ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio ex rel. James L. McQueen, Appellant,	:	Case No. 12-0923 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 the judicial system's duty to honor the same statutory due process right to counsel of an indigent, adult ward under guardianship, who has alleged competency and requested a review hearing under R.C. 2111.49(C) to challenge the continued necessity of his guardianship, as he had during his initial hearing under R.C. 2111.02. In fact, R.C. 2111.49(C) mandates that his review "hearing shall be held in accordance with section 2111.02." Both the Probate Court and Court of Appeals equivocated in honoring this right.

In crafting this statutory scheme of equivalent due process protection for indigent, adult wards during initial and subsequent review hearings, the General Assembly intended to provide for the right to counsel in both. R.C. 2111.02(C)(7)(d)(i). This is the only sound reading of these provisions. This mandate protects the right of an otherwise vulnerable citizen, who has had his right to make decisions removed by judicial power, to fully challenge that decision in a future judicial review. It is the duty of this Court to ensure that Ohio's most vulnerable citizens be given a fair opportunity to make that case, as required by the statutes. To do so, this Court should uphold the statutory due process right to counsel in a review hearing under R.C. 2111.49(C) so that it is "held in accordance with section 2111.02."

FACTUAL BACKGROUND

This case arises in mandamus from Appellant James L. McQueen's right to appointed counsel to assist him in challenging the continued necessity of his guardianship. Mr. McQueen is an indigent ward subject to guardianship through Appellee, Court of Common Pleas of Cuyahoga County, Probate Division (Probate Court). Appendix p. 34. Mr. McQueen's guardian is not a friend or family member, but rather an employee of Adult Guardianship Services (AGS), a nonprofit organization that is the sole paid provider of guardianship services in Cuyahoga County. Relator's Response in Opposition to Respondent's Motion for Summary Judgment and

Reply in Support of Relator's Motion for Summary Judgment, Ex. A, p. 1, 6; Ex. B-1, B-2, B-3. Under his guardian's authority, Mr. McQueen is currently locked in a secured nursing facility against his will. Complaint for Writ of Mandamus, Ex. 1.

On September 30, 2011, the Probate Court received a letter from Mr. McQueen requesting a guardianship review hearing, an independent expert evaluation and appointment of counsel for the hearing, pursuant to R.C. 2111.49. Appendix p. 36. More than one-hundred and twenty days had passed since the initial guardianship hearing, and no request for a review hearing had been submitted in the interim. A guardianship review hearing was scheduled in the Probate Court for December 5, 2011. Appendix p. 37. Mr. McQueen was not appointed counsel for the December 5, 2011 guardianship review hearing and it was unclear whether arrangements would be made for him to even attend the hearing. *Id.* Prior to the December 5, 2011 hearing, Mr. McQueen contacted the Probate Court through his nursing home staff to request that he either be transported to the hearing or that the hearing be held at the facility. *Id.* In response, the Probate Court issued a Journal Entry on December 2, 2011 which continued the guardianship review hearing and ordered the guardian to arrange for an updated Statement of Expert Evaluation to be submitted by his guardian prior to the rescheduled hearing. Appendix p. 37. On December 5, 2011, the Probate Court scheduled a hearing to take place on January 30, 2012 for Mr. McQueen's Motion to Review. Again, no counsel had been appointed for the hearing. Appendix p. 49.

On December 20, 2011, Mr. McQueen filed a Motion for Appointment of Counsel, Independent Expert Evaluation and/or Continuance, and Instructions to the Guardian to ensure he was present at the hearing. Appendix p. 38. On December 27, 2011, the Probate Court issued a Judgment Entry which denied Mr. McQueen's request for continuance and held that "all other

matters raised by [Mr. McQueen] will be addressed at the Review Hearing." Appendix p. 49. The "other matters" to be addressed at the review hearing included Mr. McQueen's request for appointment of counsel and his request that his guardian be instructed to ensure he was in attendance at his review hearing. *Id.*

On January 13, 2012, Mr. McQueen filed a Complaint for Writ of Mandamus in the Court of Appeals of Ohio, Eighth District (Court of Appeals), to compel the Probate Court to appoint counsel for him pursuant to R.C. 2111.49(C) and 2111.02(C)(7) before the guardianship review hearing, which was set for January 30, 2012. Complaint for Writ of Mandamus. On January 20, 2012, the Court of Appeals granted an alternative writ and stayed the probate proceedings pending the mandamus resolution. Appendix p. 17.

On April 24, 2012, the Court of Appeals denied the writ of mandamus and granted summary judgment to the Probate Court on the grounds that Mr. McQueen had not shown a clear legal right and clear legal duty sufficient to enforce the statutes through mandamus. Appendix pp. 18, 19, 20, 21-30. Mr. McQueen filed his notice of appeal as of right with the Supreme Court of Ohio on May 29, 2012 (Appendix p. 1), and the Probate Court stayed the guardianship proceedings pending a decision on the mandamus. Appendix p. 51. The appeal before this Court was brought solely to assert Mr. McQueen's statutory right to appointed counsel, when requested, to challenge the continued necessity of his guardianship.

PROPOSITION OF LAW

An indigent ward who alleges competency under R.C. 2111.49(C) is entitled to appointed counsel for that review hearing pursuant to R.C. 2111.02 and R.C. 2111.49(C).

Mandamus must lie in this case because Mr. McQueen has a clear statutory right to a guardianship review hearing and appointed counsel, and the Probate Court has a clear legal duty to hold the hearing and appoint counsel under R.C. 2111.49(C). The Court of Appeals had a

duty to interpret the interplay between R.C. 2111.02 and R.C. 2111.49(C) and erred when it failed to do so; and, on that basis, denied the requested writ. The language of R.C. 2111.49(C) creates an equivalency between the statutory due process rights afforded in an initial guardianship hearing conducted under R.C. 2111.02 and a review hearing conducted under R.C. 2111.49(C) where an indigent ward alleges competency.

Sound statutory construction supports Mr. McQueen's right to counsel for his requested review hearing. Contrary to the Court of Appeals' finding, this reading is not hampered by the fact that both code sections recite a burden of proof, or that R.C. 2111.02(C)(7) specifies that it applies in initial appointment hearings because such a reading would render nugatory the requirement in R.C. 2111.49(C) that a review hearing "shall be held in accordance with section 2111.02." The specification of the burden of proof in both provisions is necessary as it clarifies upon whom lies the burden of proof, i.e. the guardian. In addition, the focus on "appointments" in R.C. 2111.02(C) is misplaced since such language is necessary to differentiate it from situations involving minors who have no equivalent statutory due process rights. Any "doubt" raised by the Probate Court must be resolved in Mr. McQueen's favor to effectuate the legislative intent of the General Assembly.

Finally, Mr. McQueen has no remedy in the ordinary course of law because the Probate Court's failure to rule on his request for appointed counsel would deny him the benefit of appointed counsel to prepare for and represent him at the hearing.

A. IT IS THE DUTY OF THE REVIEWING COURT TO DETERMINE THE MEANING OF THE STATUTES RAISED IN A MANDAMUS ACTION.

It is well established that mandamus must lie only if the relator shows that: (1) relator has a clear legal right to the relief requested; (2) respondent is under a clear legal duty to perform the requested act; and (3) relator has no plain and adequate remedy in the ordinary course of law.

State, ex rel. Middletown Bd. of Edn., v.. Butler Cty. Budget Comm., 31 Ohio St.3d 251, 253, 510 N.E.2d 383, 384 (1987), *citing State, ex rel. Westchester, v. Bacon*, 61 Ohio St.2d 42, 399 N.E.2d 81 (1980), paragraph one of the syllabus. On appeal as a matter of right from a judgment denying or granting a writ of mandamus originally filed in a court of appeals, the Supreme Court reviews the case de novo, as if the action had been originally filed with the Court. *State ex rel. Myers v. Chiaramonte*, 46 Ohio St.2d 230, 348 N.E.2d 323 (1976); *State ex rel. Pressley v. Indus. Commn.*, 11 Ohio St.2d 141, 164, 228 N.E.2d 631 (1967).

It is also well established that a writ of mandamus should not be denied due to an alleged lack of clarity of the applicable provisions. Rather, it is the duty of the reviewing court to decide what the law means. *State ex rel. Fattlar v. Boyle*, 83 Ohio St.3d 123, 125, 698 N.E.2d 987 (1998) (finding that the court of appeals erred in denying the writ of mandamus based on the purported lack of clarity of the applicable charter provisions). In *Fattlar*, this Court reviewed a court of appeals decision which held that the relator failed to establish the prerequisites for mandamus because the pertinent provisions were unclear and susceptible of differing interpretations. *Id.* This Court went on to state that "courts in mandamus actions have a duty to construe constitutions, charters, and statutes, if necessary, and thereafter evaluate whether the Appellant has established the required clear legal right and clear legal duty." *Id.* Moreover, even where, as in *Fattlar*, the court of appeals felt the provisions were ambiguous, "[i]t is the court's duty to resolve all doubts concerning the legal interpretation of these provisions." *Id.* When a court of appeals declines to do so in the context of mandamus, it "fail[s] in its duty to resolve doubts concerning the legal interpretation" of provisions before it. *Id.* In other words, a court of appeals should not avoid ruling on a statutory interpretation question in mandamus

under the guise of a lack of a clear legal right or duty. Unfortunately, this is exactly what happened here.

In this case, the Court of Appeals concluded that Mr. McQueen's petition for a writ of mandamus should be denied for want of a clear legal right and duty because there was no case law on the subject and the language of the two statutes in question was subject to interpretation. The Court of Appeals explained that:

> the lack of controlling authority, the reiteration of the burden of proof in both statutes, and the limiting language in subsection 7 of "if the hearing concerns the appointment of the guardian" and 'the alleged incompetent' create doubt as to whether the General Assembly intended subsection 7 to be incorporated into the hearing on the necessity of continuing a guardianship. Court of Appeals Decision, ¶ 12.

However, this Court has previously explained that professed doubt as to the existence of a duty does not require or justify the denial of the writ. *State ex rel. Melvin v. Sweeney*, 154 Ohio St. 223, 226, 94 N.E.2d 785 (1950). It is, in fact, "the court's duty to solve all such doubts, and to declare the duty as it finds it to be, after its misgivings as to the intent and meaning of the statute involved, or as to any other question of law, have been eliminated." *Id.*; *see also, 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.) Thus, while the absence of necessary facts or conditions in a case may dictate the refusal of a writ, the mere difficulty of statutory

interpretation should not. *Id.* Consequently, a court has a duty to resolve any statutory doubt and to issue a final decision.

