2150.

LEGAL SETTLEMENT—MARRIED WOMAN, RESIDENT OF FOREIGN STATE — SEPARATION FROM HUSBAND, THE AGGRESSOR—SHE AND CHILDREN IN HER CUSTODY MAY ESTABLISH RESIDENCE IN OHIO — AFTER SUCH LEGAL SETTLEMENT IN COUNTY OF STATE, COMMITMENT OF MOTHER TO STATE HOSPITAL AND PLACEMENT OF CHILDREN IN PRIVATE BOARDING HOME DOES NOT CHANGE LEGAL SETTLEMENT OF PARTIES.

SYLLABUS:

1. *A married woman, residing outside of this state, may, on account of her husband's aggression, separate from him for the purpose of establishing in the state of Ohio her own legal settlement and that of her children in her custody.*

2. *After the establishment of such a legal settlement for herself and that of her children in her custody in a county in Ohio, the subsequent commitment of such married woman to the State Insane Hospital, and the plating of her children in a private boarding home in said county, does not change her legal settlement or that of the children in her custody.*

Columbus, Ohio, April 6, 1940.

Honorable Alva J. Russell, Prosecuting Attorney,
Akron, Ohio.

Dear Sir:

Acknowledgment is made of the receipt of your communication which reads as follows:

"I am requesting your opinion on the following:

For the sake of convenience the husband will be designated M and the wife N.

M and N were married in Cleveland in 1927. Sometime thereafter they removed to Pennsylvania; two children being born of this union. In 1929 M had an illegitimate child by X. In 1930 N returned to Cleveland together with the two legitimate children. In 1932 N was probated in Cleveland and since that time has been confined to the Cleveland State Hospital. The two legitimate children were placed in a boarding home in Cleveland in 1932 under the supervision of the Cleveland Children's Bureau which is a private charity organization. No commitment was made by the Cuyahoga County Juvenile Court. From 1932 up to the present time these two children have been taken care of in Cuyahoga County by the Cleveland Children's Bureau.

In the meantime, M, who started to live with X, came to Akron, Ohio, from Pennsylvania; this being in 1931. He was given relief in Akron in 1931 and 1932, and was returned to Pennsylvania in 1935. M was in Pennsylvania until April, 1938, when he came to Akron along with X and three illegitimate children. He has been in Akron since that time. He received public assistance after returning here and has been on WPA in Akron for the past year. The reason was given that it was easier to support this family on WPA than it would have been providing for them by direct relief.

The Cleveland Children's Bureau is now requesting Summit County to support the two legitimate children who have always been in Cuyahoga County and have never been in Summit County.

I might add further that N left M in Pennsylvania by reason of M's aggression. This is corroborated by the fact that one illegitimate child was born in June, 1929.

Your opinion is asked on the following points:

1. What is the residence of the two legitimate children?

2. Which county is responsible for the support, public assistance of the two legitimate children?

3. Does the fact that N is hospitalized in a public institution

make these children residents of Cuyahoga County for relief purposes? Does residence of children change to that of M when N is hospitalized?

4. Does receiving assistance from WPA prohibit M from establishing a residence in Summit County so that no public assistance can be given to his family?

5. Does the fact that the Cleveland Children's Bureau is a private child caring organization effect the residence of the legitimate children in any way?"

Section 3477 of the General Code, defining legal settlement, is 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."

Minors have no right to select or determine their legal settlement but that must be chosen by either or both of their parents. This conclusion is supported by the court in the case of Commissioners v. Commissioners, 116 O. S. 663, commenting as follows at page 667:

"Manifestly the minors of themselves could not change their legal settlement by going from one county to another without their parents, * * *."

From your letter it is noted that the mother with her children, because of the husband's aggression, moved to Cleveland, Ohio, from Pennsylvania in 1930, and was probated to the Cleveland State Hospital in 1932, thus making it necessary to place the children in a private boarding home in that city. It is my view, from the above facts, that under the laws of Ohio the mother had a right to assume custody of the children and change her residence in 1930 from Pennsylvania to Cleveland, Ohio, regardless of Section 7996 of the General Code, which gives the husband the right to select the place and mode of living. This view is supported by the court in the case of Cache v. Cache, 12 O. App. 140, wherein the first and second branches of the syllabus read:

"1. When a wife is justified in separating from her husband by reason of his aggression, she may lawfully select and acquire a residence separate from his.

