[Cite as *In re Guardianship of Shelar*, 2013-Ohio-4737.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

In re Guardianship of Frederick B. Shelar, an alleged incompetent	Court of Appeals No. L-13-1042 Trial Court No. 2012 GDN 1254

DECISION AND JUDGMENT

Decided: October 25, 2013

* * * * *

James V. Shindler, for appellant.

Thomas W. Heintschel, Craig F. Frederickson, and Douglas King, for appellee.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} Appellant, Martin Holmes, Sr., appeals the judgment of the Lucas County Court of Common Pleas, Probate Division, dismissing his application to be appointed guardian over the person and estate of appellee, Frederick Shelar. For the following reasons, we affirm.

A. Facts and Procedural Background

{¶ 2} On May 17, 2012, Shelar was admitted to Mercy St. Anne Hospital for acute pancreatitis and mental status changes with significant cognitive impairment. At the time of his admission, Shelar was a resident of Lucas County, Ohio. While at Mercy St. Anne,

Shelar was treated by Dr. Kul Gupta. Following a CT scan of his brain, Shelar was diagnosed with dementia, pancreatitis, and alcohol dependence. During the time he was in the hospital, Shelar was accompanied by his four daughters, all of whom live in Florida, where Shelar also owns a condominium.

{¶ 3} Learning of Shelar's hospital admission, appellant decided to visit Shelar. Appellant was Shelar's long-time attorney. Based on his observation of Shelar while at the hospital, appellant filed an application to be appointed guardian on June 7, 2012. Along with his application, appellant submitted a "Statement of Expert Evaluation" drafted by Gupta in which he stated that Shelar was incapable of managing his own finances or caring for himself. Gupta's opinion was based on his treatment of Shelar over a two-week period beginning on May 20, 2012. During that period, Gupta observed that Shelar, who was previously diagnosed with dementia, was "very confused and disoriented, [his] thought process is disorganized and [he] has poor judgment." Further, Gupta noted that Shelar's speech, motor behavior, memory, and comprehension were impaired during the time he was under Gupta's care. Ultimately, Gupta recommended the appointment of a guardian over Shelar's person and estate.

{¶ 4} On June 8, 2012, a court investigator, Dennis Isenberg, was sent to Shelar's Lucas County residence to evaluate Shelar's condition. Shelar refused to cooperate with Isenberg. Accompanied by his four daughters, Shelar stated, "we want [appellant] out of the picture." Further, Shelar threatened to have Isenberg physically removed by law enforcement.

{¶ 5} One week later, Isenberg filed his report with the probate court. In his report, Isenberg noted that Shelar's behavior was "very abnormal." In addition, Isenberg indicated that Shelar was in arrears on his property taxes despite having "adequate" resources available to him. Based on his limited investigation, Isenberg opined that Shelar's mental health was getting worse and Shelar was unable to care for himself or his finances without the help of a guardian.

{¶ 6} In early November 2012, Shelar decided to relocate to his condominium in Florida. After doing so, Shelar filed a motion to dismiss the guardianship proceeding, arguing that the probate court lacked subject matter jurisdiction because he was no longer a Lucas County resident. In support of his motion, Shelar attached a "Declaration of Domicile," in which he confirmed his change of residence to Cape Canaveral, Florida. With respect to his new residence, Shelar specifically stated:

> I hereby declare that I reside in and maintain a place of abode at: [Cape Canaveral, Florida], which place of abode I recognize and intend to maintain as my permanent home and, if I maintain another place or places of abode in some other state or states, I hereby declare that my above-described residence and abode in the State of Florida constitutes my predominant and principal home, and I intend to continue it permanently as such.

{¶ 7} After the parties were given an opportunity to fully brief the jurisdiction issue, the probate court concluded that it lacked subject matter jurisdiction based on

Shelar's movement to Florida. Consequently, the court dismissed the guardianship proceeding. Appellant's timely appeal followed.

B. Assignment of Error

{¶ 8} On appeal, appellant assigns the following error for our review:

> The trial court erred in finding it lacked subject matter jurisdiction to consider the application for guardianship filed by Applicant/Appellant Martin J. Holmes, Sr., due to Frederick B. Shelar's physical relocation to Florida in the middle of the proceedings.