Mr. McQueen asks this Court to do that here. As in *Fattlar*, it has been the practice of this Court to decide appeals as of right in actions originally brought in mandamus in the courts of appeals on the merits, rather than returning it to the Court of Appeals for further action. *State ex rel. Fattlar v. Boyle*, 83 Ohio St.3d 123, 698 N.E.2d 987 (1998), *State ex rel. Taraloca Land Co. v. Fawley*, 70 Ohio St.3d 441, 639 N.E.2d 98 (1994) (reversing the judgment of the court of appeals and allowing a writ of mandamus directing an auditor to transfer a certain parcel of land); *State ex rel. Colangelo v. McFaul*, 62 Ohio St.2d 200, 201, 404 N.E.2d (1980) (finding that the court of appeals had erred when it held that there was no clear legal duty to pay past compensation); *State ex rel. Schwarz v. Hamilton County Board of Elections*, 173 Ohio St. 321, 323-324, 181 N.E.2d 888 (1962) (reversing the judgment of the court of appeals and ordering Appellee to comply). It is particularly imperative that the Court do so here. While Mr. McQueen's review hearing has been stayed, he has been waiting in a secured nursing facility for this hearing, and for counsel to be appointed beforehand in order to adequately prepare, since December of 2011.

B. MR. MCQUEEN HAS A CLEAR LEGAL RIGHT AND THE PROBATE COURT HAS A CLEAR LEGAL DUTY TO APPOINT COUNSEL FOR HIS REVIEW HEARING.

This case is, at its core, a simple assertion of Mr. McQueen's statutory right to counsel. In a guardianship review hearing conducted under R.C. 2111.49(C), a ward is essentially alleging that the circumstances under which guardianship appointment was originally justified have changed such that guardianship is no longer warranted. One would be hard-pressed to find a circumstance where a right to counsel was more appropriate and necessary than guardianship, where a ward's personal liberty has already been curtailed by court order. This is even more true

in the case of Mr. McQueen, who is locked in a secured nursing facility on that authority of his guardian. This is precisely why the legislature created heightened statutory due process rights for wards to challenge the continued necessity of guardianship.

R.C. 2111.02 and R.C. 2111.49(C) must be interpreted in favor of appointed counsel in order to effectuate their dictates and give R.C. 2111.49(C) a reasonable and effective intended result. When these provisions are read together, the Court should conclude that when appropriately requested, an indigent adult ward has a clear legal right to appointed counsel for a guardianship review hearing, and a probate court has a clear legal duty to appoint counsel for that hearing.

1. The "in accordance with" language creates a mandate to afford equivalent due process rights in R.C. 2111.49(C) guardianship review hearings as required in R.C. 2111.02 initial appointment hearings.

The statutory language of R.C. 2111.49(C) and 2111.02(C)(7), when read *in pari materia* to give full effect to both, provides for a right to appointment of counsel in guardianship review hearings when requested by a ward who alleges competency. *See, State ex rel Asberry v. Payne*, 82 Ohio St.3d 44, 45, 693 N.E.2d 794 (1998) (reading R.C. 2152.352 and 120.06(A) *in pari materia* to give full force and effect to both provisions and to reject limitation on the right to counsel in juvenile custody proceedings).

R.C. 2111.49(C) states, in pertinent part:

> 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. (Emphasis added.)

Therefore, Mr. McQueen's review hearing must be conducted "in accordance with" the provisions of R.C. 2111.02. R.C. 2111.02 states, in pertinent part:

> (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 and an independent expert evaluator appointed at court expense[.] (Emphasis added.)

The express language of R.C. 2111.49(C) establishes an equivalency between the original appointment hearing afforded under R.C. 2111.02 and the review hearing afforded under R.C. 2111.49(C) for an adult incompetent. Indeed, it is telling that the General Assembly used the same phrase "in accordance with" to refer to due process rights in R.C. 2111.02 as it did in R.C. 2111.49(C) when directing how a court must conduct a review hearing when requested by a ward alleging competency. Further, the General Assembly used the word "shall" to describe how that

hearing must be held. The use of the word "shall" is generally construed to be mandatory. *In re Davis*, 84 Ohio St.3d 520, 522, 705 N.E.2d 1219 (1999) citing *Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St.3d 102, 271 N.E.2d 834 (1971); *State ex rel. Asti v. Ohio Dept. of Youth Serv.*, 107 Ohio St.3d 262, 2005-Ohio-6432, 838 N.E.2d 658. Thus, there necessarily exists an equivalency between the statutory due process rights afforded at those hearings to the alleged incompetent under R.C. 2111.02, and to the ward who has alleged competency and is seeking review under R.C. 2111.49(C).

If the court has a clear legal duty to appoint counsel upon request of an indigent adult ward at an original hearing conducted pursuant to R.C. 2111.02, then the same court has an equivalent duty to appoint counsel upon request of the same ward at a review hearing conducted pursuant to R.C. 2111.49(C) where the ward alleges competency. If not, then the review hearing has not been held "in accordance with" the provisions of R.C. 2111.02 and the equivalency of the statutory due process protection has been lost.

2. The recitation of the burden of proof in R.C. 2111.49(C) is necessary in light of the fact that R.C. 2111.02(C) does not state which party bears the burden of proof.

One of the reasons the Court of Appeals found doubt regarding Mr. McQueen's right to counsel is that both of the relevant statutes state a burden of proof. R.C. 2111.49(C) sets forth a burden of proof "upon the applicant for guardianship or the guardian" to prove by clear and convincing evidence that the guardianship continues to be necessary, while R.C. 2111.02(C)(3) also contains a burden of proof to prove the need for guardianship by the same clear and convincing evidentiary standard. The Court of Appeals was concerned that if the General Assembly had meant to incorporate all of the safeguards and rights of R.C. 2111.02(C)(7) into the review hearing under R.C. 2111.49(C), there would appear to be no need to repeat this burden of proof in R.C. 2111.49(C). However, the reiteration of the burden of proof in both

statutes is not a fatal flaw; rather, it is a necessary addition to clarify who bears this burden of proof in a review hearing.

Nowhere in R.C. 2111.02 does it state *who* bears the initial burden of proof in an initial guardianship appointment hearing. In fact, R.C. 2111.02(C)(3) only states that "[i]f 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." However, the burden of proving incompetency would normally be on the prospective guardian, given that the guardian is the movant in the proceeding. *See*, 42 Ohio Jurisprudence 3d, Evidence and Witnesses, Sec. 87 (2012) ("As 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.").

By contrast, for R.C. 2111.49(C) review hearings, where the ward is the movant and alleges competency, the General Assembly explicitly placed the burden of proof upon the guardian, rather than the movant (or ward). R.C. 2111.49(C) specifies that "the burden of proving incompetence *shall be upon the applicant for guardianship or the guardian*, by clear and convincing evidence." (Emphasis added.) The requirement of R.C. 2111.49(C) that the burden of proof be on the applicant for the guardianship or the guardian is a necessary addition because R.C. 2111.02(C)(3) does not establish which party bears the burden of proof, and without clarifying language for R.C. 2111.49(C) review hearings, at best it would be unclear who must prove competency or incompetency by clear and convincing evidence, or at worst, the movant ward would bear this burden. Thus, R.C. 2111.49(C) is not duplicative of R.C. 2111.02(C), but rather is a necessary component of the statutory scheme.

Further, by placing a clear and convincing evidence standard on the guardian in R.C. 2111.49(C) hearings where a ward alleges competence, the statute indicates that the hearing must be held in a manner that is essentially consistent with an initial guardianship appointment hearing under R.C. 2111.02. Just like in an initial guardianship appointment hearing, the guardian in a R.C. 2111.49(C) review hearing must prove by clear and convincing evidence that guardianship is still necessary. If the guardian disagrees with the ward's R.C. 2111.49(C) challenge, the guardian has a duty to contest by bringing evidence into the record to meet the burden of proof. *See, Brown v. Haffey*, 96 Ohio App.3d 724, 645 N.E.2d 1295 (8th Dist. 1994), The probate court essentially sets the reset button and holds a hearing that is conducted in a manner that is consistent with an initial appointment hearing. It logically follows that the ward has the same rights as were afforded in the initial appointment.

3. All of the due process rights afforded to an adult ward during an R.C. 2111.02 initial hearing, specifically the right to appointment of counsel, must be afforded an indigent ward who alleges competency and who requests counsel, for R.C. 2111.49(C) to have its full effect.

The Court of Appeals found further unnecessary doubt in the language of R.C. 2111.02(C)(7) which states that "[i]f the hearing concerns the appointment of a guardian * * * for an alleged incompetent, the alleged incompetent has all of the following rights," and then lists, among other things, the right to appointed counsel. The Court of Appeals reasoned that this language could be read to limit the scope of the rights and safeguards under R.C. 2111.02(C)(7) to the initial guardianship appointment hearing, thus excluding those rights from the scope of subsequent guardianship review hearings. However, this reading puts the focus of R.C. 2111.02(C) on the wrong portion of that sentence.

The majority of R.C. 2111.02 (in fact, nearly every subsection of R.C. 2111.02 other than 2111.02(C)(7)) applies to both incompetents *and* minors, whereas R.C. 2111.02(C)(7) applies

only to adult incompetents. Thus, the focus in R.C. 2111.02(C)(7) should be on the use of the words "for an alleged incompetent," not the words "appointment of a guardian." In specifying that R.C. 2111.02(C)(7) due process rights attach in appointment hearings only for incompetents, the legislature intended to set a limitation on the scope of the affected parties, not on the type of proceeding. By referencing R.C. 2111.02 in R.C. 2111.49(C), the General Assembly confirmed that the same protections would be afforded an adult incompetent during a review hearing where the ward alleges competence as would be afforded during the initial hearing.

In addition, the Ohio Revised Code Rules of Construction specify 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). In other words, all statutory language must have a reasonable and effective intended result. R.C. 2111.49(C) must invoke the due process rights under R.C. 2111.02(C)(7) in order for R.C. 2111.49(C) to have its full effect.

R.C. 2111.02 and R.C. 2111.49 must be read *in pari materia* such that they should be construed together to determine their effect. *See, State ex rel. Asberry*, 82 Ohio St.3d at 47 (statutes which involve the same subject matter should be construed *in pari materia*, giving full force and effect to both). During briefing below, even the Probate Court agreed that R.C. 2111.02 and 2111.49(C) must be read *in pari materia*.

