

**HOUSE BILL 49**  
**THE OHIO HOUSE FINANCE COMMITTEE**  
**APRIL 27, 2017**

**TESTIMONY OF JAMES R. FLAIZ,**  
**GEAUGA COUNTY PROSECUTING ATTORNEY**

My name is James Flaiz and I am the Geauga County Prosecuting Attorney. I am here today to testify in opposition to the amendment that has been offered regarding Section 1545.06 of the Ohio Revised Code. The proposed revisions to Section 1545.06 that are in the amendment would make sweeping changes to the law relating to park districts and grant probate judges broad and unprecedented powers over Ohio citizens. Specifically, the amendment would allow a probate judge to issue orders preventing “interference” with a court’s order creating a park district; investigate matters involving a park district; impose “duties or restrictions on a person or party who interferes with the park district’s purpose”; assess costs at the discretion of the judge; and allow a probate judge to issue orders “compelling compliance” with these broad new powers. The proposed amendment also allows probate judges to make virtually anyone a party to a court proceeding at the sole discretion of the judge.

A hallmark of our legal system is that cases and controversies are heard by a neutral and impartial judicial officer. The proposed amendment turns that idea on its head. Under the proposed amendment, the probate judge is empowered to investigate matters involving a park district. The probate court, on its own motion, can make virtually anyone a party to a proceeding in probate court and exercise jurisdiction over them. The probate court could impose “duties and restrictions” on **anyone** who “interferes with the park district’s purposes.” Finally, the probate court can issue orders “compelling compliance” with seemingly whatever the court deems appropriate under the broad and vague language contained in the amendment. This amended language does not contemplate different parties bringing a dispute before the court to decide but instead creates a process where if a court decides a citizen is “interfering” with a park district, then the probate judge could make the person “interfering” a party to the case, make them pay for investigation costs, impose duties and restrictions upon them, and even throw them in jail if they fail to comply. The amendment creates a new statutory scheme within R.C. 1545.06 that is a stunning assault on an individual’s constitutional rights.

This new power that would be granted to the probate court to “impose duties or restrictions on a person or party who interferes with the park district’s purposes” is incredibly vague. Who would decide what actions constitute interference? Conveniently, the probate judge presiding over the matter would. What is interference? Does writing a letter to the editor constitute interference? What about a citizens group that seeks dissolution of park district which is provided by statute? How about a board of township trustees that seeks to create a competing township park district under the Revised Code?

Under the proposed amendment, the probate judge would be given statutory authority to “investigate matters involving the park district.” This directly contravenes the Ohio Code of Judicial Conduct. The Ohio Supreme Court has stated that it is not the role of the judiciary to conduct investigations. *Disciplinary Counsel v. Campbell*, 126 Ohio St.3d 150, 153, 2010-Ohio-

3265, ¶ 14. The Ohio Supreme Court has also warned that advocacy on the part of judges “creates the appearance, and perhaps the reality, of partiality on the part of the judge. This, in turn, erodes public confidence in the fairness of the judiciary and undermines the faith in the judicial process that is a necessary component of republican democracy.” *Disciplinary Counsel v. O’Neil*, 103 Ohio St.3d 204, 207, 2004-Ohio-4704, ¶ 13. The potential implications of the statutory changes contained in this budget amendment requires careful scrutiny and vetting from probate judges across the state and the Ohio Supreme Court due to the potential of these broad new powers conflicting with the Ohio Code of Judicial Conduct.

