

IN THE SUPREME COURT OF OHIO

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| | : | CASE NO. 2009-0121 |
| IN THE MATTER OF: | : | On Appeal from the Geauga |
| | : | County Probate Court of Appeals, |
| THE GUARDIANSHIP OF | : | Eleventh Appellate District |
| JOHN SPANGLER | : | Court of Appeals |
| | : | Case Nos. 2007-G-2800 |
| | : | 2007-G-2802 |

**MERIT BRIEF OF
APPELLEES JOSEPH AND GABRIELLE SPANGLER**

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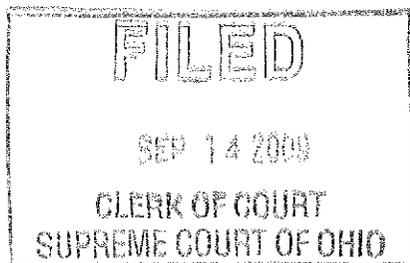
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**APPELLEES' RESPONSE TO APPELLANT'S
STATEMENT OF THE CASE AND FACTS**

This case involves a young man, named John Spangler, who is the ward in this case, and who has a very complex series of disorders, which have heightened the complexity of this case beyond the typical matters involved in a more traditional guardianship.

The guardianship originally commenced in June, 2006. At that point, the evidence was that John suffered from an intermittent explosive disorder (T. p. June 15, 2006, p. 7, Supp. 6), as well as autism, mental retardation and mitochondrial disease. (Id. p. 16, Supp. 15).

Just prior to the application for the appointment of an emergency guardian, John had been placed in the Warrensville Developmental Center due to a serious incident at home. Id. p. 6., Supp. 5. The serious incident involved a series of explosive outbursts, which included throwing things out of his window, breaking a windshield, poking holes in walls, urinating in the house, and feces all over the upstairs carpets. Id. p. 8, Supp.7. As a result of this, John was placed in Warrensville on a Wednesday afternoon.

Unfortunately, on the following Sunday morning, the parents received a phone call from the nurse at Warrensville in which John had been victimized by his roommate. Specifically, the roommate had grabbed John's private parts. Id. p. 8, Supp. 7. Understandably, John had an outburst. Id. p. 9, Supp. 8. The grabbing of John's private parts was compounded by the fact that John had a hydrocele, which is an accumulation of watery liquid in the sac around the testicles. The family went to the Center and learned that John had been pushed onto his bed and then grabbed. Id. p. 9, Supp. 8. Mrs. Spangler learned the next day that the roommate was pre-disposed to sexual touching and inappropriate touching of other people, but the family had not been informed of this. Id. p. 9, Supp. 8. There was a subsequent incident, where John was

grabbed by his arm and held under a cold shower. Id. p. 10, Supp.9. As a result, John signed himself out of Warrensville (at this point, no guardian had been appointed) and the family had him come back into their home after a one night stay at a hotel, with two care providers, Michelle and David Devlin, who had been hired to supervise John. Id. p. 12, Supp.11.

The guardianship was being sought on an emergency basis because the Center was interested in interviewing John about the incident. Mrs. Spangler wanted to be present as his guardian due to concerns that she had about post-traumatic stress issues. Id. p. 18, Supp. 17.

The Court, through Judge Burt, granted the emergency guardianship for 72 hours, and then scheduled this for a hearing before Judge Henry. Id. pp. 20-22, Supp. 19-21. A second hearing was scheduled for June 19, 2006.

At the second hearing, Suzanne Joseph, George Cervenka and Carl Vondrasek from Metzenbaum, which is also the Geauga County Board of Mental Retardation and Developmental Disability, all appeared. Other than the testimony of Mrs. Spangler, the only other testimony was from Carl Vondrasek. Mrs. Spangler explained that John was at the time of the hearing living with the Devlins under a rental agreement arrangement and that she was seeking additional services, such as food stamps and Medicaid. T.p. July 18, 2006 hearing, p.8-11, Supp. 37. GJS Supp. 2-4. Carl Vondrasek testified about Metzenbaum's involvement with the certification process to provide care services and the Individual Service Plan process. Id. p. 12. GJS Supp. 5. When asked if Metzenbaum had any concerns about the prior arrangements for John, Mr. Vondrasek answered simply, "No.". Id. p. 13, Supp.38. The other individuals did not testify at all at this hearing. The Court granted the appointment of Joseph and Gabrielle Spangler on July 18, 2006. T.d. 18, 19.

The next thing that happened in the case was the filing of the motion to remove the guardian, filed on October 25, 2006. T.d. 20. This motion was based on an affidavit of Tami Setlock, who indicated that she was the supervisor of the service and support administrators and that her responsibilities were to make sure that clients are receiving the appropriate services. GJS Supp.9. She went on to opine in her affidavit that the ward, John, was receiving appropriate services with his current providers. She went on to note that Mrs. Spangler had indicated that she intends to move John and that such a move is not in John's best interests. There is no mention of whether the services would continue (which in fact they did) or whether there was an issue regarding John's services if he were to be moved. The affidavit also verifies the body of the motion itself, which states that there was an incident involving concerns voiced by Mrs. Spangler regarding whether the providers were following the rules for John. Specifically, Mrs. Spangler was concerned about the bathroom he used, the food he was eating (which, as will be shown later, is important because of his mitochondrial disease), and that he was being left alone in spite of a requirement in his service plan that he be under 24 hour supervision. In retaliation, the Devlins had made allegations that Mr. Spangler had some marijuana in his truck. This occurred, according to the motion, in a meeting on October 23, 2006. Mrs. Spangler followed up on this on October 24 and spoke to Tami Setlock, the affiant, and was upset about the lack of follow through regarding her complaints. That same day, the Devlins met with Tami Setlock and Carl Vondrasek and claimed they were being set up by the Spanglers.

On the evening of October 24, Mrs. Spangler went to her ward's home, according to the affidavit, and was ultimately arrested. (These charges were subsequently dismissed.) Based on that, MRDD sought the removal of the guardians and the appointment of a new guardian. No where were there any allegations that the guardians were failing to provide services to their ward.

Based on these limited allegations, and without any hearing, the Court granted the motion and removed the guardians, appointed Advocacy Protective Services Incorporated, (hereafter “APSI”) as a temporary guardian and set the matter for further hearing on October 31, 2006. Docket 32.

At the temporary hearing, the Spanglers agreed to let APSI be the temporary guardian while the motion for removal was pending and scheduled the matter for final pretrial on April 24, 2007. T.d. 32. The Spanglers were to complete psychiatric assessments and drug and alcohol assessments in the interim.

In January, 2007, there were a series of incidents that started to occur with John, and a Emergency Motion to Remove the Temporary Guardian and Re-Appoint Joseph Spangler as Guardian and for an Emergency Review was filed on January 24, 2007. T.d. 34, GJS Supp. 15. The affidavit in support of the motion set forth that the Spanglers had agreed to allow APSI to be appointed as temporary guardian in order to allow a neutral party to work with John and to alleviate the stress for John. T.d. 34, Affidavit, para. 2-3. It went on to note that the Spanglers tried to work with APSI by identifying John’s care and service providers for them and making sure that APSI was aware of the various appointments that John had, as well as John’s propensity to act out when being transported to medical visits because of past traumatic experiences with visits to the Cleveland Clinic, including a visit that resulted in his admission to the psychiatric ward. Id., para.8-10. As outlined in the affidavit, in spite of communicating the appointment times and other information, John missed a number of appointments that were important to his care. Id., para. 11-14. Furthermore, even though the initial concern of Metzenbaum was that John was going to be removed from the Devlins, APSI did in fact remove John from the Devlins on December 20, 2006 and placed him in a setting where the staff was not properly trained. Id.,

para. 15. On January 10, 2007, John ended up being transported to the emergency room at Geauga Hospital in handcuffs. *Id.*, para. 16. In addition, Joseph Spangler became aware of incident reports from December 28, 2006, which showed that furniture has been thrown out in the yard and that John had been out of control. *Id.*, para.16-18. When this was brought to APSI's attention, Mr. Spangler was told that there were no problems, but that the family should be more involved. *Id.*, para. 19.

In addition, Mr. Spangler had learned from other sources that the placement was not going well. *Id.*, para. 20-22. Mr. Spangler expressed through his affidavit a concern that John's negative and destructive behaviors was increasing, his ongoing medical needs were not being met, there was a failure to implement the recommendations of the treating professionals and a failure to openly communicate with his parents about these issues. *Id.*, para.24. Based on that, Mr. Spangler was seeking the removal of APSI and his reappointment. Mr. Spangler had also completed the Court ordered assessments, and was found to have no problems that needed to be addressed. *Id.*, para.24-26.

In response, the Court ordered the Spanglers to file their evaluations with the Court. APSI filed a motion to dismiss the motion, the evaluations were submitted to the Court, but the Court summarily denied the motion without hearing and converted the pretrial to a full hearing. T.d. 39.

A Motion to Dismiss the original Motion for Removal of the Guardian was filed on April 20, 2007 on the basis that Geauga MRDD had no standing as a party in the case to file such a motion. T.d. 41. A joint motion with the Spanglers and APSI was also filed to convert the hearing back to a pretrial. T.d. 40. Although not ruled on, all of these motions were effectively denied as the hearing started on April 24, 2007.

At the hearing, after brief opening arguments, Geauga MRDD (also referred to as Metzenbaum) presented its witnesses. Susanne Joseph testified regarding the IO waiver program and explained that John had started receiving services through the Agency. T.p. April 24, 2007 hearing, p.18, GJS Supp.23. After explaining the administrative process for receiving services, she related to the Court about an incident where John had exhibited strong aggression against his mother and sister and his mother called the agency and asked for them to find a placement for him. Id., 21, GJS Supp. 24. Ms. Joseph testified, “I told her there was no opening.” She then called an emergency team together to try to find a solution. When Ms. Joseph called Mrs. Spangler back after the weekend had passed, Id., 22, GJS Supp. 25, Mrs. Spangler had decided to use IO waiver services and had found an alternative. This all occurred prior to the guardianship. With the arrangements set up by Mrs. Spangler, John was able to stay in the home for another month. Id., 27-28. GJS Supp. 26-27. The agency did not observe any abuse or neglect regarding John. Id., 31, GJS Supp. 28. Ms. Joseph also described the Warrensville incident. Id. 36, GJS Supp. 36. Because Geauga MRDD did not agree with the way that incident was handled, they stopped providing payment for services. Id., 40, GJS Supp. 30. She also testified that the Geauga MRDD had recommended that the Spanglers take guardianship of John. Id. 42, GJS Supp. 31. Ms. Joseph also indicated that the reason Geauga MRDD filed the motion to remove is because “[w]e had had complaints from the providers about the intrusion [Mrs. Spangler’s October 24 visit to the home], and then we didn’t see how we could – and the providers were not going to provide services anymore, and we didn’t know what else to do, how we can serve him with the family constantly changing on us.” Id. 51 GJS Supp. 32. When asked about what she meant by constantly changing, she indicated, “[c]hoosing a provider, getting angry at the provider, agreeing to Warrensville Developmental Center, taking him out of Warrensville

Developmental Center. Saying I need the ICSMR, no, I don't want the ICSMR.” Id. 51, GJS Supp.32. At no time did Ms. Joseph complain that John's needs were not being met. She simply did not like the advocacy of the guardian on behalf of her ward.

