[Cite as *In re Guardianship of Spangler*, 2011-Ohio-6686.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

IN THE MATTER OF THE GUARDIANSHIP OF JOHN SPANGLER	:	**O P I N I O N**
	:	**CASE NOS. 2007-G-2800 and 2007-G-2802**

Civil Appeal from the Geauga County Court of Common Pleas, Probate Division, Case No. 06 PG 000245.

Judgment: Affirmed.

Pamela W. Makowski, 503 South High Street, Suite 205, Columbus, OH 43215 (For Appellants-Gabriele Spangler and Joseph M. Spangler).

Shane Egan, 4110 North High Street, Columbus, OH 43214 (For Appellee-Advocacy and Protection Services, Inc.).

David P. Joyce, Geauga County Prosecutor, and *J.A. Miedema*, Assistant Prosecutor, Courthouse Annex, 231 Main Street, Chardon, OH 44024 (For Appellee-Geauga County Board of Mental Retardation).

THOMAS R. WRIGHT, J.

{¶1} These appeals are before this court upon remand from the Supreme Court of Ohio. As part of our original consideration of this matter, a majority of this court held that the Geauga County Board of Mental Retardation and Developmental Disabilities lacked standing to move the trial court for removal of the two guardians of an incompetent person; therefore, we reversed the trial court's final judgment on the motion without reviewing the substance of the underlying decision. On appeal from our ruling,

the Supreme Court concluded that, although a county board of mental retardation and developmental disabilities lacked the authority to file a motion to remove a guardian, a probate court still had the plenary power to investigate the acts of a guardian upon receiving sufficient information on the point. *In re Guardianship of Spangler*, 126 Ohio St.3d 339, 2010-Ohio-2471. Accordingly, since the trial court in this case did not err in going forward on the "removal" issue, this court must now address the two assignments of error that were deemed moot under our initial analysis.

{¶2} The subject matter of the trial proceedings concerned the guardianship of John Spangler, an incompetent person. Since his birth in November 1987, John has suffered from autism, mild mental retardation, and mitochondrial disease. As a consequence of his mental disabilities, John has always needed constant supervision and care, primarily because he is prone to intermittent violent behavior. When he becomes upset at a specific event or the lack of a structured environment, he has been known to cause significant property damage and pose a threat to his caregivers.

{¶3} Prior to reaching the age of majority, John lived in Geauga County with his parents, Gabrielle and Joseph Spangler ("the Spanglers"). In light of her son's plight, Gabrielle became an advocate for mentally disabled children in the local community. In turn, because his wife was more involved in dealing with such children, Joseph would typically defer to her when it was necessary to make a major decision regarding John's care. However, both parents were equally involved in tending to him on a daily basis.

{¶4} At some point immediately after John's eighteenth birthday in November 2005, the Spanglers began to experience some problems controlling John's behavior. There was a concern that John would injure his mother or sister during one of his violent episodes. As a result, in January 2006, Gabrielle contacted the Geauga County Board

of Mental Retardation and Developmental Disabilities ("the board") for the purpose of determining whether John could be placed in an appropriate facility. Up until this juncture in John's life, the board had only given modest amounts of assistance to the Spanglers in providing proper care. However, after Gabrielle made her initial request to have John removed from the family residence, the board became more involved in the major decisions concerning John's care.

{¶5} In response to the Spanglers' January 2006 request, the board began the process of having John accepted into an "intermediate care" facility. Before the process could be completed, though, Gabrielle withdrew the request for John's total removal and instead asked for additional help in caring for him at the Spanglers' home. The board eventually agreed with the amended request, and the Spanglers were able to hire new caregivers who could assist in controlling John's periodic violent behavior.

{¶6} When problems developed as to when the caregivers would be required to come to the Spangler residence, the Spanglers terminated them and immediately hired a new couple, David Devlin and his spouse,[1] to assist with John's care. Even though the Spanglers initially had a good working relationship with the Devlins, an incident took place in which John threatened to cause harm to his mother. In light of this, Gabrielle again asked the board to find placement for him in an appropriate facility. This time, the process went forward, and John was ultimately accepted into a developmental center in Warrensville, Ohio.

{¶7} In visiting their son at the Warrensville facility, the Spanglers soon formed the opinion that John had been physically abused by one of the other mentally disabled patients. Consequently, within two months of John's placement at the developmental

1. Our review of the entire evidentiary hearing indicates that no reference was ever made to the first name of David Devlin's spouse.

center, they decided to remove him from the facility, despite the fact that the board and its employees held the opinion that it would be better for John to remain under the care of the facility workers. However, rather than move him back into their family residence, the Spanglers placed John in a hotel room with the Devlins. Soon thereafter, when the Devlins began to rent a home in the area, John continued to reside with them, and they became his primary caregivers.

{¶8} In conjunction with their decision to remove John from the developmental center, the Spanglers also filed the underlying case before the Geauga County Probate Court in June 2006. In their application to be appointed John's guardian, the Spanglers alleged that their son could not provide for his own care because his mental disabilities had rendered him incompetent. Their application was accompanied by a statement of evaluation and John's written consent to the appointment.

{¶9} Three separate hearings were conducted on the Spanglers' guardianship application. Although the board raised concerns about John's living conditions with the Devlins, it did not object to the Spanglers' basic request. Accordingly, in July 2006, the trial court issued a judgment in which it found John to be incompetent and appointed the Spanglers as the guardians of his person.