Finally, I have read the comments from this amendment’s sponsor that the proposed language merely codifies a decision from the Ohio Supreme Court last year. *State ex rel. Chester Township v. Grendell*, 147 Ohio St.3d 366, 2016-Ohio-1520. However, that case merely held that the probate court did not patently and unambiguously lack jurisdiction in a specific controversy. In fact, as far as I know, the only court to interpret the Ohio Supreme Court’s decision is the Geauga County Probate Court through Judge Lohn who was later assigned to hear the dispute by the Chief Justice. (See Exhibit 1) Judge Lohn determined that it would be up to the Appellate Court through an ordinary appeal to identify limits and exceptions to the probate court’s jurisdiction. These issues are being actively litigated in the courts. Judge Lohn has already issued a decision and a visiting panel of the Eleventh District Court of Appeals recently heard oral arguments. This begs the question, why would the legislature seek to codify a decision of the Ohio Supreme Court in a case that is still being litigated?

This proposed statutory change has far reaching ramifications. There is no urgency here and while I believe the proposed amendment is wrong for our legal system and for our citizens, at the very least these issues should be considered in stand-alone legislation. Therefore, I am asking this committee to remove the amendment from the budget bill. Thank you for your time and consideration.

FILED  
IN COMMON PLEAS COURT

2017 FEB -2 PM 2:59

PROBATE-JUVENILE  
DIVISION  
GEAUGA COUNTY, OHIO

IN THE COURT OF COMMON PLEAS  
GEAUGA COUNTY, OHIO  
PROBATE DIVISION

**In Re Chester Township Park District** : Case No. 84 PC 000139  
:   
:   
: JUDGE JOHN J. LOHN, BY  
: ASSIGNMENT OF THE CHIEF JUSTICE  
:   
: **JOURNAL ENTRY AND ORDER**

This matter came on for hearing on January 6, 2017 before me, John J. Lohn, a retired judge assigned to this case pursuant the Chief Justice's authority under Ohio Const. Art. IV §6(C). The assignment number is 16 JA 2759. The purpose of the hearing was to review the master commissioner's interim report filed January 4, 2017.

Present were Special Master Commissioner Mary Janè Trapp, Attorney James Gillette, Chester Township Park Commissioners Joe Weiss and Clay Lawrence, Assistant County Prosecutor Bridey Matheney, Attorney Frank Scialdone and Chester Township Trustee Ken Radtke.

In 1984 the Chester Township Park District was created upon application of the Chester Township Board of Trustees under R.C. 1545.02. In 1985 and again in 1993 the park district entered into agreements with the township for the control and operation of park lands. A park board has the authority to make such agreements with other legislative bodies or public agencies under R.C. 1545.14. The statute gives the probate court no role in the negotiation, execution or oversight of these agreements.

In November 2014 Judge Grendell found, *inter alia*, the 1993 agreement contravened the order creating the park district and other provisions of state law. He directed Master Commissioner Trapp to meet with park commissioners and township trustees to help formulate a new agreement consistent with the original entry creating the



2017 FEB -2 PM 2:59

park district and consonant with his interpretation of R.C. Chapter 1545. The new agreement would supercede the 1993 agreement.

PROBATE DIVISION  
GEAUGA COUNTY, OHIO

The trustees tried to appeal the November 2014 decision but the court of appeals found it was not a final appealable order; *In Re Creation of Park District within Chester Township*, 2015-Ohio-1210. The trustees filed for a writ of prohibition against Judge Grendell on the grounds he patently and unambiguously lacked jurisdiction to issue his 2014 order. The Supreme Court denied the writ of prohibition on April 14, 2016; *State ex rel. Chester Twp. v. Grendell*, 216-Ohio-1520.

On June 22, 2016, Judge Grendell again found portions of the 1993 agreement violated R.C. Chapter 1545 and conflicted with the original 1984 probate court order creating the park district. This was a final appealable order. The township appealed.

