[Cite as *In re Guardianship of Spangler*, 2008-Ohio-6978.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

IN THE MATTER OF THE GUARDIANSHIP OF JOHN SPANGLER	:	**O P I N I O N**
	:	**CASE NOS. 2007-G-2800 and 2007-G-2802**

Civil Appeal from the Court of Common Pleas, Probate Division, Case No. 06 PG 000245.

Judgment: Reversed and remanded.

Pamela W. Makowski, 503 South High Street, #205, Columbus, OH 43215 (For Appellant, Mother, Gabriele Spangler and Father, Joseph M. Spangler).

Shane Egan, 4110 North High Street, Columbus, OH 43214 (For Appellee, Advocacy and Protection Services, Inc.)

David P. Joyce, Geauga County Prosecutor, *and J.A. Miedema*, Assistant Prosecutor, Courthouse Annex, 231 Main Street, Chardon, OH 44024 (For Appellee, Geauga County Board of Mental Retardation and Developmental Disabilities).

Derek S. Hamalian and *Jason C. Boylan*, Ohio Legal Rights Service, 50 West Broad Street, #1400, Columbus, OH 43215-2999 (For Appellant, John Spangler).

COLLEEN MARY O'TOOLE, J.

{¶1} John Spangler, Gabriele Spangler, and Joseph Spangler appeal from the judgment entry of the Geauga County Court of Common Pleas, Probate Division, denying their motions to dismiss the Geauga County Board of Mental Retardation and Developmental Disabilities ("GCBMRDD") from this case, denying Joseph's continuance

as sole guardian for John, and continuing, indefinitely, Advocacy and Protection Services, Inc. ("APSI") as John's guardian. We reverse and remand.

{¶2} John Spangler (d/o/b November 12, 1987) suffers from autism, mitochondrial disease, and mild mental retardation. Evidence presented in a lengthy hearing before the trial court, commencing April 24, 2007, and continuing June 13, 2007 and July 24, 2007 indicates that John, as he has grown older, has had a problem controlling his temper, and has periodic bouts of violent and destructive behavior. There have been conflicts between his parents – Gabriele and Joseph – and various service providers about appropriate care for John, his parents expressing dissatisfaction with the service providers, and the service providers concerned that his parents demands for new placements, etc., interfere with the structured regimen most conducive to John's wellbeing.

{¶3} John lived with his parents until reaching majority. Due largely to his fits of violent behavior, he was eventually placed outside the home. By a judgment entry filed June 15, 2006, his mother was appointed emergency guardian of his person. This emergency guardianship was extended by a judgment entry filed June 19, 2006. Permanent guardianship of his person was granted to both Mr. and Mrs. Spangler by a judgment entry filed July 18, 2006.

{¶4} October 25, 2006, GCBMRDD filed an ex parte motion to remove Mr. and Mrs. Spangler as John's guardians for alleged breach of duty. Specifically, GCBMRDD was concerned about Gabriele's expressed intention to remove John from the home of his then-caregivers, Mr. and Mrs. Devlin. The trial court granted the motion that same

day, and appointed APSI as John's temporary guardian. Hearing was set for October 31, 2006.

{¶5} October 31, 2006, the trial court memorialized an agreement reached between the parties in a judgment entry. Mr. and Mrs. Spangler agreed to APSI continuing as temporary guardian of John's person, and agreed to submit psychiatric and drug and alcohol assessments of themselves to the trial court prior to the next pretrial. This was scheduled for April 24, 2007.

{¶6} January 24, 2007, Mr. and Mrs. Spangler moved the trial court to remove APSI as John's temporary guardian, for allegedly breaching its fiduciary duty to provide him a safe environment, and to have Mr. Spangler appointed guardian. January 25, 2007, the trial court ordered the Spanglers to supplement this motion. That same day, APSI moved the trial court to dismiss the Spangler's motion, join GCBMRDD as a party, and appoint a guardian ad litem. The Spanglers opposed this motion February 2, 2007.

