PROBATE CORNER

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ARTICLE: Objections To Less Restrictive Alternatives To A Guardianship

In any order declaring a person incapacitated, the court must find that alternatives to guardianship were considered and that no alternative to guardianship will sufficiently address the problems of the ward. See, §744.331(6)(b), F.S. The obvious import behind this statute is to require the appointment of a guardian only when no other lesser intrusion on the privacy of the ward will accomplish the purpose of protecting the ward's property. *See, Smith v. Lynch*, 821 So. 2d 1197 (Fla. 4th DCA 2002).

A trust, trust amendment, or durable power of attorney may be considered a lesser restrictive alternative to a guardianship. To prevent the Court from considering these documents as a lesser restrictive alternative prior to the appointment of a guardian, an interested person may file a verified statement which states: (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) facts constituting a reasonable basis for that belief. *See*, Fla Pro. R. 5.550(c).

In *Searle v. Bent*, 2013 Fla. App. LEXIS 14798 (Fla. 2nd DCA 9/18/13), the Ward (Ms. Searle) was an elderly widow of considerable financial means. The Ward’s daughter, Ms. Bent, petitioned to have the Ward deemed incapacitated due to her poor physical and mental health and because of a concern that the Ward was being exploited by her caretakers. During the proceedings, Ms. Bent filed a "Verified Statement by Interested Person Pursuant to F.S. § 744.331(6)(f)." In her affidavit, Ms. Bent alleged that her mother's durable power of attorney and various estate planning documents executed after December 3, 2006 were invalid because of her lack of mental capacity or because the documents were the product of undue influence. The verified statement contained numerous facts regarding the Ward’s mental and physical condition, as well as findings made by medical experts regarding her mental capacity and need for a guardian.

Following the adjudicatory hearing, at which extensive evidence was presented, the trial court issued a detailed order finding the Ward to be incapacitated and in need of a plenary guardianship. The order stated, in part, that based on the totality of the evidence, the verified statement filed by Ms. Bent established a reasonable factual basis to believe that the Ward's trust, trust amendments, and durable power of attorney were invalid and thus not an alternative to guardianship.

On appeal, the Ward alleged the trial court erred in relying on the allegations in Ms. Bent's verified statement instead of considering less restrictive alternatives to guardianship as required by statute. She claims the trial court's actions violated her right to due process by "effectively invalidating her entire estate plan" [including her estate planning documents executed prior to December 3, 2006] based solely on the filing of an affidavit. The appellate court, in affirming the lower court, reasoned in part as follows:

"'When the language of the statute is clear and unambiguous and conveys a clear and definite meaning…the statute must be given its plain and obvious meaning.'" Fla. Convalescent Ctrs. v. Somberg, 840 So. 2d 998, 1000 (Fla. 2003) (quoting Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984)). We conclude that, by relying on Ms. Bent's verified statement to determine there were no alternatives to guardianship that would adequately protect Ms. Searle's interests and welfare, the trial court complied with the plain language of section 744.331(6)(f). Although Ms. Searle executed numerous estate planning documents dating back to 2004, the trial court found that the allegations in Ms. Bent's verified statement called the validity of those documents into question. Thus, under the statute, the trial court was prohibited from considering the documents as an alternative to guardianship.

We disagree with Ms. Searle's contention that the trial court's reliance on the verified statement "effectively invalidate[d] her entire estate plan." There is nothing in section 744.331(6)(f) that invalidates the challenged documents. As the trial court explained in its order: “The court is not required to determine the validity of the challenged documents at this time and renders no opinion on the truth or falsity, sufficiency or insufficiency of the allegations. In accordance with this finding of good faith and reasonable factual basis, the court may not deem the trust, the trust amendment or the durable power of attorney alternatives to the appointment of a guardian.”

Moreover, the trial court is not prohibited from reviewing the continued need for a guardianship if Ms. Searle's documents are later determined to be valid, or if alternatives to guardianship arise which will sufficiently address her needs. See § 744.462 (providing that the court shall review the continued need for a guardian if the ward's durable power of attorney, trust, or trust amendment is determined to be valid, or if a petition is filed alleging there is an alternative to guardianship that will meet the needs of the ward).

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**Practice Pointer:** An interested person may object to the verified statement by challenging the moving party’s “good faith belief” that the alleged incapacitated person's Trust and POA are invalid, and the facts supporting that belief. In *Searle*,the challenge to the verified statement was made at the adjudicatory hearing; however, there is no prohibition against challenging the verified statement prior to the adjudicatory hearing.

Assuming the Court refuses to consider less restrictive alternatives prior to the appointment of a guardian, the issue can be raised after the appointment of a guardian. At any time after the appointment of a guardian, an interested person may file a verified petition stating that there is an alternative to guardianship that will sufficiently address the problems of the ward, in which case the court shall review the continued need for a guardian and the extent of the need for delegation of the ward's rights. *See,* Fla. Prob. R. 5.685 and §744.462, F.S.