

DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

THOMAS J. FOSTER, SR.,
an alleged incapacitated person,

Petitioner,

v.

CHRISTA RADULOVICH,
the emergency temporary guardian;
SUSAN FOSTER MELENDY;
THOMAS J. FOSTER, JR.; and
SHARON ROPER,

Respondents.

No. 2D20-2988

December 17, 2021

BY ORDER OF THE COURT:

Upon consideration of petitioner's motion for clarification filed on October 14, 2021,

IT IS ORDERED that the motion for clarification is granted to the extent that the opinion dated September 29, 2021, is withdrawn and the attached opinion is substituted therefor.

No further motion for clarification or rehearing will be entertained in this appeal.

I HEREBY CERTIFY THE FOREGOING IS A TRUE COPY OF THE ORIGINAL COURT ORDER.

MARY ELIZABETH KUENZEL
CLERK

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Petition for Writ of Mandamus to the Circuit Court for Pinellas County; Sherwood Coleman, Judge.

J. Ronald Denman, Latasha Lordes, and Victoria McLaughlin of Bleakley Bovol Denman & Grace, Tampa, for Petitioner.

Brandon D. Bellew, Caitlein J. Jammo, Caitlin M. Powell of Johnson, Pope, Bokor, Ruppel & Burns, LLP, Clearwater, for Respondent, Thomas J. Foster, Jr.

Edward C. Castagna, Jr., of Castagna Law Firm, P.A., Clearwater, for Respondent, Susan Foster Melendy.

Thomas G. Tripp of Law Offices of Thomas G. Tripp, Pinellas Park, for Respondent, Christa Radulovich.

No appearance for Respondent, Sharon Roper.

ATKINSON, Judge.

Thomas J. Foster, Sr., petitions this court for a writ of mandamus to quash the trial court's order denying his motion to substitute attorney J. Ronald Denman as his counsel for the underlying guardianship proceeding.¹ We treat Mr. Foster's petition as a petition for writ of certiorari and grant the writ.

The Department of Children and Families (DCF) filed a petition for appointment of a plenary guardian over the person and property of Mr. Foster, an alleged incapacitated person. The trial court appointed counsel for Mr. Foster for the guardianship proceedings pursuant to section 744.331(2)(b), Florida Statutes (2020).

Appointed counsel attended the hearing on DCF's petition, but Mr. Foster was not present. The parties—including appointed counsel

¹ Respondent Susan Foster Melendy filed a response in support of Mr. Foster's petition, and Respondents Thomas J. Foster, Jr., and Christa Radulovich filed responses in opposition to the petition. Foster, Jr., and Radulovich will be referred to collectively as Respondents throughout this opinion.

on behalf of Mr. Foster—stipulated to the appointment of Christa Radulovich (Temporary Guardian) as emergency temporary guardian over Mr. Foster's property. The emergency temporary guardianship letters delegated Mr. Foster's right to contract to the Temporary Guardian and were set to expire on September 20, 2020.

Thereafter, Attorney Denman filed a motion seeking appointment as Mr. Foster's counsel for the guardianship proceedings. DCF and Respondents opposed the motion, arguing that Mr. Foster could not hire Attorney Denman because the trial court had removed his right to contract through the emergency temporary guardianship. At a hearing on the motion, Mr. Foster explained to the trial court that he had met with Attorney Denman to discuss the guardianship proceedings and wanted Attorney Denman to serve as his attorney. The trial court denied the motion for appointment as counsel.

After the hearing but before the trial court denied the motion for appointment, Mr. Foster filed a motion to substitute Attorney Denman as his counsel for the guardianship proceedings. The trial court did not immediately rule on the motion. On September 21, 2020, the day after the emergency temporary guardianship letters

expired, Attorney Denman filed a notice of appearance as Mr. Foster's attorney. The trial court then entered amended emergency temporary guardianship letters nunc pro tunc to September 20, 2020, denied the motion to substitute Attorney Denman as counsel, and struck his notice of appearance as a nullity. Attorney Denman, on behalf of Mr. Foster, challenges the order denying the motion to substitute counsel and striking his notice of appearance.

