

ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio ex rel.	:	Case No. 12-0923
James L. McQueen,	:	
Appellant,	:	On Appeal from the Court of Appeals of
	:	Ohio, Eighth District.
vs.	:	
	:	
The Court of Common Pleas of	:	
Cuyahoga County, Probate Division	:	
Appellee.	:	

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INTRODUCTION

This case is about a relatively straightforward issue of statutory interpretation. It is not a case where there is real doubt as to the clear legal right and duty of the Appellee to appoint counsel for Mr. McQueen during his review hearing. Appellee attempts to evade this straightforward statutory interpretation with its preferred narrow result to deny counsel. Mr. McQueen urges this Court to see through the flaws in Appellee's arguments and affirm his statutory right to appointed counsel, when properly requested, to assert competence and challenge the continued need for guardianship.

When read together with R.C. 2111.02, the only logical statutory interpretation is to provide a right to appointed counsel in R.C. 2111.49(C) review hearings. While both parties agree that statutory construction requires giving effect to the statutory language, Appellee actually asks this Court to ignore part of the statute in order to give another narrow clause undue weight. Mr. McQueen is asking this Court to enforce his limited statutory right to challenge the continued need for guardianship, with the assistance of counsel. Enforcement of that right will not have an adverse impact on probate courts throughout the State of Ohio and is in accord with other states' statutory schemes. Appellant is asking this Court to make the statutory ruling that the Eighth District Court of Appeals inappropriately failed to do, and find that Mr. McQueen has a clear legal right and Appellee has a clear legal duty to appoint counsel for his R.C. 2111.49(C) review hearing.

ARGUMENT

- A. When read together with R.C. 2111.02, the only logical statutory interpretation is to provide a right to appointed counsel in R.C. 2111.49(C) review hearings.**

Appellee would have this Court selectively and too narrowly read from the statutory scheme to reach its preferred result of limiting the right to appointed counsel to initial

guardianship appointment hearings only. It would have this Court delete the full effect of the “in accordance with” language of R.C. 2111.49(C) and ignore the first sentence in R.C. 2111.02(C) to reach this selective result. Appellee’s contention rests almost entirely on the specific prefatory language in R.C. 2111.02(C)(7), which states “if the hearing concerns the appointment of a guardian * * * for an alleged incompetent * * *.” Appellee asserts that this language precludes a finding that an indigent ward possesses a right to appointed counsel in a review hearing pursuant to R.C. 2111.49(C). However, a proper reading reveals the fatal flaw in Appellee’s reasoning.

The principal concern in construing a statute is the intent of the General Assembly. *Bergman v. Monarch Constr. Co.*, 124 Ohio St.3d 543, 2010-Ohio-622, 925 N.E.2d 116, ¶ 9. Mr. McQueen agrees with Appellee that this Court must “look to the language of the statute itself” to discern the intent of the General Assembly. *Columbus City School Dist. Bd. of Ed. v. Wilkins*, 101 Ohio St.3d 112, 2004-Ohio-296, 802 N.E.2d 637, ¶ 26. As Appellee has cited, it is incumbent upon the Court to “give effect to the words used, not to delete words used or to insert words not used and to read those words and phrases in context according to the rules of grammar and common usage.” *Bergman*, 2010-Ohio-622, at ¶ 10 (internal quotations omitted). The General Assembly also codified rules of construction, specifying that when “enacting a statute, it is presumed that * * * [t]he entire statute is intended to be effective, * * * [a] just and reasonable result is intended, * * * [and a] result feasible of execution is intended.” R.C. 1.47(B)-(D). Analyzing R.C. 2111.02 and R.C. 2111.49 in light of these canons of statutory interpretation is exactly what Mr. McQueen asks this Court to do. Yet, to reach the result for which Appellee selectively argues, this Court would necessarily have to delete and ignore express statutory language.

1. **Contrary to rules of statutory construction requiring that all statutory language be given effect, Appellee asks this Court to ignore a key sentence to give another narrower clause undue meaning and weight.**

Appellee claims that “a careful reading” of R.C. 2111.02 and R.C. 2111.49 reveals that appointed counsel is only expressly applicable if the hearing concerns “the initial appointment of a guardian.” Appellee’s Merit Brief, p. 13. A proper reading of the statute rebuts this contention, as R.C. 2111.02(C) states:

(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:

* * *

(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: * * *

(d) If he is indigent, upon his request:

(i) The right to have counsel * * *. (Emphasis added.)

Appellee’s argument relies almost completely on the prefatory language of (C)(7) “if the hearing concerns the appointment of a guardian.” This reading conveniently fails to acknowledge that similar prefatory language also exists at the beginning of R.C. 2111.02(C), which sets out a comprehensive scheme for hearings for “the appointment of a guardian.” The *first* sentence of R.C. 2111.02(C) uses substantially similar prefatory language to (C)(7). It uses “[p]rior to the appointment of a guardian” as prefatory language for the entire panoply of due process protections which follow in (C)(1) through (7).

Rather than read R.C. 2111.02(C) as a whole with an understanding that all of it applies to hearings for “the appointment of a guardian,” Appellee would begin reading the statute selectively *after* the first sentence in that section. At the same time, after ignoring or deleting the

first sentence in section (C), Appellee's central argument for why subsection (C)(7) limits the right to counsel in a review hearing, is based solely on the fact that (C)(7) also refers to "the *appointment* of a guardian." (Emphasis added.) While Appellee concedes that at least some portion of R.C. 2111.02 must apply in R.C. 2111.49(C) review hearings, it argues that (C)(7) cannot because of this prefatory language. Appellee's Merit Brief, p. 13. But this is not logically consistent, because if Appellee's argument regarding the prefatory language in (C)(7) were accurate, then the result would be that no portions of R.C. 2111.02 could apply to a review hearing since R.C. 2111.02 has virtually identical prefatory language throughout. This would directly contradict express statutory language and legislative intent in R.C. 2111.49(C) that a review hearing must be held "in accordance with" R.C. 2111.02. In other words, taken to its full conclusion, Appellee's reasoning leads to an all or nothing interpretation in which a probate court would be effectively barred from holding an R.C. 2111.49(C) review hearing "in accordance with R.C. 2111.02."

Appellee reaches this result by focusing solely on the "initial appointment of a guardian" language in subsection (C)(7). To reach this result, the Court would have to ignore the prefatory language of R.C. 2111.02(C), which makes clear that this statute is setting up an array of requirements for hearings on the "appointment of a guardian." Indeed, if subsection (C)(7) were read to limit its application to the initial appointment of a guardian, its prefatory language would be entirely unnecessary and redundant *within that statute itself*, as every R.C. 2111.02 hearing occurs "prior to" the appointment of a guardian.

Appellee wants this Court to close off the right to appointed counsel by rendering the "in accordance with" language in R.C. 2111.49(C) completely ineffectual. Appellee's position is based on the flawed conclusion that the General Assembly attempted to foreclose the right to

appointed counsel in an R.C. 2111.49(C) review hearing by misinterpreting the prefatory language of R.C. 2111.02(C)(7), and ignoring the prefatory language of the entire R.C. 2111.02. This is not a reasonable interpretation of legislative intent. Indeed, it violates clear rules of statutory construction that preclude deleting words or phrases and require that all statutory language be given effect. In contrast, Mr. McQueen's arguments regarding the legislative meaning for the "in accordance with" requirement in R.C. 2111.49(C) deletes nothing and instead allows the Court to read *all* of the statutory text.

2. R.C. 2111.02(C)(7) must be interpreted to distinguish cases involving minors from those involving adult incompetents who are entitled to counsel.

Only under Mr. McQueen's interpretation can this Court "give effect to the words used" as required by the applicable principles of statutory construction. As such this confirms Mr. McQueen's argument that the language of R.C. 2111.02(C)(7) must be read to distinguish the type of ward affected, e.g. a minor versus an adult alleged incompetent, rather than as a limitation on a right to appointed counsel.

The only logical construction of R.C. 2111.02(C) that gives full effect to the "in accordance with" language in R.C. 2111.49(C) for review hearings is to provide all of the due process protections owed to an *adult incompetent*. As the guardianship appointment statute in Chapter 2111, R.C. 2111.02 addresses a variety of initial guardianship-related issues, and applies to appointment of a guardian for both alleged incompetents and minors. Since R.C. 2111.02 deals with both alleged adult incompetents and minors, the General Assembly had to specify within R.C. 2111.02 if a particular subsection only dealt with an alleged incompetent. That is what it did in subsection (C)(7).

