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IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FIFTH DISTRICT

IN RE:

CASE NO.:

REBECCA L. FIERLE,

PROFESSIONAL GUARDIAN

_____/

PETITION FOR WRITOF CERTIORARI

COMES NOW Petitioner, REBECCA L. FIERLE, by and through its undersigned counsel and pursuant to Rule 9.100(c) Fla.R.App.P. petitions this Honorable Court for a Writ of Certiorari to review a non-final order entered on September 12, 2019, in a case styled as In re Rebecca Fierle, Professional Guardian, from the Mental Health Division of the Ninth Judicial Circuit Court Case No.: 48-2000-PG-000005-0, denying Petitioner's objections to Respondent's discovery requests and ordering the production of privileged documents and/or information.

I. BASIS FOR INVOKING JURISDICTION

Article V, Section 4(b) of the Florida Constitution provides that the District Courts of Appeal have jurisdiction to issue Writs of Certiorari. See also, Rule 9.030(b)(2)(A) Fla.R.App.P.

Certiorari is the appropriate vehicle to challenge non-final orders that cannot

otherwise be appealed. *Beverly Enterprises-Florida, Inc. v. Ives*, 832 So.2d 161, 162 (Fla. 5th DCA 2002). The order to be reviewed in the present case was signed on September 12, 2019, by the Honorable Janet Thorpe, Circuit Judge in the Ninth Judicial Circuit in and for Orange County, Florida. (App. 1-29).[1] It was filed on September 13, 2019. Therefore, this Petition is timely under Rule 9.100(c)(1) Fla.R.App.P..

II. STATEMENT OF THE FACTS OF THE CASE

The order to be reviewed in the present case was issued on September 12, 2019, by the Honorable Janet Thorpe, Circuit Judge in the Ninth Judicial Circuit in and for Orange County, Florida. (App. 1-29).[2] Therefore, this Petition is timely under Rule 9.100(c)(1) Fla.R.App.P.

The order for which certiorari review is being sought is an order purporting to "find[ ] probable cause that Ms. Fierle violated the Florida Administrative Code and her general duty to perform in a Ward's best interests, ... probable cause that Ms. Fierle had a fiduciary duty to, at the very least, disclose her relationship with

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[1] App. _____ denotes reference to the Appendix which is being simultaneously filed with this Petition.

[2] App. _____ denotes reference to the Appendix which is being simultaneously filed with this Petition.

AdventHealth to the Court and the monies she was receiving prior to her appointment as guardian of any wards coming from AdventHealth.... probable cause to permanently remove Rebecca Fierle from any appointment in Orange County as a professional guardian." (App. 2-3). The wording of the order appears to be a final finding of fact and, therefore, a contemporaneous Notice of Appeal has been filed. The order and proceeding in question is one not recognized in the Florida Rules of Civil Procedure, the Florida Probate Rules, or the Florida Rules of Criminal Procedure purports to enforce an Administrative Code promulgated by the Florida Department of Elder Affairs.

III. NATURE OF RELIEF SOUGHT

The nature of the relief sought by this Petition is a Writ of Certiorari quashing and/or reversing the trial court's Order dated September 13, 2019 finding probable cause to believe Petitioner had violated Florida law.

IV. ARGUMENT

The applicable standard of review is whether the challenged order is a departure from the essential requirements of law, which causes material injury throughout the lawsuit, leaving the Petitioner with no other adequate remedy to review the alleged erroneous order. Id. REBECCA L. FIERLE respectfully submits that the lower court's order departs from the essential requirements of law because it was entered without notice, without a formal hearing, without the

production of competent evidence (other than impermissible and unrecorded hearing), and without giving the Petitioner any opportunity to call her own witnesses, produce her own evidence or even to cross-examine or comment on the hearing evidence relied upon by the judge. *See generally Borden v. Guardianship of Borden-Moore*, 818 So.2d 604, 607 (Fla. 5th DCA 2002) (discussion of requirements of due process and cases cited therein); *see also Keys Citizens for Responsible Gov't, Inc. v. Fla. Keys Aqueduct Auth.*, 795 So.2d 940, 948 (Fla. 2001) ("Procedural due process requires both fair notice and a real opportunity to be heard.").