In a similar case of statutory construction, this Court interpreted three statutory provisions read together in order to find a clear statutory duty for boards of county commissioners to keep detailed meeting minutes, and thus granted a writ of mandamus. *White v. Clinton Cty. Bd. of Comm.*, 76 Ohio St.3d 416, 423-424, 667 N.E.2d 1223 (1996). The commissioners in *White* had argued that because a certain statute, R.C. 121.22, did not explicitly

mention the sort of information that should be included in the board's minutes, and because another statute, R.C. 305.10, though it required the board to "keep a full record of the proceedings," later listed particular items to include in the minutes, neither the board nor its clerk had a clear legal duty to provide more detailed minutes that included the items sought by the relator. However, this Court found that "R.C. 121.22, 149.43 and 305.10, when read together, impose a duty on all boards of county commissioners to maintain a full and accurate record of their proceedings." *White*, Syllabus 1. This Court pointed to the statutory goal of developing a "full record," and thus brushed aside the argument that the specific list of items in R.C. 305.10 was meant to limit what must be provided in the minutes. *White*, 76 Ohio St. 3d at 422-23. By analogy, R.C. 2111.02 and R.C. 2111.49(C) must be construed together in order to effectuate the purpose of providing the protections enumerated in an initial R.C. 2111.02 appointment hearing where a ward alleges incompetence and seeks a review hearing pursuant to R.C. 2111.49(C).

This Court has also rejected a court of appeals decision in a mandamus action which would have rendered a statutory provision null and void. *State ex rel. Asti v. Ohio Dept. of Youth Serv.*, 2005-Ohio-6432 at ¶ 28. In *Asti*, the court of appeals had determined that because a particular statute, R.C. 124.11(D), was silent as to the circumstances or events that would trigger statutory employment fallback rights, Mr. Asti had no clear legal right to exercise the statutory right to fallback employment. This Court, however, determined that the statute was not silent. Focusing on the mandatory nature of the word "shall" within the statute, the Court rejected the court of appeals' interpretation of the statute which would have "render[ed] nugatory the [statutory] right to reinstatement." *Id.* Just as this Court did in *Asti* with the statutory provision before it, this Court should "construe the applicable statute[s]" R.C. 2111.02 and 2111.49(C) to mandate that a review hearing *shall* be held in accordance with R.C. 2111.02 and in doing so

avoid what would otherwise render "nugatory" the language in R.C. 2111.49(C) that a review hearing "shall be held in accordance with section 2111.02." *Id.*

The Court of Appeals suggested that if R.C. 2111.49(C) was interpreted such that a ward did not have R.C. 2111.02(C)(7) rights, the provisions *might* be read such that the ward could still have other rights under R.C. 2111.02(C). Court of Appeals Decision, ¶¶ 9-10. However, it is the duty of the court "to give effect to the words used, not to delete words used or to insert words not used." *Columbus-Suburban Coach Lines, Inc. v. Pub. Util. Comm.* 20 Ohio St.2d 125, 127, 254 N.E.2d 8 (1969). The possible reading mentioned by the Court of Appeals deletes the "in accordance with" language in R.C. 2111.49(C) and eviscerates the legislative due process protections afforded a ward alleging competency while challenging the continuing necessity of guardianship. Such a reading would deny more than an indigent ward's right to appointed counsel. Specifically, it would exclude other statutory R.C. 2111.02(C)(7) rights from R.C. 2111.49(C) guardianship review hearings. These other safeguards which would be lost include the right to: a) independent counsel for a solvent ward (R.C. 2111.02(C)(7)(a)); b) the presence of a friend or family member of the ward's choice (R.C. 2111.02(C)(7)(b)); c) evidence of an independent expert evaluation ((R.C. 2111.02(C)(7)(c)); and for indigent wards, the right to have counsel and transcripts at the court's expense if the appointment is appealed (R.C. 2111.02(C)(7)(d)(ii)). A reading which fails to incorporate these protections explicitly provided for under R.C. 2111.02(C)(7) into a hearing conducted under R.C. 2111.49(C) would deny a just and reasonable result.

Further, the Court of Appeals never even accepted this possible reading; it merely hypothesized that this might be one possible reading. Court of Appeals Decision, ¶ 12. This hypothetical reading would not only deny (C)(7) rights, it could deny all other rights guaranteed

an adult in R.C. 2111.02(C) such as (C)(4) (right to have a record made) or (C)(5) and (6) (right to consideration of lesser restrictive alternative). It would eviscerate the procedural mandate of R.C. 2111.49(C). Had the legislature intended to specifically modify or limit the due process rights incorporated from R.C. 2111.02 for R.C. 2111.49(C) review hearings, it could have done so. It did not. Instead, it stated that hearings conducted under R.C. 2111.49(C) "shall be held in accordance with section 2111.02."

Incorporating the R.C. 2111.02(C)(7) right to appointed counsel into a review hearing which challenges the continued need for guardianship is also feasible of execution. There is no inherent reason that counsel cannot be appointed when an indigent ward chooses to challenge the continued necessity of his guardianship. Thus, legislative intent favors holding that the right to appointed counsel in R.C. 2111.02(C)(7) extends to review hearings when requested by indigent adult wards alleging competency.

4. A review of other sections in Chapter 2111 supports the position that R.C. 2111.49(C) review hearings invoke R.C. 2111.02 rights and protections.

Legislative intent strongly supports incorporating the due process rights afforded under R.C. 2111.02 into a review hearing conducted under R.C. 2111.49(C). Indeed, the General Assembly singled out R.C. 2111.49(C) for heightened statutory due process protections that it did not provide for in other proceedings held under Chapter 2111 of the Revised Code. It is the only instance in Chapter 2111 that requires a hearing to be conducted in accordance with R.C. 2111.02. This selective incorporation of protections enumerated in R.C. 2111.02 to R.C. 2111.49(C) demonstrates that the General Assembly intended that the procedures under R.C. 2111.02 for the initial hearing be followed during a review where the ward alleges competence.

In contrast, there are a number of code sections that require a hearing regarding a review of the guardianship, other than a review of the continuing necessity for guardianship under R.C.

2111.49(C), but which *do not* invoke R.C. 2111.02. For example, R.C. 2111.50(E) requires a hearing prior to probate court action to exercise the release of powers as a donee of a power of appointment, or to make a gift in trust over $1,000. R.C. 2111.141 also requires a probate court to hold a hearing regarding a ward's inventory. While both of these provisions require notice to the ward that the hearing will take place, neither have any specific reference to R.C. 2111.02 to set forth heightened due process protections in the context of those hearings.

If the legislature had intended to simply confer a hearing without it being held "in accordance with" heightened due process protections under R.C. 2111.02, it could have done so just as it did in these other code sections. Instead, the legislature stated its intent that a hearing challenging the necessity of the guardianship under R.C. 2111.49(C) "be held in accordance with section 2111.02" and accordingly, its due process protections. Any other interpretation renders meaningless R.C. 2111.49(C)'s reference to R.C. 2111.02.

In its discretion, a probate court may also conduct hearings on subjects other than the continued necessity of the guardianship. *See*, R.C. 2111.50 (Probate court is superior guardian of the ward). In these types of hearings, the legislature has been silent with regard to heightened due process protections. *See*, *In re Elliot*, 8th Dist. No. CA91-01-002, 1991 Ohio App. LEXIS 6048, *5-6 (Dec. 16, 1991) (Court must determine the best interest of the ward in a hearing regarding instructions to the guardian). Such hearings may challenge the action or inaction of a guardian and arise from a motion filed by the ward, the guardian, an interested party, or on the court's own motion. *See, e.g.*, R.C. 2111.13 (duties of guardian of person). In contrast to a R.C. 2111.49(C) review hearing, these proceedings may be conducted informally, without court appointed counsel. However, all of these other proceedings are distinct from a review hearing under R.C. 2111.49(C) where a ward alleges competence. For these review hearings, the

legislature specified that the hearing "shall be held in accordance with section 2111.02," incorporating its full due process protections including the right to appointment of counsel under R.C. 2111.02(C)(7).

C. MR. MCQUEEN HAS NO PLAIN AND ADEQUATE REMEDY IN THE ORDINARY COURSE OF LAW IN THIS CASE BECAUSE IMMEDIATE APPEAL IS UNAVAILABLE AND APPEAL AFTER A HEARING WITHOUT COUNSEL IS NOT ADEQUATE TO PROTECT HIS RIGHTS.

Mr. McQueen has no plain and adequate remedy in the ordinary course of law. First of all, he had no right to immediate appeal in this case. The Probate Court failed to rule on Mr. McQueen's motion for appointment of counsel, instead deferring ruling until the hearing. Appendix p. 49. Thus, Mr. McQueen had no final appealable order. Under the clear statutory framework governing appeals, R.C. 2505.02, none of the grounds for immediate appeal exist. Since Mr. McQueen was scheduled to have his request for review of his guardianship adjudicated on its merits before the Probate Court on January 30, 2012, and his request for review is still pending, he had and has no remedy other than mandamus to obtain the court-appointed representation to which he is entitled at the hearing.

This Court has recognized that in cases involving the right to counsel, mandamus is an appropriate vehicle for immediate relief, as other avenues of relief are untimely and inadequate. *See, State ex rel. Asberry*, 82 Ohio St.3d at 46-47 ("Asberry lacks an adequate remedy in the ordinary course of law to challenge Judge Payne's refusal to appoint her counsel.") *citing State ex rel. Cody v. Toner*, 8 Ohio St.3d 22, 23, 456 N.E.2d 813 (1983) ("If relator must wait for an appeal to establish his alleged right to have court appointed counsel, he will be denied the opportunity to be legally represented throughout the course of the adjudication and disposition of his case.") and *citing State ex rel. Butler v. Demis*, 66 Ohio St.2d 123, 124, 420 N.E.2d 116 (1981) ("If [the party] must wait for an appeal to establish their alleged right to have O'Farrell

appointed as their legal counsel, they will be denied the opportunity to have the attorney-client relationship of their own choosing throughout the course of the adjudication and disposition of their cases."); *See also In re Fisher*, 39 Ohio St.2d 71, 82, 313 N.E.2d 851 (1974) ("The right to be represented by counsel must be made available at the earliest stage of the proceedings commensurate with the individual's need for a timely preparation of a defense or advancement of an argument for alternative modes of treatment, preferably upon the filing of an affidavit under R.C. 5122.11 in Probate Court.").

The thrust of these cases is that requiring an unrepresented litigant to prosecute his case without counsel denies him the opportunity to be represented throughout the adjudication, and provides no guarantee that he will be able to preserve the record for appeal without prejudice to his cause. This is particularly true in the context of this case where Mr. McQueen is held against his will on authority of the opposing party and it is not even clear that he will be present at his own hearing. In fact, the Probate Court failed to even rule on Mr. McQueen's request that it order the guardian to ensure his presence at the hearing. Thus, in the context of appointment of mandated counsel, appeal after the hearing is not a plain and adequate remedy in the course of law.

