STATE OF FLORIDA
DEPARTMENT OF ELDER AFFAIRS

DEPARTMENT OF ELDER AFFAIRS,
OFFICE OF PUBLIC AND
PROFESSIONAL GUARDIANS,

OPPG Case No.: 2016-0003
DOAH Case No.: 18-0811

Petitioner,

vs.

ELIZABETH SELDEN SAVITT,

Respondent.
_____/

FINAL ORDER

On December 21, 2018, Administrative Law Judge (ALJ) Mary Li Creasy, of the Division of Administrative Hearings (DOAH) submitted a Recommended Order (RO) concerning the Amended Administrative Complaint (AAC) filed in the above-captioned matter. On January 7, 2019, the Petitioner for the Office of Public and Professional Guardians (OPPG) timely filed Exceptions to the Recommended Order. On January 19, 2019, Respondent timely filed its Responses to Petitioner's Exceptions. After review of the entire record, the RO, any exceptions filed, and responses thereto, the Executive Director of the OPPG issues this Final Order as final administrative action in this case. § 744.2001(3)(c), Florida Statutes (2015 – 2018).[1]

STANDARD OF REVIEW

Authority

1. The Executive Director of the OPPG has oversight responsibility of all public and professional guardians in Florida. § 744.2001(2), Fla. Stat.

[1] All references to the Florida Statutes are for the period 2015 – 2018, unless otherwise noted.

2. As part of that oversight responsibility, the Executive Director of OPPG may initiate disciplinary proceedings and take final action pursuant to chapter 120. § 744.2001(3)(c), Fla. Stat.

3. This Final Order constitutes agency action under chapters 120 and 744. § 120.52(2) & (3), Fla. Stat.

Findings of Fact

4. An agency reviewing a recommended order may not reject or modify the findings of fact of an ALJ, "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. "The term 'competent substantial' evidence does not relate to the quality, character, convincing power, probative value or weight of the evidence, but refers to the existence of some evidence (quantity) as to each essential element and as to the legality and admissibility of that evidence." *Scholastic Book Fairs, Inc. v. Unemployment Appeals Comm'n*, 671 So. 2d 287, 289 n.3 (Fla. 5th DCA 1996); *Nunez v. Nunez*, 29 So. 3d 1191, 1192 (Fla. 5th DCA 2010).

5. The reviewing agency cannot reject the ALJ's findings that are supported by competent substantial evidence, even to make alternate findings that are also arguably supported by competent substantial evidence. *See Green v. Fla. Dep't of Bus. & Prof. Reg.*, 49 So. 3d 315, 319 (Fla. 1st DCA 2010) (holding that the agency improperly re-weighed the evidence and substituted its own factual findings for those of the ALJ); *Strickland v. Fla. A & M Univ.*, 799 So. 2d 276, 278-80 (Fla. 1st DCA 2001) (holding that an agency abused its discretion when it improperly rejected an ALJ's findings).

6. A reviewing agency may not reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. *Rogers v. Dep't*

of Health, 920 So.2d 27, 30 (Fla. 1st DCA 2005); *Belleau v. Dep't of Envtl. Prot.*, 695 So. 2d 1305, 1307 (Fla. 1st DCA 1997); *Dunham v. Highlands Cnty. Sch. Bd.*, 652 So. 2d 894 (Fla. 2d. DCA 1995).

7. These evidentiary-related matters are within the province of the ALJ, as the "fact-finder' in these administrative proceedings. *Heifetz v. Dep't of Bus. Regulation*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). *Tedderv. Fla. Parole Comm'n*, 842 So. 2d 1022, 1025 (Fla. 1st DCA 2003).

8. The ALJ's decision to accept the testimony of one expert witness over that of another expert is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of any competent substantial evidence of record supporting this decision. See *Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co.*, 18 So. 3d 1079, 1088 (Fla. 2d DCA 2009); *Collier Med. Ctr. v. Dep't of HRS*, 462 So. 2d 83, 85 (Fla. 1st DCA 1985); *Fla. Chapter of Sierra Club v. Orlando Utils. Comm'n*, 436 So. 2d 383, 389 (Fla. 5th DCA 1983).

9. Therefore, if the DOAH record discloses any competent substantial evidence supporting a challenged factual finding of the ALJ, the agency is bound by such factual finding in preparing its Final Order. *Walker v. Bd. of Prof. Eng'rs*, 946 So. 2d 604 (Fla. 1st DCA 2006); *Fla. Dep't of Corr. v. Bradley*, 510 So. 2d 1122, 1123 (Fla. 1st DCA 1987). In addition, an agency has no authority to make independent or supplemental findings of fact. *North Port, Fla. v. Consol. Minerals*, 645 So. 2d 485, 487 (Fla. 2d DCA 1994).

Conclusions of Law

10. Section 120.57(1)(*l*), Fla. Stat., authorizes an agency to reject or modify an ALJ's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction." *See Barfield v. Dep't of Health*, 805 So. 2d 1008 (Fla. 1st DCA 2001); *L.B. Bryan & Co. v. Sch. Bd. of Broward Cnty.*, 746 So. 2d 1194 (Fla. 1st DCA 1999); *Deep Lagoon Boat Club,*

Ltd. v. Sheridan, 784 So. 2d 1140 (Fla. 2d DCA 2001). If an ALJ improperly labels a conclusion of law as a finding of fact, the label should be disregarded and the item treated as though it were actually a conclusion of law. *Battaglia Properties v. Fla. Land & Water Adjudicatory Comm'n*, 629 So. 2d 161, 168 (Fla. 5th DCA 1994).

11. An agency's review of legal conclusions in a recommended order is restricted to those that concern matters within the agency's field of expertise. *Charlotte Cnty. v. IMC Phosphates Co.*, 18 So. 3d 1089 (Fla. 2d DCA 2009); *G.E.L. Corp. v. Dep't of Envtl. Prot.*, 875 So. 2d 1257, 1264 (Fla. 5th DCA 2004). An agency has the primary responsibility of interpreting statutes and rules within its regulatory jurisdiction and expertise. *See Pub. Employees Relations Comm'n v. Dade Cnty. Police Benevolent Ass'n*, 467 So. 2d 987, 989 (Fla. 1985); *Fla. Pub. Emp. Council, 79 v. Daniels*, 646 So. 2d 813, 816 (Fla. 1st DCA 1994).

12. Agencies do not have jurisdiction to modify or reject rulings on the admissibility of evidence. Evidentiary rulings of the ALJ that deal with "factual issues susceptible to ordinary methods of proof that are not infused with [agency] policy considerations," are not matters over which the agency has "substantive jurisdiction." *Heifetz*, 475 So. 2d at 1281. Evidentiary rulings are matters within the ALJ's sound prerogative as the finder of fact and may not be reversed on agency review. *Id.* at 1282.

FINDINGS OF FACT

13. In light of the discussion above, the Findings of Fact in the RO, paragraphs 1 through 33 are hereby adopted *in toto* and are incorporated by reference[2] as if fully stated herein.