The Supreme Court has stated that "as a condition precedent to invoking a district court's certiorari jurisdiction, the petitioning party must establish that it has suffered an irreparable harm that cannot be remedied on direct appeal." *Jaye v. Royal Saxon, Inc.*, 720 So.2d 214, 215 (Fla. 1998); *see also Beekie v. Morgan*, 751 So.2d 694 (Fla. 5th DCA 2000) (court must first determine jurisdictional requirements of (1) an irreparable injury (2) that cannot be corrected by plenary appeal, before deciding whether petitioner has shown departure from essential requirements of law).

To attempt to define whether a trial court has departed from the essential requirements of the law, appellate courts often cite to Justice Joseph Boyd's

specially concurring opinion in *Jones v. State*, 477 So.2d 566, 569 (Fla. 1985), *limited* 520 So.2d 250:

> [t]he required "departure from the essential requirements of law" means something far beyond legal error. It means an inherent illegality or irregularity, an abuse of judicial power, an act of judicial tyranny perpetrated with disregard of procedural requirements, resulting in a gross miscarriage of justice. The writ of certiorari properly issues to correct essential illegality but not legal error.

See also Haines City Community Development; Sams v. St. Johns County Code Enforcement Board, 712 So.2d 446 (Fla. 5th DCA 1998); *Eyster v. Eyster*, 503 So.2d 340 (Fla. 1st DCA 1987).

The order in the instant case is most analogous to and order of contempt that the court did not have proper jurisdiction to enter or a prejudgment order finding a party in civil contempt for which certiorari may be the proper remedy. See *Knorr v. Knorr*, 751 So.2d 64 (Fla. 2d DCA 1999); *Toyota Tsusho America, Inc. v. Crittenden*, 736 So.2d 764 (Fla. 5th DCA 1999); *Sears v. Sears*, 617 So.2d 807 (Fla 1st DCA 1986); *Stewart v. Mussoline*, 487 So.2d 96 (Fla. 3d DCA 1986).

A. The Probate & Mental Health Court did not have jurisdiction and departed from the essential requirements of the law by failing to provide <u>either</u> procedural or substantive due process to the Petitioner in the Court's proposed proceeding and by failing to give notice, hold a hearing, take formal evidence or allow the Petitioner the opportunity to cross-examine witnesses, produce evidence or have any chance to respond.

The undersigned attorneys are not certain exactly what jurisdiction the Probate and Mental Health Court was attempting to exercise in the Mental Health

Case File in which the orders of the Court were entered. The order outlines what it states are "violations" of the law, and "finds probable cause" as if it were a criminal matter, but no information or indictment was ever issued and the proceeding did not involve the State Attorney or a grand jury. Likewise, no pending probate action is at issue. The Petitioner Rebecca Fierle has resigned from all guardianship cases in Orange County Florida and is not registered as a professional guardian. Yet, the order purports to "permanently remove Rebecca Fierle from any appointment in Orange County as a professional guardian."

First, the trial court had no further authority to proceed to remove or permanently remove or discipline a professional guardian, who is regulated by the Florida Department of Elder Affairs, after the professional guardian had already resigned.

