

**ELEVENTH DISTRICT COURT OF APPEALS
GEAUGA COUNTY, OHIO**

John Spangler,	:	Case Nos. 2007-G-2800
	:	and 2007-G-2802
And	:	
Joseph Spangler,	:	(Geauga County Probate
	:	Court Case No. 06PG000245)
And	:	
Gabrielle Spangler	:	
Appellants	:	
v.	:	
Geauga County Board of Mental	:	
Retardation and Developmental	:	
Disabilities,	:	
And	:	
Advocacy and Protective Services, Inc.	:	
Appellees.	:	

BRIEF OF APPELLANT JOHN SPANGLER

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Assignment of Error

The Probate Court improperly denied Appellant John Spangler’s Motion to Dismiss Appellee Geauga County Board of MR/DD because the Board lacked standing under the Ohio Revised Code to see the removal of Appellant’s Guardians.

Issues Presented for Review and Argument

1. R.C. 5126.33 is the exclusive legal which permits the Board to intervene in a guardianship case and provide necessary and needed Board services to Appellant John Spangler.

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3. The Probate Court erred in holding that the Board has standing to file a petition for the removal of the guardian as a "next friend and real party of interest."

Authorities

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II. STATEMENT OF THE CASE

This case before this Court on the appeal of John Spangler, through counsel, to determine whether the Probate Court erred in denying Appellant John Spangler's Motions to Dismiss Appellee Geauga County Board of Mental Retardation and Developmental Disabilities (hereinafter, Board) from the case for lack of standing to pursue the removal of Appellant guardians Joseph and Gabriele Spangler. This case also presents the issue of whether or not the Probate Court correctly granted the Board standing as "next friend and real party in interest" so that the Board could pursue the removal of Appellants, Joseph and Gabriele Spangler, as guardians of the person of their son, John Spangler. See, *J.E.* p. 3.

1. Procedural Posture

After Gabriele Spangler was appointed as John Spangler's emergency guardian of the person on June 15, 2006, the emergency guardianship was extended by Judgment Entry filed on June 19, 2006. See, *J.E.* p. 3. Thereafter, permanent guardianship of the person was established by Judgment Entry filed on July 18, 2006, appointing both Joseph and Gabriele Spangler, John's parents, as guardians for his person. *Id.*

On October 25, 2006, an emergency ex parte motion was filed by the Board to remove Gabriele Spangler and Joseph Spangler as guardians of their son, John Spangler, and appoint Advocacy and Protective Services Inc. (hereinafter, APSI) as temporary guardian pending further hearing. See, *J.E.* p. 1. On January 24, 2007, Gabriele and Joseph Spangler filed an emergency motion for the removal of APSI as guardian of John Spangler. *J.E.* p. 2. By Judgment Entry filed on February 7, 2007 the Court converted the pretrial scheduled for April 24, 2007 to a full hearing to decide whether to permit Joseph Spangler to continue to be guardian or appoint APSI as

permanent guardian for John Spangler. *Id.*

Counsel for Appellant John Spangler filed a Notice of Appearance on June 4, 2007, and subsequently filed a Motion to Dismiss in the Probate Court on June 13, 2007. *Docket Entry Nos. 58, 66.* That Motion was denied. *J.E.* p. 3.

On August 15, 2007, the Probate Court issued its Judgment Entry in this case and ordered that APSI continue as the guardian of the person of John Spangler. The Court stated that the Board is a fiduciary and thereby had standing in this case as a "next friend and real party of interest." See, *J.E.* p. 3. On September 24, 2007 Appellant John Spangler, through counsel Ohio Legal Rights Service, filed a Notice of Appeal.

II. STATEMENT OF FACTS

John Spangler is a twenty year old young man who has been diagnosed with autism, mitochondrial disease, and mild mental retardation. *J.E.* p. 1. He resided with his parents until he turned eighteen years old. *J.E.* p. 3. John's mother, Gabriele Spangler, was then appointed as John's emergency guardian of the person on June 15, 2006. *Id.* The emergency guardianship was extended by Judgment Entry filed on June 19, 2006. *Id.* Permanent guardianship of the person was established by Judgment Entry filed on July 18, 2006 appointing both Joseph and Gabriele Spangler, John's parents, as guardians for his person. *Id.*

