THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
NH CIRCUIT COURT

6th Circuit-Probate Division-Concord
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Case Name: **In Re: Jeannette Marino**
Case Number: **317-2015-AP-0001**

Enclosed please find a copy of Gary R. Cassavechia, Judicial Referee's Disciplinary Recommendation dated April 7, 2016 for the above case.

April 7, 2016

LoriAnne Dionne
Clerk of Court

C: Edwin W. Kelly, Administrative Judge

THE STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY

TRUST DOCKET
7TH CIRCUIT COURT
PROBATE DIVISION

IN RE JEANNETTE MARINO

317-2015-AP-0001

DISCIPLINARY RECOMMENDATION

This matter was specially assigned to the undersigned pursuant to Administrative Order 2015-14 (October 22, 2015)(Index #3) for the purpose of conducting "administrative proceedings concerning the appropriate sanctions, if any, to be imposed upon [professional guardian Jeannette] Marino, and make recommend-dations regarding [those] sanctions to the Administrative Judge." Id. A hearing was held on March 16, 2016 to afford Ms. Marino opportunity, inter alia, to present witnesses, documentary evidence, argument, and proposed rulings and findings, and to testify herself if she so chose. See Scheduling/Structuring Orders (Index ##4, 6 & 9).[1] She was represented at the hearing by Attorney David Eby.

[1] The undersigned observes for the record the unusual posture of this hearing. As set forth more fully in its Scheduling Order (Nov.24, 2015)(Index #4), unlike other licensed or certified professions, there is no disciplinary board or office to determine the appropriate sanction when a professional guardian has been adjudicated to have violated the standards of professional conduct. Compare In re Wyatt's Case, 159 N.H. 285 (2009)(attorney discipline); Appeal of Rowen, 142 N.H. 67 (1997)(physicians); In re Coffey's Case, 157 N.H. 156 (2008)(judges). As such, the hearing was held with only Ms. Marino presenting evidence and there was no person or body offering a contrary by way of cross-examination or presentation of opposing viewpoints. That said, the violations at issue here were fully adjudicated, including one appeal to the Supreme Court, see infra, and the undersigned is confident that given the records developed in those matters and additional information gleaned from other court records provided by Ms. Marino, it can render a fair and appropriate recommendation.

The undersigned has considered the record before it and is particularly mindful of my duty to recommend a sanction that is fair in light of the violations of professional standards found in the guardianship cases that have triggered this inquiry, Guardianship of M. P., Circuit Court No. 317-2011-GI-00490[2] and Guardianship of J.L., Circuit Court No. 317-2013-GI-00260.[3] However, my primary purpose is to recommend a sanction or sanctions that protect those at risk, cf. In re Richmond's Case, 153 N.H. 729, 743 (2006), namely the vulnerable wards whose person and financial wherewithal is entrusted to the care, guidance, and management of professional guardians appointed by the Circuit Court. The public places its trust in the court system to provide protection for citizens lacking the capacity to make informed decisions in matters related to their personal and/or financial affairs and it needs to have confidence that any individual assigned to make those decisions is held to the highest standards of skill, professionalism, and ethics. Accordingly, in light of the consequential nature of the violations found, and what are perceived as far too many lapses in professional judgment, care, and mission, the undersigned RECOMMENDS: (1) that Ms. Marino be **suspended** from the approved list of professional guardians for a period of at least **two years, effective immediately**; and (2) that the Administrative Judge file a report with the appropriate certification authorities of the National Guardianship Association and/or the Center for Guardianship Certification, accompanied by this recommendation and the applicable Supreme and Circuit Court orders in: the Guardianship of M. P., the Guardianship of J.L., the Guardianship of T.B., No. 317-2010-GI-00337, and the Guardianship of W.R., No. 317-2010-GI-00444. It is further recommended that Ms.

[2] New Hampshire Supreme Court No. 2014-0655.
[3] New Hampshire Supreme Court No. 2015-0281.

Marino be afforded opportunity to petition for reinstatement after the suspension period. All current appointments should be transferred to other certified and approved professional guardians or appropriate public guardian agencies.

Facts and Procedural Posture

Ms. Marino first became a professional staff guardian in 1999 when she began her employment at the Office of Public Guardian ("OPG"). She testified that she was placed on the approved list of private professional guardians, see generally, Prob. Ct. Admin. Order 16 (2009), in 2006.[4] She is certified as a professional guardian by the Center for Guardianship Certification. She testified that she has attended a number of conferences and continuing education courses in order to remain a certified professional guardian and remain knowledgeable about current practices. See Exh. 35. She has not, however, been certified as a "Master Guardian" by the Center for Guardianship Certification.[5]

As set forth more fully below, this disciplinary matter was commenced after two Circuit Court-Probate Division judges concluded that Ms. Marino had violated multiple standards of professional conduct. In one case, Guardianship of J.L., she was found to have improperly paid herself fees, thus violating two Probate Division Rules, see Cir. Ct. – Prob. Div. R. 88 & 108, as well as multiple standards of the *National Guardianship Association Standards of Practice* (hereinafter the "NGA Standards"). See Guardianship of J.L., Final Order on Guardian's Fees at 6-7, 12 (April 6, 2015). In

[4] Ms. Marino testified that initially she began providing services to clients without proper Probate Court approval because she was "not aware" that she must be first approved by the court. See id.; see also Cir. Ct. Admin. Order 2014-63; RSA 464-A:2,XIV-b.

[5] See http://www.guardianshipcert.org/find_a_certified_guardian.cfm?State=NH. She is also not listed as a member of the National Guardianship Association. See http://www.guardianship.org/displayState.php?select=New+Hampshire&Submit=Search

another, Guardianship of M. P., she was found to have violated eight NGA Standards. See id. Order at 3-4 (August 15, 2015). These findings were upheld on appeal to the New Hampshire Supreme Court. In re Guardianship of M.P., No. 2014-0655 at 4 (Unpublished Order dated Sept. 14, 2015). Given that an appeal to the Supreme Court in the J.L. matter was withdrawn, see *Letter from Judge Edwin W. Kelly* (Sept. 24, 2015)(the "Kelly Letter")(Index #1), the findings of the Circuit Court-Probate Division in both In re Guardianship of M.P. and Guardianship of J.L. are final.

As a result, the Chief Administrative Judge of the Circuit Court, as empowered by statute and administrative rule, see RSA 464-A:2, XIV-b; RSA 464-A:10; RSA 490-F:17, :18; Probate Court Administrative Order 16, notified Ms. Marino that "[g]iven the findings made in these two serious matters . . I will be considering whether and what sanctions should be imposed . . . ." *Kelly Letter* (Index #1). He provided her with an opportunity to meet with him "to show cause why sanctions, including the removal of your name from the Circuit Court list of approved professional guardians, should not be imposed." Id. After objection in the form of a letter from counsel, see *Letter from David P. Eby, Esq.* (Oct. 19, 2015)(the "Eby Letter")(Index #2), Judge Kelly referred this matter to the undersigned "to conduct administrative proceedings concerning the appropriate sanctions, if any, to be imposed upon Ms. Marino, and make recommendations regarding sanctions to the Administrative Judge." Administrative Order 2015-14 (Oct. 22, 2015)(Index #3). Judge Kelly specifically directed, however, that "[t]o be clear, Judge Cassavechia will not reconsider the decisions of the probate division in the [M.P.] and [J.L.] cases as the findings contained therein constitute binding final orders." Id.

After referral from Judge Kelly, the undersigned endeavored to structure and conduct a hearing that addressed, and appropriately resolved, any due process concerns raised by Ms. Marino in the *Eby Letter*.[6] At her request, Ms. Marino was extended the opportunity to offer a *Proposed Consent Decree* (Index #10), however, her proposal was not accepted by the Chief Administrative Judge. See Index #13. Finally, Ms. Marino, by virtue of the hearings removing her as guardian in the J.L. and M.P. matters, her subsequent appeals to the New Hampshire Supreme Court, and the *Kelly Letter*, is seen as having received adequate notice of the alleged violations of Circuit Court Administrative Order 16, the applicable law, and the alleged facts underlying those charges. See *Kelly Letter* (Index #1). A hearing was held on March 16, 2016 during which only Ms. Marino testified, and pursuant to which, extensive exhibits were entered by her into the record.[7] As a result of the inquiry and review of court records, that undersigned gleans and relates the following observations.

