

IN THE SUPREME COURT OF OHIO

IN THE MATTER OF
THE GUARDIANSHIP OF
JOHN SPANGLER

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CASE NO. 2009-0121
On Appeal from the Geauga
County Probate Court of Appeals,
Eleventh Appellate District

APPELLEE JOHN SPANGLER'S MEMORANDUM IN RESPONSE TO
APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION

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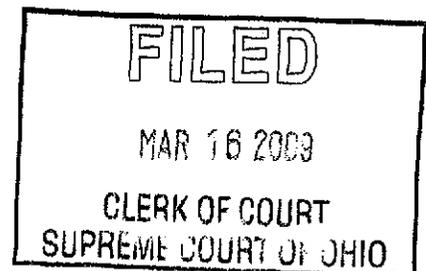


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THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST

This appeal involves the narrow issue of whether a county board of mental retardation and developmental disabilities (hereinafter “county board of MRDD”) may seek guardianship removal. This appeal does not harm the general ability of the Geauga County Board of MRDD (hereinafter “Board”) to alert the probate court of important issues concerning the provision of services. The Board already has the express statutory authority under R.C. 5126.33 to file a complaint in the probate court to fulfill its duties to arrange services for individuals with MRDD. Therefore, it should not be granted an additional implied power to seek the removal of a guardian. Because the 11th District Court of Appeals (hereinafter “Court of Appeals”) properly found that the Board already has an adequate statutory remedy under R.C. 5126.33, this case is not one of public or great general interest.

The Board invokes its statutory authority to monitor and arrange services under R.C. 5126.15 and avers that this case is of public and great general interest. The Board argues that the Court of Appeals’ decision would circumscribe its authority to refer guardianship-related matters to the probate court and participate in those proceedings. See *Memorandum in Support of Jurisdiction* at 1-2. However, the decision of the Court of Appeals does not have this effect because the Board already has express powers under the Revised Code to bring a complaint in a probate court to fulfill its statutory duties when necessary. See R.C. 5126.33. The Board is authorized to arrange services by developing an individualized plan for individuals with MRDD. R.C. 5126.31. When the Board cannot obtain consent from either the individual with MRDD or his or her guardian, if one has been appointed, it may then file a complaint in the probate court to arrange for the provision of services. R.C. 5126.33. The Court of Appeals aptly determined that this authority, granted only to county boards of MRDD, is entirely sufficient and appropriate for

the Board to discharge its statutory duties in providing and arranging services for individuals with MRDD.

The Board's other statutory authority and obligations do not create a need or a basis for enlarging its authority by implying the power to file a motion to remove a guardian. The Ohio Revised Code authorizes county boards of MRDD to monitor services provided to individuals with MRDD in order to ensure general health, welfare, and safety. R.C. 5126.055(A)(6). Only those individuals who have applied for and been determined eligible for services from the county board of MRDD actually receive those services. Once an individual is determined eligible for services, the county board of MRDD's service and support administrator organizes the provision of those services under R.C. 5126.15(B). Though the service and support administrator must monitor and arrange the individual's provision of services, R.C. 5126.15 does not create the authority for a county board of MRDD to invoke the removal of a guardian. Had the legislature intended to create such powers in a county board of MRDD through the service and support administrator, it would have expressly included those powers with the service and support administrator's other general functions. The Court of Appeals was correct in finding no such implied authority.

Similarly, the Court of Appeals' decision that the Board lacked the authority to file for the removal of a guardian through interested party status does not invoke public or great general interest. The decision does not limit a proper interested party from protecting the ward's safety, or even his or her own personal interests, through participation in guardianship proceedings. See *In re Weingart*, 8th Dist. No. 79849, 2002-Ohio-38 (longtime friend); *In re Guardianship of Tittington* (1958), 82 Ohio L. Abs. 563, 162 N.E.2d 628 (attorney); *In re Oliver's Guardianship* (1909), 9 Ohio N.P. 178, 20 Ohio Dec. 64 (sister and stranger). In addition, the decision does

not affect the Board's important functions under R.C. Chapter 5126. Rather, the Court of Appeals struck a proper balance to protect the interests of wards, guardians, county boards of MRDD, and other parties who claim an interest in the proceedings. Therefore, review by this Court is not necessary.

I. BACKGROUND

John Spangler is a twenty-two year old young man who has been diagnosed with autism, mitochondrial disease, and mild mental retardation.¹ John resided with his parents until reaching majority. John has needed significant supervision and care, which his parents have provided for most of his life. He also has relied on services arranged by his parents and provided through the Geauga County Board of Mental Retardation and Developmental Disabilities. His mother was appointed as his emergency guardian of the person on June 15, 2006. Permanent guardianship of the person was established by Judgment Entry on July 18, 2006 with both of John's parents, Joseph and Gabrielle Spangler, as guardians.

