IN THE SUPREME COURT FOR THE STATE OF FLORIDA

CASE NO: SC16-1312
L.T. CASE NOS.: 4D14-1436
502013DR002143

IN RE: ANNULMENT OF MARRIAGE OF:

GLENDA MARTINEZ SMITH,

Petitioner,

v.

J. ALAN SMITH,

Respondent.

PETITIONER'S INITIAL BRIEF

Jennifer S. Carroll
Florida Bar Number: 512796
LAW OFFICES OF JENNIFER S. CARROLL, P.A.
700 Village Square Crossing, Suite 101
Palm Beach Gardens, Florida 33410
Telephone: (561) 478-2102
Facsimile: (561) 478-2143
E-mail: jc@lojscarroll.com
Attorney for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other

PREFACE

Appellant, GLENDA MARTINEZ SMITH, was the healthcare surrogate, attorney-in-fact and wife of J. Alan Smith. She was the Respondent below and will be referred to in this brief as "Appellant" or by name. Appellee, J. ALAN SMITH, was the Petitioner below in an annulment action pursued by his professional guardian, John Cramer. Mr. Cramer will be referred to by name or as "Guardian." J. Alan Smith is the Ward of Mr. Cramer and will be referred to by name or as "Ward."

The following references will be used in this brief:

[A.]	Appellant's Appendix to Initial Brief filed in the Fourth District Court of Appeal
[AA.]	Petitioner's Appendix to Initial Brief filed in the Florida Supreme Court
[R.]	Record on appeal
[V.]	Citations to excerpts from the hearing transcripts will include the volume number ("V") from the index to the record on appeal followed by the appropriate page number(s) appearing in the transcript.

STATEMENT OF THE CASE AND FACTS

Glenda Martinez Smith and J. Alan Smith met in 2008 and began a serious relationship. They vacationed together and eventually moved in together. [V.4, T.23, 26, 32] Alan wrote Glenda letters declaring his love and affection. [V.4, T.29-31] On October 26, 2009, Alan executed a Designation of Health Care Surrogate and Living Will Declaration designating Glenda as his health care surrogate and his preneed guardian of the person. [V.4, T. 28-29; Respondent's Exhibit 1] At the same time, Alan also executed a Durable Power of Attorney ("DPOA") naming Glenda as his attorney-in-fact and agent for a wide variety of purposes, including the power to manage his property, buy and sell property, manage his banking and business interests, file his income tax return, and make gifts. [V. 4, T.28-29; Respondent's Exhibit 2] Mr. Cramer stipulated to the admission of these documents in evidence. [V.4, T.28-29] There is no dispute that Alan was fully competent when he executed these documents. [V.4, T.28-29]

Alan was estranged from his first wife when he met Glenda and he subsequently divorced his first wife. [V.4, T.12, 15] The divorce became final on or about June 2011. [V.4, T.15] Howard Friedman, Alan's attorney for the bulk of the divorce proceeding, saw Glenda and Alan often during the approximately 15 months he represented Alan in the divorce proceeding. [V.4, T.14-15] Throughout Mr. Friedman's contact with Glenda and Alan, he observed a caring and loving

relationship. [V.4, T.15, 17] Glenda was always caring for Alan and his needs. [V.4, T.17] Glenda "front[ed] a lot of money for [Alan] with regard to his caring expenses, things of that nature." [V.4, T.17] Mr. Friedman "always saw somebody who just sincerely cared for Mr. Smith." [V.4, T.17] Mr. Friedman also testified that he "would see a glow in [Alan's] eyes" when Glenda would enter the room. [V.4, T.18] Alan clearly exhibited behavior consistent with somebody who cared for Glenda a great deal. [V.4, T.18]

Alan and Glenda intended to marry when Alan's divorce was final. [See A.1] Unfortunately, Alan was in a car accident on January 15, 2010, and Alan's adult daughter, Gwen Smith, initiated guardianship proceedings shortly after the accident and asked to be appointed as Alan's plenary guardian. [R.4-8] The trial court issued on order on April 29, 2010, finding Alan to lack capacity in certain limited areas. Id. Alan was found to be incapable of exercising the rights to contract and to manage property and finances. Id. The trial court specifically found that there was no incapacity on the part of J. Alan Smith that would warrant a guardian of the person. Id. Alan retained the right to marry. Id. The trial court specifically noted that Alan enjoyed his relationship with Glenda. Id. The trial court appointed Alan's son, Kurt, as Alan's limited guardian of the property. [R.9]

