

OPPOSITION TO P 30 (2018)

REAL PROPERTY, PROBATE AND TRUST LAW SECTION OF THE FLORIDA BAR

GUARDIANSHIP, POWER OF ATTORNEY AND ADVANCE DIRECTIVES COMMITTEE

I. SUMMARY

The Guardianship, Power of Attorney and Advance Directives Committee has reviewed Proposal 30 (“P30”) and formally opposes the legislation. The Committee found the proposed constitutional amendment to be detrimental to the persons with disabilities intended to be protected by Florida statutes, including but not limited to, Chapter 744 (Florida Guardianship Law), Chapter 393 (Guardian Advocate Law), Chapter 394 (Florida Mental Health Act), and Chapter 397 (Marchman Act), result in serious overarching and unintended consequences, and potentially result in a significant increase in fees and costs incurred by the State of Florida, the person with disabilities, and others. This position is consistent with the staff analysis of P30 which states in section III(D) “The adoption of the proposed amendment may subject Florida laws relating to mental, cognitive, or developmental disabilities to a heightened level of judicial scrutiny. Areas of law which may be impacted include, but are not limited to guardianship, involuntary mental health treatment (Baker Act), etc.”¹

Article I, Section 2 of the Florida Constitution prohibits discrimination by the government on the basis of an individual’s race, religion, natural origin, or physical disability. P30 seeks to expand the protection provided under Article 1 to all types of disabilities. However, the term disability is not defined in the Florida Constitution and there appears to be no Florida case law that interprets the term within the scope of Article I, Section 2. Further, only two other states in the United States have an express constitutional prohibition regarding discrimination on the basis of a disability, and only one state includes all handicaps.

The Committee feels P30 should be opposed primarily based on the need to more fully evaluate the impact that the proposed amendment may have on various Florida Statutes that address the rights of persons with disabilities, particularly those that provide safeguards to protect those who have diminished capacity or lack capacity, either temporarily or permanently. The Committee has concerns regarding the ambiguity of the term “disability” and the effect of a

¹ <https://www.flrc.gov/Proposals/Commissioner/2017/0030/Analyses/2017p0030.pre.dr.PDF>

strict scrutiny standard that will apply to a wider, undefined range of persons in Florida than may be found under the U.S. Constitution. The Committee would like to explore the problem that this proposal is seeking to fix to determine whether a revision to or creation of a Florida Statute may be more appropriate to resolve a more specific concern without the unintended consequences.

For example, the legislative intent behind Florida Guardianship Law, which is to, among other things, assist incapacitated persons in meeting the essential requirements for their health and safety, may be thwarted by P30 by applying a strict scrutiny test that limits the ability of the judiciary to protect these persons with disabilities.

II. COMMENT AND ANALYSIS ON PROPOSED CHANGES TO ARTICLE I, SECTION 2

P30 is a proposed constitutional amendment to Article I, Section 2 of the Florida Constitution, which seeks to expand the protection against discrimination to all persons with disabilities. The specific proposal is as follows:

ARTICLE I DECLARATION OF RIGHTS

SECTION 2. Basic rights.—All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race, religion, national origin, or any ~~physical~~ disability.

Standard of Review

Under the Florida Constitution, “physical disabilities” are a specifically enumerated suspect classification requiring the court to use strict scrutiny when evaluating a law that deprives a person of any right based on their physical disability. The removal of the word physical from Article I, Section 2 would expand the suspect class to persons with all types of disabilities. In applying strict scrutiny, it is presumed that the law or policy is unconstitutional and the government bears the burden of proof to overcome the presumption.² The analysis requires careful examination of the governmental interest to determine whether the interest is

² *In re Estate of Greenberg*, 390 So. 2d 40, 43 (Fla. 1980).

substantial and requires inquiry into whether the means adopted to achieve the legislative goal are necessarily and precisely drawn.³ The Florida Supreme Court, in *Scavella v. School Bd. of Dade County*, 363 So. 2d 1095, 1097-98 (Fla. 1978), applied a standard even more stringent than the strict scrutiny test, finding that the court needed only decide whether the law at issue deprived the person with a disability of *any* right, not just their right to be treated equally under the law. If P30 is successful, and the court need only find that a law deprives a person with a disability of *any* right, it will turn Florida's guardianship, Baker Act, Marchman Act, and guardian advocate systems upside down, as they all deprive disabled persons of certain rights in conjunction with the person's best interests and safety to themselves and others.