{¶10} During the summer and early fall of 2006, John continued to live with the Devlins. Furthermore, once David Devlin had obtained the requisite state certification, the board increased the level of its assistance regarding John's care. Nevertheless, in early October 2006, the Spanglers began to register with the board certain complaints as to the actions of the Devlins. Specifically, the Spanglers contended that the Devlins had physically abused John on at least two occasions, and that they were keeping John isolated in their residence. In response, the Devlins denied the allegations of abuse,

and further maintained that Gabrielle was interfering with their care of John by making unannounced visits at awkward times. Concerning the later point, the Devlins asserted that Gabrielle's visits would often upset John, causing him to engage in violent behavior.

{¶11} After the board held a meeting to discuss the basic disputes between the Spanglers and Devlins, Gabrielle made another unannounced visit to the Devlins' home late one evening. Even though the Devlins had retired to their bedroom, Gabrielle came into the residence without being invited and began speaking to John. Upon hearing the commotion and coming downstairs, David Devlin did not directly confront Gabrielle, but did observe her behavior for a few moments. After concluding that Gabrielle was likely intoxicated, he telephoned the police, and Gabrielle was later arrested for trespassing on the Devlins' property.

{¶12} On October 25, 2006, one day after the foregoing incident, the board filed an ex parte motion for the removal of the Spanglers as guardians and the appointment of a new guardian for John. As the primary basis for the motion, the board argued that the Spanglers were interfering with the Devlins' efforts to provide proper care for John. The motion also asserted that Gabrielle was not making decisions in the best interests of John because her tendency was to make changes too quickly without considering his need for slow transitions.

{¶13} Upon reviewing the motion and its accompanying evidentiary material, the trial court granted provisional relief before the Spanglers could respond in any fashion. In its separate judgment, the court ordered the temporary removal of the Spanglers and the appointment of Advocacy Protective Services Incorporated as John's new guardian until a final determination could be rendered on the board's motion. The trial court also set the matter for an oral hearing within six days of the date of its judgment.

{¶14} Immediately prior to the scheduled proceeding, the Spanglers reached an agreement with counsel for the board to continue the hearing on the final merits of the removal request for a period of six months. The Spanglers also agreed that, during this time frame, Advocacy Protective Services Incorporated would continue to serve as the temporary guardian of John's person. Finally, it was agreed that the Spanglers would undergo psychiatric, drug, and alcohol assessments.

{¶15} Immediately after the incident involving Gabrielle that led to the motion to remove, the Devlins informed the board that they no longer wanted to serve as John's caregivers. Thus, the temporary guardian transferred John to a group home operated by the Jewish Family Services. During John's first several weeks at the group home, the temporary guardian decided to curtail Gabrielle's ability to visit her son. This decision was based upon the conclusion that her behavior around John would often trigger one of his violent episodes. Despite the lack of access to his mother, John still experienced considerable difficulties in adapting to his new environment. That is, he had a number of violent episodes in which he caused certain property damage and also harmed himself. Nevertheless, the frequency of John's episodes began to diminish after he resided at the group home for a few months.

{¶16} Beginning in April 2007, the trial court conducted a three-day evidentiary hearing on the final merits of the motion to remove the Spanglers. At the outset of the second day of the proceeding, John's separate counsel informed the trial court that his client had indicated that he would prefer for his father to be his sole guardian. In light of this, Gabrielle stated that she was willing to resign her position. However, this did not affect the nature of the evidentiary intake; i.e., the majority of the evidence as to the role of the Spanglers pertained solely to her.

{¶17} In support of its pending motion, the board offered the testimony of two of its employees, four employees of the Jewish Family Services, an employee of Advocacy Protective Services Incorporated, and David Devlin. In reply, the Spanglers presented the testimony of two teachers and one caregiver who had previously worked with John while he attended school locally in Geauga County. They also presented the testimony of the two counselors who had been assisting them as part of their psychiatric/alcohol assessment. In addition, Joseph Spangler testified in his own behalf.

{¶18} After interviewing John separately, the trial court issued a final judgment on the matter in August 2007. As to Gabrielle Spangler, the court found that her direct contact with John often constituted a "trigger" of his violent behavior. The court further found that she had impulsively sought changes in John's placement without giving due consideration to the opinions of the professional caregivers. As to Joseph Spangler, the trial court found that he failed to acknowledge the difficulties his son experiences when he has contact with other members of the family. The court also found that Joseph had not shown the ability to objectively intercede when his wife had disagreements with the professional caregivers.

{¶19} Based upon the foregoing findings, the trial court concluded that there was good cause to warrant the removal of the Spanglers as guardians of John's person. As a result, the board's motion to remove was granted, and it was ordered that Advocacy Protective Services Incorporated would continue to act as John's guardian indefinitely.

{¶20} Gabrielle and Joseph Spangler appealed the trial court's final judgment in Case No. 2007-G-2800. In addition, John pursued his own separate appeal in Case No. 2007-G-2802. In our original consideration of the appeals, this court disposed of John's sole assignment of error and two of the Spanglers' four assignments of error.

Therefore, in light of the Supreme Court's order upon remand, we shall now proceed to review the Spanglers' two remaining assignments, which provide:

{¶21} "[1.] 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.

{¶22} "[2.] 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."

