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

IN RE:

REBECCA L. FIERLE, Case number: _____

PROFESSIONAL GUARDIAN

_____/

PETITION FOR WRITOF PROHIBITION

COMES NOW Petitioner, REBECCA L. FIERLE, by and through its undersigned counsel and pursuant to Florida Rule of Appellate Procedure 9.100 respectfully petitions the court for a writ of prohibition restraining the Honorable Judge Janet Thorpe, from presiding as a circuit judge in this case and shows the court as follows:

I. BASIS FOR INVOKING JURISDICTION

This court has jurisdiction to issue a writ of prohibition under Article V § 4(b)(3) of the Florida Constitution, and Rule 9.030(b)(3) of the Florida Rules of Appellate Procedure. Prohibition is an appropriate remedy to prevent an inferior tribunal from exercising a jurisdiction it does not possess or one that has expired. 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. § 744.2001(1)-(3), Fla. Stat. (2019); *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). Moreover, the Petitioner's resignation from being a Professional Guardian and the lower court's failure to give proper notice or due process make this matter subject to prohibition. *State ex Rel. Avery v. Williams*, 222 So. 2d 477, 479 (Fla. 3d DCA 1969); *Rehrer v. Weeks*, 106 So. 2d 865 (Fla. 2d DCA 1958).

II. STATEMENT OF THE FACTS

Sua sponte, the Honorable Janet Thorpe reopened a Professional Guardian registration from a registration of a Professional Guardian from an era where the Courts had sole jurisdiction over Professional Guardians. (App. Tab 1, Docket In re Rebecca Fierle, Professional Guardian, Ninth Judicial Circuit in and for Orange County Case No. 2000-PG-000005-O) after the resignation of the Professional Guardian in open Court on July 11, 2019.

The Court subsequently proceeded to conduct discovery, order the production of documents, and make findings of fact that the Professional Guardian had violated state laws, including provisions of the Florida Administrative Code, without ever

giving Rebecca Fierle notice or an opportunity to respond. (App. Tab 2, p.1-29). Examples of Orders to Produce issued by Judge Thorpe are included in the Appendix. (App. Tab 3 pp. 35-38). Because no petitions for relief were filed, no notice given, and no opportunity to be heard given, Rebecca Fierle has not even had the opportunity to object to the Court's lack of jurisdiction. Likewise, there have been no hearings in this case and, therefore, no transcript for review.

III. THE NATURE OF THE RELIEF SOUGHT

The nature of the relief sought by this petition is the issuance of an order to show cause to Judge Thorpe as to why a writ of prohibition should not issue restraining her from conducting further proceedings or remaining as a presiding judge in this case. The order finding probable cause should be quashed.

IV. ARGUMENT

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.

Prohibition is the proper remedy when a Court attempts to exercise jurisdiction it does not have because that jurisdiction properly belongs to another

agency or court. *DHL Express (USA), Inc. v. State ex rel. Grupp*, 60 So. 3d 426, 428 (Fla. 1st DCA 2011)(" a writ of prohibition [will be issued] in this circumstance, where there are no disputed issues of fact and the lower tribunal is poised to proceed without subject-matter jurisdiction.").

To the extent that the Circuit Court might have jurisdiction to remove the guardian in individual cases before that court, that jurisdiction was never properly invoked, and the Petitioner was never given proper notice or the opportunity to be heard. This situation is analogous to the situation described in *State ex Rel. Avery v. Williams*, 222 So. 2d 477, 479 (Fla. 3d DCA 1969), where a County Court attempted to exercise jurisdiction over a closed matter. Under the former rules of civil procedure, a litigant had only thirty days to reinstate a cause of action after dismissal, and when the thirty days for reinstatement had expired the trial court was without power to reinstate a cause. *Id.* The Third District Court found that prohibition was the appropriate remedy to seek redress against the action by the trial court which was proceeding with a case without jurisdiction or authority. *Id.*

Here, the jurisdiction of the Circuit Court as a Probate and Guardianship Court was also never properly triggered because there was no proper petition for removal of the professional guardian and no notice was ever given to Rebecca Fierle of the proceedings in the case below. *Compare Rehrer v. Weeks*, 106 So. 2d 865 (Fla. 2d

