

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

NO. 32668

IN RE: SHELDA JEAN ROBINETTE,
A Protected Person

FROM THE CIRCUIT COURT OF TUCKER COUNTY, WEST VIRGINIA

C. A. No 04-G-2

RESPONDENTS' AND APPELLEES' BRIEF
IN THE ABOVE CAPTIONED CASE

BY CARLA ROBINETTE, Guardian
and Conservator for
SHELDA JEAN ROBINETTE,
Respondents

FILED
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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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Statement of Facts

1. Appellant, Kathy Robinette, is the daughter of the protected person, Shelda Jean Robinette, and resides as 4870 Quarry Lane, Richmond, OH 44143.

2. The Appellee is without knowledge as to the Order of the Common Pleas Court of Cuyahoga County, and avers that the Order speaks for itself in this proceeding.

3. Subsequent to the appointment of Elizabeth Goodwin, Esq. as guardian of the person and estate of Shelda Jean Robinette, Carla Robinette, sister of Appellant, moved Shelda Jean Robinette to Tucker County, West Virginia, and filed a Petition to be Appointed Guardian and Conservator for Shelda Jean Robinette to which was attached an Evaluation Report of Licensed Physician/Psychologist dated August 25, 2003 by Ed. L. Rader, M.D. (Copy attached as Exhibit D1 in the Petition for Appeal. A hearing was held on Carla Robinette's Petition on August 23, 2004.

4. The Appellee avers that the Twenty-Five Thousand Dollars (\$25,000.00) alleged in item 4. of the Petition for Appeal, was transferred, however, denies that the same was

fraudulent, and avers that the money is in an appropriate banking institution in the State of West Virginia in the name of Shelda Jean Robinette and Carla Robinette as Guardian and Conservator.

5. It should be pointed out that the Petitioner made no appearance in the original proceeding before the Circuit Court of Tucker County in August 23, of 2004, and only filed a Petition to Revoke the appointment after the matter was fully heard by the Circuit Court of Tucker County on August 23, 2004.

6. Attached hereto is a copy of the Order of Appointment of the said Carla Robinette as guardian and conservator, as Appellees' Exhibit "A", from which no appeal was taken, and it is contended by the Appellee herein that the Petition for Appeal should be dismissed in this case in that no appeal was taken or perfected in the original proceeding to appoint the Guardian and Conservator on August 23, 2004.

7. Carla Jean Robinette's Thirty Thousand Dollar (\$30,000.00) cash bond was approved by the Court by order dated October 22, 2004, which is sixty (60) days after the hearing on Carla Jean Robinette's petition. (copy attached as Petitioner's Exhibit D in their Petition for Appeal.) However, the Court below approved such filing and bond.

8. It should be pointed out unto the Court that the hearing on November 17, 2004, which is the basis for the appeal

of the Appellant, that the dicta contained by the Court and the colloque between counsel refers to the findings of the Court which were properly made on the August 23, 2004 proceeding and the Court found that Shelda Jean Robinette was a competent witness, however it is contended by the Appellee herein, that the dicta cited in the Brief of the Appellant in no way applies due to the specific written findings by the Court as can be seen from the Order of Appointment covering the proceedings of August 23, 2004.

9. It is a fundamental principle of law that a Court speaks only through it's Orders, and the Order denying the Petition to Revoke, contains no language as alleged in the Petitioner's Petition for Appeal.

Assignments of Error

1. As to the first Assignment of Error herein, the Appellee contends that the Court can only speak through it's Orders, and the specific Findings of Fact and Conclusions of Law made by the Court in the August 23, 2004 Order, which was not appealed by the Appellant, cannot be collaterally attacked herein.

2. As to the second basis for Appeal, the Court acknowledged that the proceedings as to the appointment of a Guardian and Conservator in Ohio were made, however, it should be pointed out unto the Court that the Ohio Court had no jurisdiction in this matter since the protected person was not a resident of the State of Ohio, and was only residing in the State of Ohio for a short period of time.