Notwithstanding the pending appeal the park commissioners and the township trustees continued their efforts to negotiate a new agreement. Commissioner Trapp continued to be involved in the negotiations as a facilitator, broker and advisor; a role she had been engaged in since 2014.<sup>1</sup>

The trustees moved to stay Judge Grendell's June 22, 2016 order. The court held a hearing on the motion for stay on August 9, 2016. During the hearing Judge Grendell asked the parties about the status of negotiations for a new agreement. Prosecutor Matheney told the judge the trustees had met in executive session to discuss the new agreement and the only concern they had was whether the probate court would strike the agreement. The judge said he would not review the agreement unless someone brought it to him. Prosecutor Matheney told the judge there was a scheduled August 18 trustee meeting and she would inform the trustees of the judge's response.<sup>2</sup>

On August 18 the trustees voted on the new agreement. It was not approved. Trustees Radtke and Petruziello voted against the agreement, Trustee Kinney voted to

<sup>1</sup> Master Commissioner's Interim Report filed January 4, 2017 (hereafter, 2017 MC Report.), p. 4.

<sup>2</sup> 2017 MC Report, p. 6-7



2017 FEB -2 PM 2:59

5. Did the Chester Township Trustees' actions or inaction with respect to the revised park agreement violate R.C. Ch. 1545?
6. Did the Chester Township Trustees' actions or inaction with respect to the revised park agreement violate Probate Judge Frank Lavrich's original order creating the Chester Park District?

PROBATE-JUVENILE  
DIVISION  
GEAUGA COUNTY, OHIO

The judge ordered Commissioner Trapp to issue a written report containing findings of fact and conclusions of law. She was to include transcripts of witness testimony as part of her report.

Also in the order the judge taxed any new master commissioner fees as court costs. He approved the fees prospectively and without limitation; before they were earned, before they were submitted and before the parties could review and challenge them. The trustees objected to the judge assessing court costs against the township in the prohibition case, *Grendell*, 216-Ohio-1520 at par. 29. This is likely one of the issues on direct appeal now.

On September 22, 2016—again without giving notice, holding a hearing or making findings—the judge issued a second order to the Master Commissioner to investigate:

1. Whether Chester Trustees Kenneth Radtke and/or Michael Petruziello, in violation of R.C. 2921.05(A) (a felony of the third degree), retaliated against the Chester Township Park Board members, and/or Judge Tim Grendell in response to the Township Trustees losing their civil mandamus action filed with the Ohio Supreme Court because the Park Board members and Judge Grendell successfully discharged their respective duties as public servants with respect to that civil mandamus action, and, if so, did such retaliation interfere with the purpose of the Chester Park District and Judge Lavrich's order creating that township park district?
2. Whether Chester Trustees Kenneth Radtke and/or Michael Petruziello, in violation of 42 U.S.C. § 1983 deprived the Chester Township Park Board members, and /or Judge Tim Grendell of their/his constitutionally protected rights in response to the Township Trustees losing their civil mandamus action filed with the Ohio Supreme Court because the Park Board members and Judge Grendell successfully discharged their respective duties as public servants with respect to

2017 FEB -2 PM 2:59

that civil mandamus action, and, if so, did such deprivation of constitutional and federal statutory rights interfere with the purpose of the Chester Park District and Judge Lavrich's order creating that township park district?

The trustees filed an action in prohibition, not a "civil mandamus action," *State ex rel Chester Township v. Grendell* 216-Ohio-1520 at par. 16.

Judge Grendell recused himself before Chief Justice O'Connor ruled on an affidavit of prejudice filed against him.

On November 7, 2016 the Chief Justice assigned me to this case and instructed me as follows:

to hear and review the master commissioner's findings relating to the trial court's entries dated September 16 and 22, 2016, in case 84 PC 000139, In the Matter of: Chester Township Park District and to preside over all future proceedings relating to those findings.

The master commissioner filed her interim report on January 4, 2017 and I examined her under oath on January 6, 2017.

Judge Grendell justified his September 2016 orders by citing *dicta* from the Supreme Court's prohibition decision: "The probate court's authority to create park districts and its plenary power 'to dispose fully of any matter' that is properly before it surely includes the ability to issue orders to enforce the entry creating the park district, including orders that impose duties on those interfering with the park district's purposes." *State ex rel. Chester Twp. v. Grendell*, 216-Ohio-1520 at par. 30.

