[Cite as *In re Guardianship of Hollins*, 2006-Ohio-1543.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NOS. 86412 & 86574

IN RE: GUARDIANSHIP OF WALTER HOLLINS, JR.	:	JOURNAL ENTRY and OPINION
DATE OF ANNOUNCEMENT OF DECISION	:	MARCH 30, 2006
CHARACTER OF PROCEEDING:	:	Civil appeal from Common Pleas Court Probate Court Division Case No. 2002 GDM 66205
JUDGMENT	:	VACATED.
DATE OF JOURNALIZATION	:	

APPEARANCES:

For appellant Mark McLeod, Guardian:	Steven D. Rowe, Esq. Erica Ann Probst, Esq. KEMP, SCHAEFFER, ROWE & LARDIERE CO., LPA 88 West Mound Street Columbus, Ohio 43215
For appellee Regina Harris, Mother:	Geoffrey N. Fieger, Esq. FIEGER, FIEGER, KENNEY & JOHNSON 19390 West Ten Mile Road Southfield, Michigan 48075-2463
For appellee Walter Hollins, Sr.:	Terry H. Gilbert, Esq. 1700 Standard Building 1370 Ontario Street Cleveland, Ohio 44113

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For appellee Frederick R. Nance:	Frederick R. Nance, Esq. John F. Shelley, Esq. Walter J. Rekstis, III, Esq. J. Seth Metcalf, Esq. SQUIRE, SANDERS & DEMPSEY, LLP 4900 Key Tower 127 Public Square Cleveland, Ohio 44114-1304
For appellee University Hospitals of Cleveland:	Edward S. Jerse, Esq. Seamus J. McMahon, Esq. George M. Moscarino, Esq. William H. Falin, Esq. MOSCARINO & TREU, LLP The Hanna Building 1422 Euclid Avenue, Suite 630 Cleveland, Ohio 44115 Kevin M. Norchi, Esq. NORCHI & ASSOCIATES, LLC 23240 Chagrin Boulevard Suite 600 Beachwood, Ohio 44122

MICHAEL J. CORRIGAN, J.:

{¶ 1} Appellant, Mark McLeod ("appellant"), served as the guardian of minor, Walter Hollins, Jr. ("ward"), with respect to his personal injury and medical malpractice complaint (and to account to the probate court for any settlement proceeds the ward received) stemming from the inadequate and improper care the ward's mother received during the ward's birth. Appellant filed his "Application for Appointment of Guardian of Minor" in 2002. At that time, the ward was 15 years old. Just before the ward turned 18, the ward won a $30 million verdict against numerous defendants in his medical malpractice and personal injury lawsuit. The ward also settled separately with appellee, University Hospitals ("UH") for $1.5

for $1.5 million. The settlement with UH was agreed to among the parties and submitted to the probate court for approval. While approval from the probate court was pending, the ward turned 18 on January 29, 2005. Believing that the guardianship of the ward was terminated because he reached the age of 18, appellant filed the guardian's account on January 31, 2005 stating as follows:

{¶ 2} "Litigation is pending on behalf of the minor. As of January 29, 2005 (the ward's 18th birthday) no settlement had been approved by this Court and as a result there are no guardianship assets to report on this accounting."

{¶ 3} That same day, the ward's mother filed an "Application for Appointment of Guardian of Alleged Incompetent," seeking to obtain from the probate court the establishment of a guardianship for the ward, alleging now that he is "incompetent by reason of 'brain injury suffered at birth as a result of asphyxia.'" Also that same day, the probate court approved the settlement between the ward and UH.

{¶ 4} Later, the ward's mother moved to Michigan with the ward and withdrew her "Application for Appointment of Guardian of Alleged Incompetent." UH sent out its settlement check which appellant endorsed and gave to the ward's mother and the ward (who now has a guardian in Michigan). The probate court in March 2005 moved to vacate its own order approving the settlement because the ward reached the age of majority, which relinquished the court of its subject matter jurisdiction. UH objected, asserting that the

probate court retained subject matter jurisdiction over the ward after he turned 18 because he was incompetent.

{¶ 5} Upon a brief submitted by an appointed attorney in the legal community regarding the issue of the court's continuing jurisdiction, the probate court, on April 21, 2005, overruled its earlier motion to vacate finding that it maintained jurisdiction over the ward and ordered appellant to file a final account and provide receipts of disbursements within 10 days of the order. When appellant failed to comply with the probate court's order, the probate court, in May 2005, ordered appellant removed as the guardian of the ward. Appellant appeals from both the April 21, 2005 and May 2005 orders, which have been consolidated here.

I.

{¶ 6} For his first assignment of error, appellant argues that the probate court's April 21, 2005 order, overruling its motion to vacate and concluding that it maintained subject matter jurisdiction, is void ab initio because the ward's 18th birthday terminated the probate court's subject matter jurisdiction. Appellant's first assignment of error is well-taken.

{¶ 7} The probate court's subject matter jurisdiction over the guardianship of a minor ends when the ward reaches the age of majority. This is true even if there are motions pending before the probate court and the ward turns 18. See, *e.g.*, *In re Altomare*, Columbiana App. No. 99-CO-26, 2001-Ohio-3540. If, however, the ward is found incompetent by the probate court, then jurisdiction

jurisdiction continues.

{¶ 8} Here, appellant was appointed guardian of the ward based on his age - he was a minor at 15 years old. Appellant's own "Application for Appointment of Guardian of Minor" states that a guardian is necessary "[t]o file a complaint for personal injuries on behalf of the minor and to account to the Probate Court for any minor settlement proceeds which may be received." For the purposes of the probate court, the original guardianship existed because the ward was a minor.