A) Guardianship of M. P.

First a brief review is in order of the findings of the Probate Division, No. 317-2011-00490, and New Hampshire Supreme Court, No. 2014-0655,[8] concerning violations of professional standards by Ms. Marino during her term as guardian for M.P.,

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[6] The Scheduling/Structuring Orders dated November 24, 2015 and December 23, 2015 are incorporated within by reference. See Index ## 4 & 6.

[7] On agreement of Ms. Marino through her counsel, see *Structuring and Scheduling Orders* at 2 (Dec. 22, 2015)(Index #6), the undersigned contacted various court personnel "regarding any history of removal, discipline, or other orders calling into question the nature of her performance as a professional guardian." Id. As the predominant reason for such inquiry was to gauge whether the M.P. and J.L. matters were reflective of a broader pattern of lapses and/or infractions, and given precious judicial time and resources that would otherwise need to be expended, my review of other records was abbreviated and limited. As such, both Judge Kelly and a reviewing court should not view the discussion today as suggesting or reflecting that an exhaustive or even comprehensive inquiry was undertaken. To the limited extent the undersigned endeavored to review her performance history, or was made aware of other issues, Ms. Marino was allowed at hearing to address any concerns I had.

[8] Those orders are incorporated by reference. Unless otherwise noted, all references to the record in this Section A are to the Probate Division record, No. 317-2011-GI-00490.

an elderly woman living at a nursing home in Franklin, New.Hampshire. For purposes of recommending what, if any, disciplinary sanction(s) should be imposed, the undersigned also took account of Ms. Marino's testimony, and reviewed transcripts from the proceedings as well as exhibits submitted by her.[9]

The M.P. matter arose from a complaint filed with the Probate Division by the executive director of a nursing facility from which M.P., a ward of Ms. Marino, was abruptly removed after Ms. Marino told the ward and her care team she was simply going out to lunch. See Order (Aug. 15, 2014). After a hearing, the Probate Division concluded that "Ms. Marino demonstrated a callous disregard for the needs and requests of [M.P.] particularly as it related to the importance of her friendship" with another resident with whom M.P. was "inseparable." Id. at 3. It also concluded that "Ms. Marino refused to meaningfully discuss or consider [M.P.'s] care team's professional opinions without justification" and that "[w]hile Ms. Marino may believe that she was justified in relocating [M.P.] in the manner she did, there was certainly no justification for failing to notify her care team." Id. The Probate Division found that Ms. Marino violated eight standards of professional conduct, including: NGA Standard 3 (treating persons with dignity); NGA Standard 4 (failing to properly consider a person's relationships with their friends); NGA Standard 12 (failing to consider the needs and physical and mental well-being of the ward in changing her residential setting); NGA Standard 5 (failing to consult with and consider the opinions of M.P.'s care team); NGA Standard 6 (failing to maximize M.P.'s meaningful input); NGA Standard 7 (failing to act

[9] While, in the interests of fairness these exhibits and testimony were allowed, counsel and Ms. Marino arguably strayed close to, if not into, the realm of re-litigating the findings of the Probate Division and Supreme Court. To the extent that any such evidence contradicted those findings, as opposed to properly addressing matters concerning sanctions, the undersigned gave that evidence little, if any, weight.

in her ward's best interest); NGA Standard 9 (violating M.P.'s right to self-determination); and NGA Standard 13 (failing to visit with M.P. and consult with her care team with a regularity required by the standards). She was removed as M.P.'s guardian. These are all serious breaches of professional conduct and, after briefing and review of the record by the New Hampshire Supreme Court, were found supportable. See In re Guardianship of M.P., No. 2014-0655 at 4 (Sept. 14, 2015).

At the hearing, Ms. Marino testified to her view of the events. When reminded that it was inappropriate to re-litigate the Probate Division's findings, counsel stated that the testimony was relevant to her state of mind and thus the scope of any appropriate sanction(s). Although I agree, I also note that the Probate Division made findings lying within the realm of her state of mind, for example, that "Ms. Marino demonstrated a callous disregard for the needs and requests of [M.P.]." Id. Consequently, her testimony was allowed and is credited to the extent that it explains her "callous disregard" in a manner that might mitigate any sanction(s) recommended.

Ms. Marino testified that she believed that the team was aware of her plan to move M.P. to a new facility. She stated, however, that she now recognizes that she "could have handled it better" by requesting a team meeting. The undersigned was troubled by Ms. Marino's testimony that she felt "blindsided" by the fact that the abrupt transfer of M.P. was not well received by her care team. It is apparent that she did not adequately or directly communicate with the executive director and important members of the care team before the move. Indeed, she admitted that it was her responsibility to have better communicated to them her plan to move M.P. It finds her attribution for the

fact that most of the team believed that M.P. was going to return from lunch to "shift changes" simply not credible.

The undersigned also notes that Ms. Marino testified that her method or scheme for moving M.P. out of her existing residence, and importantly away from a friend with whom all agree she had a very close relationship, was in M.P.'s best interest. She explained that she relied on her "clinical" experience[10] in dealing with people with dementia, who typically are resistant to change, when moving M.P. under the guise of going out to lunch.[11] However, she admitted that she did not consult with M.P.'s doctors about the move and whether it was appropriate for *this* particular patient.[12] Similarly, the undersigned notes that I am unsettled that Ms. Marino would decide that a move was in M.P.'s best interest without: (1) consulting her physician; (2) properly communicating and taking into account the views and opinions of M.P.'s care team; and (3) making any attempt to even so much as endeavor an effort to gauge whether, or how much, M.P. herself might appreciate or feel about the relocation.[13]

The seeming lack of consideration for M.P. as a distinct individual is notable given that it is undisputed that Ms. Marino only attended two of nine care team meetings

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[10] While Ms. Marino testified at the trial court hearing that she was not credentialed as a mental health clinician, see Exh. 2 at 39, on three separate occasions she endeavored to justify her decision-making or actions within a clinical context. See Exh. 2. at 28; 60, 64.

[11] There is no dispute, and indeed the Probate Division found, that M.P. was only told she was going out for lunch – not that she was being moved to a new facility.

[12] The undersigned has reviewed a submitted excerpt from a book The Alzheimer's Family by Robert B. Santulli. See Exh. 7. Ms. Marino contended that this book, which she read *after* the M.P. incident, confirms that it was a good practice for her to simply remove M.P. in the manner it occurred. After review of the materials submitted, I conclude that the excerpts are not entirely supportive of the view that subterfuge is a proper method to employ in every case or in the first instance. See id. at 180-181. In addition, the passage concerning subterfuge is focused on movement of an individual from the established milieu of his or her own home to a care facility, not transfer from one facility to another. Id. at 181.

[13] It appears that she did have some discussion, at an earlier time, with M.P. about moving to New York to be closer to her family. That is entirely different from a move from one New Hampshire facility to another. Ms. Marino, however, still does not appear to appreciate the distinction.

that were held prior to M.P.'s abrupt removal from her facility. Judge Leonard found that Ms. Marino did not meet with her ward monthly as is required by the NGA Standards. See Order (Aug. 15, 2014). It strikes the undersigned that even if I credit her testimony that she reasonably believed the new facility was a "better" one in terms of its offerings and programs, it remains entirely unclear whether she considered, or could have properly considered, whether it was "better for M.P." without any or proper consult with the care team, physicians, and her ward. As such, even if Ms. Marino's abrupt and somewhat guileful act of removing M.P. was undertaken with the best of intentions, it does not reflect well on her proficiency as a guardian as she failed, even by her own assessment, to properly communicate with M.P. and key members of her physical and emotional support system.