{¶7} February 7, 2007, the trial court filed a judgment entry converting the scheduled April 24, 2007 pretrial into a full hearing on whether to continue APSI as John's guardian, or to appoint the Spanglers. April 19, 2007, the Spanglers and APSI jointly moved the trial court to reconvert the April 24 hearing into a pretrial.

{¶8} April 20, 2007, the Spanglers moved the court to dismiss the GCBMRDD motion which had originally removed them as John's guardians for lack of standing to file such motion. The Spanglers contended it was outside the statutorily defined powers of a county board of mental retardation to attempt to seek the removal of an incompetent's guardian. GCBMRDD opposed April 23, 2007.

{¶9} As noted above, hearing commenced April 24, 2007, and continued June 13, 2007, and July 24, 2007.

{¶10} April 25, 2007, the trial court joined GCBMRDD as a party for purposes of prosecuting its motion to remove the Spanglers as John's guardians.

{¶11} June 4, 2007, counsel for John appeared in the case. Discovery ensued; and, June 13, 2007, John filed to dismiss GCBMRDD from the case, for lack of standing.

{¶12} August 15, 2007, the trial court filed its judgment entry. Finding the conduct of John's parents in constantly seeking new or different services for him hindered, rather than helped, his care, the trial court granted GCBMRDD's motion to remove the Spanglers as John's guardians, and denied their motion to remove APSI. APSI was continued indefinitely as guardian of John's person.

{¶13} September 13, 2007, the Spanglers noticed appeal. It was given case number 2007-G-2800. September 24, John noticed appeal. It was given case number 2007-G-2802. October 18, 2007, the Spanglers filed an amended notice of appeal, adding APSI as a party thereto.

{¶14} October 29, 2007, this court dismissed John's appeal, sua sponte, as untimely filed pursuant to App.R. 4(A). November 8, 2007, John moved to reinstate his appeal as timely pursuant to App.R. 4(B)(1). That same day, John moved to consolidate his appeal with that of his parents. We granted each motion by a judgment entry filed November 26, 2007.

{¶15} April 16, 2008, the Ohio Association of County Boards of Mental Retardation and Developmental Disabilities ("OACBMRDD") moved for leave to file an

amicus curiae brief, instanter. By a judgment entry filed May 14, 2008, we granted leave; and ordered the Spanglers and John to file their replies within ten days. May 20, 2008, the OACBMRDD filed for leave to participate in oral argument, which leave we granted by a judgment entry filed July 7, 2008.

{¶16} John notices a single assignment of error on appeal:

{¶17} "The Probate Court improperly denied Appellant John Spangler's Motion to Dismiss Appellee [GCBMRDD] because [GCBMRDD] lacked standing under the Ohio Revised Code to see the removal of Appellant's Guardians."

{¶18} Mr. and Mrs. Spangler assign four errors on appeal:

{¶19} "[1.] Whether the trial court erred in permitting [GCBMRDD] to file a motion for removal of the guardians as it was not a party in the case, did not have statutory authority to do so, and such a motion was beyond the statutory authority of the Court.

{¶20} "[2.] Whether the trial court erred in granting the emergency motion to remove the guardian as there was no basis presented for the filing of such a motion.

{¶21} "[3.] Whether the trial court's ruling was against the manifest weight of the evidence as there was no evidence that the original guardians had failed to provide services for the ward.

{¶22} "[4.] Whether the Probate Court erred by denying counsel the right to listen to the prior testimony tape upon written request."

{¶23} We consider John's assignment of error, and his parent's first assignment of error, together. Essentially, each challenges whether a county board of mental retardation has the power to move a probate court to remove a guardian for an incompetent person. We find they do not.

{¶24} County boards of mental retardation are creatures of statute, created to supervise services for the mentally and developmentally challenged. Regarding such bodies, the Supreme Court of Ohio has held:

{¶25} "It is well settled that an administrative agency has only such regulatory power as is delegated to it by the General Assembly. Authority that is conferred by the General Assembly cannot be extended by the administrative agency. *Burger Brewing Co. v. Thomas* (1975), 42 Ohio St.2d 377, 379, ***.

