

IN THE SUPREME COURT OF OHIO

**IN THE MATTER OF
THE GUARDIANSHIP OF
JOHN SPANGLER**

:
:
:
:
:

CASE NO. 2009-0121

**On Appeal from the Geauga
County Probate Court of Appeals,
Eleventh Appellate District**

**APPELLEE GABRIELE AND JOSEPH SPANGLER'S MEMORANDUM IN
OPPOSITION TO APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION**

PAMELA WALKER MAKOWSKI (0024667)

Counsel of Record
The Law Office of Pamela Walker Makowski
503 South High Street, Suite 205
Columbus, Ohio 43215
Telephone: 614-564-6500
Fax: 614-564-6555
Pamela.makowski@gmail.com
Attorney for Joseph and Gabriele Spangler

DAVID P. JOYCE (0022437)

Geauga County Prosecutor
JUDITH A. MIEDEMA (0076206)

Assistant Prosecuting Attorney
Courthouse Annex
231 Main Street, Suite 3A
Chardon, Ohio 44024
Telephone: 440-279-2100
Fax: 440-279-1322
miedej@odjfs.state.oh.us
Attorney for Geauga County Board of MR/DD

DEREK S. HAMALIAN (0039378)

JASON C. BOYLAN (0082409)

Ohio Legal Rights Service
50 West Broad Street, Suite 1400
Columbus, Ohio 43215
Telephone: 614-466-7264
Fax: 614-644-1888
dhamalian@olrs.state.oh.us
jboylan@olrs.state.oh.us
Attorneys for John Spangler

SHANE EGAN (0038913)

4110 North High Street, 2nd Floor
Columbus, Ohio 43214
Telephone: 614-262-3800
Attorney for Advocacy and Protective
Services, Inc.

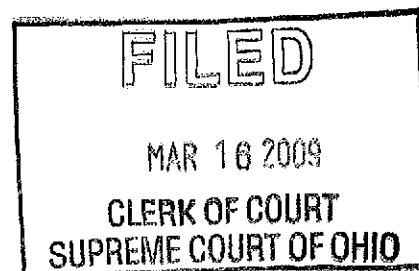


TABLE OF CONTENTS

THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST 1

ARGUMENT IN OPPOSITION TO APPELLANT’S PROPOSITIONS OF LAW 6

1. A county MR/DD board does not have the right and the ability to request a probate court to take action in the best interest of the ward outside of its statutorily prescribed procedures. 6

2. The county MR/DD board has no standing to move the probate court to remove an unsuitable guardian. 10

C. The county MR/Dd board does not have standing to participate in the probate court proceedings seeking the removal of the guardian as an interested party. 10

III. CONCLUSION 12

EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST

This case is not a case of public or great general interest. It is simply a case where a governmental agency is seeking to expand not only its statutorily mandate authority, but also the authority of the Probate Court, which is also a statutorily created entity. Apparently dissatisfied with the limitations on its power imposed by the General Assembly, the Geauga County Board of Mental Retardation and Developmental Disabilities (hereafter “GCBMRDD”) is asking this Court to do three things: 1) expand its statutory powers so that it may file motions directly in guardianship cases; 2) expand the power of the Probate Court to allow GCBMRDD and similar boards to be treated as parties under the Probate Code and 3) expand the authority of interested parties under the Probate Code to file motions to remove guardians. Essentially, the expansion of these powers would result in rewriting the code both as it applies to boards of this nature as well as the Probate Court.

While GCBMRDD complains that it needs to have this expansion of power in order to protect wards of the Probate Court, it seems to be suggesting that the Probate Court is not capable of protecting its own wards as the superior guardian. GCBMRDD already has the authority to notify the Probate Court when something is wrong with a ward’s situation when services are not being provided. There is a statutory provision, under R.C. 5126.33, that permits the Board to file a complaint with the Probate Court in order to bring deficiencies or concerns about the ward’s care to the Court’s attention. The Board is uniquely empowered to do this. No other agency or individual has the power to file a complaint with the Probate Court to bring this to the Court’s attention. As will be further discussed herein, the statutory complaint provision creates certain remedies that permit the Board to force the provision of services that the ward is not receiving.

Furthermore, a Board employee that has concerns about the guardian/ward relationship could simply send a letter to the Probate Court to explain the circumstances that it feels are creating a harmful situation for the ward. The Probate Court, as the superior guardian, is certainly then empowered to take whatever steps it feels are appropriate, including scheduling a review hearing to discuss the issues with the ward and the guardian, to place orders on the guardian to assure that the ward is being properly cared for and to ultimately remove the guardian if necessary. There are also administrative ways to address issues of concern by filing incident reports with the State.