In this case, as in *In re Fisher*, Mr. McQueen is entitled to appointment at some reasonable time before the hearing in order that his counsel may adequately represent him. The Probate Court had deferred ruling on the motion for appointment of counsel until the hearing, rescheduled for January 30, 2012. In the remote event counsel had been appointed, counsel would have been unprepared for the contest envisioned by R.C. 2111.02 and 2111.49(C), as well as described by the Eighth District in *Brown v. Haffey*, 96 Ohio App.3d 724, 645 N.E.2d 1295 (8th Dist. 1994) (finding that if the guardian disagrees with the ward's R.C. 2111.49(C)

challenge, the guardian has a duty to contest by bringing evidence into the record to meet the burden of proof).

In order to effectuate the mandate of R.C. 2111.49(C) and R.C. 2111.02, Mr. McQueen is entitled to appointment of counsel at some time before the hearing to allow counsel adequate time to prepare his case. Mandamus in this case is the only remedy at law available to assert those rights prior to the commencement of the hearing.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court overrule the Court of Appeals and grant the writ of mandamus and order that Appellee pay all costs.

Respectfully submitted,

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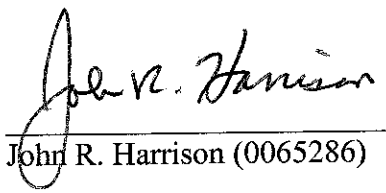
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Appellant's Merit Brief was sent by U.S. mail and facsimile on this 13th day of August, 2012, to counsel for Probate Court, Charles E. Hannan, Assistant Prosecuting Attorney, The Justice Center, Courts Tower, 8th Floor, 1200 Ontario Street, Cleveland, Ohio 44113. Fax number 216-443-7602.



John R. Harrison (0065286)

Appendix

IN THE SUPREME COURT OF OHIO

12-0923

State of Ohio ex rel. James L. McQueen,	:	
	:	**On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District**
Appellant,	:	
v.	:	**Court of Appeals Case No. CA-12-97835**
The Court of Common Pleas of Cuyahoga County, Probate Division	:	**2012-Ohio-1839**
Appellee.	:	

NOTICE OF APPEAL OF RELATOR JAMES L. MCQUEEN

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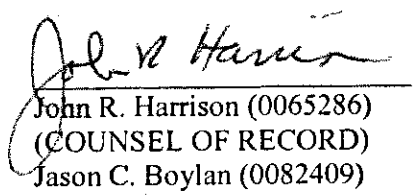
NOTICE OF APPEAL OF APPELLANT JAMES L. MCQUEEN

Appellant James L. McQueen hereby gives notice of appeal to the Supreme Court of Ohio from the Judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, entered in Court of Appeals Case No. CA-12-97835 on April 24, 2012.

This case originated in the Court of Appeals and is sought as an appeal of right pursuant to S.Ct. Prac. R. 2.1(A)(1).

Respectfully Submitted,



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I certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail to counsel for appellee, Charles D. Hannan, Jr., Assistant County Prosecutor, The Justice Center, 8th Floor, 1200 Ontario Street, Cleveland, Ohio 44113, on May 29, 2012.

John R. Harrison (0065286)

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

S/O, EX REL. JAMES L. MCQUEEN

Relator

COA NO.
97835

ORIGINAL ACTION

-vs-

COURT OF C.P. CUY.CTY., PROBATE DIV.

Respondent

MOTION NO. 453540

Date 04/24/12

Journal Entry

Writ denied. See journal entry and opinion of the same date signed by Melody J. Stewart, P.J., James J. Sweeney, J., and Mary Eileen Kilbane, J., concur.

FILED AND JOURNALIZED
PER APP.R. 22(C)

APR 24 2012

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

COPIES MAILED TO COUNSEL FOR
ALL PARTIES--COSTS TAXED

Judge JAMES J. SWEENEY, Concurs

Judge MARY EILEEN KILBANE, Concurs

Presiding Judge
MELODY J. STEWART

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 97835

STATE OF OHIO EX REL., JAMES L. McQUEEN

RELATOR

vs.

THE COURT OF COMMON PLEAS OF CUYAHOGA COUNTY, PROBATE DIVISION

RESPONDENT

JUDGMENT: WRIT DENIED

Writ of Mandamus
Motion Nos. 451411 and 452069
Order No. 453540

RELEASE DATE: April 24, 2012

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MELODY J. STEWART, P.J.:

{¶1} On January 13, 2012, the relator, James McQueen, commenced this mandamus action against the Court of Common Pleas of Cuyahoga County, Probate Division (hereinafter "the Probate Court") to compel the Probate Court to appoint an attorney pursuant to R.C. 2111.02(C) and R.C. 2111.49(C), to represent him in a hearing to determine the continued need for a guardianship in the underlying case, *In re: James McQueen*, Cuyahoga County Common Pleas Court, Probate Division Case No. 2010-GRD-0156289. On January 18, 2012, McQueen moved for summary judgment. On January 20, 2012, this court issued an alternative writ directing the Probate Court to appoint counsel for McQueen or show cause by January 25, 2012, why counsel should not be appointed.[1] The Probate Court timely filed its show cause brief and then filed its own motion for summary judgment on February 7, 2012. On February 29, 2012, McQueen filed his brief in opposition to the Probate Court's summary judgment motion. For the following reasons, this court grants the Probate Court's motion for summary judgment, denies McQueen's dispositive motion, and denies the writ of mandamus.

---

[1] McQueen in his prayer for relief requested an alternative writ, if this court found it necessary.

{¶2} The underlying case began in March 2010, with an application to appoint a guardian for McQueen. The Probate Court on May 5, 2010, found McQueen to be incompetent; the evidence showed that he was homeless, without teeth, and without medications to control his diagnosed diabetes and schizophrenia. The Probate Court appointed Karyn Seeger of Adult Guardianship Services as guardian who placed McQueen in a secured nursing facility from which he apparently cannot voluntarily leave.[2]

{¶3} In the fall of 2011, McQueen moved to have his guardianship reviewed pursuant to R.C. 2111.49 because he believes that he is not in need of a guardian. After initially scheduling the review hearing for December 5, 2011, the Probate Court rescheduled it for January 30, 2012, and ordered the guardian to submit an updated statement of expert evaluation. On December 20, 2011, McQueen moved for appointment of counsel and independent expert evaluation and for a continuance of the hearing. He argued that because he is indigent he has a right to appointed counsel and independent expert evaluation pursuant to R.C. 2111.01(C)(7) and R.C. 2111.49(C).[3] The Probate Court, in a December 27, 2011 journal entry, denied the continuance, noting that the medical evaluation had already been ordered and stating that "[a]ll other matters raised by the

---

[2] Karyn Seeger was the second applicant for guardian.

[3] It is undisputed that McQueen is indigent.

ward will be addressed at the Review Hearing." McQueen then commenced this mandamus action. When the Probate Court filed its show cause brief, it also postponed the review hearing until the resolution of this mandamus action.

{¶4} The gravamen of McQueen's argument is that R.C. 2111.49(C) provides that upon written request by the ward after 120 days after "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." R.C. 2111.02(C) provides the safeguards and rights for the appointment of a guardian as follows: "Prior to the appointment of a guardian * * * the court shall conduct a hearing on the matter of the appointment. The hearing shall be conducted in accordance with all the of the following:" Subsection 1 requires the proposed guardian to appear at the hearing and, if appointed, swear under oath to faithfully fulfill his obligations. Subsection 2 provides that if a magistrate presides at the hearing, Civ.R. 53 shall be followed. Subsection 3 states that if the hearing concerns the appointment of guardian for an alleged incompetent, the burden of proving incompetency shall be by clear and convincing evidence.[4] Subsection 4 provides that a record of the hearing shall be made upon request, and subsections 5 and 6 allow the introduction of

[4] R.C. 2111.49(C) also requires that "[i]f the ward alleges competence, the burden of proving incompetence shall be upon the applicant for guardianship or the guardian, by clear and convincing evidence."

evidence of a less restrictive alternative to a guardianship and permits the court to deny a guardianship based on such an alternative.

{¶5} Subsection 7 contains the provisions at issue in this case. It states:

> 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 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.

{¶6} Therefore, McQueen argues that, in reading the two statutes in pari materia, the "hearing shall be held in accordance with section 2111.02 " language of R.C. 2111.49(C) means that all of the safeguards and procedures of 2111.02(C), including specifically in this case the right of an indigent to have a court appointed attorney, are incorporated into a hearing to evaluate the

continued necessity of the guardianship. McQueen advocates that the language of the statutes establishes the clear legal right of an indigent ward to have appointed counsel for the review hearing and the clear legal duty of the Probate Court to appoint such counsel, and that such right is enforceable in mandamus.[5]

{¶7} To bolster his position, McQueen attaches orders from the Franklin, Medina, Summit, Jefferson, and Logan County probate courts in which the courts appointed counsel for indigent wards for review hearings. The Franklin County order is of particular interest because it appoints counsel "[p]ursuant to R.C. Sections 2111.02(C)(7)(d) and 2111.49(C)" in what appears to be a "fill in the blank" form, indicating that this is the court's policy.

{¶8} However, these orders are not controlling authority that R.C. 2111.49(C) incorporates all of the safeguards and rights of R.C. 2111.02(C) into the a review hearing. None of the orders explicitly rule that the "in accordance with" language necessarily includes all of the subsections of R.C. 2111.02(C)(7). Nor can this court conclude from these orders that those probate courts interpreted the two statutes so as to require the appointment of counsel for indigent wards in review hearings. Those courts in the exercise of their

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[5]The requisites for mandamus are well established: (1) the relator must have a clear legal right to the requested relief, (2) the respondent must have a clear legal duty to perform the requested relief and (3) there must be no adequate remedy at law. *State ex rel. Ney v. Niehaus*, 33 Ohio St.3d 118, 515 N.E.2d 914 (1987).

discretion may have decided to appoint counsel given the peculiarities of those cases. Those courts may have also concluded that the better practice is to appoint counsel for indigent wards in review hearings, even if the statutes do not require it. Thus, these orders are inconclusive for determining whether the statutes create a clear legal right and clear legal duty enforceable in mandamus for indigent wards to have appointed counsel in review hearings. McQueen does not otherwise cite to any controlling authority that R.C. 2111.49(C) incorporates all of the safeguards and rights of R.C. 2111.02(C) into a review hearing. Indeed, there seems to be a paucity of cases interpreting the statutes.