To be consistent within R.C. 2111.02(C) itself, the prefatory language of R.C. 2111.02(C)(7) must be read as limiting the type of party to which it applies, e.g. an adult

alleged incompetent. If read as Appellee would suggest, there is simply no need for the prefatory language in (C)(7) to limit the right to counsel to an initial hearing only because the *entire statute* deals with initial guardianship appointment only. Interpreted as Appellee suggests, the language would be mere surplusage because all R.C. 2111.02 hearings occur “[p]rior to the appointment of a guardian.” R.C. 2111.02(C). Yet Appellee’s argument relies on this reading that renders language in R.C. 2111.02 redundant and that gives incomplete effect to R.C. 2111.49(C)’s intent when it stated that review hearings must be held “in accordance with” the requirements of R.C. 2111.02.

Only a full reading of the interaction between the prefatory language of R.C. 2111.02(C) and subsection (C)(7), as Mr. McQueen has argued, gives full effect to both prefatory clauses and to R.C. 2111.49(C)’s “in accordance with” language. His reading effectuates the will of the General Assembly to distinguish the added protections which are afforded to an adult but not a minor during an initial appointment hearing. These same protections must be extended to an adult incompetent in an R.C. 2111.49(C) review hearing conducted “in accordance with” R.C. 2111.02(C).

3. R.C. 2111.49(C) clarifies who bears the burden of proof in a review hearing and *Corless* does not change this result.

Mr. McQueen demonstrated in his merit brief that the language stating who bears the burden of proof was necessary; otherwise a court may find the burden is *on the ward*. See, Appellant’s Merit Brief, pp. 10-12. In response, Appellee cites one case which was decided before enactment of Ohio’s guardianship scheme and involved an initial appointment hearing, not an R.C. 2111.49(C) review hearing. Appellee suggests that *Corless* supports its position that it was unnecessary for the General Assembly to state the burden of proof in R.C. 2111.49(C) because “the law required proof of the individual’s incompetency by clear and convincing

evidence even before R.C. 2111.02 expressly required it.” Appellee Merit Brief, p. 15, citing *In re Guardianship of Corless*, 2 Ohio App.3d 92, 96, 440 N.E. 2d 1203 (12th Dist. 1981).

Appellee’s citation does nothing to counter the General Assembly’s need to make clear that the guardian would carry the burden of proof in an R.C. 2111.49(C) review hearing.

Corless is inapposite in this case because it dealt only with the “degree of proof required” in an initial guardianship appointment hearing. In *Corless*, the court states that due to the drastic nature of the consequences to a proposed ward, it “feels that the degree of proof required should be clear and convincing evidence.” *Corless*, 2 Ohio App.3d at 96. However, this simply has no bearing on whether the General Assembly would later make this right clear in statute and apply it both to an initial appointment and later review hearing. First, R.C. 2111.02(C) simply codifies what the Court said in *Corless*, thereby removing any doubt as to what the law requires in such a case. This is a commonplace occurrence. See, *United Technologies Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96, 100-01 (1st Cir.1994) (stating that a principal goal of a new statutory amendment was to “clarify and confirm” the right); *Dowdell v. City of Apopka, Florida*, 698 F.2d 1181, 1191 (11th Cir.1983) (“[f]or purposes relevant here, the Act did no more and no less than codify the case law * * *.”); *In re Sutton*, 10 B.R. 737, 739 (Bankr.E.D.Va. 1981) (“[t]he purpose of this section is to codify prior case law and to clarify certain ambiguities resulting from legislative silence on the subject.”).

Second, *Corless* concerns only an application for an *initial* guardianship appointment. By contrast, R.C. 2111.49(C) concerns a specific type of review hearing: one where a ward is asserting competence such that guardianship is no longer necessary. As *Corless* did not touch on who bore the burden of proof in such a case, clarifying that the burden of proving incompetence would be upon the applicant for guardianship in a review hearing remained essential. Indeed, in

some respects the rationale expressed in *Corless* regarding the drastic consequences to the ward (especially where a ward such as Mr. McQueen has already been legally incapacitated and held in a secured facility against his will on the authority of his guardian) provides further support for Mr. McQueen's arguments that a right to counsel should be granted in review hearings. *Corless*, 2 Ohio App.3d at 96. In any event, *Corless* did not change the fact that the General Assembly clarified who bore the burden of proof in a review hearing where the movant is the ward, not the applicant or guardian as in an initial appointment hearing. 42 Ohio Jurisprudence 3d, Evidence and Witnesses, Section 87 (2012) (“[a]s a general rule, the burden of proof in any cause is upon the party asserting the affirmative of an issue as determined by the pleadings or by the nature of the case.”) Appendix p. 13; *see also*, Appellant's Merit Brief, p. 11.

B. Mr. McQueen is asking this Court to enforce his limited statutory right to counsel during a R.C. 2111.49(C) review hearing, not transform the nature of guardianship proceedings.

Mr. McQueen is seeking the enforcement of his limited statutory right to counsel during an R.C. 2111.49(C) review hearing. However, Appellee implies that Mr. McQueen is seeking a judicially created right by fiat. Appellee's Merit Brief pp. 5, 22. Appellee offers the unremarkable assertion that “the creation of the legal duty that a relator seeks to enforce is the function of the legislative branch,” not of the judiciary. *State ex rel. Tindira v. Ohio Police & Fire Pension Fund*, 130 Ohio St.3d 62, 2011-Ohio-4677, 955 N.E.2d 963, ¶ 30; quoting *State ex rel. Lecklider v. School Emps. Retirement Sys.*, 104 Ohio St.3d 271, 2004-Ohio-6586, 819 N.E.2d 289, ¶ 23. With this, Mr. McQueen has no quarrel. However, the cases from which this rule is taken do not preclude this Court from enforcing the statutory right to counsel during an R.C. 2111.49(C) review hearing.

For example, *Tindira* presents a case in which a former police officer sought a writ of mandamus ordering the board of trustees for the Ohio Police and Fire Pension Fund (OP&F) to

vacate its order denying his application for disability benefits, in part because OP&F had failed to state reasons for the denial. In holding that the legal duty appellant sought to enforce did not exist and that the court was not authorized to create such a duty, the court noted that public employee pension systems and their boards have no duty to state the basis for their decision “when no statute or duly adopted administrative rule requires it.” *Tindira*, 2004-Ohio-6586 at ¶ 30-31. Along similar lines, in *Lecklider* the court stated that “nothing in [the] statute or regulations suggest[ed]” that the duty the appellant sought to enforce existed in the regulations. *Lecklider*, 2004-Ohio-6586, at ¶ 23.

In Mr. McQueen’s case, however, the statutory scheme under R.C. 2111.49(C) and R.C. 2111.02 does more than “suggest,” it “requires” that Appellee provide counsel for his review hearing. The General Assembly is free to require that “higher standards be adopted than those minimally tolerable under the Constitution.” *Lassiter v. Dept. of Social Serv.*, 452 U.S. 18, 33 (1981). When the General Assembly *does* set its own standard, that standard is what must be applied. Mr. McQueen is not asking the Court to create the legal duty that he seeks to enforce. The Ohio General Assembly has already done so.

C. R.C. 2111.49(C) provides a statutorily limited conditional right to challenge the continued need for guardianship, with the assistance of counsel, and that right does not adversely impact probate courts.

Appellee seeks to confuse and blend the separate functions of a periodic review under R.C. 2111.49(A) with a review *hearing* conducted pursuant to R.C. 2111.49(C). Further, Appellee incorrectly asserts that Mr. McQueen has contended that wards should have “a continuing right [to appointed counsel] extended into perpetuity for all subsequent guardianship court proceedings.” Appellee’s Merit Brief, p. 12. This is not, and has never been, Mr. McQueen’s position. An indigent ward’s right to an R.C. 2111.49(C) review hearing concerning the continued necessity of guardianship, with appointed counsel, is narrowly tailored

by the statute to afford due process rights. The probate court simply presses the reset button and treats the R.C. 2111.49(C) guardianship proceeding in a similar manner as it would an initial appointment hearing.

This is separate and distinct from the guardian's reporting required in a periodic review under R.C. 2111.49(A) and (B). Periodic review of the guardianship under R.C. 2111.49(A) is a biennial paper reporting provided by the guardian to the probate court. The guardian's report updates the probate court of the ward's location, care, and condition. The guardian provides a statement by a licensed professional regarding the continued need for guardianship.

R.C. 2111.49(A)(1)(h)(i). Based on the information provided by the guardian in the periodic review, the probate court makes a determination as to the continued need for guardianship.

R.C. 2111.49(A)(2). If after reviewing the guardian's report the probate court deems it necessary to intervene in the guardianship, it can take action *sua sponte* to modify the guardianship.