{¶26} "'Such grant of power, by virtue of a statute, may be either express or implied, but the limitation put upon the implied power is that it is only such as may be reasonably necessary to make the express power effective. In short, the implied power is only incidental or ancillary to an express power, and, if there be no express grant, if follows, as a matter of course, that there can be no implied grant.

{¶27} "'In construing such grant of power, particularly administrative power through and by a legislative body, the rules are well settled that the intention of the grant of power, as well as the extent of the grant, must be clear; that in case of doubt that doubt is to be resolved not in favor of the grant but against it.' *State ex rel. A. Bentley & Sons Co. v. Pierce* (1917), 96 Ohio St. 44, 47, ***." *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, 96 Ohio St.3d 250, 2002-Ohio-4172, at ¶38-40.

{¶28} Consequently, to discover whether a county board of mental health, such as GCBMRDD, may move a probate court to remove the guardian of an incompetent's person, we must look to the powers and duties conferred upon such boards, to see whether by express or implied grant, such power exists.

{¶29} The powers and duties imposed upon county boards of mental retardation are set forth at R.C. 5126.05(A), which provides:

{¶30} "(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:

{¶31} "(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;

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

{¶33} "(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;

{¶34} "(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;

{¶35} "(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;

{¶36} "(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 be reasonably requested;

{¶37} "(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;

{¶38} "(8) Provide service and support administration in accordance with section 5126.15 of the Revised Code;

{¶39} "(9) Certify respite care homes pursuant to rules adopted under section 5123.171 (5123.17.1) of the Revised Code by the director of mental retardation and developmental disabilities."

{¶40} Obviously, the power to move the probate court to remove an incompetent's guardian is not expressly granted by R.C. 5126.05. Does any section of R.C. Chapter 5126 imply such a grant? We think not.

{¶41} R.C. 5126.31 empowers the boards to review, investigate, and remediate cases involving the abuse or neglect of mentally retarded or developmentally disabled adults. Significantly, R.C. 5126.33 provides a detailed description of the procedure such boards must follow if it cannot obtain consent for a service plan for a mentally

retarded or developmentally disabled adult, pursuant to R.C. 5126.31(C). In relevant part, R.C. 5126.33 provides:

{¶42} "(A) A county board of mental retardation and developmental disabilities may file a complaint with the probate court of the county in which an adult with mental retardation or a developmental disability resides for an order authorizing the board to arrange services described in division (C) of section 5126.31 of the Revised Code for that adult if the adult is eligible to receive services or support *** and the board has been unable to secure consent. The complaint shall include:

{¶43} "(1) The name, age, and address of the adult;

{¶44} "(2) Facts describing the nature of the abuse, neglect, or exploitation and supporting the board's belief that services are needed;

{¶45} "(3) The types of services proposed by the board, as set forth in the protective service plan described in division (J) of section 5126.30 of the Revised Code and filed with the complaint;

{¶46} "(4) Facts showing the board's attempts to obtain the consent of the adult or the adult's guardian to the services.

{¶47} "(B) The board shall give the adult notice of the filing of the complaint and in simple and clear language shall inform the adult of the adult's rights in the hearing under division (C) of this section and explain the consequences of a court order. This notice shall be personally served upon all parties, and also shall be given to the adult's legal counsel, if any, and the legal rights service. The notice shall be given at least twenty-four hours prior to the hearing, although the court may waive this requirement upon a showing that there is a substantial risk that the adult will suffer immediate

physical harm in the twenty-four hour period and that the board has made reasonable attempts to give the notice required by this division.

{¶48} "(C) Upon the filing of a complaint for an order under this section, the court shall hold a hearing at least twenty-four hours and no later than seventy-two hours after the notice under division (B) of this section has been given unless the court has waived the notice. All parties shall have the right to be present at the hearing, present evidence, and examine and cross-examine witnesses. The Ohio Rules of Evidence shall apply to a hearing conducted pursuant to this division. The adult shall be represented by counsel unless the court finds that the adult has made a voluntary, informed, and knowing waiver of the right to counsel. ***

{¶49} "(D)(1) The court shall issue an order authorizing the board to arrange the protective services if it finds, on the basis of clear and convincing evidence, all of the following:

{¶50} "(a) The adult has been abused, neglected, or exploited;

{¶51} "(b) The adult is incapacitated;

{¶52} "(c) There is a substantial risk to the adult of immediate physical harm or death;

{¶53} "(d) The adult is in need of the services;

{¶54} "(e) No person authorized by law or court order to give consent for the adult is available or willing to consent to the services.

