

[Cite as *In re Guardianship of Rhoades*, 2010-Ohio-1735.]

COURT OF APPEALS
GUERNSEY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF:

GUARDIANSHIP OF
GRACE B. RHOADES

JUDGES:
Hon. Julie A. Edwards, P.J.
Hon. William B. Hoffman, J.
Hon. Sheila G. Farmer, J.

Case No. 09CA39

OPINION

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas,
Probate Division, Case No. 09PG050632

JUDGMENT: Reversed

DATE OF JUDGMENT ENTRY: April 19, 2010

APPEARANCES:

For Appellant

C. KEITH PLUMMER
139 West 8th Street
P.O. Box 640
Cambridge, OH 43725

For Appellee Joan Quinn

RUSSELL H. BOOTH, JR.
745 Steubenville Avenue
Cambridge, OH 43725

Guardian ad Litem

DONALD D. BROWN
803 Steubenville Avenue
Cambridge, OH 43725

Farmer, J.

{¶1} Appellant, Grace Rhoades, is a 92 year old widow and the mother of three children. One of her children is appellee herein, Joan Quinn. Appellant has lived in Weirton, West Virginia for approximately thirty years.

{¶2} In September of 2008, appellant entered The Cardinal House, an assisted living facility located in Cambridge, Ohio.

{¶3} On June 2, 2009, appellee filed an application for appointment of emergency guardian of alleged incompetent, appellant herein, with the Court of Common Pleas of Guernsey County, Ohio, Probate Division. The probate court appointed appellee as emergency guardian the same day.

{¶4} On June 9, 2009, appellee filed an application for appointment of guardian. On July 1, 2009, appellant filed a motion for an independent evaluation and a motion to dismiss due to lack of residency or legal settlement in Guernsey County. The parties waived oral hearing. By judgment entry filed September 11, 2009, the probate court determined appellant was a voluntary resident of Guernsey County and it had jurisdiction to hear the case.

{¶5} Appellant filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

I

{¶6} "THE PROBATE COURT ERRED IN FINDING THAT APPELLANT WAS A RESIDENT OF GUERNSEY COUNTY, STATE OF OHIO."

I

{¶7} Appellant claims the probate court erred in determining she was a voluntary resident of Guernsey County and it had jurisdiction to hear the case. Appellant claims the probate court should have granted her motion to dismiss for lack of residency or legal settlement in Guernsey County. We agree.

{¶8} R.C. 2111.02 governs appointment of guardian. Subsection (A) states the following in pertinent part:

{¶9} "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."

{¶10} In support of her motion to dismiss, appellant presented her affidavit and attested to the following:

{¶11} "5. I consider myself to be a legal resident of West Virginia and not Ohio.

{¶12} "6. I do not wish to or intend to remain in the State of Ohio. It is my desire and intention to return to my residence in West Virginia.

{¶13} "7. My daughter, Joan Quinn, approximately 13 months ago placed me involuntarily in The Cardinal House located in Cambridge, Ohio. I do not wish to remain in The Cardinal House in Cambridge, Ohio and it is my desire to return to my home at

233 Country Club Boulevard, Weirton, West Virginia 26062 or, in the alternative, go to the home of my grandson, Butch Shaw, who lives approximately five miles from me in the State of Pennsylvania.

{¶14} "8. Irregardless of my temporary placement by my daughter, Joan Quinn, in The Cardinal House in Cambridge, Ohio, I do not consider myself to be a resident of either the State of Ohio or Guernsey County."

{¶15} Appellant also produced copies of her 2007 and 2008 tax returns which established her address as being located in West Virginia.

{¶16} Appellee's August 21, 2009 memorandum contra to appellant's motion to dismiss contained a legal argument, appellee's unverified narrative, and the "State of Ohio Residency Agreement" signed September 19, 2008 by appellant, appellee, and a representative of the residential care facility, The Cardinal House. Contained in the agreement was a purported address for appellant as being located in New Concord, Ohio. None of these documents are verified or are of evidentiary quality.

{¶17} The initial filing on June 2, 2009 for the appointment of an emergency guardian states appellant was in need of guardianship because of "[a]dvanced age and memory impairment, suspected Alzheimers." Legal settlement was listed as an address in Cambridge, Ohio. Accompanying this application is a statement of expert evaluation pursuant to R.C. 2111.49. The doctor providing this statement was located in Cambridge, Ohio.

{¶18} The probate court's investigator's report filed July 2, 2009 found appellant had the following impairments: memory, concentration and comprehension, and judgment. At best, these observations make appellant's affidavit suspect.

{¶19} In *State ex rel. Florence v. Zitter*, 106 Ohio St.3d 87, 2005-Ohio-3804, the Supreme Court of Ohio explained the following at ¶19 and 25:

{¶20} "R.C. 2111.02(A) precludes courts 'from providing a guardian for a ward who does not reside, or have a legal settlement, in the county.' *In re Guardianship of Fisher* (1993), 91 Ohio App.3d 212, 215, 632 N.E.2d 533; *In re Tripp* (1993), 90 Ohio App.3d 209, 210-211, 628 N.E.2d 139. 'Residence requires the actual physical presence at some abode coupled with an intent to remain at that place for some period of time.' *Fisher*, 91 Ohio App.3d at 215, 632 N.E.2d 533; *LeSueur v. Robinson* (1988), 53 Ohio App.3d 9, 12, 557 N.E.2d 796. '[L]egal settlement" connotes living in an area with some degree of permanency greater than a visit lasting a few days or weeks.' *Fisher*, 91 Ohio App.3d at 216, 632 N.E.2d 533.

{¶21} "Second, even assuming that the R.C. 2111.02(A) residency/legal-settlement requirement is jurisdictional, courts have held that if an apparent change of residence is involuntary, the residence remains the place before the forced move. See *State ex rel. Saunders v. Allen Cty. Court of Common Pleas* (1987), 34 Ohio St.3d 15, 16, 516 N.E.2d 232 ('precedent in this state indicates that***residence is not altered by imprisonment or other involuntary commitment'); *In re Guardianship of Goins*, Mahoning App. No. 02-CA-163, 2003-Ohio-931, 2003 WL 685878, ¶45, quoting *Murray v. Remus* (App.1925), 4 Ohio Law Abs. 7, 1925 WL 2426 (' "Residence in a place, to produce a change of domicile, must be voluntary. If therefore it be by constraint [or] involuntary, as arrest, imprisonment, etc., the antecedent domicile of the party remains" ')."

{¶22} We find although appellant's affidavit may have been questionable, it was the only evidentiary quality item produced upon which the probate court could determine

legal settlement. It is also undisputed that appellant has been in a residential care facility since September of 2008 in Cambridge, Ohio which she disputes was voluntary.

{¶23} Upon review, we find the probate court erred in determining appellant was a voluntary resident of Guernsey County and it had jurisdiction to hear the case.

{¶24} The sole assignment of error is granted.

{¶25} The judgment of the Court of Common Pleas of Guernsey County, Ohio, Probate Division is hereby reversed.

By Farmer, J.

Edwards, P.J. and

Hoffman, J. concur.

s/ Sheila G. Farmer

s/ Julie A. Edwards

s/ William B. Hoffman

JUDGES

SGF/sg 0312

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FIFTH APPELLATE DISTRICT

IN THE MATTER OF:

GUARDIANSHIP OF
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JUDGMENT ENTRY

CASE NO. 09CA39

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Guernsey County, Ohio, Probate Division is reversed. Costs to appellee.

s/ Sheila G. Farmer

s/ Julie A. Edwards

s/ William B. Hoffman

JUDGES