Statement of the Case

This is an appeal from the Geauga County Probate Court. The matter was originally filed as an Emergency Motion to Remove a Guardian by Geauga County Board of Mental Retardation and Developmental Disabilities, which was not a party to the original guardianship. T.d. 20. The Emergency Motion was granted on an ex parte basis and set for a subsequent hearing. Eventually, after a protracted hearing on the matter that occurred on April 24, 2007, T.d. 81, June 13 and 14, 2007, T.d. 82, and July 24, 2007, T.d. 83, with an in camera interview of the ward on August 9, 2007, T.d. 84, the Motion to Remove the Guardians was in fact granted. T.d. 69. The parents, who were the original guardians, were removed and Advocacy Protective Services Incorporated ("APSI") was appointed as the guardian of John Spangler. T.d. 69. A timely appeal was filed by the Spanglers. T.d. 71. An appeal was also filed by John Spangler, which was allowed and the two cases were combined. T.d. 73This appeal raises issues pertaining to the emergency order as well as the final order.

Statement of Facts

This case involves a young man, named John Spangler, who is the ward in this case, and who has a very complex series of disorders, which have heightened the complexity of this case beyond the typical matters involved in a more traditional guardianship.

The guardianship originally commenced in June, 2006. At that point, the evidence was that John suffered from an intermittent explosive disorder (T. p. June 15, 2006, p. 7), as well as autism, mental retardation and mitochondrial disease. (Id. p. 16).

Just prior to the application for the appointment of an emergency guardian, John had been placed in the Warrensville Developmental Center due to a serious incident at home. Id. p. 6. The serious incident involved a series of explosive outbursts, which included throwing things out

of his window, breaking a windshield, poking holes in walls, urinating in the house, and feces all over the upstairs carpets. Id. p. 8. As a result of this, John was placed in Warrensville on a Wednesday afternoon.

Unfortunately, on the following Sunday morning, the parents received a phone call from the nurse at Warrensville in which John had been victimized by his roommate. Specifically, the roommate had grabbed John's private parts. Id. p. 8. Understandably, John had an outburst. Id. p. 9. The grabbing of John's private parts was compounded by the fact that John had a hydrocele, which is an accumulation of watery liquid in the sac around the testicles. The family went to the Center and learned that John had been pushed onto his bed and then grabbed. Id. p. 9. Mrs. Spangler learned the next day that the roommate was pre-disposed to sexual touching and inappropriate touching of other people, but the family had not been informed of this. Id. p. 9. There was a subsequent incident, where John was grabbed by his arm and held under a cold shower. Id. p. 10. As a result, John signed himself out of Warrensville (at this point, no guardian had been appointed) and the family had him come back into their home after a one night stay at a hotel, with two care providers, Michelle and David Devlin, who had been hired to supervise John. Id. p. 12.

The guardianship was being sought on an emergency basis because the Center was interested in interviewing John about the incident. Mrs. Spangler wanted to be present as his guardian due to concerns that she had about post-traumatic stress issues. Id. p. 18.

The Court, through Judge Burt, granted the emergency guardianship for 72 hours, and then schedule this for a hearing before Judge Henry. Id. pp. 20-22. A second hearing was scheduled for June 19, 2006.

At the second hearing, Suzanne Joseph, George Cervenka and Carl Vondrasek from Metzenbaum, which is also the Geauga County Board of Mental Retardation and Developmental Disability, all appeared. Other than the testimony of Mrs. Spangler, the only other testimony was from Carl Vondrasek. Mrs. Spangler explained that John was at the time of the hearing living with the Devlins under a rental agreement arrangement and that she was seeking additional services, such as food stamps and Medicaid. T.p. July 18, 2006 hearing, p.8-11. Carl Vondrasek testified about Metzenbaum's involvement with the certification process to provide care services and the Individual Service Plan process. Id. p. 12. When asked if Metzenbaum had any concerns about the prior arrangements for John, Mr. Vondrasek answered simply, "No.". Id. p. 13. The other individuals did not testify at all at this hearing. The Court granted the appointment of Joseph and Gabrielle Spangler on July 18, 2006. T.d. 18, 19.