Throughout the course of the hearing, many of the care providers testified about the Spanglers and how they handled John. Throughout there was no evidence of any triggers or other behavior issues, and certainly none of them could render opinions about the suitability or unsuitability of the Spanglers as the guardians. For example, Veronica Richmond testified that Mrs. Spangler was able to calm John down when he was agitated. T.p. April 24, 2007 hearing, p. 142, GJS Supp. 142. She testified to several incidents, but none of them were in the presence of the family. The only complaint she had about the Spanglers is that during his Christmas visit he poked someone. Id. 132, GJS Supp.132.

Russell Kinnebrew, who was the APSI guardian, also testified. However, his testimony pertained to John after the Spanglers were removed. He did remove John from the Devlins' care because additional supports were needed. T.p. June 13, 2007 hearing, p. 277, GJS Supp.37. He kept the other service providers. Id.

Mr. Kinnebrew also indicated in his testimony that he had learned from Dr. Stephen Schwartz that to say that the mother may serve as a trigger is simplistic and this was not the primary cause of his acting out. T.p. June 13, 2007 hearing, p. 187, GJS Supp.36. He testified that ambulances and police calls were triggers. Id. 191, GJS Supp. 38. This is true even though these were the methods used in January to deal with John's behavior. The police were called and he was removed from the home by ambulance. The guardian never explored whether Joseph Spangler was a trigger for John. Id. 223. GJS Supp. 39. Sadly, this guardian only met with John one-on-one on only two occasions, which was on November 3 and April 20. Id. 265-266, GJS

Supp.40-41. Mr. Kinnebrew indicated that only the second meeting was conducted independent of any stressors, such as another meeting. Id.

The other care providers could only speak to John's care after the removal of the Spanglers and were not really in a position to render an opinion as the suitability of the parents as guardians. Carl Vondrasek also testified, but his testimony was primarily devoted to an idea that Mrs. Spangler took a dominant role in conversations. At no time was he critical of Joseph Spangler. Id. 446, GJS Supp. 42. He also testified that John had several re-enforcers that promote a positive, good day for that person. Id. 456, GJS Supp. 43. These re-enforcers primarily involved activities in the Spangler's home, and yet the APSI guardian had significantly cut-off contact with the Spanglers. Id.457-460, GJS Supp. 44-47.

When the hearing resumed on July 24, 2007, the Spanglers presented their witnesses. Michael Pollak testified that Mrs. Spangler had been evaluated and was being treated for anxiety. Id. 512-514, GJS Supp.49-51. He also felt that she seemed "plenty capable" of being a guardian. Id. 514. GJS Supp. 51.

Dr. James Davidson testified that Mr. Spangler had completed the assessment and saw him for 14 sessions and that he did not see any significant concerns about his emotional capabilities or ability to provide guardianship responsibility for his son. Id. 534-535, GJS Supp.52-53. He also testified that with regard to triggers, the trigger would be a prompt that would lead to an escalation of behavior. Id. 558. GJS Supp.54. It would be consistent for the individual. Id. 559, GJS Supp.55.

Judy Miller and Chris Shafer also testified that John was receiving appropriate care and services from the Spanglers throughout their history with them. There was no evidence of any concerns.

At the conclusion of the hearing, the Court conducted an in camera interview with John in which he clearly indicated that he wanted to be with his father and have his father make decisions for him. T.d.84.

Subsequently, the Court ruled and ordered the removal of the Spanglers and appointed the agency as the guardian. T.d. 69.

ARGUMENT

Appellees' Response to Proposition of Law No. I: A County Board of Developmental Disabilities is limited to the statutory grant of power and, as such, had no authority to initiate proceedings for the removal of the guardian when it disagreed with the guardian's decisions with respect to the ward; rather it should have initiated its statutorily granted complaint process to identify what services were not being performed, leaving the authority to determine the role of the guardian to the Probate Court, which is the superior guardian.

As this Honorable Court held in *In Re Guardianship of Santrucek*, 120 Ohio St.3d 67, 2008-Ohio-4915, “[b]ecause guardianship proceedings are not adversarial , but are in rem proceedings involving only the probate court and the ward, and the requirements for standing to appeal are more elaborate. See *In re Guardianship of Love* (19690, 19 Ohio St.2d 111.” However, if the expansion of powers of the County Board of Developmental Disabilities as proposed by the Appellant herein is permitted, then the proceedings will necessarily become more litigious. For example, the case at bar involved several days of trial over the course of many months, numerous witnesses, procedural rulings and much expense.

This is certainly not what was anticipated by the creation of County Boards of Developmental Disabilities or even by the enactment of the Probate Code. The current statutory scheme contains a thoughtful process for dealing with the individual's disabilities while preserving the integrity of the individual's basic human rights and autonomy.

It should be noted that as the *amicus* arguments are on the same legal issues, all of the arguments raised by Appellant and its *amici* are addressed together.

A. The statutory authority of the County Board of DD is part of an overall scheme for the delivery of services to a vulnerable part of our population, and must be viewed in that context to understand the reasons behind the limitations of powers.

It is important to first step back and look at the big picture before determining the merits of this case. The General Assembly has created a process for adults who may, for a variety of reasons, be vulnerable. As the generation of baby boomers become increasingly grayer, the need for these services are increasing and we need to be very careful that the services are being properly administered and utilized properly, but preserving the autonomy of the adult, including the right to refuse services. The role of the County Board of Developmental Disabilities is only a part of the overall program of Adult Protective Services. Protection of vulnerable adults is done in tandem with the County Department of Job and Family Services (which also oversees the provision of services for neglected, abused and dependent children). R.C. 5101.61 sets up the process for the reporting of abuse, neglect or exploitation of an adult, creates a class of mandatory reporters and establishes a process for the investigation of such reports. If the individual is developmentally disabled, R.C. 5101.611 requires that the case be referred to the county board of developmental disabilities. Similarly, if the County Board of DD receives a complaint and determines that the person is sixty years of age or older but does not have mental retardation or a developmental disability, it shall refer the case to the county department of job and family services. R.C. 5126.31(A). The two different boards then have similar but not identical investigative proceedings, both of which ultimately authorized the filing of a complaint with the court. R.C. 5101.65 provides for the filing of a petition in the court by the County JFS board along with a plan for services. The JFS board is also permitted to seek a restraining order if anyone denies, obstructs or interferes with the investigation. R.C. 5101.63. The DD Board is

empowered to file a complaint with the probate court and seek a temporary protection order under R.C. 5126.33 and can seek an ex parte emergency order pursuant to R.C. 5126.331 if the circumstances warrant it. Judicial intervention is only warranted in the event of the threat of serious physical harm or death. Nothing fundamentally changes when a guardian is involved, except that the guardian is also empowered to give consent, subject to the ward's right to refuse services.

B. The County Board's power to bring a complaint to assert that services need to be provided is consistent with their role in providing services to a vulnerable population and is further consistent with the balancing of the rights of the individuals to refuse services.

The argument of the Board is based on an illogical approach. The Board asserts that its duties of investigating reports, administering services and monitoring those services somehow creates a duty to protect the health, safety and welfare of the citizens of Ohio. The Board's actions are at the very least restricted to the care of citizens of the state of Ohio who suffer from a developmental disability of sufficient nature as to fall under the classification of citizens who are entitled to receive services by the Board. The duty of care is not a general duty of protecting the health, safety and welfare of these individuals. Certainly, the Board does not mean to imply that it has a duty to provide fire and police protection. The duty of care required is with respect to the provision of the services that it is charged with administering. The obligation to exercise a duty of care does not create a right. For example, an attorney has a duty of care with respect to providing legal representation, but ultimately must defer to the client's wishes (or withdraw) and cannot assert a right to implement the attorney's wishes over the client's decisions.

The statute establishing the County Board of DD clearly outlines its authority. The establishment of these boards was so significant that R.C. 5126.02 mandates the formation of the

Board and further makes it clear that it needs to be a separate entity and not combined with any other functions:

(A) Each county shall either have its own county board of mental retardation and developmental disabilities or, pursuant to section 5126.021 or 5126.022 of the Revised Code, be a member of a multicounty board of mental retardation and developmental disabilities. Subject to division (B) of this section:

(1) A county board shall be operated as a separate administrative and service entity.

(2) The functions of a county board shall not be combined with the functions of any other entity of county government.

Thus an exclusive and independent board was created, and even its functions could not be combined with any other entity's functions.

R.C. 5126.05 explicitly states the duties of the Board:

(A) Subject to the rules established by the director of mental retardation and developmental disabilities pursuant to Chapter 119. of the Revised Code for programs and services offered pursuant to this chapter, and subject to the rules established by the state board of education pursuant to Chapter 119. of the Revised Code for programs and services offered pursuant to Chapter 3323. of the Revised Code, 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 pursuant to Chapters 3317. and 3323. of the Revised Code and ensure that related services, as defined

in section 3323.01 of the Revised Code, are available according to the plan and priorities developed under section 5126.04 of the Revised Code;

(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, pursuant to sections 3323.09 and 5126.12 of the Revised Code, to the director, the superintendent of public instruction, and the board of county commissioners at the close of the fiscal year and at such other times as may reasonably be requested;

(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 in accordance with section 5126.15 of the Revised Code;

(9) Certify respite care homes pursuant to rules adopted under section 5123.171 of the Revised Code by the director of mental retardation and developmental disabilities.

(B) To the extent that rules adopted under this section apply to the identification and placement of children with disabilities under Chapter 3323. of the Revised Code, they shall be consistent with the standards and procedures established under sections 3323.03 to 3323.05 of the Revised Code.