{¶9} In response, the Probate Court argues that the General Assembly by using the language "[i]f the hearing concerns the appointment of a guardian * * * for an alleged incompetent, the alleged incompetent has all of the following rights" limited the scope of subsection 7 to the initial hearing and excluded from its scope the subsequent hearings to determine the continued necessity of a guardianship. The respondent Probate Court argues that the language is very clear. "Appointment" is not the same as re-evaluation. "Alleged incompetent" is a status different from "incompetent." Thus, subsection 7, by its limiting language, is outside the scope of "the in accordance with" language of subsection R.C. 2111.49(C).

{¶10} Furthermore, the General Assembly in subsection .49(C) imposed on the guardian in a review hearing the burden of proving incompetency by clear and convincing evidence. This is the same burden of proof that R.C. 2111.02(C)(3) imposes on the applicant in an initial guardianship hearing. If the General Assembly had meant to incorporate all of the safeguards and rights of subsection .02(C) into the review hearing, then there would be no need to repeat this safeguard in subsection .49(C). This is further indicia that the General Assembly did not mean to incorporate all of subsection .02(C) into the review hearing. The Probate Court's interpretation would allow the rights and safeguards of subsection .02(C)(2), (4), (5) and (6) to apply to review hearings; thus, R.C. 2111.49(C) would not be a nullity.

{¶11} McQueen offers the rebuttal that this interpretation would lead to absurd results if subsection 7 applied only to initial hearings. Subsection 7(a) permits an alleged incompetent the right to be represented by counsel of his/her own choice. Under the Probate Court's interpretation, McQueen argues, a solvent ward would not be allowed to retain and be represented by counsel of choice.[6] Additionally, subsections R.C. 2111.02(A) and (B) do not lend themselves to be incorporated into a hearing on the continued necessity of a

[6] This argument may present a "Catch-22" as to whether an incompetent could retain counsel.

guardianship; thus, the General Assembly must have meant to incorporate subsection .02(C) into review hearings. McQueen also asserts that this is the only instance in Chapter 2111 that the General Assembly incorporated R.C. 2111.02 into another hearing. It is clear that McQueen is advocating that all indigent wards in Ohio should, and do, have the right to appointed counsel for review hearings, if requested. If a person is in physical custody, such as McQueen who is in a secured nursing home, the value of personal counsel is indispensable, and the right to counsel should not be a function of the county of residence. Thus, both sides offer strong arguments for their positions.

{¶12} Mandamus is an extraordinary remedy which is to be exercised with caution and only when the right is clear. It should not issue in doubtful cases. *State ex rel. Taylor v. Glasser* , 50 Ohio St.2d 165, 364 N.E.2d 1 (1977); *State ex rel. Shafer v. Ohio Turnpike Comm.*, 159 Ohio St. 581, 113 N.E.2d 14 (1953); *State ex rel. Connole v. Cleveland Bd. of Edn.*, 87 Ohio App.3d 43, 621 N.E.2d 850 (1993); and *State ex rel. Dayton-Oakwood Press v. Dissinger*, 32 Ohio Law Abs. 308 (1940). In the present case, the lack of controlling authority, the reiteration of the burden of proof in both statutes, and the limiting language in subsection 7 of "if the hearing concerns the appointment of the guardian" and "the alleged incompetent" create doubt as to whether the General Assembly intended subsection 7 to be incorporated into the hearing on the necessity of

continuing a guardianship. The relator has not established the *clear* legal right and the *clear* legal duty enforceable in mandamus. Accordingly, this court declines to issue the writ of mandamus and dissolves the alternative writ.

{¶13} This ruling is a limited one. It does not preclude the relator, if necessary and appropriate, from arguing on appeal on a full record that an indigent ward pursuant to these statutes has the right to appointed counsel for a hearing on the continued necessity of the guardianship. Nor should it preclude other courts from appointing counsel for indigent wards in review hearings, if the court concludes that such an appointment is necessary, appropriate, or required.

{¶14} Accordingly, this court grants the respondent's motion for summary judgment and denies the relator's motion for summary judgment. Relator to pay costs. This court directs the clerk of the Eighth District Court of Appeals to serve upon the parties notice of this judgment and its date of entry upon the journal. Civ.R. 58(B).

{¶15} Writ denied.

MELODY J. STEWART, PRESIDING JUDGE

JAMES J. SWEENEY, J., and
MARY EILEEN KILBANE, J., CONCUR

FILED AND JOURNALIZED
PER APP.R. 22(C)

APR 24 2012

GERALDINE FIERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

IN THE SUPREME COURT OF OHIO 12-0923

Affidavit of Indigency

I, James L. McQueen, do hereby state that I am without the necessary funds to pay the costs or security deposit of this action for the following reason(s): I reside in Cuyahoga County, Ohio, and have been adjudicated an indigent ward subject to guardianship in the Court of Common Pleas of Cuyahoga County, Probate Division. I am currently unemployed, have no assets, and reside in a secured nursing facility. If I receive any money, it is limited to a monthly spending allowance as permitted under Medicaid rules.

Pursuant to Rule 15.3 of the Rules of Practice of the Supreme Court of Ohio, and for the reasons stated above, I am requesting that the filing fee and security deposit, if applicable, be waived.

James L. McQueen

Affiant, James L. McQueen

Sworn to, or affirmed, and subscribed in my presence this 17th day of May, 2012.

John R

Notary Public

John R. Harrison, Attorney At Law
NOTARY PUBLIC - STATE OF OHIO
My commission has no expiration date
Sec. 147.03 R.C.

FILED
MAY 29 2012
CLERK OF COURT
SUPREME COURT OF OHIO

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

STATE OF OHIO, EX REL. JAMES L. MCQU

Relator

COA NO.
97835

ORIGINAL ACTION

-vs-

CT. OF COMMON PLEAS,CUY.CTY.,PROBATE

Respondent

MOTION NO. 451410

Date 01/20/12

Journal Entry

The court grants an alternative writ of mandamus and request for expedited disposition as follows: The respondent court is to appoint counsel for the relator, James L. McQueen, in the underlying case, The Guardianship of James McQueen, Cuyahoga County Common Pleas Court, Probate Division, Case No. 2010-GRD-156289, or show cause why counsel should not be appointed by January 25, 2012. If counsel is not appointed or good cause not shown why counsel should not be appointed, the hearing scheduled for January 30, 2012, is stayed until this court resolves this mandamus action.

Judge JAMES J. SWEENEY, Concurs

Judge MARY EILEEN KILBANE, Concurs

Presiding Judge
MELODY J. STEWART

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

S/O, EX REL. JAMES L. MCQUEEN

Relator

COA NO.
97835

ORIGINAL ACTION

-vs-

COURT OF C.P. CUY.CTY., PROBATE DIV.

Respondent

MOTION NO. 451411

Date 04/24/12

Journal Entry

Motion by relator for summary judgment is denied.

RECEIVED FOR FILING

APR 24 2012

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

Judge JAMES J. SWEENEY, Concurs

Judge MARY EILEEN KILBANE, Concurs

Presiding Judge
MELODY J. STEWART

CA12097835

73493296

VOL 0751 PG 0857

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

S/O, EX REL. JAMES L. MCQUEEN

Relator

COA NO.
97835

ORIGINAL ACTION

-vs-

COURT OF C.P. CUY.CTY., PROBATE DIV.

Respondent

MOTION NO. 452069

Date 04/24/12

Journal Entry

Motion by respondent for summary judgment with brief in support is granted.

Judge JAMES J. SWEENEY, Concurs

Judge MARY EILEEN KILBANE, Concurs

Presiding Judge
MELODY J. STEWART

CA12097835 73493295

APR 24 2012

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

S/O, EX REL. JAMES L. MCQUEEN

Relator

COA NO.
97835

ORIGINAL ACTION

-vs-

COURT OF C.P. CUY.CTY., PROBATE DIV.

Respondent

MOTION NO. 453540

Date 04/24/12

Journal Entry

Writ denied. See journal entry and opinion of the same date signed by Melody J. Stewart, P.J., James J. Sweeney, J., and Mary Eileen Kilbane, J., concur.

COPIES MAILED TO COUNSEL FOR
ALL PARTIES—COSTS TAXED

FILED AND JOURNALIZED
PER APP.R. 22(C)

APR 24 2012

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

Judge JAMES J. SWEENEY, Concurs

Judge MARY EILEEN KILBANE, Concurs

Presiding Judge
MELODY J. STEWART

CA12097835 73493307

[Cite as *State ex rel. McQueen v. Cuyahoga Cty. Common Pleas Court, Probate Div.*, 2012-Ohio-1839.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 97835

STATE OF OHIO EX REL., JAMES L. McQUEEN

RELATOR

vs.

THE COURT OF COMMON PLEAS OF CUYAHOGA COUNTY, PROBATE DIVISION

RESPONDENT

JUDGMENT:
WRIT DENIED

Writ of Mandamus
Motion Nos. 451411 and 452069
Order No. 453540

RELEASE DATE: April 24, 2012

ATTORNEYS FOR RELATOR

John R. Harrison
Jason C. Boylan
Ohio Legal Rights Service
50 West Broad Street, Suite 1400
Columbus, OH 43215

ATTORNEYS FOR RESPONDENT

William D. Mason
Cuyahoga County Prosecutor

By: Charles D. Hannan, Jr.
Assistant County Prosecutor
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

MELODY J. STEWART, P.J.:

{¶1} On January 13, 2012, the relator, James McQueen, commenced this mandamus action against the Court of Common Pleas of Cuyahoga County, Probate Division (hereinafter "the Probate Court") to compel the Probate Court to appoint an attorney pursuant to R.C. 2111.02(C) and R.C. 2111.49(C), to represent him in a hearing to determine the continued need for a guardianship in the underlying case, *In re: James McQueen*, Cuyahoga County Common Pleas Court, Probate Division Case No. 2010-GRD-0156289. On January 18, 2012, McQueen moved for summary judgment. On January 20, 2012, this court issued an alternative writ directing the Probate Court to appoint counsel for McQueen or show cause by January 25, 2012, why counsel should not be appointed.[1] The Probate Court timely filed its show cause brief and then filed its own motion for summary judgment on February 7, 2012. On February 29, 2012, McQueen filed his brief in opposition to the Probate Court's summary judgment motion. For the following reasons, this court grants the Probate Court's motion for summary judgment, denies McQueen's dispositive motion, and denies the writ of mandamus.

