ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX REL. JAMES L. McQUEEN, Appellant, vs. THE COURT OF COMMON PLEAS OF CUYAHOGA COUNTY, PROBATE DIVISION, Appellee.	Case No. 2012-0923 On Appeal from the Cuyahoga County Court of Appeals, Eighth Judicial District Court of Appeals Case No. 12 CA 97835

MERIT BRIEF OF APPELLEE THE COURT OF COMMON PLEAS OF CUYAHOGA COUNTY, PROBATE DIVISION

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STATEMENT OF THE FACTS

Ohio law establishes that in hearings that concern the appointment of a guardian or limited guardian for an alleged incompetent, the alleged incompetent has the right, if indigent and upon request, to have counsel appointed at court expense to represent the individual at that hearing as well as in an appeal from that decision. R.C. 2111.02(C)(7)(d)(i) and (ii). This case presents as a matter of statutory interpretation the question of whether there exists a continuing duty to furnish appointed legal counsel when the probate court conducts subsequent periodic reviews of the guardianship under R.C. 2111.49(C). After carefully reviewing the statutes at issue, the Cuyahoga County Court of Appeals declined to issue a writ of mandamus where Ohio law does not establish either the clear legal right or the clear legal duty to have appointed counsel in such guardianship review hearings. For the reasons discussed hereafter, the Court of Appeals correctly declined to issue a writ of mandamus and its judgment should accordingly be affirmed.

The underlying facts of this case are largely without dispute. On March 16, 2010, an application for appointment of a guardian for relator/appellant James L. McQueen ("appellant"), an alleged incompetent, was filed in the Probate Division of the Cuyahoga County Court of Common Pleas in the matter docketed as In re: James McQueen, Case No. 2010 GRD 156289.[1] The case was assigned to the docket of the Honorable Laura J. Gallagher. On April 7, 2010, after a second applicant applied to be named appellant's guardian, the first applicant's request for appointment was withdrawn, the second applicant's request was granted for a period of thirty (30) days, and the application for guardianship was scheduled to be heard on May 5, 2010.

[1] A copy of the Case Docket for Case No. 2010 GRD 156289, current as of January 24, 2012, was attached as Exhibit B to the Respondent's Brief to Show Cause Why Counsel Should Not Be Appointed, in Compliance with Alternative Writ Issued January 20, 2012, filed in the Court of Appeals on January 25, 2012 (hereafter "Show Cause Brief").

On April 9, 2010, the Probate Court, upon its own motion, appointed an attorney to represent the indigent appellant in the cause. (Complaint for Writ of Mandamus (hereafter "Complaint") at Exhibit 1-B.)

On May 5, 2010, the second application for guardianship of the person only was heard and granted by the Probate Court. (See Show Cause Brief at Exhibit B.) There is no dispute that appellant was represented by court-appointed counsel in that hearing to determine whether a guardian should be appointed for him. Appointed counsel's fees were subsequently approved for payment at court expense. (See Show Cause Brief at Exhibit B.)

Over one (1) year later, on or about September 30, 2011, the Probate Court received a letter – prepared by the Ohio Legal Rights Service, his legal counsel in this original action in mandamus – in which appellant requested "a review of my guardianship pursuant to O.R.C. Section 2111.49" because "I no longer believe that I am in need of a guardian." (Complaint at Exhibit 1-A.) Appellant's letter stated: "I am indigent. I request that case be set for review hearing and that that [sic] counsel be appointed for me. *** " (Complaint at Exhibit 1-A.) Appellant's request for a review hearing was originally scheduled to be heard on December 5, 2011 but was thereafter reset for January 30, 2012. In a judgment entry filed on December 2, 2011, the Probate Court ordered the guardian to "arrange for an updated Statement of Expert Evaluation to be submitted to the Court prior to the rescheduled hearing." (Complaint at Exhibit 1-C.)

On December 20, 2011, appellant filed a "Motion for Appointment of Counsel, and Independent Expert Evaluation, and/or Continuance, and Instructions to Guardian," which was likewise prepared for him by the Ohio Legal Rights Service. (Complaint at Exhibit 1.) On December 27, 2011, the Probate Court denied appellant's motion to continue the January 30,

2012 guardianship review hearing, noting: "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." (Complaint at Exhibit 2.)

On January 13, 2012, appellant filed in the Court of Appeals this original action in mandamus against respondent/appellee The Court of Common Pleas of Cuyahoga County, Probate Division (hereafter "the Probate Court"), seeking to compel the Probate Court to appoint counsel to represent appellant in the guardianship review hearing and reimburse appointed counsel for counsel's reasonable attorney's fees. (Complaint at Prayer for Relief.) Five days later, appellant applied for an alternative writ of mandamus and contemporaneously moved for summary judgment. On January 20, 2012, the Court of Appeals issued an alternative writ of mandamus requiring the Probate Court by January 25, 2012 to either appoint counsel for appellant or show cause why counsel should not be appointed. On January 25, 2012, the Probate Court filed its brief to show cause why counsel should not be appointed, in compliance with the alternative writ issued on January 20, 2012. Since January 23, 2012, the Probate Court has stayed the underlying proceedings pending the final disposition of this case.

After carefully considering the parties' cross-motions for summary judgment, the Court of Appeals denied appellant's request for a writ of mandamus. See *State ex rel. McQueen v. Cuyahoga Cty. Common Pleas Court, Probate Div.*, 8th Dist. No. 97835, 2012-Ohio-1839.

The matter is now before this Court on appellant's appeal as of right.

ARGUMENT

APPELLEE'S RESPONSE TO APPELLANT'S PROPOSITION OF LAW:

Except for hearings that concern the appointment of a guardian or limited guardian for an alleged incompetent, a probate court is not under a clear legal duty to appoint counsel to represent the ward in subsequent guardianship review proceedings. R.C. 2111.02(C)(7), R.C. 2111.49(C), construed.