R.C. 2111.49(B). However, there is no requirement that an actual hearing be conducted for a periodic review. There is no requirement that the professional statement be done by an independent expert evaluator. There are also no specifically enumerated ward's rights such as appointed counsel, in the context of a periodic review. In fact, a ward may seldom even be aware that such a periodic review is occurring.

In contrast, R.C. 2111.49(C) requires the probate court to hold a formal hearing to evaluate the continued necessity of the guardianship "in accordance with R.C. 2111.02." A review hearing conducted pursuant to R.C. 2111.49(C) gives a ward, the ward's attorney, or an interested party the opportunity to formally challenge the continued need for guardianship. The guardian might then have to produce additional evidence of the continued necessity of guardianship.

This right to a hearing in R.C. 2111.49(C) is limited in several respects. The ward, ward's attorney, or interested party must specifically request *in writing* that a review hearing concerning the continued necessity of the guardianship be conducted. In order to shift the burden of proof to the guardian, the ward must affirmatively allege competence. The request for a hearing must be made at least 120 days after the guardianship originally issued. The probate court is only required to honor one such request for a review hearing per calendar year. In addition, there is no requirement in R.C. 2111.49(C) that the ward ever be affirmatively alerted of the right to a review hearing. These limitations serve to temper any concern that a review hearing under R.C. 2111.49(C) is too burdensome on a probate court.

Likewise, the appointment of counsel for an R.C. 2111.49(C) review hearing conducted "in accordance with" R.C. 2111.02 is not too onerous for the probate court. It is not, as Appellee describes in its slippery slope argument, an automatic "continuing duty" to appoint counsel at the ward's beck and call. Appellee's Merit Brief, pp. 1, 16. Rather, it is a limited right to have counsel in order to help challenge the continued need for guardianship. The General Assembly has already imposed significant limitations on the circumstances in which an indigent ward may be appointed counsel for a review hearing under R.C. 2111.49(C) such that it occurs rather infrequently.

Probate courts also have a specific fund created by the General Assembly to cover the cost of guardianship-related expenses, and other probate courts already appoint counsel for review hearings that are requested pursuant to R.C. 2111.49(C). The county indigent guardianship fund collects fees from certain probate proceedings and orders probate courts to expend those funds "only for payment of any cost, fee, charge, or expense associated with the establishment, opening, maintenance, or termination of a guardianship for an indigent ward."

R.C. 2111.51. Whether a review hearing involves the maintenance or termination of a guardianship, payment of attorney's fees to appointed counsel who assisted a ward in challenging the continued necessity of a guardianship is a proper expense under the fund's statutory language.

A number of courts throughout Ohio have already provided R.C. 2111.02 due process protections, including appointed counsel, to indigent wards who requested a review hearing under R.C. 2111.49(C) regarding the continued necessity of the guardianship. For example, the following counties have all appointed counsel for R.C. 2111.49(C) review hearings when requested: Franklin, Medina, Summit, Jefferson, and Logan.¹ See Appendix pp. 1 through 12. The geographic diversity of these counties shows that both urban and rural counties have met their statutory obligation to appoint counsel in R.C. 2111.49(C) review hearings. Further, the specific practice of appointing counsel by these other courts in the context of an R.C. 2111.49(C) review hearing argues against any suggestion that appointing counsel is an unreasonable burden on the probate courts.

D. Mr. McQueen's right to counsel is soundly supported by the Uniform Probate Code, other states' statutes, and case law, and Appellee's effort to distinguish such support should be rejected.

As asserted by the *Amici Curiae*, many states have enacted statutory provisions similar to the Ohio statutes which establish a right to appointed counsel in the initial guardianship hearing and then reaffirm the same right in the guardianship review hearing by an incorporating reference. These other states likely modeled their statutes on the Uniform Probate Code (UPC), which adopted a similar structure. Appellee acknowledges that the statutory structure for the

¹ The Court of Appeals noted that probate courts have discretion to appoint counsel using their authority as the superior guardian, even where not required by law. Court of Appeals Decision, ¶ 8; R.C. 2111.50; R.C. 2111.51. These examples, whether issued because the courts felt required to do so or in their discretion, demonstrate the feasibility of appointing counsel for review hearings, unlike Appellee's arguments to the contrary.

appointment of counsel in the initial determination of guardianship is identical in both the UPC and the Ohio statute. *Uniform Probate Code*, Section 5-305, Judicial Appointment of Guardian: Preliminaries to Hearing (Rev.2010), Appendix pp. 14-17; R.C. 2111.02. But Appellee ignores the plain language of UPC 5-318 which provides, just as the Ohio statute, the continuation of that right in a hearing to evaluate the termination of guardianship by incorporating the procedural safeguards established in the appointment hearing. R.C. 2111.49(C) and *Uniform Probate Code*, Section 5-318, Termination or Modification of Guardianship (Rev.2010), Appendix pp. 18-19.

The comments to UPC 5-318 make explicit that the procedural safeguards in the termination hearing include the right to appointed counsel. *See*, Brief of *Amici Curiae*, p. 10. Both cases cited by *Amici Curiae* support this proposition. *See*, *In re Guardianship of Williams*, 159 N.H. 318, 986 A.2d 559 (2009) (finding right to counsel in guardianship termination proceedings by incorporation through statute requiring “a hearing similar to that provided for” in the initial appointment statute); *Greer v. Professional Fiduciary, Inc.*, 792 N.W.2d 120 (Minn.App.2011) (incorporating right to counsel in guardianship termination proceeding by reference to statute requiring the court to “follow the same procedures to safeguard the rights of the ward as apply to a petition for guardianship”). Appellee attempts to discredit these cases by stating that they do not rely upon an explicit statutory right to counsel in guardianship termination hearings. But Appellee misses the point. These cases applied the right to counsel during subsequent termination proceedings based upon a statutory reference to rights provided by the initial appointment statute, which is precisely what Mr. McQueen is asking this Court to do. In interpreting their respective state statutes based on the UPC, *In re Guardianship of Williams* and *Greer* support reading the Ohio review statute similarly to require appointment of counsel so that the review hearing is held “in accordance with” the rights attaching to an initial

hearing.

E. This Court has a duty to decide the statutory question presented by this case and has consistently found that mandamus is an appropriate remedy in right to counsel cases.

The Eighth District Court of Appeals inappropriately failed to decide the statutory construction issue before this Court. Appellee, however, has mischaracterized the Court of Appeals decision below, asserting that instead of finding a lack of *clarity* in the statute, the Court of Appeals denied the writ “because the law did not provide the right claimed by Appellant.” Appellee’s Merit Brief, p. 5, n. 2. This is incorrect. The Court of Appeals stated that Mr. McQueen had “not established the *clear* legal right and the *clear* legal duty enforceable in mandamus” with the observation that “both sides offer strong arguments for their positions.” Court of Appeals Decision, ¶¶ 12-11. In so ruling, the Court of Appeals specifically limited its decision to the mandamus context and implicitly invited Mr. McQueen to bring the issue on appeal. Court of Appeals Decision, ¶ 13. The Court of Appeals’ actions clearly do not support Appellee’s contention that the Court determined that the “statutes did not confer a right to have counsel appointed subsequent to the initial guardianship appointment hearing.” Appellee’s Merit Brief, pp. 17-18.

More to the point, regardless of the professed difficulty in interpreting the statute, a court has a duty to interpret the statute and issue a ruling. *State ex rel. Fattlar v. Boyle*, 83 Ohio St.3d 123, 125, 698 N.E.2d 987 (1998); *State ex rel. Melvin v. Sweeney*, 154 Ohio St. 223, 226, 94 N.E.2d 785 (1950); *State ex rel. Summit Cty. Republican Party Exec. Comm. v. Brunner*, 118 Ohio St.3d 515, 2008-Ohio-2824, 890 N.E.2d 888, ¶ 83 (concurring opinion) (affirming duty of court in mandamus action to interpret interplay of statutory provisions). The Court of Appeals should have done so below, and where it has failed to do so, this Court should interpret the law and find a clear legal duty and right of appointed counsel in this case.

In addition, it is well established that mandamus is warranted where there has been a denial of appointed counsel, regardless of whether that right flows from a statutory or constitutional origin. *State ex rel. Asberry v. Payne*, 82 Ohio St.3d 44, 46-47, 693 N.E.2d 794 (1998); *State ex rel. Cody v. Toner*, 8 Ohio St.3d 22, 23, 456 N.E.2d 813 (1983); *State ex rel. Butler v. Demis*, 66 Ohio St.2d 123, 124, 420 N.E.2d 116 (1981); and *In re Fisher*, 39 Ohio St.2d 71, 82, 313 N.E.2d 851 (1974). Again, Appellee misses the point. Appellee criticizes Mr. McQueen's citation to these cases, but they are offered for the simple proposition that if a right to counsel exists, and it is denied, then mandamus is *the* appropriate remedy to enforce that right. Appellee's Merit Brief, pp. 18-19.