However the next sentence of the decision sets forth the limited nature of the Supreme Court's holding: "In any case, we need only decide whether the probate court patently and unambiguously lacked jurisdiction over the matter." *Grendell*, 216-Ohio-1520 at par. 31.

The Supreme Court decision did not authorize Judge Grendell to threaten the trustees and their attorneys with jail time or fines or civil judgments. From the standpoint

2017 FEB -2 PM 2:59

of the Chester Township trustees, it is critically important for the Eleventh District Court of Appeals to determine the limits of the probate court's authority over them as a board and as persons.

Under Judge Grendell's view of his jurisdiction, a property owner who has a yard sale that slows traffic to and from a park, or a contractor who improperly installs a swing set or a citizen who sends an email criticizing a park commissioner—each could be brought before the probate court to face contempt charges for “interfering with the park district's purposes.”

In my view the jurisdiction of the probate court is limited to the express power to appoint<sup>5</sup> and remove<sup>6</sup> park commissioners and to dissolve a park district;<sup>7</sup> and the implied power to investigate park operations to determine if a park commissioner should be removed.<sup>8</sup> Jurisdiction over the board of township trustees should end once the application to create the park district is approved. The newly created board of park commissioners is a “body politic and corporate.”<sup>9</sup> If approving the R.C. 1545.02 application and appointing the park commissioners is not enough to “dispose fully” of the matter before the court then I consider the park board alone to be the legal entity over which the probate court might exercise ongoing “plenary power” under R.C. 2101.24(C) (but see my discussion below on the separation of judicial and executive powers).

I am firmly convinced the court's jurisdiction does not extend to non-parties such as Mr. Radtke and Mr. Petruziello personally.

This view informs my approach to the assignment the Chief Justice gave me.

It is not within the scope of my assignment either to affirm or rescind Judge Grendell's September 2016 orders. I am a trial judge just as Judge Grendell is a trial judge. My responsibility is to review the findings of the master commissioner and decide

<sup>5</sup> R.C. 1545.05

<sup>6</sup> R.C. 1545.06

<sup>7</sup> R.C. 1545.35

<sup>8</sup> *State ex rel, Chester Twp. v. Grendell* at par. 27

<sup>9</sup> R.C. 1545.07

2017 FEB -2 PM 2:59

whether to conduct additional proceedings. As part of my decision whether to move forward, I considered the following questions:

PROBATE-JUVENILE  
DIVISION  
GEAUGA COUNTY, OHIO

1. Are the September 2016 orders constitutional?
2. Were the orders lawfully issued?
3. Did the master commissioner act in accordance with R.C. 2101.06?
4. May Commissioner Trapp ethically act upon the orders?
5. Will additional investigation by the master commissioner advance a legitimate interest of the court and the park district?

### **Separation of Powers**

This action is a proceeding under R.C. Chapter 1545. The entities over which the court exercised or is exercising jurisdiction are the applicant Chester Township Board of Trustees, the Chester Township Park District and the Chester Township Board of Park Commissioners. The judge exercises limited, collateral jurisdiction over park commissioners personally because he has the power to appoint them and to remove them from office mid-term; R.C. 1545.05-06.

The September 2016 court orders are not directed to Chester Township or to the board of trustees as a legislative body. The orders do not mention Trustee Kinney, the trustee who voted to approve the new agreement. Rather, the September 2016 orders threaten Trustees Radtke and Petruziello personally. Notably, the judge targeted these two trustees for rejecting an agreement he had no lawful way of knowing about.<sup>10</sup>

The doctrine of the separation of powers protects a legislative body from judicial activism and overreach. The doctrine is fundamental to our tripartite system, where each department of government is independent but each works in comity with the others. "It is essential to the harmonious working of this system that neither of these departments should encroach on the powers of the other," *State v. Baughman*, (1882), 38 Ohio St. 455, 459, 1882 Ohio LEXIS 189, \*8. This doctrine is part of the checks and balances inherent

---

<sup>10</sup> Improper judicial investigation is discussed separately.