{¶ 9} Although UH would like this court to believe that the ward's incompetency is undisputed, there is no finding in the record by the probate court that, in fact, the ward was incompetent, nor is there any pending "Application for Appointment of Guardian of Alleged Incompetent." UH contends that the ward was severely brain damaged as a result of his injuries and thus, was incompetent. Because he was treated as an incompetent, UH maintains that the probate court retained its jurisdiction despite the ward turning 18 years old.

{¶ 10} However, it is immaterial for the purposes of subject matter jurisdiction whether the ward was treated as an incompetent. As held by the Hocking county court of appeals in *In the Matter of the Guardianship of Sara E. Hinerman* (Nov. 1, 2001), Hocking App. No. 00CA1, absent an incompetency finding by the probate court or an application to establish a guardianship based on incompetency, Ohio law does not recognize "de facto" guardianships. This holds true

true even when the parties and the court continue to operate as if the guardianship still existed based on the child's serious injuries, such as cerebral palsy like in *Hinerman* or brain injury like the ward here. Looking at the record, the purposes of the guardianship are patently clear - the guardianship was established based on the ward being a minor, not being incompetent. Thus, the evidence in the record suggesting that the ward may be incompetent is irrelevant, especially when there is no finding by the probate court that the ward is, in fact, incompetent.

{¶ 11} Moreover, the applications for both types of guardianships are different and the proceedings to appoint guardianships on each of those independent bases are different. Indeed, the title of the application for appointment of guardian of "alleged incompetent" is telling - the ward is alleged to be incompetent until there is a finding of his or her competency. Here, there was no finding by the probate court that the ward was incompetent. While the ward's mother filed an "Application for Appointment of Guardian of Alleged Incompetent" after the ward turned 18, she later withdrew the application and moved to Michigan. Without the incompetency finding, the probate court's subject matter jurisdiction terminated.

{¶ 12} It is apparent to this court that the probate court acted in good faith and in the best interests of the ward when it found it had continuing jurisdiction. Like in *Hinerman*, "[t]here is no doubt in our minds that the [probate] court *** attempted to arrive at the

at the most judicious and beneficial results possible under the circumstances of the case." However, subject matter jurisdiction cannot be conferred on the probate court. Once the ward turned 18 on January 29, 2005, the probate court was without jurisdiction to issue any orders. Thus, appellant's first assignment of error is sustained and the April 21, 2005 order is vacated.

II.

{¶ 13} Similarly, the probate court also lacked subject matter jurisdiction to enter its May 2005 order removing appellant as guardian of the ward. Because the probate court's jurisdiction terminated when the ward turned 18, the probate court had no jurisdiction to enter any subsequent orders. Thus, appellant's second assignment of error is sustained and the May 2005 order removing appellant as guardian is vacated.

Judgment vacated.

This cause is vacated.

It is, therefore, ordered that said appellant recover of said appellees his costs herein taxed.

It is ordered that a special mandate be sent to said 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.

MICHAEL J. CORRIGAN
JUDGE

CHRISTINE T. McMONAGLE, J., CONCURS.

ANTHONY O. CALABRESE, JR., P.J., DISSENTS
WITH SEPARATE OPINION.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R.22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

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IN RE: GUARDIANSHIP OF :
WALTER HOLLINS, JR. :
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: D I S S E N T I N G
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: O P I N I O N
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:

DATE: MARCH 30, 2006

ANTHONY O. CALABRESE, JR., P.J., DISSENTING:

{¶ 14} I respectfully dissent from the majority opinion because I believe the probate court retained jurisdiction over Hollins after he reached the age of majority for the limited purpose of ruling on the motions pending before it. I believe *In re Altomare*, supra, can be distinguished from the case at hand. The ward in *Altomare* reached age 18 prior to the hearing regarding the disbursement of proceeds. In the instant case, Hollins reached age 18 after the hearing was held. Additionally, the magistrate filed his recommendation, the parties filed objections and the court held a second hearing, all while Hollins was a minor and clearly under the jurisdiction of the probate court. In fact, the only thing left for the court to do was enter judgment.

{¶ 15} Pursuant to R.C. 2101.24(C), "[t]he probate court has plenary power at law and in equity to dispose fully of any matter that is properly before the court ***." See, also, *Payton v. Payton* (June 20, 1997), Scioto App. No. 96CA2438 (holding that a court exhausts its jurisdiction only after disposing of all issues properly before it); *John Weenink & Sons Co. v. Court of Common Pleas* (1948), 150 Ohio St. 349, ¶3 of the syllabus (holding that when a "court of competent jurisdiction acquires jurisdiction of the subject matter of an action, its authority continues until the matter is completely and finally disposed of ***").

{¶ 16} Additionally, it is worth noting that the practical result of the court's decision in the instant case is that Hollins' $1.5 million settlement with University Hospitals is now being handled by

handled by a Michigan probate court. The Cuyahoga County Probate Court approved attorneys' fees and costs of approximately $481,000, while the Wayne County Probate Court in Michigan approved attorneys' fees and costs of approximately $990,000. According to the Cuyahoga County Probate Court's May 26, 2005 order removing the guardian, there was speculation that the attorneys in this case, particularly Geoffrey Fieger, were forum shopping because they were unhappy with the original allocation of attorneys' fees and that Hollins and his mother relocated to Michigan upon Fieger's request.