[2] The OPPG has determined the quantity of materials in the present case makes the attachment of the Recommended Order impractical. A copy of the Recommended Order can be obtained or inspected by visiting https://www.doah.state.fl.us/ALJ/searchDOAH/ and searching for the above-captioned case, or by submitting a public records request to doeapublicrecords@elderaffairs.org. § 120.53(4), Fla. Stat.

CONCLUSIONS OF LAW

14. Paragraphs 34 through 60, and 68 through 70, of the attached RO are hereby adopted *in toto* and are incorporated by reference as if fully stated herein. To the extent RO paragraphs 32 and 33 contain conclusions of law, they are also adopted *in toto* and incorporated by reference as if fully stated herein. *Battaglia Properties*, 629 So. 2d at 168.

RULINGS ON EXCEPTIONS

15. Parties to formal administrative proceedings must alert reviewing agencies to any perceived defects in DOAH hearing procedures, the findings of fact, or conclusions of law of ALJs by filing exceptions to DOAH recommended orders. *Comm'n on Ethics v. Barker*, 677 So. 2d 254, 256 (Fla. 1996). When a party files exceptions to certain findings of fact the party has thereby expressed its agreement with, or at least waived any objection to, those findings of fact." *Envtl. Coalition of Fla., Inc. v. Broward Cnty.*, 586 So. 2d 1212, 1213 (Fla. 1st DCA 1991).

16. Even when exceptions are not filed, however, an agency head reviewing a recommended order is free to modify or reject any erroneous conclusions of law over which the agency has substantive jurisdiction. See §120.57(1)(*l*), Fla. Stat. (2018); *Barfield v. Dep't of Health*, 805 So. 2d 1008 (Fla. 1st DCA 2001).

17. In reviewing a recommended order and any written exceptions, the agency's final order "shall include an explicit ruling on each exception." § 120.57(1)(k), Fla. Stat. (2018).

Exception One Legal Conclusions: Count I – Violation of Section 744.309(3)

18. OPPG's Exception One addressing paragraphs 61 – 64 of the RO, disputes the legal conclusion that OPPG may not apply section 744.309(3), Fla. Stat., to professional guardians because the section "applies only to judges." [RO ¶62] This Exception is rejected for the following reasons.

19. The statute's express language, which provides that a "court may not appoint a guardian in any other circumstance in which a conflict of interest may occur", arguably fails to establish a "statutory or legal obligation placed upon a professional guardian" that, if not performed, constitutes grounds for disciplinary action taken by the OPPG pursuant to section 744.20041(1)(i), Fla. Stat., as pleaded in the AAC. Therefore, no disciplinary action will be taken for Respondent's alleged violation of section 744.309(3), under 744.20041(1)(i), Fla. Stat. and to that extent, the submitted exception is rejected.

20. However, the RO's conclusions of law are must also be rejected. The following reasons outline both the reasons for rejecting the RO's Conclusions of Law, and why OPPG's substituted Conclusions of Law are as or more reasonable than the RO's. § 120.57(1)(*l*), Fla. Stat.

21. In paragraph 62 of the RO, the ALJ concluded that section 744.309(3), Fla. Stat., "applies only to judges" and "cannot be used [by the OPPG] to find a violation by Respondent." This is expressly contradicted by the Legislature's own grant of authority for the OPPG to discipline registrants for "[v]iolating any provision of [Chapter 744] or any rule adopted pursuant thereto." § 744.20041(1)(s), Fla. Stat. (emphasis added).

22. The OPPG further disagrees with the RO's legal conclusions in paragraph 63, discussing whether Respondent met the definition of a person who should have been disqualified from appointment as a guardian pursuant to section 744.309(3), Fla. Stat.

23. In Paragraph 63 the RO makes the following legal conclusion:

> While pursuant to section 744.309(3) a court may not appoint a guardian who meets the definition of a "disqualified person," OPPG failed to demonstrate by clear and convincing evidence that Respondent ever had a conflict of interest or appearance of a conflict of interest. No evidence was presented showing that Respondent was ever appointed to any guardianship case by her husband, Judge Colin. (Emphasis added.)

24. This is directly and expressly contradicted by the RO's own findings of fact, accepted above:

> Respondent completed an application for appointment in every case for which she served as a [Professional Guardian (PG)] or guardian advocate. In response to the application form's request to identify spouse, Respondent answered, "Martin H. Colin." According to Respondent, this disclosure was sufficient because the lawyers in the case and the courthouse staff were aware of her marriage to Judge Colin, and the wards were too incapacitated to read or understand the application. [RO at ¶16]
>
> However, it is undeniable that there would be at minimum an appearance of a conflict if Judge Colin presided over cases to which Respondent was assigned as a PG. As explained by OPPG's experts, Attorney [Sketchley] and Judge Cohen, the marital privilege protects communications between spouses. If Judge Colin presided over Respondent's cases as a PG, they could have ex-parte communications that would not be discoverable. It is possible that they could discuss the merits of the guardianship case, as well as the fee petition of Respondent as the PG. [RO at ¶17]
>
> * * *
>
> However, this simple identification of Judge Colin by his proper name was insufficient to put the ward, their family members, out-of-county lawyers, or other interested persons on notice of the potential conflict. Respondent should have identified her spouse as Judge Martin H. Colin, of the Circuit Court, Probate and Guardianship Division. [RO at ¶21].
>
> Significantly, no evidence was presented during the final hearing to demonstrate that Respondent benefited from this failure to adequately disclose her marriage to Judge Colin, or that her wards or other interested parties were in any way harmed. However, failure to adequately disclose a conflict, or appearance of conflict, erodes the public's confidence in the guardianship system. [RO at ¶22]
>
> (Emphasis added.)

25. The RO agreed in Conclusion of Law paragraph 78,

> Respondent's marriage to a judge, sitting in the Probate and Guardianship Division in which she practices as a [professional guardian], created a potential conflict of interest that should have been more thoroughly disclosed. Section 744.309(3) expressly provides that a court may not appoint a guardian in any "circumstance in which a conflict of interest may occur. (Emphasis added.)

26. Admitting that a disclosure needed to be made but relying on staff and 'taking their word for it,' is not an appropriate enforcement standard to ensure each and every ward throughout the state is protected as the Legislature intended. Indeed, the argument from a professional guardian that details about a conflict of interest are of no moment to a ward because the ward lacks capacity is, at best, disappointing.

27. Respondent, by virtue of her at minimum appearance of conflict of interest, met the definition of a "disqualified person" upon application of the express language of section 744.309(3).

28. In light of the foregoing, the OPPG adopts the legal conclusions set forth in paragraph 61 of the RO but rejects the legal conclusions in paragraphs 62 through 64 for the reasons stated above.

29. The OPPG also rejects the paragraph 64 legal conclusion on the basis that Respondent's failure to properly disclose the conflict "was of no consequence" because Judge Colin never formally presided over any of Respondent's cases, and was thus not actionable. The RO reached this conclusion despite a contradictory factual finding that such failure erodes the public's trust in the guardianship system. [RO ¶22]

30. The RO adds elements to a charge of violation of 744.309(3), Fla. Stat., in paragraph 64: the prohibition in that statute does not contemplate harm or consequence, only the appearance of a conflict of interest. The RO agrees a conflict of interest may occur in the situation at issue, and the public deserved more notice thereof. This is where the analysis should end.