It is important understand the statutory scheme established in the Ohio Revised Code. The Probate Court is a different kind of court, and the guardianship proceedings are not intended to be adversarial, but rather in rem proceedings. The Board's complaint process takes on a more adversarial stance because at that point the issue is the omission of necessary services for the ward when the guardian or other adult is not willing to take responsibility for providing them, and this could certainly be critical to the ward's health and well-being, requiring a clear decision on the part of the Probate Court. However, if the issue at hand falls short of the need to provide necessary services, the Probate Court's hands are not tied. The Court can investigate the matter and proceed in a non-adversarial way to solve the problem by conducting a status hearing, appointing a guardian ad litem or issuing whatever orders it feels are appropriate for the care of the ward.

In the case at bar, the guardians were the mother and father of the adult ward who suffered from an intermittent explosive disorder as well as autism, mental retardation and mitochondrial disease. The parents had dedicated their lives to the diagnosis and treatment of the ward's complicated mental and physical health issues. However, once their child became an

adult, it was necessary for them to seek a guardianship over him in order to provide care for him.

As an adult, their child had checked himself out of a mental health institution against the advice of doctors, but based on a disturbing incident that happened at the facility. But for the parent's intervention, he would have become homeless. The parents, however, placed him in a home with care providers who were supposed to provide supervision for him 24 hours a day. When the mother began to suspect that care was not being provided on a 24 hour a day basis, she began investigating the matter. She went to the GCBMRDD seeking their assistance. However, her pleas fell on deaf ears. She decided to investigate the matter herself and, although inappropriately fortifying her courage with a few drinks, she went to the home where the ward was residing, only to find her son home alone with the teenage son of the adult couple that was supposed to be providing the 24 hour supervision. After a short period of time, the husband of the couple returned home, called the police and, utilizing his law enforcement background, convinced the police to arrest her for trespassing. These charges were later dismissed, as it was not logical that she could be a trespasser on property for which she was paying the rent while visiting her son, for whom she is the guardian.

At this point, GCMRDD filed an emergency motion to have her removed, claiming that she was attempting to change the ward's service providers and that such a change would be detrimental to the ward's care. Immediately, all of the parties were thrust into not only an adversarial situation, but also one in which the motion was being heard within days after its filing, without adequate time to seek counsel and prepare for a full hearing. This also put the ward under considerable stress, which was not helpful to his overall condition. He was now also an adversary in the proceeding, and was even ultimately provided with counsel to represent himself, was put in the position of having an in camera interview, and was forced to endure a

litigation process that took literally months to complete. The hearings themselves occurred a day at a time over a four month period, with the in camera interview conducted in the fifth month. The matter took nearly 10 months for the Probate Court to reach its final decision. During that 10 months the matter was fully litigated, complete with extensive discovery. Although the primary concern was that the guardian was going to change the care providers for the ward, within six weeks of the appointment of the new guardian, the care providers were changed, suggesting that the mother's position was correct.

Had GCBMRDD followed the proper procedure, the matter could have been handled in a much less antagonistic and more productive way. If there was in the opinion of the GCBMRDD a failure to provide services, then a complaint could be filed. There is even authority under those circumstances to obtain an ex parte order. However, all of the testimony at the hearing indicated that services were in place and that they were all proper, so GCBMRDD did not have the basis to file a complaint. Therefore, the Board could have written a letter to the Probate Court. At that point the Probate Court could have called in the guardians and certainly could have invited GCBMRDD to explain their position. Since it is apparent that both parties ultimately agreed that the services needed to be changed, this could have been developed in full by the Probate Court in a nonadversarial fashion, implemented quickly and the ensuing litigation, which had both economical and non-economical costs for all of the individuals involved, could have been avoided. The Court could have advised the guardians on how to proceed based on the situation and in a more timely fashion. If the guardians did not follow the orders of the Court, the Court could then have chosen to remove guardian under the statutory process that provides for removal of a guardian. However, GCBMRDD, by attempting to carve out a new process, created a circus

that subjected all involved, especially the ward, to unnecessary stress, expense and a nonproductive adversarial situation.