{¶55} "***."

{¶56} Further, pursuant to division (D) of R.C. 5126.33, the probate court may, in extreme necessity, order a change in the mentally retarded or developmentally disabled

adult's residence; and, pursuant to division (I)(2), it may issue an ex parte order in an emergency.

{¶57} By providing this extremely detailed statutory provision whereby county boards of mental retardation may seek to remedy perceived problems in the treatment of their clients, we believe the General Assembly has effectively banned such boards from seeing the removal of a guardian, such as occurred in this case. There is no way such a power can be implied from this provision: indeed, the fact that a board of mental retardation can seek an order overriding the wishes of a guardian, cf. R.C. 5126.33, indicates that the power to seek a guardian's removal is beyond a board of mental retardation's authority.

{¶58} In this case, the trial court found GCBMRDD to be a fiduciary of John's, pursuant to its extensive authority to provide services under R.C. 5126.15. As such, the trial court further found GCBMRDD to be John's "next best friend" and a "real party in interest" to the proceeding. We are somewhat dubious that GCBMRDD can be described as a fiduciary to its clients. R.C. 2109.01 defines the term "fiduciary" to include: "an agency under contract with the department of mental retardation and developmental disabilities for the provision of protective service ***, appointed by and accountable to the probate court as guardian or trustee with respect to mentally retarded or developmentally disabled persons." GCBMRDD was not appointed as John's guardian by the trial court; and it is no more accountable to that court than any other state agency regularly appearing in probate proceedings.

{¶59} Consequently, GCBMRDD lacked standing to move the trial court to replace Mr. Spangler as John's guardian. In *Ohio Pyro, Inc. v. Ohio Dept. of*

Commerce, 115 Ohio St.3d 375, 2007-Ohio-5024, at ¶27, the Supreme Court explained the concept of "standing" as follows:

{¶60} "'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 relief 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, ***." (Parallel citations omitted.)

{¶61} In this case, GCBMRDD has no claim to make; it has no right or duty requiring judicial enforcement. It has no "personal stake" in the controversy, as its duties revolve around providing and funding treatment for developmentally disabled persons such as John. Statutorily, it has the power, in proper case and following proper procedure, to override a guardian's wishes in a particular instance – but not to petition for a guardian's removal.

{¶62} John's first assignment of error, as well as the first assignment of error of his parents, have merit. Our disposition of these assignments further dictates we find merit in Mr. and Mrs. Spangler's second assignment of error; there was no basis for filing, or granting, the ex parte motion to make APSI temporary guardian of John. In

consequence, we deem moot Mr. and Mrs. Spangler's third assignment of error (challenging the manifest weight of the evidence used in removing them as John's guardians indefinitely).

{¶63} By their fourth assignment of error, Mr. and Mrs. Spangler allege error in the trial court refusing their counsel access to the tape recording of the April 24, 2007 hearing, in order to prepare for the June 13, 2007 hearing. The Spanglers allege written request for access to the tape was made to the trial court, but we find neither any request, nor denial, in the record on appeal. Consequently, we decline to consider the assignment. Cf. App.R. 16(A)(7).

{¶64} The judgment of the Geauga County Court of Common Pleas, Probate Division, is reversed, and this matter is remanded for further proceedings consistent with this opinion.

{¶65} It is the further order of this court that appellees are assessed costs herein taxed.

{¶66} The court finds there were reasonable grounds for this appeal.

MARY JANE TRAPP, J., concurs in part and concurs in judgment only in part with Concurring Opinion,

TIMOTHY P. CANNON, J., dissents with Dissenting Opinion.

MARY JANE TRAPP, J., concurs in part and concurs in judgment only in part with Concurring Opinion.