(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, upon such terms as may be agreeable, and in accordance with this chapter and Chapter 3323. of the Revised Code and rules adopted thereunder and in accordance with sections 307.86 and 5126.071 of the Revised Code.

(D) A county board may combine transportation for children and adults enrolled in programs and services offered under section 5126.12 with transportation for children enrolled in classes funded under section 3317.20 or units approved under section 3317.05 of the Revised Code.

(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. All money received by gift, grant, bequest, or disposition of lands or property received by gift, grant, devise, or bequest shall be deposited in the county treasury to the credit of such board and shall be available for use by the board for purposes determined or stated by the donor or grantor, but may not be used for personal expenses of the board members. Any interest or earnings accruing from such gift, grant, devise, or bequest shall be treated in the same manner and subject to the same provisions as such 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.

These powers are filled with cross references to other statutes, most of which serve to limit the authority of the Board. While it is clear that the Board serves the purpose of protecting the health, safety and welfare of certain individuals, the powers it can exercise are restricted by statute.

Furthermore, it is notable that the Board's independence is so carefully carved out. The Board cannot even serve in any fiduciary capacity, for even in the event that the individual is not a ward of the Probate Court, each individual who receives services is entitled to designate a separate person to act as their advocate. R.C. 5126.15(B)(10). The role of the individual who provides representation, advocacy, advice, and assistance is so important that if the individual declines to select someone, then the service and support administrator is required to select someone, and, in either case, the individual receiving services may change the designated person. No Board approval of the individual is required, and no criteria are established regarding the

suitability or experience of that individual are imposed. The statutory requirement that such an individual be designated certainly creates the opposite relationship from that of a fiduciary or interested party. One of the specific duties of this designated person is advocacy, which demonstrates that the interests of the ward and the interests of the Board are not aligned.

The entire scheme for provisions of services has many checkpoints in place in order to preserve the fundamental rights of the individuals receiving services. The statutory scheme even articulates those rights. 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.” A great deal of autonomy is reserved to the recipients of services. This completely contradicts the concept that the Board is responsible for more than offering appropriate services and ensuring that the services offered are properly administered. The individual receiving services has a right to reject the services as well. R.C. 5126.31(D). Thus to assert that the County Board has a fiduciary relationship is without merit.

The power of the Board to bring a complaint and litigate the issues of the provision of services to adults is already very broad. A natural person cannot bring an action to force another adult to utilize services, except in the context of a guardianship. Furthermore, the DD Board is empowered to obtain the consent of a ward independent of the guardian under R.C. 5126.41(C)(2) [“An adult who has been found incompetent . . . may consent to services.”] In addition, the County Board’s mandate is only to “ensure that the adult receives the services arranged by the board from the provider and *shall have the services terminated* if the adult

withdraws consent.” R.C. 5126.31(D). [Emphasis supplied.] Thus, the Board cannot compel the individual to utilize the services. The complaint process puts that power squarely in the hands of the probate court, which has the power to “consider the individual protective service plan and . . . specifically designate the services that are necessary to deal with the abuse, neglect, or exploitation or condition resulting from abuse, neglect, or exploitation and that are available locally, and authorize the board to arrange for these services only.” 5126.33(D)(3). The probate court can also order “the adult removed from the adult’s place of residence and placed in another residential setting.” R.C. 5126.33(D)(3). Finally, the probate court has the power under R.C. 2111.02(A), on its own motion or on application by any interested party, to appoint a guardian. Of course, in this case there was already a guardian, so the probate court, in its plenary powers, and as the superior guardian (R.C. 2111.50), could issue orders directing the activities of the court appointed guardian with respect to any issues raised in the complaint process or even removal of the guardian.

The ward is adequately protected and the County Board is able to serve its function of providing services. In the event that the County Board felt that the ward was at risk for having services provided, it should have filed a complaint, sought an ex parte or temporary restraining order and waited for a ruling from the probate court. Had this been done, then the proper emphasis in the case would be on what services were or were not being provided to prevent the threat of serious physical harm or death. If the probate court determined that the ward’s best interests were not being served by the change in service providers (as was alleged by the County Board), then the court could have given instructions to the guardian regarding its wishes. If the guardian failed to follow those instructions, then, depending on the circumstances, the court could have issued orders, followed through with contempt citations and, if necessary, possibly

even remove the guardian. This approach would result in a faster resolution of the issues, would permit the ward's rights to refuse services to remain intact, would keep the Board independent of the relationship between the ward, the court and the guardian. The issues pertaining the authority of the probate court to remove the guardian under these circumstances will be addressed below.

Appellees' Response to Proposition of Law No. II: A County Board of Developmental Disabilities does not have standing to file its motion in the probate court to remove a guardian.

The County Board lacked standing to move the trial court to replace the guardian. As the Court of Appeals set forth in its decision of this case, this Honorable Court explained the concept of standing in *Ohio Pyro, Inc. v. Ohio Dept. of Commerce*, 115 Ohio St.3d 375:

"Standing" is defined at its most basic as "(a) party's right to make a legal claim or seek judicial enforcement of a duty or right." Black's Law Dictionary (8th Ed.2004) 1442. Before an Ohio court can consider the merits of a legal claim, the person or entity seeking relieve must establish standing to sue. *Ohio Contrs. Assn. v. Bicking* (1994), 71 Ohio St.3d 318, 320, * * *. "[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." (Citations omitted.) *State ex rel. Dallman v. Franklin Cty. Court of Common Pleas* (1973), 35 Ohio St.2d 176, 178-179,* * *, quoting *Sierra Club v. Morton* (1972), 405 U.S. 727, 732, ***."

Since the County Board does not have a personal stake in the outcome, it does not have standing. Its role is to offer services and, if services are refused, to terminate them. It does not have a duty to force the individual to utilize the services. It is not permitted to have a personal stake in the decision-making authority of the individual receiving services. It only gains standing to bring litigation "if the adult is eligible to receive services or support under section 5126.041 of the Revised Code and the board has been unable to secure consent." R.C. 5126.33.

Since the Spanglers were consenting to all of the services, there was no basis for filing a complaint. If the services are being accepted, why would the Board want to remove this cooperative guardian? No specific reason for this is ever articulated. It can only be speculated that the Board must not have wanted a guardian who was also monitoring the services on behalf of the ward and reporting back to the Board regarding concerns, even though the statutory scheme specifically sets the Board up as the one responsible for the administration and monitoring of the services being provided.

Even if the guardian was not being cooperative, there would still be no right of the Board to seek removal of the guardian. Because the individual has a right to refuse services, this statute further protects that right by indicating that the court can issue an order only if all of the criteria of the statute are met, including a finding by clear and convincing evidence that there is a substantial risk to the adult of immediate physical harm or death.

The Board complains that without an expansion to the authority granted in R.C. 5126.33, they would not have been able to have any relief in this case. The Board erroneously contends that the authority of the guardian to give consent, even though choosing not to do so, is an impediment. However, the statute clearly states that one of the elements is that no person authorized by court to give consent is available or willing to consent. Had the guardian not be willing to give consent, the element would have been met. The other criteria regarding the incapacity of the individual was met, but not the criteria showing a need for services. However, the Board contends that R.C. 5126.33 is useless as a remedy because the standard they would like to have apply is whether the guardian's actions were clearly contrary to the ward's best interests and place him at risk of serious emotional harm. The Board concedes that it did not have the authority to seek an order under R.C. 5126.33(D)(1)(c). When a statutorily created

entity is not given legal authority to act, then it cannot act. The answer is not to seek judicial expansion of the powers.

There is no statutory authority for the proposition that the Board is empowered to seek relief on behalf of the ward using a best interests analysis. The statutory scheme is clearly limited to instances of substantial risk of immediate physical harm or death. In fact, the idea of standing is that the party is seeking to enforce a right or make a legal claim. Seeking removal of the guardian neither enforces a right nor makes a legal claim. The Board has no right to seek the removal of a guardian, particularly a cooperative guardian as was the case here.

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 county board is created by R.C. 5126.02 and therefore its power and authority have been conferred upon it by this statute. An administrative agency has no authority beyond the authority given to it by statute. *State ex rel. Lucas Cty. Bd. of Commrs. v. Ohio Environmental Protection Agency*, 88 Ohio St.3d 166, 171, 2000-Ohio-282.

Because the Board has admitted that it does not have the ability to utilize the sole mechanism provided to it by the statute in this case, then it is without power to file any kind of action with the court, and clearly does not have standing as it has no right to enforce or legal claim to make.

Thus the Board was completely outside of its authority in seeking any kind of judicial intervention in its dispute with the guardian. Not all disagreements are actionable. It was not up

to the County Board to make any kind of determination regarding the best interests of the ward, nor to seek enforcement of its determination.

Since guardianship proceedings are generally in rem proceedings and should not be adversarial, as courts throughout Ohio have held over and over, the procedures that do result in adversarial proceedings should be limited. In the case at bar, the County Board of DD was able to impose itself as a party, with the power to subpoena witnesses, generate testimony, complete discovery, cross examine witnesses, including the guardians, and in general create a highly charged litigious environment, exposing the ward to the stress of this protracted proceeding, even requiring the ward to come to the court, have his own counsel, and to speak directly to the judge regarding his wishes. All of this in spite of the fact that in the opinion of the representatives of the Board, the ward was receiving all appropriate services. If this Honorable Court accepts this expansion of authority, then the County Board of JFS will also be able to claim a similar expansion of authority. Further, if an entity is permitted to intervene as a party, then it would be permitted to initiate legal actions on its own accord. Therefore, if the County Board is permitted to initiate legal actions, it could file nuisance abatement actions, writs of prohibition, cases claiming injunctive relief and even declaratory judgments if we accept the contention that the Board must have whatever authority is necessary to perform its duties.

The probate court below reasoned that the County Board was a fiduciary. This it clearly is not. The County Board is specifically not authorized to serve in that capacity. Pursuant to R.C. 5126.31(C) the services it is required to provide “do not include acting as a guardian, trustee, or protector as defined in section 5123.55 of the Revised Code.” A protector is defined as an agency under contract with the Board to provide services. This exclusion keeps the County

Board just outside the scope of an interested party, and appears to be part of the overall statutory scheme to maintain independence from the ward.