{¶2} The underlying case began in March 2010, with an application to appoint a guardian for McQueen. The Probate Court on May 5, 2010, found McQueen to be incompetent; the evidence showed that he was homeless, without teeth, and without medications to control his diagnosed diabetes and schizophrenia. The Probate Court

[1] McQueen in his prayer for relief requested an alternative writ, if this court found it necessary.

appointed Karyn Seeger of Adult Guardianship Services as guardian who placed McQueen in a secured nursing facility from which he apparently cannot voluntarily leave.[2]

{¶3} In the fall of 2011, McQueen moved to have his guardianship reviewed pursuant to R.C. 2111.49 because he believes that he is not in need of a guardian. After initially scheduling the review hearing for December 5, 2011, the Probate Court rescheduled it for January 30, 2012, and ordered the guardian to submit an updated statement of expert evaluation. On December 20, 2011, McQueen moved for appointment of counsel and independent expert evaluation and for a continuance of the hearing. He argued that because he is indigent he has a right to appointed counsel and independent expert evaluation pursuant to R.C. 2111.01(C)(7) and R.C. 2111.49(C).[3] The Probate Court, in a December 27, 2011 journal entry, denied the continuance, noting that the medical evaluation had already been ordered and stating that "[a]ll other matters raised by the ward will be addressed at the Review Hearing." McQueen then commenced this mandamus action. When the Probate Court filed its show cause brief, it also postponed the review hearing until the resolution of this mandamus action.

{¶4} The gravamen of McQueen's argument is that R.C. 2111.49(C) provides that upon written request by the ward after 120 days after "the original appointment of the guardian, a hearing shall be held in accordance with section 2111.02 of the Revised Code

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[2] Karyn Seeger was the second applicant for guardian.

[3] It is undisputed that McQueen is indigent.

to evaluate the continued necessity of the guardianship." R.C. 2111.02(C) provides the safeguards and rights for the appointment of a guardian as follows: "Prior to the appointment of a guardian * * * the court shall conduct a hearing on the matter of the appointment. The hearing shall be conducted in accordance with all the of the following:" Subsection 1 requires the proposed guardian to appear at the hearing and, if appointed, swear under oath to faithfully fulfill his obligations. Subsection 2 provides that if a magistrate presides at the hearing, Civ.R. 53 shall be followed. Subsection 3 states that if the hearing concerns the appointment of guardian for an alleged incompetent, the burden of proving incompetency shall be by clear and convincing evidence.[4] Subsection 4 provides that a record of the hearing shall be made upon request, and subsections 5 and 6 allow the introduction of evidence of a less restrictive alternative to a guardianship and permits the court to deny a guardianship based on such an alternative.

{¶5} Subsection 7 contains the provisions at issue in this case. It states:

> 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;

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[4] R.C. 2111.49(C) also requires that "[i]f the ward alleges competence, the burden of proving incompetence shall be upon the applicant for guardianship or the guardian, by clear and convincing evidence."

(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 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.

{¶6} Therefore, McQueen argues that, in reading the two statutes in pari materia, the "hearing shall be held in accordance with section 2111.02 " language of R.C. 2111.49(C) means that all of the safeguards and procedures of 2111.02(C), including specifically in this case the right of an indigent to have a court appointed attorney, are incorporated into a hearing to evaluate the continued necessity of the guardianship. McQueen advocates that the language of the statutes establishes the clear legal right of an indigent ward to have appointed counsel for the review hearing and the clear legal duty of the Probate Court to appoint such counsel, and that such right is enforceable in mandamus.[5]

{¶7} To bolster his position, McQueen attaches orders from the Franklin, Medina, Summit, Jefferson, and Logan County probate courts in which the courts appointed

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[5]The requisites for mandamus are well established: (1) the relator must have a clear legal right to the requested relief, (2) the respondent must have a clear legal duty to perform the requested relief and (3) there must be no adequate remedy at law. *State ex rel. Ney v. Niehaus*, 33 Ohio St.3d 118, 515 N.E.2d 914 (1987).

counsel for indigent wards for review hearings. The Franklin County order is of particular interest because it appoints counsel "[p]ursuant to R.C. Sections 2111.02(C)(7)(d) and 2111.49(C)" in what appears to be a "fill in the blank" form, indicating that this is the court's policy.

{¶8} However, these orders are not controlling authority that R.C. 2111.49(C) incorporates all of the safeguards and rights of R.C. 2111.02(C) into the a review hearing. None of the orders explicitly rule that the "in accordance with" language necessarily includes all of the subsections of R.C. 2111.02(C)(7). Nor can this court conclude from these orders that those probate courts interpreted the two statutes so as to require the appointment of counsel for indigent wards in review hearings. Those courts in the exercise of their discretion may have decided to appoint counsel given the peculiarities of those cases. Those courts may have also concluded that the better practice is to appoint counsel for indigent wards in review hearings, even if the statutes do not require it. Thus, these orders are inconclusive for determining whether the statutes create a clear legal right and clear legal duty enforceable in mandamus for indigent wards to have appointed counsel in review hearings. McQueen does not otherwise cite to any controlling authority that R.C. 2111.49(C) incorporates all of the safeguards and rights of R.C. 2111.02(C) into a review hearing. Indeed, there seems to be a paucity of cases interpreting the statutes.

{¶9} In response, the Probate Court argues that the General Assembly by using the language "[i]f the hearing concerns the appointment of a guardian * * * for an alleged

incompetent, the alleged incompetent has all of the following rights" limited the scope of subsection 7 to the initial hearing and excluded from its scope the subsequent hearings to determine the continued necessity of a guardianship. The respondent Probate Court argues that the language is very clear. "Appointment" is not the same as re-evaluation. "Alleged incompetent" is a status different from "incompetent." Thus, subsection 7, by its limiting language, is outside the scope of "the in accordance with" language of subsection R.C. 2111.49(C).

{¶10} Furthermore, the General Assembly in subsection .49(C) imposed on the guardian in a review hearing the burden of proving incompetency by clear and convincing evidence. This is the same burden of proof that R.C. 2111.02(C)(3) imposes on the applicant in an initial guardianship hearing. If the General Assembly had meant to incorporate all of the safeguards and rights of subsection .02(C) into the review hearing, then there would be no need to repeat this safeguard in subsection .49(C). This is further indicia that the General Assembly did not mean to incorporate all of subsection .02(C) into the review hearing. The Probate Court's interpretation would allow the rights and safeguards of subsection .02(C)(2), (4), (5) and (6) to apply to review hearings; thus, R.C. 2111.49(C) would not be a nullity.

{¶11} McQueen offers the rebuttal that this interpretation would lead to absurd results if subsection 7 applied only to initial hearings. Subsection 7(a) permits an alleged incompetent the right to be represented by counsel of his/her own choice. Under the Probate Court's interpretation, McQueen argues, a solvent ward would not be allowed

to retain and be represented by counsel of choice.[6] Additionally, subsections R.C. 2111.02(A) and (B) do not lend themselves to be incorporated into a hearing on the continued necessity of a guardianship; thus, the General Assembly must have meant to incorporate subsection .02(C) into review hearings. McQueen also asserts that this is the only instance in Chapter 2111 that the General Assembly incorporated R.C. 2111.02 into another hearing. It is clear that McQueen is advocating that all indigent wards in Ohio should, and do, have the right to appointed counsel for review hearings, if requested. If a person is in physical custody, such as McQueen who is in a secured nursing home, the value of personal counsel is indispensable, and the right to counsel should not be a function of the county of residence. Thus, both sides offer strong arguments for their positions.

{¶12} Mandamus is an extraordinary remedy which is to be exercised with caution and only when the right is clear. It should not issue in doubtful cases. *State ex rel. Taylor v. Glasser* , 50 Ohio St.2d 165, 364 N.E.2d 1 (1977); *State ex rel. Shafer v. Ohio Turnpike Comm.*, 159 Ohio St. 581, 113 N.E.2d 14 (1953); *State ex rel. Connole v. Cleveland Bd. of Edn.*, 87 Ohio App.3d 43, 621 N.E.2d 850 (1993); and *State ex rel. Dayton-Oakwood Press v. Dissinger*, 32 Ohio Law Abs. 308 (1940). In the present case, the lack of controlling authority, the reiteration of the burden of proof in both statutes, and the limiting language in subsection 7 of "if the hearing concerns the appointment of the guardian" and "the alleged incompetent" create doubt as to whether

[6] This argument may present a "Catch-22" as to whether an incompetent could retain counsel.

the General Assembly intended subsection 7 to be incorporated into the hearing on the necessity of continuing a guardianship. The relator has not established the *clear* legal right and the *clear* legal duty enforceable in mandamus. Accordingly, this court declines to issue the writ of mandamus and dissolves the alternative writ.

{¶13} This ruling is a limited one. It does not preclude the relator, if necessary and appropriate, from arguing on appeal on a full record that an indigent ward pursuant to these statutes has the right to appointed counsel for a hearing on the continued necessity of the guardianship. Nor should it preclude other courts from appointing counsel for indigent wards in review hearings, if the court concludes that such an appointment is necessary, appropriate, or required.

{¶14} Accordingly, this court grants the respondent's motion for summary judgment and denies the relator's motion for summary judgment. Relator to pay costs. This court directs the clerk of the Eighth District Court of Appeals to serve upon the parties notice of this judgment and its date of entry upon the journal. Civ.R. 58(B).

{¶15} Writ denied.

MELODY J. STEWART, PRESIDING JUDGE

JAMES J. SWEENEY, J., and
MARY EILEEN KILBANE, J., CONCUR

JOUR 2010
000067

PROBATE COURT
FILED
APR 07 2010
CUYAHOGA COUNTY, O.

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

IN THE MATTER OF THE
GUARDIANSHIP OF:

JAMES MCQUEEN

CASE NO. 2010 GDN 0156289

JUDGE LAURA J. GALLAGHER

JUDGMENT ENTRY

This matter came on for hearing on April 7, 2010 upon the Second Application for Appointment of Guardian of Alleged Incompetent filed on April 7, 2010. The First Application is withdrawn and hereby **dismissed**.

Present for hearing were the Applicant, Karyn Seeger, Adult Guardianship Services, Attorney for the Ward, Van Lowry, Beth Reid, Adult Guardianship Services, Assistant County Prosecutor Kelli K. Perk and, Social Worker, Annissa Aikens, for Adult Protective Services. The Court finds that all other necessary parties were served pursuant to law and/or waived service and notice of hearing.

The Court finds that its own investigator filed a Report recommending that the Application for Guardianship be granted. The Court further finds that a Statement of Expert Evaluation was filed with the Court also recommending that the Application for Guardianship be granted.

The Court finds that the proposed ward requested that counsel be appointed on March 30, 2010. Attorney Van Lowry was contacted on April 6, 2010 and accepted the appointment,

DOCKETED

however he was not given sufficient time to prepare for hearing on April 7, 2010.