"To obtain a writ of certiorari, the 'petitioner must establish (1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the trial (3) that cannot be corrected on postjudgment appeal.' " *Brundage v. Evans*, 295 So. 3d 300, 303 (Fla. 2d DCA 2020) (quoting *Parkway Bank v. Fort Myers Armature Works, Inc.*, 658 So. 2d 646, 648 (Fla. 2d DCA 1995)). We have jurisdiction because an erroneous denial of a motion for substitution of counsel causes the kind of irreparable harm for which certiorari lies because the litigant is deprived of his or her choice of counsel for the entire proceeding and this deprivation cannot be remedied on appeal. *See Nader v. Fla. Dep't of Highway Safety & Motor Vehicles*, 87 So. 3d 712, 721 (Fla. 2012) (explaining that a court must first examine the second and third

prongs of the test for certiorari, often referred to as "irreparable harm," to determine whether it has jurisdiction to hear the petition); *cf. Holmes v. Burchett*, 766 So. 2d 387, 388–89 (Fla. 2d DCA 2000) (granting an alleged incapacitated person's petition for writ of certiorari to quash a trial court's denial of her motion for substitution of counsel).

After an interested person initiates guardianship proceedings by filing a petition to determine incapacity pursuant to sections 744.3201 and 744.331(1), the trial court is required to appoint an attorney for the alleged incapacitated person. § 744.331(2)(b). Section 744.331(2)(b) provides that "[t]he alleged incapacitated person may substitute her or his own attorney for the attorney appointed by the court." An alleged incapacitated person is permitted to substitute counsel until the trial court determines incapacity by clear and convincing evidence. *See id.*; *cf. Holmes*, 766 So. 2d at 388–89 (holding that an alleged incapacitated person subject to an emergency temporary guardianship is presumed competent to contract and has a right to substitute counsel during guardianship proceedings until incapacity is established); *In re Guardianship of Bockmuller*, 602 So. 2d 608, 609 (Fla. 2d DCA

1992) (holding that counsel for an incapacitated person must be contracted for by a guardian or appointed by the court);

§ 744.1012(3) ("[I]t is the purpose of this act to promote the public welfare by establishing a system that permits incapacitated persons to participate as fully as possible in all decisions affecting them").

After a petition to determine incapacity has been filed, but before a guardian has been appointed, the trial court may appoint an emergency temporary guardian for the person, property, or both, of an alleged incapacitated person. § 744.3031(1). While the trial court must make specific findings that there is an imminent danger to the health of the "alleged incapacitated person" or that the person's property is in danger of being wasted, the trial court is not required to determine that the person is incapacitated to appoint an emergency temporary guardianship. § 744.3031(1). Rights that are not specifically enumerated by the trial court in emergency temporary guardianship letters are retained by the alleged incapacitated person because the "powers and duties of the emergency temporary guardian must be specifically enumerated by court order." See § 744.3031(1).

Respondents acknowledge that section 744.331(2)(b) permits Mr. Foster to substitute counsel to represent him in proceedings to determine his incapacity. However, they argue that Mr. Foster cannot *personally* exercise his statutory right to substitute counsel because the trial court removed his right to contract and delegated it to the temporary guardian through the emergency temporary guardianship. They argue that permitting an alleged incapacitated person whose right to contract has been removed pursuant to an emergency temporary guardianship to contract with an attorney would undermine the purpose of an emergency temporary guardianship—to protect the alleged incapacitated person and his or her property. *See* § 744.3031(1). Respondents conclude that if Mr. Foster wanted to substitute his court-appointed counsel, he should have expressed his wishes to his temporary guardian who would make the ultimate decision regarding whether to retain Attorney Denman, subject to the trial court's review for breach of fiduciary duty. *See Jacobsen v. Busko*, 262 So. 3d 238, 239 (Fla. 3d DCA 2018) ("Only the ward's plenary guardian . . . has the capacity to enter into a contract with an attorney on behalf of the ward [after the removal of the ward's right to contract following a determination

of incapacity]." (citing *In re Guardianship of Bockmuller*, 602 So. 2d at 609)).

Section 744.3031(1) gives the trial court the general authority to delegate certain rights of the alleged incapacitated person to a guardian who has the power to exercise those rights on the alleged incapacitated person's behalf. The statute confers "authority" on the temporary guardian but makes no express mention of the removal of a temporary ward's rights. See § 744.3031. Delegation of specifically delineated authority has the consequence of removing corresponding rights from the alleged incapacitated person subject to an emergency temporary guardianship to protect the person or property of the individual from danger that may result from the person's alleged incapacity if immediate action is not taken. See § 744.3031(1). Among those rights removed from the alleged incapacitated person might be the right to enter into contracts.