Exception Two: Count II – Violation of Section 744.446

31. The OPPG considered Petitioner's Exception Two, Respondent's Response, and being otherwise advised, rejects Exception Two. The OPPG accepts and adopts Paragraphs 65 through 67 of the RO. The findings of fact adopted support a legal conclusion that Petitioner failed to meet its burden that Respondent benefitted "in cases where Judge Colin also presided." [RO ¶66]

Exception Three: Count V – Violation of Section 744.361(3)

32. Exception Three disputes the RO's legal conclusion in paragraphs 71 through 74 of the RO, that the Respondent was not provided adequate notice that her taking of retainers without prior court approval of her fees constituted a breach of the duty of good faith.

33. The OPPG filed an exception to this legal conclusion, noting that Paragraph 26 of Petitioner's AAC, which is incorporated by reference into Count V in paragraph 56, alleged that "Respondent improperly received retainers, advancements, or "in trust" fees, to be paid by the wards for whom Respondent served as a professional guardian or guardian advocate, for services that had not been performed as of the date of said requests, and/or had not received prior court approval authorizing such payments to be made."

34. The exception is accepted and the Conclusions of Law in paragraphs 71 through 74 of the RO are hereby rejected. The following reasons outline both the reasons for rejecting the RO's Conclusions of Law, and why OPPG's substituted Conclusions of Law are as or more reasonable than those of the RO. § 120.57(1)(*l*), Fla. Stat. (2018).

35. While certain underlying guardianship statutes that rendered Respondent's receipt of retainers "improper" were not expressly cited in the AAC, Respondent was put on notice of Petitioner's position that her receipt of improper retainer fees was a breach of her duty to act in good faith and, therefore, that she was subject to disciplinary action pursuant to sections 744.20041(1)(i) and (s), Fla. Stat.

36. Administrative proceedings are not required to meet technical niceties or formal exactness as required of pleadings in general litigation filed in courts. *See Wright–Simpson v. Dep't of Corrections*, 891 So. 2d 1122, 1125 (Fla. 4th DCA 2004); *see also Smith v. Dep't of Health & Rehab. Servs.*, 555 So. 2d 1254, 1256 (Fla. 3d DCA 1989) (affirming a rejection of a hearing officer's legal conclusion that the charging document at issue was legally insufficient, as the

document was specific enough to inform the employee with reasonable certainty of the nature of the charges brought against her).

37. The AAC complies with all pleading requirements, which require an administrative complaint filed in a disciplinary action to contain the statutory sections alleged to have been violated, and the facts or conduct relied on to establish such violations. Rule 28-106.2015(4)(b) & (c), F.A.C.

38. The ultimate facts were pleaded in paragraph 26 of the AAC. The facts were again set forth and incorporated in paragraph 56 of the AAC. The legal elements of a breach of duty of good faith were also set forth, albeit generally, as applied to such conduct in paragraphs 58(e) and 59 of the AAC.

39. Respondent filed an Answer to the AAC denying the retainers were improper but admitting that she did not receive prior approval for the retainer payments. Accordingly, Respondent cannot be said to lack sufficient notice that allegations related to the impropriety of retainers she took could lead to the imposition of disciplinary action. *See* Respondent's Answer to AAC (8/31/18), ¶26. Respondent was also questioned extensively at deposition and during the hearing, regarding her taking of retainers in the manner she did. Full Hearing Transcript (9/5/18) at page 56.[3]

40. Basing disciplinary action against Respondent "on conduct never alleged in an administrative complaint or some comparable pleading would violate the Administrative Procedure Act." *Cottrill v. Dep't of Ins.*, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996). However, this is not the situation in the present case. To the contrary, Respondent cannot reasonably claim she did not have the requisite notice that her taking of retainers was viewed by Petitioner as

[3] References to the Full Hearing Transcript (9/5/18), will be marked as [T. at (page number), (line number)], unless otherwise noted.

unlawful, because it was pleaded in the AAC, paragraph 26, and the issue was covered extensively during the proceedings.

41. Further, Respondent was afforded the full panoply of constitutional protections on whether she could take the retainers, and if she did, whether it was improper. Respondent was at all times afforded the ability to present evidence, cross-examine witnesses, call witnesses of her own, and inspect documents which Petitioner planned to use in its case against Respondent regarding the use of retainers.

42. The RO concludes that because Petitioner could have cited different statutes, or ones that more clearly delineate the prohibition against retainers, the AAC failed to put Respondent on notice that her taking of retainers breached the duty of good faith. [RO ¶74] The OPPG rejects this conclusion.

43. The AAC comported with the basic requirements of the law and due process. The factual matters concerning the retainers were pleaded in AAC paragraph 26. The facts were again set forth and incorporated as applied to Count V in paragraph 56 of the AAC.

44. Respondent knew of the retainer issue as evidenced, *inter alia*, by her Answer to the AAC and through her depositions and appearance at trial.

45. While the AAC could have been pleaded with more specificity, its failure to cite to a better section of law is not a fatal defect when the substance of the violation is in the petition. *W.S. v. Dep't of Children and Families*, 961 So. 2d 1131, 1133 (Fla. 4th DCA 2007).

46. In *W.S.*, a father's parental rights were terminated, certainly implicating more constitutional protections than those at issue in this proceeding. The petition to terminate parental rights failed to properly cite a statutory subsection. *Id.* The Fourth District held that this was not a fatal defect to the petition because the father was on notice that the proceeding concerned the termination of his parental rights. *Id.*

47. Based on the Findings of Fact, paragraphs 2, 32, and 33, of this Final Order and the RO the OPPG must accept this Exception, and substitute its own Conclusions of Law:

> [Professional Guardians (PG)] are appointed by the court to serve as legal decision-makers for persons determined incapacitated by the court (commonly referred to as "wards"), who are unable to make decisions that affect their health, safety, and well-being. PGs are fiduciaries entrusted with the care of the wards that they serve, and, as such, have an implied duty to act in good faith. The proper conduct and management of guardianship cases requires that guardians must be independent and impartial. [RO ¶2]
>
> * * *
>
> By taking money from the ward prior to providing any services and prior to court approval, Respondent created a conflict of interest. Once Respondent took a retainer from her client, she then had a financial interest at stake in seeing her fees were approved. [RO ¶32]
>
> Attorney [Sketchley] explained that these retainers appeared to be loans to Respondent. The round numbers, randomly taken as "retainers," without any billing prior to the taking of the retainer, or court authorization, suggest Respondent used "retainers" because she needed the money. This constitutes a breach of fiduciary duty, is contrary to the best interests of the ward, and creates a financial interest in the guardianship, which are prohibited by section 744.446. By using retainers, Respondent abused her power as a guardian. [RO ¶33]
>
> (Emphasis added.)

48. The legal conclusion in paragraph 70 of the RO, accepted above, goes further in supporting this Exception and the OPPG's Conclusions of Law:

> Count V charges Respondent with violation of Florida Statute 744.361(3), which states in its entirety, "the guardian shall act in good faith." Respondent points out that this law did not become effective until July 1, 2015, and the statute does not define "good faith." However it is undisputed for centuries that common law has applied a duty of good faith to a fiduciary relationship. "Good faith" in this context obviously prevents a PG from self-dealing or helping oneself to the ward's assets without court authorization. (Emphasis added).