On October 25, 2006 the Probate Court granted an emergency ex parte motion by the Appellee Board to remove Gabriele Spangler and Joseph Spangler as guardians of their son John Spangler and appoint APSI as temporary guardian pending further hearing. *J.E.* p. 1. On January 24, 2007 Gabriele and Joseph Spangler filed an emergency motion for the removal of APSI as guardian of John Spangler. *J.E.* p. 2. By Judgment Entry filed on February 7, 2007 the Court

converted the pretrial scheduled for April 24, 2007 to a full hearing to decide whether to permit Joseph Spangler to continue to be guardian or appoint APSI as permanent guardian for John Spangler. *Id.* By Judgment Entry on August 15, 2007 the Probate Court removed Joseph and Gabriele Spangler and appointed APSI as guardian of the person of John Spangler. *Id.*

III. ARGUMENT

The Probate Court Improperly Denied Appellant John Spangler's Motion to Dismiss Appellee Geauga County Board of MR/DD Because the Board Lacked Standing under the Ohio Revised Code to Seek the Removal of Appellant's Guardians.

1. R.C. 5126.33 is the Exclusive Legal Remedy Which Permits the Board to Intervene in a Guardianship Case and Provide Necessary and Needed Board Services to Appellate John Spangler.

It is well established and well settled law in Ohio that a probate court is a court of limited jurisdiction. *Corron v. Corron*, 40 Ohio St.3d 75, 77, 531 N.E.2d 708 (1988). In a statutory proceeding such as a guardianship a probate court is limited to the language of the statute in determining its conduct in the matter before it. *Id.* There is no provision in R.C. Chapters 2109, governing fiduciaries, or R.C. Chapter 2111, governing guardianships, that grants standing to a service provider and program operator like the Board to intervene in a guardianship case to remove a guardian in order to arrange for support services.

The statutory scheme of R.C. Chapter 5126, governing County Boards of MR/DD, makes it clear that the Board is a service provider and an operator of programs for persons with mental retardation and developmental disabilities, and as such, its sole remedy should have been limited to filing a complaint under R.C. 5126.33 in order to arrange for and provide support and/or protective services it believed Appellant needed.

The powers and duties of the Board are specified in R.C. 5126.05, which provides, in

relevant part, that:

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,.... the county board of mental retardation and developmental disabilities shall:

- (1) Administer and operate facilities, programs, and services as provided by this chapter and Chapter 3323. of the Revised Code and establish policies for their administration and operation
- (2) Coordinate, monitor, and evaluate existing services and facilities available to individuals with mental retardation and developmental disabilities;
- (3) Provide early childhood services, supportive home services, and adult services, according to the plan and priorities developed under section 5126.04 of the Revised Code...
- (4) Adopt a budget, authorize expenditures...
- (5) Submit annual reports of its work and expenditures,
- (6) Authorize all positions of employment, establish compensation, including but not limited to salary schedules and fringe benefits for all board employees...
- (7) Provide service and support administration in accordance with section 5126.15 of the Revised Code; and
- (8) 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.

The forgoing statutory provisions grant no power to, and provide no authority for the Board to seek the removal of a guardian. On the other hand, the statute demonstrates that the Board's role in this case should be an operator of programs and a provider of services to persons with mental retardation and developmental disabilities.

The statutory authority given to the Board that limits its authority to intervene in a case is

R.C. 5126.33. This provision of law sets forth a process by which the Board may file a complaint with the probate in order to obtain protective services for a person who is otherwise eligible for services from the Board. It provides a mechanism for a probate court to address the issues raised in a complaint. R. C. 5126.33, in relevant part, states:

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 under section 5126.041 [5126.04.1] of the Revised Code and the board has been unable to secure consent. The complaint shall include:

- (1) The name, age, and address of the adult;
- (2) Facts describing the nature of the abuse, neglect, or exploitation and supporting the board's belief that services are needed;
- (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;
- (4) Facts showing the board's attempts to obtain the consent of the adult or the adult's guardian to the services....

Of note in this statutory provision is that the Board may still file a complaint and be heard in probate court even though a guardian has been appointed for the adult. Had the statutory procedures of Chapter 5126 been followed by the Board, the parties may not have ended up in court at all.

R.C. 5126.31 provides a statutory process for the Board to receive and investigate reports of abuse or neglect and also delineates the services that the Board may arrange and provide for through a court order. Although the allegations by the Board against the Appellants Joseph and Gabriele Spangler are characterized as breaches of their fiduciary duties, they are nothing more

that allegations of neglect which are properly addressed under R.C. 5126.31.¹ This provision of law demonstrates that not only is the conduct of the guardians addressable by R.C. 5126.31, but that R.C. 5126.31 should have been invoked.

