ORIGINAL

IN THE SUPREME COURT OF THE STATE OF OHIO

In the Matter of the Guardianship of John Spangler	)	**Case No. 2009-0121**
	)	**On Appeal from the Geauga County Court of Appeals, Eleventh Appellate District**
	)	**Case Nos. 2007-G-2800 and 2007-G-2802**

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BRIEF OF *AMICUS CURIAE* ADVOCACY AND PROTECTIVE SERVICES, INC.
In support of Appellant the 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
Email: dhamalian@olrs.state.oh.us
Email: Jboylan@olrs.state.oh.us
Attorneys for John Spangler

Pamela Walker Makowski
503 South High Street, Suite 205
Columbus, Ohio 43215
Telephone: 614-564-6500
Fax: 614-564-6553
Email: pamela.makowski@gmail.com
Attorney for Joseph and Gabrielle Spangler

David Joyce (0022437)
Geauga County Prosecutor
Judith A. Miedema (0076206)
Assistant Prosecuting Attorney
Courthouse Annex
231 Main Street - Suite 3A
Chardon, Ohio 44024
Telephone: 440-279-2600
Fax: 44-279-1322
miedej@odjfs.state.oh.us
Franklin J. Hickman (006105)
Judith C. Saltzman (0068901)
Hickman & Lowder Co., L.P.A.
1300 East Ninth Street, Suite 1020
Cleveland, Ohio 44114
Telephone: 216-861-0360
Fax: 216-861-3113
Attorneys for Geauga County Board of MR/DD

Shane Egan (0038913)
Advocacy and Protective Services, Inc.
4110 N. High Street, 2nd Floor
Columbus, Ohio 43214
Telephone: 614-262-3800
Fax: 614-262-3838
Email: segan@apsiohio.org
Attorney for *Amicus Curiae*

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TABLE OF CONTENTS

	Page(s)
Table of Authorities	iii
Statement of Amicus Interest	iv
Statement of the Case and Facts	v
Argument	1
Proposition of Law No. 1	1
Due to the board's legal obligation to ensure the health and safety of the individuals it serves, a county MR/DD board has standing to move a probate court to remove the guardian of an individual served by the board.	
Proposition of Law No. 2	5
Due to the board's status as an interested party or person, a county MR/DD board has standing to move a probate court to remove the guardian of an individual served by the board.	
Proposition of Law No. 3	7
Due to the probate court's broad authority over guardians and wards pursuant to O.R.C.§2111.50, a county MR/DD board has standing to move a probate court to remove the guardian of an individual served by the board.	
Conclusion	9
Certificate of Service	10

TABLE OF AUTHORITIES

Cases

	Page(s)
In re Constable, Clermont App. Nos. CA2006-08-058, CA2006-09-067, 2007-Ohio-3346	5
Hopkins v. Barger, [(1935)] 21 Ohio Law Abs. 386; *In re Oliver's Guardianship* (C.P. 1909), 20 Ohio Dec. 64, 9 Ohio N.P. (n.s.) 178	6
In re Riccardi, Sandusky App. No. S-04-024, 2006 –Ohio-24	6

Statues and Rules

	Page(s)
O.A.C. 5123:2-9-04(J)	1
O.A.C. 5123:2-17-02(D)(4)(a)	1
R. C. Chapter 2111	5
R. C. 2111.01(d)	3
R. C. 2111.02(A)	5
R. C. 2111.13(C)	5
R. C. 2111.50	8
R. C. 2111.50(A)(1)	7
R. C. 2111.50(A)(2)(c)	7
R. C. 5126.05	3
R. C. 5126.055(A)(4)	1
R. C. 5126.15	1
R. C. 5126.15(B)	1, 2
R. C. 5126.31(A)	1
R. C. 5126.33	3
R. C. 5126.33(D)(1)	3

STATEMENT OF AMICUS INTEREST

Advocacy and Protective Services, Inc. (APSI) is a not-for-profit Ohio corporation that currently serves as the guardian of the person for approximately 4,600 Ohio adults who have mental retardation and/or other developmental disabilities. Pursuant to R.C. 5123.55 *et seq.*, and via contracts with the Ohio Department of Mental Retardation and Developmental Disabilities, APSI and its predecessor corporations have been providing guardianship and other protective services in Ohio since 1983. In fact, APSI currently serves as guardian of the person of John Spangler, and was nominally a party to the proceedings in the lower courts. During those proceedings, APSI took no position on the question of whether John and Gabrielle Spangler were suitable guardians, nor does APSI seek to take a position on that question herein.

However, APSI has an interest in the outcome of this case because its long experience has demonstrated that the MR/DD population receives, from a county board's ability to participate in all stages of the guardianship process, an additional and indispensible measure of protection against abuse and neglect. The continued existence of this protection serves the best interest of APSI's wards both present and prospective, while offering no detriment to APSI or to any other guardian whose pledge to serve that best interest is sincere.

