

STATE OF NEW HAMPSHIRE

CIRCUIT COURT ADMINISTRATIVE ORDER 2016-007

IN RE: JEANNETTE MARINO DISCIPLINARY MATTER

ORDER

Pursuant to Circuit Court Administrative Order 2015-14, a Disciplinary Recommendation in this matter was submitted on April 7, 2016 by Judge Gary Cassavechia. See No. 317-2015-AP-0001 (Index #18). The Recommendation recites in great detail the facts found by Judge Cassavechia, two trial judges and, in one case, confirmed by the New Hampshire Supreme Court. See In re: Guardianship of M.P., No. 2014-0655 (Unpublished Order dated September 14, 2015).

Based upon those findings, Judge Cassavechia has recommended that:

1. Ms. Marino be suspended from the approved list of professional guardians for a period of at least two years, effective immediately;
2. A report be filed with the appropriate certification authorities of the National Guardianship Association and/or the Center for Guardianship Certification; and
3. Ms. Marino be afforded the opportunity to petition for reinstatement after the suspension period.

I accept the findings upon which Judge Cassavechia based his recommendations; however, for the reasons which follow, I respectfully disagree with those recommendations and order an immediate and permanent removal of Jeannette Marino from the approved list of professional guardians.

I. Findings

The following findings against Ms. Marino have been judicially determined after multiple hearings in the trial courts, the New Hampshire Supreme Court and before Judge Cassavechia in this disciplinary process:

- She intentionally and improperly paid fees to herself, and subsequently misrepresented those fees in an account filed with the court under oath, in violation of Circuit Court—Probate Division Rules 88 and 108, as well as multiple standards of the National Guardianship Association (the “NGA Standards”). The fees were taken from funds that represented the retroactive Social Security payment sent to the facility where her ward was living at the time. See Guardianship of J.L., No. 317-2013-GI-00260;

- She intentionally and improperly paid fees, without the approval of the court, from a ward's estate to a private attorney hired by the guardian and paid "market rates" after the ward had been found indigent and approved for court-appointed counsel. The improper payment was later found by the trial court to have resulted in an overpayment of \$1,452.00, which, as the court (King, J.) noted in its order, would not have been approved had it been properly submitted to the court for approval prior to payment, as required by law. See id.;
- She submitted charges for her services as a professional guardian found by the trial court (King, J.) to be facially unreasonable, given that the fees amounted to 170% of the ward's total assets. See id.;
- She intentionally attempted to recover a fee of \$1,100.00 as guardian over the person of J.L. when, in fact, she was only the guardian over his estate. In her effort to explain her conduct to the court after it discovered the charge, she falsely claimed that the entry on the invoice she submitted for payment of this amount was at first for "mileage" and, subsequently, due to an "auto correct" error when typing in the amount. Both the trial judge (King, J.) and Judge Cassavechia found her explanation to lack credibility. See id.; Disciplinary Recommendation at 18-19;
- She suddenly and inappropriately removed an elderly woman with dementia, over whom she had been appointed as guardian, from a nursing home facility in which she had become comfortable to another facility. The trial court (Leonard, J.) found her actions to have been done with "a callous disregard for [the ward's] needs and requests...." Ms. Marino was further found to have engaged in subterfuge and lies directed toward the ward and professional staff at the facility to accomplish this inappropriate removal from the facility. Based upon her conduct, she was removed as guardian, for cause, by the trial judge, and the actions of the guardian were ultimately reversed. The removal was upheld by the New Hampshire Supreme Court. See In re Guardianship of M.P., No. 2014-0655 (September 14, 2015);
- She executed a document which had the effect of appointing herself as agent, under a general power of attorney, for a developmentally disabled individual ("W.R."), over whom she served as guardian, while he was still under guardianship. The document was witnessed by the ward's wife, who was similarly disabled, and notarized by Ms. Marino. See Guardianship of W.R., No. 317-2010-GI-00444. Judge Cassavechia found that the document was obviously defective, endangered the validity of all transactions completed during its roughly six-year existence, and highlighted the public policy concern of a professional guardian arranging for the grant of broad agency powers for herself that will extend beyond the termination of the then-existing guardianship, without any oversight by a court or even the participation of an independent notary. See Disciplinary Recommendation at 21; and,
- She demonstrated a complete lack of candor to the undersigned in my capacity as her appointing authority when, in September 2014 and in the course of an administrative investigation into her conduct as a professional guardian, I directed her to forward a list