3. The protected person, Shelda Jean Robinette, was born and raised in Tucker County, West Virginia, owns property in Tucker County, and for all intents and purposes is a resident of the State of West Virginia and has been throughout these proceedings, and her entire lifetime.

4. As to the third basis for Appeal, the Appellee contends that the bond is not subject to review by this Court in that a Thirty Thousand Dollar (\$30,000.00) cash bond has been posted which is certainly preferable to a surety bond, and the bond was posted by the said Carla Robinette and the same was approved by the Circuit Court of Tucker County.

Points of Authority

Morgan v. Vest 125 W. Va. 367 24, S.E. 2d 329 (1943)
Scott v. Scott 141 W. Va. 533 91, S. E. 2d 621 (1956)
Hartman v. Hartman 132 W. Va. 728 53, S.E. 2d 407 (1949)
Shaw v. Shaw 155 W. Va. 712 187, S. E. 2d 124 (1972)
Brinkley v. Brinkley 147 W. Va. 557
Dominico vs. Dominico 153 W. Va. 695, 172 S. E. 2d 805
 (1970)
White v. Manchin et al 173 W. Va. 526, 318 S. E. 2d 470
 (1984)
Lotz v. Atamaniuk 172 W. Va. 116, 304 S. E. 2d 20 (1983)

Argument

As to Assignment of Error No. 2., it should be pointed out unto the Court that the said Shelda Jean Robinette has in all respects been a resident of West Virginia all of her lifetime, and it is respectfully submitted that the Circuit Court of Ohio had no jurisdiction whatsoever to appoint a Guardian and Conservator since the said Carla Robinette was not a resident of the State of Ohio at the time of such appointment.

The West Virginia Supreme Court has ruled that domicile or residence is mandatory in conferring venue upon courts of record. See Morgan v. Vest, 125 W. Va. 367, 24 S.E. 2d 329 and Scott v. Scott 141 W. Va. 533, 91 S.E. 2d 621 (1956).

In event that venue does not arise, the proceeding is void in all respects. See Morgan v. Vest supra and Hartman v. Hartman, 132 W. Va. 728, 53 S.E. 2d 407 (1949).

The West Virginia Supreme Court has ruled that domicile of the wife is that of her husband during co-habitation.

See Scott v. Scott 141 W. Va. 533, 91 S. E. 2d 621 (1956)

The Court's attention is invited to the case of Shaw v. Shaw 155 W. Va. 712, 187 S. E. 2d 124 (1972). The case was a divorce action but the Court held the considerations of domicile for the divorce are the same for settlement and distribution of a decedent's personal estate. The Shaw case also held that a change for convenience and working condition does not, without more, indicate a change in domicile citing numerous West Virginia cases. The Shaw case also stands for the proposition that to establish domicile, there must be a residence in a new locality and intention to remain there. The question is one of residence and intention and both must concur in order to establish a domicile. In the Shaw case, the Court held that the divorce was void due to an improper residence of the parties.

The Court's attention is also invited to the case of Brinkley vs. Brinkley, which involved a former County Clerk in Randolph County, which is found in 147 W. Va. at page 557. In this case, the Court invalidated a divorce obtained holding on

page 560, that the wife's domicile follows the husband. The case held that the temporary residence of the daughter of the former County Clerk in West Virginia was insufficient to create venue in West Virginia.

In the case of Dominico vs. Dominico, 153 W. Va. 695, 172 S. E. 2d 805 (1970) clearly shows that the West Virginia supreme Court has construed our venue statute as requiring domicile and has held that residence and domicile are synonymous under the divorce statutes. In this case, the Court upheld an award of custody to the father who had established a valid West Virginia residence, and cited the Brinkly v. Brinkly case which is found in 147 W. Va. 557 129 S. E. 2d at 436 for the authority that a wife's domicile follows that of the husband. See also numerous West Virginia cases.