Definition

The term disability is not defined in the Florida Constitution, and there are a wide range of definitions that the court may potentially consider in addressing this issue in the future. Disability is defined in the Americans With Disabilities Act (ADA) as a physical or mental impairment that substantially limits one or more major life activities of such individual, a record of such an impairment, or being regarded as having such an impairment.⁴ Major life activities under the ADA include, but are not limited to, caring for oneself, concentrating, thinking, communicating, and working.⁵

Application to Florida Statutes

While the Committee strongly believes the full impact of the P30 needs to be severely vetted, as examples of possible unintended consequences, the Committee provides the following Florida Statute Chapters that the Committee believes will be seriously impacted by the amendment:

Chapter 744: Guardianships

In Florida, a petition to determine incapacity can be filed when there is a belief that another person lacks the ability to exercise some or all of the alleged incapacitated person's (AIP) rights. Florida Guardianship Law then sets forth the procedure for determining whether the AIP is incapacitated, including appointing an attorney for the AIP, an examining committee to personally evaluate the AIP, and an evidentiary hearing to make specific findings of facts regarding the determination of incapacity and nature and extent of the incapacity. When a person

³ *Id.* (citing *Examining Board v. Flores De Otero*, 426 U.S. 572 (1976))

⁴ 42 U.S.C § 12102(1)

⁵ 42 U.S.C § 12102(2)

is judicially determined to lack the ability to exercise some or all of their rights, those rights are removed from the person and those that can be delegated are delegated to a fiduciary, whether a guardian or an agent/surrogate under an advance directive.

The very nature of an incapacity proceeding is addressing a mental impairment that substantially limits one or more major life activities of an individual. The court must determine the form of assistance in each case that least interferes with the legal capacity of a person to act on their own behalf, but any time a person is found to lack the capacity to manage one or more of their own affairs, they are being deprived of a right based on their disability. If the Florida Guardianship Law relating to deprivation of rights is presumed to be unconstitutional, the practical effect will be a frustration of the entire guardianship process, which is meant to protect the very people whose rights are removed under the statutes.

If a petition to determine incapacity is filed, the court evaluates the person's ability to exercise the following rights:

- to marry
- to contract
- to sue and defend lawsuits
- to determine his or her residency
- to consent to medical and mental health treatment
- to personally apply for government benefits
- to make decisions about his or her social environment or other social aspects of his or her life
- to vote
- to travel
- to have a driver's license
- to seek or retain employment
- to manage property or to make any gift or disposition of property.

If the court has to apply a strict scrutiny test where the removal of each of these rights is presumed to be unconstitutional, the outcome may be contrary to public policy and the burden of overcoming the presumption would create a significant problem for the parties, the court and the court system. Under the current law, the burden of proving incapacity is by clear and convincing evidence, a very high burden which offers great protection to those who do not lack capacity but are subject to guardianship proceedings. Further, Florida courts have consistently applied broad constitutional protection in guardianship matters.⁶

⁶ See *Smith v. Smith*, 224 So. 3d 740 (Fla. 2017) (holding that the ward is not required to obtain court approval prior to exercising the right to marry, but court approval is necessary before such marriage can be given legal effect);

If in each incapacity hearing, the court has to inquire into whether the means adopted to achieve the legislative goal are necessarily and precisely drawn, the court may need to conduct an incredibly detailed and overly burdensome hearing, such as anticipating each of an unlimited amount of contracts an AIP may sign and make specific findings of facts regarding the AIP's ability to enter into the contract so that the outcome is sufficiently narrowly tailored.

Chapter 393

Chapter 393 of the Florida Statutes addresses the process for a person to obtain the legal authority to act on behalf of an individual with a developmental disability. Developmental disability is defined as a disorder or syndrome that is attributable to intellectual disability, cerebral palsy, autism, spina bifida, Down syndrome, Phelan-McDermid syndrome, or Prader-Willi syndrome; that manifests before the age of 18; and that constitutes a substantial handicap that can reasonably be expected to continue indefinitely.⁷ Similar to guardianships under Chapter 744, the court makes findings of the nature and scope of the person's lack of decision-making ability and delegates certain rights to the guardian advocate. The court may appoint a guardian advocate for a person with a developmental disability if the person lacks the decisionmaking ability to do some, but not all, of the decisionmaking tasks necessary to care for their person or property. The developmentally disabled person retains all legal rights except those that have been specifically granted to the guardian advocate.