Finally, even if GCBMRDD is correct in its assertion that it is an interested party and that it has the right to proceed as an interested party under both its statutory limitations as well as those of the Probate Code, the Probate Code has limited the abilities of the interested parties to file motions as delineated in Judge Trapp's opinion below. The limited list of motions does not include a motion for the removal of the guardian. As Judge Trapp wrote, quoting *In Re Guardianship of Santrucek*, 2008-Ohio-4915, "[t]he creation of a guardianship is a significant even, and family, friends, or even concerned neighbors could all potentially be affected by the outcome of the guardianship proceeding. Not all such persons will have a legally sufficient interest to allow them to become parties to the proceedings, however."

The interests of the Board in making sure that disabled individuals are provided with appropriate services so that they can enjoy productive lives and so that fundamental liberties provided to them cannot be minimized. This is a very important function of the Boards. However, in this instance, the Board went astray by filing outside of its authority, and this problem was compounded by the Probate Court inappropriately extended its statutory power. As Judge Trapp noted in her opinion:

The interest of the board in assuring that services are provided to a disabled adult even when consent cannot be obtained are protected by this complaint procedure. But instead of using a scalpel to cure the perceived problems in assuring John received services, the board used an ax, and that ax is not a part of the board's armament under our probate code.

In the Matter of Spangler, 2009-Ohio-6978 at ¶ 78.

Given that this matter was corrected by the Court of Appeals, and the Probate Court now has clear guidance, this case no longer presents a circumstance requiring this Court to review this

matter. GCBMRDD's quest for an expansion of its statutory powers and the expansion of the

Probate Court's expansion of powers should end here with this Court declining to exercise jurisdiction in this matter.

ARGUMENT IN OPPOSITION TO PROPOSITION OF LAW

Proposition of Law No. 1: A county MR/DD board does not have the right and the ability to request the probate court to take action in the best interest of the ward outside of its statutorily prescribed procedures.

GCBMRDD is asking this Court to expand its procedures beyond those already granted it. The reasoning if GCBMRDD is fundamentally flawed, in that it is implying that the duties imposed upon it by statute create in it an obligation to assert certain rights on behalf of the individuals it intends to service. The requirement to provide services and the requirement to assure the quality of the services does not create a right in the service provider. Furthermore, the rights asserted by GCBMRDD to take measures to protect the well-being of individuals with disabilities is misplaced. The rights delineated by law are the rights of the individual, not the rights of the agency. The agency is simply empowered to provide services, to identify when services what services are needed, and, when the services are not being provided, to file a complaint under R.C. 5126.31 in order to seek a court order for those services to be put in place.

If the GCBMRDD felt that, as indicated in its memorandum, that there was a pervasive problems with the guardian's suitability, it could have notified the Probate Court of the problems by sending a report or letter. It could also have called a "team meeting" to discuss this perceived problem. It was not powerless to deal with this issue.

GCBMRDD complains that the appellate court could not point to any statute that indicated that the powers asserted by the Board were beyond the statutory powers. Asking the Court to tell you where it says you cannot do something is a very juvenile approach and contrary

to our jurisprudence. When statutory power is created, the absence of authority is the same as the absence of power. The General Assembly is not required to grant powers to an agency and then enact a statute spelling out what powers the agency does *not* have. Rather, the statutory powers themselves are limited to those powers granted by the statutes.

The case of *Cuyahoga County Bd. Of Mental Retardation v. Cuyahoga Bountly Bd. Of Commrs.* (1975), 41 Ohio St. 2d 103, 70 O.O. 2d 197, 322 N.E.2d 885, cited by Appellants in support of this expansion of powers, is clearly distinguishable. That case involved issues concerning the Board's budget, and certainly the Board has the authority to take those steps necessary to preserve its budget so that it can continue to provide services.

That case does not create a right for MRDD boards to remove guardians. Promoting the health and safety of the wards through quality control of the services that the Board is providing does not create the right to seek removal of a guardian. The processes set forth under the code for the implementation of services are designed to have full participation by the Board, the services providers and the ward and his or her guardian. In fact, R.C. § 5126.043 indicates that “[i]ndividuals with mental retardation and other developmental disabilities, including those who have been adjudicated incompetent pursuant to Chapter 2111. of the Revised Code, have the right to participate in decisions that affect their lives and to have their needs, desires, and preferences considered.” This means that the process will necessarily invite disagreement as to how services will be provided, but the point is to have a team of concerned individuals come together and try to resolve the issues in the best interests of the child. R. C. § 5126.06 states that anyone having a complaint about the provision of services shall file a complaint with the Board and “a person shall attempt to have the complaint resolved through the administrative resolution

process.” It further provides that the “person” may commence a civil action against the Board if the matter is not resolved.