On October 25, 2006, the Board filed an ex parte motion to remove John's parents as guardians, alleging breach of duty regarding Gabrielle's intention to remove John from his then caregivers. The probate court granted the motion and appointed Advocacy and Protective Services, Inc. (APSI) as temporary guardian pending further hearing. On October 31, 2006, the court memorialized an agreement reached between the parties stating that APSI would continue as temporary guardian, and John's parents would agree to counseling and assessments. John's parents fully and satisfactorily completed the counseling and assessments.

¹ The statement of facts is derived generally from the findings of the probate court below. See Judgment Entry, Probate Case No. 06PG000245, attached to Appellee's Motion in Opposition to Stay of Eleventh District Court of Appeals Decision.

On January 24, 2007, John's parents filed an emergency motion for the removal of APSI as John's guardian. On January 25, 2007, APSI moved the court to dismiss the Spanglers' supplemental motion, join the Board as a party, and appoint a guardian ad litem. The probate court converted the pretrial hearing set for April 24, 2007 into a full hearing to determine permanent guardianship for John. The April 24, 2007 hearing ensued and continued on June 13 and July 24, 2007. On April 25, 2007, the probate court joined the Board as a party for purposes of prosecuting its motion to remove John's parents as guardians.

John's parents moved the probate court to dismiss the Board for lack of standing to file its October 25, 2006 motion. Counsel for John appeared on June 4, 2007. On June 13, 2007, John filed a motion to dismiss the Board from the case for lack of standing. The probate court conducted an in camera interview of John Spangler on August 9, 2007 for the purpose of determining John's wishes on this matter. It was John's stated wish to the probate court that his father serve as his guardian. The probate court filed a Judgment Entry on August 15, 2007 granting the Board's motion to remove John's parents as guardians, and denying its motion to remove APSI. John and his parents both appealed the probate court's decision. The Court of Appeals reversed and remanded the probate court's decision, and this appeal followed.

II. ARGUMENT IN OPPOSITION TO APPELLANT'S PROPOSITIONS OF LAW

A. The Court of Appeals correctly concluded that the Board lacks the statutory authority to seek the removal of a guardian.

The Board incorrectly asserts that the Court of Appeals' decision will negatively impact the ability of county boards of MRDD to carry out its statutorily-authorized functions.

Appellant's Motion in Support of Jurisdiction, p. 8. The Court of Appeals' decision is not so all-encompassing because the Court of Appeals has specifically found that R.C. 5126.33 provides a means for the Board to affirmatively carry out its statutory functions. Accordingly, the Court of

Appeals' decision does not have a negative impact on the Board's ability to carry out its statutorily-authorized functions.

No one disputes that the Board has no express authority to file for the removal of a guardian. The question is whether the Board has any implied authority to file such a motion; it does not. In order for there to be a need for an implied authority of an agency, the clarity of the express authority should first be lacking. As a creature of statute, the Board has only the powers and duties expressly conferred upon it by statute. See e.g., *Ebert v. Bd. of Mental Retardation* (1980), 63 Ohio St.2d 31, 406 N.E.2d 1098; *A. Bentley & Sons Co. v. Pierce* (1917), 96 Ohio St. 44, 47, 117 N.E. 6. It is well established that a governmental agency like the Board has only such power as is delegated to it by the General Assembly. *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, 96 Ohio St.3d 250, 2002-Ohio-4172, at ¶38. The authority that is conferred by the General Assembly cannot be extended by the governmental agency. See *Burger Brewing Co. v. Thomas* (1975), 42 Ohio St.2d 377, 379, 71 O.O.2d 366, 329 N.E.2d 693. Although a power of an agency may be implied from an express power where it is reasonably related to the duties of the agency, any implied power must be limited to making the express power effective. *Waliga v. Bd. of Trustees of Kent State Univ.* (1986), 22 Ohio St.3d 55, 488 N.E.2d 850; *D.A.B.E., Inc.*

The Board's express authority under R.C. 5126.33 is clear and unambiguous. R.C. 5126.33(A) provides, in relevant part, that "A county board of mental retardation and developmental disabilities may file a complaint with the probate court ... for an order authorizing the board to arrange services if ... the board has been unable to secure consent" from the guardian. Since R.C. 5126.33 clearly defines the protocol for the Board to file a complaint in the ward's interest, the Court of Appeals correctly determined that it was unnecessary to create an additional implied authority. *D.A.B.E., Inc.* at ¶39. The Court of Appeals simply applied one

insular statutory provision. Because the Court of Appeals recognized an express power of the Board under R.C. 5126.33, its decision does not implicate the public or great general interest by affecting any implied powers of the Board.