One of the leading cases on domicile on residence is White v. Manchin et al 172 W. Va. 526, 318 S. E. 2d 470 (1984). Key Note No. 17 provides that a change in residence for convenience and working conditions does not, without more, indicate a change in domicile. In this case, the Court held, on page 529, that the term in residence is synonymous with the term domicile for election law purposes. The Court has used the terms "residence" and "domicile" interchangeably for

probate and domestic relations context. See the numerous cases cited therein.

The Court goes on to state, in their current discussion of the issue of domicile, several past cases refer to residence when domicile is actually appropriate. The case cited Lotz v. Atamaniuk which is found in 172 W. Va. 116, 304 S. E. 2d 20 (1983) for a discussion as to domicile and residence in domestic relations proceedings. The case held that domicile is a combination of residence or presence and an intention of remaining. The Court went on to say that two fundamental elements are essential to create a residence and these elements are: 1) bodily presence in a place. 2) the intention of remaining in that place. The Court further held that neither bodily presence nor intention alone will suffice to create a residence. There must be a combination and concurrence of these elements. The Court held specifically that Mr. Manchin had not established to necessary residence, or domicile, and thence, his candidacy was invalidated. The case cited Shaw v. Shaw supra, for the position that the important facts in determining the domicile of a person who has more than one residence are the physical character of each, the time spent, and the things done in each place etc. The Court, on page 541, states that "domicile" once acquired, is presumed to continue until it has been shown to have

changed, citing Hartman v. Hartman and various other cases therein.

An examination of the Lotz v. Atamaniuk case, revealed that the case involved a probate proceeding, however, in Key Note No. 7 it is stated that considerations for domicile for divorce as the same as settlement and distribution of a decedent's personal estate. The case in Sullabus Point II held "domicile" is a combination of residence or presence and intention of remaining. If domicile has once existed, mere temporary absence will not destroy it, however long continued.

In this particular case, even assuming, arguendo, that the Respondent did intend to reside in the State of Ohio, under the authority cited previously, she was not at liberty to do so since in West Virginia, the domicile of the husband is controlling, and by operation of law, she acquired the domicile of her husband in Tucker County.

There is absolutely no question in this case, that the parties lived and resided and were domiciled together in Tucker County for their entire lifetime, and there is no conceivable way that the Ohio Circuit Court could have usurped venue and jurisdiction in the Ohio Guardian and Conservator matters under the holdings of the West Virginia Supreme Court as aforesaid. The Law is thus clear, that there can be no venue or jurisdiction in the Ohio Guardian and Conservator

proceedings in this case. The Court in Ohio was utterly without jurisdiction to rule in this matter, such being the case, there was ample authority to declare the Ohio proceedings void ab-initio, and the Appellee contends that the proceedings before the Circuit Court of Tucker County were in all respects due and proper.

As to the first basis for appeal of the Appellant herein, as to the statement allegedly made by the Honorable Andrew N. Frye, during the hearing held on November 17, 2004, it is fundamental in the State of West Virginia that a Court speaks only through it's Orders.

In this particular case, the Court made detailed Findings of Fact and Conclusions of Law in it's August 23, 2004 Order which will be detailed as follows.

As can be seen from Exhibit A of the Appellant's Petition as to the Findings of Fact and Conclusions of Law of the Circuit Court, the Supreme Court's attention is called to the following.

First, the Court found that due and proper notice was given as to these proceedings, and the protected person was present along with the Guardian Ad Litem, and that no person appeared in opposition to the appointment of the said Cara

Robinette as Guardian and Conservator.

The Court expressly noted the previous appointment of Elizabeth A. Goodwin, however, evidence before the Court indicated that the said Shelda Jean Robinette, was a resident of Tucker County for her entire lifetime, and it submitted that the Ohio Court had absolutely no jurisdiction to appoint the Guardian and Conservator in the State of Ohio, since the said Shelda Jean Robinette was only residing in the State of Ohio on a temporary basis.