If this Court determines that R.C. 2111.02 and R.C. 2111.49(C), when read *in pari materia*, create a clear legal right and a duty upon the Appellee to appoint counsel for Mr. McQueen, then mandamus is the appropriate remedy. Instead of conceding this truth, as did Judge Payne in the *Asberry* case, Appellee instead asks this Court to discount its own long history of precedent that where the right to appointed counsel is denied, mandamus is the appropriate remedy. *Asberry*, 82 Ohio St.3d at 49.

Asberry demonstrates that mandamus is *the* appropriate remedy. *Asberry*, 82 Ohio St.3d at 46-47. Though *Asberry's* statutory construction ruling has been later overwritten as a matter of legislative enactment, its holding regarding the appropriateness of mandamus remains undisturbed. Similarly, the constitutional cases cited by Mr. McQueen also show that this Court has made no distinction in the type of right to counsel when examining whether mandamus is the appropriate remedy. See, *State ex rel. Cody v. Toner*, 8 Ohio St.3d 22, 456 N.E.2d 813 (1983); *State ex rel. Butler v. Demis*, 66 Ohio St.2d 123, 420 N.E.2d 116 (1981); and *In re Fisher*, 39 Ohio St.2d 71, 313 N.E.2d 851 (1974). Read together, these cases all demonstrate the

appropriateness of the application of mandamus where there has been a denial of a right to counsel.

Despite this long history of applying mandamus as the appropriate remedy in a right to counsel case, Appellee attempts to use the *Spangler* decision to suggest that since the proceeding is “nonadversarial,” mandamus would not be appropriate. Appellee’s Merit Brief, p. 19; *In re Guardianship of Spangler*, 126 Ohio St.3d 339, 2010-Ohio-2471, 933 N.E.2d 1067. The decision in *Spangler* in no way addresses the issues before this Court here, and Mr. McQueen’s argument for a statutory right to appointed counsel in an R.C. 2111.49(C) review hearing is not in conflict with *Spangler*. *Spangler* did not involve a right to appointed counsel, or an R.C. 2111.49(C) review hearing. Further, even were this Court to consider the review hearing to be “nonadversarial,” the nature of the proceeding does not lessen the appropriateness of mandamus where a party is entitled to appointment of counsel by statute.

This Court has consistently granted the extraordinary remedy of mandamus where that right has been violated. Finding that Mr. McQueen has such a right, it should do so here.

CONCLUSION

For the foregoing reasons, having shown his entitlement to a writ of mandamus, Mr. McQueen respectfully requests that this Court grant his requested relief with costs to be paid by Appellee.

Respectfully submitted,



JOHN R. HARRISON (0065286)

Counsel of Record

JASON C. BOYLAN (0082409)

Disability Rights Ohio

50 West Broad Street, Suite 1400

Columbus, Ohio 43215

T: 614-466-7264
F: 614-644-1888
jharrison@disabilityrightsohio.org
jboylan@disabilityrightsohio.org
Counsel for James L. McQueen

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Reply Brief of Appellant James L. McQueen was served by U.S. mail on this 22nd day of October 2012, to:

Charles E. Hannan
Timothy J. McGinty
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113
Counsel for Court of Common Pleas of Cuyahoga County, Probate Division

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Legal Aid Society of Southwest Ohio*

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Steubenville, OH 43952
*Counsel for Amicus Curiae
Southeastern Ohio Legal Services*

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Cincinnati, OH 45237
*Counsel for Amicus Curiae
Pro Seniors, Inc.*

Veronica L. Martinez
Legal Aid of Western Ohio, Inc.
Center for Equal Justice
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*Counsel for Amicus Curiae
Legal Aid of Western Ohio*

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Ohio Poverty Law Center, LLC
555 Buttles Avenue
Columbus, OH 43215
*Counsel for Amici Curiae
Ohio Poverty Law Center, LLC, and National Civil Right to Counsel Coalition*

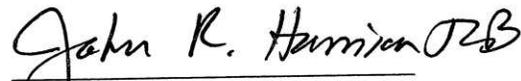
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*Counsel for Amicus Curiae
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Aneel L. Chablani
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525 Jefferson Avenue
Toledo, OH 43604
Counsel for Amicus Curiae
Advocates for Basic Legal Equality, Inc.



John R. Harrison
Counsel of Record for Relator-Appellant

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Appendix

c/o Bryden Place
1169 Bryden Rd
Columbus, OH 43205

November __, 2011

Magistrate
Franklin County Probate Court
373 S. High St., 22nd Fl.
Columbus, Ohio 43215-6311

Case No. 547500

Dear Magistrate:

I am writing to request a review of my guardianship pursuant to O.R.C. Section 2111.49. I no longer believe that I am in need of a guardian. I am indigent. As such I request that an independent expert be appointed to evaluate my continuing need for a guardianship and to testify. I also request that counsel be appointed for me.

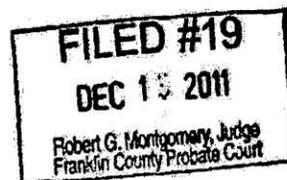
I also wish to move to the community. I am currently in a secured nursing facility. My guardian has not yet permitted me to leave. If at hearing, the Court decides that I still need a guardian, I ask that the Court appoint my mother, _____ as my guardian and/or instruct my guardian to place me in the community.

Sincerely,

Ms. Tamra Duty

Tamra Duty

Prepared by Ohio Legal Rights Service



ROBERT G. MONTGOMERY, JUDGE

ESTATE OF
GUARDIANSHIP OF
TRUST OF _____

Tamara Duty

INCOMPETENT
DECEASED

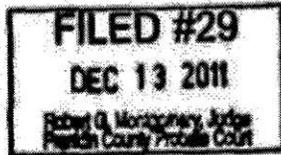
CASE NO. 547500

ENTRY SETTING HEARING

The Court orders that a hearing be set on the 1st day of February, 2012 at
10:30 o'clock A M. to consider: Guardianship Review Hearing

as filed on the 13th day of December, 2011. The hearing will be held in Probate Court,
Franklin County Courthouse, 373 South High Street, 22nd Floor, Columbus, Ohio 43215-8311.

The Court orders the person requesting this hearing to serve notice as required and file the proof of service.



Robert G. Montgomery
Robert G. Montgomery, Judge *RM*

Hearing requested by:

Attorney

Attorney Registration No.

Applicant

Address

City, State, Zip Code
()

Telephone



547500 sec Pages: 0001

COURT OF FRANKLIN COUNTY, OHIO
ROBERT G. MONTGOMERY, JUDGE

Guardianship of Tamra Duty
Case No. 547500

JOURNAL ENTRY APPOINTING COUNSEL

Pursuant to R.C. Sections 2111.02(C)(7)(d) and 2111.49(C) and it further appearing to the Court that the respondent is unable to obtain counsel or is indigent, the Court hereby orders that Patrice Mangan is appointed to act as counsel in this matter. In the event that the above captioned person is not indigent, the Court reserves the right to assess costs to said person. The Court also orders the release of relevant medical records to the Attorney for the ward.

12/24/11

Robert G. Montgomery
ROBERT G. MONTGOMERY
Probate Judge

FILED #5
DEC 22 2011
Robert G. Montgomery, Judge
Franklin County Probate Court

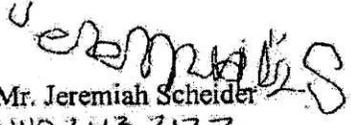
Jeremiah Scheider
570 N. Rocky River Drive
Berea, Ohio 44017
Date: 5-2-2011

Case No: 2009 06 GI 00034
Judge John J. Lohn

To Whom It May Concern:

My father Jerold Scheider, filed for guardianship in 2010. It was finalized in October 2010. Doctors, Nurses, and psychiatrist have told me to give it a year to let it work itself out and Ive tried to do that but it is not working because he has a problem with alcoholism. His mind isn't always clear when he makes descions for me and were always getting into family conflict. I think it would be better if we had a non-family guardian in place. So I am asking you if you could please remove him as my guardian and get a non-family member guardian to put in place of him.