Ohio law recognizes that in hearings that concern the appointment of a guardian or limited guardian for an alleged incompetent, an indigent subject of the guardianship has, among other rights, the right upon request to have counsel appointed at court expense to represent the individual when the probate court considers whether to appoint a guardian and in any appeal from that decision. R.C. 2111.02(C)(7)(d)(i) and (ii). Appellant contends that the right to have counsel appointed additionally applies in subsequent guardianship review proceedings under R.C. 2111.49(C). Contrary to appellant's contention, however, the relevant Ohio statutes do not establish either any clear legal right or clear legal duty that would be enforceable in mandamus. Because the Court of Appeals correctly declined to issue such relief in this case, appellee Probate Court respectfully requests that the judgment be affirmed.

Before addressing the particular statutes at issue in this case, it is appropriate first to consider the body of law applicable to extraordinary proceedings in mandamus.

A. The creation of a legal duty enforceable in mandamus is the distinct function of the legislative branch of government.

"Mandamus is a writ, issued in the name of the state to an inferior tribunal, *** commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station." R.C. 2731.01. *See also State ex rel. Am. Legion Post 25 v. Ohio Civ. Rights Comm.*, 117 Ohio St.3d 441, 2008-Ohio-1261, 884 N.E.2d 589, ¶ 11. "The function of mandamus is to compel the performance of a present existing duty as to which there is a default."

State ex rel. Willis v. Sheboy, 6 Ohio St.3d 167, 451 N.E.2d 1200 (1983), syllabus at paragraph two.

To obtain this writ, it must be shown that (1) the relator has a clear legal right to obtain performance of an act; (2) the respondent is under a clear legal duty to perform the requested act; and (3) the relator has no plain and adequate remedy in the ordinary course of the law. See *State ex rel. MetroHealth Medical Center v. Sutula*, 110 Ohio St.3d 201, 2006-Ohio-4249, 852 N.E.2d 722, at ¶ 8. "The writ of mandamus may require an inferior tribunal to exercise its judgment, or proceed to the discharge of any of its functions, but it cannot control judicial discretion." R.C. 2731.03. Thus "mandamus will not lie to control judicial discretion, even if that discretion is abused." *State ex rel. Dreamer v. Mason*, 115 Ohio St.3d 190, 2007-Ohio-4789, 874 N.E.2d 510, ¶ 12.

Of fundamental importance to such proceedings, Ohio law establishes that "[i]n mandamus proceedings, the creation of the legal duty that a relator seeks to enforce is the distinct function of the legislative branch of government, and courts are not authorized to create the legal duty enforceable in mandamus." *State ex rel. Tindira v. Ohio Police & Fire Pension Fund*, 130 Ohio St.3d 62, 2011-Ohio-4677, 955 N.E.2d 963, ¶ 30, quoting *State ex rel. Lecklider v. School Emps. Retirement Sys.*, 104 Ohio St.3d 271, 2004-Ohio-6586, 819 N.E.2d 289, ¶ 23.[2]

Confirming the heightened legal standard necessary to obtain such extraordinary relief, the court has declared that "[r]elators in mandamus cases must prove their entitlement to the writ by clear and convincing evidence." *State ex rel. Doner v. Zody*, 130 Ohio St.3d 446, 2011-Ohio-

[2] Contrary to appellant's reliance on *State ex rel. Fattlar v. Boyle*, 83 Ohio St.3d 123, 698 N.E.2d 987 (1998), for the proposition that the Court of Appeals erred in denying the writ because of a supposed "lack of clarity" in the law and as will be discussed in greater detail within the body of the argument that follows, the record here reflects that the Court of Appeals refused the writ not because the law was unclear but rather because the law did not provide the right claimed by appellant.

6117, 958 N.E.2d 1235, syllabus at paragraph three. "Clear and convincing evidence is 'that measure or degree of proof which is more than a mere "preponderance of the evidence," but not to the extent of such certainty as is required "beyond a reasonable doubt" in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Id.* at ¶ 54, quoting *State ex rel. Husted v. Brunner*, 123 Ohio St.3d 288, 2009-Ohio-5327, 915 N.E.2d 1215, ¶ 18, and *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), syllabus at paragraph three.

Applying these standards to the circumstances of the case at bar, appellee respectfully submits that the Court of Appeals

B. Except for hearings that concern the appointment of a guardian or limited guardian for an alleged incompetent, a probate court is not under a clear legal duty to appoint counsel to represent the ward in subsequent guardianship review proceedings.

Under Ohio law, a person for whom a guardianship is sought because the person is alleged to be incompetent must first be accorded certain basic procedural protections, including but not limited to the right to have legal counsel appointed at court expense if the person is indigent. See R.C. 2111.02. The issue that this case presents is whether the statutory right to appointed legal counsel that exists at that critical stage when the guardianship is established extends beyond that point so as to confer a continuing right to have counsel appointed at court expense whenever the ward timely requests an evaluation by the Probate Court as to the continued necessity of the guardianship under R.C. 2111.49(C). Appellant insists that the relevant Ohio statutes establish that the Probate Court is under a clear legal duty to appoint counsel to represent wards for such periodic guardian review proceedings.[3] Contrary to

[3] Appellant's claim to appointed counsel is based solely on Ohio statutory law. He does not assert any claim under the federal or state constitutions.

appellant's contention, appellee Probate Court respectfully submits that Ohio statutes in question do not establish an ongoing statutory legal right to obtain – or corresponding statutory legal duty to provide – appointed legal counsel in guardianship review proceedings that concern an indigent incompetent ward. Because the Court of Appeals correctly declined to issue a writ of mandamus, appellee respectfully urges this Court to affirm the judgment of the Court of Appeals.