FILED  
COMMON PLEAS COURT

2017 FEB -2 PM 2:59

in Ohio's constitution, *In Re Retaining Vorys, Sater, Seymour and Peas LLP*, 2011-Ohio-640, (Ohio Ct. App., Mahoning County Feb. 11, 2011), par. 28.

PROBATE-JUVENILE  
DIVISION  
GEAUGA COUNTY, OHIO

It is a fundamental principle of the separation of powers that the legislative branch of government is the ultimate arbiter of public policy, *State ex rel. Cook v. Seneca Bd. of Comm'rs*, (2008), 175 Ohio App. 3d 721, 731. Through a delegation of power by the General Assembly, township trustees exercise legislative authority at the state's most elemental level.

Mr. Radtke and Mr. Petruziello are involved in this case because 32 years ago their predecessors in office voted to file an application with the probate court to establish a township park district and 31 years ago the township came to an agreement with the newly created park district. 23 years ago the township made a revised agreement with the park district. The current trustees have done nothing to subject themselves to the jurisdiction of the probate court as individuals. But when Mr. Radtke and Mr. Petruziello used their legislative prerogative to vote against the new agreement, it triggered the judge to issue the September 2016 orders against them.

Mr. Radtke, Mr. Petruziello and Mr. Kinney were free to vote for or against the new agreement according to their own discretion and considered judgment. Individual trustees are immune from suit for their votes on legislative matters. "[L]egislative officers are not personally liable for their legislative acts . . .", *Hicksville v. Blakeslee*, (1921), 103 Ohio St. 508, 517. "A public officer acting within the scope of his or her authority is not liable individually, in the absence of bad faith or a corrupt motive, for failure to perform a duty involving judgment and discretion in a proper manner." *Miller v. Delaney*, 2002-Ohio-546 (Ohio Ct. App., Greene County Feb. 8, 2002), pp. 5-6.

Township trustees answer to their constituents, not to the probate judge. Unlike park commissioners whose appointments are bestowed upon them by a judge and who can be removed by him for any reason he cares to express, township trustees earn their

2017 FEB -2 PM 2:59

PROBATE - JUVENILE  
DIVISION  
GEAUGA COUNTY, OHIO

public offices through direct election by the voters and can be removed only upon proof of constitutional or other statutory grounds.<sup>11</sup>

The doctrine of the separation of legislative and judicial powers prevents me from enforcing the September 2016 orders.

As it is being applied here, R.C. 1545.02 *et seq.* likely violates the separation of *executive* and judicial powers, too. Judge Grendell's understanding of his plenary power gives him operational control and oversight over the park district, an executive function. And as seen here, the judge acted unilaterally—like an executive—without waiting for a motion from the park commissioners, without notice to the parties and without giving Mr. Radtke or Mr. Petruziello or their attorneys an opportunity to be heard.

“[I]t is not a function of the courts to dictate to the other branches of government how they follow through with the work that is their public duty to accomplish. *Wolf v. E. Liverpool City Sch. Dist. Bd. of Educ.*, 2004-Ohio-2479 par. 46 (Ohio Ct. App., Columbiana County May 12, 2004) par. 46.

The exertion of judicial influence on the park district began before last September. In 2014 the probate court appointed the master commissioner to determine if the park district was operating legally and if park funds had been mismanaged.<sup>12</sup> The report she produced is a detailed study of the park district's goals, objectives, functions, operations, finances and messaging. The report is over 250 pages long. It makes specific recommendations about the strategic, operational and ordinary activities of the park district. The report assesses the park district's mission, analyzes its management and audits its procedures. The 2014 master commissioner's report is a brilliant and, no-doubt, a very useful document.