The Board contends that without the broad interpretation it suggests, then the Board would not have the power to perform its functions. However, the Board's functions are limited to providing and administering services, investigating reports of abuse and monitoring the services being provided. The individual to whom the services are offered is supposed to maintain a certain autonomy, subject of course to the jurisdiction, if any, of the probate court. Even if the individual is a ward of the probate court, the individual can reject the services on his or her own accord under the statute. The right to this autonomy has long been fought for by advocates on behalf of disabled individuals and a ruling by this Honorable Court that the rights of the Board to compel its will upon the individual by giving it the same authority as a fiduciary would completely reverse the rights that have been gained and even codified. See, e.g., Developmental Disabilities Assistance and Bill of Rights Act, 98 Stat. 2662 (1984), 42 U.S.C. 6001, as amended

Further, the statutory scheme makes it clear that the Board is not obligated to compel the individual to receive the services. There are no enforcement provisions. In fact, throughout the statute it is contemplated that the adult has the right to refuse services or withdraw consent. Some of those examples have already been given. In addition, R.C. 5126.31(D) provides "[t]he board shall ensure that the adult receives the services arranged by the board from the provider and shall have the services terminated if the adult withdraws consent." It is then up to the probate court, if the individual is a ward of the court, to determine what orders may be appropriate. There is no authority for the County Board to make a determination of what is in

the ward's best interests nor is their authority for the County Board to institute any sort of legal proceedings, including a motion for removal of the guardian, to implement its decision.

Appellees' Response to Proposition of Law No. III: The Probate Court has no authority to entertain a motion for removal filed by the County Board of Developmental Disabilities.

Just like the Board, the Probate Court is created by statute. The original establishment of the Probate Court is found in the Ohio Constitution. Section 8, Article IV of the Constitution, defines the jurisdiction of the Probate Court as follows:

"The Probate Court shall have jurisdiction in probate and testamentary matters, the appointment of administrators and guardians, the settlement of the accounts of executors, administrators and guardians, and such jurisdiction in habeas corpus, the issuing of marriage licenses, and for the sale of land by executors, administrators and guardians, and such other jurisdiction, in any county, or counties, as may be provided by law."

Thus the probate court's jurisdiction is limited to its statutory grant. Thus, a close scrutiny of the statutes is required in determining this issue. See also *Abicht, v. O'Donnell* (1936), 52 Ohio App. 513, 3 N.E.2d 993.

While it is true that the probate court may take action to remove a fiduciary on its own motion, it is not permitted to do so at its sole discretion. The concept that the probate court is the superior guardian does not remove all procedural safeguards and give it unfettered discretion. The removal of the guardian must be done pursuant to R.C. 2109.24, which states that "{t}he court may remove any fiduciary, after giving the fiduciary not less than ten days notice, for habitual drunkenness, neglect of duty, incompetency, or fraudulent conduct, because the interest of the property, testamentary trust, or estate that the fiduciary is responsible for demands it, or for any other cause authorized by law." Furthermore, as set forth below, the standing of an

interested party does not mean that the interested party can file such a motion, as the motions to be filed are limited by statute.

The probate court erroneously held that the language cited herein did not apply any longer because of an amendment that referred to the property interest that the fiduciary was responsible for administering. See Judgment Entry of August 15, 2007, page 2. This is not consistent with any other court's interpretation of the amendments to the statute. For example, in a case involving a controversy over health care providers, the 10th District Court of Appeals held that the statute did apply, and upheld the probate court's decision to not remove the guardian. See *In re Guardianship of Clark*, 2009-Ohio-3486 (10th Dist. Ct. App., July 16, 2009).

Thus, the only way a fiduciary may be removed is upon ten days notice and through the finding of good cause as defined by the statute. At oral argument, counsel was asked if a letter to the court could have resulted in removal of the guardian. It was conceded that had the probate court determined that the letter raised sufficient concerns regarding the guardian's actions and the court ultimately found cause for removal of the guardian, then a letter could do that. However, it should be noted that while it would seem to serve the purpose of judicial economy to say that regardless of the route taken, the result would be the same, as the issue of whether the probate court's ruling was against the manifest weight of the evidence was determined to be moot by the procedural ruling. This means that there is no ruling on the merits of the removal of the guardian, so we cannot speculate that the result would be the same. In this case, and all cases like this, it is the process that goes to the very heart of the matter.

While it may be inviting to suggest that the process is not important because the guardian could have been removed once the probate court learned of the conflict between the guardian and

the Board. However, that is far too speculative. It is still not clear how the guardian's advocacy on behalf of the ward interfered in any way with the provision of services to the ward. It is true that the Devlins decided to resign as service providers because they did not like the scrutiny they were under with respect to the guardian, but the temporary guardian agreed that the placement needed to be changed. It seems remote that this matter would have even come to the probate court's attention and perhaps the probate court would have actually shared the concerns of the guardian and demanded changes in services as well. .

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. Because of the nature of a guardianship over the person only, the only ones who have standing are the ward, any applicant for guardianship or anyone who may be considered as a guardian. These are the only ones who have a personal stake in the Court's determination of who will serve as guardian. The Board is specifically prevented from serving as the guardian, for the statute only permits the agency under contract with the Board to apply for guardianship.

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 filing 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. This would have resulted in a quicker resolution of the matter, exacting a significantly lesser toll on the individuals involved in this matter, particularly the ward.

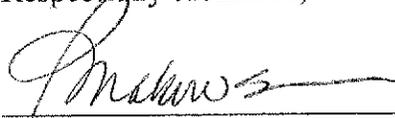
CONCLUSION

This case involves cooperative guardians who have attempted to work with the Board while pushing to make sure that appropriate services are in place for their son. The Board has not articulated any fear that the ward is under threat of serious physical harm or death. A conflict has arisen because of the advocacy level of the guardians. Rather than accepting the judgment of the Board, the guardians have pushed the Board to explore alternatives to services and have advocated on behalf of their son. There is nothing in the record that shows a refusal of services by these guardians. The Board views this advocacy as a conflict and wants the guardians removed so that it does not have to continue to answer to the guardians, even though it is the Board's role to serve as administrator of the complaints and to monitor the services, not as an entity empowered to mandate the services to be provided. There is no power of the Board to mandate services, and services must be terminated if requested by the recipient. The only

remedy available to the Board is to seek the implementation of services where necessary in the event of a threat of serious physical harm or death. One instance of poor judgment on behalf of the guardian did not result in the refusal or loss of services, and there is no evidence that this created a threat of serious physical harm or death to the ward. This conflict should not have been turned into a case of such magnitude. The court of appeals correctly ended the free reign given to the county board by the probate court, on of its appointing authorities. R.C. 5126.028. This Honorable Court should uphold the decision of the court of appeals and keep the county board of developmental disabilities, and all county boards of developmental disabilities, on track to provide those functions specifically enumerated in their statutory grant.

For these reasons, the decision of the Eleventh District Court of Appeals should be upheld.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Brief was served this 14th day of September, 2009, upon the following counsel of record by U.S. Mail, postage prepaid, addressed as follows:

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**APPENDIX TO MERIT BRIEF OF
GABRIELE AND JOSEPH SPANGLER**

**Statutes Cited
(other than those already included in Appellant's Appendix)**

| | |
|----------------|----|
| 2101.38 | 2 |
| 2109.04 | 3 |
| 2109.33 | 4 |
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| 2111.01 | 8 |
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2101.38 Administration when the probate judge is interested.

Letters testamentary, of administration, or of guardianship shall not be issued to a person after his election to the office of probate judge and before the expiration of his term. If a probate judge is interested, as heir, legatee, devisee, or other manner in an estate which would otherwise be settled in the probate court of the county where he resides, such estate, and all of the accounts of guardians in which the judge is interested, shall be settled by the court of common pleas of the county. In such matters and cases in which the judge is interested, the original papers shall be by him forthwith certified to the court of common pleas. In other matters and proceedings in a probate court in which the judge thereof is interested or in which he is required to be a witness to a will, such judge shall, upon the motion of a party interested in the proceedings, or upon his own motion, certify the matters and proceedings to the court of common pleas and forthwith file with the clerk of the court of common pleas all original papers connected therewith.

When a matter or proceeding is so certified, the court of common pleas, at chambers, by a judge thereof, or in open court shall hear and determine it as though such court had original jurisdiction of the subject matter. Upon final decision of the questions involved in such proceedings, the final settlement of the estate in which the judge is interested as executor, administrator, or guardian, or when his interest therein ceases, the clerk shall deliver to the probate court from which they came the original papers and make and file therein an authenticated transcript of the orders, judgments, and proceedings of the court of common pleas. Thereupon the probate judge shall record such orders, judgments, and proceedings in the proper records.

Effective Date: 10-01-1953

2109.04 Bond.

(A)(1) Unless otherwise provided by law, every fiduciary, prior to the issuance of his letters as provided by section 2109.02 of the Revised Code, shall file in the probate court in which the letters are to be issued a bond with a penal sum in such amount as may be fixed by the court, but in no event less than double the probable value of the personal estate and of the annual real estate rentals which will come into such person's hands as a fiduciary. The bond of a fiduciary shall be in a form approved by the court and signed by two or more personal sureties or by one or more corporate sureties approved by the court. It shall be conditioned that the fiduciary faithfully and honestly will discharge the duties devolving upon him as fiduciary, and shall be conditioned further as may be provided by law.

(2) Except as otherwise provided in this division, if the instrument creating the trust dispenses with the giving of a bond, the court shall appoint a fiduciary without bond, unless the court is of the opinion that the interest of the trust demands it. If the court is of that opinion, it may require bond to be given in any amount it fixes. If a parent nominates a guardian for his child in a will and provides in the will that the guardian may serve without giving bond, the court may appoint the guardian without bond or require the guardian to give bond in accordance with division (A)(1) of this section.

(3) A guardian of the person only does not have to give bond unless, for good cause shown, the court considers a bond to be necessary. When a bond is required of a guardian of the person only, it shall be determined and filed in accordance with division (A)(1) of this section. This division does not apply to a guardian of the person only nominated in a parent's will if the will provides that the guardian may serve without giving bond.

(4) When the probable value of the personal estate and of the annual real estate rentals that will come into the guardian's hands as a fiduciary is less than ten thousand dollars, the court may waive or reduce a bond required by division (A)(1) of this section.

(B) When an executive director who is responsible for the administration of children services in the county is appointed as trustee of the estate of a ward pursuant to section 5153.18 of the Revised Code and has furnished bond under section 5153.13 of the Revised Code, or when an agency under contract with the department of mental retardation and developmental disabilities for the provision of protective service under sections 5123.55 to 5123.59 of the Revised Code is appointed as trustee of the estate of a ward under such sections and any employees of the agency having custody or control of funds or property of such a ward have furnished bond under section 5123.59 of the Revised Code, the court may dispense with the giving of a bond.

