

IN THE CIRCUIT COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI
PROBATE DIVISION

IN THE MATTER OF:)
)
DAWN DZIUBA,) Estate No. 16SL-PR02645
An alleged incapacitated and)
disabled person.)
)
Respondent.)

**PETITIONER’S RESPONSE TO RESPONDENT’S MOTION FOR
CHANGE OF VENUE**

FACTUAL BACKGROUND

Ms. Dziuba resided in the City of St. Louis from 2006 to 2011. She resided at her father’s house at 12233 Creve Coeur Ridge Ct., Maryland Heights, MO 63043, in St. Louis County, from 2011 until she was arrested in or about June, 2014. After her arrest, Respondent resided at the Buzz Westfall Justice Center in St. Louis County from about June, 2014, through March, 2015, when she was ordered committed to the custody of the Department of Mental Health.¹ She was a patient at the Metropolitan St. Louis Psychiatric Center, located in the City of St. Louis, from March, 2015, until October, 2016. In October, 2016, she was transferred from the Metropolitan St. Louis Psychiatric Center to the St. Louis Psychiatric

¹ For 2 weeks beginning in December, 2014, Respondent was an inpatient at a Department facility for purposes of an evaluation.

Rehabilitation Center, another Department facility, also located in the City of St. Louis.

In August, 2016, Petitioner filed this action in this court seeking the appointment of a guardian and conservator for Respondent. Respondent has filed a Motion for Change of Venue.

ARGUMENT

RESPONDENT IS NOT ENTITLED TO A CHANGE OF VENUE

Section 475.040 RSMO (2000) governs changes of venue in guardianship proceedings. Pursuant to § 475.040 RSMo.:

If it appears to the court, acting on the petition of the guardian, the conservator, the respondent or of a ward over the age of fourteen, or on its own motion, at any time before the termination of the guardianship or conservatorship, **that the proceeding was commenced in the wrong county, or that the domicile or residence of the ward or protectee has been changed to another county**, or in case of conservatorship of the estate that it would be for the best interest of the ward or disabled person and his estate, the court may order the proceeding with all papers, files and a transcript of the proceedings transferred to the probate division of the circuit court of another county. The court to which the transfer is made shall take jurisdiction of the case, place the transcript of record and proceed to the final settlement of the case as if the appointment originally had been made by it (emphasis added).

This proceeding was not commenced in the wrong county

Venue in guardianship and conservatorship proceedings is governed by § 475.035. *In re Beyersdorfer*, 59 S.W.3d 523, 526 (Mo. banc 2001). Section 475.035 RSMO provides as follows:

1. The venue for the appointment of a guardian or conservator shall be:
 - (1) In the county in this state where the minor or alleged incapacitated or disabled person is domiciled; or
 - (2) If the minor or alleged incapacitated or disabled person has no domicile in this state, then in the county in which the minor or alleged incapacitated or disabled person actually resides, or if he or she does not reside in any county, then in any county wherein there is any property of the minor or alleged incapacitated or disabled person; or
 - (3) In the county, or on any federal reservation within the county, wherein the minor or alleged incapacitated or disabled person or his or her property is found; or
 - (4) In a county of this state which is within a judicial circuit which has prior and continuing jurisdiction over the minor pursuant to subdivision (1) of subsection 1 of section 211.031.
2. If the alleged incapacitated or disabled person has resided in a county other than the county of his or her domicile for more than one year, the court of that county may assume venue for the purpose of appointment of a guardian or conservator. . . .

The venue provisions set forth in § 475.035 are hierarchical. The

Missouri Supreme Court construed § 475.035.1(1)-(3) to mean that:

venue for appointment of a guardian/conservator is: (1) in the county of domicile; (2) if no domicile exists in Missouri, in the county of actual residence; (3) if no domicile or actual residence exists in Missouri, in any county where property can be found; (4) if no domicile, actual residence, or property exists in Missouri, in any county where the alleged incapacitated person or his property is found.

In re Beyersdorfer,, 59 S.W. 3d 523, 526 (Mo. banc 2001); *Estate of Summer v.*

Missouri Dept. of Mental Health, 424 S.W.2d 506, 509 (Mo.App.S.D. 2014).

