred in determining that the alleged ward had a residence or a legal settlement in Montgomery County, Ohio.”

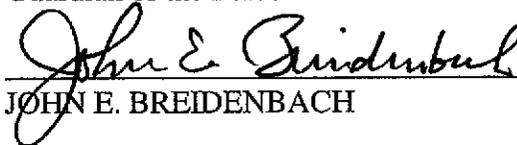
“SECOND ASSIGNMENT OF ERROR

The Trial Court erred in limiting the evidence as to Alice I. Richardson’s mental status to the date of filing of the Application for Appointment of Guardian.”

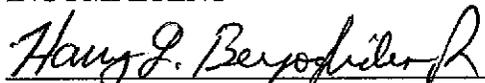
## II. CONCLUSION

In the absence of Leach's "standing" to appeal and the Civ. R. 53(D)(3)(b)(iv) waiver of Mrs. Richardson's right to appeal from the January 23, 2007, Entry and Decision Modifying the Magistrate's Decision of the Montgomery County Probate Court, the Montgomery County Court of Appeals lacked jurisdiction to hear and decide the Appellees' Assignments of Error.

Further, the unauthenticated "copy" of the August 1, 2007, West Virginia Order, and information contained therein, should be disregarded and stricken as non-record evidence. Should this Court reverse the Second District by declaring that Leach had no "standing" to appeal, it should also summarily hold under S. Ct. Prac. III §6(C)(2) that Mrs. Richardson has waived her right to appeal from the Montgomery County Probate Court's January 23, 2007, "Entry and Decision Modifying the Magistrate's Decision" to the Montgomery County Court of Appeals. The Second District's Decision and Judgment of July 6, 2007, requires reversal by this Court as to both Leach and Mrs. Richardson with reinstatement effective July 6, 2007, of the order of the Montgomery County Probate Court appointing Ledford as Guardian of the Person of Mrs. Richardson.

  
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JOHN E. BREIDENBACH

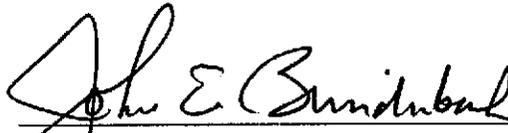
COUNSEL OF RECORD FOR APPELLANT,  
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APPOINTMENT AS GUARDIAN OF THE  
PERSON OF ALICE I. RICHARDSON, AN  
INCOMPETENT

  
\_\_\_\_\_  
HARRY G. BEYOGLIDES, JR.

COUNSEL FOR APPELLANT, ALICE E.  
LEDFORD, APPLICANT FOR APPOINTMENT  
AS GUARDIAN OF THE PERSON OF ALICE I.

**CERTIFICATE OF SERVICE**

I certify that a copy of this Reply Brief of Appellant, Alice E. Ledford, Applicant for Appointment as Guardian of the Person of Alice I. Richardson, an Incompetent, was served by regular U.S. Mail, postage prepaid, upon Counsel for Appellees, Lee C. Falke, Falke & Dunphy, LLC, 30 Wyoming Street, Dayton, Ohio 45409, on April 17, 2008.



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JOHN E. BREIDENBACH

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PERSON OF ALICE I. RICHARDSON, AN  
INCOMPETENT

# REPLY BRIEF APPENDIX

0  
**Section 1.**

**CONSTITUTION OF UNITED STATES**

**ARTICLE IV. STATES' RELATIONS**

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**Section 1. Full Faith and Credit**

**Full Faith and Credit** shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

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## Restatement of the Law, Second, Conflict of Laws, § 86

## 1 of 19 DOCUMENTS

Restatement of the Law, Second, Conflict of Laws  
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## Case Citations

## Chapter 4 - Limitations on the Exercise of Judicial Jurisdiction

## Topic 2 - Limitations Imposed by the Forum

## Restat 2d of Conflict of Laws, § 86

## § 86 Pendency of Foreign Action

**A State may entertain an action even though an action on the same claim is pending in another state.**

**COMMENTS & ILLUSTRATIONS: Comment:**

*a.* The rule of this Section applies whether the same person is plaintiff in both actions or plaintiff in one and defendant in the other. It is likewise applicable whether the two actions are both instituted in State courts or in federal courts or one in a State court and the other in a federal court. The rule does not result in the imposition of double liability on the defendant, since the judgment first handed down effectively bars further prosecution of the second action. As between States of the United States, this latter result is required by full faith and credit.