The Court finds that the proposed ward is currently under a protective services order that expires April 8, 2010.

The Court finds that the proposed ward may be a danger to himself if he is allowed to remove himself from his current placement. The Court finds that it is in the best interest of the proposed ward to appoint a Guardian for a limited time, 30 days, and to allow counsel for the proposed ward additional time to prepare his defense.

The Court further finds that the applicant is suitable to serve as guardian of the person of **James McQueen.**

The Court finds that the First Application for Guardianship is **withdrawn** and the Second Application for Guardianship of the person is hereby **granted** on a limited basis, for a period of 30 days. The Application for Guardianship will be heard on **May 5, 2010 at 10:00 a.m.**

It is further **ORDERED** that the Clerk of Court shall serve upon all parties notice of this judgment and date of entry pursuant to Civ. R. 58(B).

IT IS SO ORDERED.

APR 07 2010

JUDGE LAURA J. GALLAGHER

NOV/R 2015

000546

PROBATE COURT
FILED
APR 09 2010
CUY.

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

IN RE:	)	CASE NO. 2010 GDN 156289
	)	
JAMES McQUEEN	)	JUDGE LAURA J. GALLAGHER
	)	
AN INCAPACITATED PERSON	)	JUDGMENT ENTRY

It appearing to the Court that Respondent is an indigent person and unable to retain counsel, the Court, sua sponte and upon its own motion, appoints **Van Lowry**, Attorney at Law, to represent Respondent in this cause.

IT IS SO ORDERED.

PROBATE JUDGE APR 09 2010

DOCKETED

JOUR 2018
000152

PROBATE COURT
FILED
MAY 05 2010
CUYAHOGA COUNTY, O.

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

IN THE MATTER OF THE GUARDIANSHIP OF:

JAMES MCQUEEN

CASE NO. 2010 GDN 0156289

JUDGE LAURA J. GALLAGHER

JUDGMENT ENTRY

This matter came on for hearing on May 5, 2010 upon the Second Application for Appointment of Guardian of Alleged Incompetent filed on April 7, 2010.

Present for hearing were the Applicant, Karyn Seeger, Adult Guardianship Services, Attorney for the Ward, Van Lowry, Beth Reid, Adult Guardianship Services, Assistant County Prosecutor Kelli K. Perk and, Social Worker, Annissa Aikens, for Adult Protective Services. The Court finds that all other necessary parties were served pursuant to law and/or waived service and notice of hearing.

The Court finds that its own investigator filed a Report recommending that the Application for Guardianship be granted. The Court further finds that a Statement of Expert Evaluation was filed with the Court also recommending that the Application for Guardianship be granted.

The Court finds that a limited guardianship was granted on April 7, 2010. Hearing on the Application for Guardianship was continued to May 5, 2010 to allow counsel for the ward time to prepare for hearing. The Court finds that evidence submitted at trial consisted of the testimony

DOCKETED

of social worker Anissa Aikens, and that counsel for the ward had to opportunity to cross examine the witness as well as to advocate for the least restrictive alternative for the ward. The Court finds that prior to hospitalization at Lutheran and placement at City View the ward was homeless, without teeth with which to nourish himself, without medication to control his diagnosed diabetes and schizophrenia, and was not compliant with his mental health case manager. The Court finds that at this time there is no less restrictive alternative to guardianship. The Court further finds that the applicant is suitable to serve as guardian of the person of **James McQueen.**

The Court finds that the Second Application for Guardianship of the person is hereby **granted**.

It is further **ORDERED** that the Clerk of Court shall serve upon all parties notice of this judgment and date of entry pursuant to Civ. R. 58(B).

IT IS SO ORDERED.

MAY 05 2010

JUDGE LAURA J. GALLAGHER

SEP 3 0 2011

SFH – Ar.

12-5-11 @ 11:00

Mr. James L. McQueen
c/o City View Nursing Home
6606 Carnegie Ave.
Cleveland, OH 44103

September ___, 2011

Judge Laura J. Gallagher
Cuyahoga County Probate Court
1 Lakeside Avenue
Cleveland, Ohio 44113

Dear Judge Gallagher:

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 had been hospitalized by my guardian at Lutheran Hospital and was being medicated against my will. I also wish to live in the community in my own apartment and/or return to Saginaw Michigan to be near my family.

I am indigent. I request that case be set for review hearing and that that counsel be appointed for me. I also 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.

I ask that you instruct my guardian to stop forcibly medicating me against my will and to allow me to live in the community in my own apartment and to move to Michigan.

Sincerely,

Mr. James L. McQueen

Prepared by Ohio Legal Rights Service

James L. McQueen

Probate Court of Cuyahoga County
Division of the Court of Common Pleas

IN RE: **CASE NO. 2010GDN0156289**
DECEMBER 2, 2011

JAMES L. MCQUEEN)

AN INCAPACITATED PERSON) **JUDGMENT ENTRY**

The hearing scheduled for December 5, 2011 is hereby cancelled. The matter will be reset for hearing in January, 2012. The guardian will arrange for an updated Statement of Expert Evaluation to be submitted to the Court prior to the rescheduled hearing.

IT IS SO ORDERED.

MAGISTRATE DAVID M. MILLS

PROBATE JUDGE

DEC 02 2011

PROBATE COURT
FILED
DEC 5 2011
CUYAHOGA COUNTY, O.

IN THE PROBATE COURT OF CUYAHOGA COUNTY, OHIO

In the Matter of the Guardianship of James McQueen	:	**Case No. 2010 GDN 0156289** **Magistrate Mills**

MOTION FOR APPOINTMENT OF COUNSEL, AND INDEPENDENT EXPERT EVALUATION, AND/OR CONTINUANCE, AND INSTRUCTIONS TO GUARDIAN

Now comes James McQueen, indigent ward subject to guardianship in this Court, to request counsel be appointed at the Court's expense within adequate time to prepare for the review hearing currently scheduled for January 30, 2012; and if counsel is not appointed, that the hearing be continued until such time as counsel is appointed and provided with adequate time to prepare the case. Mr. McQueen requests that an independent expert medical evaluator be appointed. Mr. McQueen further requests that this Court instruct his Guardian to ensure that Mr. McQueen is in attendance at the hearing. An expedited ruling on this Motion is respectfully requested. A Memorandum in Support of this Motion is attached hereto.

Respectfully submitted,

James L. McQueen

James McQueen, pro se

Prepared by:
OHIO LEGAL RIGHTS SERVICE
John R. Harrison (0065286)
50 West Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-7264 (tel.)
(614) 644-1888 (fax)
jharrison@olrs.state.oh.us

MEMORANDUM IN SUPPORT

I. FACTS AND INTRODUCTION

James McQueen, ward subject to guardianship of the person, by letter requested a review hearing to establish whether he continues to need a guardian. (See Exhibit A, Letter to Court, Received September 30, 2011). In his letter Mr. McQueen also requested that counsel be appointed and that he be provided with an independent medical evaluation, both at Court expense. As this Court has found, Mr. McQueen is indigent. (See Exhibit B, Order Appointing Counsel, April 9, 2010; Exhibit D, Affidavit of Indigency). In his letter Mr. McQueen asserted that he believes he no longer is in need of a guardian. Via this Motion, Mr. McQueen again asserts he is competent. This Court initially scheduled the matter for hearing on December 5, 2011 but did not appoint counsel or provide Mr. McQueen with an independent medical evaluation.

Mr. McQueen currently resides in City View Nursing Home, which is a secured facility from which he cannot leave. Because of this, through nursing home staff, Mr. McQueen contacted the Court before December 5, 2011 to ask that the hearing be conducted at the nursing home. He understands through nursing home staff that the Court continued the hearing to January 30, 2012 and stated that he would need to provide a medical examination *through* the nursing facility. Review of the Court docket indicates that while the hearing was re-scheduled, the Court has not appointed counsel or provided for an independent medical evaluation; rather the Court instructed the Guardian to "arrange for an updated Statement of Expert Evaluation to be submitted to the court prior to the rescheduled hearing." (See Exhibit C, Order Resetting Hearing, December 2, 2011).

II. LEGAL ARGUMENT

A. Mr. McQueen is entitled to both appointed counsel and an expert evaluation at Court expense for his review hearing pursuant to R.C. 2111.02(C)(7) and 2111.49(C).

Since Mr. McQueen's request for appointment of counsel and an expert evaluation at Court expense have not yet been granted, and appointment of counsel with adequate time to prepare for hearing is essential to ensuring his rights, Mr. McQueen renews his request. Pursuant to R.C. 2111.02(C)(7) and 2111.49(C) an indigent ward is entitled to both appointed counsel and an expert evaluation at the Court's expense for a review hearing. R.C. 2111.02(C)(7) and 2111.49(C). R.C. 2111.49(C) states that upon written request by the ward or the ward's attorney, "a hearing shall be held in accordance with 2111.02 of the Revised Code to evaluate the continued necessity of the guardianship." R.C. 2111.02(C)(7) ensures an indigent ward's right to have counsel and an independent expert evaluator appointed at the Court's expense. These statutes must be read in pari materia to give full effect to both. *State ex rel. Asberry v. Payne* (1998), 82 Ohio St.3d 44, 46-47, 693 N.E.2d 794 (Reading R.C. 2152.352 and R.C. 120.06(A) in pari materia to give full force and effect to both provisions and to reject limitation on right to counsel in juvenile custody proceedings). As in *Asberry*, read in pari materia, the plain meaning of R.C. 2111.02(C)(7) and 2111.49(C) is to provide for mandatory appointment of counsel and expert evaluation at Court expense for a review hearing.

This Court provided Mr. McQueen with appointed counsel on its own motion during the initial proceedings to establish guardianship in this case in 2010. Mr. McQueen's financial situation has not changed since then. The record is clear that he is indigent and in need of appointed counsel and an independent expert evaluation at the Court's expense. Mr. McQueen has not retained counsel or obtained an expert evaluator for the guardianship review hearing. An

updated Statement of Expert Evaluation arranged by the Guardian, the opposing party in this case, is not an independent expert evaluation within the meaning of the statute.

While his right to counsel is codified in the Probate Code, Mr. McQueen also asserts that he is entitled to counsel in his guardianship review hearing under the due process clause of the Fourteenth Amendment to the United States Constitution.