Section 744.2001 confers exclusive jurisdiction over the discipline of professional guardians to the Office of Public and Professional Guardians within the Department of Elderly Affairs:

> **744.2001 Office of Public and Professional Guardians.**—There is created the Office of Public and Professional Guardians within the Department of Elderly Affairs.
>
> (1) The Secretary of Elderly Affairs shall appoint the executive director, who shall be the head of the Office of Public and Professional Guardians. The executive director must be a member of The Florida Bar, knowledgeable of guardianship law and of the social services available to meet the needs of incapacitated

> persons, shall serve on a full-time basis, and shall personally, or through a representative of the office, carry out the purposes and functions of the Office of Public and Professional Guardians in accordance with state and federal law. The executive director shall serve at the pleasure of and report to the secretary.
> (2) *The executive director shall,* within available resources:
>
> > (a) *Have oversight responsibilities for* ***all*** *public and professional guardians....*
>
> (3) *The executive director's oversight responsibilities of professional guardians* must be finalized by October 1, 2016, and *shall include*, but are not limited to:
> ...
> > (c) *Establishing disciplinary proceedings, conducting hearings, and taking administrative action* pursuant to chapter 120.

§ 744.2001(1)-(3), Fla. Stat. (emphasis added). The Circuit Court in this case is effectively attempting to act as an administrative agency and as part of the Department Of Elder Affairs rather than as a Circuit Court of general jurisdiction over legal matter under Article V of the Florida Constitution. This is explicitly forbidden by both the Florida Statutes and the powers set forth for Circuit Courts under the Florida Constitution. *State ex rel. Dept. of General Serv. v. Willis*, 344 So. 2d 580, 590-91 (Fla 1st DCA 1977); *Gulf Pines Memorial Park Inc. v. Oaklawn Memorial Park Inc.,* 361 So.2d 695, 698 (Fla. 1978)("[I]f administrative agencies are to function and endure as viable institutions, courts must refrain from

`promiscuous intervention' in agency affairs `except for most urgent reasons.'"). "The companion doctrines of primary jurisdiction and exhaustion of remedies are not statutory creatures but judicial, together constituting `a doctrine of self-limitation which the courts have evolved, in marking out the boundary lines between areas of administrative and judicial action.' * * * The one counsels judicial abstention when claims otherwise cognizable in the courts have been placed within the special competence of an administrative body; the other, when available administrative remedies would serve as well as judicial ones. Even though the legislature may not presume to characterize an adequate administrative remedy as `exclusive,' courts will so regard it." *State ex rel. Dep't of General Serv. v. Willis,* 344 So.2d 580, 589 (Fla. 1st DCA 1977). Judge Smith, the author of *Willis,* went on to explain:

> The [Administrative Procedures] Act's impressive arsenal of varied and abundant remedies for administrative error requires freshening of the doctrines of primary jurisdiction and exhaustion of remedies, and greater judicial deference to the legislative scheme. It is not that the power of circuit courts has been lessened, nor that their historic writs have been surrendered. Rather, the occasions for their intervention have lessened.

344 So.2d at 590. And as the Supreme Court reiterated and affirmed in *Gulf Pines*:

> [A]s a general proposition, the circuit court should refrain from entertaining declaratory suits except in the most extraordinary cases, where the party seeking to bypass usual administrative channels can demonstrate that no

adequate remedy remains available under Chapter 120.

Gulf Pines, 361 So.2d at 699. Later, in *Key Haven Associated Enterprises Inc. v. Board of Trustees of the Internal Improvement Trust Fund,* 427 So.2d 153 (Fla. 1982), the Supreme Court added:

> Judicial intervention in the decision-making function of the executive branch *must* be restrained in order to support the integrity of the administrative process and to allow the executive branch to carry out its responsibilities as a co-equal branch of government.

427 So.2d at 157. Here, only the Department of Elder Affairs has disciplinary authority over a professional guardian, and the Circuit Court should not be allowed to continue to exercise the power of a completely different branch of government. On the basis of lack of jurisdiction alone, certiorari should be granted and the order quashed.

But even beyond this essential jurisdictional issue, the process adopted by the court below was more akin to the operations of a corporation than of a neutral fact-finder. It came clothed with none of the usual solemnity or dignity of due process we expect of the courts. No witnesses were heard, no notice was given. Rather a fiat was rendered by the judge below apparently based solely on the hearsay of another party.

