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Ms. Diana Ramos-Reardon
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Supreme Court of Ohio
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Via email at: diana.ramos-reardon@sc.ohio.gov

Dear Ms. Ramos-Reardon:

The Ohio Disability Law and Policy Center, Inc. (Disability Rights Ohio) writes to share comments and concerns about the proposed amendments to the Rules of Superintendence for the Courts of Ohio governing guardianships. Disability Rights Ohio is designated as the system under federal and state law to protect and advocate for the rights of people with disabilities in Ohio. Our mission is to advocate for the human, civil, and legal rights of people with disabilities throughout Ohio.

Disability Rights Ohio (previously Ohio Legal Rights Service) has a long history of being involved in guardianship and protective services issues on behalf of people with disabilities. Our staff played a critical role in pursuing the 1990 amendments to Chapter 2111 of the Revised Code that added much needed due process rights for alleged incompetents to the Revised Code. Our lawyers have actively litigated important questions related to those rights. For example, in *State ex rel. McQueen v. Cuyahoga Cty. Court of Common Pleas*, 135 Ohio St.3d 291, 986 N.E.2d 925, 2013-Ohio-65 (2013), DRO attorneys obtained a ruling that counsel must be appointed to assist a ward in seeking review and termination of the guardianship. In the case of *In re Spangler,* 126 Ohio St.3d 339, 933 N.E.2d 1067, 2010-Ohio-2471 (2010), DRO attorneys obtained an important clarification on the role of county officials in guardianship proceedings. Executive Director Michael Kirkman was appointed by Chief Justice Thomas Moyer as a founding member of the Subcommittee on Adult Guardianship of the Advisory Committee on Children, Families, and the Courts, and in that capacity has continued to be involved in the development of the standards and other work by that body.

Disability Rights Ohio (DRO) commends the move to enact statewide rules to ensure that some uniform minimum standards are in place to better protect those subjected to guardianships. This issue is particularly important to the community DRO serves because paternalistic views of persons with disabilities often lead to plenary guardianships of persons with mental illness, intellectual disabilities and developmental disabilities. In many cases, though, guardianships are altogether unnecessary or could be limited if the appropriate alternatives and community supports were put in place.

The *Columbus Dispatch*'s 'Unguarded' series and related op-eds plainly demonstrated that Ohio's guardianship scheme is inadequate, outdated and failing to protect persons under guardianship. Moreover, these issues are not new, and have been discussed by the organized bar and other advocates for reform since at least 1988, when the American Bar Association (ABA) convened the first national guardianship conference and developed comprehensive recommendations for states to reform their guardianship process. These included: (1) stronger procedural protections for alleged incapacitated persons, (2) a more functional determination of incapacity, (3) use of limited guardianship and emphasis on the principle of the "least restrictive alternative", (4) stronger court monitoring, and (5) development of public guardianship programs. Since that time there have been two additional national conferences, both re-emphasizing the need for reform in these areas, and both the ABA and the AARP have published numerous studies related to the need for reform in guardianship practices (e.g. http://www.canhr.org/reports/2006/2006_14_guardianship.pdf). The Governmental Accountability Office (http://www.gao.gov/new.items/d04655.pdf; http://www.gao.gov/new.items/d101046.pdf) has published reports that detail the many deficiencies in how guardianships are established and monitored in the United States. See generally, Hurme & Wood, Guardian Accountability Then and Now: Tracing Tenets For An Active Court Role, 31 Stetson L. Rev. 865 (2002) (available at http://justice.law.stetson.edu/LAWREV/abstracts/PDF/31-3Hurme.pdf)

Work is underway in some jurisdictions to move toward supported decision making. In this model, the person's legal capacity is preserved while necessary supports are provided to help the individual make his or her decisions. With rare exception, the need for a legal surrogate such as a guardian is eliminated or at least minimized.

Against this background, Ohio has much work to do. At least 37 states require mandatory appointment of counsel in an initial guardianship application; Ohio does not. Many states have amended their laws to include modern concepts of protective services for people who are incapacitated. These recognize that plenary guardianship should be used only as the last resort, while in Ohio plenary guardianship is the default. Seven jurisdictions have adopted the 1998 Uniform Guardianship And Protective Proceedings Act (available at http://www.uniformlaws.org/shared/docs/guardianship%20and%20protective%20proceedings/uggppa_final_97.pdf).