Given the important rights at stake in this case, Mr. McQueen requests that counsel be appointed with adequate time to prepare his case, or in the alternative, reluctantly that the case be continued until such time as counsel is appointed with adequate time to prepare. This request is supported by Ohio Supreme Court precedent. *Asberry* at 49 ("Asberry lacks an adequate remedy in the ordinary course of law to challenge Judge Payne's refusal to appoint her counsel.") citing *State ex rel. Cody v. Toner* (1983), 8 Ohio St.3d 22, 23, 456 N.E.2d 813 ("If realtor must wait for an appeal to establish his alleged right to have court-appointed counsel, he will be denied the opportunity to be legally represented throughout the course of the adjudication and disposition of his case.") and citing *State ex rel. Butler v. Demis* (1981), 66 Ohio St.2d 123, 124, 20 O.O.3d 121, 420 N.E.2d 116 ("If [the party] must wait for an appeal to establish their alleged right to have O'Farrell appointed as their legal counsel, they will be denied the opportunity to have the attorney-client relationship of their own choosing throughout the course of the adjudication and disposition of their cases."). For these reasons, Mr. McQueen respectfully requests that this Court appoint counsel forthwith to provide such counsel adequate time to prepare for hearing, or in the reluctant alternative, to continue the hearing until such time as counsel is appointed and provided adequate time.

B. Mr. McQueen is entitled to attend the hearing and requests the Court to instruct his Guardian to ensure he attends the review hearing.

Mr. McQueen also requests that if this Court hears this matter outside of the secured nursing home in which he resides that his Guardian be instructed to ensure that he attends the hearing. Mr. McQueen cannot leave the nursing home without his Guardian's consent and does not have transportation to attend the hearing. The importance of his right to attend the hearing is mandated by the statutory and Constitutional provisions cited above.

III. CONCLUSION

For the foregoing reasons, Mr. McQueen also requests an expedited ruling on this Motion.

Respectfully submitted,

James L. McQueen

James McQueen, pro se

Prepared by:

OHIO LEGAL RIGHTS SERVICE
John R. Harrison (0065286)
50 West Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-7264 (tel.)
(614) 644-1888 (fax)
jharrison@olrs.state.oh.us

TABLE OF CITATIONS

Ohio Caselaw

State ex rel. Asberry v. Payne (1998), 82 Ohio St.3d 44, 46-47, 693 N.E.2d 794 3
State ex rel. Butler v. Demis (1981), 66 Ohio St.2d 123, 124, 20 O.O.3d 121, 420 N.E.2d 116 4
State ex rel. Cody v. Toner (1983), 8 Ohio St.3d 22, 23, 456 N.E.2d 813 4

Ohio Statutes

R.C. 120.06(A) 3
R.C. 2111.02 ..... 2, 3
R.C. 2111.02(C)(7) 2, 3
R.C. 2111.49(C) 2, 3
R.C. 2152.352 3

United States Constitution

Fourteenth Amendment to the United States Constitution 3

CERTIFICATE OF SERVICE

A copy of the above-styled Motion was served upon guardian, Karyn Seegar, 1468 West 25th St., #300, Cleveland, Ohio 44113, by First Class U.S. Mail this 20 day of December, 2011.

James L. McQueen

James McQueen, pro se

EXHIBIT
A

SEP 30 2011

Mr. James L. McQueen
c/o City View Nursing Home
6606 Carnegie Ave.
Cleveland, OH 44103

September ___, 2011

Judge Laura J. Gallagher
Cuyahoga County Probate Court
1 Lakeside Avenue
Cleveland, Ohio 44113

Dear Judge Gallagher:

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 had been hospitalized by my guardian at Lutheran Hospital and was being medicated against my will. I also wish to live in the community in my own apartment and/or return to Saginaw Michigan to be near my family.

I am indigent. I request that case be set for review hearing and that that counsel be appointed for me. I also 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.

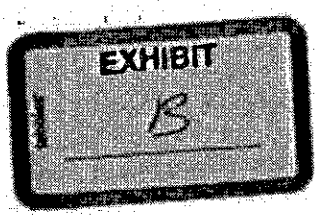
I ask that you instruct my guardian to stop forcibly medicating me against my will and to allow me to live in the community in my own apartment and to move to Michigan.

Sincerely,

Mr. James L. McQueen

Prepared by Ohio Legal Rights Service

James L. McQueen



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

IN RE:	)	CASE NO. 2010 GDN 156289
	)	
JAMES McQUEEN	)	JUDGE LAURA J. GALLAGHER
	)	
AN INCAPACITATED PERSON	)	JUDGMENT ENTRY

It appearing to the Court that Respondent is an indigent person and unable to retain counsel, the Court, sua sponte and upon its own motion, appoints **Van Lowry**, Attorney at Law, to represent Respondent in this cause.

IT IS SO ORDERED.

PROBATE JUDGE APR 09 2010

EXHIBIT C

Probate Court of Cuyahoga County
Division of the Court of Common Pleas

IN RE: **CASE NO. 2010GDN0156289**
DECEMBER 2, 2011

JAMES L. MCQUEEN)

AN INCAPACITATED PERSON) **JUDGMENT ENTRY**

The hearing scheduled for December 5, 2011 is hereby cancelled. The matter will be reset for hearing in January, 2012. The guardian will arrange for an updated Statement of Expert Evaluation to be submitted to the Court prior to the rescheduled hearing.

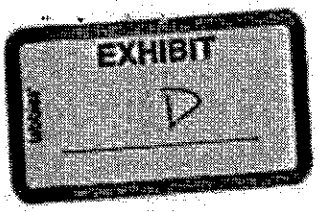
IT IS SO ORDERED.

MAGISTRATE DAVID M. MILLS

PROBATE JUDGE

DEC 02 2011

PROBATE COURT
FILED
DEC 5 2011
CUYAHOGA COUNTY, O.



IN THE PROBATE COURT OF CUYAHOGA COUNTY, OHIO

In the Matter of the Guardianship of 01566289 James McQueen	:	**Case No. 2010 GDN**
	:	**Magistrate Mills**

AFFIDAVIT OF INDIGENCY

1. I, James McQueen, being duly sworn, say that I am the movant in the attached Motion.
2. I reside in Cuyahoga County, Ohio am a citizen of the United States, and an indigent ward subject to guardianship in the Cuyahoga County Probate Court.
3. I am currently unemployed and reside in a secured nursing facility; if I receive any money, it is limited to a monthly spending allowance as allowed under Medicaid.
4. I cannot hire private counsel because of my poverty.
5. Although I have obtained pro bono counsel to pursue the appointment of counsel, I have not been able to obtain private counsel to represent me in my guardianship review hearing.

I have read the foregoing Affidavit, and the statements and averments therein contained are true as I verily believe.

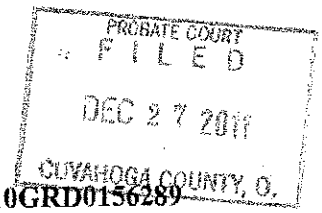
James L. McQueen — John R. Harrison

Mr. James McQueen — John R. Harrison, Esq. (Notary Public)

Sworn to before me and subscribed
in my presence this 20 day of December, 2011.

John R. Harrison, Attorney At Law
NOTARY PUBLIC - STATE OF OHIO
My commission has no expiration date
Sec. 147.03 R.C.

Probate Court of Cuyahoga County
Division of the Court of Common Pleas



IN RE:

CASE NO. 2010GRD0156289
DECEMBER 22, 2011

JAMES MCQUEEN)

AN INCAPACITATED PERSON) **JUDGMENT ENTRY**

The ward's Motion for Continuance of Review Hearing scheduled for January 30, 2012 is hereby denied. The Court has already ordered that a medical evaluation be obtained prior to January 30, 2012. All other matters raised by the ward will be addressed at the Review Hearing.

IT IS SO ORDERED.

MAGISTRATE DAVID M. MILLS

PROBATE JUDGE

Probate Court of Cuyahoga County
Division of the Court of Common Pleas

PROBATE COURT
FILED
JAN 2 3 2012
CUYAHOGA COUNTY, O.

IN RE: **CASE NO. 2010GRD0156289**
JANUARY 23, 2012

JAMES MCQUEEN)

AN INCAPACITATED PERSON) **JUDGMENT ENTRY**

In conformity with the Journal Entry issued by the Court of Appeals, Eighth District, Case No. 97835, on January 20, 2012, the hearing scheduled for January 30, 2012 in this matter is continued. It is further ordered that this matter is stayed pending a final ruling by the Court of Appeals.

IT IS SO ORDERED.

MAGISTRATE DAVID M. MILLS

PROBATE JUDGE

JAN 23 2012

ORDERED

Probate Court of Cuyahoga County
Division of the Court of Common Pleas

PROBATE COURT
FILED
MAY 18 2012
CUYAHOGA COUNTY O

IN RE **CASE NO 2010GRD0156289**
MAY 18, 2012

JAMES MCQUEEN)

AN INCAPACITATED PERSON) **JUDGMENT ENTRY**

The Review Hearing scheduled for June 4, 2012 before Magistrate David M Mills is continued and this matter is hereby stayed pending further order of Court

IT IS SO ORDERED

MAGISTRATE DAVID M MILLS

PROBATE JUDGE

2010GRD156289
108713
GOJE

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

(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.

Amended by 129th General Assembly File No. 65, SB 117, § 1, eff. 3/22/2012.

Amended by 129th General Assembly File No. 52, SB 124, § 1, eff. 1/13/2012.

Amended by 128th General Assembly ch. 7, SB 79, § 1, eff. 10/6/2009.

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

2111.13 Duties of guardian of person.

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

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

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

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

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

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

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

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

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

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

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

2111.141 Inventory to be supported by evidence.

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

Amended by 129th General Assembly File No. 52, SB 124, § 1, eff. 1/13/2012.

Effective Date: 01-01-1990

2111.49 Report of guarding of incompetent.

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

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

(b) The present address of the guardian;

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

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

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

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

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

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

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

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

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

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

(C) Except as provided in this division, for any guardianship, upon written request by the ward, the ward's attorney, or any other interested party made at any time after the expiration of one hundred twenty days from the date of the original appointment of the guardian, a hearing shall be held in

accordance with section 2111.02 of the Revised Code to evaluate the continued necessity of the guardianship. Upon written request, the court shall conduct a minimum of one hearing under this division in the calendar year in which the guardian was appointed, and upon written request, shall conduct a minimum of one hearing in each of the following calendar years. Upon its own motion or upon written request, the court may, in its discretion, conduct a hearing within the first one hundred twenty days after appointment of the guardian or conduct more than one hearing in a calendar year. If the ward alleges competence, the burden of proving incompetence shall be upon the applicant for guardianship or the guardian, by clear and convincing evidence.

Effective Date: 03-18-1997

2111.50 Probate court is superior guardian of wards.

(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.

Amended by 129th General Assembly File No. 52, SB 124, § 1, eff. 1/13/2012.

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