Florida Guardianship Litigation
CLE Outline
January 2007

I. Capacity Adjudication

A. Whether the individual is truly incapacitated

- *Mathes v. Huelsman*, 743 So. 2d 626 (Fla. 2d DCA). The daughter of the individual alleged to be incapacitated sought appointment. Two examiners determined Petitioner had full capacity, while the third found her to have limited capacity. The third examiner then amended his opinion and found Petitioner to have full capacity. Nevertheless, the trial court adjudicated Petitioner partially incapacitated and appointed a limited guardian. The Second District Court of Appeals reversed the trial court's judgment, holding that once the examining committee determines that an individual has full capacity, the petition for guardianship should be dismissed.
- *McJunkin v. McJunkin*, 896 So. 2d 962 (Fla. 2d DCA 2005). Seventy-nine year-old individual who was adjudged incompetent later filed a Suggestion of Capacity and his rights were partially restored. The Second District Court of Appeals held that the trial court erred in only partially restoring Petitioner's rights because the medical personnel who examined Petitioner found him to be competent, as did several lay witnesses.
- *In re Maynes-Turner*, 746 So. 2d 564 (Fla. 3d DCA 1999). Petitioner who suffered a severe injury was declared incompetent. She later filed a Suggestion of Capacity and the trial court partially restored her rights, despite the examining doctor's findings that Petitioner was in fact fully competent. "Absent his paternalistic notion that she might make decisions that could harm her, the doctor found Ms. Turner possessed the requisite level of capacity for full restoration." As such, the trial court erred in only partially restoring Petitioner's rights.

B. Evidentiary Standards

- Fla. Stat. § 744.331(6) - If, after making findings of fact on the basis of clear and convincing evidence, the court finds that a person is incapacitated with respect to the exercise of a particular right, or all rights, the court shall enter a written order determining such incapacity.
- *In re Bryan*, 550 So. 2d 447 (Fla. 1989). Ward's sons had him declared incapacitated to manage his property. Ward appealed on grounds that the trial court used the preponderance standard when the clear and convincing standard should have been utilized. The Florida Supreme Court held that a declaration of incompetence must follow application of clear and convincing standard.

C. Quality of the Examination

- It is error for a court to proceed with incapacity adjudication absent a three-person examination committee. *Molnar v. Maltz*, 786 So. 2d 1276 (Fla. 4th DCA).

- *Taylor v. Blank*, 431 So. 2d 285 (Fla. 5th DCA 1983) (holding that a physician who examined a Ward two weeks prior to his appointment to the examining committee properly rendered an examination as required by Florida law.)
- *See Poteat v. Guardianship of Poteat*, 771 So. 2d 569 (Fla. 4th DCA 2000). Two physicians and one nurse formed the committee that examined the Ward. One physician clearly found the Ward incompetent due to Alzheimer's-type dementia and noted that the Ward was unable to recall her address, telephone number, or place of birth. The second physician acknowledged that the Ward could not sign a check and did not know how to address an envelope, but found her competent. The nurse also found the Ward competent but stated that she "took a long time to comprehend things."
- *See* 1-17 Planning for the Elderly in Florida § 17.11 – Investigative Process

D. Conflict of Interest Between Members of the Examination Committee, Parties, and Counsel

- Fla. Stat. § 744.331(3)(a) – Members of the examining committee may not be related to or associated with one another, with the petitioner, with counsel for petitioner or the proposed guardian, or with the person alleged to be totally or partially incapacitated…
- See *Borden v. Borden-Moore*, 818 So. 2d 604 (Fla. 5th DCA 2002). Petitioner, the Ward's daughter, challenged the appearance of an attorney for the Ward without a court ordering substitution of counsel. The Petitioner also alleged conflict of interest because the attorney in question had previously represented the defendant (Ward's husband).
- But see *Vick v. Bailey*, 777 So. 2d 1005 (Fla. 2d DCA). The Second District Court of Appeals quashed the trial court's order finding a conflict of interest with an attorney who wanted to represent several parties in a guardianship proceeding. The court found that there was no conflict of interest because each of the parties the attorney claimed to represent sought determination of the Ward's capacity.

E. Restoration

- Fla. Stat. § 744.331 – previously mandated a 90-day waiting period between an adjudication of incapacity and a Ward's filing of a Suggestion of Capacity. There is no longer any waiting period.

II. Guardians

A. Who Should Be Appointed

- Preference in appointment is given to family - Fla. Stat. § 744.312(2)(a); *but see In re Guardianship of Quindt*, 396 So. 2d 1217 (Fla. 3d DCA 1981) (holding that while "first consideration" is often given to a Ward's blood relative, Florida law does not mandate that a blood relative be appointed guardian.)
- Consideration is also given to the Ward's personal preference. *Gallagher v. Comprehensive Personal Care Services, Inc.*, 742 So. 2d 268 (Fla. 3d DCA 1997).