This court has specifically recognized that a denial of due process constitutes a fundamental error. *Corona v. State*, 929 So.2d 588, 593-94 (Fla. 5th DCA 2000). This Court has held that "[t]he 'core' of due process is the *right to notice* and an opportunity to be heard." *Carillon Community Residential v. Seminole County*, 45 So.3d 7, 9 (Fla. 5th DCA 2010). *Accord Department of Transportation v. Baird*, 922 So.2d 378, 381 (Fla. 5th DCA 2008) ("The basic requirements of procedural due process are *notice* and the opportunity to be heard.")

The undersigned do not even have any knowledge or notice of what witnesses or evidence the Court has relied upon to make its findings to date or what witnesses and evidence the hearing report considered. *See generally Borden v. Guardianship of Borden-Moore*, 818 So.2d 604, 607 (Fla. 5th DCA 2002) (discussion of the requirements of due process and cases cited therein); *see in particular, Keys Citizens for Responsible Gov't, Inc. v. Fla. Keys Aqueduct Auth.*, 795 So.2d 940, 948 (Fla. 2001) ("Procedural due process requires both fair notice and a real opportunity to be heard."); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950) ("[For due process], notice must be 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to

convey the required information, and it must afford a reasonable time for those interested to make their appearance." (citations omitted).

Finally, even if this were not an adversarial proceeding and it was not a proceeding under Rule 5.720, then, the Guardian still has not had "reasonable notice" under Rule 5.042. See *Borden v. Guardianship of Borden-Moore*, 818 So.2d 604, 607 (Fla. 5th DCA 2002) ("Florida Probate Rule 5.042 requires 'reasonable' notice of any matter to be heard by the court. This court ... concluded that four days' notice of a hearing was insufficient for an award of guardianship fees and costs....The right to reasonable notice also implicates constitutional due process concerns."); *Crepage v. City of Lauderhill*, 774 So.2d 61, 64 (Fla. 4th DCA 2000) ("While there are no hard and fast rules about how many days constitute a `reasonable time,' the party served with notice must have actual notice *and time to prepare*.") (quoting *Harreld v. Harreld*, 682 So.2d 635, 636 (Fla. 2d DCA 1996)). *Accord Graham v. Fla. Dep't of Children & Families*, 970 So.2d 438, 442 (Fla. 4th DCA 2007) ("The order indicates that copies were furnished to Laurence and his attorney; however, this is insufficient service [for indirect contempt of court] under Rule 3.840. ... It is undisputed here that Laurence was not personally served with the order to show cause and thus, reversal is warranted."); *Giles v. Renew*, 639 So.2d 701, 702 (Fla. 2d DCA 1994), ("Giles was entitled to have the order served upon him, not sent by facsimile to his attorney.").

In *Utley v. Baez-Camacho*, 743 So.2d 613, 614 (Fla. 5th DCA 1999), the court delineated the essential components of due process. Summarizing "due process," the court held that "witnesses should be sworn, each party should be permitted to call witnesses with relevant information, and cross-examination should be permitted . . . . Unless the facts are stipulated to, they must be determined the old fashioned way." Id.

The proceedings in question were apparently conducted secretly by Judge Thorpe in chambers after receiving multiple hearsay reports, one of which was attached to the judge's order. Assuming that Judge Thorpe was attempting to exercise jurisdiction granted to the Circuit Court's over guardianship proceedings, those proceedings still must comply with the Rules adopted by the Florida Supreme Court and not with the whim of one judge.