In the case at bar, when confronted with the issues presented by the guardian, the Board decided that it would resort to litigation rather than attempting to meet and resolve these disputes, ignoring its own mandate to resolve things through resolution. There are many other administrative processes identified in the Code for the resolution of disputes between the Board, the service providers and the service recipients, but not one of them authorizes the Board to seek removal of a party from the process with whom it has a disagreement. It is also interesting that the subsequent temporary guardian ultimately agreed with the guardian about the provision of services. Perhaps, if the board had handled this in a less adversarial nature, it would have reached the same result.

The only process permitting resolution through the courts is when the complainant (in this case, the guardian complaining of the lack of 24 hour supervision by the care provider) cannot get a resolution through the administrative process or when the Board has identified a ward who is in need of services under R.C. 5126.33.

Interestingly, in its argument, the Board completely fails to identify any statutory authority for taking the actions it wants to take by filing the motion to remove with the Probate Court. Rather, it cites a series of cases and relies on an interpretation that the obligation to provide services somehow creates the right to assert the need for services through whatever mechanism the Board chooses on behalf of the ward. At this point, this argument is so removed from the statutory grant that it is necessary to step back and review what exactly are the powers of the Board. The county Board’s powers are clearly delineated in R. C. §5126.05, as follows:

(A) Subject to the rules established by the director of mental retardation and developmental disabilities * * * the county board of mental retardation and developmental disabilities shall:

(1) Administer and operate facilities, programs, and services as provided by this chapter and Chapter 3323. of the Revised Code and establish policies for their administration and operation;

(2) Coordinate, monitor, and evaluate existing services and facilities available to individuals with mental retardation and developmental disabilities;

(3) Provide early childhood services, supportive home services, and adult services, according to the plan and priorities developed under section 5126.04 of the Revised Code;

(4) Provide or contract for special education services * * *;

(5) Adopt a budget, authorize expenditures for the purposes specified in this chapter and do so in accordance with section 319.16 of the Revised Code, approve attendance of board members and employees at professional meetings and approve expenditures for attendance, and exercise such powers and duties as are prescribed by the director;

(6) Submit annual reports of its work and expenditures * * *;

(7) Authorize all positions of employment, establish compensation, including but not limited to salary schedules and fringe benefits for all board employees, approve contracts of employment for management employees that are for a term of more than one year, employ legal counsel under section 309.10 of the Revised Code, and contract for employee benefits;

(8) Provide service and support administration * * *;

(9) Certify respite care homes * * *.

* * *

(C) Any county board may enter into contracts with other such boards and with public or private, nonprofit, or profit-making agencies or organizations of the same or another county, to provide the facilities, programs, and services authorized or required * * *.

(D) A county board may combine transportation for children and adults enrolled in programs and services * * *.

(E) A county board may purchase all necessary insurance policies, may purchase equipment and supplies through the department of administrative services or from other sources, and may enter into agreements with public agencies or nonprofit organizations for cooperative purchasing arrangements.

(F) A county board may receive by gift, grant, devise, or bequest any moneys, lands, or property for the benefit of the purposes for which the board is established and hold, apply, and dispose of the moneys, lands, and property according to the terms of the gift, grant, devise, or bequest.

* * *

(G) The board of county commissioners shall levy taxes and make appropriations sufficient to enable the county board of mental retardation and developmental disabilities to perform its functions and duties, and may utilize any available local, state, and federal funds for such purpose.

Nothing contained in these powers can be interpreted to include the actions taken by the Board in this case.

Proposition of Law No. 2: The county MR/DD board has no standing to move the probate court to remove an unsuitable guardian.

Not only does the Board have no right, it has no standing to file a motion to remove.

Much of the response to this argument was already previously addressed and will not be repeated herein. However, specifically with respect to the standing issue, the Board does not have standing, even if it had legal authority. As the Court of Appeals noted, the Board does not have a personal stake in the controversy. It does not meet the statutory definition of next of kin, it does not have an interest in the estate and it does not meet the definition of a real party in interest. The Board does not possess a right to be enforced. Rather, it is seeking to remove a guardian, not enforce a right. The Board is a witness and, as a witness, could bring matters to the Court's attention either informally or through the authority set forth in R.C. § 5126.33. Without the authority to file such an action, and without standing to maintain such an action, this argument must fail.

Proposition of Law No. 3: *The county MR/DD board does not have standing to participate in the probate court proceedings as an interested party.*

The idea that the Board has the right to participate as an interested party is again based on a house of cards, presuming that the Board has a “right” in the first place. However, the Board certainly does not have a status that would give it standing to participate as an interested party.