Because this case requires a determination as to whether the statutes specifically at issue here create a clear legal right and/or clear legal duty, it is necessary to consider and apply certain rules that are fundamental to proper statutory interpretation. In that regard, the primary rule in statutory construction is to look to the language of the law to be construed to discern its intent. *See Columbus City School Dist. Bd. of Ed. v. Wilkins*, 101 Ohio St.3d 112, 2004-Ohio-296, 802 N.E.2d 637 at ¶ 26; *Humphrys v. Winous Co.*, 165 Ohio St. 45, 133 N.E.2d 780 (1956). Intent is discerned by considering the language used in context, construing words and phrases according to the rules of grammar and common usage. *State ex rel. Myles v. Brunner*, 120 Ohio St.3d 328, 2008-Ohio-5097, 899 N.E.2d 120. Where the meaning of the law is clear and unambiguous by its very terms, there is no need for further inquiry. As the Supreme Court of Ohio has declared,

> [T]he intent of the law-makers is to be sought first of all in the language employed, and if the words be free from ambiguity and doubt, and express plainly, clearly and distinctly, the sense of the law-making body, there is no occasion to resort to other means of interpretation. The question is not what did the [law-making body] intend to enact, but what is the meaning of that which it did enact. That body should be held to mean what it has plainly expressed, and hence no room is left for construction.

Slingluff v. Weaver, 66 Ohio St. 621, 64 N.E. 574 (1902), syllabus at paragraph two.

A proper construction should give effect to the words used and should neither delete words that were used nor insert words that were not used. *See Bergman v. Monarch Constr. Co.*, 124 Ohio St.3d 534, 2010-Ohio-622, 925 N.E.2d 116 at ¶ 9 (citation and internal punctuation

omitted). After considering the apparent purpose to be accomplished, the statute should be construed as a whole in order to give effect to all of its terms and provisions so as to render them compatible with each other whenever possible. *See Humphrys v. Winous Co., supra.*; *Commonwealth Loan Co. v. Downtown Lincoln Mercury Co.* (1964), 4 Ohio App.2d 4, 33 O.O.2d 6, 211 N.E.2d 57. See, also, R.C. 1.51. With those principles in mind, it is appropriate to consider the specific statutes that are relevant to this case.

R.C. 2111.02(A) authorizes the appointment of a guardian of the person, the estate, or both of a minor or incompetent individual, providing as follows in relevant part:

> 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. ***

R.C. 2111.02(A). "Incompetent" means

> any person who is so mentally impaired as a result of a mental or physical illness or disability, or mental retardation, or as a result of chronic substance abuse, that the person is incapable of taking proper care of the person's self or property or fails to provide for the person's family or other persons for whom the person is charged by law to provide, or any person confined to a correctional institution within this state.

R.C. 2111.01(D).

Under Ohio law, the probate court is considered the "superior guardian" of wards who are subject to the court's jurisdiction. R.C. 2111.50(A)(1) declares: "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." And unlike other court proceedings, guardianship proceedings

generally "are not adversarial but rather are in rem proceedings involving only the probate court and the ward." *In re Guardianship of Spangler*, 126 Ohio St.3d 339, 2010-Ohio-2471, 933 N.E.2d 1067, ¶ 53. *See also In re Guardianship of Santrucek*, 120 Ohio St.3d 67, 2008-Ohio-4915, 896 N.E.2d 683, ¶ 5. In *In re Guardianship of Spangler*, *supra*, the court explained:

> Because the probate court is the superior guardian, the appointed guardian is simply an officer of the court subject to the court's control, direction, and supervision. The guardian, therefore, has no personal interest in his or her appointment or removal.

In re Guardianship of Spangler, *supra* at ¶ 53 (citation omitted).

Nevertheless acknowledging the need for certain procedural protections when considering whether to appoint a guardian, R.C. 2111.02(C) provides as follows:

> **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 the 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. (Emphasis added.)

R.C. 2111.02(C).

Thus by its express terms, R.C. 2111.02(C)(7)(d) provides that an alleged incompetent for whom a guardianship is sought and who is indigent is entitled to have counsel appointed at court expense to represent the prospective ward (1) at the probate court hearing held to determine whether to appoint a guardian and (2) on appeal if the decision to appoint a guardian is appealed.

Following the appointment of a guardian, the Ohio Revised Code separately provides for periodic probate court reviews of the guardianship. In particular, R.C. 2111.49(A)(1) requires the guardian of an incompetent person to file a guardian's report with the court two (2) 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 guardian's report must include, among other things, a statement by a qualified professional who has evaluated or

examined the ward within the preceding three (3) months as to the need for continuing the guardianship. See R.C. 2111.49(A)(1)(i). R.C. 2111.49(A)(2) requires the probate court to review the guardian's report filed pursuant to R.C. 2111.49(A)(1) to determine if a continued necessity for the guardianship exists.

R.C. 2111.49(C) provides for periodic hearings to review the status of the guardianship, stating as follows:

> 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.

R.C. 2111.49(C).

It is first instructive to note that R.C. 2111.49 was enacted within Sub.S.B. No. 46, 1989 Ohio Laws 44, effective January 1, 1990. That same bill amended existing R.C. 2111.02 to, among other things, amend and assign the then-existing text of R.C. 2111.02 into new subsection (A) and to add new subsections (B) and (C) to R.C. 2111.02. Because R.C. 2111.02 and R.C. 2111.49 generally concern the same subject matter and were respectively amended and enacted contemporaneously, it is appropriate to construe both sections *in pari materia*. *See Kimble Clay & Limestone v. McAvoy*, 59 Ohio St.2d 94, 97, 391 N.E.2d 1030 (1979). As the Supreme Court of Ohio has said,

> The rule that statutes *in pari materia* should be construed together applies with peculiar force to statutes that are contemporaneous or nearly contemporaneous; for in such case, we have the same minds acting upon the one subject, and it is not to be presumed that the same body of men would pass conflicting and incongruous acts. The presumption is that they had in mind the whole subject under consideration; that while the one general subject is touched in several separate acts, yet the legislative intent was that of a harmonious whole. Hence, statutes passed at or nearly the same time should be construed together in determining their effect. Statutes relating to the same subject and passed at the same session of the legislature are to be construed together as one act.