(C) When letters are granted without bond, at any later period on its own motion or upon the application of any party interested, the court may require bond to be given in such amount as may be fixed by the court. On failure to give such bond, the defaulting fiduciary shall be removed.

No instrument authorizing a fiduciary whom it names to serve without bond shall be construed to relieve a successor fiduciary from the necessity of giving bond, unless the instrument clearly evidences such intention.

The court by which a fiduciary is appointed may reduce the amount of the bond of such fiduciary at any time for good cause shown.

When two or more persons are appointed as joint fiduciaries, the court may take a separate bond from each or a joint bond from all.

Effective Date: 09-10-1991

2109.33 Service of additional notice - exceptions to account.

A fiduciary may serve notice of the hearing upon his account to be conducted under section 2109.32 of the Revised Code, or may cause the notice to be served, upon any person who is interested in the estate or trust. The probate court, after notice to the fiduciary upon the motion of any interested person for good cause shown or at its own instance, may order that a notice of the hearing is to be served upon persons the court designates.

The notice shall set forth the time and place of the hearing and shall specify the account to be considered and acted upon by the court at the hearing and the period of time covered by the account. It shall contain a statement to the effect that the person notified is required to examine the account, to inquire into the contents of the account and into all matters that may come before the court at the hearing on the account, and to file any exceptions that the person may have to the account at least five days prior to the hearing on the account, and that upon his failure to file exceptions, the account may be approved without further notice. If the person to be notified was not a party to the proceeding in which any prior account was settled, the notice, for the purpose of barring any rights possessed by that person, may include and specify the prior accounts and the periods of time covered by them. In that event, the notice shall inform the person notified that the approval of the account filed most recently will terminate any rights possessed by him to vacate the order settling each prior account so specified, except as provided in section 2109.35 of the Revised Code, and shall further inform the person that, under penalty of losing those rights, he forthwith shall examine each prior account so specified, shall inquire into its contents, and, if he deems it necessary to protect his rights, shall take the action with respect to his rights that is permitted by law.

The notice of the hearing upon an account shall be served at least fifteen days prior to the hearing on the account. Any competent person may waive service of notice and consent to the approval of any account by the court. Waivers of service and consents to approval shall be recorded with the account.

Any person interested in an estate or trust may file exceptions to an account or to matters pertaining to the execution of the trust. All exceptions shall be specific and written. Exceptions shall be filed and a copy of them furnished to the fiduciary by the exceptor, not less than five days prior to the hearing on the account. The court for cause may allow further time to file exceptions. If exceptions are filed to an account, the court may allow further time for serving notice of the hearing upon any person who may be affected by an order disposing of the exceptions and who has not already been served with notice of the hearing in accordance with this section.

A probate court, by local rule, may require that notice of the hearing on a final account be given to all heirs in an intestate estate and to all residuary beneficiaries in a testate estate.

Any notice that is required or permitted by this section or by any local rule adopted under authority of this section shall be served, and any waiver of the right to receive any notice of those types may be waived, in accordance with the Rules of Civil Procedure.

Effective Date: 06-23-1994

2109.35 Effect of order settling account - vacation of order.

The order of the probate court upon the settlement of a fiduciary's account shall have the effect of a judgment and may be vacated only as follows:

(A) The order may be vacated for fraud, upon motion of any person affected by the order or upon the court's own order, if the motion is filed or order is made within one year after discovery of the existence of the fraud. Any person who is subject to any legal disability may file the motion at any time within one year after the removal of the legal disability or within one year after he discovers the existence of the fraud, whichever is later, or his guardian or a successor guardian may do so during the period of the legal disability. If the death of any person occurs during the period within which he could have filed the motion, his administrator or executor may file it within one year after the person's death.

(B) The order may be vacated for good cause shown, other than fraud, upon motion of any person affected by the order who was not a party to the proceeding in which the order was made and who had no knowledge of the proceeding in time to appear in it; provided that, if the account settled by the order is included and specified in the notice to that person of the proceeding in which a subsequent account is settled, the right of that person to vacate the order shall terminate upon the settlement of the subsequent account. A person affected by an order settling an account shall be deemed to have been a party to the proceeding in which the order was made if that person was served with notice of the hearing on the account in accordance with section 2109.33 of the Revised Code, waived that notice, consented to the approval of the account, filed exceptions to the account, or is bound by section 2109.34 of the Revised Code; but no person in being who is under legal disability at the time of that proceeding shall be deemed to have been a party to that proceeding unless he was represented in it as provided in section 2111.23 of the Revised Code. Neither the fiduciary nor his surety shall incur any liability as a result of the vacation of an order settling an account in accordance with this division, if the motion to vacate the order is filed more than three years following the settlement of the fiduciary's account showing complete distribution of assets; but the three-year period shall not affect the liability of any heir, devisee, or distributee either before or after the expiration of that period.

(C) The order may be vacated for good cause shown upon motion of the fiduciary, if the motion is filed prior to the settlement of the account showing that the fiduciary has fully discharged his trust.

A motion to vacate an order settling an account shall set forth the items of the account with respect to which complaint is made and the reasons for complaining of those items. The person filing a motion to vacate an order settling an account or another person the court may designate shall cause notice of the hearing on the motion to be served upon all interested parties who may be adversely affected by an order of the court granting the motion.

An order settling an account shall not be vacated unless the court determines that there is good cause for doing so, and the burden of proving good cause shall be upon the complaining party.

The vacation of an order settling an account, made after notice given in the manner provided in section 2109.33 of the Revised Code, shall not affect the rights of a purchaser for value in good faith, a lessee for value in good faith, or an encumbrancer for value in good faith; provided that, if the fiduciary has effected any such sale, lease, or encumbrance, any person prejudiced by it may proceed, after vacation of the order, against any distributee benefiting from the sale, lease, or encumbrance to the extent of the amount received by that distributee on distribution of the estate or trust, or if any heir, devisee, or distributee has effected any such sale, lease, or encumbrance, any person prejudiced by it may proceed, after the vacation of the order, against that heir, devisee, or distributee, to the extent of the value at the time of alienation of the property alienated by him, with legal interest.

Effective Date: 06-23-1994

2109.36 Order of distribution.

An application for an order of distribution of the assets of an estate or trust held by a fiduciary may be set for hearing before the probate court at such time as the court shall designate. The fiduciary may serve notice of the hearing upon such application, or cause such notice to be served, upon any person who may be affected by an order disposing thereof; or the court, upon motion of any interested person for good cause shown or at its own instance, may order such notice to be served upon any such person. Such notice shall set forth the time and place of the hearing and shall be accompanied by a statement of the proposed distribution. At the hearing upon the application the court shall inquire into, consider, and determine all matters relative thereto, and make such order as the court deems proper. If the court makes an order of distribution, the fiduciary shall comply therewith and shall account to the court for his distribution, verified by vouchers or proof. An order of distribution shall have the effect of a judgment. Such order may be reviewed upon appeal and may be vacated as provided in section 2109.35 of the Revised Code.

Effective Date: 10-01-1953

2109.59 Failure of fiduciary to make payment or distribution.

If a fiduciary, upon demand, refuses or neglects to pay any creditor whose claim has been allowed by the fiduciary and not subsequently rejected or to pay any creditor or make distribution to any person interested in the estate whose claim or interest has been established by judgment, decree, or order of court, including an order of distribution, such creditor or other person may file a petition against the fiduciary in the probate court from which the fiduciary received his appointment to enforce such payment or distribution, briefly setting forth therein the amount and nature of his claim or interest. Such petition shall not be filed against an executor or administrator until the expiration of the period prescribed in section 2117.30 of the Revised Code.

When such petition is filed, the probate court shall issue a citation to the fiduciary setting forth the filing of the petition and the nature of the claim of the petitioner and commanding such fiduciary to appear before the court on the return day thereof to answer and show cause why a judgment should not be rendered or order entered against him. Such citation shall be returnable not less than twenty nor more than forty days from its date and shall be served and returned by an officer as in the case of summons. Such citation may issue to any county in the state.

On the return of the citation the cause shall be for hearing, unless for good cause shown it is continued. The probate court may hear and determine all questions necessary to ascertain and fix the amount due from the fiduciary to the petitioner and render such judgment or make such order as may be proper. If necessary, such court may hear, determine, and settle the rights and claims of all parties interested in the subject matter of the petition. For such purpose the probate court may cause all parties in interest to be made parties to such petition by amended, supplemental, or crosspetition. The court shall cause notice to be served on all such parties in the manner provided in this section for service of the citation upon the fiduciary.

In any such proceeding the sureties on the bond of the fiduciary, if made parties thereto, may make any defense that the fiduciary could make and the court may render such judgment or make such order with respect to the sureties as may be proper.

Effective Date: 10-01-1953

2111.01 Guardian and conservatorship definitions.

As used in Chapters 2101. to 2131. of the Revised Code:

(A) "Guardian," other than a guardian under sections 5905.01 to 5905.19 of the Revised Code, means any person, association, or corporation appointed by the probate court to have the care and management of the person, the estate, or both of an incompetent or minor. When applicable, "guardian" includes, but is not limited to, a limited guardian, an interim guardian, a standby guardian, and an emergency guardian appointed pursuant to division (B) of section 2111.02 of the Revised Code. "Guardian" also includes an agency under contract with the department of mental retardation and developmental disabilities for the provision of protective service under sections 5123.55 to 5123.59 of the Revised Code when appointed by the probate court to have the care and management of the person of an incompetent.

(B) "Ward" means any person for whom a guardian is acting or for whom the probate court is acting pursuant to section 2111.50 of the Revised Code.

(C) "Resident guardian" means a guardian appointed by a probate court to have the care and management of property in this state that belongs to a nonresident ward.

(D) "Incompetent" means 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 this state.

(E) "Next of kin" means any person who would be entitled to inherit from a ward under Chapter 2105. of the Revised Code if the ward dies intestate.

(F) "Conservator" means a conservator appointed by the probate court in an order of conservatorship issued pursuant to section 2111.021 of the Revised Code.

(G) "Parent" means a natural parent or adoptive parent of a minor child whose parental rights and responsibilities have not been terminated by a juvenile court or another court.

Effective Date: 01-14-1997

2111.02 Appointment of guardian - limited, interim, emergency, or standby guardian - nomination.

(A) When found necessary, the probate court on its own motion or on application by any interested party shall appoint, subject to divisions (C) and (D) of this section and to section 2109.21 and division (B) of section 2111.121 of the Revised Code, a guardian of the person, the estate, or both, of a minor or incompetent, provided the person for whom the guardian is to be appointed is a resident of the county or has a legal settlement in the county and, except in the case of a minor, has had the opportunity to have the assistance of counsel in the proceeding for the appointment of such guardian. An interested party includes, but is not limited to, a person nominated in a durable power of attorney as described in division (D) of section 1337.09 of the Revised Code or in a writing as described in division (A) of section 2111.121 of the Revised Code.