*b. In personam actions.* While the pendency of a foreign action is not a bar to the maintenance of an action in the state of the forum, it may induce the court to grant a stay of the latter action. Two situations must be distinguished. The first is where there is a substantial likelihood that plaintiff will not be able to obtain complete relief in the first action, such as where it is unlikely to result in final judgment on the merits because of a procedural defect or where the exemption laws of the first state would preclude full satisfaction of plaintiff's claim. In cases such as these the second action will be permitted to continue. The second situation is where it is clear that plaintiff can secure all the relief to which he is entitled in the first action. Here, in order to avoid unnecessary harassment of the defendant, the courts will frequently, in their discretion, grant a stay of the second action pending the outcome of the first.

*c. Actions in rem and quasi in rem.* Usually, a court will not abate or stay an action because of the pendency of an earlier in rem or quasi in rem action. This will certainly not be done unless it is clear that the plaintiff can secure complete relief in the first action. An exceptional situation is where the proceedings in the two states are directed against the same res, as where a chattel, having been attached in one state, is removed to a second state and is there attached again. If the effect of the first proceeding under the local law of the first state is to place a lien upon the res, the second action will be abated, or at least stayed, pending the outcome of the first action, so as not to disturb the lien. As between States of the United States, this result may be required by full faith and credit.

**REPORTERS NOTES:** For a recent case in point, see *Fitch v. Whaples*, 220 A.2d 170 (Me.1966). See generally 3 Beale, Conflict of Laws 1662 (1935); Ehrenzweig, Conflict of Laws 126-128 (1962).

*Comment c:* In point are several Supreme Court decisions dealing with garnishment. See *e. g.*, *Sanders v. Armour Fertilizer Works*, 292 U.S. 190 (1934); *Wallace v. McConnell*, 13 Pet. (38 U.S.) 136 (1839); *cf.*, *Farmer's Loan and Trust Co. v. Lake St. E. R. Co.*, 177 U.S. 51 (1900).

**CROSS REFERENCES:** ALR Annotations:

Local property of insolvent foreign corporation for which a liquidator or receiver has been appointed in another state as subject to sequestration or seizure under execution or attachment. 98 A.L.R. 351.

Digest System Key Numbers:

Courts 510-514

1 of 1 DOCUMENT

OHIO RULES OF COURT SERVICE  
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\*\*\* RULES CURRENT THROUGH APRIL 1, 2008 \*\*\*  
\*\*\* ANNOTATIONS CURRENT THROUGH JANUARY 1, 2008 \*\*\*

Ohio Rules Of Civil Procedure  
Title VI Trials

*Ohio Civ. R. 53 (2008)*

**Rule 53. Magistrates**

**(A) Appointment.**

A court of record may appoint one or more magistrates who shall be attorneys at law admitted to practice in Ohio.

**(B) Compensation.**

The compensation of magistrates shall be fixed by the court, and no part of the compensation shall be taxed as costs under *Civ. R. 54(D)*.

**(C) Authority.**

**(1) Scope.**

To assist courts of record and pursuant to reference under *Civ. R. 53(D)(1)*, magistrates are authorized, subject to the terms of the relevant reference, to do any of the following:

- (a) Determine any motion in any case;
- (b) Conduct the trial of any case that will not be tried to a jury;
- (c) Upon unanimous written consent of the parties, preside over the trial of any case that will be tried to a jury;
- (d) Conduct proceedings upon application for the issuance of a temporary protection order as authorized by law;
- (e) Exercise any other authority specifically vested in magistrates by statute and consistent with this rule.