49. When the above paragraphs are viewed together, the Petitioner has proven the elements of the breach of duty of good faith in violation of 744.361(3), Fla. Stat.

50. Even the criminal context, with its heightened constitutional protections, only requires that the actions and elements be appropriately pleaded. *B.H. v. State*, 645 So. 2d 987, 996 (Fla. 1994) (*citing with approval Sanders v. State*, 386 So. 2d 256, 257 (Fla. 5th DCA 1980)). The failure to plead is only sustained as a defense where an issue "was not raised in the petition, was

not mentioned in opening statements, and was not tried by implied consent." *Id.* (*distinguishing R.S. v. Dep't of Children & Families*, 872 So. 2d 412, 413 (Fla. 4th DCA 2004)).

51. Those ultimate facts were pleaded in paragraph 26 of the AAC. The facts were again set forth and incorporated as applied to the charge in paragraph 56 of the AAC. The legal elements of a breach of duty of good faith were also set forth, albeit poorly, as applied to such conduct in paragraphs 58(e) and 59 of the AAC.

52. Finding Respondent breached her duty of good faith by virtue of taking improper retainers did not violate Respondent's due process; Respondent participated fully in the proceedings, including a final hearing conducted pursuant to chapter 120 of Florida's Administrative Procedure Act. In the administrative context, it is well established that the "extent of . . . due process afforded to a party . . . is not as great as that afforded to a party in a full judicial hearing," and thus due process does not require the formalities requisite in judicial proceedings. *Carillon Cmty. Residential v. Seminole Cnty.*, 45 So. 3d 7, 10 (Fla. 5th DCA 2010); *see also Hadley v. Dep't of Admin.*, 411 So. 2d 184, 187 (Fla. 1982).

53. Rather, the requirements of due process in the administrative context are set forth in chapter 120, Florida's Administrative Procedure Act. *Wilson v. Pest Control Comm'n of Fla.*, 199 So. 2d 777, 780 (Fla. 4th DCA 1967) (holding that Administrative Procedure Act is intended to afford due process to parties whose legal rights, duties, privileges or immunities may be determined by administrative action on agency level).

54. Florida courts have consistently held that due process is afforded, even in the professional licensing context, when the agency comports with the requirements of Chapter 120. *Tauber v. State Bd. of Osteopathic Med. Examiners*, 362 So. 2d 90, 92 (Fla. 4th DCA 1978) (finding doctor's due process rights were not violated because doctor was given sufficient notice of hearing and had the opportunity to present evidence and argument and examine witnesses at a

hearing before his license to practice medicine was suspended); *Schimenti v. Sch. Bd. of Hernando Cnty.*, 73 So. 3d 831, 833–34 (Fla. 5th DCA 2011) (holding no due process violation in disciplinary action resulting in termination of teacher when the board followed the notice requirements set forth in chapter 120); *Henderson v. Dep't of Health Bd. of Nursing*, 954 So. 2d 77, 80–81 (Fla. 5th DCA 2007) (finding no due process violation in licensing discipline action against nurse when the board followed the notice and hearing procedures set forth in chapter 120).

55. Facts found in the RO related to Respondent's taking of improper retainers directly support a legal conclusion finding that Respondent violated her duty to act in good faith. [RO ¶¶ 26-33.] The ALJ found that Respondent abused her powers as a guardian when taking the retainers at issue, and that Respondent's taking of such retainers was a "breach of fiduciary duty, is contrary to the best interests of the ward, and creates a financial interest in the guardianship, which are prohibited by section 744.446." [RO ¶33] Paragraph 79 of the RO also includes the ALJ's legal conclusion that "Respondent's use of retainers was both a breach of the duty of good faith and not in the best interest of her wards." (Emphasis added.)

56. The RO's conclusion in paragraph 74 that the AAC failed to provide notice to Respondent fails for yet another reason as the issue was tried by consent.

Trial By Consent

57. The case law surrounding trial by consent presents a multitude of factors, a listing of which may not be exhaustive. *Smith v. Mogelvang*, 432 So. 2d 119, 124-25 (Fla. 2d DCA 1983).

> The essence of the broad test generally applied to determine whether an issue has been tried by implied consent is whether the party opposing introduction of the issue into the case would be unfairly prejudiced thereby. *See Dixie Farms, Inc. v. Timmons*, 323 So.2d 637 (Fla. 3d DCA 1975). Under that broad test, an unpleaded issue is considered as having been tried or not tried by implied consent under two interrelated criteria involving (a) whether the opposing party had a fair opportunity to defend against the issue and (b) whether the opposing party could have offered additional evidence on that issue if it had been pleaded. *See International Harvester Credit Corp. v. East Coast Truck*, 547 F.2d 888, 890 (5th Cir.1977) . . . .

58. The most crucial, but not dispositive, element in factor (a) is whether there was a timely objection. *Mogelvang*, 432 So. 2d at 124. In the present case there was a timely objection that evidence concerning retainers was outside the scope of the pleadings both factually and legally as a count of the AAC. [T. at pg. 60, ln 16] This led to a colloquy, which is significant to the discussion and disposition of this legal issue:

> MS. MORRIS: I'm going to object to this line of questioning as it's outside the scope of the Amended Complaint and it's irrelevant.
> MR. MCKEON: It's probative to the issues surrounding the retainers and the services that were actually paid for by virtue of the retainers.
> THE COURT: Can you point to any place in the Amended Complaint where an issue of retainers is --
> MS.[4] MCKEON: Yes, Your Honor
> THE COURT: -- discussed?
> MR. MCKEON: It's paragraph twenty-six Your Honor.
> MS. MORRIS: That's the only paragraph as far as I'm aware. There are none -- no allegations contained in any count.
> MR. MCKEON: And Your Honor, these allegations are included as I discussed. These are --
> MS. MORRIS: They're incorporated.
> MR. MCKEON: They are incorporated.
> THE COURT: They are incorporated.
> MS. MORRIS: They are. They're just not the subject of any statutory count though.
> MR. MCKEON: They're included as a prior violation of law which would render someone disqualified or unfit to practice.
> THE COURT: I'm going to overrule the objection and allow this one line of questioning. Go ahead sir.
> *Id.*

59. Both parties, and the Court, agreed that such facts were pleaded and then incorporated into the count section of the AAC. Significantly, the Court overruled the objection that the retainers were outside the scope of the AAC.

60. Just as significantly, the Respondent never raised the issue again on this ground nor objected to the inclusion of such evidence on the grounds of outside the pleadings, and Respondent

[4] As in original.

appears to have taken the issue as decisively plead. What the Respondent did contest was the whether the retainers were substantively improper, and whether the charge was a prohibited *ex post facto* law. Respondent's Proposed Recommended Order, ¶50.

61. This made unnecessary a motion by Petitioner to move to conform the pleadings to the evidence, as the Court ruled the pleadings already contained the requisite information. Such a motion would have been the proper remedy if the Court sustained the objection, but the Court did not and overruled the objection. The issue did not again appear until the Court *sua sponte* changed its legal conclusion in its RO. While the Court was entitled to so change its mind, the effect of this was to prejudice the Petitioner's ability to remedy the pleading after overruling the objection.