Evans v. Lawyer, 123 Ohio St. 62, 68, 173 N.E. 735 (1930).

Reviewing these statutes in proper context reveals that until the 1990 amendments effected by Sub.S.B. No. 46, the Ohio Revised Code did not provide for ***any*** hearing prior to the appointment of a guardian or limited guardian. Then newly-enacted R.C. 2111.02(C) expressly directed the probate court to conduct a hearing on the matter of the appointment "[p]rior to the appointment of a guardian or limited guardian under division (A) or (B)(1) of" R.C. 2111.02. R.C. 2111.02(C)(1) through (7) prescribed the statutory due-process protections to be afforded to the person for whom the appointment of a guardian was sought.

As is most pertinent here, the Ohio General Assembly unambiguously stated in R.C. 2111.02(C)(7) that "[i]f the hearing concerns the appointment of a guardian or limited guardian for an alleged incompetent, the alleged incompetent has all of" the rights set forth thereafter in R.C. 2111.02(C)(7), including, if indigent and upon request, the right to have counsel appointed at court expense to represent the individual at the guardian-appointment hearing and on appeal if the decision to appoint a guardian is appealed. See R.C. 2111.02(C)(7)(d)(i) and (ii). By the precise terms used in the statute, the right to appointed counsel is not a continuing right extended in perpetuity for all subsequent guardianship court proceedings but rather arises "[i]f the hearing concerns the appointment of a guardian or limited guardian for an alleged incompetent." Had the General Assembly intended to confer such a continuing right for all guardianship proceedings

following the appointment of a guardian or limited guardian, there would have been no reason for the General Assembly to have explicitly qualified that right by prefacing it with the introductory clause, "[i]f the hearing concerns the appointment of a guardian or limited guardian for an alleged incompetent."

By contrast, nothing in the contemporaneously-enacted R.C. 2111.49 established a right to appointed counsel for the periodic reviews of the guardianship following the initial appointment. Indeed, it is instructive to note that while the General Assembly specifically detailed in R.C. 2111.49(A)(1)(a) through (i) the information that must be contained in the guardian's report, it did not expressly confer any right to appointed counsel in such proceedings.

To be sure, R.C. 2111.49(C) does provide that the guardianship-review hearing "shall be held in accordance with section 2111.02 of the Revised Code to evaluate the continued necessity of the guardianship." But a careful reading of those statutes reveals that certain provisions are expressly applicable "[i]f the hearing concerns the appointment of a guardian or limited guardian for an alleged incompetent." See R.C. 2111.02(C)(3) (burden of proving incompetency is by clear and convincing evidence); R.C. 2111.02(C)(7) (conferring certain procedural rights). By contrast, other provisions are not so limited to hearings that concern the appointment of a guardian or limited guardian for an alleged incompetent and thus may be applicable to hearings that do not concern the appointment of a guardian or limited guardian for an alleged incompetent. See R.C. 2111.02(C)(1) (requiring guardian's personal appearance and sworn testimony); R.C. 2111.02(C)(2) (requiring application of Civil Rule 53 to hearings conducted by a magistrate); R.C. 2111.02(C)(4) (requiring a recording or record of the hearing upon request); R.C. 2111.02(C)(5) (requiring evidence of a less restrictive alternative to guardianship); R.C. 2111.02(C)(6) (authorizing the court to deny guardianship based on the existence of a less

restrictive alternative). Thus by a textual analysis of these provisions, some provisions may have more general application while others by their very terms are applicable only "[i]f the hearing concerns the appointment of a guardian or limited guardian for an alleged incompetent." See R.C. 2111.02(C)(3); R.C. 2111.02(C)(7).[4]

In short, R.C. 2111.02(C) expressly provides that hearings "[p]rior to the appointment of a guardian or limited guardian" shall be conducted in accordance with that subdivision. In doing so, it expressly qualifies certain rights to those hearings that concern "the appointment of a guardian or limited guardian for an alleged incompetent." According to the rules of statutory interpretation, the General Assembly's declaration that certain rights apply "[i]f the hearing concerns the appointment of a guardian or limited guardian for an alleged incompetent" presumably was intended to qualify the right otherwise conferred. The fact that certain procedural rights are applicable when considering whether to appoint a guardian does not necessarily mean that they carry over into subsequent guardianship review proceedings.

Indeed, that conclusion is separately confirmed by an examination of R.C. 2111.49(C) itself, as the Court of Appeals recognized. See *State ex rel. McQueen v. Cuyahoga Cty. Common Pleas Court, Probate Div.*, 8th Dist. No. 97835, 2012-Ohio-1839 at ¶ 10. In particular, R.C. 2111.49(C) states 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." But R.C. 2111.02(C)(3) already provides 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." If R.C. 2111.49(C) requires that guardianship

[4] And as the Court of Appeals itself observed, the ward is no longer merely "an alleged incompetent" once a guardian has been appointed. See *State ex rel. McQueen v. Cuyahoga Cty. Common Pleas Court, Probate Div.*, 8th Dist. No. 97835, 2012-Ohio-1839 at ¶ 9.

review hearings be held "in accordance with" all of the provisions contained in R.C. 2111.02(C), then there would have been no reason for the General Assembly to have expressly and indeed duplicatively required in R.C. 2111.49(C) that the guardian prove the ward's incompetence by clear and convincing evidence. That the General Assembly did provide – in contemporaneously-enacted statutes and amendments – that proof of incompetency be shown by clear and convincing evidence "[i]f the hearing concerns the appointment of a guardian or limited guardian for an alleged incompetent," R.C. 2111.02(C)(3), *and* if the ward subsequently "alleges competence," R.C. 2111.49(C), manifests that the General Assembly understood that a right applicable "[i]f the hearing concerns the appointment of a guardian or limited guardian for an alleged incompetent" was limited to that proceeding and knew how to provide a comparable right to a subsequent proceeding, simply by saying so.

