

Elder Law Section Guardianship Committee

AGENDA

Meeting Date: September 13, 2022

Chair: Twyla Sketchley

Vice Chairs: Michelle Kenney & Melissa Williams

Time: Noon Eastern

VIA ZOOM

Time: Jul 12, 2022 12:00 PM Eastern Time (US and Canada)

Every month on the Second Tue, until Jun 13, 2023, 12 occurrence(s)

Aug 9, 2022 12:00 PM

Sep 13, 2022 12:00 PM

Oct 11, 2022 12:00 PM

Nov 8, 2022 12:00 PM

Dec 13, 2022 12:00 PM

Jan 10, 2023 12:00 PM

Feb 14, 2023 12:00 PM

Mar 14, 2023 12:00 PM

Apr 11, 2023 12:00 PM

May 9, 2023 12:00 PM

Jun 13, 2023 12:00 PM

Join Zoom Meeting

<https://us02web.zoom.us/j/85859846481?pwd=M4JIZCAOmLMkQQtamAc8lK0hIC8bXS.1>

Meeting ID: 858 5984 6481

Passcode: 349083

One tap mobile

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I. Call to Order – Chair/Vice Chair 12:05 p.m.

II. Roll Call/Attendance

III. Approval of Minutes

Minutes from August 2022 Meeting Attached
Kandace moved Melissa Second - Unanimous

IV. Announcements

- a. Elder Law Section Annual Retreat in Boston, MA September 29, 2022 – October 1, 2022
<https://member.floridabar.org/s/lt-event?id=a1R1R00000898uRUAQ#/Overview>
- b. National College of Probate Judges Fall Conference in Destin, Florida November 14 – 18, 2022.
- c. AFELA UnProgram in Orlando, FL December 2, 2022 – December 3, 2022
<https://afela.org/event/the-unprogram-2/>

V. Law/Case Law Updates

a. New Cases

- i. Araguell v. Bryan (In re: Guardianship of Araguell, Fla. 1st DCA 1D20-2789
- ii. Baker Donaldson v. L. Frank Chopin 11 Cir. Ct. Appeals No. 22-10255
(unpublished opinion)

b. New Statutes

c. New Court Rules

d. New FL Bar Rules

- i. Reminder of recent changes to Rule 4-1.14 Client with Diminished Capacity
(effective May 2, 2022)

e. New Administrative Rules

- i. OPPG – Been working on the rules and will need to be reviewed by OFR before they can be published and noticed. There is a proposal on monitoring professional guardians as required by Florida Law.

ii. DCF

iii. AHCA – Update on the lawsuit on public records by Nancy Wright

f. New Local Rules

- i. Administrative Rules

1. 4th Circuit Court Administrative Order on payment of attorney and examining committee. Second Amended Administrative Order No. 2009-03
 - a. Does this exceed the authority of the court to make local rules or violate statute
 - b. Should we petition FL Supreme Court to review? Similar
 2. 5th Circuit Court Administrative Order on payment of guardians Fourth Amended Administrative Order A-2018-69
 - a. Does this exceed the authority of the court to make local rules or violate statute
 - b. Should we petition FL Supreme Court to review? – Chante Jones
- ii. Local Judicial Rules
- iii. Unwritten rules by clerk’s offices regarding review of petitions, accountings, plans, etc.
1. Do you know what you clerk of court uses to audit financial reports?
 2. What, other than annual financial reports, does your clerk audit?
 3. Are the clerk’s making “findings” adopted by judges?
- g. New Federal Laws

VI. Legislative Update

- a. DNRO Language – Victoria Heuler, Michelle Kenney – Exhibit A Florida Public Guardian Coalition Proposal
- i. See Attached Exhibit A
 - ii. The statute does not give much direction. Provide medical documentation that is showing that resuscitation is futile, the person is at end of life
 1. Outline what evidence can be considered and what the standard is to be used.
 2. Florida is the only state that has a requirement that a guardian get a court order for a DNRO
 3. How do we get a standard applied consistently
 4. Did we put judges in the position of being the person who “signs the death warrant”?
 5. There isn’t even a consistent standard on the applicability of advance directives
 6. Can we address these issues at the beginning of the guardianships so that they can be avoided in the emergency issue
 7. By making it an enumerated right, then the ward and family get to be involved at the beginning of the process. This allows a focus on the

examination of rights, allows input from the family, and notice to everyone.