Kurt Smith was unable to continue as Alan's limited guardian and on November 8, 2010, an Order Appointing John Cramer as Successor Limited

Guardian of Property was entered as to Alan. [R.9-11] John Cramer is a professional guardian. [See A.1]

Alan and Glenda got married on December 28, 2011. In December 2012, Mr. Cramer filed a Renewed Petition for Appointment of Plenary Guardian of the Person and Property. On December 19, 2012, the trial court issued an Order Appointing Emergency Temporary Plenary Guardian appointing Mr. Cramer as Alan's emergency temporary plenary guardian. [R.25] The guardian was always represented by counsel (Ellen Morris) Alan did not have court-appointed counsel for himself at the emergency temporary guardian proceeding.[1]

At the December 18, 2012, hearing, Alan and Glenda's marriage certificate was put in evidence without objection from Mr. Cramer. [See A.2: 12/18/12 T. p.55-56; A.4]

At the conclusion of the December 18, 2012, hearing, the trial court acknowledged the marriage of Alan and Glenda and that Glenda was Alan's spouse:

> …however, my concern for you, Mr. Cramer, because I'm going to look to you to make proper decisions, is that **Mr. Smith is married, apparently to Ms. Martinez, I have a certificate of marriage, that right was not removed**, and her testimony I struck, but the essence of her testimony that was

[1] The trial court's failure to appoint Alan counsel at the outset of the Emergency Temporary Guardian proceeding was error and one of the grounds for the Fourth District's reversal of the December 19, 2012, order in Martinez ex rel. Smith v. Cramer, 121 So. 3d 580 (4th DCA 2012).

> important to me had to do with the fact that she is able to provide companionship and companion care, those two good things. Now for someone like Mr. Smith, it's great that he has good doctors, good nurses and people like that from a medical point of view, but that is not substitute for the type of personal ability that a spouse has to provide companion care to their spouse. **Like it or not … she is his spouse**, she certainly is hands-on and it is often when a spouse is in an impaired condition like that one of the real benefits, even to someone in Mr. Smith's condition, is to still see his spouse, be able to know she's there and benefit from that…

[See A.2: 12/18/12 T. p.89-90]

The trial judge further instructed the Guardian that he was not to interfere with Glenda having close and continuing contact with Alan while Alan was at Life Care. Id. at p.91.

On January 2, 2013, the trial court issued an Order Appointing Counsel on the Emergency Temporary Guardian appointing Lynne Hennessey as counsel for Alan "in all pending matters under 744.3031(2) Petition for Determination of Emergency Temporary Guardian, Florida Statutes." [See A.3] Shortly after her appointment as Alan's appointed counsel in the guardianship proceeding, Ms. Hennessey, on February 25, 2013, filed a Petition for Annulment and initiated a separate legal proceeding to annul Alan and Glenda's marriage. [R.1-11] There was no court order authorizing Ms. Hennessey to initiate this proceeding.

On August 2, 2013, Glenda filed, in the guardianship proceeding, a Motion to Compel Lynne Hennessey to Dismiss the Annulment Action that She Filed With

Respect to J. Alan Smith and a Motion to Ratify Approval of the Marriage of J. Alan Smith and Glenda Martinez or Alternatively to Approve the Marriage. [R.66-70; See A.1]

On October 3, 2013, the trial court in the guardianship proceeding entered its Order Appointing Plenary Guardian of Person and Property, appointing Mr. Cramer as Alan's plenary guardian of person and property. [R.32-34] This Order was reversed by the 4th DCA on March 18, 2015. See Martinez v. Smith, 159 So. 3d 394 (Fla. 4th DCA 2015) At the time of the October 3, 2013 order, Glenda's Motion to Ratify Approval of the Marriage of J. Alan Smith and Glenda Martinez or Alternatively to Approve the Marriage was still pending. [R.71-72] The lower court did not address this motion in its October 3, 2013 order. [R.32-34]

On October 19, 2013, Ms. Hennessey, Alan's court appointed counsel in the guardianship proceeding, filed a Motion for Summary Judgment purportedly on Alan's behalf in the annulment proceeding. [R.29-53] Again, there was no court order authorizing Ms. Hennessey to pursue this annulment action. On October 24, 2013, the trial court in the guardianship proceeding[2] entered an Order Authorizing Guardian of the Property to Pursue Annulment on Behalf of the Ward and to Retain Counsel. [R.60] On October 28, 2013, Mr. Cramer filed his Amended Motion to Substitute Party in the annulment proceeding. [R.54-60] On November

[2] The trial judge in the guardianship proceeding and the trial judge in the annulment proceeding were one and the same.