B) Guardianship of J.L.

This matter involves a series of motions to, and orders issued by, the Concord Probate Division concerning fees charged by Ms. Marino, who was guardian over the estate of J.L., a man with a relatively small estate.[14] See Guardianship of J.L., No. 317-2013-GI-00260 (Index ## 19, 40, 42, 44, 46, 50 & 56).[15] The facts found by the Probate Division in those orders are incorporated by reference into this recommendation.

Briefly, Ms. Marino was appointed guardian over the estate of J.L. in July 2013. When the final account was filed approximately a year later in July 2014, Ms. Marino sought, and received, court approval for guardian fees in the amount of $2,193.16. See Index #38. She subsequently filed a motion to approve additional fees of $4,641.19.

[14] An inventory filed with the Probate Division revealed total assets of $5,329.29. Guardianship of J.L., No. 317-2013-GI-00260 (Index #19).

[15] In this section, index numbers refer to those in the Guardianship of J.L., No. 317-2013-GI-00260 unless otherwise indicated.

See id. (index #40). The Probate Division denied that request in September 2014 on the basis that the "guardianship of the estate was closed, and the ward has no more assets." Id. (Index #42). Ms. Marino then filed her first *Motion for Reconsideration*,[16] see Index #41, in October 2014. The Probate Division denied the motion, concluding that the additional fees were "unreasonable on their face" as they comprised "more than 170% of the ward's assets." Id. (Index #42). It also specifically found that although some work performed benefitted J.L., she sought to charge $125 an hour for ministerial work and "much of the work did not benefit the ward." Id.

Ms. Marino proceeded to file a second motion seeking reconsideration of the court's order denying her request for the additional $4,641.19 in fees. (Index #43). In it, she disclosed, *in a footnote*, see Exh. 27, that she had previously paid herself $4,800, in addition to the $2,193.16 in "total fees" disclosed in her account, see Index #38, and the $4,641.19 she sought approval of from the Probate Division. To be clear, this $4,800 payment of fees, previously collected without earlier disclosure to or approval of the court, and thus in violation of multiple court rules and professional standards of practice, see Prob. Div. R. 88 & 108; NGA Standard 22, III; Prob. Ct. Admin. Order 16 at ¶11, were not disclosed until after two motions were filed by Ms. Marino, and multiple orders were issued by the Probate Division specifically addressing fees.[17]

The Probate Division scheduled a hearing on the matter that was held on December 19, 2014. Ms. Marino attended the hearing, with counsel. The undersigned has reviewed the transcript, see Exh. 28, and makes the following observations. At the hearing, Ms. Marino explained that she paid herself the $4,800 from $6,700 in

[16] This was the first of three motions for reconsideration. See id. (Index ##41, 43, 57).
[17] The undersigned remains mindful that this estate was very modest, "with less than $4,000 in gross assets." Order at 1 (Index #46).

retroactive social security payments sent to the Moore Center, the facility where J.L. was living at the time.[18] In addition, it was revealed for the first time at the hearing that additional retroactive benefits had been paid to an attorney hired by Ms. Marino in the J.L. matter totaling $1,980 "after the ward had been found indigent and was approved for court appointed counsel." Order at 3 (Index #46). The undersigned, in its review of the transcript is troubled by the following exchange:

> THE COURT: So 6700 went to the Moore Center as rep payee. It's in [J.L.'s] account. So they're doing a spend down and you're volunteering to take that off their hand[s] so they can get under the $2,400 limit. The check goes directly to you by the Moore Center. And Social Security doesn't care"
>
> MS. MARINO: No, I don't believe Social Security gets to care because this is – again, it's done routinely.[19]

The undersigned further observes that at the hearing, Ms. Marino's initial explanation for the $6,700 in retroactive income and payment of the $4,800 without prior disclosure to, and later approval by, the Probate Division included a lot of casting blame on others for giving what she termed as inconsistent advice on how to properly account for it. Exh. 28 at 11-16.[20] However, the obligation to receive court approval before receiving and retaining fees is straightforward. Prob. Div. R. 88; NGA Standard 22, III; Prob. Ct. Admin. Order 16 at ¶11.[21] At best, if Ms. Marino was confused as to the best manner to account for the $6,700 in retroactive benefits and $4,800 fees, as Judge King observed at the hearing, she still has an obligation to account for funds due a ward,

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[18] Notably, it appears from the transcript that her counsel was unaware that the fees had already been collected by Ms. Marino. Exh. 28 at 10. This does not give the undersigned comfort that Ms. Marino intended to be transparent in her disclosure of the fees paid.

[19] It should be noted, however, that her attorney opined at the hearing that indeed "I personally think [social security] care[s] because I know they can audit." Exh. 28 at 22.

[20] Judge King had to press Ms. Marino multiple times for an explanation of why this $4,800 fee payment was not disclosed until her second motion for reconsideration.

[21] Even if she could collect first and report later, Ms. Marino filed the "final" accounting without reporting the $4,800 in fees.

Exh. 28 at 14, and "[e]ven if you report it wrong it's better than not telling [the court] about it." Exh. 28 at 15.[22]

Judge King also observed that "[t]here's nothing anywhere in the file, except for footnote one, in your motion for reconsideration that would have ever allowed a judge to even know that money existed." Exh. 28 at 16. Ms. Marino was unable, at the December 2014 hearing however, to inform the Probate Division whether she had provided it with itemized bills for the $4,800 payment from the Moore Center. Id. at 17. As such, she was allowed additional time to provide proper documentation.

After submission of additional documentation, the Probate Division issued an interim order on Ms. Marino's second motion for reconsideration on February 4, 2015. See Index #46; Exh. 30.. In that Order, the Probate Division made careful findings that:

- The first and final account, filed under oath, "did not include any itemization of the fees" for the $2,193.16 then claimed by Ms. Marino.
- That the additional $4,641.19 of "outstanding guardian fees" sought in a later pleading to "be paid as a medical necessity" from J.L.'s future social security benefits were unreasonable under the standards set forth in In re Estate of Rolfe, 136 N.H. 294, 298 (1992). The Probate Division also observed that it was not provided with properly itemized bills for some of these claimed fees. See NGA Standard 22,IV(E)(guardians required to give detailed explanations for fees).
- Ms. Marino was paid $4,800 by the Moore Center in fees from retroactive social security payments that she failed to include in the first and final account submitted under oath as being "true to the best of her knowledge and belief." Those fees were not reported to the court before payment and were never approved, in violation of multiple standards, court rules, and administrative orders. See Prob. Ct. Admin. Order 16, ¶11; NGA Standard 22, III; Prob. Div. R. 88.
- Similarly, attorney's fees had been paid without approval of the court.

[22] Indeed, the Probate Division's form accounting provides, in Schedule G, for reporting of "Cash Received From Other Sources." See *Guardian's/Conservator's Accounting*, Form NHJB-2160-P. Even assuming that these payments were not reportable, which is unlikely, the accounting form also references Probate Division Rule 108(E) requiring that "[t]he account shall show significant transactions that do not affect the amount for which the Fiduciary is accountable."

- Ms. Marino, despite receiving leave to file documentation after the hearing, failed "to explain either the guardianship fees or the legal fees," as required by NGA Standard 22, IV(E).

Order (Index #46). The Probate Division did not rule on the second motion for reconsideration, but gave Ms. Marino additional time to submit itemized invoices and any documentation submitted to the Moore Center to support payments made directly to her for fees.

After more time had passed, and further documentation provided,[23] the Probate Division issued a "Final Order on Guardian's Fees" on April 6, 2015. See Index #50. It reviewed in detail the concerns/breaches of fiduciary duty voiced/observed in prior orders. Remarkably, the Probate Division discovered additional problems with Ms. Marino's management of J.L.'s affairs. These included additional findings that:

- The improper payment to counsel without court approval from funds issued by the Moore Center resulted in a $1,452 overpayment. The attorney should have billed for his time at the indigent, not market rate. The Probate Division observed that: "[h]ad the bill been submitted to the court, it would not have been approved as submitted." Id. at 3.