DRO recognizes that the proposed guardianship rules are a step in the right direction. Even these rules, however, are severely deficient and will not enough to address the problems and abuses highlighted in the *Dispatch* series. The proposed rules are far below both the national guardianship standards set forth by the National Guardianship Association (NGA), as well as the practices of numerous other states. Even the Advisory Subcommittee's original, 2008 draft standards more closely mirrored the national standards and had much more robust rules and protections for wards than the current, watered down version.

For instance, the national standards reflect a person-centered approach and contain very detailed descriptions and requirements for decision-making, choosing the least restrictive alternative, self-determination of the ward, and the guardian's duties regarding diversity and personal preferences

of the ward (see NGA rules 7-10). Each of these provisions consists of multiple paragraphs explaining what the guardian should do to ensure decisions are aligned as much as possible with the wishes and choices of the ward. In contrast, Ohio's counterpart rules (rule 66.09(B)-(F)) have been condensed largely to just one or two vague sentences.

As noted in the *Dispatch* series, 24 states have enacted into law – not just rules – reforms to their guardianship systems to strengthen oversight and better protect persons subjected to guardianships. Many states, including Alaska, Arizona, California, Florida and Michigan, have incorporated some or all of the national standards into their laws, including an emphasis on utilization of guardianships only as a last resort. California law contains person-centered language throughout and prohibits establishment of a guardianship unless the court makes an express finding that it is the least restrictive alternative. Arizona law requires guardians, where appropriate, to encourage wards to develop their maximum self-reliance and independence. Arizona also requires guardians to actively work toward limiting or terminating the guardianship and seek alternatives to guardianship. Florida law, which is perhaps the most robust in its protections, has an entire section devoted to the rights of the ward and requires guardians to explore alternatives to guardianship.

Additionally, some states have provisions specific to wards with mental illness or with intellectual and developmental disabilities. Arizona has specific provisions applicable to wards with mental illness in terms of the ward's rights and the guardian's duties regarding inpatient treatment. California law has additional provisions specific to wards with intellectual and development disabilities in terms of maximizing self-reliance and independence and finding the least restrictive alternatives. And Florida has a 'guardian-advocate' process for persons with intellectual and developmental disabilities that does not require a finding of incapacity in order to appoint a guardian-advocate and allows for limiting the powers of the guardian-advocate.

The national standards require at least 12 visits, or once a month, per year by the guardian to the ward. This enables a guardian to really know and assess what is going on with the ward in terms of the person's condition, care and desires. Ohio's proposed rules only require two visits per year. Other states, such as Florida, require at least four visits per year, or once per quarter. The national standards also contain separate provisions specific to guardians of the person and guardians of the estate, setting forth in great detail the responsibilities of each type of guardianship.

Ironically, the Advisory Committee's initial 2008 draft rules did closely mirror the national standards and contained more detailed, person-centered, rights protective language and quality assurance provisions. Though some remnants of these provisions are still sprinkled throughout the current proposed rules, particularly in rule 66.09, 'Responsibilities of Guardian to Ward,' most of these provisions were inexplicably gutted, leaving the current, bare bones language that is a far cry from the robust and detailed provisions of the 2008 draft and the national standards. The quality assurance provision was cut entirely, as were the separate provisions detailing the responsibilities of guardians of the person and guardians of the estate.

The result is that the proposed rules reflect a continued tendency toward plenary guardianships, rely too heavily on self-reporting of guardians in terms of conflicts and fee petitions, fail to

actively promote person-centered planning and participatory decision-making of the ward, and still enables inconsistency and a lack of uniformity across the state. For example, the *Dispatch* series noted that Stark County imposes a hard limit on the number of wards for which a person can act as guardian, while Franklin County has no such limit and has a handful of guardians with over 100 wards each. The rules as currently written would do nothing to alter this fact, because rule 66.09(K) merely requires a guardian to "appropriately manage the guardian's caseload to ensure the guardian is adequately supporting and providing for the best interest of the wards in the guardian's care." It is left up to each individual guardian - unless the local court decides to take a closer look or impose some limitation - to determine appropriate management. The national standards do not impose a hard cap, but do state that a guardian should only take on as many wards that would still allow for monthly visits to all wards.