4, 2013, the trial court in the annulment proceeding entered an Order on Amended Motion to Substitute Party, allowing Mr. Cramer as Guardian of Alan to be substituted as a party. [R.61]

On February 12, 2014, the trial court held a hearing on the Guardian's Motion for Summary Judgment. [V.3] Ms. Hennessey, Alan's court appointed counsel in the guardianship proceeding, represented Mr. Cramer, the Guardian, at this hearing. [V.3, T.3] Glenda's counsel objected at the outset of the hearing to the petition for annulment initially filed by Ms. Hennessey "as if she was Alan Smith's attorney." [V.3, T.5-6] The trial court deferred ruling on the Motion for Summary Judgment until after the court ruled on Glenda's Motion to Ratify Approval of Marriage or Alternatively to Approve the Marriage. [R.71-72] The trial court agreed that the November 8, 2010 order appointing Mr. Cramer as Alan's guardian of the property does not say that "prior" court approval is required for Alan to marry. [V.3, T.14] The court further stated: "And the order does not say that any marriage prior to approval is null and void. It just says that it needs court approval." [V.3., T.18] The trial court also was aware of the prior trial judge's pronouncements regarding the marriage of Alan and Glenda at the December 18, 2012 hearing and stated:

> The court is not impressed by what Judge Colin said in an open proceeding. At that particular point they were – they, at least, appeared, on its face, to have been married.

[V.3, p.11]

On March 10, 2014, a hearing was held on Glenda's Motion to Ratify Approval of Marriage or Alternatively to Approve the Marriage and the Guardian's Motion for Summary Judgment. [V.4] At the hearing, Ms. Hennessey represented both Alan and the Guardian, stating "Attorney Lynne Hennessey. I'm the court appointed attorney for J. Alan Smith, and he is here in court today through his guardian, John Cramer." [V.4, T.4] At the hearing, the trial court heard from Mr. Friedman (Alan's counsel in his divorce), Mrs. Stables (Alan and Glenda's neighbor for a year from October 2011 – October 2012), and Glenda. [V.4] Mr. Cramer did not testify. [V.4]

Glenda testified that, after Alan's divorce was final in the summer of 2011, Glenda spoke to Mr. Cramer on two occasions and informed him that she and Alan wanted to get married and "to please" go to the judge to ask permission. [V.4, T.34] Glenda asked Mr. Cramer to get court approval for her and Alan to marry prior to Glenda and Alan marrying in December 2011. [V.4, T.38] Mr. Cramer "wouldn't hear of it." [V.4, T.34] On one occasion, Mr. Cramer hung-up the phone in the middle of the conversation. [V.4, T.34] On the second occasion, Mr. Cramer told Glenda that she and Alan couldn't get married. [V.4, T.34]

The undisputed evidence at the hearing also established that, in October 2011 after Alan's divorce, Alan and Glenda moved into a single family home in

Miami next door to Margaret Stables. [V.4, T. 23, 26, 27] Alan and Glenda lived there for a year. [V.4, T.25, 27] As far as Mrs. Stables knew, Alan and Glenda were married when they moved in. [V.4, T.26] Mrs. Stables visited Alan and Glenda often and observed them to be a loving couple. [V.4, T.23] Glenda gave Alan much attention. Id. Glenda cooked meals that Alan liked. Id. Glenda engaged speech therapy and physical therapy for Alan. Id. According to Mrs. Stables, Alan could understand when spoken to and acknowledged with body language. [V.4, T.25]

Glenda loves Alan very much. [V.4, T.36] Alan and Glenda married on December 28, 2011, as they had always intended. [V.4, T.43; See A.3] After Alan was confined to a nursing home on the instructions of Mr. Cramer in December 2012, Glenda continued to visit Alan at least three times per week, even though it was a 100 miles round trip for her. [V.4, T.36]

At the conclusion of the hearing, the trial court granted Ms. Hennessey's Motion for Summary Judgment. [V.4, T.60] On March 18, 2014, the trial court entered a Final Order Denying Motion to Ratify Approval of the Marriage of J. Alan Smith and Glenda Martinez or Alternatively to Approve the Marriage and Final Order Granting Summary Judgment. [R.76-78] On March 18, 2014, the trial court entered a Final Judgment of Annulment. [R.74-75] Glenda appealed to the Fourth DCA. The Fourth DCA issued a 2-1 decision, Judge Warner dissenting. A

copy of that opinion is attached. [AA.1]

Appellant filed a Motion For Rehearing, Motion For Rehearing En Banc, and Motion to Certify Question to the Florida Supreme Court. The Fourth DCA granted Appellant's Motion to Certify Question [AA.2], and denied the remaining motions.