STATEMENT OF THE CASE AND FACTS

The statements provided herein by Appellant the Geauga County Board of MR/DD will be sufficient and *amicus curiae* Advocacy and Protective Services, Inc. (APSI) will not duplicate those statements here.

ARGUMENT

PROPOSTION OF LAW NO. 1

Due to the board's legal obligation to ensure the health and safety of the individuals it serves, a county MR/DD board has standing to move a probate court to remove the guardian of an individual served by the board.

Standing derives from the legislatively-mandated duty of county boards of mental retardation and developmental disabilities to take action whenever necessary to protect the health, safety, and welfare of the individuals it serves. This duty is both implicit in the entirety of Chapter 5126 of the Ohio Revised Code, and set forth with specificity in a number of statues and regulations pursuant to Chapters 5126 and 5123.

R.C 5126.055(A)(4) requires that the MR/DD board "shall. . .ensure the individual's health, safety, and welfare. The monitoring shall include quality assurance of services." R.C. 5126.31(A) demands that an MR/DD board "review reports of abuse and neglect. . .to determine whether. . .the subject of the report is an adult with [MR/DD] in need of services to deal with the abuse or neglect." If such is the case, the MR/DD board must "ensure that all reasonable measures necessary to protect health and safety of any at-risk individual have been taken." O.A.C. 5123:2-17-02(D)(4)(a). Even apart from abuse-or-neglect situations, the MR/DD board is authorized to act to ensure health and safety where there appears to be substantial risk of immediate harm. O.A.C. 5123:2-9-04(J).

R.C. 5126.15 makes it clear that the MR/DD board's affirmative obligations to the individuals it serves are ongoing and day-to-day, via the concept of service and support administration.

R.C. 5126.15(B) states:

> (B) The individuals employed by or under contract with a board to provide service and support administration shall do all of the following:

(1) Establish an individual's eligibility for the services of the county board of mental retardation and developmental disabilities;

(2) Assess individual's needs for services;

(3) Develop individual service plans with the active participation of the individual to be served, other persons selected by the individual, and, when applicable, the provider selected by the individual, and recommend the plans for approval by the department of mental retardation and developmental disabilities when services included in the plans are funded through Medicaid;

(4) Establish budgets for services based on the individuals assessed needs and preferred ways of meeting those needs;

(5) Assist individuals in making selections from among the providers they have chosen;

(6) Ensure that services are effectively coordinated and provided by appropriate providers;

(7) Establish and implement an ongoing system of monitoring the implementation of individual service plans to achieve consistent implementation and the desired outcomes for the individuals;

(8) Perform quality assurance reviews as a distinct function of service and support administration;

(9) Incorporate the results of quality assurance reviews and indentified trends and patterns of unusual incidents and major unusual incidents into amendments of an individual's service plan for the purpose of improving and enhancing the quality and appropriateness of services rendered to the individual;

(10) Ensure that each individual receiving services has a designated person who is responsible on a continuing basis for providing the individual with representation, advocacy, advice, and assistance related to the day-to-day coordination of services in accordance with the individual's service plan. The service and support administrator shall give the individual receiving services an opportunity to designate the person to provide daily representation. If the individual declines to make a designation, the administrator shall make the designation. In either case, the individual receiving services may change at any time the person designated to provide daily representation.

Even this partial listing of an MR/DD board's mandated involvement with, and obligations to, the individuals—like John Spangler—that it serves suggest that the 11th District

Court of Appeals ruling is impermissibly narrow, insisting as it does both that R.C. 5126.05 is the only statutory basis for an MR/DD board's authority, and that R.C. 5126.33 is the only road by which a board can approach a probate court to challenge an unsuitable guardian.

However, R.C. 5126.33 is in fact nothing more (nor less) than a "last-resort" statute, and is of no help to either an MR/DD board or a helpless ward unless the probate court: "finds, on the basis of clear and convincing evidence all of the following:

a) The adult has been abused, neglected, or exploited;

b) The adult is incapacitated;

c) There is substantial risk to the adult of immediate physical harm or death." (R.C. 5126.33(D)(1)) [*emphasis added.*]

The Court of Appeals ruling thus would require the MR/DD board to watch from the sidelines in all those cases, like John Spangler's, where the board believes a guardian is failing a ward, but cannot—for whatever reason—develop "clear and convincing" evidence both of "immediate" danger to life or limb and of the "incapacitated" state of the ward.