{¶67} While I concur that this matter must be reversed and remanded, I do so upon narrower grounds than the majority. The majority finds that a county board of

mental retardation and developmental disabilities does not have either an express grant of authority to file a motion to remove a guardian under R.C. 5126.05(A) or implied grant of authority to file such a motion. I believe the focus of the standing analysis should instead be on the rights and remedies provided to the various concerned individuals and entities in guardianship matters in R.C. Chapters 2109 and 2111.

{¶68} The analysis employed by the Supreme Court of Ohio in its recent decision *In Re Guardianship of Santrucek,* 2008-Ohio-4915, while used to determine who has standing to appeal a decision of a probate court in a guardianship proceeding, is cogent to the analysis we undertake in this case.

{¶69} In *Santrucek,* the court held that "[a] person who has not filed an application to be appointed a guardian, or who otherwise has not been made a party to the guardianship proceedings, has no standing to appeal." Id. at syllabus.

{¶70} The court began its analysis with the observation that "[b]ecause guardianship proceedings are not adversarial, but are in rem proceedings involving only the probate court and the ward, the requirements for standing to appeal are more elaborate. See *In re Guardianship of Love* (1969), 19 Ohio St.2d 111." Id. at ¶5 (parallel citations omitted). The same may be said as to the requirements for standing of interested persons or interested parties in a guardianship proceeding, be it either the establishment or the termination of a guardianship for an incompetent.

{¶71} The court in *Santrucek* found that the out-of-state daughter of the prospective ward clearly had an interest in the outcome of the guardianship proceedings. But although the daughter filed a motion challenging the subject matter jurisdiction of the Ohio probate court, she did not file a Civ.R. 24 motion to intervene.

{¶72} The court noted, as is applicable to this case, that "nonparties are limited in the types of motions they may file." Id. at ¶9. The court explained that "[t]he creation of a guardianship is a significant event, and family, friends, or even concerned neighbors could all potentially be affected by the outcome of a guardianship proceeding. Not all such persons will have a legally sufficient interest to allow them to become parties to the proceedings, however." Id. at ¶11.

{¶73} The pivotal questions in this case vis-a-vis the standing question are what was the status of the board at the time it filed its motion to remove and what was the board's legally sufficient interest?

{¶74} Clearly the board cannot meet the definition of "next-of-kin" found in the code section applicable to guardianships, R.C. 2111.01(E), which defines "next-of-kin" to be any person who would be entitled to inherit from the ward. Inasmuch as a guardian for John had already been appointed in an earlier proceeding, the board was not a "guardian", as defined at R.C. 2111.01(A). Although the term "interested party" is not defined in R.C. 2111.01, we find it used throughout those code chapters dealing with guardianships and fiduciaries, but in those applicable code sections we find only twelve limited areas[1] where interested parties may have standing in a guardianship proceeding and only eight of these eight sections actually empower an interested party

1. R.C. 2111.02 (seek a guardianship); R.C. 2111.13 (object to medical treatment); R.C. 2111.141 (entitled to notice of hearing on report of investigator); R.C. 2111.471 (file a motion to transfer jurisdiction); R.C. 2111.49 (request a hearing on the continuation of a guardianship); R.C. 2109.33 (file a motion taking exception to an accounting); R.C. 2109.36 (file a motion relative to distribution of assets); R.C. 2109.59 (file a petition to enforce payment or distribution); R.C. 2101.38 (file a motion when the probate judge is interested); R.C. 2109.04 (file a motion to require a bond); R.C. 2109.35 (file a motion to vacate order settling account); and R.C. 2127.19 (file an application to release the liens in a land sale).

to file a motion of any description.[2] Moreover, when R.C. 2109.24, the fiduciary removal statute, refers to "persons having an interest in the estate", it does so only in the final paragraph, and our court has held that this last paragraph applies only to the removal of testamentary trustees. *In re Estate of Veroni* (Dec. 31, 1998), 11th Dist. No. 97-L-119, 1998 Ohio App. Lexis 6365, *16.

{¶75} While the board clearly was not a party to this case at the time it filed the ex parte motion to remove the Spanglers as John's guardians, it may be reasonably argued that the board was an "interested party" at the time the ex parte motion to remove was filed. As an arguably interested party though, the board was limited in what it could file, as noted above.