<sup>11</sup> Ohio Const. Art. II § 38; R.C. 3.07

<sup>12</sup> *State ex rel. Chester Twp. v. Grendell* at par. 4

FILED  
IN COMMON PLEAS COURT

2017 FEB -2 PM 2:59

PROBATE JUVENILE  
DIVISION  
GEAUGA COUNTY, OHIO

But it is not a R.C. 2101.06 report. No testimony was taken and the master commissioner made no conclusions of law other than to point out park district practices that did not comply fully with state statutes.

In her 2014 report, the master commissioner wrote, "Oversight of park districts has been entrusted to the probate court because so many parks began with a gift of property to the public upon someone's death with instruction that the property remain a park in perpetuity."<sup>13</sup> None of the parties ever challenged the statement that the probate court has oversight of the parks. The master commissioner did not cite any legal authority for that proposition.

The probate court has oversight over park commissioners.<sup>14</sup> The board of commissioners has oversight over the park district.<sup>15</sup> It does not follow that because the park board has authority to negotiate agreements and because the probate court appoints the members of the park board, the probate court can negotiate agreements for the park board. I use the word "negotiate" broadly here, to include threats to put people in jail if they do not vote for an agreement.

I don't understand how one can posit that the probate court has inherent authority to oversee park district operations when the statutory powers of the park board are so exclusive, comprehensive and detailed. Every problem mentioned in the 2014 Master Commissioner Report should have been foreseen, prevented or corrected by the board of park commissioners and their administrators through the exercise of due diligence.

The Supreme Court analogized a probate court's jurisdiction over a park district to the court's power over guardianships and estates.<sup>16</sup> A ward, an estate—they are not governmental bodies. A guardian, a fiduciary—they do not perform government functions. But because his argument in support of jurisdiction was not completely

---

<sup>13</sup> "Report and Recommendations of the Master Commissioner—Analysis of the "Chester Township Park District Review 2013" (hereafter, 2014 Master Commissioner's Report), July 28, 2014, p. 92

<sup>14</sup> R.C. 1545.06.

<sup>15</sup> R.C. 1545.07 and 1545.09, *et al.*

<sup>16</sup> *State ex rel. Chester Twp. v. Grendell* at par. 27

2017 FEB -2 PM 2:59

implausible, Judge Grendell prevailed in the prohibition action. Having found a speck of jurisdiction by applying the guardianships/estates analogy, the Supreme Court had done its job. Writ denied. The Supreme Court did not consider the separation of powers doctrine. It will be up to the appellate court, through an ordinary appeal, to identify limits and exceptions to the probate court's jurisdiction.

The judge's incursion into the legislative function is clearly prohibited. His usurpation of executive authority is probably prohibited.

### **Consideration of Matters Outside the Record**

The September 2016 orders contain factual predicates not supported by the court record. There were no court filings and there was no hearing from which the judge determined the facts set out in the entries. The judge determined facts either through his own investigation or a misapplication of method of taking judicial notice under Evid. R. 201.

Ohio Jud.Cond.R. 2.9(C) states, "A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed." It is an abuse of discretion for a judge to conduct his or her own investigation of the facts of a matter; *State ex rel. Head of Claims, Allstate Ins. Co. v. Gaul*, 131 Ohio App. 3d 419, p. 435. Independent investigation by the judge constitutes plain error; *Am. Builders & Contrs. Supply Co. v. Frank's Roofing, Inc.*, 2012-Ohio-4661, par. 20. It is impermissible for the trial court to consider evidence outside the record and conduct its own investigation of the facts; *State v. Bayliff*, 2010-Ohio-3944 par. 27.

A judge may take judicial notice of facts outside the record if those facts are not reasonably in dispute and known generally within the territorial jurisdiction of the court or can be established through unquestionably accurate sources; Evid. R. 201(B).

When a court takes judicial notice, it must advise the parties and give them an opportunity to object either before or after judicial notice is taken, Evid. R. 201(E). Yet

2017 FEB -2 PM 2:59

the judge did not inform the parties he was taking judicial notice of any facts in his September 2016 orders. He never held a hearing during which the parties could have objected to the taking of judicial notice. Some of the facts are not capable of being judicially noticed.