Sincerely,


Mr. Jeremiah Scheider
440 243 2122

MEDINA COUNTY, OHIO
PROBATE COURT
FILED
JUDGE JOHN J. LOHN

2011 MAY 13 AM 10:48

IN THE COURT OF COMMON PLEAS

PROBATE DIVISION

MEDINA COUNTY, OHIO

IN THE MATTER OF THE GUARDIANSHIP OF: Jeremiah Scheider, *An Adult*

CASE NO: 2009 06 GI 00034

REQUEST FOR COUNSEL FOR WARD

Upon receiving a telephone call from the above named ward, he requested representation by an attorney to act as Counsel in this matter on his behalf.



**Arlene Laurence,
Deputy Clerk**

DOCKETED

RECEIVED
PROBATE COURT
FILED
JUDGE JOHN J. LOHN

2011 MAY 17 PM 3:28

**IN THE COURT OF COMMON PLEAS
PROBATE DIVISION
MEDINA COUNTY, OHIO**

IN RE: GUARDIANSHIP OF JEREMIAH SCHEIDER, an adult
CASE NUMBER: 2009 06 GI 00034

JUDGE JOHN J. LOHN
MAGISTRATE LORIE K. BROBST

MAGISTRATE'S ORDER SETTING REVIEW
HEARING

The Court received a correspondence from Jeremiah Scheider dated May 2, 2011. Said correspondence is attached hereto as exhibit A, and fully incorporated herein.

Based thereon, the Magistrate finds that it is in the best interests of this ward for this guardianship to be reviewed.

WHEREFORE, IT IS ORDERED that a review hearing shall occur on the 29th day of June, 2011 at 10:00 a.m. p.m.

The clerk shall cause notice of this order be given to Guardian regular US mail, and the Ward by personal service. It is requested that the Court Investigator be present at review hearing.


MAGISTRATE LORIE K. BROBST

RIGHT TO SET ASIDE MAGISTRATE'S ORDER

Any party may file a motion with the court to set aside a magistrate's order. The motion shall state the moving party's reasons with particularity and shall be filed not later than ten days after the magistrate's order is filed. The pendency of a motion to set aside does not stay the effectiveness of the magistrate's order, though the magistrate or the court may by order stay the effectiveness of a magistrate's order.

DOCKETED

FILED
PROBATE COURT
JUDGE JOHN J. LOHN

**IN THE COURT OF COMMON PLEAS
PROBATE DIVISION
MEDINA COUNTY, OHIO**

2011 MAY 18 AM 10:52

IN RE: GUARDIANSHIP OF: Jeremiah Scheider, *An Adult*
CASE NO: 2009 06 GI 00034

**JUDGMENT ENTRY – ORDER
ASSIGNING COUNSEL**

Upon receiving a telephone call from the above named ward, he requested counsel. The Court, at the ward's request, hereby orders that Grant Relic, Attorney at Law, 4178 Center Road, Brunswick, Ohio 44212, telephone (330) 225-5025, act as counsel in this matter.

In the event that the ward is not indigent, the Court reserves the right to assess costs to said ward. The Court also orders the release of relevant medical records to the attorney on behalf of the ward.

IT IS SO ORDERED.



JUDGE JOHN J. LOHN

DOCKETED

Motion To Terminate

Mr. Tod Vaughan
c/o Wayside Farms
4557 Quick Road
Peninsula, Ohio 44264

PROBATE COURT COUNTY OF SUMMIT, O.
FILED

JUL 13 2011

WILLIAMS, JUDGE

June 8, 2011

Magistrate Ann Snyder
Summit County Probate
209 South High Street
Akron, Ohio 44308-1616

Dear Magistrate Snyder:

I am writing to request a review of my guardianship pursuant to O.R.C. Section 2111.49. I no longer believe that I am in need of a guardian. My psychiatrist, Dr. Eileen Schwartz, has stated that she does not believe I need a guardian. I am indigent. As such I request that an independent expert be appointed to evaluate my continuing need for a guardianship and to testify. I also request that counsel be appointed for me.

I also wish to move to the community. I have been accepted into the Home Choice program which would help me move into the community. I need my guardian's signature to participate. My guardian has not been willing to enroll me. I ask that the Court instruct my guardian to enroll me in Home Choice.

*DM
7-13-11*

Sincerely,
TOD VAUGHAN

Mr. Tod Vaughan



2010 GA
00218
00043365843
XXX

IN THE COURT OF COMMON PLEAS
PROBATE DIVISION
SUMMIT COUNTY, OHIO

IN THE MATTER OF:

CASE NO. 2010 GA 219

THE GUARDIANSHIP OF:
Tod Vaughan

JUDGE BILL SPICER
JOURNAL ENTRY APPOINTING
COUNSEL

Pursuant to R.C. Section 2111.02 (C)(7)(i),

the Court finds that the ward is unable to obtain counsel and therefore appoints PATRICIA HILL to act as attorney for the proposed ward. As the proposed ward is indigent, attorney fees will be paid from the guardian expense fund.

The Court further orders the release of relevant medical, psychiatric and financial records to Attorney PATRICIA HILL.

IT IS SO ORDERED.

Bill Spicer

JUDGE BILL SPICER
aw

cc: Patricia Hill, Esq.
Mardy Chaplin, Esq.

PROBATE COURT COUNTY OF SUMMIT, O
FILED

JUL 25 2011

BILL SPICER, Judge



2010 GA
00219
00022392462
APC

Ms. Judith Day
c/o Catherine's Care Center, Inc.
717 North Sixth Street
Steubenville, OH 43952-1832

June 17 2011

Judge Samuel W. Kerr
Jefferson County Probate Court
301 Market Street
Steubenville, Ohio 43952

Dear Judge Kerr:

I am writing to request a review of my guardianship pursuant to O.R.C. Section 2111.49. I no longer believe that I am in need of a guardian. I also wish to live in the community, but my brother, Mr. David Day, my guardian, is refusing to assist me to do so.

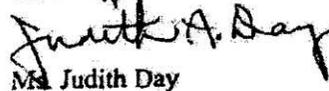
264-7751 I had been receiving therapy through Jefferson Behavioral Healthcare. My therapist, Ms. Carol Scott, LISW has supported my efforts to move to the community. She believes that I could manage in my own apartment with supports. The physical issues which caused me to be placed in Catherine's Care Center are no longer a concern. My psychiatrist has suggested that he will not offer an opinion unless the guardian agrees.

I am indigent. As such I request that an independent expert be appointed to evaluate my continuing need for a guardianship, my ability to live in the community, and to testify.

283-4781 I also request that counsel be appointed for me. I am very comfortable with Mr. Tom Zaney of Southeast Ohio Legal Services (SEOLS). Through Ohio Legal Rights Service, I have contacted Mr. Zaney. He suggested that I request SEOLS be appointed as my counsel.

I have been accepted into the Home Choice program which would help me move into the community. Through Home Choice, I would receive case management and a plan to live in the community. I would also be eligible for up to \$2,000 in assistance for rent, security deposit, clothing and furniture. I need my guardian's signature to participate, but David has not been willing to enroll me. I ask that the Court instruct him to enroll me in Home Choice.

Sincerely,


Ms. Judith Day

Prepared by Ohio Legal Rights Service

John J. Jansson
614-466-7264 x.145

PROBATE COURT OF JEFFERSON COUNTY, OHIO

GUARDIANSHIP OF JUDITH A. DAY, AN INCOMPETENT PERSON FILED
PROBATE COURT

CASE NO. 2009 ES 34

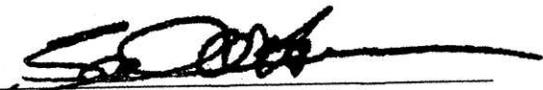
AUG 26 2011

ENTRY

JEFFERSON COUNTY, OHIO
SAMUEL W. KERR
JUDGE

Upon the request of the ward, Judith A. Day, wanting her guardianship terminated, the Court hereby appoints Sara A. Gasser, Esq., to represent her in this matter.

Date: August 26, 2011

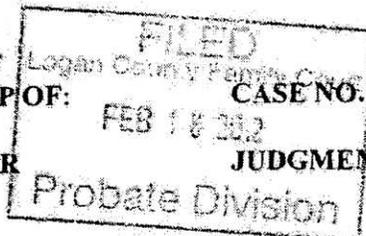


SAMUEL W. KERR, Probate Judge

cc: Sara A. Gasser, Esq.
Judith A. Day
David G. Day, Guardian
Bryan Felmet, Esq.
Jenna Lynch, Social Worker
Catherine's Care Center

IN THE COMMON PLEAS COURT OF LOGAN COUNTY, OHIO
FAMILY COURT-PROBATE DIVISION

IN THE MATTER OF
THE GUARDIANSHIP OF:
CRYSTAL L. SHANER



CASE NO. 09-GI-09

JUDGMENT ENTRY

This matter came on for status hearing on February 8, 2012. Attorney Chris A. Schrader, Barbara E. Frost, Attorney Joseph Bader as Guardian ad Litem for Crystal Shaner and Crystal Shaner were present.