However, section 744.331(2)(b) specifically provides that an alleged incapacitated person has the right to substitute appointed counsel with counsel of his or her choice during proceedings to determine incapacity; this right, by logic and practicality, must entail the right to enter into an agreement with the attorney of his

choosing.² Thus, while section 744.3031(1) is broad enough to allow removal of the right to contract generally, section 744.331(2)(b) effectively prohibits the trial court from removing the alleged incapacitated person's right to contract with an attorney. In other words, because the statute confers on the alleged incapacitated person the right to contract with and substitute counsel, this constitutes an exception from the general authority of the trial court to remove the alleged incapacitated person's rights by conferring authority on an emergency temporary guardian. *See Fla. Virtual Sch. v. K12, Inc.*, 148 So. 3d 97, 102 (Fla. 2014) ("When reconciling statutes that may appear to conflict, the rules of statutory construction provide that a specific statute will control over a general statute . . .").

Respondents' reliance on *Jacobsen* and *In re Guardianship of Bockmuller* is misplaced. The wards in these cases were

² While an attorney-client relationship might be capable of formation absent an explicit and express agreement, such an arrangement typically occurs as a consequence of the attorney's representations made or services rendered to the client. Here, the issue is whether *the client* may be permitted to act on his own behalf to procure counsel—an endeavor that we presume for purposes of this opinion to most likely entail a contract, in some form or another, entered into with chosen counsel.

incapacitated persons subject to plenary guardianships. *Jacobsen*, 262 So. 3d at 239; *In re Guardianship of Bockmuller*, 602 So. 2d at 609. The right to substitute counsel in section 744.331(2)(b) only applies to *alleged* incapacitated persons, not to individuals whose incapacity has been determined by clear and convincing evidence. Unlike the wards in *Jacobsen* and *In re Guardianship of Bockmuller*, Mr. Foster was an alleged incapacitated person and, as such, had a statutory right to substitute counsel pursuant to section 744.331(2)(b) which the trial court is not authorized to remove pursuant to section 744.3031(1).

Respondents also suggest that *Holmes*, 766 So. 2d 387, one of the cases relied on by Mr. Foster, undermines Mr. Foster's position because the trial court had not removed the alleged incapacitated person's right to contract in that case. *See id.* at 388, 388 n.2. In *Holmes*, this court concluded that the trial court departed from the essential requirements of the law by prohibiting the alleged incapacitated person from substituting appointed counsel for the counsel of her choice because the trial court had not removed her right to contract and, thus, she was presumed competent to contract. *Id.* at 388. However, our conclusion in this case is not

undermined by our earlier decision in *Holmes* because we did not consider in that case whether the general authority given to the trial court pursuant to section 744.3031(1) allows the trial court to prevent an alleged incapacitated person from exercising his or her explicit right to contract with and substitute counsel pursuant to section 744.331(2)(b). A person subject to an emergency temporary guardianship remains an *alleged* incapacitated person until such time as he is adjudicated incapacitated and is free to exercise all rights not otherwise delegated to a guardian pursuant to an emergency temporary guardianship, including the right to substitute counsel. *See* §§ 744.3031(1), .331(2)(b).³

As an alleged incapacitated person, Mr. Foster had a right to substitute his court-appointed attorney with the attorney of his choice until the trial court determined his incapacity. *See*

³ After this case was perfected, Mr. Foster's court-appointed attorney for the guardianship proceedings below filed documents with this court indicating that the trial court determined Mr. Foster to be incapacitated. However, this postperfection determination of incapacity does not prevent this court from concluding that the trial court departed from the essential requirements of the law by denying Mr. Foster's motion to substitute counsel to represent him during proceedings to determine incapacity at a time when his incapacity was merely alleged.

§ 744.331(2)(b). By denying his motion to substitute counsel, the trial court departed from the essential requirements of the law. We consider Mr. Foster's petition as one for a writ of certiorari, grant the writ, and quash the trial court's order denying his motion to substitute counsel.

Clarification

After this court issued its original opinion, which included the foregoing, Mr. Foster sought clarification. A dispute had arisen in the trial court over the effect of this court's opinion quashing the order denying Mr. Foster's motion to substitute counsel. Mr. Foster argued that this court's opinion had the effect of returning Mr. Foster and the other interested parties to the positions they were in before the motion to substitute counsel had been denied and requiring the trial court to again undertake proceedings to determine his capacity, but this time while he is represented by counsel of his choice. Thereafter, Respondents filed a response in which they expressed no objection to clarification but not unexpectedly urged an interpretation approximately opposite to that

advanced by the Petitioner. We treat Respondents' response as a motion for clarification and grant both motions.

Respondents argue that the motion for substitution of counsel has been rendered moot by the subsequently entered order adjudicating Mr. Foster incapacitated and that reconsideration of the motion for substitution of counsel on remand would be unnecessary. Respondents alternatively argue that if the trial court were to revisit the motion to substitute counsel this court's opinion does not require the court to grant it because the opinion included no express admonition to that effect.