It appears that the desire to preserve local control over guardianships has trumped the dire need for better oversight and protections. But local courts have had opportunities for years to tighten their guardianship requirements and to put better protections in place. A few have chosen to do so, but most have not. As the *Dispatch* series points out, 61% of the courts do not even require basic background checks of guardians. Ensuring uniformity, allowing plenary guardianships only as a last resort and aligning the rules with national standards and practices does not have to be an 'either/or' proposition in terms of local control. There are ways to preserve local authority and allow local courts some flexibility to account for issues unique to their counties without sacrificing the robust requirements and protections that need to be implemented.

In addition to these overarching concerns with the rules, we also have concerns with the following specific rules.

Rule 66.02(C) - Exclusion of family member guardians. The rules do not apply to guardians who are related to the ward, unless the court deems it appropriate to impose orders or conditions on the guardian. Considering that, in Franklin County alone, anywhere from one-half to two-thirds of guardians are family members, excluding family members from the mandated training, background check, and other requirements will have little effect in curbing the abuse and neglect highlighted in the 'Unguarded' series. The abuse, neglect and financial exploitation of wards also occur at the hands of family member guardians.

Guardians act as a fiduciary and act with the authority of the Probate Court and the state. DRO can discern no rational reason to exclude any guardian from oversight by the Court. Any concern about family members not being able to understand the courses because they are 'legal' in nature is misplaced. With the possible exception of guardianships of the estate, much of a guardian's duties are akin to social services – facilitating benefits and services, ensuring a ward's clothing, food and housing needs are met, making health care decisions and supporting quality of life opportunities and activities for the ward, etc. Making sure family member guardians are aware of these obligations and how to go about fulfilling them, as well as the conflict of interest prohibitions, is equally as important as ensuring that professional guardians are educated about these obligations and prohibitions.

Rule 66.04(A)(2) – Consideration of a limited guardianship. Although the concept of requiring the court to first consider a limited guardianship is a good start, the rule does not go far enough

to emphasize the importance of considering alternatives to any kind of guardianship. Because of the serious impact of guardianships on the rights and decision making of wards, the presumption of competence and the consideration of less restrictive alternatives should be strictly preserved and applied. This can be achieved by requiring explicit findings that less restrictive alternatives would not meet the ward's needs before imposing a limited or plenary guardianship, as Arizona and California laws require, or at the very least requiring exploration of alternatives to guardianship and the least intrusive means of assistance available, as Florida law requires. California law also requires a prospective guardian to identify in the application for guardianship what alternatives have been considered and to explain why these alternatives will not work or are not available. The national standards also stress that limited guardianships should be preferred over plenary guardianships.

Rule 66.05(A) - Background checks. DRO supports the use of criminal and civil background checks of prospective guardians. But credit checks should be required, as well, especially when a guardianship is going to be plenary or a guardianship of the estate. Because guardians are essentially standing in the place of the court (which has superior guardian status), it is not unreasonable to expect a prospective guardian to pass these background checks, and guardians should be willing and able to undergo these checks. Further, if a guardian's employees or other staff are going to be interacting with the ward or otherwise involved in the handling of the guardianship, those employees should also be required to undergo the appropriate background checks.

Rules 66.06 and 66.07 – Education requirements. DRO welcomes the requirement of both entry-level and continuing education on the fundamentals of guardianship. However, only 6 hours of initial education and 3 hours per year thereafter is insufficient. To put it in perspective, Florida law requires professional and public guardians initially to undergo a minimum of 40 hours of instruction and training unless they are licensed attorneys. Thereafter, they must have at least 16 hours of continuing education every two years. Florida law also requires all prospective professional guardians to pass a competency exam and to register before being able to act as a professional guardian.

Additionally, we have some concerns about the provision allowing a waiver for good cause if a person has been acting as a guardian for at least 5 years. What is the definition of good cause and how will this be determined? Is good cause for waiver purposes going to differ from county to county? Considering the growing trend across the country toward the need for person-centered planning and supportive decision making, rather than substituted decision making, it is feasible that someone who has been a guardian for several years may need this education just as much as a new guardian.