The services that the Board can arrange for and provide under R.C. 5126.31 are as follows:

The board shall arrange for the provision of services for the prevention, correction or discontinuance of abuse or neglect or of a condition resulting from abuse or neglect for any adult who has been determined to need the services and consents to receive them. These services may include, but are not limited to, service and support administration, fiscal management, medical, mental health, home health care, homemaker, legal, and residential services and the provision of temporary accommodations and necessities such as food and clothing.

Additional statutory authority to provide necessary services to Appellant is demonstrated by the language of R. C. 5126.31(C), which provides that in arranging for services identified above the Board shall develop an individualized service plan identifying the types of services required. See, R.C. 5126.31(C). Once the services have been identified, the consent of the guardian is no longer needed in order for the Board to provide those services under R.C. 5126.31(C)(2). *“An adult who has been found incompetent under Chapter 2111. of the Revised Code may consent to services.”* *Id.* (Emphasis added). If unable to obtain consent, the Board may seek, if the adult is incapacitated, a court order pursuant to section 5126.33 of the Revised Code which authorizes the board to arrange these services. R.C. 5126.31(C)(2). In addition to the significance of this provision of law that allows an adult to consent to services even though he or she may have a guardian, there is no provision for allowing the guardian to override the adult’s consent. Thus, any of the services enumerated in R.C. 5126.31 could have been provided with Appellant John

¹ Neglect means, when there is a duty to do so, failing to provide an individual with any treatment, care, goods, or services that are necessary to maintain the health and safety of the individual. R.C. 5123.50(D).

Spangler's consent and could have dealt with housing issues, temporary accommodations, and any services deemed necessary by the Board.

In combination, these statutory provisions provide an effective and comprehensive legislative design by which an adult can receive needed services from a Board of Mental Retardation and Developmental Disabilities, and in which a guardian has very limited ability to interfere in the provision of services. Conversely, the statutory scheme provides the Board with a mechanism to file a complaint with the probate court where no consent can be obtained and identified services are necessary.

For all of the forgoing reasons, this Court should reverse the Probate Court's denial of Appellant's Motion to Dismiss.

2. The Probate Court Erred in Holding That the Board Has Standing Through Fiduciary Obligations Owed to John Spangler.

The court below held that Section 5126.15(B) of the Revised Code imposes obligations on the Board owed to John Spangler that are fiduciary in nature, and as such the Board has standing to file for guardian removal. *J.E.* p. 3. The Court's determination on this matter is contrary to the statutory definition of a "fiduciary", Ohio case law, and the provisions of R.C. 5126.15(B).

Section 2109.01 of the Revised Code defines a "fiduciary" under Chapters 2101 to 2131 of the Revised Code in relevant part as:

Any person, other than an assignee or trustee for an insolvent debtor or guardian under Sections 5905.01 to 5905.19 of the Revised Code, appointed by and accountable to the probate court and acting in a fiduciary capacity for any person, or charged with duties in relation to any property, interest, trust, or estate for the benefit of another; and includes an agency under contract with the department of mental retardation and developmental disabilities for the provision of protective service under sections 5123.55 to 5123.59 of the Revised Code, appointed by and accountable to the probate court as guardian or trustee with respect to mentally retarded or developmentally disabled persons.

As a matter of statutory construction, the above statute should be read to require that the Board be “appointed by and accountable to” the probate court. The phrase “ appointed by and accountable to” should be read to modify the third clause “or charged with duties.” When read in this manner, the Board cannot be determined to have a fiduciary obligation to John Spangler.

Case law also illustrates that a fiduciary relationship does not exist between the Board and John Spangler. "No fiduciary duty is owed absent the showing of a fiduciary relationship, out of which the duties arise." *Eller Media Co. v. DGH, Ltd.*, 2004 Ohio 4748, P53, 2004 Ohio App. LEXIS 4298 (Ohio Ct. App. 2004).

A fiduciary relationship is defined as one in which special confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence acquired by virtue of this special trust. This type of relationship can be created either by a formal agreement or may arise de facto from an informal relationship if both parties understand that a special trust or confidence has been reposed. It cannot, therefore, be unilateral.

