233

LEGAL SETTLEMENT — ILLEGITIMATE CHILD — WHERE WOMAN ABANDONS HUSBAND WITHOUT FAULT ON HIS PART AND LIVES SEPARATE AND APART FROM HIM IN ANOTHER COUNTY—LATER BECOMES MOTHER OF ILLEGITIMATE CHILD—SUCH CHILD DERIVES LEGAL SETTLEMENT FROM MOTHER, WHO IN TURN DERIVES LEGAL SETTLEMENT FROM HER HUSBAND—LEGAL SETTLEMENT OF SUCH ILLEGITIMATE CHILD IS THAT OF HUSBAND OF ITS MOTHER.

SYLLABUS:

In a case where a woman abandons her husband without fault on his part and continues to live separate and apart from him in another county, and later becomes the mother of an illegitimate child, such illegitimate child derives its legal settlement from its mother, who in turn derives a legal settlement from her husband; consequently, the legal settlement of such illegitimate child is that of the husband of its mother.

Columbus, Ohio, April 20, 1945

Hon. Harold K. Bostwick, Prosecuting Attorney
Chardon, Ohio

Dear Sir:

You have recently requested my opinion as to the legal settlement of one Nancy, an illegitimate minor.

My immediate predecessor in office rendered to the prosecuting attorney of Lake County on November 6, 1944, Opinion No. 7203 concerning the same party. Said opinion will be found in Opinions of the Attorney General for 1944 at page 608. However, the facts presented to my predecessor were so entirely different from those disclosed by the agreed statement of facts attached to your request that I find it necessary to set forth the facts presented to me. They are:

M. and R. were married in the state of New York on March 3, 1933. To this marriage were born three children. These children were all born in the city of Cleveland where R. has resided continuously since the marriage. Some time during the year 1936, M. started living with one D., although M. and R. were not at that time and have never since been divorced. R., the husband, filed a petition in the Cuyahoga County Juvenile Court alleging that M., his wife, abandoned their children. This case was heard in October, 1936, and a sentence imposed upon M. was suspended during good behavior. The three children were placed with their maternal grandmother in Geauga County and R., the father, was ordered to pay $6.00 per week for their support. He paid these sums until October, 1937. Since September, 1939, the eldest of the three children of M. and R. has been under the supervision of R. and has been supported by him. The two younger children have received aid from the Geauga County Relief Administration in the home of their maternal grandmother and since October, 1944, she has been receiving an aid to dependent children grant for them from Geauga County.

M. has never lived with R. since the hearing in Cleveland in October, 1936, but some time during that month M. and D. contracted a meretricious relationship and have since resided together as man and wife. They moved to Lake County from Cuyahoga County in October, 1936. On or about

March 1, 1938, they moved from Lake County to Geauga County, where they obtained poor relief beginning in July, 1938, and at various times up to September 9, 1943. On September 7, 1943, they moved back to Lake County. During the relationship of M. and D. there have been born five children. It is the youngest of these five children, Nancy, born July 27, 1943, who is the subject of your inqury.

Nancy was severely burned on November 24, 1943, and was taken to the Lake County Memorial Hospital where she remained until June 16, 1944. Non-residence notice was given Geauga County by said hospital following an application for relief filed November 29, 1943. The hospital bill amounts to $1125.00, on which D., the father of Nancy, has paid $10.00. It is upon this set of facts that you desire my opinion concerning the legal settlement of Nancy.