If the proposed amendment is passed, the concerns of the unintended consequences in guardianship advocate cases are the same as those outlined in guardianship matters above. Chapter 393 is often the favored mechanism for those who want someone to continue to have authority to care for a family member or friend once that person turns 18. If the guardian advocate statutes are presumed unconstitutional, this may create a significant roadblock to properly protecting persons with developmental disabilities once they reach an age of majority.

Chapter 394

Florida Statute Chapter 394 sets forth the law and procedure for a "Baker Act." The Baker Act allows for a person to be picked up and transported to a crisis stabilization unit for an involuntary psychiatric examination if they suffer from a mental illness and meet other criteria outlined in Chapter 394, such as posing a substantial threat to themselves. The law specifically provides that "a person who is receiving treatment for mental illness shall not be deprived of any

⁷ Florida Statute § 393.063(12)

constitutional rights. However, if such a person is adjudicated incapacitated, his or her rights may be limited to the same extent the rights of any incapacitated person are limited by law.”⁸

Under Chapter 394, a person may be subject to an involuntary examination and involuntary placement in a facility. For example, if a police officer finds someone who is suicidal and determines they meet the criteria for a Baker Act, the officer has the authority to pick up the person and take them to a facility for involuntary examination. The examination must be completed without unnecessary delay, and, if the result of the examination is that the person should continue to be held, a petition for involuntary placement must be filed with the court. If the actions of police officers, medical facilities and courts were presumed to be unconstitutional by virtue of discriminating against people with mental illness, there would be no safeguards to protect these people from themselves and others. With all of the mass shootings that our country has been faced with in recent years, this is an enormous problem and there need to be mechanisms available to the government to protect those with mental illness from themselves and others.

Chapter 397

Florida Statutes Chapter 397 is the Marchman Act, which is similar in nature to the Baker Act, but addresses substance abuse. Substance abuse issues may be considered a mental impairment that substantially limits one or more major life activities of such individual, and therefore may fall under the category of a disability. The Marchman Act provides a comprehensive continuum of accessible and quality substance abuse prevention, intervention, and treatment services in the least restrictive environment. The services include involuntary assessment and involuntary treatment when appropriate. Therefore, the same concerns as indicated above for Baker Acts apply if the constitutional amendment goes into effect because it calls into question the constitutionality of the Marchman Act process.

III. Conclusion

This opposition paper has expressed many of the initial primary concerns with P30, although certainly not all of the concerns. The Guardianship, Power of Attorney and Advance Directives Committee of the Real Property, Probate and Trust Law Section of the Florida Bar opposes this proposed constitutional amendment. For the reasons stated herein, and for others which are not fully expressed, the proposed amendment to would be detrimental to the disabled

⁸ Florida Statute § 394.459(1)

adults intended to be protected by Florida Statutes, would cause uncertainty as to the constitutionality of multiple chapters of Florida Statutes, and would result in a significant increase in fees and costs incurred by the State of Florida, the disabled person, and others. The intent behind the amendment to prevent discrimination to mentally disabled persons is a just cause, but the unintended consequences put the people the amendment is trying to protect in great danger of being exploited, causing harm to themselves or others, and causing harm to their property. Current Florida Statutes already provide the necessary safeguards for the court to interfere with the lives of disabled persons as little as possible, and Florida Case Law has applied broad constitutional protection for these disabled persons. Accordingly, the Real Property, Probate and Trust Law Section of the Florida Bar asks that the Constitutional Revision Committee not be approved and placed on the ballot.

- IV. Fiscal Impact on State and Local Government** – Substantial additional time burdens on the Courts and the costs associated therewith can be expected due to the increased constitutional challenges associated with P30. In addition, costs to the clerks will be increased significantly as the clerk will be required to monitor and document additional restrictions/requirements as part of their review of the annual accountings and plans submitted by the guardian.
- V. Fiscal Impact on Private Sector** – This proposal will exponentially increase the amount of unnecessary and costly litigation under Florida Statutes focusing on minute issues which will now be required to be heavily litigated in order to ensure compliance with the heightened constitutional standards.
- VI. Constitutional Issues** –See above.
- VII. Other Interested Parties** – This Amendment will impact all sections of the Florida Bar. In addition, this amendment will impact private employers, private businesses, medical providers, and other private sector companies who will be required to ensure compliance with this new constitutionally protected class.