The next thing that happened in the case was the filing of the motion to remove the guardian, filed on October 25, 2006. T.d. 20. This motion was based on an affidavit of Tami Setlock, who indicated that she was the supervisor of the service and support administrators and that her responsibilities were to make sure that clients are receiving the appropriate services. She went on to opine in her affidavit that the ward, John, was receiving appropriate services with his current providers. She went on to note that Mrs. Spangler had indicated that she intends to move John and that such a move is not in John's best interests. There is no mention of whether the services would continue (which in fact they did) or whether there was an issue regarding John's services if he were to be moved. The affidavit also verifies the body of the motion itself, which states that there was an incident involving concerns voiced by Mrs. Spangler regarding whether the providers were following the rules for John. Specifically, she was concerned about the bathroom he used, the food he was eating (which, as will be shown later, is important because of

his mitochondrial disease), and that he was being left alone in spite of a requirement in his service plan that he be under 24 hour supervision. In retaliation, the Devlins had made allegations that Mr. Spangler had some marijuana in his truck. This occurred, according to the motion, in a meeting on October 23, 2006. Mrs. Spangler followed up on this on October 24 and spoke to Tami Setlock, the affiant, and was upset about the lack of follow through regarding her complaints. That same day, the Devlins met with Tami Setlock and Carl Vondrasek and claimed they were being set up by the Spanglers.

On the evening of October 24, Mrs. Spangler went to her ward's home, according to the affidavit, and was ultimately arrested. (These charges were subsequently dismissed.) Based on that, MRDD sought the removal of the guardians and the appointment of a new guardian. No where were there any allegations that the guardians were failing to provide services to their ward.

Based on these limited allegations, and without any hearing, the Court granted the motion and removed the guardians, appointed Advocacy Protective Services Incorporated, (hereafter "APSI") as a temporary guardian and set the matter for further hearing on October 31, 2006. Docket 32.

At the temporary hearing, the Spanglers agreed to let APSI be the temporary guardian while the motion for removal was pending and scheduled the matter for final pretrial on April 24, 2007. T.d. 32. The Spanglers were to complete psychiatric assessments and drug and alcohol assessments in the interim.

In January, 2007, there were a series of incidents that started to occur with John, and a Emergency Motion to Remove the Temporary Guardian and Re-Appoint Joseph Spangler as Guardian and for an Emergency Review was filed on January 24, 2007. T.d. 34. The affidavit in support of the motion set forth that the Spanglers had agreed to allow APSI to be appointed as

temporary guardian in order to allow a neutral party to work with John and to alleviate the stress for John. T.d. 34, Affidavit, para. 2-3. It went on to note that the Spanglers tried to work with APSI by identifying John's care and service providers for them and making sure that APSI was aware of the various appointments that John had, as well as John's propensity to act out when being transported to medical visits because of past traumatic experiences with visits to the Cleveland Clinic, including a visit that resulted in his admission to the psychiatric ward. Id., para.8-10. As outlined in the affidavit, in spite of communicating the appointment times and other information, John missed a number of appointments that were important to his care. Id., para. 11-14. Furthermore, even though the initial concern of Metzenbaum was that John was going to be removed from the Devlins, APSI did in fact remove John from the Devlins on December 20, 2006 and placed him in a setting where the staff was not properly trained. Id., para. 15. On January 10, 2007, John ended up being transported to the emergency room at Geauga Hospital in handcuffs. Id., para. 16. In addition, Joseph Spangler became aware of incident reports from December 28, 2006, which showed that furniture has been thrown out in the yard and that John had been out of control. Id., para.16-18. When this was brought to APSI's attention, Mr. Spangler was told that there were no problems, but that the family should be more involved. Id., para. 19.

In addition, Mr. Spangler had learned from other sources that the placement was not going well. Id., para. 20-22. Mr. Spangler expressed through his affidavit a concern that John's negative and destructive behaviors was increasing, his ongoing medical needs were not being met, there was a failure to implement the recommendations of the treating professionals and a failure to openly communicate with his parents about these issues. Id., para.24. Based on that, Mr. Spangler was seeking the removal of APSI and his reappointment. Mr. Spangler had also

completed the Court ordered assessments, and was found to have no problems that needed to be addressed. Id., para.24-26.

