

IN THE COURT OF COMMON PLEAS  
SUMMIT COUNTY, OHIO

KIMBERLEE FORBES, Guardian and on	:	
behalf of MICHELLE DENISE BUTLER	:	
	:	Case No. CV-2013-11-5518
Appellant,	:	
	:	Judge Thomas Parker
vs.	:	
	:	Administrative Appeal
OHIO DEPARTMENT OF	:	
JOB AND FAMILY SERVICES, <i>et al.</i> ,	:	
	:	
Appellees.	:	

PROPOSED BRIEF OF AMICUS CURIAE

I. INTRODUCTION

This case focuses on the significant issue of whether the legal guardian of a person with a disability who has been adjudicated as legally incompetent may appeal to the court of common pleas to maintain Medicaid benefits, in the guardian’s representative capacity and on behalf of his or her ward, and proceed in such action *pro se*. Under Ohio Civ.R. 17, guardians are entitled to bring suit on behalf of their wards. Moreover, guardians of the person are required to authorize the provision of medical benefits and provide for the maintenance of the ward. Thus, guardians should be permitted to proceed in appeals on behalf of their wards *pro se*. Authorization of such is in the interests of individuals with disabilities who are adjudicated incompetent and who would otherwise likely be unable to secure legal representation and proceed in their appeals. Thus, this case addresses a significant issue of access to further administrative appeal.

II. STATEMENT OF INTEREST OF AMICUS CURIAE

*Amicus curiae* Disability Rights Ohio is a not-for-profit organization designated by the Governor of the State of Ohio under federal law as the system to protect and advocate for the

rights of individuals with disabilities, including individuals with intellectual and developmental disabilities under the Developmental Disabilities Assistance and Bill of Rights Act of 2000, 42 U.S.C. 15042.<sup>1</sup> The mission of Disability Rights Ohio is to advocate for the human, civil, and legal rights of people with disabilities in Ohio.

As the protection and advocacy system for Ohio, Disability Rights Ohio has extensive experience representing individuals with disabilities in Medicaid administrative appeals and in guardianship matters. Disability Rights Ohio recognizes that this case has implications for every individual with a disability who is under guardianship and who receives Medicaid benefits and services, and therefore submits this brief to present to the Court this important issue regarding individuals with disabilities' access to further administrative appeal under Ohio Medicaid law.

### **III. STATEMENT OF THE CASE**

This case arises from a state hearing and administrative appeal filed pursuant to chapters 5101.35 and 119 of the Revised Code. *See* R.C. 5101.35 and 119.12. *See also* Ohio Adm.Code 5101:6-1 *et seq.* Michelle Butler, through an authorized representative, filed a Medicaid appeal regarding the level of services she receives under the Individual Options Medicaid waiver, a home and community-based program that allows her to receive the services she needs in her own home and to avoid unnecessary institutionalization.

A Medicaid state hearing decision was issued overruling Ms. Butler's appeal, and a final administrative appeal was issued by the Ohio Department of Job and Family Services (ODJFS) upholding the decision. An appellant who disagrees with a final administrative appeal decision of ODJFS may appeal from the decision to the court of common pleas pursuant to chapters 5101.35 and 119.12 of the Revised Code. *See* R.C. 5101.35 and 119.12. *See also* Ohio Adm.Code

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<sup>1</sup> Prior to October 1, 2012, Disability Rights Ohio was Ohio Legal Rights Service, an independent state agency chartered at R.C. 5123.60. The mission and activities of Disability Rights Ohio are the same as those of Ohio Legal Rights Service.

5101:6-1 *et seq.* Thus, Kimberly Forbes, guardian of Michelle Butler, filed a notice of appeal with the Court of Common Pleas, Summit County, on behalf of Michelle Butler and in her representative capacity as guardian.

On December 17, 2013, Appellee ODJFS filed a motion to strike the notice of appeal “because the Notice of Appeal was filed by a non-attorney on behalf of the Appellant.” This brief is filed due to the significant issue raised by the Appellee’s motion.