62. Further supporting this conclusion is that Respondent had a fair opportunity to defend against this issue and could submit additional evidence in its defense. *Mogelvang*, 432 So. 2d at 124-25. That is, the Respondent was permitted to cross-examine witnesses, present evidence of its own and even argue on the issue. The Respondent did argue later in the hearing that the retainer issue was not actionable on the pleadings, not because it was not properly pleaded to notice, but rather that it was a prohibited *ex post facto* law. T. at pg. 117, ln. 2 – p. 122 ln. 6; *see also* Respondent's Proposed Recommended Order, ¶50.

63. The understanding of what the pleading, and the hearing were about, is demonstrated in another colloquy:

> [MR. MCKEON]: All right, no further questions.
> THE COURT: When did that occur?
> [RESPONDENT]: Can I refer to my lawyer because I -
> THE COURT: Answer to the best of your ability. If you don't know, you can just say "I don't know." Your lawyer can't serve as a witness in this case.
> [RESPONDENT]: Maybe 2017.
> THE COURT: Is the assignment of guardianship cases at issue in this case? Is that part of the amended administrative complaint?
> MR. MCKEON: The assignment in so far as, the OPPG's position is that Ms. Savitt received it. It was a benefit to be assigned in cases and it potentially may come out in evidence that her marriage to Judge

Colin was a driving force.

THE COURT: Is that part of the Amended Administrative Complaint?

MR. MCKEON: I don't want to talk without making sure. Arguably, in paragraph thirty-one, it compassed that broadly. And then paragraph twenty-eight.

THE COURT: The allegations are basically, she failed to -- allegedly failed to disclose the conflict of interest and she took some retainers prior to the work actually being done. And then there was also a potential conflict of interest to previously with the fact that she's - she has a friendship relationship with Judge French and his ex-wife. It is not the basis of this Complaint in any way that she received an unusual amount of appointments as a result of her relationship with the judges in the circuit or that -- this is the problem for me, you didn't provide any background information on how these judges are assigned. I am not a guardianship judge.

MR. MCKEON: Sure.

THE COURT: I have no experience with the guardianship process. So, I don't know if the gist of this is, because she's married to the judge, she's getting all these extra appointments and she's getting all this extra money that she - that prejudiced other potential guardians. I didn't get that sense from reading the Administrative Complaint. My belief was, when I read the Administrative Complaint and then just recently, reviewed the Amended Administrative Complaint last week, was that the primary concern was of the conflict of interest supposedly with her husband who signed a couple of orders in several cases and this retainer issue. Is that correct?

MS. MORRIS: That's my understanding of this Amended Complaint. And in fact, although the preliminary allegations are incorporated into every count, you still have to meet the count's requirements and none of the counts address most of the preliminary allegations. The counts deal with the failure to disclose that's conflict of interest to her husband. The counts don't even deal with the retainer and that's because there was no law in place at the time, when these retainers were taken that prohibited the taking of the retainers. So their counts don't even include those.

MR. MCKEON: Your Honor, I believe that count five, which is - it's based upon the application of Section 744.361 sub 3, which provides that a guardian shall act in good faith. The OPPG's position is that Ms. Savitt was not acting in good faith as a result of the actions that we discussed here today. Also, in

count six, there is a guardian - there is a duty and codified in 744.361 sub 4, that a guardian may not act in a manner that is contrary to the ward's best interest. Under the circumstances, the OPPG's position that as Ms. Savitt sits here today, the actions that we have discussed render her to not have acted in a manner that is within the best interest of the wards under the circumstances. And finally, under count seven, there's an allegation premised on the application of Section 744.474 sub 3 that provides that a guardian is subject to removal from a case, in addition to any other penalties prescribed by law if the guardian has abused his or her powers. And it's the OPPG's position that Ms. Savitt has - of the acts that we discussed today.

MS. MORRIS: And Judge, if I might just respond and point out, that - and that - I understand that - I understand now that as the administrative judge, you don't make rulings, you do report and recommendations. I think that's what I understood because I had planned to make a motion for a judgment on the pleadings at the end of Petitioner's case. So I know that that doesn't apply here. But in 744.361, subparagraph three, count five, this statute did not exist during -

THE COURT: Until 2016.

MS. MORRIS: And actually yes, in 2015, July 7 2015.

THE COURT: Okay.

MS. MORRIS: This is a different statute than the OPPG statute. So this count five, this violation of this statute, this statute was changed. It did not exist when the cases - at issue here, 2010, 2011, 2012. I have for Your Honor, the law of what 744.361 subparagraph three was during those years. Had - and it - and nowhere in the law is there a statute during that time that states the - provides that a guardian shall act in good faith. Although inherently, one might argue of course, that a position of a fiduciary trust position should always act in good faith. And I believe Ms. Savitt testified to that as well. The fact is that the count of the statute for elements is nonexistent under these cases.

THE COURT: All right. I appreciate the argument and the clarification. Are you finished with your questions sir?

MR. MCKEON: Yes Your Honor.

THE COURT: All right. Why don't we go ahead and go off the record.

[T. at pg. 117, ln. 2 – p. 122 ln. 6 (emphasis added)]

64. This colloquy demonstrates that it was patently obvious to both the Court, and the

Respondent, that the retainers were one of the central issues in this proceeding, despite the not being pleaded as thoroughly as possible. In fact, Respondent did not challenge the retainer issue on a lack of notice or failure to plead, but rather as an *ex post facto* law. It is simply inaccurate for the RO and Respondent to now claim that Respondent did not have notice of what was at issue in this proceeding.

65. Based on this record of the hearing, it would be manifestly prejudicial to the Petitioner to conclude the retainers were not at issue, as the Petitioner had every impression the retainers were at issue in the hearing and would be adjudicated on the merits.

66. In light of the foregoing, the OPPG accepts and adopts paragraph 70 of the RO, but finds that Respondent breached her duty to act in good faith, whether predicated upon common law or statute, as Respondent received adequate notice that she faced disciplinary action for such conduct. Therefore, the RO's conclusions of law in paragraphs 71 through 74, finding otherwise, are rejected for the reasons so stated.

Exception Four Legal Conclusions: Count VI - Violation of Section 744.361(4)

67. The RO found that Respondent's taking of retainers prior to court authorization of her fees was "clearly against her wards' best interests." [RO ¶75.] However, the RO concluded that because the Petitioner did not specifically cite sections 744.446(2) or 744.454, Fla. Stat., in the AAC the OPPG was precluded from disciplining Respondent for taking retainers prior to being authorized by the court. [RO ¶76.]

68. The RO noted the OPPG did not specifically allege that the retainers Respondent took were also in violation of sections 744.446(2), Fla. Stat., which prohibits the use of the guardian-ward relationship for private gain, other than the repayment of fees and expenses provided by law, and 744.454, Fla. Stat., which prohibits a guardian from borrowing money from her ward.