Appellant says that the General Assembly had to repeat the burden of proof in R.C. 2111.49(C) because it did not specify in R.C. 2111.02(C)(3) *who* had the burden of proof. See Appellant's Merit Brief at pp. 10-12. That argument is unpersuasive, however, because the law required proof of the individual's incompetency by clear and convincing evidence even before R.C. 2111.02 expressly required it. See *In re Guardianship of Corless*, 2 Ohio App.3d 92, 96, 440 N.E.2d 1203 (12th Dist.1981). The law did not place the burden of proof on the subject of the guardianship.

In short, in order to accept appellant's proposition that an indigent ward in a guardianship review hearing conducted under R.C. 2111.49(C) has the right to have counsel appointed, one would have to omit from the text of R.C. 2111.02(C)(7) the qualifying language "[i]f the hearing concerns the appointment of a guardian or limited guardian for an alleged incompetent," so that the rights conferred there would now apply without regard to whether the hearing concerns the

appointment of a guardian or limited guardian for an alleged incompetent. And to reach that conclusion just because R.C. 2111.49(C) provides for a hearing "held in accordance with" R.C. 2111.02 would require one to additionally ignore as mere surplusage the fact that incompetency in the review hearing must be proved by clear and convincing evidence, R.C. 2111.49(C), since R.C. 2111.02(C) already required such proof. Contrary to appellant's contentions, however, the text of the statutes themselves make clear that the General Assembly conferred certain rights and procedures, qualifying some of them depending upon whether the hearing concerned the initial appointment of a guardian. Because the Revised Code provides explicitly under R.C. 2111.02(C)(7)(d)(i) and (ii) for the right to appointed counsel at the hearing concerning the appointment of a guardian and any appeal from the decision to appoint a guardian, there is no clear legal right under Ohio law to have counsel appointed thereafter, nor is there a corresponding clear legal duty to do so under Ohio law.

Moreover, while the instant case concerns only the issue of whether there is a continuing right to have legal counsel appointed in guardianship review hearing under R.C. 2111.49, there is no reason to think that appellant's argument would be limited to that claim. Indeed, R.C. 2111.02(C)(7)(d)(i) provides not only for the right to appointed counsel but also for the right to have "an independent expert evaluator appointed at court expense." Accepting appellant's argument, it would presumably follow that there exists a comparable continuing duty to appoint an independent expert evaluator to assist the ward whenever a review is sought under R.C. 2111.49(C). Only by ignoring the statutory limitations expressly set forth in the relevant statutes can appellant seek by judicial decree to expand without qualification the balanced rights and procedures devised by the General Assembly.

Appellant's argument is fundamentally inconsistent with longstanding principles of statutory interpretation. As indicated previously, a proper construction should give effect to the words used and can neither delete words that were used nor insert words that were not used. *See Bergman v. Monarch Constr. Co.*, 124 Ohio St.3d 534, 2010-Ohio-622, 925 N.E.2d 116 at ¶ 9 (citation and internal punctuation omitted). The Ohio General Assembly is presumed to say what it means and mean what it says. *See State v. Virasayachack*, 138 Ohio App.3d 570, 574, 741 N.E.2d 943 (8th Dist.2000) ("Ordinarily, we must presume the legislature means what it says; we cannot amend statutes to provide what we consider a more logical result.")

In this instance, the legislature identified the critical stage of the proceedings – the decision whether to appoint a guardian in the first place – and established a panoply of due process protections for that proceeding, including the right to appointed counsel for the guardian-appointment hearing and any appeal therefrom. That does not mean that all of those due process protections extend indefinitely beyond that critical stage of the proceedings. That applies with special force to the appointment of counsel inasmuch as there is no generalized right to have counsel appointed in private civil actions. *See State ex rel. Jenkins v. Stern*, 33 Ohio St.3d 108, 515 N.E.2d 928 (1987).[5]

For his part, appellant criticizes the Court of Appeals for supposedly having failed to grant the writ "due to an alleged lack of clarity of the applicable provisions." See appellant's Merit Brief at pp. 5-6. Appellant's criticism is unfair, for the Court of Appeals carefully

[5] Indeed, even indigent criminal defendants do not have a 6th Amendment right to appointed counsel beyond the first appeal as of right. *See Ross v. Moffitt*, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974) (no 6th Amendment right to appointed counsel for discretionary appeal); *Pennsylvania v. Finley*, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987) (no 6th Amendment right to appointed counsel in post-conviction collateral attack).

examined the statutes in question before determining that those statutes did not confer a right to have counsel appointed subsequent to the initial guardianship appointment proceedings.

Appellant's reliance on *State ex rel. Asberry v. Payne*, 82 Ohio St.3d 44, 693 N.E.2d 794 (1998), is misplaced. In that case, the court held that R.C. 2151.352, as it was then written, provided indigent children, parents, custodians, or other persons *in loco parentis* with an unqualified right to appointed counsel in all juvenile court proceedings. R.C. 2151.352 was subsequently amended to except civil matters in which the juvenile court was exercising jurisdiction pursuant to certain provisions of R.C. 2151.23. See Am.Sub.H.B. 66. Consequently, the *Asberry* decision has been superseded by statute. *See In re D.J.M.*, 11th Dist. No. 2011-L-022, 2011-Ohio-6836, ¶ 35. Analogously, R.C. 2111.02(C)(7)(d) does not confer an unqualified right to appointed counsel in all guardianship proceedings but rather by its terms specifies that the right attaches only "[i]f the hearing concerns the appointment of a guardian or limited guardian for an alleged incompetent ***." To the extent that the General Assembly established the outer parameters of the right to appointed counsel in such proceedings, relator's attempt to extend that right beyond those limits is fundamentally inconsistent with the statutory language.

