

## 16<sup>th</sup> ANNUAL PROBATE & GUARDIANSHIP SEMINAR

### ROLE AND DUTIES OF COUNSEL FOR AIP

By: David R. Carlisle, Esq.

- I. Appointment of Counsel for AIP. s. 744.331(2).
  - a. Qualifications to be Appointed. 744.331(2)(d)
  - b. Substitution of AIP's Own Attorney. 744.331(2)(b)
  
- II. Attorney-Client Relationship
  - a. Duty of attorney to follow expressed wishes of AIP.  
744.102(1)
  - b. Rules regulating the Florida Bar. 4-1.14 – Client Under a Disability.
  - c. Rules Regulating the Florida Bar. 4-1.2 – Objectives and Scope of Representation.
  - d. Confidentiality and Attorney-Client Privilege. Rule 4-1.6 – Confidentiality Of Information;  
90.502 – Lawyer-client Privilege.
  
- III. Duties of Counsel for AIP.
  - a. To serve upon and read to AIP (1) Formal Notice of Petition to Determine Incapacity, (2) serve Petition to Determine Incapacity, and (3) serve the Petition for Appointment of Guardian.
  - b. File a Return of Service of Formal Notice
  - c. Advise and consult with AIP to determine whether:
    - 1. He or she agrees that a guardian should be appointed.
    - 2. Whether the person petition is who the AIP desires be the guardian.
    - 3. Whether the AIP desires to be present at the hearing.
    - 4. Whether the AIP desires to speak at the hearing and advise of the right not to testify.
    - 5. Whether the physical, mental or medical condition fo the AIP requires that his or her presence at the hearing be waived. 744.31(5)(b).

6. Attempt to determine the nature and extent of the AIP's property.
7. Attempt to determine whether the AIP has in place any advance directives, powers of attorney or trusts which might present alternatives to guardianship.
8. Attempt to determine next of kin.
- d. Review the AIP's medical records, if any.
- e. Review the examining committee reports.
- f. Consult with the AIP's attending physician.

IV. FILE A WRITTEN RESPONSE TO PETITION TO DETERMINE INCAPACITY.

- a. Standing Mute
- b. Negate Allegations
- c. Affirmative Defenses

V. DEFENDING THE ADJUDICATORY HEARING.

- a. Standing Mute
- b. Stipulate or Object to Examining Committee Reports.  
(They are hearsay - *Shen v. Parkes*, 100 So. 3d 341 (Fla. 3d DCA 2013).

VI. FEES FOR COURT APPOINTED ATTORNEY.

- a. Entitled to reasonable fees payable from the assets of the AIP/ward. 744.331(7)(a)-(b).
- b. No guardian appointed - adequate alternatives to guardianship. *Smith v. Lynch*, 821 So 2d 1197 (Fla. 4<sup>th</sup> DCA 2002).
- c. Dismissal of Petition = bad faith. 744.331(5)(b) and 744.331(7)(c)
- d. Dismissal of Petition = no bad faith.
  1. If ETG has assets, fee can be paid.
  2. IF no ETG = no payment. *Steiner v. Steiner*, 159 SO. 3d 253 (Fla. 2d DCA 2015).

VII. QUESTION AND ANSWER