- *Wixtrom v. Dept. of Children and Family Svcs.*, 864 So. 2d 534 (Fla. 5th DCA 2004). Petitioner sought appointment as guardian of the fetus of an incapacitated female who lived in a group home, who became pregnant as a result of a sexual battery. The District Court of Appeals affirmed the trial court's denial of the petition on grounds that Florida statutory law does not provide for guardianship of fetuses.

B. Removal

- Grounds
- Felonies for non-fraudulent crimes v. misdemeanors crimes involving fraud or dishonesty

B. Accounting and Surcharge

- Proceedings to surcharge a guardian are adversarial proceedings that require formal notice. *Snell v. Snell*, 915 So. 2d 709 (Fla. 1st DCA 2005); *Merkle v. Guardianship of Jacoby*, 862 So. 2d 906 (Fla. 2d DCA 2003).
- A petition for surcharge was denied where the guardian's failure to obtain court approval for disbursements from a Ward's account, as well as to require sufficient accounting, did not result in damages to the Ward's estate. *Lawyers' Surety Corp. v. Saltz*, 658 So. 2d 1152 (Fla. 2d DCA 1995).

C. Alternatives to Guardianship

- Guardian of the property

1. Trust
2. Durable Power of Attorney [DPOA] – Fla. Stat. § 709.08
    - Document by which principal designates attorney in fact
    - Must be executed with same formalities required for conveyance of real property
    - Remains in effect until revoked by the principal, until principal's death, or until the filing of a petition to determine the principal's capacity, unless the court determines the DPOA directs that some authority is to remain exercisable. § 709.08(3)(b)
    - Provides procedure for emergency DPOA authority between time of filing of petition and time of adjudication of capacity. § 709.08(3)(c)(2)
    - Contains provision for retention of authority to make health care decision. § 709.08(3)(c)(3).

3. Challenges to Guardianship Alternatives

- **Fla. Stat. § 744.331(6)(f)** - Permits "interested person" to file verified motion to invalidate a DPOA, trust, or trust amendment as alternative to guardianship:

> (f) (*Effective July 1, 2007*) Upon the filing of a verified statement by an interested person stating:
>
> 1. That he or she has a good faith belief that the alleged

incapacitated person's trust, trust amendment, or durable power of attorney is invalid; and

2. A reasonable factual basis for that belief,

the trust, trust amendment, or durable power of attorney shall not be deemed to be an alternative to the appointment of a guardian. The appointment of a guardian does not limit the court's power to determine that certain authority granted by a durable power of attorney is to remain exercisable by the attorney in fact.

- This is contrary to the general rule that one may not challenge a revocable trust on grounds of undue influence while the Settlor is still alive.
- *See* Fla. Stat. § 737.2065 – Trust contests - An action to contest the validity of all or part of a trust may not be commenced until the trust becomes irrevocable, except this section does not prohibit such action by the guardian of the property of an incapacitated settlor. (repealed July 1, 2007).
- Florida *Nat'l Bank of Palm Beach Co. v. Genova*, 460 So. 2d 895 (Fla. 1984) (holding that the Settlor of a revocable trust reserves the absolute right of revocation while he or she is alive).
- *Freeman v. Lane*, 504 So. 2d 1297 (Fla. 5th DCA 1987) Settlor petitioned for revocation of trust; trustee (one of her sons) challenged the revocation as consequence of undue influence from Settlor's other sons.
- *Ullman v. Garcia*, 645 So. 2d 168, 169 (Fla. 3d DCA 1994).
- *See* Fla. Stat. § 732.518 - Will contests - An action to contest the validity of a will may not be commenced before the death of the testator.

- Alternatives to Guardian of the Person
  1. Health Care Surrogate – Fla. Stat. Ch. 765
    - Written document designating surrogate to make health decisions for the principal must be signed by the principal in the presence of two subscribing witnesses - § 765.202(1)
    - In effect until date of termination contained within document or, if there is none, until revoked by the principal - § 765.202(6)
    - Provides procedure for medical evaluation if capacity to make health care decisions is called into question - §765.204

D. Fifth Amendment Waiver

- *Wright v. Dept. of Health and Rehabilitative Services*, 668 So. 2d 661 (Fla. 4th DCA 1996). Appellant's position as a court-appointed **guardian** was not that of a private individual serving a private interest, but rather that of an arm of the court fulfilling a regulated function. We can discern no reason to recognize an exception to section 744.517 where the appointed functionary has failed to prepare the statutorily-required records. Accordingly, Appellant waived her right to claim a fifth amendment privilege.

- *Pisciotti v. Stephens*, 940 So. 2d 1217 (Fla. 4th DCA 2006). given the fundamental nature of the Fifth Amendment's constitutional guarantees, we perceive grave difficulties in applying the privilege to the deposition questions but not to the related final accountings. To refuse to apply the privilege to the order for a final accounting document in this case would have the rather perverse effect of protecting sister from giving testimonial answers conceivably providing a link in the chain of evidence but then refusing the same protection by requiring her to file accountings yielding the same information. Because of the facts and circumstances of this case, we distinguish *Rasmussen*.

