

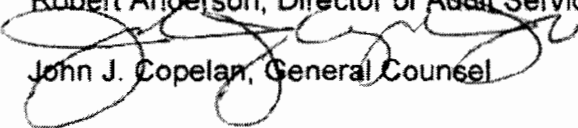
State of Florida
Department of Children and Families

Charlie Crist
Governor

George H. Sheldon
Secretary

MEMORANDUM

TO: David Fairbanks, Assistant Secretary for Programs
Robert Anderson, Director of Adult Services

FROM: 
John J. Copelan, General Counsel

DATE: November 25, 2008

RE: General Counsel Opinion No. 2008-01 (Corrected Copy)
DCF's authority to file petitions to determine incapacity and to appoint guardian

Question: May the Department of Children and Families be the petitioner in a Petition to Determine Incapacity under section 744.331, Florida Statutes, or a Petition for Appointment of Guardian pursuant to section 744.334, Florida Statutes?

Answer: While the Department's statutory authority to file these petitions is the subject of proposed legislation, the short answer is yes. For the reasons set forth below, the Department may file such petitions (1) after all other alternatives have been explored by the Department for the health and safety of the individual under the provisions of F.S. 415, providing for protective services for vulnerable adults, and (2) the Department is satisfied there is no one else available, capable, and willing, to file such petitions on behalf of the individual.

Discussion:

The mission of the Department, as set forth in section 20.19(1)(a), Florida Statutes, is "to work in partnership with local communities to ensure the safety, well-being, and self-sufficiency of the people served", and this language appears to be broad enough to support this agency action. While the law does not specifically authorize the Department to file a petition to determine incapacity or petition for appointment of guardian¹, neither does it preclude the Department from doing so.

To the extent the Department has filed such petitions in the past, we are not aware of any parties or the Court in such proceedings who have questioned the Department's action. Chapter 415 sets the authority for the Department to file a petition for an order authorizing the provision of protective services to vulnerable adults to prevent abuse, neglect, and exploitation. Chapter 744 provides the process by which a person may be determined incapacitated under Florida guardianship law and outlines provisions applicable to ward-guardian relationships in the state.

¹ Legislation is being proposed for next legislative session to authorize the Department to file petitions for incapacity and guardianship.

1317 Winewood Boulevard, Tallahassee, Florida 32399-0700

Petitions to determine incapacity and petitions for appointment of guardian are, in practice, filed together. Section 744.3201(3) states, "a copy of any petition for appointment of guardian... shall be filed with the petition to determine incapacity." To avoid adjudication of incapacity without a prospective guardian in place, the courts require that both petitions be filed together. Although a petition for appointment of guardian can be filed before a petition to determine incapacity, a petition for appointment requires a statement of the nature of incapacity, making it appropriate to file both petitions simultaneously. See section 744.334(1), Florida Statutes.

Although court filing fees for both these petitions can amount to hundreds of dollars, it is important to note that the Department, like all state agencies, is exempt from filing fees in circuit courts, district courts of appeal, and the Supreme Court of Florida. See sections 25.241(3), 28.345, and 35.22(3), Florida Statutes. This exemption applies to "all court-related fees and charges assessed by the clerks" in circuit court, but only to filing fees in the higher courts. *Id.*

The following concerns have been considered by our office in connection with the filing of petitions to determine incapacity and petitions for appointment of a guardian:

Issue One: Whether, despite the absence of specific authorization in Chapter 415, the Department may file petitions to determine incapacity or petitions for appointment of guardian.

Chapter 415, Florida Statutes, which describes the protective service functions of the Department, does not specifically authorize the Department to file either petition. Section 415.1051, F.S., describes those instances when DCF protective services interventions are necessary but the individual needing services lacks the capacity to provide consent. Under this section the Department may petition the court for an order authorizing the provision of protective services. If such an order is entered, no later than 60 days after it is entered the Department must again petition the court to determine whether protective services will be continued for the vulnerable adult who lacks capacity to consent to services and whether a petition for appointment of guardian should be filed. Although the Department's ability to request this hearing has the same substantive effect as filing a petition to determine incapacity, the Department is not given specific authority in this chapter to file such a petition. Thus, Chapter 415 neither authorizes nor precludes filing of a petition to determine incapacity or petition for appointment of guardian by the Department or its representative.

If the Department cannot file a petition to determine incapacity or for appointment of a guardian, where no one else can be found to file them, the practical impact would be that an incapacitated person is in a no-man's land that perpetuates the risk of the very abuse or neglect the Department is empowered to guard against. A Department caseworker has neither time, skills nor adequate authority to provide these services. The only solution is a guardian, and when the alternative is to leave the client unprotected or abandoned, the entire legislative purpose behind Chapter 415 would be thwarted by the Department's inaction.

Issue Two: Whether the Department is permitted under the Guardianship statute to execute a petition to determine incapacity or a petition to appoint a guardian..

Section 744.3201(1), Florida Statutes, provides that "A petition to determine incapacity of a person may be executed by an *adult person*." (emphasis added). This term is not defined in statute.

Section 1.01(3), Florida Statutes does provide a definition of "person." "The word 'person' includes individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business

trusts, syndicates, fiduciaries, corporations, and *all other groups or combinations.*” [Emphasis added.] The definition, particularly the final phrase in italics, is clearly intended to be quite broad, and there is no indication whatsoever that a state agency is to be excluded. Section 402.34, Florida Statutes, bolsters this conclusion with its reference to the Department of Children and Families, the Department of Health, and the Agency for Persons with Disabilities as a “body corporate” that possesses the ability to contract and to sue and be sued.