69. The OPPG filed an exception to this legal conclusion, noting that Paragraph 26 of Petitioner's AAC, which is incorporated by reference into Count VI in paragraph 60, alleged that "Respondent improperly received retainers, advancements, or 'in trust' fees, to be paid by the wards for whom Respondent served as a professional guardian or guardian advocate, for services that had not been performed as of the date of said requests, and/or had not received prior court approval authorizing such payments to be made."

70. For the reasons stated below, the OPPG rejects the RO's legal conclusion in paragraph 76, finding that the allegations in the AAC failed to provide adequate notice to Respondent that her taking of retainers, without prior approval of her fees, constituted a breach of her duty to refrain from acting in a manner contrary to her wards' best interests.

71. While certain underlying guardianship statutes that rendered Respondent's receipt of retainers "improper" were not expressly cited in the AAC, Respondent was put on notice of Petitioner's position that her receipt of improper retainer fees was a breach of her duty to refrain from acting in a manner contrary to a ward's best interests and, therefore, she was subject to disciplinary action pursuant to section 744.20041(1)(i), Fla. Stat.

72. Administrative proceedings are not required to meet technical niceties or formal exactness as required of pleadings in general litigation filed in courts. *See Wright–Simpson*, 891 So. 2d at 1125; *see also Smith*, 555 So. 2d at 1256 (rejecting a hearing officer's legal conclusion that the charging document at issue was legally insufficient, as the document was specific enough to inform the employee with reasonable certainty of the nature of the charges brought against her).

73. The AAC complied with all pleading requirements, which require an administrative complaint filed in a disciplinary action to contain the statutory sections alleged to have been violated, and the facts or conduct relied on to establish such violations. *See* Rule 28-106.2015(4)(b) & (c), F.A.C.

74. Significantly, Respondent filed an Answer to the AAC denying the retainers were improper, but admitting that she did not receive prior approval for the retainer payments. Accordingly, Respondent cannot be said to lack sufficient notice that allegations related to impropriety of retainers she took could lead to the imposition of disciplinary action.

75. Respondent, in the course of discovery, was also provided with an investigative report that formed the basis of this administrative action. The analysis included in the report communicated that the retainers were in violation of chapter 744. Respondent was also questioned extensively at hearing regarding her taking of retainers in the manner she did. T. at pg. 56.

76. Basing disciplinary action against Respondent "on conduct never alleged in an administrative complaint or some comparable pleading would violate the Administrative Procedure Act." *Cottrill*, 685 So. 2d at 1372 (Fla. 1st DCA 1996). However, Respondent cannot claim she did not have the requisite notice that Petitioner viewed her taking of retainers as unlawful.

77. Respondent contends that she was not put on adequate notice, and both Respondent and the RO accord great weight to the fact Respondent was not notified of the investigation while it occurred, nor notified of any purported improper guardianship practices prior to being served with this administrative action. The OPPG is unaware of any criminal, administrative, ethical or licensing investigation that is conducted in this way.

78. Finding Respondent breached her duty to act in her wards' best interests by taking improper retainers did not violate Respondent's due process; Respondent fully participated in the proceeding, including a final hearing conducted pursuant to Chapter 120 of Florida's Administrative Procedure Act. In the administrative context, it is well established that the "extent of . . . due process afforded to a party . . . is not as great as that afforded to a party in a full judicial

hearing," and thus due process does not require the formalities requisite in judicial proceedings. *Carillon Cmty.*, 45 So. 3d at 10; *see also Hadley* 411 So. 2d at 187.

79. Instead, the requirements of due process in the administrative context are set forth in Chapter 120, Florida's Administrative Procedure Act. *Wilson v. Pest Control Comm'n of Fla.*, 199 So. 2d 777, 780 (Fla. 4th DCA 1967) ("The Administrative Procedure Act is intended to afford due process to parties whose legal rights, duties, privileges or immunities may be determined by administrative action on agency level.").

80. Florida courts have consistently held that due process is afforded, even in the professional discipline/licensing context, when the agency comports with the requirements of Chapter 120. *Tauber*, 362 So. 2d at 92 (ruling doctor's due process rights were not violated because doctor was given sufficient notice of hearing and had the opportunity to present evidence and argument and examine witnesses at a hearing before his license to practice medicine was suspended); *Schimenti*, 73 So. 3d at 833–34 (finding no due process violation in disciplinary action resulting in termination of teacher when the board followed the notice requirements set forth in chapter 120); *see also Henderson*, 954 So. 2d at 80–81 (concluding no due process violation in licensing discipline action against nurse when the board followed the notice and hearing procedures set forth in chapter 120).

81. Findings of fact in the RO related to Respondent's taking of improper retainers directly support a legal conclusion that Respondent violated her duty to refrain from acting in a manner contrary to her wards' best interests. [RO ¶¶ 26-33] The RO found Respondent abused her powers as a guardian when taking the retainers at issue, and that Respondent's taking of such retainers was a "breach of fiduciary duty, is contrary to the best interests of the ward, and creates a financial interest in the guardianship, which are prohibited by section 744.446." [RO ¶33] (emphasis added). What the RO does not consider is the prohibition in section 744.361(4), Fla.

Stat., that "a guardian may not act in a manner that is contrary to the ward's best interests . . . ." While not specifically pleaded on paper, the Court overruled Respondent's objection on whether the issue was sufficiently pleaded.

82. Paragraph 79 of the RO also includes the legal conclusion that "Respondent's use of retainers was both a breach of the duty of good faith and not in the best interest of her wards."

83. In light of the foregoing, the OPPG finds that Respondent breached her duty to refrain from acting in a manner contrary to her wards' best interests, and is therefore subject to disciplinary action pursuant to section 744.20041(l), Fla. Stat., as Respondent received adequate notice that she faced disciplinary action for her taking of the retainers at issue in this manner. Therefore, the ALJ's conclusions of law in paragraph 76 are rejected.

Exception Five Legal Conclusions: Count VII – Violation of Section 744.474(3)

84. Paragraph 77 of the RO opines that "Respondent abused her power as a guardian by taking retainers without prior court approval of her fees. However, nothing in this section, or section 744.2001 through 744.20041 gives OPPG the authority to remove a guardian." The RO then concludes that Petitioner is unable to discipline a professional guardian whose actions subject them to removal from a guardianship because, unlike the circuit courts overseeing a guardianship case, the OPPG does not have the authority to remove a guardian from a specific case to which they were appointed. This is despite previously finding "[b]y using retainers, Respondent abused her powers as a guardian." [RO ¶33]

85. A professional guardian may be disciplined by the OPPG for violating any provision of chapter 744. § 744.20041(1)(s), Fla. Stat. Discipline includes the permanent revocation of the license of the professional guardian. § 744.20041(2)(b), Fla. Stat. One of the enumerated reasons for which a guardian may be removed from a guardianship to which they have

been appointed is the "[a]buse of his or her powers." § 744.474(3), Fla. Stat. (2012-2018); the enumerated reasons for "removal shall be in addition to any other penalties prescribed by law." *Id.*

86. Therefore, it stands to reason that a professional guardian who is in violation of this statutory requirement is also potentially subject to disciplinary action brought by the OPPG pursuant to section 744.20041(1)(i), Fla. Stat. To hold otherwise would be equivalent to finding that there is no statutory or legal obligation for a professional guardian to refrain from abusing their powers as such, as there is no other statutory provision in chapter 744 expressly relating to such a duty.