of any guardianships from which she had been removed other than the Guardianship of M.P. In her response, she indicated that she had never been removed as guardian but had been replaced, as “the result of an agreed to Stipulation”, as Trustee for a Special Needs Trust in the case of Guardianship of T.B., No. 317-2010-GI-00337 and the Special Needs Trust of T.B., No. 317-2010-TU-00853. In point of fact, Judge Cassavechia found that Ms. Marino had not been removed by agreement, but rather had been removed as Trustee by the court for cause, including regularly charging excessive and unreasonable fees. See Disciplinary Recommendation at 22. Indeed, Judge Cassavechia observed that she filed a Motion for Reconsideration of that decision. Id. In short, her assertion that her removal as Trustee was the “result of an agreed Stipulation” was nothing short of a bold-faced lie made directly to her appointing authority in the course of an investigation into her conduct.

II. Analysis

Judge Cassavechia's review of this matter was exhaustive, as were those of the trial judges in each of the underlying cases which are the subject of this disciplinary process. I will not repeat the details of the findings except as necessary to support my decision as to the sanctions to be imposed. Reference should be made to those orders and the Disciplinary Recommendation for more detail. Judge Cassavechia based his recommendation for sanctions on an analysis of the standard utilized in attorney discipline matters. In re: Richmond's Case, 153 N.H. 729, 743 (2006).

I believe the fiduciary responsibility of a guardian to a ward is significantly different than that of an attorney toward a client and should require a higher standard of scrutiny in cases where improper conduct is alleged to have occurred. The most obvious difference between the two professional relationships is that, by the very definition of guardianship, the guardian is always acting on behalf of someone who lacks the capacity to act for themselves. See RSA 464-A:1 (purpose). Indeed, the two primary cases forming the basis for this disciplinary action are a clear demonstration of the vulnerability of every ward for whom a guardian is appointed and speak loudly and clearly in favor of a higher standard. Having said that, however, the articulation of that higher standard is not mine to make in the context of this case. I have chosen, therefore, to review the recommendations for sanctions using the attorney discipline standard, as suggested by Judge Cassavechia.

I also make note of his decision to apply a preponderance of the evidence standard in making his recommendation. See Scheduling Order at 12-13 (November 24, 2015)(Index #4). Judge Cassavechia informed Ms. Marino that this was to be the standard used and gave her an opportunity to object. Id. at 2. None was forthcoming. See Structuring Conference Memorandum (Index #5). Judge Cassavechia selected that standard of proof in light of the New Hampshire Supreme Court's decision that this was appropriate in the context of discipline of psychologists. See Petition of Grimm, 138 N.H. 42, 49-51 (1993), and the Washington Supreme Court's observation that given the critical need to “effectively regulate guardians so as to protect the most vulnerable individuals,” a preponderance standard was appropriate. In the Matter of the Disciplinary Proceeding Against Petersen, Professional Guardian, 329 P.3d 853, 863 (Wash. 2014); see Scheduling Order at 10, 12-13. In this disciplinary matter, the Circuit Court has a duty to protect wards, who, by definition, are incapacitated and dependent upon the professionalism and ethics of the guardian appointed over them, and thus use of the preponderance standard by Judge Cassavechia was appropriate. Cf. In re:

Reiner's Case, 152 N.H. 163, 168-69 (2005) (upholding preponderance standard in attorney discipline matter to protect public and integrity of profession); Petition of Grimm, 138 N.H. at 49-50 (significant interest in psychologist license protected by use of the preponderance standard).