III. Jurisdiction

A. No Transfer of Adjudication of Incapacity

- Fla. Stat. § 744.2025(1) - Prior Court Approval Required - A guardian who has power pursuant to this chapter to determine the residence of the ward may not, without court approval, change the residence of the ward from this state to another, or from one county of this state to another county of this state, unless such county is adjacent to the county of the ward's current residence. Any guardian who wishes to remove the ward from the ward's current county of residence to another county which is not adjacent to the ward's current county of residence must obtain court approval prior to removal of the ward. In granting its approval, the court shall, at a minimum, consider the reason for such relocation and the longevity of such relocation.

B. Domiciliary Conflicts

- Between states:
  - "An adult of unsound mind, who by reason of his mental status cannot acquire a new domicile for himself, cannot have his domicile changed for him by being in fact carried by another person, no matter how closely related to him, to another place." *Miller v. Nelson*, 35 So. 2d 288 (Fla. 1948); *but see*
  - "[T]he mere fact that a person is of unsound mind does not necessarily preclude him from changing his state domicil, if he still has lucid intervals, or sufficient mental capacity to elect a new domicil…"*Matthews v. Matthews*, 141 So. 2d 799 (Fla. 1st DCA 1962). The *Matthews* court distinguished its facts from *Miller*, explaining that the individual whose capacity was in question in had previously been adjudicated incapacitated in Virgina. However, the incapacitated left Virginia on his own determination, established a residence in Florida, maintained employment and held and exchanged property. The court found that the individual "demonstrated his intention to change his domicil from Virginia to Florida…by every act within his power." *Id.* at 802.
  - A probate court's denial of a petition to terminate a guardianship [pursuant to Fla. Stat. § 744.2025] due to the ward's change of domicile to another state without good cause is an abuse of discretion. *Bynum v. George*, 719 So. 2d 960 (Fla. 4th DCA 1998).

- Between counties:
  - *In re Guardianship of Mickler*, 152 So. 2d 205 (Fla. 1st DCA 1963) (discussing factual conflict with regard to which county the Ward was domiciled in at the time the Taylor County Circuit Court adjudicated her incapacitated. "A change of legal residence may be accomplished by a good faith intention to acquire a new domicile coupled with actual removal. The effectiveness of such change is dependent upon the concurrence of both fact and intention.")

C. Validity of Will or Trust in one Jurisdiction

- *Hanson v. Denkla*, 357 U.S. 235 (1958). A state does not have in rem jurisdiction over inter vivos dispositions of a testator whose estate passes through its probate system. *Id.* at 248.Otherwise probate courts "would enjoy nationwide service of process to adjudicate interests in property with which neither the State nor the decedent could claim any affiliation." *Id.* at 248-249.

IV. Standing

- *Hayes v. Guardianship of Thompson*, __ So. 2d __ (Fla. 2006). The Florida Supreme Court resolved certified conflict between the Third and Fourth District Courts of Appeal with regard to who has standing to petition for or in opposition to a guardianship. The Court held that a person, including a Ward's heir, has standing if "the applicable provisions of either the Florida Guardianship Law or Probate Rules entitle the person to notice of the proceeding or authorize the person to file an objection to the proceeding."
- *Siegel v. Novak*, 920 So. 2d 89 (Fla. 4th DCA 2006). A Settlor's two sons had standing to challenge distributions of a trust because New York had the most significant relationship to the trust. As such, the matter should be decided pursuant to New York law. In so holding, the Fourth District Court of Appeals determined that standing is a substantive, not procedural, issue.
- *Stefanos v. Rivera-Berros*, 673 So. 2d 12 (Fla. 1996). Once parental rights to a child have been terminated, the parent also lacks the legal interest necessary to establish standing to intervene and contest for the adoption of the child.

Statutory Changes with Regard to Court Monitors

Fla. Stat. § 744.107 Court Monitors– The Legislature:

- Amended the provision prohibiting appointment of a family member or an individual with a personal interest in the guardianship proceedings as a court monitor
- Added a provision that the order of appointment of the monitor must be served upon the guardian, ward and persons as determined by the court
- Added a provision that the monitor must serve on the ward, the guardian, the court, and any other persons as determined by the court, a verified report of any investigation or examination of the ward.
- Added a provision that if a monitor's report indicates that further action by the court is necessary to protect the ward, the court may enter any order necessary to protect the ward or the ward's estate.

    - Added a provision that if a motion for a monitor is found to have been filed in bad faith, attorneys' fees and costs may be assessed against the movant.
- Created Fla. Stat. § 744.1075 – Emergency court monitor statute – a court may appoint an emergency monitor without notice, upon inquiry from any interested person or on its own motion. There must be imminent danger of the ward's physical or mental safety, or that the ward's estate is in danger of misappropriation or waste. The emergency monitor's powers and duties must be enumerated by the court order.
    - The emergency monitor's authority lasts for sixty (60) days or a finding of no probable cause, whichever occurs first.
    - The court may take interim measures such as temporary restraining orders, freezing of assets injunctions, suspension of the guardian, or another discretionary act to protect the physical and mental health of the ward.
    - The statute also permits a to court may impose sanctions or take other remedial actions against a guardian or his attorney.