Id. at P54. The Probate Court below unilaterally implied a de facto fiduciary relationship between the Board and John Spangler due to the Board's responsibilities under R.C. 5126.05 and 5126.15(B). However the receipt of services from the Board is insufficient to establish that such a relationship had been created between the Board and John Spangler. A working relationship alone, such as an arm's length business relationship, is not enough to create a fiduciary relationship. See, *Hoyt v. Nationwide Mut. Ins. Co.*, 2005 Ohio 6367, P31 (Ohio Ct. App. 2005).

While R.C. 5126.05 delineates the powers and duties of the Board, its duties are stated in general terms of providing services to a general class of individuals. For example, the two duties listed in R.C. 5126.05(1) and (2) and applicable to this case, are to administer and operate facilities, programs, and services and establish policies for their administration and operation; and to coordinate, monitor, and evaluate existing services and facilities available to individuals with mental

retardation and developmental disabilities. The duties enumerated in these sections are not specific to Appellant, and do not specify a particular service. Accordingly, the general duties of a service provider and program operator, such as the Board, are insufficient to establish a fiduciary duty or relationship with John Spangler.

3. The Probate Court Erred in Holding that the Board Has Standing to File a Petition for the Removal of the Guardian as a "Next Friend and Real Party of Interest."

The Court below concluded that the Board has standing as a "next friend and real party of interest" to file a petition for the removal of a guardian. *J.E.* p. 3. The Court found that the Board has an obligation to bring to the Court's attention situations in which it perceives that a guardian is not acting in the ward's best interest. *Id.* However, the Court relied on a case that was not decided on the merits² and based standing on terms referenced in the applicable statutes. For the reasons that follow, the Board cannot be considered "next friend" or "real party in interest".

R.C. Chapters 2109 and 2111 do not make reference to any person or party appearing before the court for any purpose as a "next friend" or "real party of interest". That the probate court is a court of limited jurisdiction is well established. *Corron* at 77. The conduct of the probate court is limited to the language of the applicable statutes which includes ensuring that parties and persons who come before it also meet the statutory requirements and limitations. The ruling that the Board is before the court as "next friend and real party in interest" ensures that there are no such requirements and limitations. The lack of standing by the Board is accentuated by the absence of any statutory language empowering the Board with standing to remove a guardian. The Board too, has statutorily defined duties and limited authority. See, R.C. 5126.05 and 5126.15. These statutes

² The Probate Court relied on *In Re Guardianship of Ricardi*, 2006-Ohio-6617 (Ohio Ct. App. 2006), in which the Sixth District Court of Appeals did not reach the merits in making its decision because the Appellant did not timely file objections.

define and delineate the Board's statutory powers and duties.

The statutory limitations of an entity similar to the Board is illustrated by *State, ex rel. Dallman v. Court of Common Pleas*, 35 Ohio St. 2d 176, 179 (1973). In this case, the Ohio Supreme Court reviewed a similar situation in which a prison superintendent initiated a proceeding and asserted standing to question a trial court's order. The Court held that the superintendent "has no authority or duties other than those conferred by statute, and we find no statute authorizing him to question the jurisdiction of appellee in this instance." *Id.* These same principles apply in the case and the same limitations will be found. R.C. 5126.05 and 5126.15 demonstrate that the legislature granted the Board authority to provide services and operate programs, but it is clear that these statutes do not provide the Board with the authority to seek the removal of a guardian.

The Board in this case was impermissibly permitted to stretch its authority beyond the limitations of its statutory authority. Thus, it is imperative that the Board's authority be confined to the duties defined by the legislature in enacting the applicable statutes.

The United States Supreme Court has referred to "next friend standing" and "real parties in interest" with regard to habeas corpus petitions. *Whitmore v. Arkansas*, 495 U.S. 149, 163-5 (1990); See, also *Novak v. Gansheimer*, 2003 Ohio 2839 (Ohio Ct. App. 2003). In this context, "next friend" standing cannot be granted automatically, and the burden is on the "next friend" to clearly establish the propriety of his status and thereby justify the jurisdiction of the court. *Whitmore* at 164. The "next friend" must provide an explanation, such as mental incompetence, why the real party in interest cannot appear on his own behalf to prosecute the action. *Id.* at 163. The "next friend" must also be truly dedicated to the best interests of the person on whose behalf he seeks to litigate, and have a significant relationship with the real party in interest. *Id.* at 163-4. The "next friend" does not

himself become a party to the action in which he participates, but simply pursues the cause on behalf of the detained person, who remains the real party in interest. *Id.* at 163.