Early in his report, Judge Cassavechia noted that, "[t]he 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." See Disciplinary Recommendation at 2. He goes on to correctly further note that, "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." Id. at 24.

Using the attorney discipline process as the template for consideration of whether and what sanction should be imposed for Ms. Marino's behavior and conduct, there are four factors to be considered:

1. The nature of the duty violated;
2. The guardian's mental state;
3. The potential or actual injury caused; and,
4. The existence of aggravating or mitigating factors.

See, e.g., In re: Richmond's Case, 153 N.H. at 743.

(a) Nature of the Duty Violated

In Judge Cassavechia's Report, he finds that Ms. Marino's conduct, as summarized earlier in this Order, violated at least two Probate Division Rules, an Administrative Order and a substantial number of standards of the National Guardianship Association. See Disciplinary Recommendation at 6-7, 14, 19, and 28.

Probate Court Administrative Order 16, entitled "Criteria for Professional Guardians," requires that professional guardians comply with the NGA Standards. Among the duties imposed by the Administrative Order and the NGA Standards found to have been violated are the following:

- Compliance with all applicable statutes, regulations and court rules (Administrative Order 16 and NGA Standard 1);
- Submission of all fees to the court for review and approval (Administrative Order 16 and NGA Standard 22);
- Submission of only those fees that are reasonable and related to guardianship duties (Administrative Order 16 and NGA Standard 22);
- Treatment of the person under guardianship with dignity (Administrative Order 16 and NGA Standards 9-13); and
- Treatment of all professionals and service providers with courtesy and respect and strive to enhance cooperation on behalf of the person (Administrative Order 16 and NGA Standard 5).

Not listed specifically in either the Administrative Order or the NGA Standards is the implicit duty to be truthful in all pleadings and documents filed with the court and to exercise candor and forthrightness with the court.

Where there are multiple misconduct charges, “the sanctions imposed should at least be consistent with the sanction for the most serious instance of misconduct among a number of other violations; it might well be, and generally should be, greater than the sanction for the most serious misconduct.” Wyatt’s Case, 159 N.H. 285, 306 (2009). The most serious of the duties that Ms. Marino violated was her duty to treat M.P., a ward in her care, with dignity and respect. Equally serious, however, were her misrepresentations and outright untruthfulness in accounts filed with the court and responses to inquiries connected to this investigation.

As to her duty to treat wards in her care with dignity and respect, it is my opinion that in Guardianship of M.P., we are dealing with actions that are of a vastly different and even more disturbing nature than the serious misbehavior she exhibited in the case of Guardianship of J.L. Judge Cassavechia stated the issue eloquently in his Disciplinary Recommendation when, in speaking of an incapacitated ward’s vulnerability, he said, “[s]ociety 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.” Id. at 32. Judge Cassavechia found that Ms. Marino failed, “to appropriately value M.P.’s personal dignity and integrity....” After making that observation, he said her actions demonstrated “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.” Id.

(b) Guardian’s Mental State

Judge Cassavechia noted the findings of the trial judges that Ms. Marino intentionally committed violations of the Probate Division Rules and NGA Standards, including her failure to properly account for funds she received in the Guardianship of J.L. See Disciplinary Recommendation at 6-7, 14-15. In that case, Judge King, as trial judge, specifically found that had the guardianship not already been terminated, he would have removed her for cause, based on her conduct. Id. at 14. Judge Cassavechia added to Judge King’s criticism of Ms. Marino and found that her conduct “demonstrated a stunning lack of professional competence.” Id. at 14. Also, in the J.L. case, Judge King said that her 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.” Id. at 15 (quotations omitted). He concluded by saying that given her “self-described abilities and significant experience handling complex matters,” he believed it was more likely the latter. Id. (quotations omitted).

At the hearing before Judge Cassavechia, Ms. Marino was given yet another opportunity to explain her actions in the case of J.L. Her response resulted in Judge Cassavechia observing that, “either she is not being forthright, or does not fully comprehend that her conduct was problematic.” Id. at 16. He went on to say 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.” Id. at 17.