Appellant filed a Notice to Invoke Discretionary Jurisdiction to this Court. This Court accepted jurisdiction on August 25, 2016.

CERTIFIED QUESTION

The Fourth DCA granted appellant's Motion to Certify a Question of Great Public Importance to this Court. As stated in its opinion:

> The majority and dissent disagree on the effect of a statute which restricts the fundamental right to marry. "Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." *Loving v. Virginia*, 388 U.S. 1, 12 (1967). Where a fundamental right is involved, the statute must be "strictly tailored to remedy the problem in the most effective way and must not restrict a person's rights any more than absolutely necessary." *Mitchell v. Moore*, 786 So. 2d 521, 527 (Fla. 2001). Section 744.3215(2), Florida Statutes (2013), which requires court approval of a marriage of a ward, whose right to contract has been removed but whose right to marry has not, affects the rights of wards of all types, although it particularly affects the elderly. Because of its implications on that fundamental right to marry and its potential impact on wards, the interpretation of that statute is a question of great public importance, and we certify the following question:
>
> Where the fundamental right to marry has not been removed from a ward under section 744.3215(2)(a), Florida Statutes, does the statute require the ward to obtain approval from the court prior to exercising the right to marry, without which approval the marriage is absolutely void, or does such failure render the marriage voidable, as court approval could be conferred after the marriage?

Section 744.3215(2)(a), Florida Statutes, provides:

> (2) Rights that may be removed from a person by an order determining incapacity but not delegated to a guardian include the right:
>
> (a) To marry. If the right to enter into a contract has been removed, the right to marry is subject to court approval.

This statute has never been interpreted by the appellate courts prior to this opinion. J. Alan Smith's right to marry was never removed.

Judge Warner's Opinion

In her opinion, Judge Warner recognized that the order determining capacity did not remove Mr. Smith's right to marry. Judge Warner recognized that Mr. Smith's right to marry is a fundamental right, and Section 744.3215(2)(a), Florida Statutes, "does not state that marriage is prohibited unless approval is given prior to the marriage." (Judge Warner's Opinion, p.8) As stated by Judge Warner:

> Where a marriage is prohibited, the legislature knows how to say it. *See* §741.21, Fla. Stat. (2013)

[Judge Warner's Opinion, p. 8]

Judge Warner concluded that the court can ratify the marriage after the fact if, as in this case, neither party was legally disabled from the marriage. (Judge Warner's Opinion, p. 9) Judge Warner reasoned that because marital contracts are civil contracts, contractual provisions may be ratified. As stated by Judge Warner:

> Should we not extend that principle to a marriage contract? What is the harm to allowing a court to determine post-marriage whether the elderly person understands that he is married and ensure that he has not been taken advantage of financially by the marriage?

[Judge Warner's Opinion, p. 9]

Judge Warner further recognized that on this record, there was nothing to suggest that Mr. Smith did not understand the contract. The evidence demonstrated

without dispute that Mr. Smith had asked Ms. Martinez to marry him prior to any incapacity. As stated by Judge Warner:

> By treating the failure to secure court approval prior to the marriage as voiding the marriage without inquiry, the court has effectively prevented Smith from the comfort and companionship of a spouse, something he most likely desperately needs in his declining years. The first judge recognized that and expressly approved the marriage, albeit not by a written order. On this record, there is nothing to suggest that Smith did not understand the contract. Indeed, he asked Martinez to marry him prior to any incapacity. And there was no testimony that Martinez was taking financial advantage of him. To the contrary, Smith's divorce lawyer testified that Martinez was paying many of Smith's bills. I think it is a travesty that this frail man has been deprived of his wife by judicial fiat where there is not intrinsic invalidity to the marriage itself.