The opinion of my predecessor, above referred to, directs attention to Section 3476, General Code, containing the following language:

> "* * * Relief to be granted by the county shall be given to those persons who do not have the necessary residence requirements, * * *"

He pointed out that the phrase "necessary residence requirements" as contained in Section 3476, General Code, patently means the necessary residence requirements to obtain the relief at township or municipal corporation expense. It should also be carried in mind that when the General Assembly enacted the law popularly referred to as the "poor relief act" (Sections 3391 to 3391-12, both inclusive, General Code), which transferred most of the obligations to furnish "poor relief" to "county local relief authorities" and "city local relief authorities," it specifically retained the obligation of counties created by Section 3476, General Code, to furnish relief to persons not having the necessary residence requirements to obtain relief from such other authorities. See subparagraph 8 of Section 3391-2, General Code, reading as follows:

> "8. Except as modified by the provisions of this act, Section 3476 and other sections of the General Code of like purport shall remain in full force and effect and nothing in this act shall be construed as altering, amending, or repealing the provisions of Section 3476 of the General Code, relative to the obligation of the county to provide or grant relief to those persons who do not have the necessary residence requirements and to those who are

> permanently disabled or have become paupers and to such other persons whose peculiar condition is such that they cannot be satisfactorily cared for except at the county infirmary or under county control."

The agreed statement of facts states that it is the contention of Lake County that Nancy has received medical care at their expense. Section 3391, General Code, defining "poor relief," states that "medicines and the services, wherever rendered, of a physician or surgeon * * * furnished at public expense," constitute poor relief.

Since the services rendered Nancy constitute poor relief, we are led to inquire as to the legal settlement of Nancy, for, if she does not have a legal settlement in Lake County, it is nevertheless the duty of Lake County, as distinguished from the "Lake County Relief Authority," to furnish the medical care and services of a physician and surgeon, wherever rendered to said child at public expense, but if she in fact has a legal settlement in Geauga County or some other county than Lake County, it would seem that Lake County would be entitled to reimbursement for the cost of such relief. The statutes providing for the recovery of expenses of relief furnished in such instances are Sections 3482, 3483, 3484, 3484-1 and 3484-2, General Code. I am assuming from your inquiry that you are familiar with such statutes and will confine my remarks to the question previously stated.

The term "legal settlement" is defined in Section 3477, General Code. That section reads as follows:

> "Each person shall be considered to have obtained a legal settlement in any county in this state in which he or she has continuously resided and supported himself or herself for twelve consecutive months, without relief under the provisions of law for the relief of the poor, or relief from any charitable organization or other benevolent association which investigates and keeps a record of facts relating to persons who receive or apply for relief. No adult person coming into this state and having dependents residing in another state, shall obtain a legal settlement in this state so long as such dependents are receiving public relief, care or support at the expense of the state, or any of its civil divisions, in which such dependents reside."

As pointed out in Opinion No. 6307, rendered by my predecessor and found in Opinions of the Attorney General for 1943 at page 473, the terms

"legal settlement," "legal residence" and "domicile" are not synonymous. However, the criteria by which it is determined whether a "legal settlement" has been acquired are in many respects the same as those by which "legal residence" or "domicile" is determined. We find the courts in each instance referring to such facts as place of birth, expression of intent, and freedom of choice. Therefore, the decisions upon questions of residence and domicile are helpful.

The place of birth of an illegitimate child determines its settlement until another can be shown, whether acquired derivatively or by its own acts. Kennan on Residence and Domicile (1934 Ed.), page 599.

Admittedly, Nancy, born July 27, 1943, can not by her own acts have acquired a legal settlement. The proposition that a minor can not change its legal settlement has been the law of this state for many years. Trustees of Jefferson Township v. Trustees of Letart Township, 3 Ohio 100; Trustees of Spencer Township v. Trustees of Pleasant Township, 17 O. S. 31. See also, LaCrosse County v. Vernon County, 233 Wis. 664, 290 N. W. 279.

The question then is, has Nancy a legal settlement by derivation? It should be remembered that not every person has a legal settlement, although every person does have a domicile. If Nancy has a legal settlement other than the place of her birth, it must have been derived from her mother. The authorities seem agreed that the domicile of an illegitimate child is that of the child's mother. Likewise, if the mother has a legal settlement, the legal settlement of her illegitimate child is that of the child's mother. See Kennan on Residence and Domicile, page 299; also Milwaukee County v. Waukesha County, 236 Wis. 233, 294 N. W. 835.