In response, the Court ordered the Spanglers to file their evaluations with the Court. APSI filed a motion to dismiss the motion, the evaluations were submitted to the Court, but the Court summarily denied the motion without hearing and converted the pretrial to a full hearing. T.d. 39.

A Motion to Dismiss the original Motion for Removal of the Guardian was filed on April 20, 2007 on the basis that Geauga MRDD had no standing as a party in the case to file such a motion. T.d. 41. A joint motion with the Spanglers and APSI was also filed to convert the hearing back to a pretrial. T.d. 40. Although not ruled on, all of these motions were effectively denied as the hearing started on April 24, 2007.

At the hearing, after brief opening arguments, Geauga MRDD (also referred to as Metzenbaum) presented its witnesses. Susanne Joseph testified regarding the IO waiver program and explained that John had started receiving services through the Agency. T.p. April 24, 2007 hearing, p.18. After explaining the administrative process for receiving services, she related to the Court about an incident where john had exhibited strong aggression against his mother and sister and his mother called the agency and asked for them to find a placement for him. Id., 21. Ms. Joseph testified, "I told her there was no opening." She then called an emergency team together to try to find a solution. When Ms. Joseph called Mrs. Spangler back after the weekend had passed, Id., 22, Mrs. Spangler had decided to use IO waiver services and had found an alternative. This all occurred prior to the guardianship. With the arrangements set up by Mrs. Spangler, John was able to stay in the home for another month. Id., 27-28. The agency did not observe any abuse or neglect regarding John. Id., 31. Ms. Joseph also described the

Warrensville incident. Id. 36. Because Geauga MRDD did not agree with the way that incident was handled, they stopped providing payment for services. Id., 40. She also testified that the Geauga MRDD had recommended that the Spanglers take guardianship of John. Id. 42. Ms. Joseph also indicated that the reason Geauga MRDD filed the motion to remove is because "[w]e had had complaints from the providers about the intrusion [Mrs. Spangler's October 24 visit to the home], and then we didn't see how we could – and the providers were not going to provide services anymore, and we didn't know wheat else to do, how we can serve him with the family constantly changing on us." Id. 51. When asked about what she meant by constantly changing, she indicated, "[c]hoosing a provider, getting angry at the provider, agreeing to Warrensville Developmental Center, taking him out of Warrensville Developmental Center. Saying I need the ICSMR, no, I don't want the ICSMR." Id. 51. At no time did Ms. Joseph complain that John's needs were not being met. She simply did not like the advocacy of the guardian on behalf of her ward.

Throughout the course of the hearing, many of the care providers testified about the Spanglers and how they handled John. Throughout there was no evidence of any triggers or other behavior issues, and certainly none of them could render opinions about the suitability or unsuitability of the Spanglers as the guardians. For example, Veronica Richmond testified that Mrs. Spangler was able to calm John down when he was agitated. T.p. April 24, 2007 hearing, p. 142. She testified to several incidents, but none of them were in the presence of the family. The only complaint she had about the Spanglers is that during his Christmas visit he poked someone. Id. 132. Russell Kinnebrew, who was the APSI guardian, also testified. However, his testimony pertained to John after the Spanglers were removed. He indicated in his testimony that he had learned from Dr. Stephen Schwartz that to say that the mother may serve as a trigger is

simplistic and this is not the primary cause of his acting out. T.p. June 13, 2007 hearing, p. 187. He testified that ambulances and police calls were triggers. Id. 191. This is true even though these were the methods used in January to deal with John's behavior. The police were called and he was removed from the home by ambulance. The guardian never explored whether Joseph Spangler was a trigger for John. Id. 223. In fact, this guardian only met with John one-on-one on only two occasions, which was on November 3 and April 20. Id. 265-266.

The other care providers could only speak to John's care after the removal of the Spanglers and were not really in a position to render an opinion as the suitability of the parents as guardians. Carl Vondrasek also testified, but his testimony was primarily devoted to an idea that Mrs. Spangler took a dominant role in conversations. At no time was he critical of Joseph Spangler. Id. 446. He also testified that John had several re-enforcers that promote a positive, good day for that person. Id. 456. These re-enforcers primarily involved activities in the Spangler's home, and yet the APSI guardian had significantly cut-off contact with the Spanglers. Id.457-460.

When the hearing resumed on July 24, 2007, the Spanglers presented their witnesses. Michael Pollak testified that Mrs. Spangler had been evaluated and was being treated for anxiety. Id. 512-514. He also felt that she seemed "plenty capable" of being a guardian. Id. 514.

Dr. James Davidson testified that Mr. Spangler had completed the assessment and saw him for 14 sessions and that he did not see any significant concerns about his emptional capabilities or ability to provide guardianship responsibility for his son. Id. 534-535. He also testified that with regard to triggers, the trigger would be a prompt that would lead to an escalation of behavior. Id. 558. It would be consistent for the individual. Id. 559.

Judy Miller and Chris Shafer also testified that John was receiving appropriate care and services from the Spanglers throughout their history with them. There was no evidence of any concerns.

At the conclusion of the hearing, the Court conducted an in camera interview with John in which he clearly indicated that he wanted to be with his father and have his father make decisions for him. T.d.84.

Subsequently, the Court ruled and ordered the removal of the Spanglers and appointed the agency as the guardian. T.d. 69.

Law and Argument

Assignment of Error No. 1

Whether the trial court erred in permitting Geauga MRDD to file a motion for removal of the guardians as it was not an party in the case, did not have statutory authority to do so, and such a motion was beyond the statutory authority of the Court.

Issue One

MRDD should not have been permitted to file a motion in the case as they were not a party and had no standing.

Issue Two

Even though the Court allowed Geauga MRDD to be joined as a party after the filing of the motion, Geauga MRDD did not have the statutory authority to file the motion in the case, and, as such, this was an ultra vires act.

Issue Three

The Probate Court did not have jurisdiction to permit MRDD to be a party or otherwise be involved in the case as the Probate Court is a statutory court and there is no statutory authority for such action.

For the purpose of this Assignment of Error, these issues are so intertwined that they need to be addressed in one argument. In addition, for the purpose of this argument, the argument set forth in John Spangler's brief is also incorporated herein.

Geauga MRDD was not a party under the Rules of Civil Procedure, which specifically provides under Civ. R. 17 that every action shall be prosecuted by the real party in interest. While the rule provides that "[a]n executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his name as such representative without joining with him the party for whose benefit the action is brought," Geauga MRDD does not meet any of these definitions. Most clearly, it is not a party authorized by statute to sue in the name of John Spangler. In fact, Civ. R. 17(B) addresses the issue of incompetents, and indicates that the proper party is the guardian or, if there is no guardian, then the Court will appoint a guardian ad litem.

The Geauga MRDD is a statutorily created entity, and its powers are limited by statute. The powers of a county board of mental retardation and developmental disabilities are clearly articulated in ORC §5126.05. A reading of that statute makes it clear that the county board is established for the purpose of providing services to those who are mentally retarded of suffering from developmental disabilities. The powers vested in the board include those related to this purpose, including the power to contract, seek funding and supervise the provisions of services.

Of course, this raises the issue of what happens when the Geauga MRDD finds that there is an incompetent adult whose needs are not being met. The General Assembly has specifically provided for such an occurrence through the enactment of RC §5126.33, which authorizes the local board to to seek relief from the probate court for an order authorizing the board to arrange services for an individual if the individual is eligible for services and the board is unable to secure the necessary consent for the services. The process to be followed is clearly set forth and,

as noted above, since the Probate Court is a court of limited jurisdiction, the statute must be followed.

In the case at bar, the Geauga MRDD filed a motion to remove a guardian and to substitute an alternative guardian in an already established guardianship. As noted above, Geauga MRDD has no legal standing to file a motion in a case in which it is not a party. At the very least, Geauga MRDD should have been required to file a motion to intervene in the guardianship with notice to the ward and the guardian and an opportunity to be heard on the motion. However, even that would not have worked, as there is no statutory authority for the county board to intervene in a guardianship, and taking such an action is an *ultra vires* act. There is also no statutory authority for the Probate Court to join the county board as a party to a guardianship.

A review of the statute makes it clear that instead of filing the motion, the first step of the process is the filing of a complaint. It is not enough to just file a complaint. The complaint itself must be specifically for the purpose of ***authorizing the board to provide services to the individual eligible for services for which consent cannot be secured***. The motion filed in this case cannot even be loosely characterized as having that objective. It is filed to remove the guardian. There is no mention in the motion of the services that the board wishes to provide, nor of the failure of the guardian to provide consent. The statute articulates very clearly the information that must be provided in the complaint. The complaint must contain identifying information of the adult, facts describing the nature of the abuse, neglect, or exploitation and supporting the board's belief that services are needed, the types of services proposed by the board, as set forth in the protective service plan that must be filed with the complaint and facts showing the board's attempts to obtain the consent of the adult or the adult's guardian to the

services. Ironically, in the case at bar, the Geauga MRDD is the one providing services, so essentially, the county board would have to set forth facts in its complaint alleging abuse, neglect or exploitation that the adult is suffering at the hands of Geauga MRDD. Finally, the complaint must be served upon the adult, with a notice from the board, must be given to Ohio Legal Rights Service, and the adult must be afforded the opportunity to be represented by counsel and, if the adult is indigent, the court must appoint the counsel. None of these procedural steps has been completed by the Geauga MRDD board.

The Court is also required to handle these complaints in a particular way. The Court must find, on the basis of clear and convincing evidence, ***all*** of the following:

(a) The adult has been abused, neglected, or exploited;

(b) The adult is incapacitated;

(c) There is a substantial risk to the adult of ***immediate*** physical harm or death;

(d) The adult is in need of the services;

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

The board is also supposed to submit a detailed protective service plan to the Court. John was already under a service plan at the time of the filing of the motion. The clear intent of this statute is to be focused on providing services to the adult who has been identified as in need of services and suffering from abuse, neglect or exploitation.

The motion does not even begin to meet these criteria. The motion was filed seeking the removal of the guardian based on a vague and imprecise claim that the guardians have violated their fiduciary duties. There is no statutory authority for the bringing of such a claim by the MRDD. In fact, there was no proposal to provide specific services. The statutory scheme also

provides that the Court limit the provision of services to a six month period, but no services were even proposed. The ward was, at the time of the filing of the motion, residing in a facility approved by Geauga MRDD. The concern voiced by Geauga MRDD was that the ward might be removed from the facility. In fact, the temporary guardian has in fact subsequently removed the ward from that facility. The fact that this was handled on as an emergency removal without any of the statutory safeguards in place compounds the procedural due process issues that arise when the Geauga MRDD chose to bypass the proper legal process.

The public policy for restricting the powers of Geauga MRDD in this context are readily apparent. The guardian is supposed to be making decisions for an adult ward. Just as any adult, the ward should be given the freedom, through the guardian, to make decisions for himself. Just because a ward is incompetent does not mean that the ward should be denied the basic liberties provided for in life, including the freedom to live where he wishes, to associate with the people he wishes to associate with and to be given all of the privacy rights permitted under the United States Constitution and the laws of this country and the state of Ohio. No adult can have these rights taken away by a governmental agency without a compelling reason to do so. Under this statutory scheme, the compelling reason that is required is a showing that the adult is actually being neglected, abused or exploited and that services are available to that adult who is mentally retarded or developmentally disabled have not been consented to and are necessary to prevent immediate physical harm or death. This is a very high standard to be met. Such a high standard is warranted to prevent any imposition on the civil and constitutional rights of the adult, whether the adult is competent or incompetent. In addition, remove the guardians is an extreme measure. If the Court was concerned that a certain placement was going to be disrupted, as the superior

guardian, the Court could have simply issued appropriate orders to limit this, thereby preserving stability for the ward.

Because this Court's powers and the powers of Geauga MRDD are both limited by statute, and because the process employed by the board and the relief sought from the Court fall well beyond the authorized jurisdiction of the Court, this Court has not choice but to dismiss the motion. In the event that the Geauga MRDD feels that it has a basis for pursuing a complaint because services are not being provided, that remedy is available by the initiation of a separate action. However, the statutory guidelines must still be followed and there must be a valid claim as required by the statute. To allow otherwise is a violation of the Ohio statutes and a violation of the ward's state and federal constitutional rights.

Assignment of Error No. 2

Whether the trial court erred in granting the emergency motion to remove the guardian as there was no basis presented for the filing of such a motion.

Issue One

The Probate Court did not have sufficient information before it prior to removing the guardian. There was no emergency and no basis for removal of the guardian on an emergency basis and the removal of the guardian under these circumstances was contrary to the procedure set forth statutorily.

Even assuming that the Board was permitted to follow the process that it created for the removal of the guardian, there should still be some standards in place. While the Probate Court has the power under RC 2109.24 to remove a guardian, the statute indicates that:

> The court may remove any fiduciary, after giving the fiduciary not less than ten days' notice, for habitual drunkenness, neglect of duty, incompetency, or fraudulent conduct, because the interest of the property, testamentary trust, or estate that the fiduciary is responsible for administering demands it, or for any other cause authorized by law.

The fiduciary in this case was given less than ten days notice and was not given advanced notice of the basis for the removal. The removal is for an extreme situation, and most cases involving

the removal of a guardian are based on allegations that funds were mishandled. Interestingly, the process followed by Geauga MRDD tends to mimic the process provided in Juvenile Court for Children's Services to gain emergency custody of children who are abused or neglected. That statute is clearly inapplicable, but even if it were applicable, the Court would still be required to make findings regarding the unsuitability of the guardian. The Court in its own entry simply says, "having reviewed the motion and supporting affidavit [the Court] orders that the Motion for removal be granted on a temporary basis pending further hearing." There was no finding for cause, nor were the guardians given ten days notice. Even if we were to attempt to create from the body of law and procedure that would permit this, the Court would have to be bound by a cause authorized by law, which, presumably in this case, would be based upon RC §5126.33. However, there was no evidence and therefore there could be no finding that John has been abused, neglected, or exploited, that there is a substantial risk to John of ***immediate*** physical harm or death, that John is in need of the services or that there is no person authorized by law or court order to give consent for the adult is available or willing to consent to the services. In fact, the actual complaint of Geauga MRDD is that the mother, as guardian, was too pro-active, that she raised too many issues pertaining to John's care, that she made demands to have services provided to her son and that the services already set in place by the mother and father were appropriate and Geauga MRDD did not want these plans to be changed. There is no allegation that John was not receiving services, nor did Geauga MRDD propose services that should have been provided.

Issue Two

The Probate Court should not have granted the ex parte motion without conducting any sort of hearing.

Even if Geauga MRDD had standing and could have filed a motion for a temporary restraining order, which is procedurally the only type of motion under the Civil Rules that fits this motion, then the provisions of Civ. R. 65 have to be followed. Specifically, there must be evidence of ***immediate and irreparable*** injury and there must be notice to the opposing party unless the applicant certifies to the court in writing the efforts made to give notice or the reasons notice should not be required. There is not even an allegation of immediate and irreparable injury. In fact, the allegation is that the guardian might take some action in the future. There is no evidence that anything has been put into motion to change the ward's residence, because there was no evidence. Without notice to the guardian and without a certification from the applicant, this motion should not have been granted. Therefore, the emergency motion should have been denied as it did not meet the procedural or substantive requirements for such a motion.

Assignment of Error No. 3

Whether the trial court's ruling was against the manifest weight of the evidence as there was no evidence that the original guardians had failed to provide services for the ward.

Issue One

The Probate Court did not have sufficient evidence on which to rely for removal of the guardian as there was no evidence that the guardian was in fact unsuitable as there was no evidence that the guardian had failed to provide services to the ward.

Issue Two

The Probate Court's ruling was contrary to the express wishes of the ward and, therefore, violated the ward's rights to have the guardian of his choice absent any evidence that the guardian was unsuitable.