[Judge Warner's Opinion, p. 9]

SUMMARY OF THE ARGUMENT

The certified question should be answered as follows:

Where the fundamental right to marry has not been removed from a ward under Section 744.3215(2)(a), Florida Statutes, the statute does not require the ward to obtain approval from the court prior to exercising the right to marry. Court approval, or ratification, can be conferred after the ward has exercised his fundamental right to marry.

ARGUMENT

I. "Prior" court approval of Alan and Glenda's marriage was not required by the plain language of the statute.

A. Standard of Review

"The interpretation of a statute is a purely legal matter and therefore subject to the *de novo* standard of review." Davila v. State, 75 So. 3d 192, 195-96 (Fla. 2011). "A court's purpose in construing a statute is to give effect to legislative intent, which is the polestar that guides the court in statutory construction." Id. The courts look primarily to the actual language used in the statute to discern legislative intent. Id. "[W]hen 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." Id. The courts are "without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications." Id.

Courts should give statutory language its plain and ordinary meaning, and may not add words that were not included by the legislature. Germ v. St. Luke's Hospital Ass'n, 993 So. 2d 576, 578 (Fla. 1st DCA 2008), *citing* Exposito v. State, 891 So. 2d 525 (Fla. 2004).

B. "Prior" court approval was not required.

Nothing in the November 8, 2010 Order appointing John Cramer as Alan's successor Guardian required Alan and Glenda to seek court approval of their

marriage *before* they were married. [R.9-11] The November 8, 2010 order simply states:

> 2. The following rights of the Ward are delegated to the Guardian appointed by this Order:
>
> [X] to Contract,
> [X] to manage the property of the Ward
>
> Note: If the right of the Ward to Contract has been delegated to the Guardian but the right to marry is retained, then **the right to marry is subject to Court approval**.

[R.9-11][3] (e.s.)

Thus, Alan's right to marry was subject to court approval – not *prior* approval by the court and not prior approval by Mr. Cramer. At the February 12, 2014 hearing, the trial court acknowledged that "prior" court approval did not appear to be required by the November 8, 2010 order. [V.3, T.14, 18]

"Prior" court approval is also not required by Section 744.3215(2), Florida Statutes which states in pertinent part:

> (2) Rights that may be removed from a person by an order determining incapacity but not delegated to a guardian include the right:
>
> (a) To marry. If the right to enter into a contract has been removed, the right to marry is subject to court approval.

[3] Note that the November 8, 2010 order simply tracks the language in Section744.3215(2)(a), Florida Statutes.

Despite neither the November 8, 2010 order nor Section 744.3215, Florida Statutes, having any language requiring *prior* court approval for Alan to exercise his fundamental right to marry, the trial court granted Mr. Cramer's annulment petition on this basis. The Final Judgment of Annulment states in pertinent part:

> The parties' purported marriage on December 28, 2011, is void. At the time of the purported marriage, J. Alan Smith had been judicially determined to be incapacitated; his right to contract was delegated to his guardian; and he was required to seek court approval **before** marrying. Court approval was not sought or obtained.

[R.74] (e.s.)

The trial court imposed a requirement that neither the prior order nor the statute required – neither required court approval *before* marrying. The order tracks the language of Section 744.3215(2)(a), which is "clear on its face" – it does not require court approval *before* marrying. See Rothman v. Rothman, 93 So. 3d 1052, 1054 (Fla. 4th DCA 2012) (strictly construing Section 744.331(4), Florida Statutes, to hold petition to determine incapacity must be dismissed where majority of members of the examining committee find the person is not incapacitated); In re Guardianship of White, 140 So. 2d 311, 316 (Fla. 1st DCA 1962) (trial court's authority in guardianship matters is conferred by statute and strictly construed). See also In re Guardianship of J.D.S., 864 So. 2d 534, 538 (Fla. 5th DCA 2004) (*quoting* Holly v. Auld, 450 So. 2d 217, 219 (Fla.1984)). ("[W]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning,

there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.")

Section 744.3215(2)(a) plainly does not require "prior" court approval for a ward to exercise his/her fundamental right to marry. Consequently, under Section 744.3215(2)(a), a ward can seek court approval of a marriage that has already taken place. The courts are "without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications" and thus the courts cannot construe Section 744.3215(2)(a) so as to require that court approval of a ward's marriage be obtained *prior* to the marriage or *before* the marriage. See Davila v. State, 75 So. 3d at 195-96. Therefore, for the trial court to summarily annul Alan and Glenda's marriage based on a failure to obtain prior court of approval of the marriage is contrary to the plain language of the statute.