II. Analysis

{¶ 9} Subject matter jurisdiction involves a court's power to hear and decide cases. *State ex rel. Tubbs Jones v. Suster*, 84 Ohio St.3d 70, 73, 701 N.E.2d 1002 (1998). "A motion to dismiss for lack of subject matter jurisdiction raises a question of law, which is reviewed de novo." *In re Anderson*, 7th Dist. Monroe No. 05 MO 14, 2007-Ohio-1107, ¶ 15, citing *Groza-Vance v. Vance*, 162 Ohio App.3d 510, 2005-Ohio-3815, 834 N.E.2d 15, ¶ 13 (10th Dist.).

{¶ 10} "A probate court possesses only the jurisdiction conferred by statute and the Ohio Constitution." *State ex rel. Florence v. Zitter*, 106 Ohio St.3d 87, 2005-Ohio-3804, 831 N.E.2d 1003, ¶ 46 (O'Donnell, J., dissenting), citing Article IV, Section 4(B), Ohio Constitution; *Corron v. Corron*, 40 Ohio St.3d 75, 531 N.E.2d 708 (1988), paragraph one of the syllabus. Concerning guardianship proceedings, R.C.

2101.24(A)(1)(e) grants probate courts the exclusive jurisdiction to appoint and remove guardians. Further, R.C. 2111.02(A) states in pertinent part:

> If found necessary, a 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.

{¶ 11} "Residence" requires the "actual physical presence of a person at some place of abode coupled with an intent to remain at that place for some period of time." *LeSueur v. Robinson*, 53 Ohio App.3d 9, 12, 557 N.E.2d 796 (6th Dist.1988), citing *Franklin v. Franklin*, 5 Ohio App.3d 74, 76, 449 N.E.2d 457 (7th Dist.1981). "Legal settlement also requires that the proposed ward actually dwell in the county seeking to exercise its jurisdictional power over the appointment of a guardian." *Id.*, citing *In re Guardianship of Rawlins*, 3d Dist. Marion No. 9-82-47, 1983 WL 7278 (June 7, 1983); R.C. 5113.05.

{¶ 12} Here, Shelar's Declaration of Domicile indicates his physical relocation to Cape Canaveral, Florida, and further notes his intent to remain there indefinitely. On its face, Shelar's declaration established that he was no longer a resident of Lucas County on the date the probate court issued its decision dismissing the guardianship proceeding. In addition, Shelar no longer maintained a legal settlement in Lucas County on that date.

{¶ 13} Notwithstanding Shelar's declaration, appellant contends that the trial court erroneously determined that it lacked subject matter jurisdiction over the guardianship proceeding. In support, he makes two arguments.

{¶ 14} In his first argument, appellant asserts that the Supreme Court of Ohio's decision in *Zitter, supra,* establishes that R.C. 2111.02(A) relates to venue rather than jurisdiction. In *Zitter*, the issue before the court was whether the Mercer County Probate Court, "patently and unambiguously" lacked jurisdiction over the underlying guardianship proceeding such that a writ of prohibition should be granted in favor of the alleged incompetent, Ermal Florence. *Zitter*, 106 Ohio St.3d 87, 2005-Ohio-3804, 831 N.E.2d 1003, at ¶ 17. Florence, a 92-year-old widow with four children (Glen, Harold, Janet, and Larry), was a long-time resident of Mercer County, Ohio, where she and her late husband operated a family farm and livestock business. *Id.* at ¶ 2. In early 2002, Florence moved out of her home and into Harold's home in Miami County, Ohio. *Id.* at ¶ 3. In August 2003, she moved into an assisted-living facility in Clark County, Ohio, where she became a full-time resident. *Id.*

{¶ 15} One year after Florence moved to Clark County, Glen and Larry filed an application with the Mercer County probate court to appoint a guardian for Florence. *Id.* at ¶ 5. In their application, Glen and Larry alleged that Harold forced Florence to move from her Mercer County home despite a desire to remain there. *Id.* The probate court proceeded to order Florence to remain in Ohio for a competency determination. Opposing the appointment of a guardian, Florence sought a writ of prohibition to prevent

the probate court from exercising jurisdiction over the guardianship proceeding. *Id*. at ¶ 11.