Rule 66.08(B) - Pre-appointment visit. DRO agrees with the concept of a prospective guardian meeting with a prospective ward at least once before the actual appointment of guardianship to allow them to get to know each other and see if the relationship will be a good fit. Oftentimes, prospective wards are, understandably, apprehensive about having a complete stranger making decisions on their behalf when the guardian doesn't even know the ward or the ward's beliefs, value system or wishes. In this context, a pre-appointment visit makes sense. That said, however, certain precautions should be put in place to protect the rights of a prospective ward

and prevent the visit from being an evidence-gathering opportunity against the ward. For instance, the rules should prohibit a guardian from using anything from the visit in court to support the application for guardianship. An initial assessment of whether the prospective ward is competent or capable of any level of decision-making is a determination for the court-appointed investigator and evaluation, not the guardian, and it is inappropriate and violative of the prospective ward's due process rights to allow this type of activity in a pre-appointment visit. The rules should also allow for the prospective ward to have the option of having an attorney present during the pre-appointment visit, or to decline the visit altogether.

Rule 66.08(K) – Guardian's compensation. This rule contains only three requirements: (1) the guardian must itemize all expenses related to the guardianship, (2) the guardian is prohibited from charging fees or costs in excess of those approved by the court, and (3) the guardian is prohibited from receiving compensation or incentives from a direct service provider of the ward. This rule is seriously lacking in comparison to the national standard and the practice by other states. The national standards contain duties for both guardians and the appointing courts regarding compensation. Guardians must provide detailed written explanations of the following: the basis for any fee (e.g. a rate schedule) at the time of appointment as guardian, a projection of annual fees within 90 days of the appointment, disclosure of any fee changes, an application for authorization of any fee-generating actions not included in the original projections, and any claim for fees. The national standards also impose a duty upon guardians to conserve the ward's estate when making decisions and charging a fee.

In determining whether the requested fees are reasonable and should be awarded, the national standards require courts to consider a set of enumerated factors, such as the necessity of the services, the claim for fees in relation to the initial projected fees and budget, the guardian's expertise, the complexity of the work, any changes in circumstances of the ward and the work, the actual work done and the skill level required to complete the work, the outcome of the work, the customary fees paid and expended for similar services in the community, whether the best interests of the ward were put first, etc.

Other states have adopted similar requirements to the national standard. For example, Arizona requires a guardian to provide a written explanation of the basis for compensation and how the compensation will be computed. The burden is on the guardian to show that the fees are reasonable and necessary. The court must determine whether the fees are reasonable and necessary based on enumerated factors, including the best interest of the ward, the usual and customary fees, whether appropriate and prudent delegation to lower-cost staff or services occurred, etc. For attorneys acting as guardians, Florida law requires the court to clearly distinguish between fees for legal services and fees and expenses for guardianship services and make a determination that no conflict exists. Florida law also contains an enumerated set of criteria that must be considered in determining whether to award fees to a guardian.

By contrast, rule 66.08(I) merely requires a guardian to file a fee schedule differentiating guardianship services from legal services, with no requisite oversight or determination of reasonableness by the court before awarding fees.

DRO recommends that rule 66.08(I) and (K) be changed to reflect the more vigorous requirements contained in the national standard and adopted by other states, in order to effectively curb against the serious risk of financial exploitation highlighted by the *Dispatch* series. Additionally, safeguards should be expressly included in the rule to ensure that guardians are not charging rates equivalent to legal fees for non-legal, guardianship work. Finally, the Court should consider stricter regulation of the potential for conflict of interest in allowing the guardian/attorney to provide legal services to the guardianship. The lack of objectivity intrinsic to this practice can easily lead to confusion and overstepping, e.g. *Disciplinary Counsel v. Johnson*, 113 Ohio St.3d 344, 865 N.E.2d 873, 2007-Ohio-2074 (2007); *Cleveland Bar Association v. Mitchell*, 118 Ohio St.3d 988, 86 N.E.2d 2222008-Ohio-1822 (2008)(attorney kept "a stable [sic] of 23 seniors that I'm able to assist, and that's based on the number of adult day workers and home health aides that I have available to me.")

These rules are a welcomed step in the right direction, but fail to go far enough to provide protection to current and prospective wards from abuse, financial exploitation and neglect. If Ohio is serious about strengthening guardianship requirements and protecting those subjected to guardianships, then an overhaul of both these rules and Ohio's guardianship statute will be necessary.

Sincerely,

Michael Kirkman
Executive Director

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Attorney at Law