C. "Subject To"

If the Legislature had intended that a ward seek "court approval" *prior to* exercising his right to marry, it would have so stated.

But instead, the Legislature specifically states the ward retains the right to marry "subject to court approval." Courts have often interpreted this phrase as contemplating "ratification" -- i.e., the right which is being made "subject to court approval" is a right that is actually, in fact, exercised prior to court approval. After

it is exercised, it is then *ratified* upon court approval. Court approval and ratification are often treated as one in the same. See generally Estate of Gilfillan, 79 Cal. App. 3d 429 (Cal. App. 2d Dist. 1978) (appellate court recognized that the language of California Probate Code Section 1122 is to be interpreted to permit the trustee to take its compensation in advance of court approval, subject to the court's subsequent ratification.); McLean v. Peyser, 169 Md. 1 (Md. 1935) (Lease had been executed "subject to approval by the court." The lease was ultimately ratified.); see also Loft, Inc. v. Seymer, 148 Md. 638 (Md. 1925) (sale by trustees "subject to court approval" actually takes place before the court approval). See also Pollekoff v. Blumenthal, 83 Md. App. 85 (Md. Ct. Spec. App. 1990); Succession of Boyter, 766 So. 2d 623 (La.App. 2 Cir. Aug. 23, 2000) (agreement executed to sell property "subject to the suspensive condition of court approval.")

D. Moreover, the trial court recognized Alan and Glenda's marriage in open court and this was sufficient for court approval.

The trial court had previously recognized the marriage without objection. Statements and admissions made by both the trial court and Mr. Cramer's counsel at the December 18, 2012 hearing establish that Alan and Glenda's marriage was approved, accepted, and ratified by the court even though it had already taken place. At the December 18, 2012 hearing, the trial court and Mr. Cramer's counsel acknowledged Alan retained the right to marry:

COURT: Here's the thing, he did not lose his right to marry, I know that, correct?

MS. MORRIS: Yes, Sir.

[See A.2: 12/18/12 T. p.42]

Also, Alan and Glenda's marriage certificate was put in evidence without objection by Mr. Cramer. [A.2: 12/18/12 T. p.55-56; A.4]

At the conclusion of the December 18, 2012 hearing, the trial court made the following pronouncements recognizing the marriage of Alan and Glenda and that Glenda was Alan's spouse:

> … however, my concern for you, Mr. Cramer, because I'm going to look to you to make proper decisions, is that Mr. Smith is married, apparently to Ms. Martinez, I have a certificate of marriage, that right was not removed, and her testimony I struck, but the essence of her testimony that was important to me had to do with the fact that she is able to provide companionship and companion care, those two things. Now for someone like Mr. Smith, it's great that he has good doctors, good nurses and people like that from a medical point of view, but that is not substitute for the type of personal ability that a spouse has to provide companion care to their spouse. Like it or not, … she is his spouse, she certainly is hands-on and it is often when a spouse is in an impaired condition like that one of real benefits, even to someone in Mr. Smith's condition, is to still see his spouse, be able to know she's there and benefit from that…

[A.2: 12/18/12 T. p.89-90]

The trial court's acknowledgement of Alan and Glenda's marriage on the record in open court and the trial court's instructions to the Guardian to honor that

marriage and not impede or interfere with Glenda's contact with Alan while Alan was at Life Care were sufficient to constitute "court approval" of the marriage of Alan and Glenda.

Additionally, in light of the Guardian's acknowledgment that Alan retained the right to marry and the Guardian's failure to object to Alan and Glenda's marriage certificate or dispute Alan and Glenda's marriage in any way at the December 18, 2012 hearing when faced with the trial court's pronouncements (and to affirmatively state on the record that he would not attempt to keep them apart), the Guardian is estopped from disputing Alan and Glenda's marriage and seeking its annulment a year later.

II. The Ward's court appointed counsel had no authority to petition for annulment; and it was a conflict of interest for the ward's counsel to represent the ward's guardian in the annulment proceeding.[4]

As recognized by Judge Warner in her opinion:

> In addition to the foregoing, I would also hold that Hennessey, as attorney for the ward, had no authority to petition for annulment of the marriage on his behalf. At the time that the attorney was appointed, Smith was non-verbal and did not communicate to the attorney any desire to have his marriage to Martinez annulled. The court appointed the attorney to represent Smith "in all matters pending under Section 744.3031(2) Petition for Determination of Temporary Guardian . . . ." The attorney's authority did not extend to filing a petition for annulment of his marriage. Further, section 744.102(1),

[4] Once the jurisdiction of any court is properly invoked, the court may determine the entire case to the extent permitted by substantive law. See Fla. R. App. P. 9.040(a) and Committee Notes thereto.