Furthermore, "incapacitated" has no pertinent legal definition anywhere in the Revised Code. "Incompetent" is defined however, for the purposes of the guardianship statutes at Revised Code 2111.01(d) as:

> any person who is so mentally impaired as a result of a mental or physical illness or disability, or mental retardation, or as a result of chronic substance abuse, that the person is incapable of taking proper care of the person's self or property or fails to provide for the person's family or other persons for whom the person is charged by law to provide, or any person confined to a correctional institution within the state.

It is suggested that this definition describes a degree of impairment that falls clearly (albeit unquantifiably) short of the degree of impairment connoted by the undefined

"incapacitated," and thus further reveals the inability of R.C. 5126.33 to serve as the panacea put forth by the majority opinion of the 11th District Court of Appeals.

In other words, if that opinion is not reversed, an MR/DD board will be able to petition a probate court to protect an individual who has been adjudicated incompetent only if the individual is also "incapacitated," and only when an unsuitable guardian has finally brought the helpless individual to the brink of disaster. Such a result will ignore and subvert the MR/DD board's statutory obligation to the individuals it serves and hamper the probate court's ability to protect its wards, while removing a considerable degree of public scrutiny from potentially unsuitable guardians.

PROPOSTION OF LAW NO. 2

Due to the board's status as an interested party or person, a county MR/DD board has standing to move a probate court to remove the guardian of an individual served by the board.

Conspicuous by its absence from the majority decision of the 11th District Court of Appeals is any discussion of whether standing can derive from one's status as an "interested party" or "interested person" in a guardianship case, even though the appellate briefs discussed this question extensively in demonstrating the many situations in which probate and appellate courts have found various entities to have the necessary interest to deserve standing.

R.C. 2111.13(C) is one gateway statute in this regard. It empowers "the ward or an interested party [to file] objections with the probate court" to attempt to curtail or limit a guardian's authority. Similarly, R.C. 2111.02(A) allows "any interested party" to ask a probate court to appoint a guardian. Significantly, Chapter 2111 leaves "interested" undefined and thus unrestricted, and courts that have construed the word have also refused to give it a narrower meaning than logic and ordinary usage suggest it should have. In the words of *In re Constable*, Clermont App. Nos. CA2006-08-058, CA2006-09-067, 2007-Ohio-3346 at ¶9: "Review of Ohio case law reveals no instance in which a moving party was found to be uninterested for purposes of participating in a guardianship proceeding." [*emphasis added.*]

Courts have found the sufficient modicum of interest on behalf of a step-brother, a niece, a nephew, and a friend. *Id.* "Interested party" has also been held to include an attorney who did not know or even personally see his prospective ward; *Id.,* citing *In re Guardianship of Titington* (P.C. 1958), 82 Ohio Law Abs. 563, 162 N.E.2d 628; a sister, and a stranger when the ward had no close relatives,. *Id.,* citing, *Hopkins v. Barger*, (1935) 21 Ohio Law Abs. 386; *In re Oliver's Guardianship* (1909), 20 Ohio Dec. 64, 9 Ohio N.P. (n.s.) 178.

Such longstanding and unwavering judicial willingness to spurn a narrow, exclusionary construction of the word "interested" where the welfare of mentally-impaired individuals is at stake was most recently reiterated in *In re Riccardi*, Sandusky App. No. 5-04-024, 2006-Ohio-24, a case whose central issues align foursquare with those of the instant case. In *Riccardi*, the Sandusky County MR/DD Board filed a motion to remove the guardian of Elizabeth Ann Riccardi. The guardian moved to dismiss the petition on the grounds that the MR/DD board lacked standing. The probate court magistrate disagreed, finding that the obligations of the appellee MR/DD board to Elizabeth Ann Riccardi pursuant to R.C. 5126.15(B) "appeared fiduciary in nature and as such Appellee had standing as a next friend and real party in interest to file a petition to remove the guardian." *Id.* ¶7. The Court affirmed the decision of its magistrate and removed the guardian. *Id.* Although the appeal was dismissed by the Court of Appeals because objections to the report of the magistrate were not timely filed, the court observed that "substantial justice ha[d] been done." *Id.* ¶*20.*

The relevant cases thus reveal that the 11th District Court of Appeals' refusal to acknowledge the Geauga County Board of MR/DD as a party "interested" enough in the guardianship case of an individual it serves so as to deserve standing therein is a decision unprecedented in Ohio law. Moreover, it is handed down against an entity whose involvement with that individual is extensive, ongoing, and mandated by law, and thus is "interested" by any standard consistent with ordinary usage. The decision is contrary to both law and logic, and should be reversed.

PROPOSITION OF LAW NO. 3

Due to the probate court's broad authority over guardians and wards pursuant to O.R.C.§2111.50, a county MR/DD board has standing to move a probate court to remove the guardian of an individual served by the board.