First, it should be recalled that this court denied the notice of voluntary dismissal joined by the Respondents and filed by Mr. Foster's court-appointed trial counsel, purportedly on behalf of Mr. Foster, in which it was suggested that Mr. Foster's petition was rendered moot by the trial court's determination, made during the pendency of this appeal, that Mr. Foster was incapacitated. As such, this court has already weighed in on this mootness argument and rejected it.

Respondents' conclusion that the trial court would be at liberty to deny the motion for substitution of counsel upon

remand—based solely on a lack of explicit direction by this court to grant the motion—does not follow from the language of this court's original opinion and is inconsistent with case law regarding the effect of a writ of certiorari quashing the order under review. A reasonable conclusion to be drawn from this court's opinion quashing the denial of a motion to substitute counsel on the basis that it departed from the essential requirements of the law is that the trial court would be departing from the essential requirements of the law again if it were to deny the motion upon remand. To circumvent this intuitive deduction, Respondents point to the subsequently entered adjudication of incapacity. We find Respondents' reasoning unpersuasive.

Certiorari review is limited in its scope and affords the reviewing court a limited array of remedial options that it can grant to a successful petitioner. *Broward County v. G.B.V. Int'l, Ltd.*, 787 So. 2d 838, 844 (Fla. 2001). "On certiorari the appellate court only determines whether or not the tribunal . . . whose order . . . is to be reviewed has in the rendition of such order . . . departed from the essential requirements of the law and upon that determination either to quash the writ of certiorari or to quash the order

reviewed." *Id.* (quoting *Tamiami Trail Tours v. R.R. Comm'n*, 174 So. 451, 454 (1937)). In its original opinion, this court quashed the order denying Mr. Foster's motion for substitution of counsel. This "le[ft] the subject matter, that is, the controversy pending before the tribunal, . . . as if no order . . . had been entered." *Id.* This court determined that denying Mr. Foster his statutory right to choose his own lawyer for the incapacity proceedings based solely on the establishment of a temporary guardianship constituted a departure from the essential requirements of the law. Logic does not permit the conclusion that his subsequent adjudication of incapacity *pursuant to proceedings during which we found he should have been represented by his choice of counsel* would justify denying him representation by his choice of counsel again upon remand.

Once a writ of certiorari has been granted and the order on review has been quashed,

the parties stand upon the pleadings and proof as it existed when the order was made with the rights of all parties to proceed further as they may be advised to protect or obtain the enjoyment of their rights under the law in the same manner and to the same extent which they might have proceeded had the order reviewed not been entered.

Id. Had the order denying Mr. Foster's motion for substitution of counsel not been entered, he would have had his choice of counsel during the subsequent proceedings during which his capacity was determined. Once his statutory right to counsel of choice had been erroneously deprived in the order under review, that deprivation persisted up to, during, and beyond the point in time that the trial court adjudicated him incapacitated. Upon remand, Mr. Foster is entitled to "protect or obtain the enjoyment of [his] rights under the law"—including his statutory right to counsel of choice—"in the same manner and to the same extent which [he] might have proceeded had the order" denying his motion to substitute counsel "not been entered." *See id.* Which is to say, because he was entitled to counsel of his choice during the incapacity proceedings that followed the erroneous denial of his motion for substitution of counsel, he is entitled to have those matters adjudicated while represented by his lawyer of choice upon remand.

To advance their clarification argument, the Respondents misconstrue this court's holding by characterizing it as a ruling based merely on chronology—*if only the order denying substitution of counsel had come after an adjudication of incapacity, then it would*

not have been erroneous. But the statutory right to substitute counsel only applies *before* a determination of incapacity has been made. § 744.331(2)(b) (providing that in "[p]rocedures to determine incapacity" that "each person *alleged* to be incapacitated in all cases involving a petition for adjudication of incapacity . . . may substitute her or his own attorney for the attorney appointed by the court" (emphasis added)). And this court found the order denying the motion to be erroneous because it was based on the existence of an emergency temporary guardianship. Our opinion explained that the general authority to remove an alleged incapacitated person's right to contract under the emergency temporary guardianship statute cannot eliminate that person's specific statutory right to contract with counsel of his choice. As such, the only inference that may reasonably be drawn from this court's opinion quashing the denial of his motion to substitute counsel is that the motion should have been granted at the time it was filed and that Mr. Foster should have been represented by his choice of counsel during the subsequent proceedings to determine his incapacity. To ignore or deny his motion upon remand would be in defiance of this court's opinion.

Petition for writ of certiorari granted; order quashed;
remanded for further proceedings consistent with this opinion.

LUCAS and ROTHSTEIN-YOUAKIM, JJ., Concur.