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1. JUVENILE COURT ACT — ILLEGITIMATE DEPENDENT CHILD — EXPENSES, COMMITMENT AND SUPPORT, INSTITUTION FOR FEEBLE MINDED, CHARGEABLE, COUNTY, CHILD'S LEGAL SETTLEMENT — WHERE CHILD TRANSFERRED TO FOSTER PARENT, IN FOREIGN COUNTY AND MOTHER, LATER RENOUNCEMENT AND TRANSFER ESTABLISHES CHILD, LEGAL SETTLEMENT, MOTHER.
2. CHILD UNDER JURISDICTION PROBATE COURT — RESIDENCE DETERMINED BY COMMISSIONER OF MENTAL DISEASES — SECTION 1890-33 G.C.

SYLLABUS:

1. *Under the Juvenile Court Act the expenses incident to commitment and support of an illegitimate dependent child to an institution for the feeble-minded are to be charged to the county of the child's legal settlement. Where the mother of the child has verbally released her right to custody and has transferred the child to a foster parent in another county, a later renouncement and transfer of the child to the mother immediately establishes in the child the legal settlement of its mother.*

2. *Where the commitment proceedings are instituted under the jurisdiction of the probate court the determination of residence of the child is to be decided by reference to the commissioner of mental diseases as provided in Section 1890-33, General Code.*

Columbus, Ohio, August 4, 1941.

Hon. John W. Howell, Prosecuting Attorney,
Gallipolis, Ohio.

Dear Sir:

This will acknowledge receipt of your request for my opinion, which reads as follows:

"I would like to obtain your opinion concerning the legal

settlement of a child that we now have in this county.

The facts of the case are as follows: In January 1926 an illegitimate child was born to a single woman in this county. During the year 1928 the mother took the child to Delaware County in this state and placed the child with a man and his wife verbally releasing all claim to the child. In about two years after this date or in 1930 the married couple who had assumed the care and support of such child removed to Lucas County in this state where the child has been ever since. In 1935 the foster mother of this child was accidentally killed and the foster father then placed the child with his sister in Lucas County and contributed towards the support and maintenance of said child until December 1940 when the father felt he no longer could pay for its support. At this time he brought the child to its mother who in the meantime had married and now lives in Gallia County where he left said child with the mother. At no time since 1928 has the mother contributed toward the support of this child.

Inasmuch as this child is feeble-minded and now a public charge, the question has arisen as to whether or not this county or Lucas County is the county of her legal settlement to pay for her commitment to one of the state institutions for feeble-minded."

The child described in your inquiry, handicapped by dependency as well as feeble-mindedness, is not only subject to the jurisdiction of the juvenile court and the provisions of law pertinent thereto, but also to the jurisdiction of the probate court and the provisions of law specifically relating to institutions for the feeble-minded and insane.

In Section 1890-103, General Code, it is provided that:

"In the reception of feeble-minded persons into the institution for the feeble-minded, preference and priority, so far as practicable, shall be given to feeble-minded children who are delinquent or dependent, as defined in the juvenile court code of the state. No prior or separate proceedings under the juvenile court code shall be necessary, however, to the institution of proceedings and commitment of a juvenile delinquent or dependent as feeble-minded to the institutions for the feeble-minded."

The above quoted section as it appeared in former Section 1894, General Code, was discussed in Deibels' Ohio Probate Law, 1936 at Section 98 in the following language:

"As to feeble-minded delinquent or neglected children, the probate court has jurisdiction to commit under this section;

but apparently the juvenile court can commit to feeble-minded institutions, also.”

This dual jurisdiction is mentioned because of the differences in procedure which affect the determination of responsibility for the payment of charges incident to commitment and support.

In Chapter III of the General Code, which deals specifically with institutions for the feeble-minded and insane, it is provided in Section 1890-45 that the charges of support and maintenance of patients confined in state institutions for the feeble-minded shall be paid in accordance with provisions of existing Sections 1815-1 to 1815-10 and Section 1815-12, General Code. Section 1815-12, General Code, provides in substance that the committing county shall be liable for the inmate's support. An exception to this liability of the county making the commitment, however, is set forth in Section 1890-33, General Code, as follows:

“If the legal residence of such person is in another county of the state of Ohio, the regular probate court fees and expenses incident to the commitment and any other expense incurred in his behalf, shall be charged to and paid by the county of his residence upon the approval and certificate of the probate judge thereof. A certified transcript of all proceedings had in the committing court shall be sent to the probate court of the county of the residence of such person. Such court shall enter and record said transcript. All further proceedings shall be the same as if the affidavit had been filed, hearing had, and commitment made in such probate court. Such certified transcript shall be prima facie evidence of the residence of such person. When the residence of such person cannot be established as represented by the committing court, the matter of residence shall be referred to the commissioner for investigation and determination.”