M., the mother of Nancy, was and still is legally married to R. According to the agreed statement of facts, R. has been since 1934 and still is a resident of Cuyahoga County and has a legal settlement in that county. M. abandoned him and her legitimate children in that county when she and D. moved to Geauga County in the year 1936. The statement of facts contains no information upon the cause of the separation. However, I am informed by it that the wife was found guilty upon a charge of abandonment preferred in Cuyahoga County Juvenile Court by

the husband. With this fact in mind, I am forced to conclude that the fault was on the part of the wife, M., or at least that she had no actionable ground of complaint against R. The authorities are quite generally agreed that if the wife is compelled to leave the husband for any reason which would constitute a ground for divorce she can establish a domicile for herself. See Hawkins v. Ragsdale, 80 Ky. 353, and cases cited in 44 Am. Jur. 483. On the other hand, if the husband is wholly without fault, the wife retains his domicile though she may be absent from his domicile for a long period.

While some recent decisions seem to lean toward the theory that there can be an amicable separation, not based upon actionable fault of either party, Ohio courts have not taken any steps in that direction. In fact, the law in Ohio seems to be that nothing short of divorce can restore to a woman the right to acquire for herself a legal settlement different from that of her husband. In Trustees of Spencer Township v. Trustees of Pleasant Township, 17 O. S. 31, the syllabus reads:

> "1. The legal settlement of a minor child, member of his father's family, continues to be in the township where his father was last legally settled, notwithstanding the father removes with his wife and children to a township in another county and there abandons them, if neither he nor his family remain in such township long enough to acquire a new settlement.
>
> 2. The abandoned wife, during coverture, is not legally able to acquire for herself or minor child a legal settlement different from that of her abandoned husband, the father of the child.
>
> 3. After such abandoned wife procures a divorce from her husband, she then, but not before, becomes able, as a *feme sole*, to acquire for herself a legal settlement; and if her custody of the minor child, granted by the decree of divorce, has any effect to make her legal settlement instead of her former husband's, the settlement of the child, such effect cannot follow until time enough elapses after the divorce and before her subsequent second marriage, to enable her to acquire a legal settlement as a *feme sole*."

Ohio is not alone in this category. The case of Thomaston v. St. George, 17 Me. (5 Shep.) 117, also stands for the proposition that a wife is incapable of gaining a settlement in her own right.

Some question may arise by reason of the fact that M. was and still is a married woman whose husband resides in an adjoining county, which tends toward the presumption of legitimacy accruing to children born

during coverture. The rule respecting the proof necessary to overcome the presumption of legitimacy has been considerably relaxed in Ohio by the recent case of State, ex rel. Walker, v. Clark, 144 O. S. 305. The second and third paragraphs of the syllabus are:

> "2. A child conceived during the existence of a lawful marital relation is presumed in law to be legitimate—a procreation of the husband and wife.
>
> 3. Such presumption is not conclusive and may be rebutted by evidence, which must be clear and convincing, that there was no sexual connection between the husband and wife during the time in which the child must have been conceived. (Paragraph two of the syllabus in the case of Powell v. State, ex rel. Fowler, 84 Ohio St., 165, overruled.)"

If the presumption of legitimacy has not been overcome in this instance, Nancy is presumed by the law to be the child of R; and Nancy would derive a legal settlement in Cuyahoga County directly from him. However, your agreed statement of facts states that Nancy is the illegitimate child of M. and D., and for the purposes of this opinion she has been so regarded.

It is therefore my conclusion that an illegitimate child acquires its legal settlement by derivation from its mother. If the mother is a married woman, her legal settlement is derived from her husband, and such legal settlement is also the legal settlement of her illegitimate child.

Applying the foregoing conclusions to the set of facts presented by you, I am of the opinion that the legal settlement of Nancy is Cuyahoga County.

Respectfully,

HUGH S. JENKINS

Attorney General