2. If the wife removes into this state and acquires a bona fide residence herein for the length of time required by our Code, she is entitled to the benefit of our divorce laws, although during all of the time she lived with her husband he was a resident of another state and continued to reside therein."

Further support for this conclusion is found in the case of Chever v. Wilson, Vol. 9 Wall. 108, where the court commented as follows:

"The rule is that she may acquire a separate domicile whenever it is necessary or proper that she should do so. The right springs from a necessity for its exercise and endures as long as the necessity continues."

In the case of Cache vs. Cache, supra, the court commented further at page 143 of the opinion:

"When a married woman is justified in separating from her husband, his marital control over her, which made his residence her residence, is broken, and she can lawfully acquire an actual residence separate from his. She then has a right to select any place for her residence that she may desire."

A similar rule was applied and commented upon in the case of Ex Parte Bryant, 106 Ore. 359, 20 R. C. L. 599.

The fact that the wife lived in Cleveland, Ohio, almost two years before the probate court assumed jurisdiction was indicative of her legal settlement. In support of this conclusion, reference is made to Opinions Attorney General, 1920, Vol. 1, page 265, Opinion No. 1063, the syllabus reading in part:

"A probate court has not jurisdiction in insanitary cases where the residence of the alleged insane person is known unless said person has a legal settlement in the county."

The residence of the mother at the time of her commitment to the Cleveland State Hospital determined that of the children. There have been no subsequent changes that would alter their place of residence since that time. Legal commitment by the probate court to the State Hospital would in no way change the residence of the children or cause it to revert to that of the father, because the mother at that time being *non compos mentis* and still having her abode in Cleveland, Ohio, would not be mentally capable of

establishing an intent to change her legal settlement at that time. The courts have consistently held that in the determination of custody, the welfare of the children is a most important factor. In support of this conclusion the court, in the case of In Re Taylor, 19 O. N. P. 438, commented as follows:

> "In an action involving the custody of a child, as to which there has been no judicial determination, the residence of the parent having the present custody is sufficient to confer jurisdiction, and where the best interests of the child seem to require that such custody be continued it will not be disturbed, * * *."

The rule for determining legal settlement of children for purposes of administration of the poor laws was changed at the time of the adoption of Section 10507-8 of the General Code, which section reads as follows:

> "The wife and husband are the joint natural guardians of their minor children and are equally charged with their care, nurture, welfare and education and the care and management of their estates. The wife and husband shall have equal powers, rights and duties, and neither parent has any right paramount to the right of the other concerning the custody of the minor or the control of the services or the earnings of such minor or any other matter affecting the minor; provided that if either parent, to the exclusion of the other, is maintaining and supporting the child, such parent shall have the paramount right to control the services and earnings of the child. Neither parent shall forcibly take a child from the guardianship of the parent legally entitled to its custody.
>
> In case the wife and husband live apart, the court may award the guardianship of a minor to either parent, and the state where the parent having the lawful custody of the minor resides, shall have jurisdiction to determine questions concerning the minor's guardianship."

It is true that prior to the enactment of Section 10507-8, supra, the legal settlement of a minor followed that of the father, but the provisions of the above statute make the support of children a joint and equal duty of both father and mother. This rule is commented upon in 30 O. Jur. p. 663, §88, as follows:

> "* * * Children were held to have the settlement of their fathers, before the statute (10507-8) set out supra, §48, making the support of children a joint and equal duty of father and mother, was enacted. * * *"

In determining the legal settlement of these children, it is unnecessary to answer your forth question because the residence of the father and the place of his employment is irrelevant to the determination of the question involved.

In view of the foregoing group of facts and the law governing these facts, it is my opinion that:

1. A married woman, residing outside of this state, may, on account of her husband's aggression, separate from him for the purpose of establishing in the state of Ohio her own legal settlement and that of her children in her custody.

2. After the establishment of such a legal settlement for herself and that of her children in her custody in a county in Ohio, the subsequent commitment of such married woman to the State Insane Hospital, and the placing of her children in a private boarding home in said county, does not change her legal settlement or that of the children in her custody.

Respectfully,

THOMAS J. HERBERT,
Attorney General.