In *State ex rel. Cody v. Toner*, 8 Ohio St.3d 22, 456 N.E.2d 813 (1983), the court held that the denial of court-appointed counsel for an indigent paternity defendant who faces the State as an adversary, when the complainant mother and her child are recipients of public assistance, violates the due process guarantees of the Ohio and United States Constitutions. *Id.* at syllabus. That case is inapposite because, as indicated previously, guardianship proceedings are not adversarial. See *In re Guardianship of Spangler*, 126 Ohio St.3d 339, 2010-Ohio-2471, 933 N.E.2d 1067, ¶ 53; *In re Guardianship of Santrucek*, 120 Ohio St.3d 67, 2008-Ohio-4915, 896 N.E.2d 683, ¶ 5.

In *State ex rel. Butler v. Demis*, 66 Ohio St.2d 123, 420 N.E.2d 116 (1981), there was no dispute that the indigent parents were entitled to have counsel appointed to represent them in their juvenile court proceedings to terminate their parental rights termination proceedings, though they were not entitled to have the counsel they selected. Those adversarial proceedings are again readily distinguishable from non-adversarial guardianship proceedings, rendering that case inapposite.

In *In re Fisher*, 39 Ohio St.2d 71, 313 N.E.2d 851 (1974), the court held that in an involuntary civil commitment proceeding undertaken pursuant to R.C. 5122.15, the Due Process Clause of the Fourteenth Amendment to the United States Constitution required, among other things, to have counsel appointed for them at public expense if they were unable to afford counsel. *Id.*, syllabus at paragraph two. That case did not concern guardianship proceedings under R.C. 2111.02 and appellant has not asserted any claim here under the Due Process Clause, so that case is again inapposite.

In short, the neither the relevant Ohio statutes nor Ohio decisional law supports appellant's contention that he is entitled to have counsel appointed at court expense to represent him during the periodic guardianship review hearings conducted pursuant to R.C. 2111.49(C). To the contrary, R.C. 2111.02(C)(7)(d) provides that an indigent prospective ward is entitled to have counsel appointed at court expense (1) at the R.C. 2111.02(C) hearing held to determine whether to appoint a guardian and (2) on appeal if the decision to appoint a guardian is appealed. See R.C. 2111.02(C)(7)(d)(i) and (ii). No such right attaches to the R.C. 2111.49(C) guardianship *review* hearing at issue in this case.

With respect to the Amici Curiae who filed a brief in support of appellant's case, several points should be noted. To begin, their reliance on various provisions of the Uniform Probate Code ("UPC") is unpersuasive for several reasons.

First, they acknowledge that "Ohio has not adopted the UPC." See Merit Brief of Amici Curiae at p. 11. Second, § 5-305(b) of the UPC provides two (2) alternative formulations that include a provision for appointed counsel to represent the prospective ward in connection with "a petition to establish a guardianship," § 5-305(a). That provision of appointed counsel when considering whether to "establish a guardianship" is consistent with Ohio's provision of the right to appointed counsel "[i]f the hearing concern the appointment of a guardian or limited guardian for an alleged incompetent," R.C. 2111.02(C)(7). Third, § 5-305 of the UPC does not provide for a continuing right to appointed counsel in subsequent guardianship proceedings, and § 5-318(c) of the UPC provides only the "before terminating a guardianship," the court shall follow the same procedures to safeguard the ward as apply to a petition for guardianship. Those UPC provisions do not, however, propose the provision of appointed counsel for guardianship proceedings that do not concern the establishment or the termination of the guardianship.

The cases cited by the Amici are likewise inapposite.

In *In re Guardianship of Williams*, 159 N.H. 318, 986 A.2d 559 (2009), the court merely observed that a ward has the right to counsel in guardianship termination proceedings under New Hampshire law. Id. at 329, 986 A.2d 559. The court did not suggest some ongoing right to appointed counsel under New Hampshire law or otherwise.

In *Greer v. Professional Fiduciary, Inc.*, 792 N.W.2d 120 (Min.App. 2011), the court observed that Minnesota's conservatorship and guardianship statutes guarantee incapacitated persons the right to counsel, *id.* at 128, but even Minnesota's guardianship statute provides for

the right to appointed counsel "for the initial proceeding held *** if neither the proposed ward nor others provide counsel ***." Minn.Stat. § 524.5-304(b). That case does not recognize continuing right to appointed counsel under Minnesota law or otherwise.

The Amici additionally advance several public policy arguments in support of the claimed right to have counsel appointed for guardianship review hearings under R.C. 2111.49(C). See Merit Brief of Amici Curiae at pp. 15-27. But regardless of whether there are good or bad policy reasons to provide for a right to appointed counsel for indigent wards when the guardianship comes up for review under R.C. 2111.49(C), creating any such legal duty "is the distinct function of the legislative branch of government, and courts are not authorized to create the legal duty enforceable in mandamus." *State ex rel. Tindira v. Ohio Police & Fire Pension Fund*, 130 Ohio St.3d 62, 2011-Ohio-4677, 955 N.E.2d 963, ¶ 30, quoting *State ex rel. Lecklider v. School Emps. Retirement Sys.*, 104 Ohio St.3d 271, 2004-Ohio-6586, 819 N.E.2d 289, ¶ 23.

The Amici finally contend that requiring the probate court to provide appointed counsel in guardianship review hearings would not be "unduly burdensome" because the Cuyahoga County Probate Court did not exhaust its indigent guardianship fund under R.C. 2111.51 according to statistics covering the period of time from 2006 to 2010. See Merit Brief of Amici Curiae at pp. 27-30. They speculate that because there were surplus funds during the years 2006 through 2008, "there should be more than enough funds to cover court-appointed counsel for indigent parties." See Merit Brief of Amici Curiae at p. 28. That contention should be rejected for several reasons.