Florida Probate Rule 5.025(d)(1) addresses the removal or a guardian. It provides that the initiation of an action to remove a guardian requires the service of Formal Notice. See Fla. Prob. R. 5.025(d)(1); see also Fla. Prob. R. 5.660(a) ("Proceedings for removal of a guardian may be instituted by a court, . . . and formal notice of the petition for removal of a guardian must be served on all guardians, other interested persons, next of kin, and the ward.") When an adversarial proceeding is initiated by formal notice, the rules require a pleading to set forth the specific facts justifying the removal of the Guardian with particularity,

Fla. Prob. R. 5.660(a) ("The pleading must state with particularity the reasons why the guardian should be removed."), and the notice and pleading must provide the Guardian twenty (20) days within which to respond to those allegations after formal service of the notice. See Fla. Prob. R. 5.040(a)(1). As the docket sheet for the Mental Health Case reveals, no such pleading and no such notice was ever given. In fact, the 2000 case predates the advent of Electronic Court Filing and even electronic notice was never provided to Rebecca Fierle or to her attorneys.

Moreover, no formal petition has ever been filed at the time this Petition is being submitted. For all these reason, the order below was entered without jurisdiction by a court that failed to follow even the most fundamental procedural due process and should be quashed.

B. The Probate and Mental Health Court deviated from the essential requirements of law by misinterpreting the provisions of Florida relating to Do No Resuscitate Orders and by treating an administrative code provision as if it were a Rule promulgated by the Supreme Court.

The Order for which certiorari is sought states (without identifying the source of the hearsay assertion) that "it was alleged Ms. Fierle *had placed* a 'Do Not Resuscitate Order' on a Ward *against the Ward's express wishes*.... It was later determined Ms. Fierle *had placed* 'Do Not Resuscitate Orders' on most, if not all, of the Wards *under her control*.... [and] [a]t no time during this Judge's tenure

in the Probate Division for Orange County, did Ms. Fierle bring an issue dealing with a 'Do Not Resuscitate Order' to the Court's attention,..." (App.1-2). The Court below then stated "This appears to be a direct violation of the [Florida] Administrative Code [Rule 58M-2009(15)]..." (App.2).

Each of these findings is a departure from the essential requirements of law. First, the judge has completely misconstrued the legal nature and effect of "Do Not Resuscitate Orders" under Florida law. No Guardian can "place" or execute a "Do Not Resuscitate Order" because it is a medical order that must be entered by a physician. Under Chapter 401, the Department of Health is given authority to regulate emergency medical services which includes the licensing of Emergency Medical technicians (EMTs) and paramedics and the establishment of trauma services under the direction of a medical director. Ordinarily, EMTs and paramedics act on the standing orders of their supervising physician to render emergency care and CPR to victims of heart attacks and other trauma cases. The "Do Not Resuscitate Order" provides the EMTs and paramedics a valid *medical order* from the patient's treating physician to override the standing order to resuscitate. Under section 395.1041, the treating physician's "Do Not Resuscitate" orders will also apply in the hospital setting even though the patient's treating physician who filled out the DNR order might not actually be present or even on staff at the hospital where the patient arrives.

An order not to resuscitate is a physician's order. See, e.g., § 401.45(3)(a), Fla. Stat. (2019) ("Resuscitation may be withheld or withdrawn from a patient by an emergency medical technician or paramedic if evidence of an **order not to resuscitate *by the patient's physician*** is presented to the emergency medical technician or paramedic."); see also Fla. Admin. Code R. 64J-2.018 (3) ("The DNRO form and patient identification device must be signed by the patient's physician."); accord *Wright v. Johns Hopkins*, 728 A.2d 166, 177 ("The evidence relied upon by the plaintiffs blurs the distinctions between a Living Will and a possible DNR order. [A DNR order] is an order that 'speaks to a form of treatment, CPR, that would be applied, if at all, only after an unpredictable and dramatic change in the patient's condition --that is, if the patient were to suffer a cardiac arrest.'").