{¶ 16} In support of the writ of prohibition, Florence noted that she had not lived in Mercer County for three years. Thus, she argued that the probate court patently and unambiguously lacked jurisdiction over the guardianship proceeding under R.C. 2111.02(A). *Id.* at ¶ 20. On appeal, the Ohio Supreme Court disagreed, stating that "it is not clear that the residency or legal-settlement requirement of R.C. 2111.02(A) is jurisdictional." *Id.* at ¶ 21. The court recognized a split among Ohio appellate courts on this issue, noting that some courts have held that R.C. 2111.02(A) is jurisdictional, while others have concluded that it relates to venue. The court went on to conclude that, even assuming R.C. 2111.02(A) is jurisdictional, it would not operate as a bar to jurisdiction where the evidence demonstrated that Florence's change of residence was not voluntary. *Id.* at ¶ 25, citing *State ex rel. Saunders v. Allen Cty. Court of Common Pleas*, 34 Ohio St.3d 15, 16, 516 N.E.2d 232 (1987). Ultimately, the court concluded that R.C.

2111.02(A) did not patently and unambiguously divest the probate court of jurisdiction over the guardianship proceeding, and thus, the writ of prohibition was not warranted. *Id.* at ¶ 28.

{¶ 17} Here, appellant relies upon *Zitter* to support his argument that R.C. 2111.02(A) relates to venue, not subject matter jurisdiction. However, such a reading of *Zitter* is misplaced. In its decision, the Supreme Court of Ohio was careful not to speak in absolutes as it discussed R.C. 2111.02(A). Instead, the court stated: "Although some courts have held [R.C. 2111.02(A)] to be jurisdictional, * * * other courts and commentators have not." *Id.* at ¶ 21. Later on in its analysis, the court used conditional language when it stated: "*If* Judge Zitter is correct that this requirement relates to venue, it will not be enforced by prohibition." (Emphasis added.) *Id.* at ¶ 24. A straightforward reading of *Zitter* reveals no definitive indication as to whether R.C. 2111.02(A) is jurisdictional. Simply put, such a decision was not necessary to the resolution of the issue before the court. Thus, *Zitter* is inapposite.

{¶ 18} Moreover, we have previously held that the residency requirement set forth in R.C. 2111.02(A) is jurisdictional. For example, in *LeSueur,* 53 Ohio App.3d at 12, 557 N.E.2d 796, we held that LeSueur's lack of residence or legal settlement in Fulton County prevented the Fulton County Probate Court from exercising jurisdiction under R.C. 2111.02. *See also In re Tripp*, 90 Ohio App.3d 209, 211, 628 N.E.2d 139 (6th Dist.1993) (characterizing the residency requirement set forth in R.C. 2111.02(A) as a jurisdictional requirement and concluding that the Wood County Probate Court had

jurisdiction over the guardianship proceeding because Tripp was a resident of Wood County). Consistent with our prior holdings, we conclude that R.C. 2111.02(A) requires the alleged incompetent to be a resident of the county or have a legal settlement in the county in which the probate court is located in order for the court to possess jurisdiction over the guardianship proceeding. Thus, we find appellant's venue argument meritless.

{¶ 19} In his second argument, appellant asserts that Shelar's relocation did not divest the probate court of its jurisdiction because the relocation was involuntary. In *Zitter, supra,* the Supreme Court of Ohio stated: "if an apparent change of residence is involuntary, the residence remains the place before the forced move." *Zitter*, 106 Ohio St.3d 87, 2005-Ohio-3804, 831 N.E.2d 1003, at ¶ 25, citing *Saunders,* 34 Ohio St.3d at 16, 516 N.E.2d 232.

{¶ 20} However, appellant offers no evidence to support his contention that Shelar's change in residence was involuntary. The evidence appellant cites to in support of his argument (i.e. Gupta's report and Isenberg's report) is relevant in determining Shelar's *competence*. However, the evidence does not establish that Shelar's move to Florida was against his will or was procured by arrest, imprisonment, or any other involuntary means. *See Saunders,* 34 Ohio St.3d at 16, 516 N.E.2d 232, quoting *Murray v. Remus,* 1st Dist. Hamilton No. 2650, 1925 WL 2426, *7 (June 8, 1925) ("'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.'").

{¶ 21} Absent any evidence to the contrary, we conclude that Shelar voluntarily changed his residence and legal settlement to Florida. Consequently, the probate court no longer had jurisdiction over the guardianship proceeding under R.C. 2111.02(A).

{¶ 22} Accordingly, appellant's assignment of error is not well-taken.

III. Conclusion

{¶ 23} For the foregoing reasons, the judgment of the Lucas County Court of Common Pleas, Probate Division, is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE