IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
MARION COUNTY

IN RE: GUARDIANSHIP OF	**:**	**C.A. NO. 9-15-0034**
E. JODENE CARPENTER	**:**	**(REGULAR CALENDAR)**
	:	**APPEAL FROM THE MARION**
{E. Jodene Carpenter, Appellant}	**:**	**COURT OF COMMON PLEAS**
	:	**PROBATE DIVISION**
	:	**CASE NO. 12 GDN 0035**

AMICI BRIEF IN SUPPORT OF APPELLANT E. JODENE CARPENTER

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I. STATEMENT OF INTEREST OF AMICUS CURIAE

The Ohio Disability Rights Law and Policy Center, Inc., (Disability Rights Ohio) is a nonprofit corporation whose mission is to advocate for the human, civil, and legal rights of people with disabilities in Ohio. Under both state and federal law, Disability Rights Ohio investigates abuse, neglect, and rights violations affecting people with disabilities, and pursues administrative, legal, and policy remedies for those violations. Disability Rights Ohio is designated by the Ohio Governor as the protection and advocacy system under federal law for people with disabilities in Ohio, *see*, 42 U.S.C. 10541 *et seq.*, and as the Client Assistance Program, 29 U.S.C. 732.

Disability Rights Ohio attorneys were instrumental in passage of the 1990 Adult Guardianship Reform Act and have served as counsel in hundreds of guardianship cases, including *State ex rel. McQueen v. Cuyahoga Cty. Court of Common Pleas, Probate Div.*, 135 Ohio St.3d 291, 2013-Ohio 65, 986 N.E.2d 925 (2013) and *In re Guardianship of Spangler*, 126 Ohio St.3d 339, 2010-Ohio-2471, 933 N.E.2d 1067 (2010) at the Ohio Supreme Court; and Disability Rights Ohio's Executive Director was appointed by Chief Justice Thomas Moyer as a founding member of the Ohio Supreme Court Adult Guardian Subcommittee, Committee on Family, Children, and the Courts.

The Legal Aid Society of Columbus represents low-income persons and seniors with legal problems in a variety of areas, including housing, consumer, public benefits, and domestic relations in a six-county area of central Ohio. Over the past decade the Legal Aid Society has represented clients with disabilities in over seven thousand cases and has assisted clients with over one hundred guardianship proceedings, including defense of petitions for involuntary guardianship.

The amici share extensive experience in representing individuals with disabilities in a

variety of contexts, including individuals subject to guardianship. Amici have a shared interest in the principles of due process, autonomy, and self-determination that are at the core of a right to counsel of one's choosing. Amici welcome this opportunity to share information with the Court about the guardianship system and contextual legal principles that affect the important issues at stake in this appeal.

II. INTRODUCTION

Adult guardianships impose substantial deprivations on the liberties, autonomy, and independence of those who are subject to this system. For this reason, the law in Ohio requires a county probate court to afford such a person independent legal counsel of his or her choice when seeking to review the continued necessity of the guardianship and to address other crucial matters involving the guardianship, and constitutional due process requires an adversarial evidentiary hearing and strong procedural protections before this right can be infringed.

The system is already heavily biased against a person subject to guardianship. The lack of effective enforcement of the right to independent legal counsel, including a requirement that his or her legal guardian consent to the person's choice for legal representation, as the lower court held, would significantly restrict a person's ability to challenge the guardianship or particular actions or decisions of his or her guardian.

III. FACTS AND PROCEDURAL HISTORY

The Marion County Probate Court appointed Maria L. Hypes, an attorney, as the guardian of the person and estate of Appellant, E. Jodene Carpenter, in January 2013. Judgment Entry, Cert. Rec. Doc. 15; Letters of Guardianship, Cert. Rec. Doc. 20.[1] On July 14, 2015, the Appellant filed a motion asking that the court allow her to be represented by independent legal

[1] All citations to the certified record sent to the Third Appellate District pursuant to App.R.9(A) on October 20, 2015, and listed as handwritten numbers one to one hundred five inclusive, are referenced throughout this Amici Brief in the format Cert. Rec. Doc. X – XXX.

counsel of her choosing, attorney Brian Cook, to pursue preparation of a request to evaluate the continued necessity of the guardianship, consider less restrictive alternatives to guardianship, and other matters. Cert. Rec. Doc. 80. There are a number of concerning issues with the guardianship, including the Appellant's current institutionalization in a nursing facility and her desire to live and receive the services she needs in her own home. Cert. Rec. Doc. 38 and 43. Another issue appears to be the court's approval of over $92,545.67 in fees from the Appellant's estate to Ms. Hypes since her initial appointment as Appellant's guardian (mostly at her attorney rate of $175-$200 an hour). Cert. Rec. Docs. 25, 28, 31,34, 37, 46, 49, 51, 60, 63, 67, 75, 77 and 97.

The Marion County Probate Court, in its Judgment Entry dated August 13, 2015, Cert. Rec. Doc. 96 erroneously denied the motion of the Appellant to be represented by independent legal counsel of her choice for these matters. Distinguishing the Supreme Court of Ohio's recent decision in *State ex rel. McQueen v. Cuyahoga Cty. Court of Common Pleas, Probate Div.*, 135 Ohio St.3d 291, 2013-Ohio 65, 986 N.E.2d 925, (2013), and citing Rule 1.14 of the Ohio Rules of Professional Conduct, the court reasoned that Mr. Cook did not first consult with or obtain the consent of the Appellant's legal guardian. The Court determined that Mr. Cook had been contacted by one of Appellant's family members, who allegedly has exercised undue influence over her.

However, in misinterpreting the applicability of Prof.Cond.R. 1.14, the lower court effectively provided the Appellant's legal guardian with veto power over her own decisions and actions and the continued need for the guardianship, despite the inherent conflict of interest. Furthermore, the hearing at which the lower court denied the Appellant her statutory right to independent legal counsel of her choosing was completely devoid of procedural due process

protections. Therefore, the lower court's decision must be overturned.

To place this matter into proper context, Amici will first discuss the guardianship system in Ohio, the ways in which it deprives individuals of their liberties, independence, and autonomy, and the need for proper oversight by probate courts to prevent unnecessary restrictions. Then, Amici will explain the right to independent counsel of one's choosing under these circumstances under Ohio law and *McQueen* and the inapplicability of Prof.Cond.R. 1.14 to this matter. Finally, Amici will set forth the constitutional due process protections that a court must afford before this right can be infringed.

IV. LEGAL ARGUMENT

A. People who are subject to the adult guardianship system in Ohio face significant restrictions on their liberties, independence, and autonomy.

Appointment of a legal guardian over an individual is an extraordinary act that contravenes a person's liberties, independence, and autonomy to make his or her own decisions and "removes fundamental rights and transfers them from the individual to the guardian. It is one of society's most drastic interventions." Cassidy, *Restoration of Rights in the Termination of Adult Guardianship*, 23 Elder L.J. 83, 84 (2015) (study commissioned by ABA Commission on Law and Aging). In Ohio, a probate court may appoint a legal guardian for an adult who has been adjudicated as incompetent under R.C. 2111.02 to manage his or her affairs and make decisions on his or her behalf.

For those who have been appointed a guardian of the person, the individual loses the ability to make critical decisions about his or her medical care and other matters involving his or her personal life, including the residential setting in which he or she receives any needed services and support. *See* R.C. 2111.13(A)(1)-(2) (a guardian of the person must "protect and control the person of the ward" and "provide suitable maintenance for the ward when necessary"). An

individual appointed a guardian of the estate no longer has the freedom to make his or her own financial decisions. R.C. 2111.14(A)(3) (a guardian of the estate has the duty to manage the estate, pay and collect debts, and bring suit on behalf of the ward). Many people placed under a guardianship in Ohio are subject to a plenary guardianship (guardian of the person and estate), which constitutes an almost total loss of control over their own lives.

In addition to the ability to make one's own medical, residential, and financial decisions, a person under guardianship may also lose certain privileges and fundamental rights. *See, e.g.*, R.C. 4507.20 (an adjudication of incompetency could lead to the loss of one's driver's license); R.C. 3105.31(C) (the marriage of a person adjudicated to be incompetent may be annulled); R.C. 5122.301 and 3503.21(A)(5) (a probate court could find a person incompetent for purposes of voting, resulting in cancellation of his or her voter registration).

Despite the fact that guardians are fiduciaries appointed to act in the best interest of persons deemed incapable of caring for themselves or their finances (*see*, R.C. 2111.50(C) and 2109.01), guardianships also involve the potential for abuse, neglect and financial exploitation by those same guardians who are entrusted with such enormous responsibilities. Sadly, anecdotes of instances in which guardians have abused, neglected or financially exploited their wards are abundant.[2] A national study on guardianship by the U.S. Government and Accountability Office concluded that abuse and neglect were compounded when courts failed to

[2] *See, e.g.*, *Disciplinary Counsel v. Clifton*, 79 Ohio St.3d 496, 499, 684 N.E.2d 33 (1997) (concluding that an attorney must be permanently disbarred for taking funds from the ward's account without permission and for negligence in the care of the ward's person and estate); Drew Simon, *Attorney Gets Prison for Stealing $208k from Clients*, www.whio.com/news/news/crime-law/eaton-attorney-sentenced-theft/ngMgp/ (updated June 17, 2014) (accessed Nov. 10, 2015) (attorney sentenced for stealing money from his wards and clients); Columbus Dispatch, *Unguarded* (investigative series), 2014, www.dispatch.com/content/topic/special-reports/2014/unguarded.html (accessed Nov. 10, 2015); Lucas Sullivan, et al., *Investigations Launched into Billing by Lawyers Appointed as Guardians*, www.dispatch.com/content/stories/local/2014/05/18/unguarded.html (updated May 18, 2014) (accessed Nov. 11, 2015) (finding that attorney-guardians charge at legal rates for various activities, like giving driving directions to a ward's family member, wrapping Christmas presents for the ward, and eating cookies with the ward); U.S. Govt. Accountability Office Report to the Chairman, Special Committee on Aging, U.S. Senate, *Guardians: Cases of Financial Exploitation, Neglect, and Abuse of Seniors* (Sept. 2010) (finding instances of abuse and neglect in 45 states, as well as the collective stealing of millions of dollars by guardians).

screen or properly oversee guardians.[3] Similar concerns have been raised by the American Bar Association in calling for more comprehensive judicial monitoring of guardianships.[4]

Furthermore, there are vast numbers of people with disabilities (including those with developmental or intellectual disabilities, serious mental illness, physical disabilities, traumatic brain injuries, and so forth) who are institutionalized in nursing facilities, intermediate care facilities, hospitals, and other restrictive, segregated institutional settings. Over the years, home and community-based programs have been developed by the state of Ohio to enable people with disabilities to live and receive the services and support they need in their own homes or in other settings integrated in their communities.[5] Despite the opportunities presented by these programs for greater inclusion in their communities, many eligible individuals have legal guardians appointed by probate courts who nevertheless support their continued, unnecessary institutionalization. This can be for paternalistic reasons or simply ignorance regarding the availability of other options, but the result is the loss of physical liberty and isolation from society.

The U.S. Supreme Court, in a landmark decision, held that unnecessary institutionalization is a form of discrimination under the Americans with Disabilities Act and that states must administer their services and programs for people with disabilities in the most integrated setting appropriate to each individual's needs. *Olmstead v. L.C. ex rel. Zimring*, 527

[3] U.S. Gov't Accountability Office Report to the Chairman, Special Committee on Aging, U.S. Senate, *Guardianship: Cases of Financial Exploitation, Neglect, and Abuse of Seniors* (Sept. 2010).
[4] Hurme, *Steps to Enhance Guardianship Monitoring*, American Bar Association (1991)
[5] *See*, for example, various Medicaid programs and waivers: the HOME Choice program , Ohio Adm.Code 5160-51-01, *et seq* (to transition people out of institutional settings into the community); the Ohio Home Care waiver program, Ohio Adm.Code 5160-46-02, *et seq* (providing personal care or nursing care in the community in lieu of institutionalization in a nursing facility); the PASSPORT program, Ohio Adm.Code 5160-31-02, *et seq* (home-based services for persons over age 60); and, the Individual Options waiver, Ohio Adm.Code 5123:2-9-01, *et seq.* (for people with developmental or intellectual disabilities). Finally, the state of Ohio has recently created a program called "Recovery Requires a Community" to assist people with serious mental illness in transitioning out of nursing facilities and in accessing mental health treatment and services in a home and community-based setting. http://mha.ohio.gov/Portals/0/assets/Initiatives/Recovery%20Requires%20Community/RRaC-Fact-Sheet.pdf. (Accessed Nov. 10, 2015).

U.S. 581, 119 S.Ct. 2176, 144 L.Ed.2d 540 (1999). The Supreme Court in *Olmstead v. L.C.* acknowledged that "institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life." *Id.* at 583. Also, "confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment." *Id.* at 601.

Fortunately, recently enacted Rules of Superintendence for the Courts of Ohio reflect the principles that people subject to guardianship should still maintain their freedoms, self-determination, and independence to the fullest extent possible. Sup.R. 66.09(C) provides that a guardian must make choices or decisions on behalf of the individual that best meets his or her needs "while imposing the least limitations on [his or her] rights, freedom, or ability to control [his or her] environment." Also, Sup.R. 66.09(D) states that "[a] guardian shall advocate for services focused on a ward's wishes and needs to reach the ward's full potential. A guardian shall strive to balance a ward's maximum independence and self-reliance with the ward's best interest." Sup.R. 66.01(A) states that a determination of a person's "best interest" must include "consideration of the least intrusive, most normalizing, and least restrictive course of action possible given the needs of the ward."

Chapter 2111 of the Revised Code also recognizes that less restrictive means may exist to protect a person who may not be able to manage his or her affairs, without subjecting him or her to the harshness of a guardianship, and that a person may only need a guardian for specific purposes while retaining rights in other areas. *See*, R.C. 2111.02(C)(5)-(6) (requiring a probate court to consider evidence of less restrictive alternatives to guardianship and allowing a court to

deny a guardianship for this reason); R.C. 2111.02(B)(1) (allowing a probate court to appoint a guardian with limited, specific powers, and allowing the individual to retain autonomy in all other areas of his or her life).

Similarly, in other states, supported decision-making is being recognized as another less restrictive means to help a person manage his or her affairs by providing a circle of supports in making key decisions, rather than taking the more traditional route of removing all decision-making control from the person altogether through a guardianship. *In re Guardianship of Dameris L.*, 956 N.Y.S.2d 848 (N.Y.Sur. Ct. N.Y. County 2012); *see also,* Nina A. Kohn *et. al., Supported Decision-Making: A Viable Alternative to Guardianship?*, 117 Penn St. L. Rev. 4, 1111, 1117 (2013).

B. In light of the loss of liberties, independence, and autonomy involved and the immense power and authority granted to legal guardians, probate court must steadfastly protect the substantive rights of a person subject to guardianship, including the right to legal counsel of one's choosing for guardianship proceedings under R.C. 2111.49(C).

In a hearing for an initial appointment of a guardian, an individual is afforded certain procedural protections enumerated in R.C. 2111.02(C)(7) because of the significant liberty interests at stake. One of those rights includes the right to be represented by independent counsel of the individual's own choosing. R.C. 2111.02(C)(7)(a). In 1997, the General Assembly enacted R.C. 2111.49, which contains additional protections for persons under guardianship. In particular, R.C. 2111.49(C) enables a person under an existing guardianship (or his or her attorney or other interested party) to request at any time after the expiration of 120 days from the date of the initial appointment of guardianship, and at least once every calendar year,[6] a hearing

[6] There appears to be some confusion regarding whether the Appellant has already had a guardianship review hearing under R.C. 2111.49(C) this calendar year. According to the transcript of the July 21, 2015 hearing, the Marion County Probate Court apparently assumes that its receipt and approval of periodic financial reports from the guardian amounts to this statutory hearing. July 21, 2005 Tr. at 6, 17. But this does not constitute a hearing "to

to "evaluate the continued need of the guardianship." This hearing must be held "in accordance with section 2111.02 of the Revised Code" and, if the individual 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).

The Supreme Court of Ohio recently made clear that the procedural protections mandated in R.C. 2111.02 initial guardianship hearings also apply in the context of a guardianship review hearing under R.C. 2111.49(C). *McQueen* 2013-Ohio-65, at ¶ 17. Although the facts of *McQueen* involved an indigent person under guardianship who requested a court-appointed attorney under R.C. 2111.02(C)(7)(d)(i), the Court unequivocally stated that there was no doubt that "R.C. 2111.49(C) expressly incorporates the hearing requirements relating to original appointments of guardians to proceedings concerning the continued necessity of guardianships." *Id.* This includes the person's right to be represented by independent counsel of his or her choice, which is explicitly enumerated in R.C. 2111.02(C)(7)(a).

This explicit right of a person under guardianship to speak with and choose independent counsel is reinforced by the Ohio Guardianship Guide, recently published by the Office of the Attorney General of Ohio to help guardians and people subject to guardianship familiarize themselves with the duties and rules of the guardianship system. Mike Dewine, *Ohio Guardianship Guide*: *An Overview of the Guardianship Process*, http://www.ohioattorneygeneral.gov/Files/Publications-Files/Publications-for-Consumers/Ohio-Guardianship-Guide-%28PDF%29. (Accessed Nov. 11, 2015). It lists several rights that people subject to guardianship have, despite being adjudicated as incompetent. These rights include: "[t]he right to exercise control over all aspects of life that the court has not delegated to the

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evaluate the continued need of the guardianship" pursuant to R.C. 2111.49(C). There is no other evidence in the record that a hearing under R.C. 2111.49(C) has taken place in the calendar year 2015 or in any previous year.

guardian," p.12 "[t]o speak privately with an attorney, ombudsman, or other advocate," p. 13 and "[t]o an attorney and independent expert evaluator * * *." p. 14.

Notably, a probate court has an obligation, as the superior guardian under R.C. 2111.50(A)(1), to ensure a person's right to retain independent legal counsel of his or her choosing is upheld. It has a separate obligation to determine whether payment of fees from the guardianship estate for the attorney's work are warranted, which protects against unscrupulous attorneys who could attempt to financially exploit an individual. *See, In re Allen*, 50 Ohio St. 3d 142, 552 N.E.2d 934 (1990) (establishing a three-part test to determine if payment of attorney fees from the guardianship estate is merited).

In this case, the Appellant, in seeking to terminate her guardianship and address other crucial matters, has a right to independent counsel of her choosing for these purposes (incidentally, she is not claiming to be indigent and is not seeking payment by the court for her legal expenses in this matter). In its August 13, 2015 Judgment Entry, Cert. Rec. Doc. 96, the Marion County Probate Court erroneously denied her this right, concluding that Mr. Cook, her attorney of choice, did not inform or contact her appointed legal guardian prior to contacting the Appellant, despite Mr. Cook's knowledge she has a guardian, or obtain the guardian's consent.

The right to independent counsel of one's choosing under R.C. 2111.49(C) and R.C. 2111.02(C)(7)(a) is not contingent upon the approval of, or prior consultation with, a person's legal guardian. The lower court's reasoning effectively authorizes a legal guardian to have veto power over a person's efforts to challenge the continued necessity of the guardianship or seek review of a guardian's decisions or actions, which constitutes an insurmountable and inherent conflict of interest that insulates the guardian from oversight and accountability.

In reaching this conclusion, the Marion County Probate Court mistakenly relied, in part,

on Prof.Cond.R. 1.14(a), which states that when a client's "mental capacity to make adequately considered decisions in connection with a representation is diminished * * * because of mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client." The court cited note 4 of Prof.Cond.R. 1.14(a) to support its position, which states that "[i]f a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client."

While Prof.Cond.R. 1.14, n. 4 states what should happen in ordinary cases involving a guardian, the rule does not require that an attorney always look to the person's legal representative. It defies logic and common sense to require the application of note 4 to circumstances in which a person subject to guardianship is challenging the continued necessity of the guardianship and is alleging a violation of her rights, abuse or neglect, or financial exploitation by his or her guardian. This is not a situation if an attorney is representing a person subject to guardianship in a personal injury case or a criminal case, for example. Rather, this is one where a person subject to guardianship is in an adversarial position to her guardian.

Importantly, other states which have an ethical rule of professional conduct identical to Ohio's Prof.Cond.R. 1.14 have found that it is necessary for an attorney to act against a guardian's wishes when the guardian is acting adversely toward his or her client's interests. 1998 NC Eth. Op. 18, 1999 WL 33262175 (an attorney for a minor was allowed to withhold confidential information from the legal guardian because the lawyer believed the guardian was acting adversely to the interests of the child or the information was not necessary to make a decision about the representation); OR Eth. Op. 2005-159, 2005 WL 5679584 (an attorney for a parent who was found to be incompetent and who was appointed a guardian ad litem must

independently assess the client's interests and ensure the guardian ad litem is representing those interests); *Schult v. Schult*, 241 Conn. 767, 770, 699 A.2d 134 (1997) (when a child has both an attorney and a guardian ad litem appointed in a divorce action between the parents, the attorney can advocate a position contrary to the position of the guardian ad litem if the attorney is representing the child's interest, and the trial court finds that such conflicting advocacy is in the best interest of the child).

Furthermore, a person subject to guardianship should be able to speak with an attorney freely and privately about the merits of the case and legal options before initiating a request for a hearing under R.C. 2111.49(C). Nothing in Chapter 2111 of the Revised Code or any other state law requires a person subject to guardianship to obtain permission from his or her guardian before speaking with an attorney about a case or obtaining legal advice. In fact, R.C. 2111.49(C) explicitly allows "the ward's attorney" to request in writing a hearing to evaluate the continued necessity of the guardianship, which clearly presupposes the ability of the individual to retain counsel before submitting this request for purposes of investigation and legal advice.

A person may need independent legal counsel for other crucial matters relating to his or her guardianship when his or her interests and those of his or her guardian are essentially adversarial (such as an allegation of rights violations, abuse, neglect, or financial misappropriation), in much the same way as an initial guardianship appointment under R.C. 2111.02 or a guardianship review hearing under R.C. 2111.49(C).

A legal guardian appointed by a county probate court is obligated to act in the best interest of his or her ward. R.C. 2111.50(C). Because probate courts "at all times" must act as "the superior guardian of wards," according to R.C. 2111.50(A)(1), a person subject to guardianship who believes his or her legal guardian is not acting in his or her best interests can

notify the probate court and request that, as the superior guardian, the court overrule a guardian's decision or a failure to act or inform the court about an instance or instances of abuse, neglect, financial exploitation, or rights violations.

Fortunately, Sup.R. 66.03(B) now requires probate courts to adopt local rules establishing a process in which people subject to guardianship can submit "comments and complaints regarding the performance of guardians appointed by the court and for considering such comments and complaints," including a requirement that a probate court "give prompt consideration to the comment or complaint and take appropriate action" (*id*., at (B)(3)) and "notify the person making the comment or complaint and the guardian of the disposition of the comment or complaint."(*id*, at (B)(5)). An individual, for example, who is unnecessarily institutionalized in a nursing facility may need independent legal counsel to advocate for his or her right to receive needed services and support in a setting in the community.

C. A probate court, consistent with constitutional due process requirements, must ensure a full adversarial evidentiary hearing with robust procedural protections before it can infringe upon the right of a person subject to guardianship to choose his or her legal counsel.

Before a probate court can deny a person subject to guardianship his or her statutory right to independent counsel of his or her choice, it must comply with constitutional due process requirements. Neither the Supreme Court of Ohio nor Ohio's appellate courts have determined what process is constitutionally required under these circumstances, but decisions from courts in other states that have directly addressed this issue demonstrate that a full adversarial evidentiary hearing with strong procedural protections must occur before this right is infringed. Two decisions from the Supreme Court of Oklahoma, both of which involve factual circumstances similar to the present case, provide valuable guidance.

An individual with dementia who was contesting an initial appointment of guardianship

sought to have his own chosen attorney represent him, but the lower court appointed a different attorney without swearing witnesses, receiving documentary evidence, or setting a full adversarial proceeding with witnesses designated by the parties and with portions of the proceeding conducted off the record. *Towne v. Hubbard*, 2000 OK 30, 3 P.3d 154 (2000).

Noting that guardianship proceedings pose a "risk to the prospective ward of a massive curtailment of liberty," the Supreme Court of Oklahoma reversed the lower court's ruling, holding that the right of an individual in a guardianship proceeding to be represented by legal counsel of his or her own choosing "cannot be abridged by means inconsistent with due process of law." To comply with these constitutional requirements, a court must provide "adequate advance notice to the prospective ward that retained counsel will be [removed]" and must conduct "a meaningful evidentiary hearing in the context of orderly adversarial procedure," at which "the prospective ward may appear and present evidence" and which contains "the opportunity to confront and cross-examine adverse witnesses, a neutral decision-maker, representation by counsel, findings meeting a clear and convincing evidence standard, and a record sufficient to permit meaningful appellate review." *Towne*, 3 P.3d at 159-161.

Another case involved an individual with a head injury who was already subject to a limited guardianship and who sought to replace his court-appointed attorneys with his own chosen attorney. *In re Guardianship of Holly*, 2007 OK 53, 164 P.3d 137 (2007). After a hearing in which he received no notice, the lower court denied his request on the sole basis of unsworn statements by one of the attorneys, finding that the individual's chosen attorney had met with him without first contacting the limited guardian or the court-appointed attorneys, had been introduced to the individual by the brother of one of the attorneys, and that the individual was at risk of being exploited for financial gain. The lower court then expanded the limited

guardianship to a full guardianship.

Finding "the procedural conduct of [the guardianship proceeding to be] so fraught with error that it demands a response from this Court," (*id.*, at p. 143) and citing its decision in *Towne*, the Supreme Court of Oklahoma vacated all of the trial court's orders and remanded for a full adversarial evidentiary hearing, with the right to introduce testimonial and documentary evidence, regarding the individual's capacity to retain counsel and the ability of retained counsel to represent him with loyalty. "Unsworn, in-court statements by attorneys acting as advocates are not evidence," the decision noted. *Id.* Also, extending the holding in *Towne*, the decision held that an individual's right to independent legal counsel of his or her choosing applies to a person already adjudicated as incompetent and subject to guardianship, since the "'massive curtailment of liberty' * * * continues as long as that guardianship persists." *Id.*, at 144, *quoting Towne*, 3 P.3d at 159.

Intermediate appellate courts in Florida and Massachusetts have reached similar conclusions. *See, Holmes v. Burchett*, 766 So.2d 387, 388 (Fla.App. 2000) (due process requires adjudicatory hearing to determine the capacity of a person adjudicated as incompetent to choose counsel); *In re Guardianship of Zaltman*, 655 Mass.App.Ct. 678, 678-79, 684-85, 691, 693, 843 N.E.2d 663 (Mass.App. 2006) (evidentiary hearing required, possibly by due process, regarding the capacity of a person adjudicated as incompetent to retain counsel before counsel's appearance may be stricken); *see generally*, *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

Notably, Ohio Evid.R. 101(C)(7) states that the rules of evidence do not apply to "[s]pecial statutory proceedings of a non-adversary nature in which these rules would by nature be clearly inapplicable." Guardianship proceedings have generally been interpreted as non-

adversarial and thus as special statutory proceedings, although the rules of evidence have been applied in some individual guardianship cases. *See, In re Guardianship of Salaben*, 11th Dist. Ashtabula No. 2008-A-0037, 2008-Ohio-6989, ¶¶ 43, 64-71, 91-93. Even when the rules of evidence have not been strictly applied, some courts have reversed guardianship decisions that were supported by no information of evidentiary quality or have refused to defer to a probate court's discretion over a guardianship matter when reviewing decision made without taking any evidence. *See, Guardianship of Herr*, 5th Dist. Richland No. 98-CA-16-2, 1998 WL 666986, *2 (Sept. 2, 1998); *In re Guardianship of Melhorn*, 2d Dist. Montgomery No. 22764, 2009-Ohio-2424, ¶¶ 51, 54. This court should interpret the rules of evidence in a manner that preserves the constitutionality of guardianship proceedings, especially when the substantive rights of the person subject to guardianship are implicated. *See, State ex rel. Taft v. Franklin Cty. Court of Common Pleas*, 81 Ohio St.3d 480, 481, 692 N.E.2d 560 (1998).

A probate court must also strive to determine the capacity of a person to retain independent legal counsel of his or her choosing (through an in-camera interview, if necessary) and make factual findings regarding this determination. The capacity of a person to make his or her own decisions is a factual matter, is fluid, and varies by task. With appropriate support, many individuals who are adjudicated incompetent as defined under R.C. 2111.01(D) (a legal conclusion that is categorical and does not allow for nuance) can still make many decisions in their daily life. There can be no presumption that a person who is subject to guardianship lacks the capacity to make any decision regarding his or her life. *See, Matter of M.R.*, 135 N.J. 155, 169, 638 A.2d 1274 (1994); *Woods v. Commonwealth of Kentucky*, 142 S.W.3d 24, 41 (Ky. 2004); *Zaltman*, 65 Mass.App.Ct. at 688; *Matter of Roche*, 296 N.J.Super. 583, 588, 687 A.2d 349 (N.J. Super. Ct. Ch. Div. 1996). Importantly, in enacting R.C. 2111.49(C) and

2111.02(C)(7)(a), the General Assembly has already concluded that people who have been adjudicated as incompetent and unable to manage their own affairs can still be capable of hiring an attorney.

In this case, the hearing at which the Marion County Probate Court determined that the Appellant could not have independent legal counsel of her choice was not a proper adversarial evidentiary hearing and did not comply with constitutional due process requirements. No witnesses were sworn, July 21, 2015 Tr., at 2-3, no testimony was taken, *id*. at 1-21, and no documents were introduced into evidence. *Id*. The hearing involved only dialogue among the court and counsel. *Id*. There was no confrontation or cross-examination of witnesses; in fact, no arrangements were made to transport the Appellant to the hearing, *id*. at 11, 13, and she was not present. *Id*.

Furthermore, there was no reliable evidence (certainly no clear and convincing evidence) before the lower court regarding the Appellant's capacity to retain her own attorney or whether she had been subjected to undue influence by her family member or whether Mr. Cook would be disloyal to her interests. *See*, July 21, 2015 Tr. at 7-10, 13-14, 18-20 (containing unsworn lay opinions regarding ward's capacity and wishes and extensive unsworn hearsay regarding alleged undue influence by family members). In Ohio, a finding of undue influence requires: (1) a susceptible person, (2) another's opportunity to exert undue influence on the person, (3) improper influence exerted or attempted, and (4) a result showing the effect of such influence. *Kinchen v. A.R. Mays, Etc.*, 8th Dist. Cuyahoga No. 100672, 2014-Ohio-3325, ¶ 10, citing *West v. Henry*, 173 Ohio St. 498, 501 (1962). The mere existence of, or the opportunity to exercise, undue influence is not enough to meet the standard. Rather, the influence must bear directly on the decision being made and must be actually exerted on the person's mind and "'so overpower

and subjugate the mind of the [person] as to destroy his free agency and make him express another's will rather than his own.'" *Kinchen*, at ¶10, quoting *Rich v. Quinn*, 13 Ohio App.3d 102, 103 (12th Dist. 1983).

Also, the record is ambiguous on whether an in-camera interview of the Appellant actually occurred, see Order, scheduling interview for July 28, 2015 (Cert. Rec. Doc. 86); July 21, 2015 Tr., at 20-21, but even if it did, there is no record of that interview and no findings by the court indicating the impact it had on its decision. *See*, Judgment Entry, August 13, 2015, Cert. Rec. Doc. 96, at 1-2.

V. CONCLUSION

In conclusion, the judgment entry of the Marion County Probate Court, which denied the Appellant her statutory right to independent legal counsel of her choosing without due process of law, must be overturned. The Third District Court of Appeals must ensure that probate courts have proper oversight over their guardianship systems and respect the rights of people subject to guardianship to live autonomous, independent lives to the fullest extent possible.

Respectfully submitted,

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