First, the right that appellant seeks to establish here plainly would not be limited to Cuyahoga County and its indigent guardianship fund. If the Ohio Revised Code provides for the

right to appointed counsel alleged here, then that rule would plainly affect every probate court in every county in Ohio. That would be the practical implication if a writ of mandamus were to issue here.

Second, as speculative as the Amici's argument may be, their statistics may actually say more than they intended to say. In particular, while noting the quantity of new guardianships for incompetent individuals filed in any given year, the probate court must conduct hearings on those applications pursuant to R.C. 2111.02. In the following hear, the probate court will not only have to conduct hearings on the new case filings pursuant to R.C. 2111.02 but will also have to conduct review hearings for previous year case filings pursuant to R.C. 2111.49. And in the following year, the court will again conduct hearings on new case filings under R.C. 2111.02 as well as all preceding years by case reviews under R.C. 2111.49. So while the amount of funds expended in any given year by itself may seem small, the financial burden would necessarily grow exponentially.

In a case that seeks to divine a clear legal duty from statutes that do not provide for such a duty, it is well to recall that extraordinary relief in mandamus must be rendered judiciously. In *State ex rel. Liberty Mills, Inc. v. Locker* (1986), 22 Ohio St.3d 102, 103, 488 N.E.2d 883, the court said: "Mandamus is an extraordinary writ that must be granted with caution." *Id.* at 103, 488 N.E.2d 883. And in *State ex rel. Tarpy v. Board of Ed. of Washington Court House* (1949), 151 Ohio St. 81, 84 N.E.2d 276, the court confirmed that mandamus should not issue if the grounds for relief are doubtful. *Id.* at syllabus.

Because Ohio law does not establish either that appellant has a clear legal right to have counsel appointed at court expense for his guardianship review hearing under R.C. 2111.49(C) or that the appellee Probate Court is under a clear legal duty to appoint counsel for such

proceedings, the Court of Appeals correctly declined to issue a writ of mandamus compelling the appointment of counsel as a matter of law. Appellee accordingly requests that this court affirm the judgment of the Court of Appeals.

CONCLUSION

Appellee the Court of Common Pleas of Cuyahoga County, Probate Division, respectfully requests that the judgment of the Court of Appeals be affirmed.

Respectfully submitted,

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PROOF OF SERVICE

A true copy of the foregoing Merit Brief of Appellee The Court of Common Pleas of Cuyahoga County, Probate Division was served this 1ST day of October 2012 by regular U.S. Mail, postage prepaid, upon:

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APPENDIX

C
Baldwin's Ohio Revised Code Annotated Currentness
Title XXI. Courts--Probate--Juvenile (Refs & Annos)
Chapter 2111. Guardians; Conservatorships (Refs & Annos)
General Provisions
→→ 2111.01 Definitions

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

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

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

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

(D) "Incompetent" means any person who is so mentally impaired as a result of a mental or physical illness or disability, or mental retardation, or as a result of chronic substance abuse, that the person is incapable of taking proper care of the person's self or property or fails to provide for the person's family or other persons for whom the person is charged by law to provide, or any person confined to a correctional institution within this state.

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

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

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

CREDIT(S)

(2009 S 79, eff. 10-6-09; 1996 H 288, eff. 1-14-97; 1994 H 571, eff. 10-6-94; 1989 S 46, eff. 1-1-90; 1986 S 322; 1980 H 900; 1978 S 415; 1976 H 244; 1971 H 290; 1969 H 688; 129 v 1448; 1953 H 1; GC 10507-1)

Current through all 2011 laws and statewide issues and 2012 Files 70 through 143 of the 129th GA (2011-2012).

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Baldwin's Ohio Revised Code Annotated Currentness
Title XXI. Courts--Probate--Juvenile (Refs & Annos)
Chapter 2111. Guardians; Conservatorships (Refs & Annos)
General Provisions
→→ 2111.02 Appointment of guardian

(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.

CREDIT(S)

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

Current through all 2011 laws and statewide issues and 2012 Files 70 through 143 of the 129th GA (2011-2012).

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C
Baldwin's Ohio Revised Code Annotated Currentness
Title XXI. Courts--Probate--Juvenile (Refs & Annos)
Chapter 2111. Guardians; Conservatorships (Refs & Annos)
Miscellaneous Provisions
→→ 2111.49 Guardian's report; court intervention; hearing

(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.

CREDIT(S)

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

Current through all 2011 laws and statewide issues and 2012 Files 70 through 143 of the 129th GA (2011-2012).

END OF DOCUMENT

C

Baldwin's Ohio Revised Code Annotated Currentness
Title XXI. Courts--Probate--Juvenile (Refs & Annos)
Chapter 2111. Guardians; Conservatorships (Refs & Annos)
Miscellaneous Provisions
→→ 2111.50 Probate court powers over guardianship

(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.

CREDIT(S)

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

C
Baldwin's Ohio Revised Code Annotated Currentness
Title XXI. Courts--Probate--Juvenile (Refs & Annos)
Chapter 2111. Guardians; Conservatorships (Refs & Annos)
Miscellaneous Provisions
→→ 2111.51 Indigent guardianship fund

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

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

CREDIT(S)

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

Current through all 2011 laws and statewide issues and 2012 Files 70 through 143 of the 129th GA (2011-2012).

END OF DOCUMENT

C

Uniform Laws Annotated Currentness

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

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

Part 3. Guardianship of Incapacitated Person

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

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

Alternative A

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

(1) requested by the respondent;

(2) recommended by the [visitor]; or

(3) the court determines that the respondent needs representation.