- While the request for the $4,641.19 in additional fees was pending, Ms. Marino emailed the Moore Center, who had control over J.L.'s social security funds requesting that they begin paying her $350 per month towards those fees. Again, those fees were not approved by the court at the time, and in fact, were mostly subsequently denied as unreasonable. Id. at 4, n. 3.

- In February 2015, the Probate Division received documentation showing that the $4,800 paid for fees by the Moore Center was received approximately a month before Ms. Marino filed the account that failed to disclose this payment. Id. at 6. Thus, it is undisputed that $4,800 in fees paid were neither reported nor approved when Ms. Marino requested additional payments of $4,641.19 in addition to the $2,193 approved by the court.[24]

[23] The undersigned notes with alarm that at some point during the late winter or early spring of 2015, Ms. Marino also disclosed that she was still holding an insurance refund check payable to J.L. for $1,094.25. Final Order on Guardian's Fees at 5, 13 (Index #50).

[24] In addition, she requested payment for her time litigating these fees; a request appropriately denied by the Probate Division. Id. at 5, 12.

- The Probate Division deduced from an invoice provided for the first time in February 2015 that Ms. Marino attempted to "get a fee for guardianship over the person," although she was only appointed as guardian over the estate, id. at 8, n. 5, and "would not have been entitled to this fee." Id. at 8.

The Probate Division concluded that Ms. Marino violated Probate Division Rule 88 requiring that guardian fees be approved by the court and Rule 108 requiring disclosure and approval. It also observed that all guardians are required by Probate Court Administrative Order 16 to comply with NGA Standards and held that the following had been violated: (1) NGA Standard 17, VII (guardians should be "above reproach"); NGA Standard 18, VIII (sufficiency of accountings); and NGA Standard 22, III (court review and approval of fees and reasonableness of fees). It held that: "[i]n light of these serious and significant breaches of fiduciary duty, the court, but for the fact that the guardianship over the estate has now been terminated, would remove the guardian for cause." Id. at 6-7.

Perhaps most distressing are the Probate Division's final findings that not only did Ms. Marino intentionally commit violations; she also demonstrated a stunning lack of professional competence. After its review of invoices for the period from May 2013 through July 22, 2014 provided by Ms. Marino, the Probate Division noted based upon a bill dated June 30, 2014 showing "payments/credits of $0.00" that she "intentionally" did not report the $4,800 payment from the Moore Center in pleadings seeking additional fees. Id. at 7. It also observed that the "ward received little benefit" from Ms. Marino's services. It found that she paid the court-appointed attorney fees, without approval, at "grossly inflated rates." It further determined that certain work performed at J.L.'s home and on his car "bore no fruit for the ward"; and though it acknowledged he derived

some benefit in terms of Ms. Marino's application for Medicaid and Social Security, she had attempted to recoup an unreasonable amount of fees. Id. at 8-11. In sum, the Probate Division held:

> In issuing this order, the court has also considered the gross deviations in reporting fees which include misrepresenting the amount of fees taken in an account filed with the court under oath, by reporting less than one-third (1/3) of the fees actually taken during the accounting period, the fact that the guardian took fees without court approval, and authorized payment of legal fees without the authority to do so. **These actions, at best, demonstrate a lack of competence or, worse, a deliberate attempt to keep the court from knowing the extent and nature of the fees taken in this case.** Given this guardian's self-described abilities and 'significant experience' handling complex matters, it is more likely the latter.

Id. at 12 (citations omitted & emphasis added).

Although it ultimately awarded Ms. Marino $3,600 for her services, id. at 11, she was ordered to reimburse the ward for $3,303.21 in fees. Id. at 12. The Probate Division also, inter alia, referred the matter to the Chief Administrative Judge for review. Ms. Marino filed a lengthy third *Motion for Reconsideration* (Index # 57) which was denied by the Probate Division. See Order on Guardian's Third Motion for Reconsideration (Index #60). A subsequent appeal to the New Hampshire Supreme Court was withdrawn, see Index ## 63 & 77, rendering all findings and orders of the Probate Division final.

At the disciplinary hearing before the undersigned on March 16th, as earlier indicated, Ms. Marino was afforded the opportunity to address those findings so far as they may inform any sanction(s) recommended. She testified that upon her appointment, she perceived J.L.'s affairs to be a "mess" requiring a lot of

assistance. With regard to the $4,800 received from the Moore Center, she admitted that she failed to inform the Probate Division that she had been paid those fees when filing the accounting and motion requesting an additional $4,641.19 in fees, and that it was a "gross oversight" on her part. She admitted that she should have sent invoices to the Probate Division and asked for approval. It is disconcerting that she claims that the $4,800 was never included in the accounts by her because the funds never came into her possession as guardian or her ward's possession as the check from the Moore Center was made out directly to her as an individual.[25] This response ignores that: (1) she directed that payment be made to her as the guardian of the estate; and (2) she collected it as reimbursement for fees claimed as a representative of the estate. Thus the undersigned can only surmise that either she is not being forthright, or does not fully comprehend that her conduct was problematic.

The undersigned is also somewhat incredulous that a "mitigating" factor should be that without her disclosure in the second motion for reconsideration, the Probate Division never would have known about the payment from the Moore Center. The "disclosure" was not in the form of a motion to correct/amend the record, rather, it came in a *footnote* in a *second* motion for reconsideration after court questioned her initial request for additional fees. As Judge King observed in his Order on Guardian's Third Motion for Reconsideration (Index #60), the footnote, when read within context of the pleading, was included "in an effort to persuade the court that she had done great work getting the ward social security benefits, and thus justify her additional fees." Id. at 3.

[25] She also endeavored to lay blame on not having a "place" on the accounting form for this payment, a dubious explanation for the reasons set forth supra. As such, the undersigned concludes that she was not fully forthright, or demonstrated an unacceptable lack of basic knowledge of the guardianship accounting forms of which she professed extensive knowledge and experience.

As such, the undersigned can only but deduce that at best Ms. Marino's conduct demonstrated a significant lack of understanding of applicable and basic court rules, administrative orders, and professional standards concerning her duty to report and gain approval of fees charged, collected or to be paid. At worst, it demonstrates a clear intent to circumvent those rules. The undersigned's inclination to so conclude is only bolstered by Ms. Marino's email, reported in the Final Order (Index #50), that she endeavored to collect the $4,641.19 fees, *while the request was pending before the Probate Division and without disclosure*, in installments of $350 per month directly from the Moore Center. Id. at 4, n.3.

With respect to the improper payments she authorized from the Moore Center to the ward's attorney, Ms. Marino explained that she was unaware the attorney should have been paid at the indigent rate because she had not received notice from the clerk's office that her petition for indigent status had been granted. The undersigned appreciates that Judge King already addressed this concern at length in his Order on Guardian's Third Motion for Reconsideration at 7-12 (Index #60), and it will only entertain it here for the limited purpose of discharging the specific task with which I am charged. Even assuming without deciding that lack of notice somehow mitigates competency concerns about the overpayment,[26] it still does not lessen the fact that the Probate Division found, pursuant to Circuit Court-Probate Division Rule 88, that she "had no authority to direct this bill be paid without prior court approval." Order on Guardian's Third Motion for Reconsideration at 11 (Index #60). So again, her

[26] The Probate Division rejected her claim that lack of notice was determinative given its conclusion that Ms. Marino, having filed the request for indigent counsel, should have reasonably checked the attorney's status before paying the market rate.

authorization of the payment of attorney's fees, and subsequent lack of reporting, raises at best competency concerns, and at worse concerns about her professional ethics.