The decision of the 11th District Court of Appeals stands for the proposition (among others) that a probate court has no right or authority to so much as even entertain a motion from an MR/DD board to remove the perhaps-unsuitable guardian of an individual whom the board serves. In thus protecting and deferring to a guardian at the expense of the "superior guardian" which appointed it in the first place, the decision of the court below ignores the extensive power a probate court holds relative not only to its wards, but to its appointed guardians as well. This power is made clear by R.C. 2111.50(A)(1), which provides that "at all times, the probate court is the superior guardian of wards who are subject to its jurisdiction, and all guardians who are subject to the jurisdiction of the court shall obey all orders of the court that concern their wards or guardianships."

Moreover, R.C. 2111.50(A)(2)(c) states that "for good cause shown, the probate court may limit or deny, by order or rule, <u>any power</u> that is granted to a guardian by a section of the Revised Code, <u>or by relevant decisions of the courts of this state</u>." [*emphasis added.*]

It is submitted that this is a near-plenary grant of authority to the probate court, as well as an unequivocal curtailment of any putative "rights" of a probate court-appointed guardian. Conceivably, even a decision of the Supreme Court of Ohio enhancing a guardian's power could be superseded, via R.C. 2111.50(A)(2)(c), by a probate court's order or rule denying that power. Arguably, R.C. 2111.50(A)(2)(c) enables a probate court to issue a local rule stating that an MR/DD board is an "interested" person or party in the guardianship case of an individual whom the board serves, or even a rule declaring that the suitability of the guardian of an individual

served by an MR/DD board is subject to review by the probate court upon the motion of the MR/DD board, and for good cause shown.

Although the questions suggested by the above hypothetical may be moot at this time, it is hoped that they assist in demonstrating that the decision of the 11th District Court of Appeals impermissibly upends the relationship between probate court and guardian delineated in R.C. 2111.50. This is meant to be a relationship between a "superior" guardian, on the one hand, and a person appointed by and accountable to the superior guardian on the other hand. This person must obey all orders of the superior guardian, and the scope of this person's powers as guardian is determined solely by the superior guardian.

The broad powers of the probate court relative to its guardians, and the statutory status relationship outlined above would thus seem to strongly suggest—if not compel—the inferences that the probate court has inherent authority to accept a MR/DD board's motion to remove a guardian, and that the guardian has no right to the protection from accountability conferred on it by the decision of the 11th District Court of Appeals.

CONCLUSION

If it is upheld, the decision of the 11th District Court of Appeals will compromise on MR/DD board's ability to perform its statutory duties, undercut a probate court's statutory authority relative to the guardians it appoints, and create a potential risk to wards with developmental disabilities that heretofore has not existed in the State of Ohio.

For these and all of the foregoing reasons, *amicus curiae* Advocacy and Protective Services, Inc. urges that the decision below be reversed.

Respectfully submitted,

Shane Egan (0038913)
Advocacy and Protective Services, Inc.
4110 North High Street, 2nd Floor
Columbus, Ohio 43214
Telephone: 614-262-3800
Fax: 614-262-3838
Email: segan@apsiohio.org

CERTIFICATE OF SERVICE

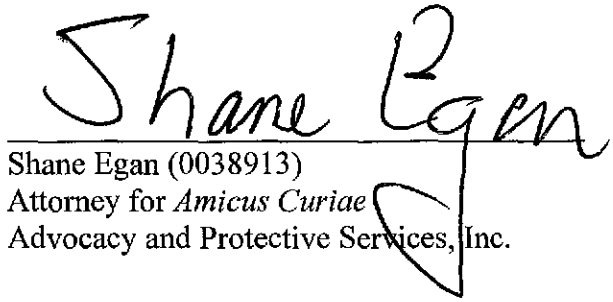
I hereby certify that a true copy of the foregoing motion was served this 20th day of July, 2009 upon the following counsel of record by U. S. Mail, postage prepaid, addressed as follows:

Derek S. Hamalian (0039378)
Jason C. Boylan (0082409)
Ohio Legal Rights Service
50 West Broad Street, Suite 1400
Columbus, Ohio 43215
Attorneys for John Spangler

David Joyce (0022437)
Geauga County Prosecutor
Judith A. Miedema (0076206)
Assistant Prosecuting Attorney
Courthouse Annex
231 Main Street, Suite 3A
Chardon, Ohio 44024
Attorneys for Geauga County Board of MR/DD

Pamela Walker Makowski
503 South High Street, Suite 205
Columbus, Ohio 43215
Attorney for Joseph and Gabrielle Spangler

Franklin J. Hickman (006105)
Judith C. Saltzman (0068901)
Hickman & Lowder Co., L.P.A.
1300 East Ninth Street, Suite 1020
Cleveland, Ohio 44114
Attorneys for Geauga County Board of MR/DD



Shane Egan (0038913)
Attorney for *Amicus Curiae*
Advocacy and Protective Services, Inc.