{¶23} Under their first remaining assignment, the Spanglers contest the propriety of the trial court's ex parte judgment of October 25, 2006, in which they were removed as guardians on a temporary basis and Advocacy Protective Services Incorporated was appointed as acting guardian until a final determination could be made. They maintain that the use of an "ex parte" order was improper because, in filing its emergency motion to remove, the board did not indicate that its counsel made any effort to give them prior notice so that they could have an opportunity to respond. The Spanglers also contend that no temporary relief should have been granted because the board made no showing that John could be subject to immediate harm.

{¶24} In support of their challenge to the ex parte procedure, the Spanglers rely upon a clause contained in R.C. 2109.24, which governs the resignation or removal of a fiduciary. In stating a list of reasons that would warrant a fiduciary's removal, the third paragraph of this statute indicates that the fiduciary must be afforded not less than 10 days notice before the procedure can go forward. Attempting to apply this requirement to the facts of this case, the Spanglers assert that the lack of any prior notice rendered the entire subsequent procedure completely void.

{¶25} As will be fully discussed under their second remaining assignment, this

court would agree that R.C. 2109.24 does delineate the applicable standard for deciding when guardians of an incompetent person can be removed by order of a probate court. Nevertheless, it must be emphasized that R.C. 2109.24 is contained in a chapter of the Ohio Revised Code which governs the duties and acts of general fiduciaries. A review of other aspects of the Revised Code readily reveals that it has a separate chapter, R.C. Chapter 2111, which sets forth specific provisions for guardians and conservatorships. Obviously, if R.C. Chapter 2111 contains a statute that expressly deals with a particular subject, it would be controlling over similar provisions in other Revised Code chapters. As a result, the fact that the "removal" standard of R.C. 2109.24 has been interpreted to apply to guardians does not necessarily mean that the other provisions of the statute must be followed.

{¶26} Furthermore, our review of the "notice" provision of R.C. 2109.24 readily demonstrates that it does not contain any language showing that it was meant to apply to an "emergency" situation. In the absence of any reference to possible scenarios in which there is a need for an immediate decision to protect against harm, the wording of R.C. 2109.24 must be construed to apply only to non-emergency situations. Thus, it is evident that the statute's "ten-day notice" requirement only governs the final disposition of a motion to remove, not a temporary order.

{¶27} In conjunction with the foregoing point, this court would further note that a review of the remainder of R.C. Chapter 2109 indicates that it does not have any other section governing the procedure, emergency or otherwise, for the removal of a fiduciary by a probate court. Similarly, there are no provisions in the code chapter pertaining to guardians, i.e., R.C. Chapter 2111, which state a specific procedure to be followed for the removal of the guardian of an incompetent person. As to the latter code chapter, it

must be mentioned that, pursuant to R.C. 2111.02(B)(2), when a guardian is temporarily or permanently removed, a probate court has the ability to appoint ex parte an interim guardian without giving notice to the ward. While this provision was obviously relevant to the procedure in the underlying proceeding, it must be emphasized that the provision presumes that the guardian's removal, temporary or permanent, has already occurred. Accordingly, the use of an ex parte order applies only to the appointment of an interim guardian, not to the temporary removal of the original guardian.

{¶28} Nevertheless, despite the lack of any specific statutory provision allowing for the employment of an ex parte order to temporarily remove an appointed guardian, this court still concludes that a probate court has the general authority to render such a judgment. This conclusion is predicated upon the scope of a probate court's power over all matters relating to an incompetent ward. As to this point, we would first indicate that R.C. 2111.50(A)(1) expressly provides:

{¶29} "At all times, the probate court is the superior guardian of wards who are subject to its jurisdiction, and all guardians who are subject to the jurisdiction of the court shall obey all orders of the court that concern their wards or guardianships."

{¶30} In addition to the forgoing general provision, R.C. 2111.50(B) states that, subject to a few limited exceptions, a probate court possesses "all the powers" which an incompetent ward would legally be permitted to exercise if he was not under a disability. Subsection (B) then sets forth a list of seven acts that the probate court has the power to perform, but also states that this list is non-exclusive.

{¶31} Given the extensiveness of the probate court's statutory authority under R.C. 2111.50, it has been held that a guardian can never exercise complete control over a ward. *Art v. Erwin*, 10th Dist. No. 10AP-747, 2011-Ohio-2371, at ¶25. Instead, as the

Supreme Court of Ohio has indicated, "the appointed guardian is simply an officer of the court subject to the court's control, direction, and supervision." *Spangler*, 2010-Ohio-2471, at ¶52.

{¶32} In light of the probate court's status as "superior" guardian, logic dictates that such a court has the inherent ability to take any step to protect the best interests of an incompetent ward. Obviously, under certain circumstances, this inherent authority would include the power to issue an ex parte order that temporarily removes a guardian until a final decision on a motion to remove can be made. That is, if it can be established that the ward could be subject to harm during the interim period until a complete evidentiary hearing could be held, an ex parte order is justifiable in order to adequately protect the ward's best interests.

{¶33} In similar situations in which an ex parte order can be employed to protect against possible irreparable harm, the order cannot be granted unless it is also shown that the moving party has made a reasonable effort to give notice to the opposing side. See Civ.R. 65(A). Regarding a motion to remove a guardian of an incompetent ward, this court would generally agree that some form of effort to contact the guardian should be required before an ex parte order would be justified. However, we would also recognize that there are limited circumstances in which the mere act of giving notice to the guardian could defeat the specific purpose of providing immediate temporary relief. In other words, there can be instances in which the ward might suffer additional irreparable harm as a direct result of requiring that notice be given to the guardian.