The Board maintains that filing a complaint under R.C. 5126.33 was not appropriate in this case because “there was a pervasive problem with the guardian’s suitability.” See *Appellant’s Memorandum in Support of Jurisdiction*, p. 8. However, R.C. Chapter 5126 does not contemplate that a county board of MRDD will make its own determination of whether an individual is a suitable guardian. Rather, it provides an avenue for county boards of MRDD to file a complaint alerting the probate court of the need for service arrangement. See R.C. 5126.33.

Furthermore, a county board of MRDD can file a complaint in the probate court under R.C. 5126.33 to bring allegations of neglect. A guardian of the person is charged with a number of duties in order to act in the best interests of the ward. The principal fiduciary duties are for the guardian of the person to “protect and control the person of the ward” and “provide suitable maintenance for the ward.” R.C. 2111.13(A)(1) and (2). A guardian’s failure to fulfill these central fiduciary duties would be properly characterized as “neglect.” Neglect is defined as “where there is a duty to do so, failing to provide an individual with any treatment, care, goods, or services that are necessary to maintain the health and safety of the individual.” R.C. 5123.50(D). This definition of “neglect” is sufficiently broad to encompass instances in which the Board finds it necessary to fulfill its statutory duty to ensure the provision of services by filing a complaint with the probate court. No such allegations of neglect were made by the Board here. The Board instead initiated guardianship removal outside of its express powers through an ex parte motion. The language of R.C. Section 5126 should not be manipulated in

favor of ultra vires acts beyond the scope of the Board's clearly-defined and entirely adequate statutory authority.

B. The Court of Appeals correctly concluded that the Board does not have standing to seek the removal of a guardian.

Standing is defined as “[a] party’s right to make a legal claim or seek judicial enforcement of a duty or right.” Black’s Law Dictionary (8Ed.Rev. 2004) 1442. “[T]he question of standing depends upon whether the party has alleged such a ‘personal stake in the outcome of the controversy’ as to ensure that ‘the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.’” *State ex rel. Dallman v. Court of Common Pleas* (1973), 35 Ohio St.2d 176, 178-179, 298 N.E.2d 515 quoting *Sierra Club v. Morton* (1972), 405 U.S. 727, 732, 31 L.Ed.2d 636. It is a fundamental rule that a party lacks standing to invoke the jurisdiction of the court unless it has some real interest in the subject matter of the action. *Id.* at 179, 298 N.E.2d 515.

Here, the Board had no “personal stake” in the outcome of this case because its functions revolve around arranging and organizing services for individuals with MRDD, not filing for the removal of a guardian. *In the Matter of the Guardianship of Spangler*, 2008-Ohio-6978 at ¶61. The Board’s only interest is in the provision of services to the individual with MRDD. The Board can file a complaint in the guardianship proceeding to arrange services under R.C. 5126.33 when necessary fulfill this statutory role.

The Board misapplies the principles expounded in *Board of Mental Retardation v. Board of Commissioners* (1975), 41 Ohio St.2d 103, 322 N.E.2d 885 (hereinafter, “*Cuyahoga County Board of MRDD*”) in support of its standing argument. *Cuyahoga County Board of MRDD* stands for the proposition that if an agency has no other adequate remedy at law, it may have standing to bring a mandamus action to protect its personal stake in funding. The county board

of MRDD in *Cuyahoga County Board of MRDD* had no express statutory authority to enforce the distribution of tax appropriations altered by the local board of commissioners. The Court in that case held that the county board of MRDD could enforce the funding of a tax levy in a mandamus action in order to compel the local county commissioners to provide funding. The Court in *Cuyahoga County Board of MRDD* explained:

“The statute gives the BMR (board of mental retardation) the power to make contracts; enjoins it by law to provide the necessary funds for its facilities, programs, and services; and commands the county commissioners to make appropriations sufficient to enable the board to perform its functions and duties. These clearly mandated powers and duties of necessity imply the right to sue for their enforcement and permit, if not required, the BMR to bring an action in mandamus to compel appropriation and delivery of the funds necessary for administering its programs.” *Cuyahoga County Board of MRDD* at 106.

The county board of MRDD was essentially thrust into litigation in order to receive funding that had been appropriated elsewhere. The decision supports a county board of MRDD’s power to ensure funding for its services through a mandamus action when it is the only appropriate remedy for the county board of MRDD to properly perform its statutorily-defined functions of arranging and monitoring the provision of services for individuals with MRDD. That situation does not exist here. Here, the Board can enforce its personal stake in arranging and organizing services by bringing a complaint under R.C. 5126.33 in the probate court to seek consent for the provision of those services.