The Court expressly found that the said Shelda Jean Robinette was a resident of Tucker County, and the evidence before the Court indicated that she had been a resident all of her lifetime, owning property in Tucker County, voting in Tucker County, having a West Virginia driver's license, and all other matters indicating domicile and residence in the State of West Virginia.

The Court expressly found that the said Carla Robinette was a proper person to be appointed as Guardian and Conservator, and noted the felony conviction of the said Carla Robinette which was many years previous, and found the same to have no application herein.

The Court expressly found in conformance his opinion that Mrs. Robinette can maintain certain personal matters, however, indicated that it was clearly in the best interest and welfare of the said Shelda Jean Robinette to have the said Carla Robinette appointed as Guardian and Conservator.

In the Order of Appointment, the Court expressly included it's Findings of Fact and Conclusions of Law, and in all respects made the proper findings as required by West Virginia law.

Attached to the Order of Appointment was a Statement of Rights to Appeal of a Modification or Termination, citing West Virginia Code, §44A-4-6, which indicated that an appeal could be granted under the provisions of West Virginia law, and it should be pointed out unto the Court that no appeal was taken or perfected as to the August 23, 2004 Order, and it is submitted that the Petition for Appeal herein is not timely filed under the provisions of West Virginia law.

Points and Authorities

I. THERE WERE NO PROCEDURAL ERRORS IN THE TRIAL OF THIS CASE SO AS TO JUSTIFY A REVERSAL BY THE WEST VIRGINIA SUPREME COURT OF APPEAL AND THE RULINGS OF THE CIRCUIT COURT WERE SUPPORTED BY THE LAW AND THE EVIDENCE.

McDougal vs. McCammon, 193 W. Va. 229, 455 S. E. 2d 788 (1995).

Burgess v. Porterfield, 196 W. Va. 178, 469 S. E. 2d 114 (1996)

In Re: State of West Virginia Public Building Asbestos Litigation, 193 W. Va. 119, 454 S. E. 2d 413 (1994)

The West Virginia Rules of Evidence, and the West Virginia Rules of Civil Procedure, allocate significant discretion to the Trial Court in making evidentiary and procedural rulings, for this reason, the Court will generally apply an abuse of discretion standard to alleged procedural errors. See McDougal vs. McCammon, 193 W. Va. 229, 455 S. E. 2d 788 (1995).

In Burgess v. Porterfield, 196 W. Va. 178, 469 S. E. 2d 114 (1996), this Court stated "On appeal, this Court reviews the circuit court's final order and ultimate disposition under an abuse of discretion standard. We review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed de novo." Burgess v. Porterfield, 196 W. Va. 178, 469 S. E. 2d 114 (1996).

In considering the post trial motion or the motion to have the Guardian and Conservator removed, it appears as if the Trial Court applied the standard set out in In Re: State of West Virginia Public Building Asbestos Litigation, 193 W. Va. 119, 454 S. E. 2d 413 (1994).

"...the trial judge has the authority to weight the evidence and consider the credibility of the witnesses. If the trial judge finds the verdict is against the clear weight of the evidence, is based on false evidence or will result in a miscarriage of justice, the trial judge may set aside the verdict, even if supported by substantial evidence, and grant a new trial.: In Re: Asbestos Litigation, at 126.

Although the In Re: State of West Virginia Public Building Asbestos Litigation, involved a motion to set aside the verdict, it is submitted that in the case at bar, the Trial Court applied the proper standard of review, and determined that his previous findings were not against the clear weight of the evidence, and the Court properly denied the removal of the Guardian and Conservator herein. The Appellant relies on the dicta allegedly made by Judge Frye at the proceeding to remove the said Carla Robinette, however, such dicta is not contained in the Findings of Fact nor the Court Order appointing the said Carla Robinette, and it must be assumed that the Court made the proper findings as contained in it's Order, and the alleged statements by Judge Frye are only dicta in this case.