> Florida Statutes, defines the role of an attorney for an alleged incapacitated person:
>
> > "Attorney for the alleged incapacitated person" means an attorney who represents the alleged incapacitated person. The attorney shall represent the expressed wishes of the alleged incapacitated person to the extent it is consistent with the rules regulating The Florida Bar.
>
> § 744.102 Fla. Stat. (2013). As there is no evidence on the record that Smith himself expressed any wish to annul his marriage, there is nothing to support Hennessey's filing of this petition.
>
> Further, although Cramer, as guardian, was granted substitution in the petition for annulment after his appointment, this should not cure any lack of authorization to commence this proceeding. Indeed, it has only raised more concerns and further denial of fundamental due process. Cramer continued to be represented by Hennessy, which violated section 744.331(2)(c), Florida Statutes (2013). That statute prohibits an attorney representing the incapacitated person from serving as guardian or counsel for the guardian. As independent counsel is essential to protect the due process rights of the incapacitated person, the order granting the petition for annulment should be reversed for this fundamental conflict of interest. *See In re Fey*, 624 So. 2d 770 (Fla. 4th DCA 1993).

Based on Sections 744.102(1), 744.3031(1), and 744.331(2)(c), Florida Statutes, it was a conflict of interest for the Ward's court-appointed counsel in the guardianship proceeding to represent the Ward's guardian in the annulment proceeding and such conflict constitutes fundamental error.

Mrs. Hennessey was appointed to represent the ward – J. Alan Smith – in the guardianship proceeding by order of the court dated January 2, 2013. The order

states:

> The Court hereby ORDERS that **Lynne K. Hennessey**, Esquire, is hereby appointed counsel to represent **J. Alan Smith** an alleged incapacitated person, in all pending matters under 744.3031(2) Petition for Determination of Emergency Temporary Guardian, Florida Statutes.

[See A.3 - emphasis in original]

As counsel for Alan, Ms. Hennessey was obligated to "represent the expressed wishes" of Alan. Section 744.102(1), Florida Statutes, defines "Attorney for the alleged incapacitated person" as:

> an attorney who represents the alleged incapacitated person. The attorney shall represent the expressed wishes of the alleged incapacitated person to the extent it is consistent with the rules regulating The Florida Bar.

Because Mrs. Hennessey was serving as counsel for Alan in the guardianship proceeding, she could not also serve as counsel for Mr. Cramer, Alan's Guardian, in the annulment proceeding. Such representation defeats the purpose of having independent counsel for a ward, which is required by Section 744.3031, Florida Statutes. Section 744.3031(1), Florida Statutes states in pertinent part:

> The court shall appoint counsel to represent the alleged incapacitated person during any such summary proceedings, and such appointed counsel may request that the proceeding be recorded and transcribed.

Such representation is also contrary to Section 744.331(2)(c), Florida Statutes which provides:

> Any attorney representing an alleged incapacitated person may not serve as guardian of the alleged incapacitated person or as counsel for the guardian of the alleged incapacitated person or the petitioner.

Here, Ms. Hennessey's representation of Mr. Cramer was prohibited by statutory law (§744.3031, §744.331) and the Ward, because of his incapacity, was not able to give informed consent. Thus, Rule 4-1.7 prohibited such dual representation. That Ms. Hennessey may not have had any improper motive in her dual representation of the Ward and the Guardian is of no consequence. As the Florida Supreme Court stated in Moore:

> It is settled that, except in exceptional circumstances which are not to be found in this record, an attorney may not represent conflicting interests in the same general transaction, no matter how well-meaning his motive or however slight such adverse interest may be. **The rule in this respect is rigid**, because it is designed not only to prevent the dishonest practitioner from fraudulent conduct but also to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent.

The Florida Bar v. Moore, 194 So. 2d 264, 269 (Fla. 1966) (e.s.)

