

281.

JUVENILE COURT—WHEN JURISDICTION EXISTS FOR COMMITMENT OF CHILDREN—CHILDREN'S "LEGAL SETTLEMENT" DISCUSSED.

SYLLABUS:

1. *A Juvenile Court does not have jurisdiction to make commitments of children under Section 1653, General Code, unless service, either actual or constructive, is first had on the father of such child or on the person having the custody of such child, which custody was created by operation of law, or awarded to such person by judicial order, judgment or decree.*

2. *A father, by force of his kinship, is the natural guardian of his minor children, and the children's domicile and "legal settlement" is that of the father unless and until that status is changed by operation of law, or by judicial order, judgment or decree.*

COLUMBUS, OHIO, April 9, 1929.

HON. J. F. KUHN, *Prosecuting Attorney, New Philadelphia, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion which reads as follows:

"One, _____, was committed to the Tuscarawas County Children's Home in June 6, 1924, by the Juvenile Court of Tuscarawas County. The commitment, in part, reads as follows:

"To be there received, cared for, educated and kept in custody of the trustees of said home, until he shall arrive at the age of 18 years, unless sooner released according to law, by the proper authorities of said institution, or by this court."

At the time the complaint was filed, a citation was issued by this court, but the citation did not include the father, and no service, either by publication or otherwise, was made upon him. His whereabouts were unknown at the time.

On October 31st, 1925, the parents of _____ moved from Wheeling, West Virginia, to 409 Tremont Street, Massillon, Stark County, Ohio. On February 9, 1926, on demand of the father *_____ was returned to his parents, and lived with them in Massillon, Stark County, until August 23rd, 1927. From January 7th, 1927, to May 2nd, 1927, the family received aid at various times from the Salvation Army in Massillon, Stark County, Ohio

Due to the fact that the father assaulted one of his daughters on August 20th, 1927, he was sent to the Canton workhouse, and _____ was placed in a foster home near Navarre in Stark County about September 1st, 1927, and remained there until December, 1928.

During September, 1927, the family received some aid from the Associated Charities in Massillon, Stark County, Ohio, but outside of that no other aid was received.

It now becomes necessary to provide a home for _____. What county is liable for his support? Your attention is called to the case of *Lewis vs. Reed*, 117 O. S. 152."

Sections 1647 and 1648, General Code, found in the chapter of the Code relating to juvenile courts, read in part as follows:

Sec. 1647. "Any person having knowledge of a minor under the age of

eighteen years who appears to be either a delinquent, neglected or dependent child, may file with such juvenile court a complaint, * * * ”

Sec. 1648. “Upon filing of the complaint, a citation shall issue, requiring such minor to appear, and the parents or guardian or other person, if any, having custody or control of the child, or with whom it may be, to appear with the minor at a time and place to be stated in the citation; * * * Whenever it shall appear from affidavit that a parent or guardian or other person having the custody of such child resides or has gone out of the state or that his or her place of residence is unknown so that such citation cannot be served on him or her, the clerk shall cause such citation to be published once in a newspaper of general circulation throughout the county, and published in the county, if there be one so published. The citation shall state the nature of the complaint, and the time and place of the hearing, which shall be held at least two weeks later than the date of the publication; and a copy of such citation shall be sent by mail to the last known address of such parent, guardian or other person having custody of such child, unless said affidavit, shows that a reasonable effort has been made without success to ascertain such address. * * * When said period of two weeks from the time of publication shall have elapsed, said court shall have full jurisdiction to deal with such child as provided by this chapter. * * * ”

In the case of *Rarey vs Schmidt*, 115 O. S. 518, it is held as stated in the syllabus:

“1. The words, ‘other person having the custody of such child,’ as used in Section 1648, General Code, contemplate and mean a person having the custody created by operation of law or awarded to such person by judicial order, judgment, or decree.

2. Where a minor child has neither legal guardian nor a custodian created by operation of law or by judicial order, judgment, or decree, other than a parent, and the residence of such parent is known, service, actual or constructive, must be had upon such parent before a juvenile court has jurisdiction to declare such child a dependent child.

3. An order of a juvenile court declaring a minor child to be a dependent child and awarding its custody to a stranger, obtained without service upon the parent, the guardian, or a person having the custody of such child by operation of law or awarded by a judicial order, judgment, or decree, confers upon such stranger no power to consent to the adoption of such child by any one.”