Finally, if the findings cited above were not enough to cause one to distrust Ms. Marino’s truthfulness, there was her obvious lie to me in the course of my initial investigation cited earlier in this Order. Supra at 2-3.

Based on the findings of the referee and two trial judges, the conclusion is inescapable that Ms. Marino acted intentionally when, through subterfuge and lies, she moved M.P. from the original nursing home, when she filed the deficient accounts and invoices in the case of J.L., and when she lied to me about the nature of her removal in the Special Needs Trust of T.B. during my original investigation of improprieties.

(c) Potential or Actual Injury Caused

Again, using the template of attorney discipline cases, our Supreme Court, in the case of In re: Morse, 160 N.H. 538, 547 (2010), defined injury as, “harm to the client, the public, the legal system or the profession which results from a lawyer’s misconduct.” When reading the facts related to Ms. Marino’s treatment of M.P., it is nearly impossible not to find the resulting damage to this woman to be serious. She was removed from an environment she had grown comfortable with and from a person who provided her with friendship to the point the two were described as “inseparable”.

That, however, is not the end of the damage caused by this guardian’s actions. The lies and subterfuge she used in accomplishing this removal stand as a signpost for misconduct beyond which no guardian should ever be allowed to proceed. Her behavior stands out as conduct that we, as a court charged with the responsibility for incapacitated individuals, need to prevent at every turn. If the court cannot trust that the guardians it appoints to care for those truly most vulnerable among us will be truthful and compassionate to their wards, and work professionally and collaboratively with other service providers, then how can we fulfill the obligation we have as a court to protect those who are placed in our care and under our responsibility by statute?

The damage to J.L. was no less severe in its own right and equally demonstrative of a very disturbing attitude on the part of this guardian that, frankly, reeks of arrogance. Somehow, this guardian felt no compunction to charge fees found to be facially unreasonable by the trial court and amounting to 170% of this ward’s entire, very modest estate. Notably, the trial court found the fee request unreasonable even before it learned of her collection of a \$4,800 additional fee directly from the ward’s retroactive social security payment. Additionally, she intentionally failed to disclose to the court the payment of fees to herself to which she was not entitled and then repeatedly tried to justify her failure through the filing of Motions to Reconsider. Finally, as Judge Cassavechia observed in his Recommendation, while her fee request was pending, Ms. Marino emailed the facility with control over J.L.’s social security funds asking that they begin paying her \$350 per month towards fees that were not yet approved by the court and subsequently largely denied as unreasonable. Id. at 13.

In Morse, 160 N.H. at 548-49, the Court states firmly, “no single transgression reflects more negatively on the legal profession than a lie.... The confidence of judges to rely with certainty upon the word of attorneys forms the very bedrock of our judicial system.” Id., citing, Young’s Case, 154

N.H. 359, 369 (2006); Kalil's Case, 146 N.H. 466, 467 (2001). For our purposes, these principles apply equally to guardians.

The injury to each of the wards, the integrity of the guardianship process, and to the ability of the court to carry out its mandate to protect those entrusted to its care is self-evident, real and significant.

(d) Mitigating and Aggravating Factors

In balancing mitigating and aggravating factors, Judge Cassavechia found only two mitigating factors. They were that Ms. Marino does not have an extensive history of disciplinary actions, and that she has taken many continuing education courses necessary to maintain her certification. However, he also found that the latter factor offers little in the way of mitigation, given what he characterized as a shocking number of lapses in professional conduct brought to light by these cases. In fact, he found that the number of those lapses were actually aggravating factors. See Disciplinary Recommendation at 34.

In addition, of course, are the further aggravating factors noted earlier concerning the lies and subterfuge she used toward other professionals, as well as the trial courts, and me in the course of my initial investigation. Finally, it is clear from the record that this guardian not only showed no remorse when she was before the trial courts, she showed virtually no awareness of the severity of her conduct. It was only during the disciplinary proceeding before Judge Cassavechia that she began to show remorse; however, as noted by Judge Cassavechia, that was apparently only with the assistance of "suggestive questioning" by her attorney. Id. at 33.