{¶34} Even though there is no dispute that the guardian of an incompetent ward must be afforded the rudimentary requirements of due process when a request for her removal is made, the extent of her right to notice must be viewed in light of the ultimate

purpose of the guardianship itself; i.e., appropriately providing for the ward. If the giving of immediate notice of the "removal" motion could cause the commission of a new act by the guardian which would harm the ward before the probate court could render a temporary order, the protection of the ward would certainly be entitled to greater weight than the due process concerns. As to the foregoing point, it should be noted that, as a mere officer of the probate court, the guardian actually has no personal interest in her appointment or removal. *Spangler*, 2010-Ohio-2471, at ¶53. Furthermore, this court would emphasize that, in the context of a motion to remove, the guardian would no longer be concerned with the ward's interests; as the superior guardian for the ward, the probate court would clearly be in the best position to protect his interests in granting any type of ex parte temporary relief.

{¶35} Therefore, we conclude that an order regarding the temporary removal of the guardian can be made ex parte when it is shown that: (1) the ward could sustain irreparable harm unless immediate temporary relief is granted; and (2) the temporary order would not provide protection for the ward if the guardian was given immediate notice.

{¶36} In the instant case, our review of the board's emergency motion to remove indicates that it did contain sufficient assertions to establish that John could be subject to irreparable harm if immediate relief was not granted. Specifically, the motion referred to the fact that Gabrielle Spangler had recently been arrested for trespassing upon the property of John's caregivers while appearing to be intoxicated. To the extent that the assertion tended to show that Gabrielle Spangler was acting irrationally at that time, the trial court could have justifiably found that John had to be protected from her until a final hearing on the motion to remove could be conducted.

{¶37} Furthermore, given the nature of her recent act, the trial court could have also found that if the Spanglers were given immediate notice of the emergency motion, irreparable harm could occur before a temporary "removal" order could be released. In trespassing upon the caregivers' property, Gabrielle Spangler had acted surreptitiously in entering the residence late in the evening without knocking. Based upon this, it would have been reasonable to conclude that a strong possibility existed that she might try to take John from the caregivers' home before any type of temporary order was rendered. Thus, the trial court's decision to issue the ex parte order was warranted despite the fact that the board did not make any effort to give the Spanglers any immediate notice of the emergency motion prior to the disputed order's release.

{¶38} In addition to the foregoing analysis, this court further holds that even if the trial court had erred in making an ex parte ruling on the "emergency" aspect of the motion to remove, any procedural mistake was not prejudicial to the Spanglers. As to this point, we would again note that the trial court scheduled a full adversarial hearing on the board's emergency motion within one week of the issuance of the ex parte order; therefore, the disputed order did not remain in effect for a prolonged period of time. The record also shows that the scheduled hearing did not go forward on that date because the Spanglers agreed that a continuance was necessary so that they could undergo psychiatric, drug, and alcohol assessments. The Spanglers also agreed that Advocacy Protective Services Incorporated would continue to act as interim guardian until the merits of the motion to remove were fully litigated.

{¶39} By negotiating a continuance of the full hearing, the Spanglers obviously were not making any type of admission on the final merits of the motion to remove. Yet, the need for the agreement did signify that the board's motion was not baseless and

that additional time was necessary in order for them to defend the matter adequately. Under such circumstances, any alleged error in the issuance of the temporary ex parte order would have become harmless when the Spanglers expressly agreed the order would remain effective during the interim period. Hence, for both of the foregoing reasons, the Spanglers' first remaining assignment lacks merit.

{¶40} Under their second remaining assignment, the Spanglers contend that the trial court's decision to remove them as guardians of John's person was not supported by the evidence presented during the final hearing. First, they submit that their removal was impermissible under the law when there was no evidence indicating that they had failed to adequately provide for John's basic needs. Second, the Spanglers argue that the decision to permanently remove them was unwarranted when the evidence showed that the board filed its motion merely because they were too proactive in protecting the welfare of their son.

{¶41} At the outset of our legal discussion, this court is compelled to address the preliminary question of what standard must be satisfied before a guardian of the person can be properly removed from the position. In its final judgment, the trial court held that the removal of such a guardian was governed by R.C. 2111.50(A)(2)(c), which contains a specific reference to a standard of "good cause." On the other hand, our review of the relevant case law indicates that the vast majority of Ohio courts have cited R.C. 2109.24 as delineating the standard to be followed when a guardian is to be deprived of all basic authority over the ward. See, e.g., *In re Guardianship of Marsh,* 178 Ohio App.3d 723, 2008-Ohio-5375; *In re Guardianship of Burrow*s, 11th Dist. No. 2006-P-0118, 2007-Ohio-4764; *In re Ewanicky*, 8th Dist. No. 81742, 2003-Ohio-3351; *In re Guardianship of Miller* (Aug. 3, 1998), 12th Dist. Nos. CA97-09-045 & CA97-10-049, 1998 Ohio App.

LEXIS 3519. As to a general fiduciary or guardian, the latter statute does not have any express reference to "good cause."

{¶42} Under Ohio's statutory scheme, the essential provisions for a guardian of the person are set forth in R.C. Chapter 2111. For example, R.C. 2111.02 explains the basic procedure that must be employed for the original appointment of such a guardian. In turn, R.C. 2111.13 states the duties of such a guardian. Moreover, R.C. 2111.50(B) provides a list of powers that a probate court can delegate to a guardian of the person.

{¶43} In regard to a guardianship over the person of a minor, R.C. 2111.46 does refer to the removal of that guardian for "good cause" and the selection of a successor guardian. However, our review of the remaining provisions in R.C. Chapter 2111 fails to reveal any similar language as to a guardianship over the person of someone who has been declared incompetent. Although R.C. 2111.47 states a procedure for terminating a guardianship over an incompetent person, the procedure can only be employed when the person has regained his competency.

{¶44} In the absence of any express provision in R.C. Chapter 2111 governing the removal of a guardian for an incompetent person, Ohio courts have looked to R.C. Chapter 2109 for guidance. That chapter of the state's statutory law contains provisions pertaining to the use of fiduciaries in probate matters. Besides various sections which relate to a fiduciary's basic duties and the posting of a fiduciary's bond, the chapter has a specific section, R.C. 2109.24, that governs the resignation or removal of a fiduciary. In its present version, the third paragraph of this statute provides:

{¶45} "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."

{¶46} In the instant case, in considering the question of what standard should be used for determining whether the Spanglers should be removed as guardians of John's person, the trial court acknowledged that Ohio courts had previously applied the quoted language of R.C. 2109.24. Specifically, the trial court indicated in its judgment that prior courts had interpreted a clause of the statute to grant probate courts broad discretion to remove a guardian whenever the best interest of an incompetent ward would be served. The trial court then concluded that this discretion was deleted from the statute when its most recent amendment took effect on January 1, 2007. Based upon this, the trial court ultimately held that the "good cause" standard under R.C. 2111.50(A)(2)(c) should now be followed.

{¶47} The trial court's analysis was predicated entirely upon the "interest" clause in the third paragraph of R.C. 2109.24. Prior to the enactment of the "2007" amendment of this statute, the disputed clause had read: "because the interest of the trust demands it ***." In contrast, the disputed clause now reads: "because the interest of the *property, testamentary* trust, *or estate that the fiduciary is responsible for administering* demands it ***." (Emphasis added.) Citing the italicized portions of the present version, the trial court held that the purpose of the "2007" amendment was to limit the application of the disputed clause to instances in which a fiduciary is exercising control over any property interest. In turn, the trial court further held that the prior case law, which had interpreted R.C. 2109.24 so broadly, could no longer be followed.

{¶48} As to the merits of the trial court's analysis, this court would first note that the third paragraph of R.C. 2109.24 has always stated multiple bases for the removal of

a fiduciary. In passing the "2007" amendment to the statute, the General Assembly only altered the language of one reason for removal. In all respects, the general tenor of the third paragraph has remained the same. Therefore, while we would agree that the new language in the disputed clause could be interpreted to limit the scope of its application, the remainder of the statute's third paragraph has not changed. In other words, to the extent that the other clauses in the third paragraph previously delineated viable reasons for the removal of a guardian of the person, the "2007" amendment did not modify that application.

{¶49} Second, our review of the prior case law construing R.C. 2109.24 confirms the trial court's statement that some courts appeared to predicate their broad application of the statute upon the previous version of the "interest of the trust demands it" clause. See, e.g., *In re Guardianship of Clark,* 10th Dist. No. 09AP-96, 2009-Ohio-3486, at ¶29, quoting *In re Estate of Bednarczuk* (1992), 80 Ohio App.3d 548. However, other courts, while agreeing that the earlier version of R.C. 2109.24 gave the probate court significant discretion regarding the removal of a guardian, did not rely upon the disputed "interest" clause. Instead, such courts based their legal analysis of the statute upon the "catchall" clause at the conclusion of the third paragraph.

{¶50} For example, in *In re Briggs* (July 9, 1997), 9th Dist. No. 18117, 1997 Ohio App. LEXIS 3050, the appellate court began its discussion of the standard for removal by paraphrasing the governing provisions of R.C. 2109.24 in the following manner: "A guardian may be removed for a breach or neglect of duty or any other good cause, even in the absence of bad intention." Id. at *6. Despite the fact that the *Briggs* court did not refer to the disputed "interest" clause, it still concluded the "best interests of the ward" could form the grounds for a proper decision to remove the guardian:

{¶51} "It is well-settled that 'the right of the guardian to the custody of the ward exists (***) solely for the latter's benefit and may be regulated, controlled, or denied by the court when necessary in the promotion of the best interest of the ward.' 39 American Jurisprudence 2d (1968) 58, Guardian and Ward, Section 65. Indeed, the paramount consideration in removing a guardian is the best interests of the ward, to which even the rights of relatives must sometimes yield. See American Jurisprudence 2d (1968) 34, Guardian and Ward, Section 31. See, also, *Pio v. Ramsier* (1993), 88 Ohio App.3d 133, 135, ***; *In re Estate of Bednarczuk* (1992), 80 Ohio App.3d 548, ***; *In re Luck* (1899), 7 Ohio N.P. 49, 10 Ohio Dec. 1, 5. Thus, a guardian may be removed when proven to be exercising authority in a manner adverse, antagonistic, or hostile to the best interests of the ward. See, *e.g.*, *Pio, supra*; *In re Estate of Bost* (1983), 10 Ohio App.3d 147, ***." Id. at *6-7.