A party lacks standing to invoke the jurisdiction of the court unless he has, in an individual or representative capacity, some real interest in the subject matter of the action. *Dallman* at 179. A real party in interest is the person who, by substantive law, possesses the right to be enforced. *Brown v. Wright*, 2006 Ohio 38, P11 (Ohio Ct. App. 2006).

In this case, the Probate Court found that the Board was a next friend and a real party of interest. *J.E.* p. 3. However, these terms are mutually exclusive first, because a next friend, by its very definition, is only a nominal party to the proceeding and second, because the “real party in interest” would be John Spangler. *Whitmore* at 163. Despite some confusion with nomenclature, the Board fits neither the description of a next friend nor a real party of interest.

The Board cannot be a "real party of interest" because it does not possess any rights to be enforced. As *Whitmore* and its progeny hold, a next friend acts on behalf of another and it is that person who is the real party in interest. See *Whitmore* at 163. In this case, if there are any rights to be enforced, they belong to John Spangler. The Board is merely the governmental agency that provides services to John Spangler.

Though John Spangler has been found incompetent, he has representation for his interests from the undersigned attorneys. Additionally, his request that his father remain as his guardian and that he wanted his father to make legal decisions for him were made known to the court. See, Transcript of Proceedings, June 13, 2007, p. 181. Furthermore, even if the Board was granted next friend status, it would still not be a proper party to the proceeding. *Id.* Thus current guardianship case law should not be expanded to borrow next friend standing from the habeas context where the

entity involved is not entitled to standing by any other means.

4. **Ohio Statutory Law Does Not Confer Standing on the Board to Seek the Removal of the Guardians.**

The inquiry in determining whether the Board has standing to seek removal of Appellant's parents as his guardians is controlled and circumscribed by Chapters 2109 and 2111 of the Ohio Revised Code. In this regard, the General Assembly has had no difficulty articulating who should and should not be permitted to proceed in certain matters before the Court. For purposes of standing, a person or a party may have standing in a guardianship case as an "interested party" or "next of kin" to the ward. The Board is clearly not "next of kin" to John Spangler because that term refers to familial relationships for purposes of R.C. Chapter 2111. See R.C. 2111.01(E). Additionally, for purposes of R.C. Chapter 2111, "next of kin" is given a very limited role in guardianship proceedings. In fact, the only reference to "next of kin" is in the notice requirement of R.C. 2111.04.

An "interested party", like "next of kin" has a statutorily limited role in guardianship proceedings, and because of these limitations, the Board lacks the statutory standing to seek or apply for the removal of a guardian. An "interested party" (or "interested person" under R.C. Chapter 2109), is a term of art with a very limited statutory role. An interested party can object to medical treatment under R.C. 2111.13, make a written application for evaluation of the continued need for guardianship under R.C.2111.29(C), seek an accounting under R.C. 2109.33, and seek guardianship appointment under R.C. 2111.02. Although an interested party may have standing in some instances, there is no statutory provision in which an interested party can move for the removal of a fiduciary such as a guardian. See, R.C. 2109.24.

In this case, even if the Board could have been properly granted interested party status; there still would have been no basis for it to seek the removal of the guardian because an

interested party does not have standing to seek the removal of a guardian under R.C. Chapter 2111. Therefore, for all of the forgoing reasons, this Court should hold that the Probate Court erred in denying Appellant John Spangler's Motion to Dismiss.

IV. CONCLUSION

For the reasons stated herein, the Court should hold, as a matter of law, that the Board's exclusive legal remedy in this case was to file a complaint with the probate court pursuant to R.C. 5126.33. For the additional reasons stated herein, this Court should reverse the Probate Court's determination that the Board had standing as next friend and real party of interest to seek the removal of John Spangler's guardians; and should find that the Probate Court improperly denied Appellant's Motion to Dismiss the Board.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the above styled Appellate Brief was served upon David Joyce and Susan Wieland, Prosecuting Attorneys, Courthouse Annex, 231 Main Street, Suite 3A, Chardon, Ohio 44024, Counsel for the Geauga County Board of MRDD; Pamela Walker Makowski, Price Lawfirm, 555 City Park Avenue, Columbus, Ohio 43206, Counsel for Joseph and Gabrielle Spangler; and Shane Egan, Counsel for Advocacy and Protective Services Inc., 4110 N. High Street, Columbus, Ohio 43214, and by First Class U.S. Mail this ____ day of February, 2008.

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