The Court reviewed the Supplemental Report on alternative living arrangements for Crystal filed with the Court on January 3, 2012 by Attorney Joseph Bader, Guardian ad Litem for Crystal Shaner.

The ward, Crystal Shaner requested a Court appointed attorney to represent her. Crystal requested that an independent evaluation be conducted by Robert A. Bornstein, Ph.D. of Ohio State University hospital at the Court's own expense. The Court contacted Dr. Kenneth Bosslet, Crystal's physician at Sidney Care Center and he made the referral to Dr. Bornstein. The Sidney Care Center will notify the Court of her appointment with Dr. Bornstein. A further hearing is to be set upon the filing of Dr. Bornstein's evaluation.

The Court ORDERS that Sarah J. Sterling, Attorney at Law is appointed to represent Crystal Shaner. The Court further ORDERS that Attorney Sterling's fees are to be paid from the Guardianship Indigent Fund.

All until Further Order of the Court.

A handwritten signature in dark ink, appearing to read "C. Douglas Chamberlain".

C. DOUGLAS CHAMBERLAIN
PROBATE JUDGE

- Cc: ✓ Chris A. Schrader, Attorney at Law
✓ Joseph Bader, Attorney at Law, Guardian ad Litem for Crystal Shaner
✓ Sarah J. Sterling, Attorney at Law

42 Ohio Jur. 3d Evidence and Witnesses § 87

Ohio Jurisprudence, Third Edition
Database updated September 2012
Evidence and Witnesses

Paul M. Coltoff, J.D., John A. Gebauer, J.D., Michael N. Giuliano, J.D., Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc., Jill Gustafson, J.D., Janice Holben, J.D., Rachel M. Kane, M.A., J.D., Charles J. Nagy, J.D., Karl Oakes, J.D., Eric C. Surette, J.D., and Timothy Travers, J.D.

III. Burden of Proof
B. Party upon Whom Burden Rests
1. In General

Topic Summary Correlation Table Divisional References

§ 87. Generally

West's Key Number Digest

West's Key Number Digest, Evidence 91

As a general rule, the burden of proof in any cause is upon the party asserting the affirmative of an issue¹ as determined by the pleadings or by the nature of the case.² For this reason, a party whose nondefaulting opponent fails to appear for trial must prove his or her case even in the absence of the opposing party. A court may not enter judgment against a defendant without requiring proof of the plaintiff's claim. The sole responsibility of a defendant who has appeared in the case is to refute the plaintiff's case after the plaintiff has established a prima facie case by proper evidence. If the plaintiff cannot make out such a case, the defendant need not present any evidence at trial.³

This does not necessarily mean that the allegations that are affirmative in form determine the burden of proof. A cause of action may depend upon the negation of certain facts. In such event, the burden of negating the facts is on the party whose cause of action depends on them.⁴

The burden of proof applicable in a particular case is a question of law.⁵

Footnotes

- 1 McFadden v. Elmer C. Breuer Transp. Co., 156 Ohio St. 430, 46 Ohio Op. 354, 103 N.E.2d 385 (1952); Minor Child of Zentack v. Strong, 83 Ohio App. 3d 332, 614 N.E.2d 1106 (8th Dist. Cuyahoga County 1992); Schaffer v. Donegan, 66 Ohio App. 3d 528, 585 N.E.2d 854 (2d Dist. Montgomery County 1990).
- 2 Martin v. City of Columbus, 101 Ohio St. 1, 127 N.E. 411 (1920); Schaffer v. Donegan, 66 Ohio App. 3d 528, 585 N.E.2d 854 (2d Dist. Montgomery County 1990) (generally determined by pleadings).
- 3 Ohio Valley Radiology Associates, Inc. v. Ohio Valley Hosp. Ass'n, 28 Ohio St. 3d 118, 502 N.E.2d 599 (1986).
- 4 § 88.
- 5 In re A.M.W., 170 Ohio App. 3d 389, 2007-Ohio-682, 867 N.E.2d 471 (9th Dist. Medina County 2007).

Uniform Laws Annotated

Uniform Probate Code (1969) (Last Amended or Revised in 2010) (Refs & Annos)

Article V. Uniform Guardianship and Protective Proceedings Act (1997/1998) (Refs & Annos)

Part 3. Guardianship of Incapacitated Person

Unif. Probate Code § 5-305

§ 5-305. Judicial Appointment of Guardian: Preliminaries to Hearing.

Currentness

(a) Upon receipt of a petition to establish a guardianship, the court shall set a date and time for hearing the petition and appoint a [visitor]. The duties and reporting requirements of the [visitor] are limited to the relief requested in the petition. The [visitor] must be an individual having training or experience in the type of incapacity alleged.

Alternative A

(b) The court shall appoint a lawyer to represent the respondent in the proceeding if:

- (1) requested by the respondent;
- (2) recommended by the [visitor]; or
- (3) the court determines that the respondent needs representation.

Alternative B

(b) Unless the respondent is represented by a lawyer, the court shall appoint a lawyer to represent the respondent in the proceeding, regardless of the respondent's ability to pay.

End of Alternatives

(c) The [visitor] shall interview the respondent in person and, to the extent that the respondent is able to understand:

- (1) explain to the respondent the substance of the petition, the nature, purpose, and effect of the proceeding, the respondent's rights at the hearing, and the general powers and duties of a guardian;
- (2) determine the respondent's views about the proposed guardian, the proposed guardian's powers and duties, and the scope and duration of the proposed guardianship;
- (3) inform the respondent of the right to employ and consult with a lawyer at the respondent's own expense and the right to request a court-appointed lawyer; and
- (4) inform the respondent that all costs and expenses of the proceeding, including respondent's attorney's fees, will be paid from the respondent's estate.

(d) In addition to the duties imposed by subsection (c), the [visitor] shall:

- (1) interview the petitioner and the proposed guardian;
- (2) visit the respondent's present dwelling and any dwelling in which the respondent will live if the appointment is made;

(3) obtain information from any physician or other person who is known to have treated, advised, or assessed the respondent's relevant physical or mental condition; and

(4) make any other investigation the court directs.

(e) The [visitor] shall promptly file a report in writing with the court, which must include:

(1) a recommendation as to whether a lawyer should be appointed to represent the respondent;

(2) a summary of daily functions the respondent can manage without assistance, could manage with the assistance of supportive services or benefits, including use of appropriate technological assistance, and cannot manage;

(3) recommendations regarding the appropriateness of guardianship, including as to whether less restrictive means of intervention are available, the type of guardianship, and, if a limited guardianship, the powers to be granted to the limited guardian;

(4) a statement of the qualifications of the proposed guardian, together with a statement as to whether the respondent approves or disapproves of the proposed guardian, and the powers and duties proposed or the scope of the guardianship;

(5) a statement as to whether the proposed dwelling meets the respondent's individual needs;

(6) a recommendation as to whether a professional evaluation or further evaluation is necessary; and

(7) any other matters the court directs.

Legislative Note: Those states that enact Alternative B of subsection (b) which requires appointment of counsel for the respondent in all proceedings for appointment of a guardian should not enact subsection (e)(1).

Editors' Notes

COMMENT

2011 Electronic Pocket Part Update.

Alternative provisions are offered for subsection (b). Alternative A was favored by the drafting committee. Alternative A relies on an expanded role for the "visitor," who can be chosen or selected to provide the court with advice on a variety of matters other than legal issues. Appointment of a lawyer, nevertheless, is *required* under Alternative A when the court determines that the respondent needs representation, or counsel is requested by the respondent or recommended by the visitor.

Alternative B is derived from UGPPA (1982) Section 2-203 (UPC Section 5-303 (1982)). It is expected that in states enacting Alternative A of subsection (b), counsel will be appointed in virtually all of the cases. Alternative B was favored by the A.B.A. Commission on Legal Problems of the Elderly, which attached great significance to expressly making appointment of counsel "mandatory." Therefore, for states which wish to provide for "mandatory appointment" of counsel, Alternative B should be enacted.

In Alternative A for subsection (b), then, appointment of counsel for an unrepresented respondent is mandated when requested by the respondent, when recommended by the visitor, or when the court determines the respondent needs representation. This requirement is in accord with the National Probate Court Standards. *National Probate Court Standards*, Standard 3.3.5 "Appointment of Counsel" (1993), which provides:

(a) Counsel should be appointed by the probate court to represent the respondent when:

(1) requested by an unrepresented respondent;

(2) recommended by a court visitor;

(3) the court, in the exercise of its discretion, determines that the respondent is in need of representation; or

(4) otherwise required by law.