**(2) Regulation of proceedings.**

In performing the responsibilities described in *Civ. R. 53(C)(1)*, magistrates are authorized, subject to the terms of the relevant reference, to regulate all proceedings as if by the court and to do everything necessary for the efficient performance of those responsibilities, including but not limited to, the following:

- (a) Issuing subpoenas for the attendance of witnesses and the production of evidence;
- (b) Ruling upon the admissibility of evidence;
- (c) Putting witnesses under oath and examining them;
- (d) Calling the parties to the action and examining them under oath;
- (e) When necessary to obtain the presence of an alleged contemnor in cases involving direct or indirect contempt of court, issuing an attachment for the alleged contemnor and setting the type, amount, and any conditions of bail pursuant to *Crim. R. 46*;
- (f) Imposing, subject to *Civ. R. 53(D)(8)*, appropriate sanctions for civil or criminal contempt committed in the presence of the magistrate.

**(D) Proceedings in Matters Referred to Magistrates.**

**(1) Reference by court of record.****(a) Purpose and method.**

A court of record may, for one or more of the purposes described in *Civ. R. 53(C)(1)*, refer a particular case or matter or a category of cases or matters to a magistrate by a specific or general order of reference or by rule.

**(b) Limitation.**

A court of record may limit a reference by specifying or limiting the magistrate's powers, including but not limited to, directing the magistrate to determine only particular issues, directing the magistrate to perform particular responsibilities, directing the magistrate to receive and report evidence only, fixing the time and place for beginning and closing any hearings, or fixing the time for filing any magistrate's decision on the matter or matters referred.

**(2) Magistrate's order; motion to set aside magistrate's order.****(a) Magistrate's order.****(i) Nature of order.**

Subject to the terms of the relevant reference, a magistrate may enter orders without judicial approval if necessary to regulate the proceedings and if not dispositive of a claim or defense of a party.

**(ii) Form, filing, and service of magistrate's order.**

A magistrate's order shall be in writing, identified as a magistrate's order in the caption, signed by the magistrate, filed with the clerk, and served by the clerk on all parties or their attorneys.

**(b) Motion to set aside magistrate's order.**

Any party may file a motion with the court to set aside a magistrate's order. The motion shall state the moving party's reasons with particularity and shall be filed not later than ten days after the magistrate's order is filed. The pendency of a motion to set aside does not stay the effectiveness of the magistrate's order, though the magistrate or the court may by order stay the effectiveness of a magistrate's order.

**(3) Magistrate's decision; objections to magistrate's decision.****(a) Magistrate's decision.****(i) When required.**

Subject to the terms of the relevant reference, a magistrate shall prepare a magistrate's decision respecting any matter referred under *Civ. R. 53(D)(1)*.

**(ii) Findings of fact and conclusions of law.**

Subject to the terms of the relevant reference, a magistrate's decision may be general unless findings of fact and conclusions of law are timely requested by a party or otherwise required by law. A request for findings of fact and conclusions of law shall be made before the entry of a magistrate's decision or within seven days after the filing of a magistrate's decision. If a request for findings of fact and conclusions of law is timely made, the magistrate may require any or all of the parties to submit proposed findings of fact and conclusions of law.

**(iii) Form; filing, and service of magistrate's decision.**

A magistrate's decision shall be in writing, identified as a magistrate's decision in the caption, signed by the magistrate, filed with the clerk, and served by the clerk on all parties or their attorneys no later than three days after the decision is filed. A magistrate's decision shall indicate conspicuously that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under *Civ. R. 53(D)(3)(a)(ii)*, unless the party timely and specifically objects to that factual finding or legal conclusion as required by *Civ. R. 53(D)(3)(b)*.

**(b) Objections to magistrate's decision.****(i) Time for filing.**

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

If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. If a party makes a timely request for findings of fact and conclusions of law, the time for filing objections begins to run when the magistrate files a decision that includes findings of fact and conclusions of law.

**(ii) Specificity of objection.**

An objection to a magistrate's decision shall be specific and state with particularity all grounds for objection.