Alternative B

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

End of Alternatives

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

(1) explain to the respondent the substance of the petition, the nature, purpose, and effect of the proceeding, the respondent's rights at the hearing, and the general powers and duties of a guardian;

(2) determine the respondent's views about the proposed guardian, the proposed guardian's powers and duties, and the scope and duration of the proposed guardianship;

(3) inform the respondent of the right to employ and consult with a lawyer at the respondent's own expense and the right to request a court-appointed lawyer; and

(4) inform the respondent that all costs and expenses of the proceeding, including respondent's attorney's fees, will be paid from the respondent's estate.

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

(1) interview the petitioner and the proposed guardian;

(2) visit the respondent's present dwelling and any dwelling in which the respondent will live if the appointment is made;

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

(4) make any other investigation the court directs.

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

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

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

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

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

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

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

(7) any other matters the court directs.

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

COMMENT

2011 Electronic Pocket Part Update.

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

Alternative B is derived from UGPPA (1982) Section 2-203 (UPC Section 5-303 (1982)). It is expected that in states enacting Alternative A of subsection (b), counsel will be appointed in virtually all of the cases. Alternative B was favored by the A.B.A. Commission on Legal Problems of the Elderly, which attached great significance to expressly making appointment of counsel "mandatory." Therefore, for states which wish to provide for "mandatory appointment" of counsel, Alternative B should be enacted.
In Alternative A for subsection (b), then, appointment of counsel for an unrepresented respondent is mandated when requested by the respondent, when recommended by the visitor, or when the court determines the respondent needs representation. This requirement is in accord with the National Probate Court Standards. *National Probate Court Standards*, Standard 3.3.5 "Appointment of Counsel" (1993), which provides:

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

(1) requested by an unrepresented respondent;

(2) recommended by a court visitor;

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

(4) otherwise required by law.

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

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

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

tee that counsel for respondent be appointed in all but the most clear cases, such as when the respondent is clearly incapacitated.

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

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

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

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

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

Subsection (c)(4) puts the respondent on notice that if the respondent has an estate, costs and expenses are paid from the estate, including attorney's fees and visitor's fees. If there is an estate, those entitled to compensation would be paid from the estate. If there is no estate, those entitled to compensation will ordinarily be compensated by whatever process the enacting state has for indigent proceedings, such as from the county general fund, unless the enacting jurisdiction has made other arrangements. If a conservatorship exists, payment is made pursuant to the procedures provided in Section 5-417, otherwise the guardian must file a fee petition. See Section 5-316.

The visitor must talk with the physician or other person who is known to have assessed, treated or advised about the respondent's relevant physical or mental condition. This information is crucial to the court in making a determination of whether to grant the petition, since a professional evaluation will no longer be required in every

case. See Section 5-306. If the doctor refuses to talk to the visitor, the visitor may need to seek from the appointing court an order authorizing the release of the information.
The visitor's report must be in writing and include a list of recommendations or statements. For states enacting Alternative A to subsection (b), if the visitor does not recommend that a lawyer be appointed, the visitor should include in the report the reasons why a lawyer should not be appointed. States enacting this article should consider developing a checklist for the items enumerated in subsection (e).

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

NOTES OF DECISIONS

Best interests of ward 1

1. Best interests of ward

Concern over the appearance of undue influence can establish "good cause" justifying the appointment of a neutral and detached person as guardian and conservator of an incapacitated person over others with higher priority who have a financial interest in the protected person's assets; appointing a neutral and detached person can alleviate the possibility of undue influence on the incapacitated person and can alleviate the possibility of an appearance of undue influence, to the benefit of all concerned. In re Guardianship and Conservatorship of Thomas, N.D.2006, 723 N.W.2d 384. Mental Health ⇐ 116.1

"Good cause" existed to appoint incapacitated woman's nephew as her guardian and conservator, rather than woman's caretaker, as there was no actual or potential conflict of interest between nephew's duties as guardian and conservator, given that any financial interest he had in woman's estate was virtually zero, whereas caretaker had financial interest in woman's assets, which gave rise to possibility that he would exercise undue influence on her. In re Guardianship and Conservatorship of Thomas, N.D.2006, 723 N.W.2d 384. Mental Health ⇐ 118

Sufficient evidence supported county court's finding that ward's best interests would be served by removing mother as guardian and appointing uncle as successor guardian; although mother alleged that uncle did not have statutory priority over mother or ward's brother, and that Department failed to prove mother was unfit to serve as guardian, evidence showed that mother had difficulty properly caring for ward and tended to take actions that were not in ward's best interests, and evidence did not show that ward's brother had taken any action to be appointed successor guardian. In re Guardianship of Gilmore, Neb.App.2003, 662 N.W.2d 221. Mental Health ⇐ 175

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

END OF DOCUMENT

Uniform Laws Annotated Currentness
Uniform Probate Code (1969) (Last Amended or Revised in 2010) (Refs & Annos)
Article V. Uniform Guardianship and Protective Proceedings Act (1997/1998) (Refs & Annos)
Part 3. Guardianship of Incapacitated Person

→→ § 5-318. Termination or Modification of Guardianship.

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

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

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

COMMENT

2011 Electronic Pocket Part Update.

If the ward's condition changes so that the guardian believes that the ward is capable of exercising some or all of the rights that were previously removed, Section 5-314(b)(5) requires the guardian to immediately notify the court and not wait until the due date of the next report to be filed under Section 5-317.
Subsection (b) can be used by the court not only to terminate a guardianship but also to remove powers or add powers granted to the guardian.

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

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

ward, the ward's personal values and expressed desires should be considered.

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

Unlike the 1982 UGPPA, this section does not limit the frequency with which petitions for termination may be made to the court, preferring instead to leave that issue up to general statutes and rules addressing court management in general. Compare UPC Section 5-311(b) (1982).
Termination of the guardianship does not relieve the guardian of liability for prior acts. See Section 5-112.
Unif. Probate Code § 5-318, ULA PROB CODE § 5-318

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