The Florida Statutes provide only a few other legal requirements for such an order. "An order not to resuscitate, to be valid, must be on the form adopted by rule of the department." § 401.45(3)(a), Fla. Stat. (2019). In addition, "the form must be signed *by the patient's physician* and by the patient *or, if the patient is incapacitated,* the patient's health care surrogate or proxy as provided in chapter 765, court-appointed guardian as provided in chapter 744, or attorney in fact under a durable power of attorney as provided in chapter 709. The court-appointed

guardian … must have been <u>*delegated authority to make health care decisions*</u> on behalf of the patient." *Id.; see also* § 401.45(3)(a), Fla. Stat. ("The form must be signed by the patient's physician and by the patient or, if the patient is incapacitated, the patient's … court-appointed guardian as provided in chapter 744, …. The court-appointed guardian … must have been *delegated authority to make health care decisions* on behalf of the patient."); *see also* Fla. Admin. Code R. 64J-2.018 (3) ("[T]he patient, or, if the patient is incapable of providing informed consent, the patient's … court appointed guardian … must sign the form and the patient identification device in order for them to be valid.").

Once the Guardian has delegated authority, no further permission is mandated by statutes or required by chapter 744 or chapter 401 of the Florida Statutes. The lower court's permission would not have been required for the creation of such an order by the Wards' physicians and never has been.

Even in the OPPG Standards for guardians likewise provide that this is a decision to be made by the guardian. She can consult family and friends to discern what the ward would have done when competent. She is NOT required to get their permission nor the court's. Many professional guardians and lawyers can tell you of being chastised by judges for seeking court permission for a DNR because the judges recognize this. The only time court permission would be needed is if the guardian faces a certain "ethical dilemma" described as follows:

> (15) DECISION-MAKING CONCERNING WITHHOLDING AND WITHDRAWAL OF MEDICAL TREATMENT.
> (a) If a Ward expressed or currently expresses a preference regarding the withholding or withdrawal of medical treatment, a Professional Guardian shall follow the wishes of the Ward. *If the Ward's past or current wishes are in conflict with each other or are in conflict with what the Professional Guardian feels is in the best interest of the Ward*, the Professional Guardian shall have this ethical dilemma submitted to the court for direction.

Fla. Admin. Code R. 58M-2009(15). This is not a substantive change of Florida law as the Court below seems to assume. It is merely a restatement of the fact that both the Florida Statutes, section 765.105, and the Florida Probate Rules, Rule 5.900 *permit* a Guardian to file a court action when the course of action is not clear. Nothing in the Administrative Code provision cited by the judge below ***requires*** Court approval of "Do No Resuscitate Orders" or any other advanced directive, presuming a DNR Order is an order to decline life-prolonging procedures, § 765.101(12), Fla. Stat., *but see also* § 765.101(1), Fla. Stat. (2019). In fact, by statute, the GUARDIAN, *not the court* is the one with the right to make that decision, although judicial review of the guardian's decision can be sought. *Compare* § 765.401(1), Fla. Stat. (2019) *and* § 765.105, Fla. Stat. (2019); *accord John F. Kennedy Hosp. v. Bludworth*, 452 So. 2d 921, 926-27 (Fla. 1984)("We hold that *the right of a patient*, who is in an irreversibly comatose and essentially

vegetative state to refuse extraordinary life-sustaining measures, *may be exercised* either by his or her close family members or *by a guardian of the person* of the patient appointed by the court.... Under the circumstances of this and similar cases, *prior court approval is not required*. The courts, however, are always open to hear these matters if request is made by the family, guardian, physician, or hospital. Disagreement among the physicians or family members or evidence of wrongful motives or malpractice may require judicial intervention upon the filing of an appropriate petition.").

The decision may be based on what the Guardian believes to be the patient's own desires (For example, the incompetent Ward's own statements to the Guardian and the statements of family and friends of the Ward would be relevant) or on the best interests of this patient. § 765.401(2) and (3), Fla. Stat. (2019). The guardianship court *could* have been consulted under section 765.105 and Florida Probate Rule 5.900, but the court's jurisdiction was never invoked. § 765.105, Fla. Stat. (2019) The Department of Elder Affairs had no power to override the statutory provision of Chapter 765 or the Supreme Court's Rule-making power under Article 5 of the Constitution. If Guardian acted under the statute she should be **immune** from civil or criminal liability for the DNR decision. § 765.109(1), Fla. Stat. (2019) ("The surrogate or proxy who makes a health care decision on a patient's behalf, pursuant to this chapter, is not subject to criminal prosecution or

civil liability for such action."). Neither the hospital nor the attorney-in-fact, nor the family of the Ward ever challenged or transferred the patient as permitted under Florida law. §§ 765.105(1) and 765.1105, Fla. Stat. (2019). Also, *no Florida case has **ever** held that a court order is necessary* to withhold or withdraw medical care.