In the case of *Lewis vs. Reed*, 117 O. S. 152, the first branch of the syllabus reads as follows:

“Under Section 1648 of the General Code, the mother of an illegitimate child is entitled to notice, actual or constructive, of proceedings upon a complaint of dependency instituted in the juvenile court in reference to such child. Until notice of such proceedings has been given to the mother, the jurisdiction of the juvenile court does not attach and a judgment of permanent commitment rendered in such dependency proceeding is void.”

In both of the above cases there was involved the element of fraud which had been practiced on the court as the whereabouts of one of the parents was known to the complainant in both cases; however the court particularly in the Schmidt case decided the case squarely on the question of jurisdiction. In the course of the opinion, at page 520, the court said:

"In view of the conclusion we have reached, we shall confine our consideration and discussion to the question of jurisdiction.

The jurisdiction of the juvenile court to declare a child dependent, and therefore to deal with its custody, care, supervision, and education, is of statutory creation, and the answer to the jurisdictional problem of this case must be found in the statute."

In view of the terms of the statute, Section 1648, *supra*, and the construction placed thereon in the two cases above referred to, it seems clear that the original commitment of the child referred to in your inquiry, made by the Juvenile Court of Tuscarawas County on June 6, 1924, was void for the reason that the court did not have jurisdiction in the premises, unless the person in whose custody the child was at that time had that custody "by operation of law" or such custody had been awarded "to such person by judicial order, judgment or decree" and I infer that was not the case else you would not have mentioned the fact that the father was not cited by publication or otherwise.

Be that as it may, however, the trustees of the Tuscarawas County Children's Home surrendered the child to its parents in Stark County on February 9, 1926, as they had a right to do if the commitment had been legal. Section 3094, General Code, with reference to the administration of a children's home by its trustees, provides in part:

" * * * The trustees may discharge any inmates of such home and may return them to their parents or guardians when they believe them capable of providing for themselves or their parents or guardians for them."

The trustees of the Tuscarawas County Children's Home apparently thought the parents of this child were capable of providing for it when they returned it to them.

Nothing appearing in your communication to the contrary, I assume for the purposes of this opinion that the father of the child is still a resident of Stark County, and no proceedings have been taken to change the legal relationship between the father and the child. The father, by force of his kinship, is the natural guardian of the child, and will remain so until through some legal procedure the relationship is changed by the appointment or designation of a legal guardian.

In *Jacobs on Domicile*, Sections 235 and 236, it is said that while the father lives the domicile of a child is the same as that of his father, he being the natural guardian of the child, and that the father can change the domicile of the child only by changing his own. Of course, if the custody of a child is taken from the father by a court of competent jurisdiction and a legal guardian is appointed or designated for the child, or the legal custody of the child is reposed in some one other than the father, the domicile of the guardian so appointed or that of the person into whose custody the child is given becomes the domicile of the child.

In a proceeding for the appointment of a guardian under Revised Statutes, Section 6254, now Section 10915 of the General Code, *In re. Guardianship of James Murray*, 4 O. N. P. (N. S.) 233, it is said:

"A minor cannot himself change his domicile, and as the residence of a minor is determined by the domicile of a parent or some person standing in the relation of a parent to him, the word 'resident' as used in Section 6254, Revised Statutes, means 'domicile.' "

This case was affirmed by the Circuit Court *In re. Guardianship of James Murray*, 8 O. C. C. (N. S.) 498.

It does not appear from your communication, by what arrangement this child was placed in a so-called "foster home" near Navarre, in Stark County, after its father had been sent to the workhouse, in August of 1927. The term "foster home" as used in the statute, Section 3095, General Code, relates to a private home where children are placed by the trustees of a public children's home or by the Department of Public Welfare, formerly the Board of State Charities, by authority of Section 1352-3, General Code. However, this term is used, generally, to apply to any private home where a child is taken in and ministered to and fostered, whether it be done by arrangement with the public authorities or otherwise, and I presume you have used the term in the latter sense rather than in a strictly technical sense, as nothing appears to have been done at that time with reference to the child by the Juvenile Court or any other public authority having jurisdiction in the matter.