{¶52} Again, given the lack of any reference in *Briggs* to the "interest of the trust demands it" clause of R.C. 2109.24, logic dictates that the *Briggs* court viewed the "best interests of the ward" as a grounds for removal which fell within the "catchall" provision of the statute; i.e., the "best interests of the ward" constituted another "cause" to remove that is authorized under the law. Building upon this, it also follows that, contrary to the trial court's analysis, the subsequent amendment of the "interest of the trust demands it" clause in 2007 had no effect upon the viability of the "best interests" basis for removing a guardian.

{¶53} In considering the *Briggs* decision in light of the general provisions of R.C. Chapter 2111, this court would note that, as to the extent of a probate's court's authority over a ward, R.C. 2111.50(A)(1) expressly provides that such a court is viewed as the "superior guardian" of any ward, and that all guardians are obligated to obey all court

orders pertaining to the ward or the guardianship. Furthermore, in regard to the role of the guardian in the process, the Supreme Court of Ohio has already made clear that a guardian is simply viewed as an officer of the probate court and, thus, has no personal interest in her appointment or removal. *Spangler*, 2010-Ohio-2471, at ¶53.

{¶54} Given the broad nature of a probate court's statutory power, we conclude that the Ohio legislature did not intend for a probate court to show any deference to the guardian in reviewing the propriety of her determinations as to the care of a ward. That is, a probate court's ultimate concern is the welfare of the ward, and if it is established that the ward's general welfare could be better served through the appointment of a new guardian, the court has the general authority to proceed.

{¶55} Based upon the foregoing, this court concludes, consistent with the legal analysis in *Briggs*, that the best interests of the ward is a separate basis for removal of a guardian that is "authorized" under the statutory scheme set forth in R.C. Chapter 2111. In turn, we also conclude that the "best interests" basis has historically fallen under the "catchall" provision of R.C. 2109.24, and that the "2007" amendment of that statute did not alter the application of the "catchall" provision in any respect.

{¶56} As a final point regarding the trial court's analysis of the legal standard for a guardian's removal, this court would further indicate that, once the trial court held that R.C. 2109.24 was no longer applicable, it looked to R.C. 2111.50(A)(2)(c) for guidance. This particular provision states:

{¶57} "For good cause shown, the probate court may limit or deny, by order or rule, any power that is granted to a guardian by a section of the Revised Code or relevant decisions of the courts of this state."

{¶58} In ultimately deciding that "good cause" was the proper legal standard for

determining whether the Spanglers' removal as John's guardians was justified, the trial court theorized that, because R.C. 2111.50(A)(2)(c) delineated the standard by which a probate court could limit the powers of a guardian, the provision could also be applied to totally deprive a guardian of all authority.

{¶59} As to the trial court's reliance upon R.C. 2111.50(A)(2)(c), this court would simply note that the provision in question has no reference to the removal of a guardian of an incompetent person. As was previously discussed, R.C. 2111.46 sets forth a specific standard for the removal of a guardian over the person of a minor. Accordingly, if the Ohio legislature did intend for R.C. 2111.50(A)(2)(c) to govern the complete removal of the guardian of an incompetent person, it could have used express language similar to that in R.C. 2111.46. In the absence of such language in R.C. 2111.50(A)(2)(c) or any other section in R.C. Chapter 2111, logic dictates that the general provisions concerning the removal of a fiduciary should still be followed. To this extent, this court further holds that, even if we agreed with the trial court's legal analysis as to the effect of the "2007" amendment on the "interest of the trust demands it" clause in R.C. 2109.24, we would still conclude that the remaining provisions of the third paragraph of R.C. 2109.24 would be controlling.

{¶60} In summation, this court rejects the trial court's analysis as to the standard to apply in ruling upon a motion to remove the guardian of the person of an incompetent individual. Instead of using the "good cause" standard of R.C. 2111.50(A)(2)(c), the trial court should have focused its analysis solely upon the provisions of the third paragraph of R.C. 2109.24. That is, after finding that none of the five specific reasons to remove, such as neglect of duty or incompetency, were applicable under the facts of this action, the court should have applied the "best interests" standard under the "catchall" provision

of the third paragraph.

{¶61} Having determined that the trial court's legal interpretation and application of R.C. 2109.24 was incorrect, this court must now decide if the use of an inappropriate standard was prejudicial. As an initial point, it can obviously be said that the distinction between the "good cause" standard and the "best interests" standard is relatively minor. In most instances, facts which support a finding of "good cause" to remove a guardian would likely warrant a finding that it would be in the best interests of the ward if a new guardian is appointed. For example, if the facts of a specific case show that a guardian of an incompetent person has kept the ward in a residential home when his needs could *only* be met in some type of facility, the removal of the guardian would be justified under either standard.

{¶62} Nevertheless, it must also be emphasized that the focal points of the two standards are different. Under the "best interests" standard, the focus is solely upon the general welfare of the ward. On the other hand, while the effect on the ward is certainly a consideration under the "good cause" standard, its primary focus is the actions of the guardian. In light of this subtle difference, there could be some instances in which the application of the two standards would result in different outcomes concerning whether removal of the guardian is warranted. Specifically, there can be situations in which the guardian has performed her duties adequately and has provided for the general needs of the ward, but removal of the guardian could still be justified under the "best interests" standard because the condition of the ward could be better served by a new guardian.