Finally, the Administrative Code Rule provides several procedures that it claims are requirements for petitions or information to be presented in Court.
The Florida Supreme Court has the sole authority to adopt rules of procedure for the courts. Art. V § 2(a), Fla. Const. The Florida Probate Rules have NEVER adopted those Administrative Code Provisions cited by the court in its order finding probable cause The only rule change made by the Supreme Court was to require professional guardians to be registered and to rename an office in charge of Public Guardians (not professional guardians). *In re Amendments for Probate Rules*, 200 So.3d 761 (2016).

It provided as follows:

> Additionally, rule 5.710 (Reports of Public Guardian) is amended in subdivisions (c), (d), and (e) to reflect the renaming of the Statewide Public Guardianship Office as the Office of Public and Professional Guardians. See ch.2016–40, § 8, Laws of Fla. (amending section 744.2001, Florida Statutes, formerly numbered section 744.7021, Florida Statutes)....

> RULE 5.560. PETITION FOR APPOINTMENT OF GUARDIAN OF AN INCAPACITATED PERSON...
> (a) Contents. The petition shall be verified by the petitioner and shall state:
> ....
> (10) if the proposed guardian is a professional guardian, a statement that the proposed guardian has complied with the registration requirements of section 744.2002, Florida Statutes.
>
> 2016 Revision: Subdivision (a)(10) amended to reflect the renumbering of the statute from section 744.1083 to section 744.2002, Florida Statutes. Committee notes revised to update statutory references.

In re Amendments for Probate Rules, 200 So.3d 761 (2016). Certainly, the Supreme Court never adopted a rule requiring a plenary guardian to seek court approval for a DNR. The only rule that governs a court's consideration of a DNR order or end of life issue is arguably Fla. Prob. R. 5.900 which no one ever invoked by petition and which is not mandatory. Also This is not a case for advance approval of the Guardian's acts under Rule 5.360,[3] despite Judge Thorpe's suggestion to the contrary. Nor is it a case for extraordinary authority under Rule 5.365.[4] There was no legal basis under the Florida Statutes, Florida case law, or

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[3] Rule 5.360 is the rule enacted to carry cases where a guardian OF THE PROPERTY needs express approval. See § 744.441, Fla. Stat. (2019) ("Powers of guardian upon court approval.—After obtaining approval of the court pursuant to a petition for authorization to act, a plenary guardian of the property, or a limited guardian of the property within the powers granted by the order appointing the guardian or an approved annual or amended guardianship report, may:")

[4] Rule 5.365 is the rule enacted to allow the guardian to terminate marriages and do some things not otherwise within a guardian's power. See § 744.3725, Fla. Stat. (2019) ("Procedure for extraordinary authority.—Before the court may grant authority to a guardian to exercise any of the rights specified in s. 744.3215(4), the court must:

> (1) Appoint an independent attorney to act on the incapacitated person's behalf, and the attorney must have the opportunity to meet with the person and

under the Court Rules to support Judge Thorpe's ruling that court approval needed to be sought prior to consenting to a DNR Order executed by a physician for the benefit of the Ward. This compounded the error Judge Thorpe made in failing to understand that the DNR Order is an act of medical judgment under Florida law, a physician's order, not an order of the Guardian.

For this reason, too, the judge's ruling departed from the essential requirements of the law.