In my judgment, there is no realistic way that I can assure incapacitated people who are put under the guardianship of Ms. Marino that they will be treated with dignity or that their financial and other affairs will be handled professionally or competently. Ms. Marino has been a professional guardian since 1999. Almost seventeen (17) years of practice as a guardian should clearly have produced someone who thoroughly understood court rules and procedures. From the vast contact she has had with incapacitated individuals, we should have been able to expect that her compassion and concern for the dignity of these most vulnerable individuals would be without question. And, from her many years appearing in the courtrooms of this state, we should have been confident that she would exercise what our New Hampshire Supreme Court calls an "unswerving allegiance to the truth." In re: Morse, 160 N.H. at 549.

The findings of the trial courts and Judge Cassavechia convince me otherwise. In speaking of the serious issues raised by her conduct in the case of J.L., Judge Cassavechia said he found no factors in mitigation of her behavior and believed that her serious offenses could only be explained, "as either significant lapses of professional incompetence, or, a more sinister pattern of intentionally enriching herself and others from the limited resources of her ward." Disciplinary Recommendation at 19.

There is no level of continuing education or training that will instill truthfulness in an untruthful person, integrity in someone who is self-interested, or compassion in someone who can act with callous disregard to one as vulnerable as M.P. A suspension, with any hint of possibility that she

could someday resume the role of guardian over any person, will not protect current or future wards in her care. I find her conduct to demonstrate a lack of professional competence and personal integrity such that no court should ever be allowed to appoint her to a position of trust again.

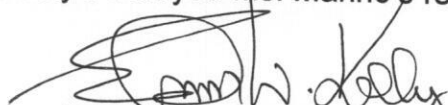
Therefore, I am ordering that the certification of Jeannette Marino as a Professional Guardian be immediately and permanently revoked.

I am also ordering that a copy of this Order, Judge Cassavechia's Disciplinary Recommendation, and Circuit Court Administrative Order 2016-008 be forwarded to the following individuals, agencies and associations:

All Judges of the Circuit Court Probate Division;
New Hampshire Attorney General;
New Hampshire Department of Health and Human Services- Bureau of Elderly and Adult Services;
U. S. Social Security Administration, Concord office;
National Guardianship Association;
Center for Guardianship Certification;
Attorneys for All Wards under Ms. Marino's Guardianship;
Family members of all Wards under Ms. Marino's Guardianship; and
J.L., M.P., W.R., T.B., and/or their attorneys, guardians, trustees of special needs trusts, and family members.

Ms. Marino shall immediately make available all of her files having to do with any active Guardianship matter in which she is involved to the successor guardian(s) to be named. She shall, within thirty (30) days of this Order, file Final Accounts in every case in which she is currently serving as guardian over the estate.

Without commenting on whether Ms. Marino has a right of appeal to the New Hampshire Supreme Court, if she chooses to do so, I will not stay the Orders entered supra, pending that appeal. The decision not to stay the Orders is made out of concern for the public's safety, and my statutory duty to protect incapacitated individuals. Cf. Sup. Ct. R. 37A(d)(4) (attorney sanction need not be stayed pending appeal if the Professional Conduct Committee orders otherwise and states reason). Ms. Marino has been found, by two trial judges, a referee, the New Hampshire Supreme Court upon appellate review, and the undersigned, to have committed multiple serious breaches of the standards of conduct, violated the rules of this court, and demonstrated a certain lack of professional conduct and candor to the courts. The undersigned has a duty to protect this state's most vulnerable citizens. The courts are dependent upon the professional ethics and competence of professional guardians in the first instance. I would be derelict in that duty if I stayed Ms. Marino's removal, pending appeal.



Edwin W. Kelly, Administrative Judge
New Hampshire Circuit Court

May 6, 2016