At any rate, it appears that, at the present time, the child is without any established home and it is now necessary to provide a home for it. When children are dependent on public charity or when they are without homes, it is not the policy of the law that they be committed to an infirmary, or what is now called the "county home." Another institution known as a "children's home" has been provided for this purpose, and the right of a child to be cared for at a county children's home is not entirely dependent on its right to relief under the poor laws of the State. In fact the provisions of law relating to county children's homes do not deal primarily or necessarily with the "relief of the poor." Section 3089, General Code, relating to county children's homes, reads in part as follows:

"The home shall be an asylum for children under the age of eighteen years, of sound mind and not morally vicious and free from infectious or contagious diseases, who have resided in the county not less than one year, and for such other children under such age from other counties in the state where there is no home, as the trustees of such home and the persons or authority having the custody and control of such children, by contract agree upon, who are, in the opinion of the trustees, suitable children for admission by reason of orphanage, abandonment or neglect by parents, or inability of parents to provide for them. * * * "

Section 3091, General Code, provides in part as follows:

"When a child maintained in the infirmary of any county becomes eligible to the children's home of such county or district, such fact shall be certified to the trustees thereof by the superintendent of the infirmary. Except such as are imbecile, idiots or insane, no child or children entitled to admission into a children's home shall be kept or maintained in any county infirmary in this state. * * * "

There are two ways by which children may be admitted to a children's home, either by commitment on order of the Juvenile Court or by a majority of the trustees of the home. Section 3090, General Code.

Apparently the child about whom you inquire comes within the class known as dependent children, as the same is defined in Section 1645, General Code, and it is therefore within the power of the Juvenile Court of Stark County to deal with such child in accordance with Section 1653, General Code, which reads in part as follows:

"When a minor under the age of eighteen years, or any ward of the court under this chapter, is found to be dependent or neglected, the judge may make an order committing such child to the care of the children's home if

there be one in the county where such court is held, if not, to such a home in another county, if willing to receive such child, for which the county commissioners of the county in which it has a settlement, shall pay reasonable board; or he may commit such child to the board of state charities or to some suitable state or county institution, or to the care of some reputable citizen of good moral character, or to the care of some training school or an industrial school, as provided by law, or to the care of some association willing to receive it, which embraces within its objects the purposes of caring for or obtaining homes for dependent, neglected or delinquent children or any of them, and which has been approved by the board of state charities as provided by law. * * * "

The fact that this family, from January 7, 1927, to May 2, 1927, received aid from the Salvation Army, and later from the Associated Charities in Massillon, is not material under the circumstances. The father became a resident of Stark County on October 31, 1925, and has continued to be a resident of Stark County until the present time. He acquired a "legal settlement" in Stark County by reason of his residing there from October 31, 1925, to January 7, 1927, without aid, and the fact that the family received aid thereafter would not have the effect of taking away the residential status or a "legal settlement" already acquired. His dependents took, through him, the same residential status and "legal settlement" as he possessed. In the case of *Board of Commissioners vs. Board of Commissioners*, 116 O. S. 663, it is held as stated in the syllabus:

"When the parents of minor children are divorced, and the decree gives to the mother the sole and exclusive care, custody and control of the minor children, the legal settlement of the mother thereby becomes the legal settlement of the minor children; and when the mother thereafter, acting in good faith, moves to another county, taking the minor children with her, and intending to make the latter county the permanent home of herself and her minor children as well, and, pursuant thereto, the mother acquires a legal settlement in the county to which she thus moves, the minor children thereby acquire, through their mother, a legal settlement in the same county."

It appears in the above case, that the mother and children, the status of whom was in question, had resided in Summit County for a very brief period. The mother, however, had in the meantime been married to a man, who at the time of marriage, was possessed of a "legal settlement" in Summit County, and the court held, as will be noted, that by virtue of the marriage the mother acquired through her husband a "legal settlement" in Summit County and the children took this same legal settlement although the mother and the children had only resided in Summit County a few months.

I am therefore of the opinion, in specific answer to your question, that Stark County is responsible for any relief that it may be necessary to extend for the child in question, and that the child may be admitted to the Stark County Children's Home upon the order of a majority of the trustees of the home, or may be dealt with by the Juvenile Court of Stark County, in accordance with the provisions of Section 1653, supra.

Respectfully,
 GILBERT BETTMAN,
Attorney General.