87. Where the literal language of a statute is in conflict with the stated legislative policy of the act, the court will not give the language its literal interpretation "when to do so would lead to an unreasonable conclusion or defeat legislative intent or result in a manifest incongruity." *See Blinn v. Fla. Dep't of Transp.*, 781 So. 2d 1103, 1107 (Fla. 1st DCA 2000); *see also Matrix Emp. Leasing v. Hernandez*, 975 So. 2d 1217, 1219 (Fla. 1st DCA 2008) (holding that, "[t]o properly determine the scope of a statutory term, it is necessary to consider the act as a whole, the evil to be corrected, the language of the act, including its title, the history of the enactment, and the state of the law already in existence on the subject.").

88. To limit the application of the section 744.474 in the manner suggested by the RO contradicts the express language of sections 744.20041(1)(i) and (s), and frustrates the intended purpose of sections 744.2001(2)(a) and (3)(c), Fla. Stat., which mandate that OPPG has "oversight responsibilities for all public and professional guardians" that include "[e]stablishing disciplinary proceedings, conducting hearings, and taking administrative action pursuant to chapter 120."

89. Findings of fact in the RO related to Respondent's taking of improper retainers, which are incorporated herein, directly support a legal conclusion that Respondent violated the duty to refrain from abusing her powers as a guardian, codified in section 744.309(3), Fla. Stat.

[RO ¶¶ 26-33] The RO specifically found that "[b]y using retainers, Respondent abused her power as a guardian." [RO ¶ 33]

90. In light of the foregoing, the OPPG finds that Respondent abused her powers as a guardian and is therefore subject to disciplinary action for same, pursuant to sections 744.20041(l)(i), and (s), Fla. Stat., as Respondent received adequate notice that she faced disciplinary action for her taking of the retainers at issue. Therefore, the ALJ's conclusions of law in paragraph 77 are rejected for the reasons stated.

91. Paragraph 78 is rejected as to the conflict issue for the reasons stated above. The discussion of a benefit to Respondent is rejected in that it is an added element of the offense charged.

92. Paragraph 79 is accepted to the extent it concludes Respondent's use of retainers was both a breach of the duty of good faith and not in the best interests of her wards.

93. Paragraph 79 is rejected to the extent it concludes the issues were not adequately pleaded.

94. Paragraph 80 is rejected to the extent that it is significant as a matter of proof that no harm was demonstrated to the wards or their families. It is significant in that no one was further harmed. However, such a matter is not significant in providing a defense to Respondent's actions. It is a mere mitigating factor in determining the penalty, not the offense.

95. Paragraph 80 is accepted to the extent it concludes: Respondent's actions, of failing to adequately disclose her marriage to a then sitting judge in the Probate and Guardianship Division in which Respondent practices as a professional guardian and guardian advocate, and taking retainers not authorized by law, erode the public confidence in the guardianship system.

CONCLUSION

Given the rulings on the above Exceptions, the OPPG concludes that the findings of fact set forth in the RO, which are incorporated herein, demonstrate that Respondent is subject to disciplinary action for violations of section 744.20041(1)(i), Fla. Stat., as she failed to perform the following statutory or legal obligations placed upon a professional guardian:

96. Respondent violated her legal obligation, as a professional guardian with a fiduciary relationship to the wards she serves, to act in good faith. As indicated in paragraph 70 of the RO, a guardian's duty to act in good faith arises out of common law and was codified in section 744.361(3), Fla. Stat., in 2015.

97. Respondent violated her legal obligation, as a professional guardian with a fiduciary relationship to the wards she serves, to refrain from acting in a manner that is contrary to her wards' best interests. This obligation arises out of common law, and was codified in section 744.361(4), Fla. Stat.

98. Respondent violated her legal obligation to refrain from abusing her powers as a guardian, codified in section 744.474(3), Fla. Stat. (2012-2018).

99. As pleaded all are grounds for disciplinary action under section 744.20041(1)(i), Fla. Stat.

100. Additionally, due to the proof of violation of statutes of chapter 744, the OPPG is permitted to discipline Respondent pursuant to section 744.20041(1)(s), Fla. Stat. As discussed above, the facts and the statute as the bases for the violation were expressly pleaded. The prayer for relief requests that relief be granted pursuant to section 744.20041, Fla. Stat. *W.S.*, 961 So. 2d at 1133.

101. Like the statute at issue in *W.S.*, section 744.20041 requires acts to be pleaded that violate a list of prohibited actions. One of those prohibited actions is violating "any provision of [chapter 744] or any rule adopted pursuant thereto." § 744.2004(1)(s), Fla. Stat.

102. The AAC pleaded specific provisions of chapter 744 which were violated and related them back to the facts alleged. This is all that was required under section 744.20041(1), Fla. Stat. Given that the violations in the AAC were proven, a discussion of the disciplinary action under section 744.20041(2), Fla. Stat., now follows.

DISCIPLINARY ACTION

103. Section 744.20041(2), Fla. Stat., allows the OPPG to enter an order imposing any of the following penalties for violating section 744.20041(1):

(a) Refusal to register an applicant as a professional guardian.
(b) Suspension or permanent revocation of a professional guardian's registration.
(c) Issuance of a reprimand or letter of concern.
(d) Requirement that the professional guardian undergo treatment, attend continuing education courses, submit to reexamination, or satisfy any terms that are reasonably tailored to the violations found.
(e) Requirement that the professional guardian pay restitution of any funds obtained, disbursed, or obtained through a violation of any statute, rule, or other legal authority to a ward or the ward's estate, if applicable.
(f) Requirement that the professional guardian undergo remedial education.

104. "In determining what action is appropriate, the [OPPG] must first consider what sanctions are necessary to safeguard wards and to protect the public. Only after those sanctions have been imposed may the [OPPG] consider and include in the order requirements designed to mitigate the circumstances and rehabilitate the professional guardian." § 744.20041(3), Fla. Stat.

105. There is a range of penalties a professional guardian faces when her actions constitute grounds for disciplinary action by the OPPG under section 744.20041(1), Fla. Stat.:

> The range of penalties are based upon a single count violation of each provision listed. Multiple counts of the violated provisions or a combination of the violations may result in a higher penalty. Each range includes the lowest and highest penalties that may be imposed for that violation. . . . The [OPPG] may find it necessary to deviate

from the guidelines for the reasons stated in subsection (3) of this rule.

Rule 58M-2.011(1), F.A.C. (emphasis added).

106. "In imposing discipline upon applicants and guardians, the [OPPG] shall act in accordance with guidelines and shall impose a penalty within a range corresponding to the violations set forth in form DOEA/OPPG Form 003, [OPPG] Disciplinary Guidelines (February 2017), incorporated herein by reference and available at http://www.flrules.org/Gateway/reference.asp?No=Ref-07914, unless the [OPPG] finds it necessary to deviate from the guidelines for the stated reasons given in subsection (3), of this rule." Rule 58M-2.011(2), F.A.C.