{¶63} In conjunction with the foregoing point, this court would again state that, as part of their "manifest weight" challenge, the Spanglers maintain that their removal was unjustified because there was no evidence that they had failed to provide for John's

basic needs. However, pursuant to the "best interests" standard, the fact that the ward has not been neglected becomes irrelevant if it is established that the condition of the ward would improve through the replacement of the existing guardian.

{¶64} In most instances in which a trial court has predicated its final decision on an inappropriate standard, it is necessary for the appellate court to reverse the decision and remand the matter so that the trial court can apply the proper standard to the facts of the case. In the present appeal, though, a review of the trial court's written judgment shows that, although the court indicated that it had analyzed the facts of the case under the "good cause" standard, its final holding was stated in considerably broader terms:

{¶65} "Based on evidence presented at the time of the hearing, the Court finds that there is good cause and that it is in John's best interest that the removal of Gabrielle and Joseph Spangler as guardians for John Spangler continue ***."

{¶66} Notwithstanding the fact that the trial court had engaged in a distinct legal analysis regarding what standard should be employed in deciding the motion to remove, it ultimately made express findings under both standards. Hence, the error in the trial court's legal analysis does not foreclose our ability to review the actual substance of its decision to remove the Spanglers as guardians.

{¶67} As a general proposition, the decision to grant or deny a motion to remove a guardian lies within the sound discretion of the probate court. *Ewanicky*, 2003-Ohio-3351, at ¶18. Accordingly, the probate court's ruling must be upheld on appeal unless it is not supported by the evidence or is contrary to law. *Briggs*, 1997 Ohio App. LEXIS 3050, at *8. In other words, the decision to remove the guardian will only be reversed when an abuse of discretion has occurred. *In re Guardianship of Reed*, 10th Dist. No. 09AP-720, 2010-Ohio-345, at ¶8

{¶68} In relation to a "manifest weight" analysis in a "removal" action, this court has indicated that, as the trier of fact, the probate court is in the best position to observe the witnesses, evaluate their testimony, and weigh the evidence. *Burrows*, 2007-Ohio-4764, at ¶45, citing *In re Estate of Knowlton*, 1st Dist. No. C-050728, 2006-Ohio-4905, at ¶32. Based upon this, it has been held that there is a presumption that the probate court's findings are correct. *Clark*, 2009-Ohio-3486, at ¶30, quoting *In re Guardianship of Worth* (June 20, 1997), 2d Dist. No. 1430, 1997 Ohio App. LEXIS 2644. Therefore, a certain degree of deference must be shown on appeal:

{¶69} "'A reviewing court should not reverse a decision simply because it holds a different opinion concerning the credibility of the witnesses and evidence submitted before the trial court. A finding of an error in law is a legitimate ground for reversal, but a difference of opinion on credibility of witnesses and evidence is not.'" *Burrows*, 2007-Ohio-4764, at ¶45, quoting *Knowlton*, 2006-Ohio-4905, at ¶32.

{¶70} In the instant case, the trial court's decision to remove Gabrielle Spangler as a guardian was predicated upon two factual findings. First, the trial court found that some of John's violent episodes were attributable to having direct contact with her. As to this finding, the Spanglers submit that the evidence regarding her relationship with her son should have been rejected because the witnesses never gave a scientific definition for the term "trigger."

{¶71} After reviewing the testimony in question, this court holds that the lack of any technical explanation concerning what behavior constituted a "trigger" for John did not harm the persuasiveness of the evidence. Specifically, three witnesses stated that John's level of anxiety would increase if he had direct contact with Gabrielle, and that the anxiety attacks often caused aggressive episodes in which John would be

destructive to his surroundings and very difficult to control. Two of these witnesses also testified that John would be verbally aggressive toward his mother. In light of this, the trial court could readily find that Gabrielle's inability to communicate with her son directly would make it increasingly difficult for her to make proper decisions regarding her son's care.

{¶72} As the second reason for removing Gabrielle as John's guardian, the trial court found that she had exhibited a tendency to make impulsive decisions. Our review of the evidence shows that this finding was supported by three incidents. First, the evidence indicates that when the Spanglers initially decided to move John from their family residence, the board took steps to place him in a proper facility. Notwithstanding these efforts, Gabrielle changed her mind and chose to attempt to keep John at home, but then reverted back to the original decision within two months. The second incident of impulsive behavior took place when she chose to move John from the Warrensville developmental center. Leaving aside the question of whether she should have followed the advice of the board and keep John at the facility, the record demonstrates that the move was completed before other adequate arrangements could be made. That is, she decided to move John into a hotel with the Devlins, even though David Devlin had not been properly certified as a caregiver and had not been approved by the board.

{¶73} The third incident of impulsive behavior pertained to the Devlins' treatment of John. In early October 2006, the Spanglers raised issues concerning whether John was being physically abused and was being kept in isolation inside the Devlin house. Despite the fact the board conducted a meeting on the Spanglers' concerns and John himself denied the allegations of abuse, Gabrielle still continued to "spy" on the Devlins by constantly driving by their residence. This behavior culminated in the event in which

Gabrielle went into the Devlin residence while appearing to be intoxicated and was later arrested for trespassing.