There is still the issue of whether the term “adult person” in the guardianship statute has independent meaning and purpose and precludes a filing by an entity rather than an individual. After all, there is no such thing as an “adult corporation” or “adult association.” Ultimately, it will be the decision of the judge whether the Department is an appropriate petitioner in a specific case. But the provision seems intended to broaden, not narrow, the access to the courts for those seeking to have a guardian appointed. By far the most common category of petitioner is an individual, and the Legislature seemed concerned, in the inclusion of the term “adult,” only that the person filing have legal capacity. The permissive language, “may,” rather than the restrictive intention implied by a word such as “shall,” supports this interpretation. Furthermore, everything in both Chapter 415 and Chapter 744 indicates a legislative intention that persons who appear incapacitated and subject to neglect or abuse should be brought to the attention of the courts.

With respect to a petition for appointment of guardian, the relevant section, Section 744.344(1), does not specify who may file a petition for appointment. The section outlines the requirements of the petition and requires the petitioner verify that all statements contained therein are to the best of the petitioner’s knowledge and belief.

Issue Three: Whether Department employees will expose themselves to personal liability by filing one of these petitions in the absence of explicit statutory authority.

A significant concern is that, in the absence of specific statutory authorization, employees who file these petitions or the Department itself might be sued in a negligence or federal civil rights suit. At our request, Ray Williams, Bureau Chief for State Liability Claims of the Division of Risk Management, Department of Financial Services, has addressed the issue. He concludes that the Department and its employees would in almost all cases be insured through the Risk Management Trust Fund. Coverage extends to the Department and its employees “unless such officer, employee or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.”

State employees cannot be held personally liable or named as a defendant in a negligence suit unless their conduct rises to the level of “bad faith.” F.S. 768.28(9)(a). The filing of a petition by front-line DCF employees would not be “bad faith” as long as the action is taken on the basis of evidence and is not done maliciously. Employees sued for federal civil rights violations are entitled to the defense of qualified or “good faith” immunity. If employees do not knowingly violate clearly established law or act intentionally, they should avoid liability in federal civil rights actions. A legal opinion authorizing employees to file the petitions in question would be an adequate basis for the employees’ actions.

The mere filing of a petition does not deprive any person of substantive or procedural rights. The person would be allowed to present his or her case to the court, and money damages generally are not available for violation of a procedural due process right. Substantiation of this position lies in the Department’s previous experience with these petitions. One or more DCF offices have filed such petitions over the years, and no claims appear to have been filed.

Issue Four: Whether the Department, by filing petitions which may result in the loss of liberty interests, creates a conflict of interest and compromises its position as the provider of services to the ward.

Section 744.309(3), Florida Statutes, precludes the Department from being appointed guardian because it is the agency that provides services to the ward. However, the issue of whether the Department can file a petition to determine incapacity or petition for appointment of guardian is distinguishable because the Department is not requesting the court place the Department in a position of authority over the ward. The petition merely asks that a determination of capacity be made or that a recommendation of prospective guardianship is heard.

Section 415.1051, Florida Statutes, provides for the Department to petition the court for an order authorizing the provision of protective services. At the hearing on the Department's petition, the court must determine whether "the vulnerable adult lacks the capacity to consent to the provision of such services." Section 415.1051(1)(c)3.b., Florida Statutes. This provision is not significantly different from allowing the Department to file a petition to determine incapacity pursuant to chapter 744. Under section 415.1051(1)(e)1.,d., within 60 days after the date of an order authorizing protective services for a person lacking capacity to consent for such services, the Department is authorized to file a petition to determine whether a petition for guardianship should be filed. The Department has an obligation under section 20.19(1)(a), Florida Statutes, to ensure the safety and well-being of Florida citizens. Under the same logic that makes it appropriate for the Department to petition to assess capacity, it is appropriate for the Department to recommend, in good faith, that a particular individual be appointed to serve as guardian. The Department is not assigning the guardian, but merely making a recommendation for the court's consideration, without financial or legal conflict, believing it to be in the best interest of the adult.

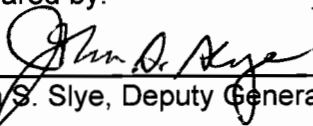
Conclusion:

Although the Department does not currently have express statutory authority to file petitions to determine incapacity or petitions for the appointment of guardian, it is also not precluded from doing so by statute. In fact, pursuing such petitions is the only way to fulfill other statutory obligations in cases where the department determines, in its discretion, that an individual is incapacitated and needs a guardian, but no other person is willing to pursue the petition.

As a practical matter, the Department's statutory obligation of protective services makes the caseworker a de facto guardian for a person who cannot reasonably function independently when no one else is willing to come forward and petition to be guardian. The Department may determine that it is the protector of last resort and should pursue court approval of a guardianship.


This conclusion does NOT authorize the Department to execute such petitions in all circumstances. This power is limited to those circumstances when no other individual or organization is reasonably available, capable, and willing to seek the guardianship. The Department's employees should specifically plead such a fact in its petition.

Prepared by:



John S. Slye, Deputy General Counsel

Approved: 



John J. Copelan, General Counsel