744.20041(1)(i)

107. The potential disciplinary actions a professional guardian faces for failing to perform any statutory or legal obligation pursuant to section 744.20041(1)(i), Fla. Stat., range from the issuance of a written reprimand or letter of concern, to a two-year suspension, for a professional guardians first offense. *See* DOEA/OPPG Form 003, pg. 3. Subsequent offenses for the violation of section 744.20041(1)(i) range from a written reprimand or letter of concern to suspension or revocation. *Id.*

108. The OPPG may deviate from the guidelines. Rule 58M-2.011(3), F.A.C.

109. Respondent was found to have violated three statutory or legal obligations that render her subject to disciplinary action pursuant to section 744.20041(1)(i):

(1) Count V -- 744.361(3), breach of duty to act in good faith by taking retainers prior to services creating a prohibited conflict of interest and financial interest in the guardianship. [RO ¶32];

(2) Count VI – 744.361(4) breach of her duty to act in a ward's best interests under the circumstances by taking money from a ward in the form of a retainer

"prior to providing any services and prior to court approval[,]" thereby creating a loan from the ward to the Respondent. [RO ¶¶ 32-33];

(3) Count VII – 744.474(3) violating the prohibition against abuse of powers by taking money from a ward in the form of a retainer "prior to providing any services and prior to court approval[,]" thereby creating a loan from the ward to the Respondent. [RO ¶¶ 32-33]

110. Respondent was found to have violated multiple statutory sections under chapter 744. The manner in which Respondent took retainers also suggests that she did so for her own benefit because she needed money. [RO ¶33]

111. This is dangerous to the public as there is no way to monitor the taking of loans from wards due to their incapacity; this is the very reason guardianship exists. "[Professional Guardians] have a special relationship with their wards." [RO ¶26]

112. Respondent was found to have taken loans, without permission or interest thereon, on multiple occasions. Respondent's pattern of behavior demonstrated in randomly taking retainers in cases, with no set business practices in place to establish the cases in which retainers would be sought or establish the amount of retainer taken, with no written retainer agreements with her clients, demonstrates a disregard for the checks and balances the Florida Legislature has put into place for the safeguarding of vulnerable adults in need of a guardian or guardian advocate.

113. Additionally, Respondent's marriage to a judge, sitting in the Probate and Guardianship Division in which she practiced as a professional guardian and guardian advocate, created a potential conflict or appearance of conflict that should have been more thoroughly disclosed.

114. As found by the RO, such action "constitutes a breach of fiduciary duty, is contrary to the best interests of the ward, and creates a financial interest in the guardianship . . ." [RO ¶33]

Ultimately, Respondent "[eroded] the public confidence in the guardianship system." [RO ¶22] These reasons are found to be significant aggravating factors. Permanently revoking Respondent's registration would serve a deterrent effect to all guardian registrants that such behavior is outside their scope of practice and fiduciary duties toward their wards.

115. For these reasons, the OPPG finds it necessary to deviate from the guidelines found in Rule 58M-2.011(2), and revoke Respondent's registration for the above violations of section 744.20041(1)(i), Fla. Stat.

Section 744.20041(1)(s)

116. The potential disciplinary actions a professional guardian faces for violating provisions of chapter 744 through section 744.20041(1)(s), Fla. Stat. range from the issuance of a written reprimand or letter of concern, to a suspension for two years or revocation, for a professional guardians first offense. *See* DOEA/OPPG Form 003, pg. 3.

117. Here, Respondent was found to have violated four statutory sections under chapter 744 that render her subject to disciplinary action pursuant to section 744.20041(1)(s), Fla. Stat.:

(1) Count I – 744.309(3) failure to adequately disclose a conflict of interest so that the public received adequate notice of her marriage to a probate judge;

(2) Count V -- 744.361(3), breach of duty to act in good faith by:

(a) taking retainers prior to services creating a prohibited conflict of interest and financial interest in the guardianship; and

(b) failing to thoroughly disclose a conflict of interest through her marriage to a judge creating at least an appearance of a conflict of interest.

(3) Count VI – 744.361(4) breach of her duty to act in a ward's best interests under the circumstances by taking money from a ward in the form of a retainer

"prior to providing any services and prior to court approval[,]" thereby creating a loan from the ward to the Respondent. [RO ¶¶ 32-33]

(4) Count VII – 744.474(3) violating the prohibition against abuse of powers by taking money from a ward in the form of a retainer "prior to providing any services and prior to court approval" thereby creating a loan from the ward to the Respondent. [RO ¶¶ 32-33]

118. When evaluating the appropriate disciplinary action to be imposed, the OPPG "shall take into consideration the danger to the public; the number of repetitions of offenses; the length of time since the date(s) of violation; the number of disciplinary actions taken against the guardian; the length of time the guardian has practiced; the actual damage, physical or otherwise, to the ward; the deterrent effect of the penalty imposed; any efforts for rehabilitation; and any other mitigating or aggravating circumstances." Rule 58M-2.011(3), F.A.C.

119. Respondent was found to have violated multiple statutory sections under chapter 744. The manner in which Respondent took retainers also suggests that she did so for her own benefit because she needed money. [RO ¶33]

120. Respondent was found to have taken loans, without permission or interest thereon, on multiple occasions. Respondent's pattern of behavior in randomly taking retainers in cases, with no set business practices in place to establish the cases in which retainers would be sought, or establish the amount of retainer taken, with no written retainer agreements with her clients, demonstrates a disregard for the checks and balances the Legislature has put into place for the purpose of safeguarding vulnerable adults in need of a guardian or guardian advocate. This is dangerous to the public as there is no way to monitor the taking of loans from vulnerable persons.

121. As found by the RO, such action "constitutes a breach of fiduciary duty, is contrary to the best interests of the ward, and creates a financial interest in the guardianship . . . ." [RO

¶33] Ultimately, Respondent "[eroded] the public confidence in the guardianship system." These reasons are found to be significant aggravating factors. Permanently revoking Respondent's registration would serve a deterrent effect to all guardian registrants that such behavior is outside their scope of practice and fiduciary duties toward their wards.

122. For these reasons, the OPPG finds it necessary to deviate from the guidelines found in Rule 58M-2.011(2), and revoke Respondent's registration for the above violations of section 744.20041(1)(s), Fla. Stat.

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED:

1. Respondent's Florida professional guardian registration, number 1006, is hereby revoked, effective immediately.

2. Such revocation is permanent. § 744.20041(8), Fla. Stat.

3. Let this Final Order serve as notice of the revocation of Respondent's professional guardian registration, number 1006, to any current or future court of competent jurisdiction where Respondent is appointed as guardian. §§ 744.2004(4), 744.20041(9), Fla Stat.

DONE AND ORDERED this 21 day of March 2019.

Department of Elder Affairs,
Office of Public and Professional Guardians

Carol A. Berkowitz

Carol Berkowitz, M.A., Esq.,
Executive Director

JUDICIAL REVIEW

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rules 9.110 and 9.190, Florida Rules of Appellate Procedure, with the Agency Clerk of the Department of Elder Affairs, and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal within 30 days of rendition of this Final Order.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order has been provided by certified and electronic mail, unless otherwise noted, to the following on this 21st day of March, 2019:

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