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to present evidence and cross-examine witnesses at any hearing on the petition for authority to act;

(2) Receive as evidence independent medical, psychological, and social evaluations with respect to the incapacitated person by competent professionals or appoint its own experts to assist in the evaluations;

(3) Personally meet with the incapacitated person to obtain its own impression of the person's capacity, so as to afford the incapacitated person the full opportunity to express his or her personal views or desires with respect to the judicial proceeding and issue before the court;

(4) Find by clear and convincing evidence that the person lacks the capacity to make a decision about the issue before the court and that the incapacitated person's capacity is not likely to change in the foreseeable future; and

(5) Be persuaded by clear and convincing evidence that the authority being requested is in the best interests of the incapacitated person.")

See also § 744.3215. Fla. Stat. (2019) ("Rights of persons determined incapacitated.—. . . .

(4) Without first obtaining specific authority from the court, as described in s. 744.3725, a guardian may not:

(a) Commit the ward to a facility, institution, or licensed service provider without formal placement proceeding, pursuant to chapter 393, chapter 394, or chapter 397.

(b) Consent on behalf of the ward to the performance on the ward of any experimental biomedical or behavioral procedure or to the participation by the ward in any biomedical or behavioral experiment. The court may permit such performance or participation only if:

1. It is of direct benefit to, and is intended to preserve the life of or prevent serious impairment to the mental or physical health of the ward; or

2. It is intended to assist the ward to develop or regain his or her abilities.

(c) Initiate a petition for dissolution of marriage for the ward.

(d) Consent on behalf of the ward to termination of the ward's parental rights.

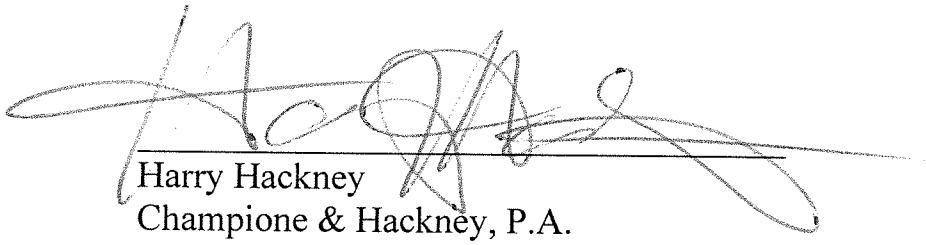
(e) Consent on behalf of the ward to the performance of a sterilization or abortion procedure on the ward.")

V. CONCLUSION

WHEREFORE, it is respectfully requested that this Honorable Court grant the Petition for Writ of Certiorari and quash and/or reverse the trial court's ruling in addition to any other determination the Court may deem just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing and the appendix have been furnished by U.S. Mail 14th day of October, 2019 to: the Honorable Janet C. Thorpe, Circuit Court Judge, Orange County Courthouse, 425 N. Orange Avenue, Orlando, FL 32801.



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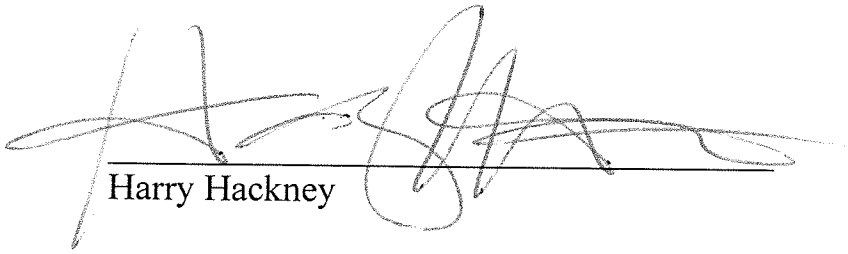
CERTIFICATE OF COMPLIANCE

I certify that this petition complies with the requirements of Fla.R.App.P. 9.100(l).

Pursuant to Fla.R.App.P. 9.100(l), the type, size, and style used in this

petition is 14-point Times New Roman.



Harry Hackney