(b) The role of counsel should be that of an advocate for the respondent.

Alternative A of subsection (b) follows the National Probate Court Standards, Standard 3.3.5(a)(1) through (a)(3). Alternative B perhaps may be said to be in accord with the National Probate Court Standards, Standard 3.3.5(a)(4).

The drafting committee for the 1997 UGPPA debated at length whether to mandate appointment of counsel or to expand the role of the visitor. The drafting committee concluded that as between the two, the visitor may be more helpful to the court in providing information on a wider variety of issues and concerns, by acting as the eyes and ears of the court as well as determining the respondent's wishes and conveying them to the court. The committee was concerned that including mandatory appointment of counsel would cause many to view the Act as a "lawyer's bill" and thus severely handicap the Act's acceptance and adoption. It is the intent of the committee that counsel for respondent be appointed in all but the most clear cases, such as when the respondent is clearly incapacitated.

For jurisdictions enacting Alternative A under subsection (b), the visitor needs to be especially sensitive to the fact that if the respondent is incapacitated, then the respondent may not have sufficient capacity to intelligently and knowingly waive appointment of counsel. A court should err on the side of protecting the respondent's rights and appoint counsel in most cases.

Appointment of a visitor is mandatory (subsection (a)), regardless of which alternative is enacted under subsection (b). The visitor serves as the information gathering arm of the court. The visitor can be a physician, psychologist, or other individual qualified to evaluate the alleged impairment, such as a nurse, social worker, or individual with pertinent expertise. It is imperative that the visitor have training or experience in the type of incapacity alleged. The visitor must individually meet with the respondent, the petitioner and the proposed guardian. The visitor's report must contain information and recommendations to the court regarding the appropriateness of the guardianship, whether lesser restrictive alternatives might meet the respondent's needs, recommendations about further evaluations, powers to be given the guardian, and the appointment of counsel. If the petition is withdrawn prior to the appointment of the visitor, no appointment of the visitor is necessary.

National Probate Court Standards, Standard 3.3.4 "Court Visitor" (1993) provides:

The probate court should require a court appointee to visit with the respondent in a guardianship petition to (1) explain the rights of the respondent; (2) investigate the facts of the petition; and (3) explain the circumstances and consequences of the action. The visitor should investigate the need for additional court appointments and should file a written report with the court promptly after the visit.

The visitor must visit the respondent in person and explain a number of items to the respondent to the extent the respondent can understand. If the respondent does not have a good command of the English language, then the visitor should be accompanied by an interpreter. The drafters did not mandate that the visitor be able to speak the respondent's primary language, but good practice and due process protections dictate the use of interpreters when needed for the respondent to understand. The phrase "to the extent that the respondent is able to understand" is a recognition that some respondents may be so impaired that they are unable to understand. If assistive devices are needed in order for the visitor to explain to the respondent in a manner necessary so that the respondent can understand, then the visitor should use those assistive devices. The visitor is also charged with confirming compliance with the Americans With Disabilities Act when visiting the respondent's dwelling and the proposed dwelling in which it is expected that the respondent will reside.

Subsection (c)(4) puts the respondent on notice that if the respondent has an estate, costs and expenses are paid from the estate, including attorney's fees and visitor's fees. If there is an estate, those entitled to compensation would be paid from the estate. If there is no estate, those entitled to compensation will ordinarily be compensated by whatever process the enacting state has for indigent proceedings, such as from the county general fund, unless the enacting jurisdiction has made other arrangements. If

a conservatorship exists, payment is made pursuant to the procedures provided in Section 5-417, otherwise the guardian must file a fee petition. See Section 5-316.

The visitor must talk with the physician or other person who is known to have assessed, treated or advised about the respondent's relevant physical or mental condition. This information is crucial to the court in making a determination of whether to grant the petition, since a professional evaluation will no longer be required in every case. See Section 5-306. If the doctor refuses to talk to the visitor, the visitor may need to seek from the appointing court an order authorizing the release of the information.

The visitor's report must be in writing and include a list of recommendations or statements. For states enacting Alternative A to subsection (b), if the visitor does not recommend that a lawyer be appointed, the visitor should include in the report the reasons why a lawyer should not be appointed. States enacting this article should consider developing a checklist for the items enumerated in subsection (e).

“Visitor” is bracketed in recognition that states use and may wish to substitute different words to refer to this position.

Notes of Decisions (3)

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Unif. Probate Code § 5-305, ULA PROB CODE § 5-305

Uniform Laws Annotated

Uniform Probate Code (1969) (Last Amended or Revised in 2010) (Refs & Annos)

Article V. Uniform Guardianship and Protective Proceedings Act (1997/1998) (Refs & Annos)

Part 3. Guardianship of Incapacitated Person

Unif. Probate Code § 5-318

§ 5-318. Termination or Modification of Guardianship.

Currentness

(a) A guardianship terminates upon the death of the ward or upon order of the court.

(b) On petition of a ward, a guardian, or another person interested in the ward's welfare, the court may terminate a guardianship if the ward no longer needs the assistance or protection of a guardian. The court may modify the type of appointment or powers granted to the guardian if the extent of protection or assistance previously granted is currently excessive or insufficient or the ward's capacity to provide for support, care, education, health, and welfare has so changed as to warrant that action.

(c) Except as otherwise ordered by the court for good cause, the court, before terminating a guardianship, shall follow the same procedures to safeguard the rights of the ward as apply to a petition for guardianship. Upon presentation by the petitioner of evidence establishing a prima facie case for termination, the court shall order the termination unless it is proven that continuation of the guardianship is in the best interest of the ward.

Editors' Notes

COMMENT

2011 Electronic Pocket Part Update.

If the ward's condition changes so that the guardian believes that the ward is capable of exercising some or all of the rights that were previously removed, Section 5-314(b)(5) requires the guardian to immediately notify the court and not wait until the due date of the next report to be filed under Section 5-317.

Subsection (b) can be used by the court not only to terminate a guardianship but also to remove powers or add powers granted to the guardian.

Subsection (c) requires the court in terminating a guardianship to follow the same procedures to safeguard the ward's rights as apply to a petition for appointment of a guardian. This includes the appointment of a visitor and, in appropriate circumstances, counsel.

Although clear and convincing evidence is required to establish a guardianship, the petitioner need only present a prima facie case for termination. Once the petitioner has made out a prima facie case, the burden then shifts to the party opposing the petition to establish by clear and convincing evidence that continuation of the guardianship is in the best interest of the ward. Given the constriction on rights involved in a guardianship, the burden of establishing a guardianship should be greater than that for restoring rights. In determining whether it is in the ward's best interest for the guardianship to continue, every effort should be made to determine the ward's wishes and expressed preferences regarding the termination of the guardianship. In determining the best interest of the ward, the ward's personal values and expressed desires should be considered.

To initiate proceedings under this section, the ward or person interested in the ward's welfare need not present a formal document prepared with legal assistance. A request to the court may always be made informally.

Unlike the 1982 UGPPA, this section does not limit the frequency with which petitions for termination may be made to the court, preferring instead to leave that issue up to general statutes and rules addressing court management in general. Compare UPC Section 5-311(b) (1982).

Termination of the guardianship does not relieve the guardian of liability for prior acts. See Section 5-112.

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Unif. Probate Code § 5-318, ULA PROB CODE § 5-318

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Baldwin's Ohio Revised Code Annotated
General Provisions
Chapter 1. Definitions; Rules of Construction (Refs & Annos)
Statutory Provisions (Refs & Annos)

R.C. § 1.47

1.47 Intentions in the enactment of statutes

Currentness

In enacting a statute, it is presumed that:

- (A) Compliance with the constitutions of the state and of the United States is intended;
- (B) The entire statute is intended to be effective;
- (C) A just and reasonable result is intended;
- (D) A result feasible of execution is intended.

Credits

(1971 H 607, eff. 1-3-72)

Notes of Decisions (69)

R.C. § 1.47, OH ST § 1.47

Current through all 2011 laws and statewide issues and 2012 Files 70 through 149 of the 129th GA (2011-2012).

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Proposed Legislation

Baldwin's Ohio Revised Code Annotated
Title XXI. Courts--Probate--Juvenile (Refs & Annos)
Chapter 2111. Guardians; Conservatorships (Refs & Annos)
General Provisions

R.C. § 2111.02

2111.02 Appointment of guardian

Effective: March 22, 2012
Currentness

(A) If 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 that guardian. An interested party includes, but is not limited to, a person nominated in a durable power of attorney under section 1337.24 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 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 the appointment as guardian, 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 those 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 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 that 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 magistrate, 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 the alleged incompetent's choice;

(b) The right to have a friend or family member of the alleged incompetent's choice present;

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

(d) If the alleged incompetent is indigent, upon the alleged incompetent's 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) If a person has been nominated to be a guardian of the estate of a minor in or pursuant to a durable power of attorney under section 1337.24 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 a durable power of attorney under section 1337.24 or pursuant to section 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.