**(iii) Objection to magistrate's factual finding; transcript or affidavit.**

An objection to a factual finding, whether or not specifically designated as a finding of fact under *Civ. R. 53(D)(3)(a)(ii)*, shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that finding or an affidavit of that evidence if a transcript is not available. With leave of court, alternative technology or manner of reviewing the relevant evidence may be considered. The objecting party shall file the transcript or affidavit with the court within thirty days after filing objections unless the court extends the time in writing for preparation of the transcript or other good cause. If a party files timely objections prior to the date on which a transcript is prepared, the party may seek leave of court to supplement the objections.

**(iv) Waiver of right to assign adoption by court as error on appeal.**

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

**(4) Action of court on magistrate's decision and on any objections to magistrate's decision; entry of judgment or interim order by court.**

**(a) Action of court required.**

A magistrate's decision is not effective unless adopted by the court.

**(b) Action on magistrate's decision.**

Whether or not objections are timely filed, a court may adopt or reject a magistrate's decision in whole or in part, with or without modification. A court may hear a previously-referred matter, take additional evidence, or return a matter to a magistrate.

**(c) If no objections are filed.**

If no timely objections are filed, the court may adopt a magistrate's decision, unless it determines that there is an error of law or other defect evident on the face of the magistrate's decision.

**(d) Action on objections.**

If one or more objections to a magistrate's decision are timely filed, the court shall rule on those objections. In ruling on objections, the court shall undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law. Before so ruling, the court may hear additional evidence but may refuse to do so unless the objecting party demonstrates that the party could not, with reasonable diligence, have produced that evidence for consideration by the magistrate.

**(e) Entry of judgment or interim order by court.**

A court that adopts, rejects, or modifies a magistrate's decision shall also enter a judgment or interim order.

**(i) Judgment.**

The court may enter a judgment either during the fourteen days permitted by *Civ. R. 53(D)(3)(b)(i)* for the filing of objections to a magistrate's decision or after the fourteen days have expired. If the court enters a judgment during the fourteen days permitted by *Civ. R. 53(D)(3)(b)(i)* for the filing of objections, the timely filing of objections to the magistrate's decision shall operate as an automatic stay of execution of the judgment until the court disposes of those objections and vacates, modifies, or adheres to the judgment previously entered.

**(ii) Interim order.**

The court may enter an interim order on the basis of a magistrate's decision without waiting for or ruling on timely objections by the parties where immediate relief is justified. The timely filing of objections does not stay the execution of an interim order, but an interim order shall not extend more than twenty-eight days from the date of entry,

subject to extension by the court in increments of twenty-eight additional days for good cause shown. An interim order shall comply with *Civ. R. 54(A)*, be journalized pursuant to *Civ. R. 58(A)*, and be served pursuant to *Civ. R. 58(B)*.

**(5) Extension of time.**

For good cause shown, the court shall allow a reasonable extension of time for a party to file a motion to set aside a magistrate's order or file objections to a magistrate's decision. "Good cause" includes, but is not limited to, a failure by the clerk to timely serve the party seeking the extension with the magistrate's order or decision.

**(6) Disqualification of a magistrate.**

Disqualification of a magistrate for bias or other cause is within the discretion of the court and may be sought by motion filed with the court.

**(7) Recording of proceedings before a magistrate.**

Except as otherwise provided by law, all proceedings before a magistrate shall be recorded in accordance with procedures established by the court.

**(8) Contempt in the presence of a magistrate.**

**(a) Contempt order.**

Contempt sanctions under *Civ. R. 53(C)(2)(f)* may be imposed only by a written order that recites the facts and certifies that the magistrate saw or heard the conduct constituting contempt.

**(b) Filing and provision of copies of contempt order.**

A contempt order shall be filed and copies provided forthwith by the clerk to the appropriate judge of the court and to the subject of the order.

**(c) Review of contempt order by court; bail.**

The subject of a contempt order may by motion obtain immediate review by a judge. A judge or the magistrate entering the contempt order may set bail pending judicial review of the order.

**HISTORY:** Amended, eff 7-1-75; 7-1-85; 7-1-92; 7-1-93; 7-1-95; 7-1-96; 7-1-98; 7-1-03; 7-1-06.