Except when the guardian of an incompetent is an agency under contract with the department of mental retardation and developmental disabilities for the provision of protective services under sections 5123.55 to 5123.59 of the Revised Code, the guardian of an incompetent, by virtue of such appointment, shall be the guardian of the minor children of the guardian's ward, unless the court appoints some other person as their guardian.

When the primary purpose of the appointment of a guardian is, or was, the collection, disbursement, or administration of moneys awarded by the veterans administration to the ward, or assets derived from such moneys, no court costs shall be charged in the proceeding for the appointment or in any subsequent proceedings made in pursuance of the appointment, unless the value of the estate, including the moneys then due under the veterans administration award, exceeds one thousand five hundred dollars.

(B)(1) If the probate court finds it to be in the best interest of an incompetent or minor, it may appoint pursuant to divisions (A) and (C) of this section, on its own motion or on application by an interested party, a limited guardian with specific limited powers. The sections of the Revised Code, rules, and procedures governing guardianships apply to a limited guardian, except that the order of appointment and letters of authority of a limited guardian shall state the reasons for, and specify the limited powers of, the guardian. The court may appoint a limited guardian for a definite or indefinite period. An incompetent or minor for whom a limited guardian has been appointed retains all of the incompetent's or minor's rights in all areas not affected by the court order appointing the limited guardian.

(2) If a guardian appointed pursuant to division (A) of this section is temporarily or permanently removed or resigns, and if the welfare of the ward requires immediate action, at any time after the removal or resignation, the probate court may appoint, ex parte and with or without notice to the ward or interested parties, an interim guardian for a maximum period of fifteen days. If the court appoints the interim guardian ex parte or without notice to the ward, the court, at its first opportunity, shall enter upon its journal with specificity the reason for acting ex parte or without notice, and, as soon as possible, shall serve upon the ward a copy of the order appointing the interim guardian. For good cause shown, after notice to the ward and interested parties and after hearing, the court may extend an interim guardianship for a specified period, but not to exceed an additional thirty days.

(3) If a minor or incompetent has not been placed under a guardianship pursuant to division (A) of this section and if an emergency exists, and if it is reasonably certain that immediate action is required to prevent significant injury to the person or estate of the minor or incompetent, at any time after it receives notice of the emergency, the court, ex parte, may issue any order that it considers necessary to prevent injury to the person or estate of the minor or incompetent, or may appoint an emergency guardian for a maximum period of seventy-two hours. A written copy of any order issued by a court under this division shall be served upon the incompetent or minor as soon as possible after its issuance. Failure to serve such an order after its issuance or prior to the taking of any action under its authority does not invalidate the order or the actions taken. The powers of an emergency guardian shall be specified in the letters of appointment, and shall be limited to those powers that are necessary to prevent injury to the person or estate of the minor or incompetent. If the court acts ex parte or without notice to the minor or incompetent, the court, at its first opportunity, shall enter upon its journal a record of the case and, with specificity, the reason for acting ex parte or without notice. For good cause shown, after notice to the minor or incompetent and interested parties, and after hearing, the court may extend an emergency guardianship for a specified period, but not to exceed an additional thirty days.

(C) Prior to the appointment of a guardian or limited guardian under division (A) or (B)(1) of this section, the court shall conduct a hearing on the matter of the appointment. The hearing shall be conducted in accordance with all of the following:

(1) The proposed guardian or limited guardian shall appear at the hearing and, if appointed, shall swear under oath that the proposed guardian or limited guardian has made and will continue to make diligent efforts to file a true inventory in accordance with section 2111.14 of the Revised Code and find and report all assets belonging to the estate of the ward and that the proposed guardian or limited guardian faithfully and completely will fulfill the other duties of guardian, including the filing of timely and accurate reports and accountings;

(2) If the hearing is conducted by a referee, the procedures set forth in Civil Rule 53 shall be followed;

(3) If the hearing concerns the appointment of a guardian or limited guardian for an alleged incompetent, the burden of proving incompetency shall be by clear and convincing evidence;

(4) Upon request of the applicant, the alleged incompetent for whom the appointment is sought or the alleged incompetent's counsel, or any interested party, a recording or record of the hearing shall be made;

(5) Evidence of a less restrictive alternative to guardianship may be introduced, and when introduced, shall be considered by the court;

(6) The court may deny a guardianship based upon a finding that a less restrictive alternative to guardianship exists;

(7) If the hearing concerns the appointment of a guardian or limited guardian for an alleged incompetent, the alleged incompetent has all of the following rights:

(a) The right to be represented by independent counsel of his choice;

(b) The right to have a friend or family member of his choice present;

(c) The right to have evidence of an independent expert evaluation introduced;

(d) If the alleged incompetent is indigent, upon his request:

(i) The right to have counsel and an independent expert evaluator appointed at court expense;

(ii) If the guardianship, limited guardianship, or standby guardianship decision is appealed, the right to have counsel appointed and necessary transcripts for appeal prepared at court expense.

(D)(1) When a person has been nominated to be a guardian of the estate of a minor in or pursuant to a durable power of attorney as described in division (D) of section 1337.09 of the Revised Code or a writing as described in division (A) of section 2111.121 of the Revised Code, the person nominated has preference in appointment over a person selected by the minor. A person who has been nominated to be a guardian of the person of a minor in or pursuant to a durable power of attorney or writing of that nature does not have preference in appointment over a person selected by the minor, but the probate court may appoint the person named in the durable power of attorney or the writing, the person selected by the minor, or another person as guardian of the person of the minor.

(2) A person nominated as a guardian of an incompetent adult child pursuant to section 1337.09 or 2111.121 of the Revised Code shall have preference in appointment over a person applying to be guardian if the person nominated is competent, suitable, and willing to accept the appointment, and if the incompetent adult child does not have a spouse or an adult child and has not designated a guardian prior to the court finding the adult child incompetent.

Effective Date: 01-14-1997; 2008 SB157 05-14-2008

2111.13 Duties of guardian of person.

(A) When a guardian is appointed to have the custody and maintenance of a ward, and to have charge of the education of the ward if the ward is a minor, the guardian's duties are as follows:

(1) To protect and control the person of the ward;

(2) To provide suitable maintenance for the ward when necessary, which shall be paid out of the estate of such ward upon the order of the guardian of the person;

(3) To provide such maintenance and education for such ward as the amount of the ward's estate justifies when the ward is a minor and has no father or mother, or has a father or mother who fails to maintain or educate the ward, which shall be paid out of such ward's estate upon the order of the guardian of the person;

(4) To obey all the orders and judgments of the probate court touching the guardianship.

(B) Except as provided in section 2111.131 of the Revised Code, no part of the ward's estate shall be used for the support, maintenance, or education of such ward unless ordered and approved by the court.

(C) A guardian of the person may authorize or approve the provision to the ward of medical, health, or other professional care, counsel, treatment, or services unless the ward or an interested party files objections with the probate court, or the court, by rule or order, provides otherwise.

(D) Unless a person with the right of disposition for a ward under section 2108.70 or 2108.81 of the Revised Code has made a decision regarding whether or not consent to an autopsy or post-mortem examination on the body of the deceased ward under section 2108.50 of the Revised Code shall be given, a guardian of the person of a ward who has died may consent to the autopsy or post-mortem examination .

(E) If a deceased ward did not have a guardian of the estate , the estate is not required to be administered by a probate court, and a person with the right of disposition for a ward, as described in section 2108.70 or 2108.81 of the Revised Code, has not made a decision regarding the disposition of the ward's body or remains, the guardian of the person of the ward may authorize the burial or cremation of the ward.

(F) A guardian who gives consent or authorization as described in divisions (D) and (E) of this section shall notify the probate court as soon as possible after giving the consent or authorization.

Effective Date: 09-22-2000; 10-12-2006

2111.141 Inventory to be supported by evidence.

The court, by order or rule, may require that any inventory filed by a guardian pursuant to section 2111.14 of the Revised Code be supported by evidence that the inventory is a true and accurate inventory of the estate of the ward of the guardian, which evidence may include, but is not limited to, prior income tax returns, bank statements, and social security records of the ward or other documents that are relevant to determining the accuracy of the inventory. In order to verify the accuracy of an inventory, the court may order a guardian to produce any additional evidence that may tend to prove that the guardian is in possession of or has knowledge of assets that belong to the estate of his ward and that have not been included in the guardianship inventory, which evidence may include, but is not limited to, the guardian's income tax returns and bank statements and any other documents that are relevant to determining the accuracy of an inventory. The court may assign court employees or appoint an examiner to verify an inventory filed by a guardian. Upon appointment, the assigned court employees or appointed examiner shall conduct an investigation to verify the accuracy of the inventory filed by the guardian. Upon order of the court, the assigned court employees or appointed examiner may subpoena any documents necessary for his investigation. Upon completion of the investigation, the assigned court employees or appointed examiner shall file a report with the court. The court shall hold a hearing on the report with notice to all interested parties. At the hearing, the guardian shall have the right to examine and cross-examine any assigned court employees or appointed examiner who conducted the investigation and filed the report that is the subject of the hearing. The court shall charge any costs associated with the verification of an inventory filed by a guardian against the estate of the ward, except that, if the court determines that the guardian wrongfully withheld, or aided in the wrongful withholding, of assets from the inventory filed by the guardian, the court shall charge the costs against the guardian.

Effective Date: 01-01-1990

2111.49 Report of guarding of incompetent.

(A)(1) Subject to division (A)(3) of this section, the guardian of an incompetent person shall file a guardian's report with the court two years after the date of the issuance of the guardian's letters of appointment and biennially after that time, or at any other time upon the motion or a rule of the probate court. The report shall be in a form prescribed by the court and shall include all of the following:

(a) The present address of the place of residence of the ward;

(b) The present address of the guardian;

(c) If the place of residence of the ward is not the ward's personal home, the name of the facility at which the ward resides and the name of the person responsible for the ward's care;

(d) The approximate number of times during the period covered by the report that the guardian has had contact with the ward, the nature of those contacts, and the date that the ward was last seen by the guardian;

(e) Any major changes in the physical or mental condition of the ward observed by the guardian;

(f) The opinion of the guardian as to the necessity for the continuation of the guardianship;

(g) The opinion of the guardian as to the adequacy of the present care of the ward;

(h) The date that the ward was last examined or otherwise seen by a physician and the purpose of that visit;

(i) A statement by a licensed physician, licensed clinical psychologist, licensed independent social worker, licensed professional clinical counselor, or mental retardation team that has evaluated or examined the ward within three months prior to the date of the report as to the need for continuing the guardianship.