Credits

(2011 S 117, eff. 3-22-12; 2011 S 124, eff. 1-13-12; 2009 S 79, eff. 10-6-09; 2008 S 157, eff. 5-14-08; 1996 H 288, eff. 1-14-97; 1989 S 46, eff. 1-1-90; 1988 S 228; 1983 S 115; 129 v 1448; 128 v 76; 1953 H 1; GC 10507-2)

Editors' Notes

OSBA PROBATE AND TRUST LAW SECTION

1983:

See the comment for 1983 following Sec. 2111.121.

Notes of Decisions (156)

R.C. § 2111.02, OH ST § 2111.02

Current through all 2011 laws and statewide issues and 2012 Files 70 through 149 of the 129th GA (2011-2012).

Baldwin's Ohio Revised Code Annotated
Title XXI. Courts--Probate--Juvenile (Refs & Annos)
Chapter 2111. Guardians; Conservatorships (Refs & Annos)
Miscellaneous Provisions

R.C. § 2111.49

2111.49 Guardian's report; court intervention; hearing

Currentness

(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.

Credits

(1996 S 223, eff. 3-18-97; 1989 S 46, eff. 1-1-90)

Notes of Decisions (4)

R.C. § 2111.49, OH ST § 2111.49

Current through all 2011 laws and statewide issues and 2012 Files 70 through 149 of the 129th GA (2011-2012).

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Baldwin's Ohio Revised Code Annotated
Title XXI. Courts--Probate--Juvenile (Refs & Annos)
Chapter 2111. Guardians; Conservatorships (Refs & Annos)
Miscellaneous Provisions

R.C. § 2111.50

2111.50 Probate court powers over guardianship

Effective: January 13, 2012

Currentness

(A)(1) At all times, the probate court is the superior guardian of wards who are subject to its jurisdiction, and all guardians who are subject to the jurisdiction of the court shall obey all orders of the court that concern their wards or guardianships.

(2)(a) Subject to divisions (A)(2)(b) and (c) of this section, the control of a guardian over the person, the estate, or both of the guardian's ward is limited to the authority that is granted to the guardian by the Revised Code, relevant decisions of the courts of this state, and orders or rules of the probate court.

(b) Except for the powers specified in division (E) of this section and unless otherwise provided in or inconsistent with another section of the Revised Code, the probate court may confer upon a guardian any power that this section grants to the probate court in connection with wards.

(c) For good cause shown, the probate court may limit or deny, by order or rule, any power that is granted to a guardian by a section of the Revised Code or relevant decisions of the courts of this state.

(B) In connection with any person whom the probate court has found to be an incompetent or a minor subject to guardianship and for whom the court has appointed a guardian, the court has, subject to divisions (C) to (E) of this section, all the powers that relate to the person and estate of the ward and that the ward could exercise if present and not a minor or under a disability, except the power to make or revoke a will. These powers include, but are not limited to, the power to do any of the following:

(1) Convey or release the present, contingent, or expectant interests in real or personal property of the ward, including, but not limited to, dower and any right of survivorship incident to a survivorship tenancy, joint tenancy, or tenancy by the entireties;

(2) Exercise or release powers as a trustee, personal representative, custodian for a minor, guardian, or donee of a power of appointment;

(3) Enter into contracts, or create revocable trusts of property of the estate of the ward, that may not extend beyond the minority, disability, or life of the ward;

(4) Exercise options to purchase securities or other property;

(5) Exercise rights to elect options under annuities and insurance policies, and to surrender an annuity or insurance policy for its cash value;

(6) Exercise the right to an elective share in the estate of the deceased spouse of the ward pursuant to section 2106.08 of the Revised Code;

(7) Make gifts, in trust or otherwise, to relatives of the ward and, consistent with any prior pattern of the ward of giving to charities or of providing support for friends, to charities and friends of the ward.

(C) Except for the powers specified in division (D) of this section, all powers of the probate court that are specified in this chapter and that relate either to any person whom it has found to be an incompetent or a minor subject to guardianship and for whom it has appointed a guardian and all powers of a guardian that relate to the guardian's ward or guardianship as described in division (A)(2) of this section, shall be exercised in the best interest, as determined in the court's or guardian's judgment, of the following:

(1) The ward whom the probate court has found to be an incompetent or a minor subject to guardianship;

(2) The dependents of the ward;

(3) The members of the household of the ward.

(D) If the court is to exercise or direct the exercise, pursuant to division (B) of this section, of the power to make gifts in trust or otherwise, the following conditions shall apply:

(1) The exercise of the particular power shall not impair the financial ability of the estate of the ward whom the probate court has found to be an incompetent or a minor subject to guardianship and for whom the court has appointed a guardian, to provide for the ward's foreseeable needs for maintenance and care;

(2) If applicable, the court shall consider any of the following:

(a) The estate, income, and other tax advantages of the exercise of a particular power to the estate of a ward whom the probate court has found to be an incompetent or a minor subject to guardianship and for whom the court has appointed a guardian;

(b) Any pattern of giving of, or any pattern of support provided by, the ward prior to the ward's incompetence;

(c) The disposition of property made by the ward's will;

(d) If there is no knowledge of a will of the ward, the ward's prospective heirs;

(e) Any relevant and trustworthy statements of the ward, whether established by hearsay or other evidence.

(E)(1) The probate court shall cause notice as described in division (E)(2) of this section to be given and a hearing to be conducted prior to its exercise or direction of the exercise of any of the following powers pursuant to division (B) of this section:

(a) The exercise or release of powers as a donee of a power of appointment;

(b) Unless the amount of the gift is no more than one thousand dollars, the making of a gift, in trust or otherwise.

(2) The notice required by division (E)(1) of this section shall be given to the following persons:

(a) Unless a guardian of a ward has applied for the exercise of a power specified in division (E)(1) of this section, to the guardian;

(b) To the ward whom the probate court has found to be an incompetent or a minor subject to guardianship;

(c) If known, to a guardian who applied for the exercise of a power specified in division (E)(1) of this section, to the prospective heirs of the ward whom the probate court has found to be an incompetent or a minor subject to guardianship under section 2105.06 of the Revised Code, and any person who has a legal interest in property that may be divested or limited as the result of the exercise of a power specified in division (E)(1) of this section;

(d) To any other persons the court orders.

(F) When considering any question related to, and issuing orders for, medical or surgical care or treatment of incompetents or minors subject to guardianship, the probate court has full *parens patriae* powers unless otherwise provided by a section of the Revised Code.

Credits

(2011 S 124, eff. 1-13-12; 1989 S 46, eff. 1-1-90)

Notes of Decisions (24)

R.C. § 2111.50, OH ST § 2111.50

Current through all 2011 laws and statewide issues and 2012 Files 70 through 149 of the 129th GA (2011-2012).

Baldwin's Ohio Revised Code Annotated
Title XXI. Courts--Probate--Juvenile (Refs & Annos)
Chapter 2111. Guardians; Conservatorships (Refs & Annos)
Miscellaneous Provisions

R.C. § 2111.51

2111.51 Indigent guardianship fund

Currentness

Each county shall establish in the county treasury an indigent guardianship fund. All revenue that the general assembly appropriates to the indigent guardianship fund for a county, thirty dollars of the thirty-five-dollar fee collected pursuant to division (A)(34) of section 2101.16 of the Revised Code, and twenty dollars of the sixty-dollar fee collected pursuant to division (A)(59) of that section shall be deposited into the fund that is established in that county. Expenditures from the fund shall be made only upon order of the probate judge and only for payment of any cost, fee, charge, or expense associated with the establishment, opening, maintenance, or termination of a guardianship for an indigent ward.

If a probate court determines that there are reasonably sufficient funds in the indigent guardianship fund of the county in which the court is located to meet the needs of indigent guardianships in that county, the court, by order, may declare a surplus in the indigent guardianship fund and expend the surplus funds for other guardianship expenses or for other court purposes.

Credits

(1994 H 457, eff. 11-9-94; 1993 H 9, eff. 9-14-93; 1990 S 267; 1989 S 46)

R.C. § 2111.51, OH ST § 2111.51

Current through all 2011 laws and statewide issues and 2012 Files 70 through 149 of the 129th GA (2011-2012).