{¶76} It is also clear that the board was later joined as a party upon the motion of the temporary guardian, APSI. The granting of the joinder motion was not specifically appealed. While I fail to see how APSI or the board for that matter demonstrated any of the grounds for joinder or intervention, i.e. that in its absence complete relief could not be accorded among those already parties, or that the board claimed an interest relating to the subject of the action and was so situated that the disposition of the action in its absence may either impair or impede its ability to protect that interest or leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the board's claimed interest; any failure to assign this as error is not fatal.

2. R.C. 2111.471 (file a motion to transfer jurisdiction); R.C. 2111.49 (request a hearing on the continuation of a guardianship); R.C. 2109.33 (file a motion taking exception to an accounting); R.C. 2109.36 (file a motion relative to distribution of assets); R.C. 2101.38 (file a motion when the probate judge is interested); R.C. 2109.04 (file a motion to require a bond); R.C. 2109.35 (file a motion to vacate order settling account); and R.C. 2127.19 (file an application to release the liens in a land sale).

{¶77} As the majority in *Santrucek* noted, "intervenors have standing only to the extent necessary to protect the interest that justifies the intervention. This restriction on standing is particularly relevant in the context of an in rem guardianship proceedings, which, at its basic level, involves the court and the ward *** and *inherently limits any interest or standing of a third party*. *** " (Emphasis added.) Id. at ¶12.

{¶78} The board had a statutory remedy in this case, R.C. 5126.33, which authorizes the board to file a complaint in the probate court for an order authorizing the board to arrange appropriate services for the disabled individual. This statutory procedure even allows for an ex parte order. The interest of the board in assuring that services are provided to a disabled adult even when consent cannot be obtained are protected by this complaint procedure. But instead of using a scalpel to cure the perceived problems in assuring John received services, the board used an ax, and that ax is not a part of the board's armament under our probate code.

{¶79} I do agree with the majority that the trial court's determination that the board had standing as a next friend and real party in interest based upon statutorily imposed obligations "on the agency owed to John Spangler that are fiduciary in nature" is not well-grounded in law. The trial court did tacitly acknowledge that such an argument has yet to be accepted on its merits by any court in this state.

{¶80} As explained in the Staff Notes to Civ.R. 17, "[t]he real party in interest principle does not refer to 'capacity to sue.' Assume that a minor is negligently injured. The minor is a real party in interest, but he does not have the capacity to sue. The minor sues under Rule 17(B) by his next friend, an adult, who does have the capacity to sue."

{¶81} In John Spangler's case, John was and remains even as an incompetent the real party in interest because "[a] real party in interest is the person who, by substantive law, possesses the right to be enforced." *Brown v. Wright*, 2d Dist. No. 20560, 2006-Ohio- 38, at ¶11. John had duly appointed guardians, and if a conflict arose between the ward's interests and those of his guardian, the court could have appointed a guardian ad litem pursuant to Civ.R. 17(B) and Civ.R. 73.

{¶82} I agree with the majority that the board failed to establish its standing as a real party in interest.

TIMOTHY P. CANNON, J., dissenting.

{¶83} I respectfully dissent.

{¶84} First, the procedural posture in this case reveals a disturbing delay by the Spanglers from the time the board filed the initial request to the time they voiced any objection of record. The board filed a request to remove Mr. and Mrs. Spangler as guardians on October 25, 2006. A hearing was set for October 31, 2006. At that hearing, the parties, including Mr. and Mrs. Spangler, entered into an agreement allowing APSI to serve as John's temporary guardian. A hearing was set for April 24, 2007. The Spanglers filed a request to dismiss the board's motion because of lack of standing on April 20, 2007, almost six full months after the board had originally brought this issue to the attention of the court. However, even if that motion had been summarily granted, the status of the case would have been placement of John with APSI under the October 31, 2006 *agreed* entry. Nevertheless, a hearing commenced

on April 24, 2007. The following day, the trial court added the board as a party to the case. Two additional days of hearings occurred, on June 13, 2007 and July 24, 2007, before the trial court reached its conclusion that it would be in the best interest of John Spangler to remain under the guardianship of APSI.