(2) The court shall review a report filed pursuant to division (A)(1) of this section to determine if a continued necessity for the guardianship exists. The court may direct a probate court investigator to verify aspects of the report.

(3) Division (A)(1) of this section applies to guardians appointed prior to, as well as on or after, the effective date of this section. A guardian appointed prior to that date shall file the first report in accordance with any applicable court rule or motion, or, in the absence of such a rule or motion, upon the next occurring date on which a report would have been due if division (A)(1) of this section had been in effect on the date of appointment as guardian, and shall file all subsequently due reports biennially after that time.

(B) If, upon review of any report required by division (A)(1) of this section, the court finds that it is necessary to intervene in a guardianship, the court shall take any action that it determines is necessary, including, but not limited to, terminating or modifying the guardianship.

(C) Except as provided in this division, for any guardianship, upon written request by the ward, the ward's attorney, or any other interested party made at any time after the expiration of one hundred twenty days from the date of the original appointment of the guardian, a hearing shall be held in accordance with section 2111.02 of the Revised Code to evaluate the continued necessity of the guardianship. Upon written request, the court shall conduct a minimum of one hearing under this division in the calendar year in which the guardian was appointed, and upon written request, shall conduct a minimum of one hearing in each of the following calendar years. Upon its own motion or upon written request, the court may, in its discretion, conduct a hearing within the first one hundred twenty days after appointment of the guardian or conduct more than one hearing in a calendar year. If the ward alleges competence, the burden of proving incompetence shall be upon the applicant for guardianship or the guardian, by clear and convincing evidence.

Effective Date: 03-18-1997

5101.61 Reporting abuse, neglect or exploitation of adult.

(A) As used in this section:

(1) "Senior service provider" means any person who provides care or services to a person who is an adult as defined in division (B) of section 5101.60 of the Revised Code.

(2) "Ambulatory health facility" means a nonprofit, public or proprietary freestanding organization or a unit of such an agency or organization that:

(a) Provides preventive, diagnostic, therapeutic, rehabilitative, or palliative items or services furnished to an outpatient or ambulatory patient, by or under the direction of a physician or dentist in a facility which is not a part of a hospital, but which is organized and operated to provide medical care to outpatients;

(b) Has health and medical care policies which are developed with the advice of, and with the provision of review of such policies, an advisory committee of professional personnel, including one or more physicians, one or more dentists, if dental care is provided, and one or more registered nurses;

(c) Has a medical director, a dental director, if dental care is provided, and a nursing director responsible for the execution of such policies, and has physicians, dentists, nursing, and ancillary staff appropriate to the scope of services provided;

(d) Requires that the health care and medical care of every patient be under the supervision of a physician, provides for medical care in a case of emergency, has in effect a written agreement with one or more hospitals and other centers or clinics, and has an established patient referral system to other resources, and a utilization review plan and program;

(e) Maintains clinical records on all patients;

(f) Provides nursing services and other therapeutic services in accordance with programs and policies, with such services supervised by a registered professional nurse, and has a registered professional nurse on duty at all times of clinical operations;

(g) Provides approved methods and procedures for the dispensing and administration of drugs and biologicals;

(h) Has established an accounting and record keeping system to determine reasonable and allowable costs;

(i) "Ambulatory health facilities" also includes an alcoholism treatment facility approved by the joint commission on accreditation of healthcare organizations as an alcoholism treatment facility or certified by the department of alcohol and drug addiction services, and such facility shall comply with other provisions of this division not inconsistent with such accreditation or certification.

(3) "Community mental health facility" means a facility which provides community mental health services and is included in the comprehensive mental health plan for the alcohol, drug addiction, and mental health service district in which it is located.

(4) "Community mental health service" means services, other than inpatient services, provided by a community mental health facility.

(5) "Home health agency" means an institution or a distinct part of an institution operated in this state which:

(a) Is primarily engaged in providing home health services;

(b) Has home health policies which are established by a group of professional personnel, including one or more duly licensed doctors of medicine or osteopathy and one or more registered professional nurses, to govern the home health services it provides and which includes a requirement that every patient must be under the care of a duly licensed doctor of medicine or osteopathy;

(c) Is under the supervision of a duly licensed doctor of medicine or doctor of osteopathy or a registered professional nurse who is responsible for the execution of such home health policies;

(d) Maintains comprehensive records on all patients;

(e) Is operated by the state, a political subdivision, or an agency of either, or is operated not for profit in this state and is licensed or registered, if required, pursuant to law by the appropriate department of the state, county, or municipality in which it furnishes services; or is operated for profit in this state, meets all the requirements specified in divisions (A)(5)(a) to (d) of this section, and is certified under Title XVIII of the "Social Security Act," 49 Stat. 620 (1935), 42 U.S.C. 301, as amended.

(6) "Home health service" means the following items and services, provided, except as provided in division (A)(6)(g) of this section, on a visiting basis in a place of residence used as the patient's home:

(a) Nursing care provided by or under the supervision of a registered professional nurse;

(b) Physical, occupational, or speech therapy ordered by the patient's attending physician;

(c) Medical social services performed by or under the supervision of a qualified medical or psychiatric social worker and under the direction of the patient's attending physician;

(d) Personal health care of the patient performed by aides in accordance with the orders of a doctor of medicine or osteopathy and under the supervision of a registered professional nurse;

(e) Medical supplies and the use of medical appliances;

(f) Medical services of interns and residents-in-training under an approved teaching program of a nonprofit hospital and under the direction and supervision of the patient's attending physician;

(g) Any of the foregoing items and services which:

(i) Are provided on an outpatient basis under arrangements made by the home health agency at a hospital or skilled nursing facility;

(ii) Involve the use of equipment of such a nature that the items and services cannot readily be made available to the patient in the patient's place of residence, or which are furnished at the hospital or skilled nursing facility while the patient there to receive any item or service involving the use of such equipment.

Any attorney, physician, osteopath, podiatrist, chiropractor, dentist, psychologist, any employee of a hospital as defined in section 3701.01 of the Revised Code, any nurse licensed under Chapter 4723. of the Revised Code, any employee of an ambulatory health facility, any employee of a home health agency, any employee of an adult care facility as defined in section 3722.01 of the Revised Code, any employee of a community alternative home as defined in section 3724.01 of the Revised Code, any employee of a nursing home, residential care facility, or home for the aging, as defined in section 3721.01 of the Revised Code, any senior service provider, any peace officer, coroner, clergyman, any employee of a community mental health facility, and any person engaged in social work or counseling having reasonable cause to believe that an adult is being abused, neglected, or exploited, or is in a condition which is the result of abuse, neglect, or exploitation shall immediately report such belief to the county department of job and family services. This section does not apply to employees of any hospital or public hospital as defined in section 5122.01 of the Revised Code.

(B) Any person having reasonable cause to believe that an adult has suffered abuse, neglect, or exploitation may report, or cause reports to be made of such belief to the department.

(C) The reports made under this section shall be made orally or in writing except that oral reports shall be followed by a written report if a written report is requested by the department. Written reports shall include:

(1) The name, address, and approximate age of the adult who is the subject of the report;

(2) The name and address of the individual responsible for the adult's care, if any individual is, and if the individual is known;

(3) The nature and extent of the alleged abuse, neglect, or exploitation of the adult;

(4) The basis of the reporter's belief that the adult has been abused, neglected, or exploited.

(D) Any person with reasonable cause to believe that an adult is suffering abuse, neglect, or exploitation who makes a report pursuant to this section or who testifies in any administrative or judicial proceeding arising from such a report, or any employee of the state or any of its subdivisions who is discharging responsibilities under section 5101.62 of the Revised Code shall be immune from civil or criminal liability on account of such investigation, report, or testimony, except liability for perjury, unless the person has acted in bad faith or with malicious purpose.

(E) No employer or any other person with the authority to do so shall discharge, demote, transfer, prepare a negative work performance evaluation, or reduce benefits, pay, or work privileges, or take any other action detrimental to an employee or in any way retaliate against an employee as a result of the employee's having filed a report under this section.

(F) Neither the written or oral report provided for in this section nor the investigatory report provided for in section 5101.62 of the Revised Code shall be considered a public record as defined in section 149.43 of the Revised Code. Information contained in the report shall upon request be made available to the adult who is the subject of the report, to agencies authorized by the department to receive information contained in the report, and to legal counsel for the adult.

Effective Date: 07-01-2000

5101.611 Referring cases of abuse.

If a county department of job and family services knows or has reasonable cause to believe that the subject of a report made under section 5101.61 or of an investigation conducted under sections 5101.62 to 5101.64 or on the initiative of the department is mentally retarded or developmentally disabled as defined in section 5126.01 of the Revised Code, the department shall refer the case to the county board of mental retardation and developmental disabilities of that county for review pursuant to section 5126.31 of the Revised Code.

If a county board of mental retardation and developmental disabilities refers a case to the county department of job and family services in accordance with section 5126.31, the department shall proceed with the case in accordance with sections 5101.60 to 5101.71 of the Revised Code.

Effective Date: 07-01-2000

5101.63 Temporary restraining order.

If, during the course of an investigation conducted under section 5101.62 of the Revised Code, any person, including the adult who is the subject of the investigation, denies or obstructs access to the residence of the adult, the county department of job and family services may file a petition in court for a temporary restraining order to prevent the interference or obstruction. The court shall issue a temporary restraining order to prevent the interference or obstruction if it finds there is reasonable cause to believe that the adult is being or has been abused, neglected, or exploited and access to the person's residence has been denied or obstructed. Such a finding is prima-facie evidence that immediate and irreparable injury, loss, or damage will result, so that notice is not required. After obtaining an order restraining the obstruction of or interference with the access of the protective services representative, the representative may be accompanied to the residence by a peace officer.

Effective Date: 07-01-2000

5101.65 Petitioning for court order to provide protective services.

If the county department of job and family services determines that an adult is in need of protective services and is an incapacitated person, the department may petition the court for an order authorizing the provision of protective services. The petition shall state the specific facts alleging the abuse, neglect, or exploitation and shall include a proposed protective service plan. Any plan for protective services shall be specified in the petition.