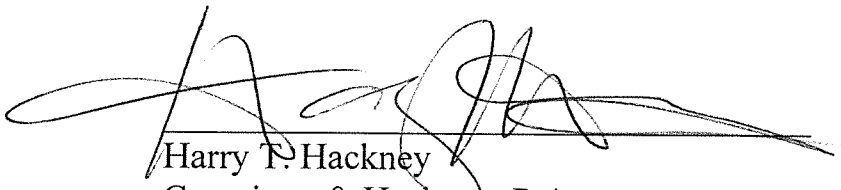
DCA 1958) (Writ of Prohibition was the proper remedy where the county court attempted to proceed with a hearing on incompetency but had never obtained service on the individual who was the subject of the proceeding). Prohibition is an appropriate remedy to test a court's jurisdiction over a party to a suit and to restrain proceedings in a suit where jurisdiction has never been acquired over the parties through service of process or by voluntary appearance or waiver. *Id.* at 867. Where jurisdiction has not been obtained over the person due to failure of proper process and service as prescribed by law, the writ of prohibition must be affirmed. *Id.* at 869-70; *accord Taylor v. State*, 65 So. 3d 531, 533-34, 537 (Fla. 1st DCA 2011)("[W]e conclude that the circuit court has jurisdiction only if Mr. Taylor was in lawful custody on September 30, 2010, the date of filing the petition that is now before the court. It makes no difference that he was in lawful custody on May 5, 2002, the date of the state's first attempt to have him involuntarily committed.... Prohibition granted.").

Under Florida Probate Rule 5.025(d)(1), 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).

In this case, no formal petition has been filed at the time this Motion is being submitted. Likewise, the finding of probable cause, even if it were to be construed as within the powers of the Court as part of its contempt powers, was not properly invoked and could not be properly invoked and prohibition would also lie for that reason. *Compare State ex rel. Gillham v. Phillips*, 193 So. 2d 26, 29 (Fla. 2d DCA 1966) ("[P]rohibition is an appropriate remedy to prevent judicial action when the judge is without jurisdiction to act in a cause, and may be specifically invoked against a judge when a party is about to be cited for contempt on the basis of acts which could not constitute contempt of court.").

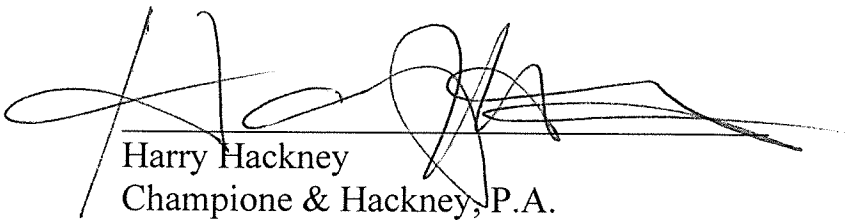
For these reasons, the petitioner respectfully submits that Judge Thorpe had no authority to proceed to make findings of fact regarding violations of law by Rebecca Fierle or to take steps to "remove" Rebecca Fierle as Professional Guardian after she had resigned as a Professional Guardian.



Harry T. Hackney
Campione & Hackney, P.A.
2750 Dora Avenue
Tavares, FL 32778
Phone: 352-343-4561
Email: HHackney@CampioneHackney.com
SecondaryEmail: rsteinman@campionehackney.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this petition was 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.

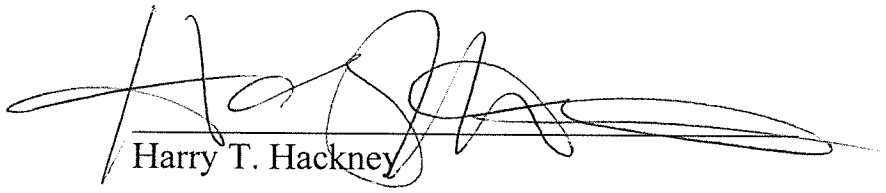


Harry Hackney
Champione & Hackney, P.A.
2750 Dora Avenue
Tavares, FL 32778
Phone: 352-343-4561
Email: HHackney@CampioneHackney.com
SecondaryEmail: rsteinman@campionehackney.com

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 T. Hackney