{¶74} In attempting to explain Gabrielle's behavior in the foregoing matters, the Spanglers assert that, by granting the motion to remove them, the trial court essentially penalized her for being too proactive in her son's care. However, upon considering the entire trial proceeding, this court concludes that the Spanglers' characterization of the evidence is misplaced. While it cannot be denied that Gabrielle cared deeply for John, the record confirms that the depth of that affection had deprived her and her husband of the ability to make objective decisions in regard to John. Furthermore, she had reached the point where she was not considering the advice of the professional caregivers with the board and the facilities. In turn, this meant that John's general welfare was suffering because she was not giving him sufficient time to adapt to his new surroundings.

{¶75} In relation to Joseph Spangler, the trial court basically found that he had been too deferential to his wife in the past to be trusted to make independent decisions in the future. Our review of the trial transcript shows that the trial court's finding on this particular point was primarily based upon the testimony of Carl Vondracek, a behavior support specialist with the board. Vondracek testified that, during his various meetings with the Spanglers, he had noticed that Gabrielle had always made the final decisions as to John. He also testified that, whenever he had tried to speak directly with Joseph, Gabrielle would always interrupt the conversation and not allow Joseph to talk. In light of this, Vondracek opined that Joseph did not have the ability of making a determination regarding John without Gabrielle's approval.

{¶76} When the Vondracek testimony is viewed in the context of the remaining evidence, the record supports the conclusion that the trial court did not abuse its

discretion in affording the testimony considerable weight. In this regard, it should be noted that the testimony of another caregiver established that, after John was placed in the group home operated by the Jewish Family Services, the new temporary guardian decided not to allow Gabrielle to have direct contact with John. Despite this, during one of Joseph's separate visits, the caregiver observed Joseph giving a telephone to John so that Gabrielle could talk to him. The ensuing conversation caused John to have one of his violent episodes. Thus, other evidence before the trial court indicated that Joseph would not acknowledge the difficulties John would have as a result of direct contact with Gabrielle, and that he would continue to permit her to upset John notwithstanding the recommendation of the professional caregivers.

{¶77} Taken as a whole, the trial record in this action contains some competent, credible evidence that supported the trial court's findings of fact as to both Gabrielle and Joseph Spangler. Moreover, the court's findings supported the legal conclusion that the appointment of a new permanent guardian would be in John's best interests because the Spanglers' decisions regarding John's care was not assisting him in adapting to his new environment in the developmental centers. Accordingly, since the record does not show that the trial court abused its discretion in holding that the Spanglers' removal as guardians of John's person was justified, the appealed determination was not against the manifest weight of the evidence.

{¶78} As the remaining two assignments of error fail to establish any error which was not previously addressed by the Supreme Court of Ohio, the judgment of the trial court is affirmed.

TIMOTHY P. CANNON, P.J., concurs.

MARY JANE TRAPP, J., concurs with Concurring Opinion.

MARY JANE TRAPP, J., concurs with Concurring Opinion.

{¶79} Given the deferential standard of review we must follow in reviewing a probate court's decision to remove a guardian, I am compelled to concur with the majority as the trial court's decision was supported by some competent, credible evidence.

{¶80} I write separately because there was conflicting testimony in this record, which should not be ignored in any future proceedings. This is particularly necessary because, as noted by Judge Henry in his written opinion below, "[t]here may come a time in the future when John's parents can demonstrate enough emotional stability that they can thoughtfully and rationally interact with service providers in a manner that they can take over the responsibility of serving as their son's guardian."

{¶81} At trial, witnesses for Mr. and Mrs. Spangler presented testimony that conflicted with appellees' witnesses. Most significantly, each parent's respective therapist testified that the parents had been in therapy since APSI was appointed temporary guardian (Mrs. Spangler for alcoholism and anxiety, Mr. Spangler for stress related to his marriage and the situation with John). Both professionals testified that they had no concerns about their clients taking a more active role in John's life, or about Mr. Spangler being appointed John's guardian. Mr. Devlin also testified that he no longer had concerns about Mrs. Spangler's alcoholism, because he was satisfied she had entered treatment.

{¶82} The trial court also heard testimony that John seems to do best in a family setting, and that the Geauga County Board of Mental Retardation and Developmental Disability was satisfied with the treatment John was receiving in October 2006, when

the agency petitioned the court to remove the parents as guardians. John's school principal, who was formerly one of his special education teachers, testified she was worried about John now that he does not have frequent access to his family. She explained, "I'm concerned that his, the basis of his security has always been his family, and he doesn't have them, and he doesn't understand why, and I don't think he's able to tell all of us what's going on inside ***." She also indicated that she had not been concerned at all about the level of educational access John was getting prior to October 2006, contrary to Russell Kinnebrew's testimony.

{¶83} As to the parents' behavior toward John, there was testimony that Mr. Spangler was good at calming his son down. Finally, there were also indications on the record that triggers are usually consistent for each autistic person, and that the fact John did not react negatively to his parents during every interaction with them could indicate they were not triggers.

{¶84} Whenever possible, parents should be permitted to be guardians to their adult children, and those parents who zealously advocate for the best possible care for their children should not be penalized for being zealous. Impulsive behavior to one may just be pro-active behavior to another – it is all in the eye of the beholder. Each person with autism is special, and no one can fault parents for continually searching and advocating for the best treatment plan specifically designed to address their child's unique needs, and the needs of the child's family.

{¶85} As the majority notes, situations may arise where the guardian has performed her duties and has provided for the ward's needs, but the best interests of the ward, measured by the facts before the court at that time, militate in favor of a new guardian. In this case we are required to defer to the factual findings of the trial court.