Here, Respondent has a domicile in the State of Missouri. When she moved to her father's home in St. Louis County in 2011, that became her domicile. *See Estate of Summer v. Missouri Dept. of Mental Health*, 424 S.W.2d at 509. She lived there for approximately 3 years until she was arrested in 2014. As Respondent has a Missouri domicile – St. Louis County – venue lays there. As this Petition was filed in Respondent's county of domicile, this proceeding was not commenced in the wrong county to allow for a change of venue under § 475.040.

Aside from the hierarchy in § 475.035, that statute makes an alternative available in some cases. If the alleged incapacitated or disabled person has resided in a county other than the county of domicile for more than one year, the court of that county may assume venue. *See* § 475.035.2. That alternative is discretionary. *See Badgley v. Missouri Dep't. of Corrections*, 977 S.W.2d 272, 275-6 (Mo. App.W.D. 1998) (in construction of statutes "may" as opposed to "shall" is indicative of discretion or choice between two or more alternatives). Petitioner filed this Petition in St. Louis County where Respondent is domiciled. Petitioner's failure to file in another county based on an alternative venue provision does not support a finding that this proceeding was filed in the wrong county to allow for a change of venue under § 475.040.

**Respondent's domicile or residence has not been changed
to another county**

“Domicile has been equated with one’s intended permanent residence.”

To change domicile, there must be presence in a new domicile and present intent to remain there indefinitely and make that location one's permanent residence, without any fixed or certain purpose to return to the former place of abode. *In re Estate of Toler*, 325 S.W.2d 755, 759 (Mo. 1959); *Matter of Estate of Potashnick*, 841 S.W.2d 714 (Mo.App.S.D. 1992), citing *Gaffney v. Gaffney*, 528 S.W.2d 738, 741[4] (Mo. banc 1975) and *Bridges v. Bridges*, 559 S.W.2d 753, 755[5] (Mo.App.1977). There is no evidence in the record that Respondent has an intent to remain in the City of St. Louis indefinitely and make that her permanent residence. To the contrary, she recently filed a request to be released/discharged from the St. Louis Psychiatric Rehabilitation Center.

In addition, Respondent's commitment to the Metropolitan St. Louis Psychiatric Center and the St. Louis Psychiatric Rehabilitation Center, both located in the City of St. Louis, does not change her domicile or residence. *In the Estate of Summer*, 424 S.W.3d at 510. *See also State ex rel. Henderson v. Blaeuer*, 723 S.W.2d 589, 590 (Mo. App. W.D. 1987) (a person does not gain or lose domicile by becoming an inmate or patient in a public institution); *Hamilton v. Henderson*, 117 S.W.2d 379, 381 (Mo. App. K.C. 1938) (the fact

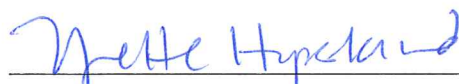
that an insane person is confined in an institution outside the county does not change his residence). Moreover, § 475.040.4 differentiates between a residence and a place where the alleged incapacitated person can be found. Just because Respondent has been committed to and can be found in a facility in the City of St. Louis does not mean that her residence, for purposes of venue, is in the City of St. Louis.

CONCLUSION

This proceeding was filed in the county of Respondent's domicile, so it was not commenced in the wrong county. Moreover, neither Respondent's domicile nor residence has changed to another county. Therefore, Respondent does not meet the criteria for a change of venue under § 475.040, and Respondent's Motion for Change of Venue should be denied.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER
MISSOURI DEPARTMENT OF
MENTAL HEALTH

CERTIFICATE OF SERVICE

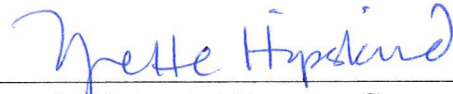
The undersigned hereby certifies that on the 21st day of November, 2016, a true and accurate copy of the foregoing was served, via e filing, upon the following:

James Huck
11647 Gravois Road, Suite 100
St. Louis, MO 63126

and was served via United States mail, postage prepaid, upon the following:

Thomas Arras
Public Administrator
105 South Central Avenue
Room 535
Clayton, MO 63105

Dawn Dziuba
St. Louis Psychiatric Rehabilitation Center
5300 Arsenal St.
St. Louis, MO 63139



Assistant Attorney General