It will be noted from the foregoing that the determination of residence is to be decided by reference to the commissioner of mental diseases. It follows, therefore, that if proceedings for commitment are instituted in the probate court, the determination of residence or settlement of the child in question is to be decided in the manner provided and not by opinion issuing from this office.

However, if the child is to be committed as a dependent to an institution for the feeble-minded under the Juvenile Court Act the question of liability for support is governed by Section 1639-34, General Code, which provides as follows:

“When a child has been committed as provided by this chapter, the court may make an examination regarding the income of the parents or guardian or person charged with its support, and may then order that such parent or guardian or person pay for the care, maintenance and education of such child, and for expenses involved in providing orthopedic, medical or surgical treatment or special care of such child. The court shall have power to enter up judgment for the money due and to enforce such judgment by execution. Provided, however, that whenever a child which has a legal settlement in another county comes within the jurisdiction of the court, the court may certify such case to the court of the county of legal settlement exercising the powers and jurisdiction conferred in this chapter for further proceedings, and such court shall thereafter proceed as if the original complaint had been filed in said court.

Any expense incurred for the care, support, maintenance, education or medical or surgical treatment or special care of a child, which has a legal settlement in another county, shall be at the expense of the county of legal settlement, if the consent of the judge of the court exercising the powers and jurisdiction conferred in this chapter, of the county of legal settlement is first obtained. When such consent is obtained, the county commissioners of the county in which such child has a legal settlement, shall reimburse the committing court for such expense, out of its county general fund.

Any dependent or neglected child which has a legal settlement in a foreign state may be committed to the state department of public welfare, division of charities, for return to the state of legal settlement.

Any expense created by the court for the care, maintenance and education of dependent, neglected or delinquent children, or for orthopedic, medical or surgical treatment or special care of such children under the provisions of this chapter, except such part thereof as may be paid by the state or federal government, shall be paid from the county treasury upon specifically itemized vouchers, certified to by the judge of the court.”

The residence or legal settlement of a child is controlled by Section 1639-6, General Code, which enacts into statutory law the common law rule. Section 1639-6 provides:

“For the purposes of this chapter, a child shall have the same residence or legal settlement as its parents, legal guardian of its person, or his custodian who stands in the relation of loco-parentis. A person shall be presumed to have a legal settlement in any county of the state in which he or she has continuously resided and supported himself or herself for twelve consecutive months without public relief or assistance.”

No distinction is made in Section 1639-6, supra, with respect to illegitimate children and it would seem, therefore, that the Legislature intended that an illegitimate child is to be embraced within the meaning of the word "child" as it appears in the section.

In Opinion No. 891, Opinions of the Attorney General for the year 1937, Vol. II, at page 1607, it was held that an illegitimate child takes the legal settlement of the mother. This derivative right in the child is immediate and arises at birth. 48 C. J. 483.

While Section 3477, General Code, in defining legal settlement qualifies its acquisition by requiring a prior twelve month residence, this qualification has no application to a settlement acquired through derivation.

In view of the fact that no judicial proceedings have been instituted, it is evident that the mother is the lawful custodian of the child for it is well settled in Ohio that no rights can be acquired under a materially defective adoption proceedings. 1 O. J. 440.

It has been held, however, that a verbal release, coupled with consideration, may constitute a contract to adopt and thus change the lawful custody of the child. But in the instant case the return of the child would be tantamount to a rescission of such an executory contract and defeat any right to custody. Clark vs. Bayer, 32 O.S. 299.

Whether the settlement of the child in question acquired at the time of birth was extinguished or changed by the defective adoption need not be discussed for under Section 1639-6, supra, the question is rendered moot by the subsequent return of the child to its parent. At the time of the return the child derived the legal settlement of its mother and whether this present settlement status is to be considered as a reacquisition or simply a continuation of the settlement acquired at birth makes little difference in the determination of the county ultimately responsible for the expenses incident to commitment and support of the child.

In answer to your inquiry, therefore, it is my opinion that:

1. Under the Juvenile Court Act the expenses incident to commitment and support of an illegitimate dependent child to an institution for the feeble-minded are to be charged to the county of the child's legal settle-

ment. Where the mother of the child has verbally released her right to custody and has transferred the child to a foster parent in another county, the later renouncement and transfer of the child to the mother immediately establishes in the child the legal settlement of its mother.

2. Where the commitment proceedings are instituted under the jurisdiction of the probate court the determination of residence of the child is to be decided by reference to the commissioner of mental diseases as provided in Section 1890-33, General Code.

Respectfully,

THOMAS J. HERBERT,
Attorney General.