Furthermore, contrary to the Board's assertion, there is no concern that the inability to remove a guardian would cause the Board to lose its accreditation through the Ohio Department of MRDD. If the Board "finds serious health and safety issues," it can still file a complaint

alleging neglect under R.C. 5126.33. See *Memorandum in Support of Jurisdiction* at 9. For this same reason, there is no concern that the Board would be stripped of its ability to protect eligible individuals with MRDD because its authority under R.C. 5126.33 was not revoked by the Court of Appeals. The Court of Appeals appropriately found that it was unnecessary to invoke broader authority than what was expressly provided for by statute, given that narrower express authority was already available to the Board through R.C. 5126.33.

C. **The Court of Appeals was correct in concluding that the Board could not file for the removal of a guardian as an interested party.**

Chapters 2109 and 2111 of the Ohio Revised Code, governing the probate court, control the circumstances in which an interested party may participate in guardianship proceedings. “Interested party” status is a term of art with a limited role in guardianship proceedings. In order to take action in a guardianship proceeding, a person can only be an interested party for a number of narrowly-defined purposes. Although the term “interested party” is not specifically defined in R.C. Chapters 2109 or 2111, courts have used case-by-case discretion to determine that individuals with familial relationships to the ward, close friends, or when the former relationships do not exist for the ward, attorneys or other advocates, may be granted interested party status in the course of a guardianship proceeding. See *In re Weingart*, 8th Dist. No. 79849, 2002-Ohio-38 (longtime friend); *In re Guardianship of Titington* (1958), 82 Ohio L. Abs. 563, 162 N.E.2d 628 (attorney); *In re Oliver’s Guardianship* (1909), 9 Ohio N.P. 178, 20 Ohio Dec. 64 (sister and stranger). Not all persons have a legally sufficient interest to allow them to become interested parties to the proceeding, however. *In re Guardianship of Santrucek*, 120 Ohio St.3d 67, 2008-Ohio-4915 at ¶11. The Board fails to cite a single case in which a county board of MRDD, or any other governmental agency, has been granted interested party status in order to remove a guardian.

An interested party's motion-filing authority with regard to guardianship proceedings is specifically enumerated, and thus limited by statute. In a probate court proceeding, an interested party may take action in only twelve limited areas, and only eight of these areas actually empower the interested party to file a motion of any description. An interested party may be permitted to do any of the following actions: seek appointment as guardian (R.C. 2111.02); object to the ward's medical treatment (R.C. 2111.13); be entitled to notice of a hearing on the report of an investigator (R.C. 2111.141); move for the transfer of jurisdiction (R.C. 2111.471); request a hearing on the continued need for guardianship (R.C. 2111.49); file a motion taking exception to an accounting (R.C. 2109.33); file a motion relative to distribution of assets (R.C. 2109.36); file a petition to enforce payment or distribution (R.C. 2109.59); file a motion when the probate judge is interested (R.C. 2101.38); file a motion to require a bond (R.C. 2109.04); file a motion to vacate an order settling an account (R.C. 2109.35); and file an application to release the liens in a land sale (R.C. 2109.35).

The ability to file for the removal of a guardian is not one of the authorities specified above. In the absence of a provision where an interested party may file for guardianship removal, and in light of the Board's ability to file a complaint under R.C. 5126.33, the Court of Appeals correctly determined that it was unnecessary to expand the statutorily-defined role of an interested party.

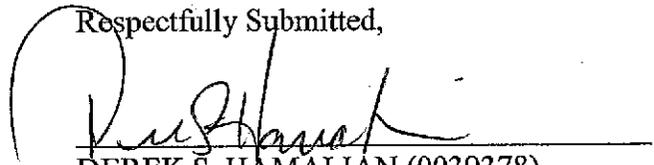
Finally, the Court of Appeals' decision that the Board could not file for the removal of a guardian as an interested party does not invoke broad public and general interest because the Board can fulfill its statutory role of arranging appropriate services by filing a complaint under R.C. 5126.33. Contrary to the Board's assertion, it is not the protector of the ward's interests. The probate court is the superior guardian of the ward. R.C. 2111.50(A). The probate court, in

its discretion, can always appoint a guardian ad litem pursuant to Civ.R. 17(B) and Civ.R. 73 when necessary to advocate on behalf of the ward's interests.

III. CONCLUSION

For all of the foregoing reasons, this Court should deny the Appellant's *Memorandum in Jurisdiction* in this case because it does not involve matters of public and great general interest, and there is no need to review the decision of the 11th District Court of Appeals.

Respectfully Submitted,



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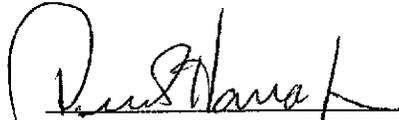
CERTIFICATE OF SERVICE

A copy of the above-styled Motion in Opposition to Jurisdiction was served upon the following by ordinary U.S. Mail on this 16th day of March, 2009.

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