STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

September 16, 2014

Opinion No. 14-84

Guardianships for Undocumented Alien Minors

QUESTION

May a probate court establish guardianship of the person for undocumented alien minors?

OPINION

If an undocumented alien minor, the minor's parents, or the minor's custodial parent has established domicile in Tennessee, a probate court may establish guardianship of the person for the undocumented alien minor.

ANALYSIS

Tenn. Code Ann. § 34-2-101 grants concurrent jurisdiction to the juvenile, probate, circuit, and chancery courts to appoint guardians of the person for minors.

> (a) Actions for the appointment of only a guardian of the person may be brought in the juvenile court in the county in which there is venue. Actions for the appointment of a guardian of the person or property or both may be brought in a court exercising probate jurisdiction or any other court of record in the county in which there is venue.
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> (b) An action for the appointment of a guardian may be brought in the *county of residence* of the minor, the *county of residence* of the minor's parents or, if the minor's parents are living apart, the *county of residence* of the custodial parent.

Tenn. Code Ann. § 34-2-101 (emphasis added).

The only statutory requirement is that the action be brought in the "county of residence" of the minor or the minor's parents or custodial parent. "County of residence" is not defined, but the term has been defined in the conservatorship context. In *In re Conservatorship of Clayton*, 914 S.W.2d 84 (Tenn. Ct. App. 1995), the Tennessee Court of Appeals held that "the term 'county of residence' in Tenn. Code Ann. § 34-13-101(b) [now § 34-3-101(b)] means the county of the disabled person's legal residence or domicile and that our courts cannot exercise personal

jurisdiction in proceedings to appoint a conservator over disabled persons who just happen to be within their territorial jurisdiction." 914 S.W.2d at 91. Conservatorship proceedings are akin to guardianship proceedings,[1] so this definition is properly applied to the term "county of residence" in Tenn. Code Ann. § 34-2-101(b).

Whether a person is domiciled in a state is determined, for state-law purposes, by the laws of that state. *Munoz-Hoyos v. de Cortez*, 207 P.3d 951, 952 (Colo. Ct. App. 2009); *see Cho v. Jeong*, No. 03A01-9608-CV-00257, 1997 WL 306017, at *5 (Tenn. Ct. App. June 6, 1997) (quoting *Bustamante v. Bustamante*, 645 P.2d 40, 42 (Utah 1982)) ("A state must determine who qualifies as a resident under its own laws . . . ."); *Napletana v. Hillsdale College*, 385 F.2d 871, 872 (6th Cir. 1967) ("[C]ustomarily the federal courts look to state law . . . for definitions of terms such as 'domicile' which are direct products of state law."). *See also* Restatement (Second) of Conflict of Laws § 13, Comment b (1971) ("The forum's rules of domicil are applied when domicil is a fact necessary to the judicial jurisdiction of the state of the forum . . . ."). Under Tennessee law, "domicile" means a person's permanent home where he or she intends to return and to remain; it is not simply a place of abode. *Conservatorship of Clayton*, 914 S.W.2d at 89. While a person may have more than one residence, he or she can have only one domicile, and to change domicile, a person must: "(1) actually change his or her residence to a new place; (2) intend to abandon his or her old domicile; and (3) intend to establish a new domicile at the new residence." *Id.*

"[I]llegal entry into the country would not, under traditional criteria, bar a person from obtaining domicile within a State." *Plyler v. Doe*, 457 U.S. 202, 227 n.22 (1982). No Tennessee court has addressed the question whether an undocumented alien may establish domicile in Tennessee. In *Cho v. Jeong*, 1997 WL 306017, the Tennessee Court of Appeals held that a non-U.S. citizen could establish domicile in Tennessee for purposes of obtaining a divorce, but the plaintiff in that case had legally entered the United States. *Id.* at *5-7. *See also Anene v. Anene*, No. 03A01-9511-CV-00387, 1996 WL 557802, at *2-3 (Tenn. Ct. App. Oct. 2, 1996) (holding that trial court properly assumed jurisdiction of divorce proceeding in which plaintiff, a citizen of Nigeria, had gained legal entry to the United States). Likewise, in Tenn. Att'y Gen. Op. 01-104 (June 27, 2001), this Office assumed an alien's legal entry when it opined that Tennessee courts have jurisdiction to grant a non-U.S. citizen's application for a name change. Some state courts, however, have held that a person's immigration status does not preclude him or her from establishing domicile or residency for certain purposes. *See, e.g., Munoz-Hoyos*, 207 P.3d at 953 ("[T]he proper determination of [plaintiff's] residence for purposes of the cost bond statute was not dependent on her immigration status, but on the evaluation of her place of domicile and her subjective intent."); *Padron v. Padron*, 641 S.E.2d 542, 543 (Ga. 2007) ("A person's immigration

[1] A conservator is a person appointed by the court to exercise the decision-making rights and duties of a person with a disability, Tenn. Code Ann. § 34-1-101(4)(A); a guardian is a person appointed by the court to provide supervision, protection, and assistance of and for a minor, *id.* § 34-1-101(11).

status does not, as a matter of law, preclude that person from establishing residency for purposes of obtaining a dissolution of marriage."); *Caballero v. Martinez*, 897 A.2d 1026, 1033 (N.J. 2006) ("We hold that an undocumented alien's intent to remain in New Jersey can satisfy the intent required by the [Unsatisfied Claim and Judgment Fund] to qualify as a 'resident.'").

"*Plyler* makes it patently clear that there is no federal impediment to finding that an undocumented person qualifies as a resident of a county of a state." *St. Joseph's Hosp. and Med. Ctr. v. Maricopa Cnty.*, 688 P.2d 986, 992 n.6 (Ariz. 1984). And nothing in Tennessee law precludes an undocumented alien from establishing domicile in a county of the State for purposes of the appointment of a guardian under Tenn. Code Ann. § 34-2-101.[2] *See St. Joseph's Hosp.*, 688 P.2d at 992 (holding, in the absence of any state law to the contrary, that illegal entry into the United States does not disqualify an alien from becoming a county resident for purposes of statutes governing emergency medical care). A county probate court may therefore establish guardianship of a person for an undocumented alien minor where the minor, the minor's parents, or the minor's custodial parent has established domicile in the county.

ROBERT E. COOPER, JR.
Attorney General and Reporter

JOSEPH F. WHALEN
Acting Solicitor General

KATHRYN A. BAKER
Assistant Attorney General

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[2] *Cf.* Tenn. Code Ann. §§ 49-8-104(b)(1), 49-9-105(b)(1) (as amended by 2014 Tenn. Pub. Acts, ch. 745, §§ 1, 2) (a prospective college student may be classified as a Tennessee resident *for purposes of charging in-state tuition* "*if the student is a citizen of the United States*, has resided in Tennessee for at least one (1) year immediately prior to admission and has [graduated from a Tennessee secondary school or earned a Tennessee high-school equivalency diploma]") (emphasis added); *see also* Tenn. Comp. R. & Regs. 0240-2-2-.01, -.02(3) (Board of Regents rules providing that for purposes of determining whether a student is in-state or out-of-state, "[u]ndocumented aliens cannot establish domicile in Tennessee, regardless of length of residence in Tennessee").

Requested by:

The Honorable Brian Kelsey
State Senator
7 Legislative Plaza
Nashville, Tennessee 37243