Finally, during the hearing, Ms. Marino addressed the attempt to bill a $1,100 flat fee for what the trial court had discerned to be services as guardian over the person. See Exh. 37. According to Judge King's Order on Guardian's Third Motion for Reconsideration at 5-6 (Index #60) and the court file, see *Motion for Reconsideration* ¶28 (Index #57), Ms. Marino reported that the entry was a "typo" and she meant to charge for "mileage" rather than a "monthly fee" as recited. Judge King did not find that offering credible. See Order on Third Motion for Reconsideration at 5 (Index #60). At the disciplinary hearing Ms. Marino initially attempted to explain the asserted "typo" differently. Initially she attributed it to erroneously typing "con" that prompted her QuickBooks billing program to print "consulting" rather "copying," which would have been printed if the correct typing prompt of "cop" had been entered. Yet, when queried further by the undersigned for clarification given my then present inability to locate exhibit admitted documentation and what struck me as a rather large charge for copies, Ms. Marino responded by offering that it was her erroneous typing of the wrong prompt for "mileage" that caused the billing program to print "monthly fee." Wholly apart from the finality of the trial court's ruling on her credibility based on her pled explanation, the absence of any explication for how the prompts "con" or "cop," for that matter should cause "mileage" to be entered on the invoice, the inconsistency between what she pled in her *Motion for Reconsideration* and testimony at the disciplinary hearing leaves the undersigned dubious of her proffer. In addition, the undersigned is disturbed that the invoice included in Exhibit 37 "was only produced at the insistence of the [trial] court" in

February, months after her original request for approval of additional fees. As such, without searching court inquiry, "this $1,100 would have been paid without anyone knowing the difference." Order on Guardian's Third Motion for Reconsideration at 5 (Index #60). Again, this matter, at best, reflects poorly on Ms. Marino's bookkeeping acuity and at worst, reflects a certain inability or unwillingness to be forthright.

In sum, the undersigned is significantly bothered and deeply concerned by the events that unfolded in the J.L. guardianship. I accept, as I must, the Probate Division's multiple findings that Ms. Marino violated numerous court rules, an administrative order specifically pertaining to professional guardians, and NGA Standards. However, for purposes of recommending a sanction, I find no factors in mitigation as these were serious financial offenses that can only be explained as either significant lapses of professional competence, or, a more sinister pattern of intentionally enriching herself and others from the limited resources of her ward.

C) Other Instances of Questionable Professional Judgment

Although the undersigned was charged with evaluating and recommending a proper sanction for the Probate Division's findings in M.P. and J.L., it was agreed by Ms. Marino and her counsel that I, with assistance of staff, could inquire from other probate divisions about instances where Ms. Marino may have been removed or otherwise sanctioned as guardian. As already mentioned, although only a rather cursory and limited review was conducted, and as such, the notes below should not be considered conclusive or exhaustive in scope, I find the following instances of concern.

i) Guardianship of W.R.

This matter involves a developmentally disabled gentleman who became ill and

was apparently on life support in June 2010. Ms. Marino petitioned and was court appointed guardian over his person and estate as his wife, A.R., who is also disabled, was unable to make decisions for her husband. See Guardianship/Conservatorship of W.R., No. 317-2010-GI-00444. W.R. eventually recovered and on November 29, 2010, Ms. Marino petitioned to terminate the guardianship. Id. (Index #15).[27] That petition was granted and the guardianship terminated on January 27, 2011. Id.

The matter recently came to the attention of Probate Division staff after W.R. approached staff seeking documents from the file held by that court. Upon review of the file, the clerk noticed certain irregularities in the file that eventually were brought to the attention of the undersigned. A review of these irregularities calls into question the professional competence, or at least basic diligence, of Ms. Marino as a guardian.

Specifically, in December 2010, while the guardianship was still pending, Ms. Marino was appointed agent under a general power of attorney granted by W.R. The document was signed by her ward, W.R., witnessed by his challenged wife, and notarized by Ms. Marino herself. This execution method is remarkably inappropriate given the conflicts of interest inherent to her role as designated agent and administrating notary, if nothing else. Moreover, it does not appear to include the statutory disclosures and acknowledgments required by RSA 506:6, VI & VII necessary before an agent might act pursuant to a power of attorney applicable at the time it was executed.

As such, it is clear that not only would this document likely be ineffective, but the practice of notarizing her own appointment, see 58 Am.Jur. 2d NOTARIES PUBLIC §13 at

[27] All index numbers in this Section C(i) refer to Guardianship/Conservatorship of W.R., No. 317-2010-GI-00444 unless otherwise noted.

529, signed by a principal still under guardianship and witnessed by a challenged person who apparently was herself unable to act as agent for her own husband, calls into question her professional competence.

Ms. Marino was given the opportunity to testify about this matter at the hearing. She explained that both W.R. and A.R. have intellectual disabilities and grew up at the now closed Laconia State School. She was familiar with the couple and since A.R. lacked the cognitive ability to speak with W.R.'s doctors after he became sick, she stepped in as guardian. She further testified that earlier this year she was notified that the power of attorney was ineffective and she has since had the document re-drafted. She testified, and the final accounting filed confirms, that she took no fees as guardian.

Although the undersigned is encouraged that the document's defects may have been rectified, I remain concerned that Ms. Marino operated as agent under it for approximately six years, potentially endangering the validity of transactions completed pursuant to it. In addition, the undersigned is concerned that as a matter of policy vulnerable wards are put at risk if professional guardians can grant themselves broad agency powers extending beyond termination of a guardianship, without any oversight by a court or even the participation of an independent notary.

ii) Guardianship of T.B. and Special Needs Trust of T.B.

In September 2014, Chief Administrative Judge Kelly requested that Ms. Marino forward to him certain information, including whether she had previously been removed as guardian over the person or estate in any other matters than the Guardianship of M.P. Ms. Marino responded by letter dated October 9, 2014,[28] stating that "I have not

[28] Ms. Marino shared the packet of information before the March 16, 2016 hearing. See In re Jeanette Marino, 317-2015-AP-0001 (Index #11).

been removed as guardian in any other matter, but do want to disclose I was replaced as Trustee for the Special Needs Trust of [T.B.] . . . . This replacement was the result of an agreed to Stipulation dated February 7, 2013."

At the disciplinary hearing Ms. Marino supplied the undersigned with certain documents from the T.B. matter. See In re Jeanette Marino, 317-2015-AP-0001 (Index #11). Briefly, she was appointed guardian over the person and estate of T.B. and as trustee for her special needs trust. See In re: Guardianship of T.B., No. 317-2010-GI-337; In re: Special Needs Trust of T.B., 317-2010-TU-853. In March 2013, she "voluntarily" resigned as guardian over the person after T.B. filed a motion requesting appointment of a new guardian. See Order (Index #44).[29] In July 2014, a hearing was held to address, inter alia, the ward's request that Ms. Marino be removed as guardian over the estate and as trustee. Ms. Marino had moved for termination of the guardianship over the estate, but objected to her removal as trustee of the special needs trust. See Order (Index #76). The trial court granted the motion to terminate the guardianship over the estate and eventually also ordered that Ms. Marino be removed as trustee. The Probate Division noted that it had "ongoing concerns about the ongoing excessive and unreasonable fees being charged by Ms. Marino." It also noted disputes between Ms. Marino and DHHS over her failure to provide documents the State was entitled to receive. Id. Ms. Marino subsequently filed a *Motion to Reconsider* (Index #80) her removal as trustee. The state Division of Health and Human Services ("DHHS") objected, (Index #82), and that motion was denied. (Index #83).

[29] Unless otherwise indicated, index numbers referenced in this Section C(ii) to documents in the In re: Guardianship of T.B. , No. 317-2010-GI-337, matter.