8. There needs to be better education for judges on probate and guardianship. Most of it is basic information. How would this be disseminated to the judges throughout the state?
9. Statute revised to include the end of life is enumerated and that this does not have to be at the end of the life.
10. Need to look at the magistrates' education
11. We need everyone's comments on the DNRO legislation
12. We are putting together a committee for education at the judge's conferences

b. 745 Rewrite – Michelle Kenney

i. Update on process, status, and legislative sponsors

1. Draft review is complete.
2. There is an updated version that was to go back to bill drafting.

c. Proposal to Combine Petition to Determine Incapacity and Petition to Appoint Guardian – Michelle Kenney Attachments to Email Agenda

VII. Special Projects

a. Guardianship Local Rule Repository – Melissa Finley Williams

b. Clerk's Transparency Work Group – Twyla Sketchley, Deb Slater, Shannon Miller, Karen Murillo

c. Anti-guardianship Group Monitoring – Bill Johnson & Paul Lemieux

d. Public Relations Projects – Victoria Heuler, Twyla Sketchley

i. News Stories of Interest

- ii. **Need stories that show the guardianship (family, professional, or public guardian) had to be put in place for the protection of the elder or person with a disability.**

Stories that show the guardianship saved a person's life, got a ward necessary medical care, saved a ward's assets. We need stories that show that a professional guardian helped saved a ward from an abusive family member or where the ward had no other person outside a professional. Send these stories to Twyla Sketchley so that we can get them to the PR committee.

e. WINGS Update – Jose Rodriguez

VIII. Advocate Article

- a. Guardianship Committee must submit article for November 1, 2022 deadline edition
- b. Topics
 - i. Britney Spears Guardianship Article
- c. Florida Bar Journal Article on Behalf of Elder Law Section

IX. Old Business

X. New Business

- a. Guardian Advocacy treatment as having no authority in Pinellas County
- b. Committee Attendance Policy
- c. Consumer Financial Protection Bureau (CFPB) information on unfair debt collection practices by nursing homes. Resources from Victoria Heuler:

https://files.consumerfinance.gov/f/documents/cfpb_issue-spotlight-nursing-home-debt-collection_report_2022-09.pdf

https://files.consumerfinance.gov/f/documents/cfpb_nursing-home-debt-collection_joint-letter_2022-09.pdf

https://www.justiceinaging.org/wp-content/uploads/2019/01/25-Common-Nursing-Home-Problems-and-How-to-Resolve-Them_Final.pdf

<https://theconsumervoices.org/issues/other-issues-and-resources>

XI. Next Meeting – October 11, 2022

XII. Adjourn

- a. Lourdes moves 1:12 p.m.

EXHIBIT A

I. Honoring Preexisting Order Not to Resuscitate / Advance Directive Provision

I. Honoring Preexisting Order Not to Resuscitate / Advance Directive Provision

744.363 Initial guardianship plan. —

(1) The initial guardianship plan shall include all of the following:

(f) A list of any preexisting orders not to resuscitate executed under s. 401.45(3) or preexisting advance directives, as defined in s. 765.101, the date an order or directive was signed, whether such order or directive has been suspended by the court, and a description of the steps taken to identify and locate the preexisting order not to resuscitate or advance directive. **When a preexisting order not to resuscitate or a preexisting advance directive is disclosed on a court approved initial guardianship plan and has not been suspended by the court, a plenary guardian or a limited guardian of the person with medical decision-making authority may consent, without prior court approval, to the withholding or withdrawal of life-prolonging procedures as directed by the preexisting order not to resuscitate or the advance directive.**

744.3675 Annual guardianship plan. —

(1) Each plan for an adult ward must, if applicable, include:

(d) A list of any preexisting orders not to resuscitate executed under s. 401.45(3) or preexisting advance directives, as defined in s. 765.101, the date an order or directive was signed, whether such order or directive has been suspended by the court, and a description of the steps taken to identify and locate the preexisting order not to resuscitate or advance directive. **When a preexisting order not to resuscitate or a preexisting advance directive is disclosed on a court approved annual guardianship plan and has not been suspended by the court, a plenary guardian or a limited guardian of the person with medical decision-making authority may consent, without prior court approval, to the withholding or withdrawal of life-prolonging procedures as directed by the preexisting order not to resuscitate or the advance directive.**

Justification:

1. House and Senate bill sponsors from 2020 legislation were unaware a ward's preexisting advance directives were not being honored.
2. Similar language was adopted to SB 1032 (2022 Session)
3. Language vetted through the Elder Law Section and Real Property Probate and Trust Law Section (2022 Session)

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II. Enumerated Right Provision

744.3215 Rights of persons determined incapacitated. -

(3) Rights that may be removed from a person by an order determining incapacity and which may be delegated to the guardian include the right:

(h) To consent to the withholding or withdrawal of life-prolonging procedures.