The cases cited by the Board do not even involve the issue of statutory agency that it has standing as a party. Even the case of *In the Matter of the Guardianship of Riccardi*, 6th Dist. No. S-04-024, 2006-Ohio-24, which did involve a county MRDD Board, did not address the issue of standing. The Sixth Appellate District actually held that it was without jurisdiction to review the matter because the appeal was not filed in a timely manner. There is no finding whatsoever regarding the standing issue. The Eleventh District Court of Appeals ruling was not inconsistent with that decision, as the *Riccardi* case had no bearing on the standing issue.

Even if the Board did have standing, it cannot overcome the fact that the Probate Court powers are also limited and therefore the remedies sought by the interested parties are limited. As set forth in the Court of Appeals decision, there are a limited number of motions that may be filed, whether a party or an interested party. As the Court of Appeals noted, a review of the Probate Code reveals that there are twelve limited areas where interested parties may have standing.¹ *In the Matter of Spangler*, 2009-Ohio-6978 at ¶ 74. None of these involve the removal of a guardian.

¹ These areas are limited to seeking appointment as guardian (R.C. 2111.02); objecting to the ward’s medical treatment (R.C. 2111.13); being entitled to notice of a hearing on the report of an investigator (R.C. 2111.141); moving for the transfer of jurisdiction (R.C. 2111.471); requesting a hearing on the continued need for guardianship (R.C. 2111.49); filing a motion taking exception to an accounting (R.C. 2109.33); file a motion relative to distribution of assets (R.C. 2109.36); filing a petition to enforce payment or distribution (R.C. 2109.59); filing a motion when the probate judge is interested (R.C. 2101.38); filing a motion to require a bond (R.C. 2109.04); filing a motion to vacate an order settling an account (R.C. 2109.35); and fiinge an application to release the liens in a land sale (R.C. 2109.35)

Given these limitations, it is clear that regardless of what the Board may argue with respect to its own authority, the Probate Court does not even have the authority to entertain the motion that the Board filed. As noted by the Court of Appeals, if the Court was made aware of the conflict between the ward's interests and those of the guardian, the court could have appointed a guardian ad litem pursuant to Civ. R. 17(B) and Civ. R. 73. Certainly, based upon the recommendation of the guardian ad litem, the Probate Court could have made whatever determination it deemed best as the superior guardian and could have simply required the guardian to implement the court's wishes.

CONCLUSION

This is not a case of public or great general interest. The analysis required to get to the result sought by Appellant would result in three major changes to the statutory scheme: 1) an unjustifiable expansion of the statutory powers of the GCBMRDD, 2) an expansion of the statutory authority of the Probate Court and 3) an expansion of the probate code statutory scheme to provide that interested parties can file motions outside of those identified by the statutes. This broad expansion of powers will open up the door to other agencies or entities and would significantly change the nature of guardianship. This is not a case of public or great general interest. It is simply a case about a Board that acted outside the scope of its authority, and that has now been rectified. There is no reason for this Court to grant jurisdiction in this matter and this Court should let the Eleventh District Court of Appeals decision stand.

Respectfully submitted,



Pamela Walker Makowski (0024667)
The Law Office of Pamela Walker Makowski
503 South High St., Suite 205
Columbus, OH 43215
(614)564-6500
(614)564-6555 (*facsimile*)
pamela.makowski@gmail.com

Attorney for Gabriele and Joseph Spangler

PROOF OF SERVICE

I certify that a copy of the foregoing Memorandum in Opposition to Appellant's Memorandum in Support of Jurisdiction was sent by ordinary U.S. Mail to the following counsel of record this 16th day of March, 2009:

DAVID P. JOYCE 0022437
Geauga County Prosecutor
J.A. MIEDEMA 0076206
Assistant Prosecuting Attorney
Courthouse Annex
231 Main Street
Chardon, OH 44024

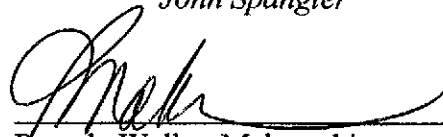
*Counsel For Appellant,
Geauga County Board Of Mr/Dd*

SHANE EGAN
4110 North High Street
Columbus, OH 43214

*Attorney For Advocacy And Protective
Services, Inc.*

DEREK S. HAMALIAN 0039378
JASON C. BOYLAN 0082409
Ohio Legal Rights Service
50 West Broad Street, Suite 1400
Columbus, Ohio 43215

*Attorneys For Appellant,
John Spangler*



Pamela Walker Makowski
Attorney for Gabriele and John Spangle