The undersigned takes notice that in her letter to Judge Kelly in October 2014, Ms. Marino indicated that her "replacement" as trustee was the result of an "agreed to Stipulation." See In re Jeanette Marino, 317-2015-AP-0001 (Index #11). However, the record reveals that not only did she object to removal, she requested reconsideration of the order removing her. This, again, further erodes confidence in her overall ability to address Probate Division judges with the candor expected from a certified individual approved for appointment as a guardian under their aegis.

iii) Compliance with Request for Information

The undersigned discerns a similar inability to communicate with candor in regard to another request by Judge Kelly in his letter dated September 30, 2014. See In re Jeanette Marino, 317-2015-AP-0001 (Index #11). In that letter, Judge Kelly requested, inter alia, the names of all cases in which she was then appointed guardian. He also requested "the date on which you last personally visited with your ward." Ms. Marino forwarded to Judge Kelly copies of the certificates of appointment and stated in her reply to him that she had "also noted on each certificate the date of my last in person visit with my Wards." Letter dated October 9, 2014. However, review of those certificates reveals that all fail to indicate the year when she in fact visited that ward, and two provide neither month nor date.[30] That failure to comply with a direct request evinces an essential lack of candor that gives the undersigned pause as to the effectiveness of any court oversight of her activities should a sanction be fashioned that allows Ms. Marino to continue as a guardian.

Standard of Review

[30] At the disciplinary hearing Ms. Marino offered that all the visits reported by month and date were within the twelve months preceding the September 30, 2014 letter of Judge Kelly; however no explanation was given for the reason the year was omitted.

The undersigned begins determination of the appropriate recommended sanction by observing that courts are

> the ultimate guardian of the ward and bear[] responsibility for protecting the ward's person and estate, while the appointed guardian is just an officer of the court. More importantly, guardians are appointed only for the most vulnerable individuals who are incapable of making their own critical decisions, much less vindicating their rights.

In the Matter of the Disciplinary Proceeding Against Petersen, Professional Guardian, 329 P.3d at 863 (citations omitted). Any recommended sanction "is not intended as a mode of inflicting punishment for an offense; its purpose is to protect the public," In re Richmond's Case, 153 N.H. 729, 743 (2006), in particular, vulnerable wards whose well-being the Court is charged with promoting and protecting. See RSA 464-A: 1 (purpose); see generally RSA 464-A:3 (jurisdiction of the court). As such, the undersigned's primary focus is appropriately what sanction should be imposed given the numerous violations of court rules, administrative orders, applicable professional standards and the additional lapses in candor and/or professional judgment set forth supra, such that the Circuit Court can best effectuate its duty to protect our state's most vulnerable and defenseless citizens. Assignment of that duty by the Legislature to the Circuit Court Probate Division, cf. RSA 464-A:2, XIV-b, means that it has been entrusted with the responsibility to make the protection of incapacitated guardianship wards its paramount concern. As such, when serious breaches have been found, the Circuit Court is charged with ensuring that wards will not remain exposed to harm either by intent or by inability of his or her guardian to comply with the standards of professional conduct.

Again, New Hampshire does not have well-defined statutory or common law guidelines for evaluating the appropriate sanction. Some statutes applicable to professional guardians indicate that the Probate Division has broad discretion to remove them from an individual guardianship. These provisions inferentially implicate a preference for revocation of the appointment in order to protect wards. RSA 464-A:39(c) authorizes removal of a guardian when it is found by the court to be in a ward's best interest. Similarly, if a guardian fails to file or settle a proper account within the established statutory period or some other ordered by the court, a citation may issue requiring the guardian to appear and show cause for the failure. See RSA 464-A:37. If the court subsequently finds that failure to be willful or negligent, it may, inter alia, fine the guardian or "terminate" his/her powers. Id. RSA 464-A:10, entitled "Who May Be Guardian," lists professional guardians as a qualified provider, but tellingly also states that "[t]his paragraph shall not be construed to limit the ability of the court to remove any guardian appointed under this chapter." RSA 464-A:2, XIV-b defines "professional guardian" with reference to the court's appointment powers. Specifically, the definition includes a proviso that: "[t]o be eligible for appointment, a professional guardian shall meet criteria established by the administrative judge of the probate court." Id.

An authority specifically applicable to revocation of appointment is Probate Court Administrative Order 16 entitled "Criteria for Professional Guardian," which provides that a professional guardian may be "[s]ubject to removal from the list of approved guardians for non-compliance with any criteria for professional guardians or for good cause as determined by the Probate Court Administrative Judge." Id. ¶ 16. The Order specifies that professional guardians must, inter alia, adhere to the National Guardianship

Association *Standards of Practice*, id. ¶ 3 ("*NGA Standards*"), act in compliance with all applicable statutes, regulations and court rules, id. ¶ 7, and submit fees for court review and approval. Id. ¶11. As such, it seems fair to deduce that failure to perform in conformity with these requirements may form the basis for revocation of appointment.

There may be, however, lesser forms of sanction appropriate in this case. The Center for Guardianship Certification publishes certain regulations governing national certified guardians. Its disciplinary process envisions three levels of sanction: censure, suspension, and revocation. See *Rules and Regulations Regarding Certification and Recertification of National Certified Guardians* at 7-8 (May 3, 2014); cf. *NGA Standards* at 29-30. Certainly, New Hampshire common law, as well as administrative and court rules, governing discipline of attorneys, doctors, judges, and other professionals contemplate escalating levels of discipline based upon the offense, In re Wyatt's Case, 159 N.H. at 306 (attorneys); Appeal of Rowen, 142 N.H. at 74-75 (physicians); In re Coffey's Case, 157 N.H. at 186-91(judges); and provide factors to consider when imposing a sanction. See In re Richmond's Case, 153 N.H. at 743.

After due consideration, the undersigned adopts, as a guiding tool in making its decision, the standard used to evaluate the appropriate sanction when an attorney has violated the New Hampshire Rules of Professional Conduct.[31] Cf. In re Coffey's Case, 157 N.H. at 189 (examination of attorney misconduct can be helpful in different context). The undersigned will utilize the analytical framework undertaken in attorney matters, as

[31] These considerations are based upon the *ABA Standards for Imposing Lawyer Sanctions* (1992).

professional guardians are appointed by the courts. See RSA 464-A.[32] Indeed, like attorneys, professional guardians are entrusted to act in their client's interests. In addition, many attorneys, like professional guardians, have access to their client's money and other financial resources. Indeed, one could argue that professional guardians should be held to a higher standard given their control over a ward's person, direct superintendence and management over their assets, and their wards' diminished or non-existent ability to effectively advocate on their own behalf.[33]

The factors considered in attorney discipline matters include: (1) the nature of the duty violated; (2) the guardian's mental state; (3) the "potential or actual injury caused" by the guardian's misconduct; and (4) "the existence of aggravating or mitigating factors." In re Richmond's Case, 153 N.H. at 743. When there exist multiple misconduct charges, "the sanction imposed should at least be consistent with the sanction for the most serious instance of misconduct among [them]; it might well be and generally should be greater than the sanction for the most serious misconduct." In re Wyatt's Case, 159 N.H. at 306 (quotations omitted). In fashioning a final recommendation for sanction(s), however, consideration should be given by decision makers to the facts and circumstances of the case, determination of a baseline sanction, and "tak[ing] into account both the severity of the misconduct and any mitigating circumstances in the record." In re Richmond's Case, 153 N.H. at 743; see, e.g., In re Clark's Case, 163 N.H. 184, 190-92 (employing process where false statement provided

[32] Some jurisdictions consider them to be "officers of the court." For example, in Washington, professional guardians are subject to court oversight and are considered "officers of the court." In the Matter of the Disciplinary Proceeding Against Petersen, Professional Guardian, 329 P.3d at 859-60.
[33] The attorney discipline standards were not used for judicial discipline as judges are held to a higher standard than attorneys, and thus a more rigorous analysis is used. In re Coffey's Case, 157 N.H. at 171.

to tribunal); In re Morse, 160 N.H. 538, 547 (2010)(employing process where mishandled estate); In re Coddington's Case, 155 N.H. 66, 68-72 (2007) (employing process where there was a failure to safeguard property); In re Wolterbeek, 152 N.H. 710, 714-16 (2005). In the end, however, the sanctioning should be guided by the fundamental concern set forth above, namely the duty to protect vulnerable wards from harm.[34]

Analysis

In applying the analysis set forth above, "the first step is to categorize the . . . misconduct and identify the appropriate sanction. After determining the sanction, [it is fair to] consider the effect of any aggravating or mitigating factors on the ultimate sanction. In re Wolterbeek, 152 N.H. at 714. The undersigned is mindful that where, as here, there are multiple findings of misconduct, the baseline sanction is that appropriately imposed on the most egregious violation. In re Wyatt's Case, 159 N.H. at 306.