**IV. ARGUMENT – A GUARDIAN OF PERSON MAY APPEAL TO THE COURT OF COMMON PLEAS ON BEHALF OF HIS/HER WARD, AND SHOULD BE PERMITTED TO PROCEED IN SUCH ACTION *PRO SE***

A guardian is entitled to bring suit on behalf of his or her ward.<sup>2</sup> Rule 17 of the Ohio Civil Rules of Procedure provides that “[e]very action shall be prosecuted in the name of the real party in interest.” Civ.R. 17(A). A guardian “may sue in his name as such representative without joining with him the party for whose benefit the action is brought.” *Id. See also* R.C. 2111.17 (“A guardian may sue in the guardian’s own name, describing the guardian as suing on behalf of the ward.”). Part B of Rule 17 provides that “[w]henever a minor or incompetent person has a representative, such as a guardian or other like fiduciary, the representative may sue or defend on behalf of the minor or incompetent person.” Civ.R. 17(B).

As the guardian may sue on behalf of his or her ward and is a proper party to the action, the guardian of person should be permitted to proceed *pro se* in an appeal from an administrative decision regarding Medicaid benefits. A guardian of the person has “the custody and provide[s] for the maintenance of the ward.” R.C. 2111.06; *see also* R.C. 2111.01. A guardian of the person is responsible for “authoriz[ing] or approv[ing] the provision to the ward of medical,

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<sup>2</sup> If the Court found that the guardian was an improper party to the action, the Court would still be required to appoint a guardian ad litem or make another order as appropriate to protect the individual determined incompetent. *See* Civ.R. 17(B) (“If a minor or incompetent person does not have a duly appointed representative the minor may sue by a next friend or defend by a guardian ad litem. When a minor or incompetent person is not otherwise represented in an action the court shall appoint a guardian ad litem or shall make such other order as it deems proper for the protection of such minor or incompetent person”).

health, or other professional care, counsel, treatment, or services... ." R.C. 2111.13(C). In addition, the proposed Ohio minimum standards for guardians approved by the Supreme Court Advisory Committee on Children, Families and the Courts, January 22, 2010, provides that the guardian of the person "shall make reasonable efforts to *identify* medical, psychological, therapeutic, and social services, training, education, social and vocational opportunities *and secure* those that are immediately necessary for the health and welfare of the ward..." Proposed Ohio Minimum Standards for Guardians, approved by the Supreme Court Advisory Committee on Children, Families and the Courts, January 22, 2010, Standard 10.2 (emphasis added), available at <http://www.supremecourt.ohio.gov/Boards/familyCourts/>.

Because the guardian of person is required to authorize the provision of medical benefits and provide for the maintenance of the ward, the Court should permit the guardian of the person to proceed *pro se* in an appeal from an administrative decision in order to maintain his or her ward's Medicaid benefits. The guardian under these circumstances is acting in his or her representative capacity and is fulfilling his or her statutory duties under Ohio; therefore, the guardian is not engaging in the unauthorized practice of law.

Finally, permitting the guardian to proceed in the appeal *pro se* serves the interest of the individual determined incompetent. An individual adjudicated as incompetent cannot be a party to an action; thus, if the guardian is not permitted to proceed *pro se*, he or she would be required to hire an attorney in order to appeal. The costs of hiring an attorney are simply much too prohibitive for many individuals with disabilities, especially those who receive Medicaid benefits and by definition are low-income. Furthermore, attorneys are not able to obtain attorneys' fees for their representation in such cases, making it more difficult for individuals to find representation for their appeals. *See* R.C. 119.092(F)(2)-(3).

## V. CONCLUSION

For the foregoing reasons, this Court should deny the appellee's motion to strike the notice of appeal filed by appellant Kimberlee Ann Forbes, guardian, on behalf of Michelle Butler, on the basis that Ms. Forbes' representation of Ms. Butler constitutes unauthorized practice of law, because Ms. Forbes is entitled to bring suit on behalf of Ms. Butler in accordance with Civ.R. 17, and she should be permitted to proceed in her appeal *pro se*.

Respectfully submitted,  
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