Justification:

1. This provision applies in all new guardianship cases once the language becomes law.
2. Adding end of life decision making as an enumerated right (not in current law).
3. Provision provides the following:
 - Ward is allowed an opportunity to speak on his/her behalf.
 - Ward is represented by counsel.
 - Objective opinion by the three-member examining committee as to whether the ward can exercise the right on his/her own.
 - Ward's next of kin is given notice and an opportunity to be heard.
 - Potentially reduces the need for emergency proceedings because the judicial decision can be made during the initial guardianship proceedings rather than emergency situations.
 - Prior to the 2020 legislation becoming law, guardians end of life decisions on behalf of their wards did not require pre-approval by the court. This provision retains the court's authority to review the guardian's authority in current law, however, allows for these decisions to be handled during the initial guardianship proceedings, if the judge chooses to do so, rather than during emergency situations.

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III. Court Approval Provision After Initial Guardianship Proceedings

744.441 Powers of guardian upon court approval. — ~~After obtaining approval of the court (2) pursuant to a petition for authorization to act:~~

~~(2) — A plenary guardian or a limited guardian of a ward may sign an order not to resuscitate as provided in s. 401.45(3). When a plenary guardian or a limited guardian of a ward seeks to obtain approval of the court to sign an order not to resuscitate, if required by exigent circumstances, the court must hold a preliminary hearing within 72 hours after the petition is filed, and:~~

~~(a) Rule on relief requested immediately after the preliminary hearing; or~~

~~(b) Conduct an evidentiary hearing not later than 4 days after the preliminary hearing and rule on the relief requested immediately after the evidentiary hearing.~~

(2) A plenary guardian or limited guardian of a ward may obtain authority to consent to the withholding or withdrawal of life-prolonging procedures, by having been delegated such authority under Sec. 744.3215(3)(h), Florida Statutes; by submitting to the court a preexisting advance; or by filing a petition under Sections 765.401, 765.404, Florida Statutes or Fla. Prob. R. 5.900.

(a) If the proposed withdrawal or withholding of treatment is in conflict with the known wishes of the Ward, as presently or previously expressed, or is objected to by the Ward's next of kin or any interested person, a guardian must seek court approval before consenting to such withdrawal or withholding of treatment notwithstanding a previous delegation of authority under Sec. 744.3215(3)(h), or the existence of a preexisting directive.

(b) The court must require a hearing where there is an objection or conflict between the Guardian's request to withhold or withdraw medical treatment and the wishes presently or previously expressed by the Ward, the Ward's next of kin, or any interested person; or where there is insufficient information to determine whether the criteria for granting the requested authority has been met.

(c) Notice of a petition to withhold or withdraw life-prolonging procedures, and of any hearing, must be served upon interested persons and next of kin.

Justification:

1. The provision applies to existing guardianship cases except when an advance directive or order not to resuscitate was previously submitted to the court.
2. Uses the same wording “withholding or withdrawing...” as is used in Sec. 765.401(3), F.S.
3. Listed statutes clarify the judicial proceedings followed by the court and guardians.

(d) Where a hearing is required and exigent circumstances are alleged, the court must hold a preliminary hearing within 72 hours after the petition is filed, and;

- I. **Rule on the relief requested immediately after the preliminary hearing; or**
- II. **Conduct an evidentiary hearing not later than 4 days after the preliminary hearing and rule on the relief requested immediately after the evidentiary hearing.**

(e) Notwithstanding subsection (d), if the ward is in a hospital and two of the ward’s treating physicians state death of the ward is expected to occur within the next seventy-two hours, there is no known objection to the entry of a do not resuscitate order, and the hospital ethics committee has met and agrees with the entry of a do not resuscitate order; without a hearing or prior court approval, a plenary guardian or limited guardian with medical decision-making authority may consent to withholding or withdrawing life-prolonging procedures. Within seventy-two hours, the guardian must file with the court notice that the guardian consented to withholding or withdrawing life-prolonging procedures pursuant to this subsection. The guardian must attach supporting documentation.