{¶85} Second, I disagree with the way the lead opinion has framed the issue in this case. I do not believe focusing on what "powers" have been conferred to county boards of mental retardation and developmental disabilities is the proper inquiry. Rather, I believe the simple question in this case is whether the board had the "right" or "ability" to request the probate court to take action in the best interest of the ward.

{¶86} "A county board of mental retardation and developmental disabilities exists to serve the needs of the mentally retarded and developmentally disabled residents of a given county. The board has a duty to set up an individual plan for each resident, to provide services to the resident, and to ensure that those services are being carried out." *Estate of Ridley v. Hamilton Cty. Bd. of Mental Retardation & Developmental Disabilities*, 150 Ohio App.3d 383, 2002-Ohio-6344, at ¶15.

{¶87} R.C. 2111.13(C) permits an "interested party" to file objections to a guardian's actions. I believe the general duties of the board are sufficient to deem the board an "interested party" and object to the guardian with the probate court.

{¶88} The majority holds that the board's authority and "power" is limited to the complaint procedure set forth in R.C. 5126.33. The lead opinion states that it believes the detailed procedure in R.C. 5126.33 is evidence that the "General Assembly has effectively banned such boards from seeking the removal of a guardian ***." I agree with the amicus brief that the procedure set forth in R.C. 5126.33 is not the board's

exclusive remedy. In fact, that section clearly establishes that the type of complaint contemplated by that statute does not apply to this situation. It only applies when the board is seeking protective services for the adult. R.C. 5126.33(D)(1) sets forth what the trial court must find in order to issue an order for protective services:

{¶89} "The court shall issue an order authorizing the board to arrange the protective services if it finds, on the basis of clear and convincing evidence, all of the following:

{¶90} "(a) The adult has been abused, neglected, or exploited;

{¶91} "(b) The adult is incapacitated;

{¶92} "(c) There is a substantial risk to the adult of immediate physical harm or death;

{¶93} "(d) The adult is in need of the services;

{¶94} "(e) No person authorized by law or court order to give consent for the adult is available or willing to consent to the services."

{¶95} In this case, the board felt the guardians were not fulfilling their duty and it would be in the best interest of the ward to have them removed. There was no allegation that there was an "immediate risk of physical harm or death." Therefore, a R.C. 5126.33 complaint would not be appropriate. However, I believe it is inappropriate to suggest the board is without remedy if it feels the guardian is not doing his or her job and that the best interest of the ward would be served if a new guardian is appointed.

{¶96} Anyone can ask the probate court to address problems with a guardian. Thus, it is difficult to believe that the Legislature intended to ban the very board created

to look after the best interests of persons with mental retardation or developmental disabilities from performing this action.

{¶97} At oral argument, the Spanglers' counsel acknowledged that *anyone* can write to the probate court, as the superior guardian of the ward pursuant to R.C. 2111.50(A)(1), and request anything with regard to the guardianship. Thereafter, the probate court has the discretion to grant or deny the request, or set the matter for a hearing. Further, counsel agreed that the board could have sent a letter to the probate court with the same information contained in its motion and the end result would have been the same. By adopting the majority rule, we are telling the probate court, with wide and plenary powers over guardianship matters, to whom it can and cannot listen. As the trial court noted, R.C. 5126.15 imposes obligations and duties upon the board. These duties are owed to John Spangler, not his parents.

{¶98} Finally, I believe the majority needs to provide further guidance for the trial court upon remand. The majority has remanded the matter for further proceedings but has not expressly indicated to the trial court what actions would be appropriate. After a lengthy and thorough set of hearings, the trial court made a finding that "neither Gabriele nor Joseph Spangler are suitable to serve as John Spangler's guardian." What is the probate court supposed to do now? Return John to his parents' control – just because the majority does not feel it was appropriate for the board to bring John's plight to the attention of the court?

{¶99} I would give great deference to the trial court after its exhaustive efforts to determine what is in John's best interest, and, thus, I would affirm the trial court's order.