The "nature of the duty violated" is next addressed. As set forth supra, Ms. Marino has been adjudicated to have committed a substantial number of violations of Circuit Court rules, an administrative order, and standards of professional conduct. In this instance, I must wrestle with multiple findings of misconduct, in two separate matters. With respect to the mental state component, the undersigned observes that it "may be one of intent, knowledge, or negligence. What is relevant is the volitional

[34] Ms. Marino suggests that the undersigned adopt the standard used to evaluate sanctions against guardians ad litems. See *Proposed Findings of Fact and Rulings of Law* ¶20; see generally, N.H. Code Admin. R. GAL 402.02(b). However, I have chosen not to adopt this standard because, although both professional guardians and guardians ad litem share somewhat common nomenclature, professional guardians possess far more power over the ward's person and access to their treasure than a GAL who acts in an advisory/representative capacity. In any event, I surmise that given the severity and number of violations, the recommended sanction would be the same under either test.

nature of the . . . acts, and not the external pressures that could potentially have hindered [Ms. Marino's] judgment." In re Wyatt's Case, 159 N.H. at 307 (quotations, citations, and ellipses omitted). In the attorney discipline context, "[d]isbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client. However, suspension is generally warranted when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client." In re Richmond's Case, 153 N.H. at 743-44 (quotations and citations omitted); cf. In re Wolterbeek, 152 N.H. at 714 (disbarment appropriate where lawyer acts with the intention to benefit himself). As such, the analysis will begin with a determination of the appropriate sanction for the most serious violations in each matter based upon the nature of the action and her mental state when undertaking it.

The most concerning violation is the act in the J.L. matter directing payment to herself and counsel from funds held by the Moore Center for fees that had not been approved, and ultimately never were; and (2) failing to report the payment of these fees in an accounting filed under oath with the Court. "In cases involving . . . misuse of client funds, [decision makers] often take severe disciplinary action." In re Coddington's Case, 155 N.H. at 70.

Further, the ability of Probate Division judges to rely on a professional guardian acting with candor is essential to both protection of a ward and the functioning of the entire professional guardian program. Cf. In re Clark's Case, 163 N.H. 184, 191, ("The confidence of judges to rely with certainty upon the word of attorneys forms the very bedrock of our judicial system"). Although Ms. Marino eventually disclosed the $4,800

payment in her second *Motion for Reconsideration*, in its initial decision on the request for additional fees, and consideration of the first *Motion for Reconsideration*, the Probate Division was operating under the assumption that she had, to date, only billed for $2,193 as reported on the accounting filed in July 2014, when in fact a month prior to submission of the account she had *collected* $4,800 from the Moore Center. In the attorney context, the Supreme Court views withholding information from the court as warranting serious sanction. Attorneys face suspension "when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding," In re Wolterbeek, 152 N.H. at 715 (quotations omitted), and disbarment where there is an intent to deceive the courts. Id.

Consequently, the undersigned concludes that the appropriate sanction for the $4,800 payment from the Moore Center, failure to report it in the accounting submitted under oath, and email requesting the Moore Center to pay her in advance of approval of the $4,641.19, is **suspension** from the approved list of professional guardians. Although the undersigned would be justified in recommending removal as the $4,800 payment was to her own benefit, see id., I am reluctant to recommend a sanction based upon intent to deceive or that there was knowing conversion.[35] Rather, I am confident in my conclusion that Ms. Marino knew or *should have known* she was dealing with J.L.'s property in an improper manner and that her accounting did not include material information. See Final Order on Guardian Fees at 6-7. The undersigned does not view

[35] I would be more inclined to impose removal given her email to the Moore Center. However, my understanding is that those funds were ultimately never forwarded to her.

her eventual footnote disclosing the $4,800 payment in the Second Motion for Reconsideration as an attempted remedial act. As noted infra, viewed in context, it was not intended to clarify the record, nor was repayment offered at the time of "disclosure."

The undersigned also observes that Ms. Marino demonstrated either a lack of knowledge, or intentional unwillingness to abide by, certain requirements that it discerns are basic duties of a professional guardian. First, it is fundamental that a professional guardian may not collect and retain fees absent court approval. See, e.g. Cir. Ct. Prob. Div. R. 88 & 108; NGA Standards 18, VIII & 22, III. In J.L., Ms. Marino directed the Moore Center to "cut a check" for $4,800 in fees that not only had yet to be reported, but were not preapproved. In addition, she emailed the Moore Center requesting payment of $350 per month from the ward's social security benefits of $4,642.19 knowing the petition for court approval was pending. See id. As such, this complete lack of understanding warrants, from a public protection standpoint, an immediate suspension from the list of approved professional guardian.

With respect the M.P. matter, of the eight violations found by the Probate Division and affirmed by the Supreme Court, the undersigned concludes that the most serious among them are those that directly pertain to a failure to sufficiently value or consider M.P.'s personal dignity. See NGA Standards 3, 9, 12. In particular, I note the Probate Division's finding that: "Ms. Marino demonstrated a callous disregard for the needs and requests of Ms. Payan." Order (Aug. 15, 2014). Thus, sanctioning must be fashioned commensurate with this breach of a guardian's duty. In doing so, I am mindful of the observation in the NGA's *Model Code of Ethics* that:

> the imposition of guardianship bestows grave and far-reaching authority upon the person appointed as guardian.

> The authority of the guardian may encompass the control of the ward's bodily integrity, place of residence and personal finances. The potential scope of this authority is vast and requires the guardian to act with the greatest degree of care and circumspection. The potential for abuse of this power, whether deliberate or well-meaning, must be appreciated, acknowledged and guarded against.

Id. at 9-10. Ms. Marino's failure to appropriately value M.P.'s personal dignity and integrity warrants imposition of a serious sanction given that it demonstrates a willingness to ignore or disregard a person she exerts great power over, and thus I must conclude that others should be protected from exposure to similar risk.

The undersigned accepts that Ms. Marino believed that the Concord facility is "better" in terms of its institutional setting and programs offered. I also accept that it is a more expensive facility. It is doubtful that Ms. Marino could have known whether it was *better for M.P.* given the lack of engaged cooperation with her care team, absence of consult with her physicians, and specific endeavored discussion with M.P. about the option of moving from Franklin to Concord and away from her best and fondest friend. I do not conclude that Ms. Marino's belief was reasonable under attendant circumstances. Given my over 35 years of experience as a probate judge, I am particularly mindful of an incapacitated ward's vulnerability. Society can sometimes be dismissive of the retained individuality of incapacitated persons as they often struggle to fully communicate with the outside world. As such, they are particularly dependent upon care-givers and guardians not to treat them as an impoverished shell of a being devoid of personal integrity. Here, again it seems that the appropriate sanction is suspension from the approved list of professional guardians.

Next the undersigned considers the concern of consequential injury to the wards. In the J.L. matter, the $4,900 that Ms. Marino paid herself is not, in a vacuum, a princely sum. However, J.L. was deemed indigent, and as such, in a relative sense it caused serious injury to him.[36] Similarly, seeking prepayment of $350 a month for fees ultimately deemed, for the most part, unreasonably charged, would have deprived him of precious income as an indigent person. In addition, the undersigned observes that serious sanctions have been imposed on attorneys for mishandling of funds totaling less than $10,000. See In re Farley's Case, 147 N.H. 476, 477 (2002)(attorney was out of trust for approximately $3,000). In the M.P. matter, although her injury may not have been economic, she was, with "callous disregard" robbed of personal integrity and she lost treasured daily contact with the one individual with whom she was then most attached and in fact, provided more love and support than her own family.[37]

The undersigned now considers aggravating and mitigating factors. In mitigation Ms. Marino offers the fact that she does not have an extensive history of disciplinary actions and this appears to be the case. In addition, under suggestive questioning from her counsel she offered that she is remorseful. The undersigned does not doubt that she showed remorse during its hearing; however, after review of the pleadings and transcript in M.P., and as evidenced in the multiple motions for reconsideration and transcript provided in J.L., I discern little display of remorse before the trial court.