Effective Date: 07-01-2000

5123.55 Protective services definitions.

As used in sections 5123.55 to 5123.59 of the Revised Code:

(A) "Guardian" means a guardian of the person, limited guardian, interim guardian, or emergency guardian pursuant to appointment by the probate court under Chapter 2111. of the Revised Code.

(B) "Trustee" means a trustee appointed by and accountable to the probate court, in lieu of a guardian and without a judicial determination of incompetency, with respect to an estate of ten thousand dollars or less.

(C) "Protector" means an agency under contract with the department of mental retardation and developmental disabilities acting with or without court appointment to provide guidance, service, and encouragement in the development of maximum self-reliance to a person with mental retardation or a developmental disability, independent of any determination of incompetency.

(D) "Protective service" means performance of the duties of a guardian, trustee, or conservator, or acting as a protector, with respect to a person with mental retardation or a developmental disability.

(E) "Conservator" means a conservator of the person pursuant to an appointment by a probate court under Chapter 2111. of the Revised Code.

Effective Date: 09-22-2000

5126.02 County or multicounty board of mental retardation and developmental disability required.

(A) Each county shall either have its own county board of mental retardation and developmental disabilities or, pursuant to section 5126.021 or 5126.022 of the Revised Code, be a member of a multicounty board of mental retardation and developmental disabilities. Subject to division (B) of this section:

(1) A county board shall be operated as a separate administrative and service entity.

(2) The functions of a county board shall not be combined with the functions of any other entity of county government.

(B) Division (A) of this section does not prohibit or restrict any county board from sharing administrative functions or personnel with one or more other county boards, including entering into an arrangement authorized by division (B) of section 5126.0226 of the Revised Code.

Effective Date: 2005 SB10 09-05-2005; 2006 HB699 03-29-2007

51.26.028 Membership of county and multicounty boards.

Each county board of mental retardation and developmental disabilities shall consist of seven members. In the case of a single county board, the board of county commissioners of the county shall appoint five members and the senior probate judge of the county shall appoint two members. In the case of a multicounty board, the membership shall be appointed as follows:

(A) If there are five member counties, the board of county commissioners of each of the member counties shall each appoint one member and the senior probate judges of the member counties with the largest and second largest population shall each appoint one member.

(B) If there are four member counties, the board of county commissioners of the member county with the largest population shall appoint two members, the other three boards of county commissioners shall each appoint one member, and the senior probate judges of the member counties with the largest and second largest population shall each appoint one member.

(C) If there are three member counties, the boards of county commissioners of the member counties with the largest and second largest populations shall each appoint two members, the other board of county commissioners shall appoint one member, and the senior probate judges of the member counties with the largest and second largest population shall each appoint one member.

(D) If there are two member counties, the board of county commissioners of the member county with the largest population shall appoint three members, the board of county commissioners of the other county shall appoint two members, and the senior probate judge of each county shall each appoint one member.

Effective Date: 2005 SB10 09-05-2005

5126.041 Eligibility determinations.

(A) As used in this section:

(1) "Biological risk" and "environmental risk" have the meanings established pursuant to section 5123.011 of the Revised Code.

(2) "Preschool child with a disability" has the same meaning as in section 3323.01 of the Revised Code.

(3) "State institution" means all or part of an institution under the control of the department of mental retardation and developmental disabilities pursuant to section 5123.03 of the Revised Code and maintained for the care, treatment, and training of the mentally retarded.

(B) Except as provided in division (C) of this section, each county board of mental retardation and developmental disabilities shall make eligibility determinations in accordance with the definition of "developmental disability" in section 5126.01 of the Revised Code. Pursuant to rules the department of mental retardation and developmental disabilities shall adopt in accordance with Chapter 119. of the Revised Code, a county board may establish eligibility for programs and services for either of the following:

(1) Individuals under age six who have a biological risk or environmental risk of a developmental delay;

(2) Any preschool child with a disability eligible for services under section 3323.02 of the Revised Code whose disability is not attributable solely to mental illness as defined in section 5122.01 of the Revised Code.

(C)(1) A county board shall make determinations of eligibility for service and support administration in accordance with rules adopted under section 5126.08 of the Revised Code.

(2) All persons who were eligible for services and enrolled in programs offered by a county board of mental retardation and developmental disabilities pursuant to this chapter on July 1, 1991, shall continue to be eligible for those services and to be enrolled in those programs as long as they are in need of services.

(3) A person who resided in a state institution on or before October 29, 1993, is eligible for programs and services offered by a county board of mental retardation and developmental disabilities, unless the person is determined by the county board not to be in need of those programs and services.

(D) A county board shall refer a person who requests but is not eligible for programs and services offered by the board to other entities of state and local government or appropriate private entities that provide services.

(E) Membership of a person on, or employment of a person by, a county board of mental retardation and developmental disabilities does not affect the eligibility of any member of that person's family for services provided by the board or by any entity under contract with the board.

Effective Date: 06-06-2001; 2007 HB119 09-29-2007

5126.043 Participation of guardian and incompetent in decisions.

When an individual with mental retardation or other developmental disability is required within this chapter to consent, refuse to give consent, or withdraw consent for services and the individual has been adjudicated incompetent pursuant to Chapter 2111. of the Revised Code, the guardian for the individual appointed under that chapter and functioning in accordance with the appointment shall be responsible for giving, refusing to give, or withdrawing the consent for services.

Individuals 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.

Effective Date: 03-13-1997

5126.05 County board - powers and duties.

(A) Subject to the rules established by the director of mental retardation and developmental disabilities pursuant to Chapter 119. of the Revised Code for programs and services offered pursuant to this chapter, and subject to the rules established by the state board of education pursuant to Chapter 119. of the Revised Code for programs and services offered pursuant to Chapter 3323. of the Revised Code, 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 pursuant to Chapters 3317. and 3323. of the Revised Code and ensure that related services, as defined in section 3323.01 of the Revised Code, are available according to the plan and priorities developed under section 5126.04 of the Revised Code;

(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, pursuant to sections 3323.09 and 5126.12 of the Revised Code, to the director, the superintendent of public instruction, and the board of county commissioners at the close of the fiscal year and at such other times as may reasonably be requested;

(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 in accordance with section 5126.15 of the Revised Code;

(9) Certify respite care homes pursuant to rules adopted under section 5123.171 of the Revised Code by the director of mental retardation and developmental disabilities.

(B) To the extent that rules adopted under this section apply to the identification and placement of children with disabilities under Chapter 3323. of the Revised Code, they shall be consistent with the standards and procedures established under sections 3323.03 to 3323.05 of the Revised Code.

(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, upon such terms as may be agreeable, and in accordance with this chapter and Chapter 3323. of the Revised Code and rules adopted thereunder and in accordance with sections 307.86 and 5126.071 of the Revised Code.

(D) A county board may combine transportation for children and adults enrolled in programs and services offered under section 5126.12 with transportation for children enrolled in classes funded under section 3317.20 or units approved under section 3317.05 of the Revised Code.

(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. All money received by gift, grant, bequest, or disposition of lands or property received by gift, grant, devise, or bequest shall be deposited in the county treasury to the credit of such board and shall be available for use by the board for purposes determined or stated by the donor or grantor, but may not be used for personal expenses of the board members. Any interest or earnings accruing from such gift, grant, devise, or bequest shall be treated in the same manner and subject to the same provisions as such 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.

Effective Date: 12-13-2001; 2007 HB119 09-29-2007

5126.331 Ex parte emergency order.

(A) A probate court, through a probate judge or magistrate, may issue by telephone an ex parte emergency order authorizing any of the actions described in division (B) of this section if all of the following are the case:

(1) The court receives notice from the county board of mental retardation and developmental disabilities, or an authorized employee of the board, that the board or employee believes an emergency order is needed as described in this section.

(2) The adult who is the subject of the notice is eligible to receive services or support under section 5126.041 of the Revised Code.

(3) There is reasonable cause to believe that the adult is incapacitated.

(4) There is reasonable cause to believe that there is a substantial risk to the adult of immediate physical harm or death.

(B) An order issued under this section may authorize the county board of mental retardation and developmental disabilities to do any of the following:

(1) Provide, or arrange for the provision of, emergency protective services for the adult;

(2) Remove the adult from the adult's place of residence or legal settlement;

(3) Remove the adult from the place where the abuse, neglect, or exploitation occurred.

(C) A court shall not issue an order under this section to remove an adult from a place described in division (B)(2) or (3) of this section until the court is satisfied that reasonable efforts have been made to notify the adult and any person with whom the adult resides of the proposed removal and the reasons for it, except that, the court may issue an order prior to giving the notice if one of the following is the case:

(1) Notification could jeopardize the physical or emotional safety of the adult.

(2) The notification could result in the adult being removed from the court's jurisdiction.

(D) An order issued under this section shall be in effect for not longer than twenty-four hours, except that if the day following the day on which the order is issued is a weekend-day or legal holiday, the order shall remain in effect until the next business day.

(E)(1) Except as provided in division (E)(2) of this section, not later than twenty-four hours after an order is issued under this section, the county board or employee that provided notice to the probate court shall file a complaint with the court in accordance with division (A) of section 5126.33 of the Revised Code.

(2) If the day following the day on which the order was issued is a weekend-day or a holiday, the county board or employee shall file the complaint with the probate court on the next business day.

(3) Except as provided in section 5126.332 of the Revised Code, proceedings on the complaint filed pursuant to this division shall be conducted in accordance with section 5126.33 of the Revised Code.

Effective Date: 01-30-2004

5126.41 Individual service plans.

The county board of mental retardation and developmental disabilities shall identify residents of the county for whom supported living is to be provided. Identification of the residents shall be made in accordance with the priorities set under section 5126.04 of the Revised Code and the waiting list policies developed under section 5126.042 of the Revised Code. The board shall assist the residents in identifying their individual service needs.

To arrange supported living for an individual, the board shall assist the individual in developing an individual service plan. In developing the plan, the individual shall choose a residence that is appropriate according to local standards; the individuals, if any, with whom the individual will live in the residence; the services the individual needs to live in the individual's residence of choice; and the providers from which the services will be received. The choices available to an individual shall be based on available resources.

The board shall obtain the consent of the individual or the individual's guardian and the signature of the individual or guardian on the individual service plan. The county board shall ensure that the individual receives from the provider the services contracted for under section 5126.45 of the Revised Code.

An individual service plan for supported living shall be effective for a period of time agreed to by the county board and the individual. In determining that period, the county board and the individual shall consider the nature of the services to be provided and the manner in which they are customarily provided.

Effective Date: 03-13-1997