The case cited by the Appellant, State ex rel Shamblin v. Collier, is not applicable herein, in that it involves a proceeding under the former statute, and the Court recognized that the former statute was repealed by a passage of HB4508, on

March 12, 1994, such statute entitled the West Virginia Guardian and Conservator Act.

It should be indicated that the Guardian Ad Litem recommended the said Carla Robinette, to be appointed, and that there was no objection or exception made to Dr. Rader's Report.

The Appellant's assertion that there was a summary inquiry by the Court is not born out by the records, and it is submitted that the Court did make the specific Findings of Fact and Conclusions of Law as required by West Virginia Code, §44A-29E.

It is submitted that the Findings of the Circuit Court of Tucker County were in all respects proper, and the Petition for Appeal should be denied herein.

As to the argument made by the Appellant, as to Ohio law being controlling herein, it is specifically recognized that Ohio law provides that if the proposed ward was a resident at the time of the Guardianship proceedings were instituted, that the Court would have sole and exclusive jurisdiction.

The evidence developed before the Circuit Court of Tucker County indicated that the said Shelda Jean Robinette, was in fact a resident of the State of West Virginia, and the Court

inter alia found that the Ohio Court had no jurisdiction due to the lack of residence therein.

As to the third basis for appeal as to the inadequacy of the bond in question, the Court required a cash bond in lieu of a surety bond, and the Supreme Court will acknowledge that it is far more difficult to post a cash bond than a surety bond.

West Virginia Code, §44A-19C, is ambiguous in indicating that the Court may approve a bond in an amount and form that the Court may order, and provides that the Court may allow a property bond in lieu of a cash bond, and it submitted that due to the ambiguity of the Statute, the Court was within it's discretion as to requiring a cash bond herein.

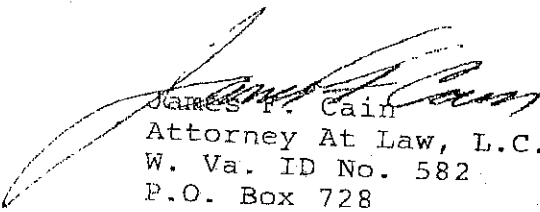
The Court specifically approved the cash bond by Order entered on October 22, 2004, and any delay in filing is not a violation of the act, and was specifically approved by the Circuit Court. See attached Exhibit "B".

It is thus submitted that the Petition as filed by the Appellant herein should be denied, and the Order of the Circuit Court of Tucker County should be affirmed by this Court.

The Appellant herein further contends that the Court was not made aware of the financial resources of the Protected Person, which is incorrect, and attached hereto and incorporated herein is the Appellees' Exhibit "C", which is a three (3) page Statement of Financial Resources filed prior to the hearing appointing the said Carla Robinette as Guardian, thus the Court were fully aware of the financial resources of the Protected Person.

CARLA ROBINETTE
Guardian and Conservator for
SHELDA JEAN ROBINETTE
Respondents

By Counsel



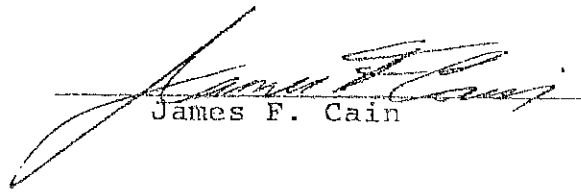
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CERTIFICATE OF SERVICE

I, James F. Cain, do hereby certify that I have served a true copy of the foregoing Respondents' and Appellees' Brief in Case No. 32668, upon the West Virginia Supreme Court of Appeals by fax filing on even date herewith, and upon Timothy N. Logan, Esquire, by placing a true copy of the same to him in the U. S. mail with sufficient postage attached thereto and addressed as follows:

Timothy N. Lgan, Esq.
54 N. Richhill Street
Waynesburg, PA 15370

Dated this the ~~11th~~ day of July, 2005.


James F. Cain