The September 2016 orders that commissioned Attorney Trapp and ordered her to investigate new matters were the product of a highly irregular and erroneous process. The judge should have conducted a hearing before issuing the orders. The parties should have been notified of the facts the judge was relying upon.

**Failure to Comply with R.C. 2101.06**

In addition, the Master Commissioner did not follow the mandatory process set out in the statute under which she was appointed. Judge Grendell appointed the master commissioner pursuant to R.C. 2101.06, which states in part:

The commissioner shall take the testimony and report the testimony to the court with the commissioner's conclusions on the law and the facts involved.

The master commissioner conceded the method she used to create her report was informal. She spoke with persons without having placed them under oath and without recording their statements. She obtained written materials through public records requests or by asking interested persons or their lawyers to produce materials voluntarily. The master commissioner explained she was "information gathering," learning as much as she could about the situation before issuing summonses, taking testimony or ordering the production of documents. As mentioned earlier, this same extra-statutory process was used to generate Commissioner Trapp's earlier report in 2014.

To be fair, the master commissioner sought to contact me for instructions as to how she should proceed. I did not permit any back-channel communication between the master commissioner and myself. The master commissioner testified she did not progress past a preliminary investigation because she had no clear guidance from me.

FILED  
COMMON PLEAS COURT

2017 FEB -2 PM 2:59

PROBATE - JUVENILE  
DIVISION  
GAUGA COUNTY, OHIO

### Master Commissioner as Witness and Adjudicator

The master commissioner, a former judge, had ethical qualms about fulfilling parts of her assignment.

Commissioner Trapp has been serving as a broker, facilitator and advisor to the township trustees and the park commissioners since 2014. When Judge Grendell learned the commissioners did not approve the new agreement—a fact not adjudicated by him—he ordered the master commissioner to determine if the dissenting trustees and their attorneys committed fraud upon the court; interfered with park operations, were in contempt of court, violated state law or violated the original 1984 order establishing the park district.

A special master commissioner has an adjudicative function—to determine facts, and a conclusory function—to draw legal conclusions based on the facts. The September 2016 orders put the master commissioner in a position where she had to adjudicate a process she personally witnessed and participated in. That is not permitted.

The Code of Judicial Conduct explicitly applies to special master commissioners. “A judge within the meaning of this code, is a lawyer who is authorized to perform judicial functions \* \* \* including an officer such as a magistrate, court commissioner or special master; *Ohio Code of Judicial Conduct*, “Application” I-(B). The master commissioner must disqualify herself if it is likely she would be called as a witness in the proceeding; Jud.Cond.R. 2.11.

If the judge had moved forward with contempt hearings against the trustees or their attorneys, Commissioner Trapp most certainly would be called as a witness. Commissioner Trapp could provide direct testimony about the conduct of the parties and their counsel during negotiations. She also could provide evidence as to whether any of the participants acted with scienter such that they could be charged with contempt, fraud or purposeful interference with park district operations.

2017 FEB -2 PM 2:59

PROBATE - JUVENILE  
DIVISION  
GEAUGA COUNTY, OHIO

The roles of witness, investigator and adjudicator were impermissibly combined in Judge Grendell's September 16, 2017 order. Commissioner Trapp cannot proceed with her assignment without committing an ethical violation. This explains her reluctance to move beyond an informal investigation. She is required to self-disqualify. Disqualification is mandatory despite the fact the parties did not request it; Jud.Cond.R. 2.11 Comment 2.

#### **Further Action Not Warranted**

The Master Commissioner has yet to address either of the questions set out in the September 22, 2016 referral. It is not necessary that she do so.

The September 22 order instructed the Master Commissioner to determine if Trustees Radtke or Petruziello committed the crime of "Retaliation," a felony under R.C. 2921.05.