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[36] Ms. Marino justifies this payment as an attempt to "spend down" his assets so as not to endanger his indigent status. She did not, however, completely inform the undersigned why other options for the "spend down" that more directly benefitted J.L. were not considered.

[37] As such, I cannot agree with counsel's closing argument at the hearing that Ms. Marino's "missteps" resulted in no direct harm to J.L. and M.P.

Ms. Marino offers as mitigation the fact that she has been a professional guardian for many years and has taken many continuing education courses necessary to maintain her NGA certification. This is also true, but on the facts of this case it offers little by way of mitigation. This is because after consideration of the record, the undersigned was fairly shocked at the number of lapses in professional competence that were brought to light. In the M.P. matter, her level of, and willingness to, communicate with the care team was well below what one should expect. In J.L., she did not promptly return to the ward a $1,094.25 insurance refund check. "Typos" resulted in $1,100 over-charge of fees for guardianship over the person services although she was only appointed guardian over the estate. Similarly, the undersigned finds that the facts of the W.R. matter display a complete lack of professional competence and questionable ethical judgment.

Finally, the undersigned finds as an aggravating factor that despite many years of appointment as a professional guardian, there are a stunning number of instances, in addition to those serious lapses noted supra, demonstrating a certain lack of candor that makes me question how much trust any court might place in her in the future if I were to recommend, and Judge Kelly accept, a sanction less than suspension or removal. She was not entirely truthful in her response to Judge Kelly concerning the voluntary nature of her removal as trustee T.B. special needs trust matter. She supplied the certificates of appointment, but did not comply with the request that she also provide Judge Kelly with fully recited dates that she last visited her wards. In J.L., she presented differing recitals of the mechanics leading to her claimed $1,100 "typo" for the printed billing invoice for "Guardianship Services – Monthly Fee" after both Judge King

and the undersigned expressed measured dubiosity over her proffered explanations during hearings before us.

Ms. Marino further offers that removal as guardian in both M.P. and J.L. was sufficient sanction. However, removal was effectuated because it was deemed in the best interest of the ward. See RSA 464-A:39(c). By statute, the focus of inquiry in relation to removal is on the ward, not sanctioning the professional guardian. This separate disciplinary process expands the inquiry from the interests of one ward, to protection of the public and potential future wards. Considerations include more systematic concerns. For example, the undersigned is concerned not only about her serious breaches of professional conduct, but about her lapses in professional judgment and multiple instances where she demonstrated less than complete candor with Judge Kelly, the trial court judges or the undersigned. As such, it must take into consideration whether the Probate Division, charged with oversight over some of the State's most compromised and tenuously postured citizens, can, with some measure of comfort and confidence, allow her to perform professionally or trust her representations to the courts.

Ms. Marino also urges the undersigned to consider a binder of disciplinary decisions from both the New Hampshire Guardian ad Litem Board[38] and the State of Washington Certified Professional Guardian Board. I have reviewed these materials, and although I appreciate the sheer effort it took to compile this information, it does not materially alter my recommendation. The Washington State cases submitted involving charges similar to most serious ones advanced in this matter, namely that a guardian or

[38] As noted supra, the undersigned does not discern that GAL Board decisions are applicable to sanctions placed upon a professional guardian given the higher level of responsibility granted a professional guardian who has broad access to an incapacitated ward's treasure and power over the affairs of his or her person. Put another way, the undersigned's analysis must take into account that the risk of injury is vastly higher in the case of a professional guardian.

guardianship service advanced fees without prior court approval, have a broad range of agreed-to sanctions from simple admonishment to revocation, and involved facts not readily comparable to the matter at bar. Compare In re Pamela Privette, CPG No. 2013-052; 060 & 2014-003 with In re Paula Zamudio & Reliable Guardianship Services, CPGB Nos. 2011-038 & 042. These cases do demonstrate that the proper sanction is highly case specific. For example, in the Privette matter, the professional guardian advanced herself fees prior to court approval, under-reported fees taken, mismanaged client's cases, and did not properly communicate with key providers. She also violated a prior agreement concerning discipline. She was found to have violated four standards of professional conduct. The professional guardian *reached an agreement* with the Board that, inter alia, her certification be revoked.

On the other end of the spectrum of discipline for advancing fees prior to court approval was *the agreement* between the board and Ms. Zamudio that she should only be reprimanded for three violations of the applicable code of conduct. In that matter, Ms. Zamudio's employer and co-respondent, Reliable Guardianship Services, had already been de-certified and the ward's primary contact was with another guardian employed by Reliable Guardianship Services. Ms. Zamudio was found to have engaged in a good faith effort to rectify the consequences of misconduct.

Recommendation

After due consideration and in recognition of vulnerability of wards placed under guardianship, the serious nature of the violations of court rules, administrative orders, the multiple violations of the NGA standards of professional conduct, the undersigned RECOMMENDS that a baseline sanction of **suspension** from the approved list of

professional guardians **for at least two years** is appropriate in this matter. Although Ms. Marino has been a professional guardian for many years, in light of the serious nature of the found violations, the undersigned's surprise at the instances of questionable professional conduct casting doubt on her competence and/or knowledge of fundamental standards, and repeated lack of candor that calls into question the degree of trust that may be placed in her and her submissions to the Probate Division, there is deep concern for the continued well-being of the wards' persons and proper application of their resources regardless of amount.

I also recommend that because of these concerns, **suspension be effective pending any appeal**, see infra, and effectuated as soon as her current appointed cases may be transferred to other guardians.

The undersigned also recommends that a copy of this recommendation and the Chief Administrative Judge's decision on such sanction(s) as is/are imposed be filed immediately with the NGA and/or Center for Guardianship Certification.

In light of her long-time experience as an appointed professional guardian, I recommend that the Chief Administrative Judge afford her the ability to apply for reinstatement at the end of the suspension period provided she meets all requirements of the administrative rules.

Finally, the undersigned also recommends that the Chief Administrative Judge allow Ms. Marino, if she chooses, opportunity to file an appeal with the New Hampshire Supreme Court. Although one recent opinion found that due process "does not require states to afford litigants a right to appellate review," D'Angelo v. New Hampshire Supreme Court, 740 F.3d 802, 806 (2014), in the interest of fairness, it is

recommended that the opportunity to appeal the disciplinary decision to the Supreme Court be afforded, leaving to the Supreme Court whether to accept or reject any such proffer is made[39]

The Clerk is directed to immediately deliver this Disciplinary Recommendation to Chief Administrative Judge Kelly and Attorney Eby on behalf of Ms. Marino.

Dated: 4/7/16

Gary R. Cassavechia, Judicial Referee

[39]It is unclear whether the appeal would be taken up as a Rule 11 *Petition for Original Jurisdiction* as the Chief Administrative Judge is acting in his administrative capacity and would be deciding a question not previously addressed by the Supreme Court and from a procedure arguably subject to the Supreme Court's supervisory jurisdiction. See Sup. Ct. R. 3 (definition of "petition for original jurisdiction"); R. 11. It may also be a straight Rule 7 *Appeal from Trial Court Decision on the Merits* if the action is deemed to be taken by a "trial court." See Sup. Ct. R. 3 (definition of "decision on the merits'); R. 7.

Also, it is unclear what level of review will be properly engaged in by the Supreme Court. Unlike attorney discipline matters, see Case of Wood, 137 N.H. 698, 700 (1993), where court rule places ultimate authority in the Supreme Court, by statute, the Circuit Court is granted particular authority to oversee the guardians appointed by it, see RSA 464-A:10; RSA 464-A:2,XIV-b, and thus, oversight may be more deferential. See In the Matter of the Disciplinary Proceeding Against Petersen, Professional Guardian, 329 P.3d. at 858. These determinations are more appropriately left for the Supreme Court.