Ms. Hennessey, as the Ward's court-appointed counsel, was obligated to represent the rights of the Ward alone. Florida statutes and case law contemplate that a ward's attorney will be independent from the guardian and any other

interested person. A ward's interests and a guardian's interests are not always aligned. See In re Guardianship of Murphey, 630 So. 2d 591, 594 (Fla. 4th DCA 1993) (quashing order removing ward's private counsel and his authority to engage appellate co-counsel if necessary, and remand for further proceedings to determine whether the guardian and ward have a conflict of interest); Glatthar v. Hoequist, 600 So. 2d 1205, 1208 (Fla. 5th DCA 1992) (guardian had conflict of interest with ward and appellate court remanded to lower court to determine whether degree of conflict warranted guardian's removal). Hence, the need for independent counsel for the ward. This mandatory separation and independence was not observed here.

III. Due process of the ward was not sufficiently protected.

The issue of due process is fundamental and can be raised at any time. Again, as recognized by Judge Warner at Page 10 of her opinion:

> Finally, although not raised, I do not believe that due process of the ward was sufficiently protected, even if the guardian could bring the petition for annulment. Where a guardian seeks to pursue a dissolution of marriage on behalf of the ward, the guardian must seek authority. Before the court may grant authority, section 744.3725(1), Florida Statutes (2013), requires the court to appoint independent counsel for the ward. Additionally, section 744.3725(5), Florida Statutes (2013), requires the court to find by clear and convincing evidence that the action of dissolving the marriage is in the best interests of the incapacitated person. I would apply these same provisions to an annulment of a voidable marriage. Clearly, the ward did not have independent counsel, nor did the court consider his best interests in annulling his marriage.

> The Legislature stated its intent in the guardianship laws as protecting the rights of the ward to the maximum extent possible: The Legislature finds that adjudicating a person totally incapacitated and in need of a guardian deprives such person of all her or his civil and legal rights and that such deprivation may be unnecessary. . . .
>
> Recognizing that every individual has unique needs and differing abilities, the Legislature declares that it is the purpose of this act to promote the public welfare by establishing a system that *permits incapacitated persons to participate as fully as possible in all decisions affecting them*; that assists such persons in meeting the essential requirements for their physical health and safety, *in protecting their rights,* in managing their financial resources, and in developing or regaining their abilities to the maximum extent possible; and *that accomplishes these objectives through providing, in each case, the form of assistance that least interferes with the legal capacity of a person to act in her or his own behalf*. This act shall be liberally construed to accomplish this purpose.
>
> § 744.1012, Fla. Stat. (2013) (emphasis added). This has not happened in this case. Instead, this frail gentleman has been deprived of his fundamental right to marry, in proceedings which violated his fundamental rights of due process and without a consideration of his best interest. I think this totally thwarts the Legislature's express intent.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the certified question be answered as follows:

Where the fundamental right to marry has not been removed from a ward under Section 744.3215(2)(a), Florida Statutes, the statute does not require the ward to obtain approval from the court prior to exercising the right to marry. Court

approval, or ratification, can be conferred after the ward has exercised his fundamental right to marry.

/s/Jennifer S. Carroll
Jennifer S. Carroll
Florida Bar Number: 512796
LAW OFFICES OF JENNIFER S. CARROLL, P.A.
700 Village Square Crossing, Suite 101
Palm Beach Gardens, Florida 33410
Telephone: (561) 478-2102
Facsimile: (561) 478-2143
E-mail: jc@lojscarroll.com
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished via transmission generated through the Florida Courts E-Filing Portal to the email addresses of: Ellen S. Morris at emorris@elderlawassociates.com and lrubin@elderlawassociates.com; Lynne K. Hennessey at lkhpa@bellsouth.net; Alan Fishman at asf@afishmanlaw.com; Robert W. Goldman (amicus) at rgoldman@gfsestatelaw.com and jatkinson@gfsestatelaw.com; and Gerald L Hemness (amicus) at service@hemnesslaw.com this 14th day of September, 2016.

/s/Jennifer S. Carroll
Jennifer S. Carroll

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the font standards, i.e., Times New Roman 14-point font, as set forth in Florida Rule of Appellate Procedure 9.210(a)(2).

/s/Jennifer S. Carroll
Jennifer S. Carroll

CERTIFICATE OF COMPLIANCE WITH ADMINISTRATIVE ORDER AO04-84

I hereby certify that I have complied with Administrative Order AO04-84 in that a copy of Petitioner's Brief has been electronically submitted this 14th day of September, 2016.

/s/Jennifer S. Carroll
Jennifer S. Carroll