Even if all of the procedural errors had been rectified, in the end there is no evidence to support the findings of the Court. The Court, after making findings pertaining to the procedural posture of the case, made a limited number of findings pertaining to the issue of removal. Specifically, the Court found that over the past year (a year during which the litigation was

pending and not the year prior to the filing of the motion) that the mother had been at odds with the caseworkers and that she repeatedly and impulsively sought changes in John's treatment without regarding to the opinions of professionals and without having other arrangements in place. There is absolutely no evidence to support that. In fact, the evidence is that the professionals did not all agree with the treatment options. At no time was John without treatment, whether the past year meant a year prior to the rendering of the decision or the year prior to the filing of the motion. The Court also indicated that there were times when the family contact was a "trigger" for John. There was no evidence with a reasonable degree of medical certainty that the family contact was indeed a trigger. The term "trigger" was not really adequately explained by any professional, and yet it is the "trigger" idea that serves as the foundation for the Court's decision. The Court also found that Joseph Spangler showed an unwillingness or inability to objectively and assertively intercede in the disputes during the past year. The record is clear that Joseph Spangler repeatedly and appropriately interceded, but he was no longer the guardian and his requests, concerns and counsel were summarily rejected by the temporary guardian. The Court, without any further evidence to point to, indicated that the parents were not suitable as guardians. There was no evidence to justify this, either. The Court indicated that the parents did not have emotional stability or that they acted irrationally, but again, there is no evidence to support that contention. In fact, the psychiatric evaluation of Joseph Spangler demonstrated that he was emotionally stable.

When evaluating the duties of a guardian, these are quite simple and spelled out in the statute. As set forth in R.C. 2111.13, the duties of the guardian are:.

(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.

It is even the testimony of the Geauga MRDD officials that John's maintenance and educational needs were being met. There is no evidence that the guardians had violated any of these duties. Never was it proposed that there needed to be changes. In fact, the one potential change that gave rise to the filing of the original motion, which was the change in the home for John, was ultimately changed by the temporary guardian as well. It is a sad commentary that these proactive parents who dedicated themselves to seeking out professional counsel and advice, who provided whatever services they could, even at their own cost, and who maintained vigilance in overseeing their son's care were somehow deemed unsuitable because they interfered with the agency that is charged with providing services to John. They had become a thorn in the side of the agency and, when evaluating all of the facts of this case, it is clear that this is the only reason their removal was sought.

Ultimately, the probate court is the superior guardian. RC 2111.50. As such, if the Court was concerned about the change in placement, the Court could have simply required a review hearing or the submission of information to the Court for Court approval prior to such a change. If there was a specific problem, then the extreme measure of removing the individuals who had cared so well for their son from the beginning of his life could have been avoided. In fact, if the idea was to have someone neutral make objective decisions, the Court should have put itself in that place by having a hearing to resolve any disputes between the parties. A simple order to restrain the guardians from changing John's placement without further Court review would have

avoided the extensive (and expensive) protracted litigation involved in this case, as well as the complete disruption of John's family. John himself made clear in his in camera interview that he wanted to be with his dad and wanted to go home to his family's home and spend the night and see his friends. T.d. 84, August 9, 2007 In Camera Interview Transcript, p. 11.

Assignment of Error No. 4

Whether the Probate Court erred by denying counsel the right to listen to the prior testimony tape upon written request.

Issue One

The records of the probate court are public records and there should be no denial of access, particularly by counsel for the parties, to any part of the public record.

Interestingly, although the Court file documents this, there is nothing in the docket recording this incident. However, following the first day of the hearing, which was April 24, 2007, but prior to the next day of the hearing, which was June 13, 2007, counsel for the guardians made a written request to the Court to listen to the tape of the testimony in order to prepare for the upcoming hearing. This request was denied.

The records of the Probate Court are public records. The Court is obligated to make the records available to the public, even if the records are kept by means other than paper. RC 2101.121. As such, the denial of the right to review the record as requested by counsel was a clear violation of the statute and yet another demonstration of the abuse of discretion exercised by the trial court. This is yet another reason that the lower court's decision should be reversed.

CONCLUSION

This case represents a complete miscarriage of justice. Procedurally it is a train wreck that created such confusion that the Court lost sight of the real issues of the case. John Spangler was well served by his mother and father as guardians because of their pro-active stance, and yet it was their pro-activeness that caused a hardship for the Geauga MRDD, resulting in them taking this action in order to alleviate the pain in the neck that the Spanglers presented. The Court did not make appropriate findings of unsuitability because the evidence did not support that. For these reasons, this Court should reverse the decision of the lower court and reinstate the Spanglers as guardians.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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