The determination as to whether a person committed a felony must be referred in the first instance to the county prosecutor, R.C. 309.08 and thereafter to the county grand jury, R.C. 2939.10. A master commissioner's opinion on this subject is conjectural and of no value to these proceedings. It is outside the subject matter jurisdiction of a probate court; R.C. 2101.24.

If a judge suspects a crime was committed, he himself should make a referral to the county prosecuting attorney, whose duty it is to inquire into the commission of crimes.

The September 22, 2016 order also directs the master commissioner to determine if any of the park commissioners or Judge Grendell personally were deprived of their civil rights by Trustees Radkte or Petruziello under 42 U.S.C. §1983, "Civil Action for Deprivation of Civil Rights."

Whether the individual park commissioners' civil rights were violated is irrelevant to these proceedings. The parks commissioners are involved in this action in

2017 FEB -2 PM 2:59

their representative capacities as members of the park board. The master commissioner cannot opine on a subject concerning the park commissioners' personal civil rights. The issue is beyond the jurisdiction of the probate court and not a proper subject for referral to a master commissioner under R.C. 2101.06.

JUVENILE  
DIVISION  
GEAUGA COUNTY, OHIO

Likewise the judge cannot appoint a master commissioner to give an opinion as to whether his own civil rights were violated. Judge Grendell is involved in this case in his judicial capacity as probate judge. Whether he personally has a cause of action against individual trustees is beyond the scope of a probate court proceeding and not a proper referral to a special master commissioner.

Moreover, the judge cannot ethically so instruct the master commissioner because the master commissioner's legal opinion on this subject would have value only to the judge personally. A judge may not use his office for personal gain, Jud.Cond.R. 1.3. If a judge wants to know if his civil rights were violated, he must hire a lawyer at his own expense to get a definitive answer. A master commissioner cannot act as his private counsel.

The September 22, 2016 order was not within the Court's plenary power to hear and dispose of matters relating to the Chester Township Park District.

### **Conclusion**

I heard testimony and reviewed the master commissioner's interim report in accordance with my assignment by the Chief Justice. Although the master commissioner's report is incomplete, additional efforts to respond to any unaddressed directives are outside the scope of the probate court's jurisdiction and are not proper subjects for a R.C. 2101.06 referral.

The September 2016 entries violate the separation of powers doctrine and are premised upon an improper judicial investigation. I will not conduct further proceedings.

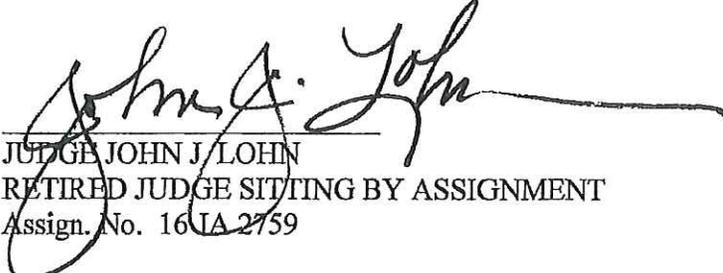
2017 FEB -2 PM 2:59

Under R.C. 2101.06 I must confirm, modify or set aside the report of the special master commissioner. For the reasons stated herein, I set aside the report of the special master commissioner.

The probate court pre-approved the master commissioner's fees and taxed them as court costs in its September 16, 2016 entry. There are no other matters left for me to consider.

The master commissioner is discharged from her commission set out in the entries of September 16 and September 22, 2016.

**SO ORDERED.**

  
\_\_\_\_\_  
JUDGE JOHN J. LOHN  
RETIRED JUDGE SITTING BY ASSIGNMENT  
Assign. No. 16 IA 2759

cc: Master Commissioner Mary Jane Trapp, Chester Township Trustees, Geauga County Prosecuting Attorney, Atty. Raskin/ Atty. Scialdone, Chester Park Board, Atty. Gillette