

THE STATE OF NEW HAMPSHIRE  
SUPREME COURT

In re Jeannette Marino

Supreme Court Docket No. \_\_\_\_\_

2016-0253



**MOTION TO STAY ORDER PENDING APPEAL AND REQUEST FOR  
EXPEDITED DECISION**

NOW COMES the Appellant, Jeannette Marino, by and through her attorneys, Devine, Millimet & Branch, Professional Association, and pursuant to Supreme Court Rule 7-A respectfully files this Motion to Stay Order Pending Appeal, stating in support as follows:

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**INTRODUCTION**

1. This is an appeal from an Administrative Order issued by Edwin W. Kelly, Administrative Judge of the New Hampshire Circuit Court, dated May 6, 2016, whereby Judge Kelly, following a disciplinary proceeding initiated under the authority of Probate Division Administrative Order 16, ordered that Jeannette Marino is to be immediately stripped of her status as a Professional Guardian in the State of New Hampshire.

2. Ms. Marino seeks an immediate stay pending appeal to preserve the status quo and to avoid irreparable harm to her livelihood, her reputation, and to avoid severely impacting the seventeen (17) wards for whom she currently serves as a Professional Guardian. Judge Kelly has expressly declined to allow a stay pending any appeal from his order, and therefore this Motion to Stay is proper. N.H. Sup. Ct. R. 7-A. A copy of the Order from which the appeal is taken is attached as Exhibit A.<sup>1</sup> Judge Kelly has also issued Administrative Order 2016-008 listing all pending matters from which Ms. Marino is to be removed. Exhibit B.

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<sup>1</sup> “Without commenting on whether Ms. Marino has a right of appeal to the New Hampshire Supreme Court, if she chooses to do so, I will not stay the Orders entered pending that appeal.” Administrative Order 2016-007 (Kelly, J.), at p. 8.

3. Ms. Marino requests an expedited decision on this Motion to Stay given the irreparable and irreversible consequences that will result if the underlying Administrative Order is immediately implemented. There is no “opposing party” here and therefore any 10-day waiting period before consideration of this motion should be waived. N.H. Sup. Ct. R. 1. Moreover, the position of the Administrative Judge is clearly set forth in his decision, attached.

4. Judge Kelly’s Administrative Order follows a disciplinary process initiated by him against Ms. Marino involving two separate guardianship matters in which she was appointed by the Circuit Court, Probate Division, as a Professional Guardian pursuant to RSA 464-A. Ms. Marino is on the approved list of Professional Guardians maintained by the Probate Division pursuant to RSA 464-A:2.<sup>2</sup> Administrative Order 16 establishes the criteria to be eligible for appointment as a Professional Guardian.<sup>3</sup> The State of New Hampshire has no independent licensing authority or official certification process with respect to Professional Guardians. There is also no established statutory or administrative process in New Hampshire for disciplining Professional Guardians. There is no professional conduct board that oversees disciplinary issues. The Administrative Judge is the sole authority to decide eligibility for appointment as a Professional Guardian, and in this matter such authority has been exercised and extended to include conducting the underlying disciplinary hearing and sanctioning process which has led to this appeal.

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<sup>2</sup> 464-A:2 Definitions. "Professional guardian" means a competent person who provides guardianship services for a fee to a ward and who is not related to the ward by blood, adoption, marriage, or civil union. To be eligible for appointment, a professional guardian shall meet criteria established by the administrative judge of the probate court.

<sup>3</sup> Administrative Order 16 begins by asserting that the Administrative Judge “shall certify professional guardians who shall then be eligible for appointment[....]” Of the requirements listed for eligibility, the only reference to disciplinary proceedings is #16 which states that professional guardians shall: “Be subject to removal from the list of approved guardians for non-compliance with any of the criteria for professional guardians or for good cause as determined by the Probate Court Administrative Judge.”

5. Ms. Marino was found to have committed violations of various National Guardianship Standards and New Hampshire Court Rules by failing to properly and timely account for fees received in connection with her services (In re Guardianship of J.L.), and by having inappropriately relocated one of her wards to a new residential dementia treatment facility (In re Guardianship of M.P.<sup>4</sup>). Ms. Marino was removed as the Professional Guardian in the Matter of M.P., her fees in Matter of J.L. were reduced, and the Probate Division Judges assigned to each of those matters referred these issues to Judge Kelly.

6. Judge Kelly thereafter referred the matters to Judge Gary Cassavechia to hold a hearing and issue a recommended sanction. After a hearing at which Ms. Marino was the sole witness to testify, Judge Cassavechia by “Disciplinary Recommendation” dated April 7, 2016, recommended to Judge Kelly that Ms. Marino be suspended from the list of approved Professional Guardians for a period of two years. A copy of said Disciplinary Recommendation is attached as Exhibit C. Further, it was recommended that she be removed from all other matters in which she is appointed as a Professional Guardian, numbering seventeen (17) in total. Ms. Marino filed a motion for reconsideration which was denied by Judge Cassavechia by Order dated April 21, 2016. Exhibit D.

7. Judge Kelly thereafter rejected Judge Cassavechia’s recommended two-year suspension, and instead chose to impose what can only be considered the most severe form of punishment available, namely, a permanent revocation of Ms. Marino’s eligibility to practice as a Professional Guardian in the State of New Hampshire and perhaps other jurisdictions.

8. Judge Kelly further ordered that his decision is to be immediately disseminated to multiple Federal and State agencies, along with all of Ms. Marino’s current wards and their

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<sup>4</sup> This Court by order dated September 14, 2015, affirmed the decision of the Circuit Court (Leonard, J.) in the Matter of M.P. (Case No. 2014-0655).

family members. The Order directs that all of Ms. Marino's seventeen (17) existing guardianship cases are to be immediately transferred to the Office of Public Guardian.

9. Ms. Marino now files a Notice of Appeal with this Court, along with this Motion to Stay Judge Kelly's Orders, pending this Court's appellate review.

#### **STANDARD OF REVIEW ON MOTION TO STAY**

10. A stay should be granted to preserve the status quo where the applicant demonstrates (1) a likelihood of success on the merits, (2) that irreparable harm will occur absent a stay, (3) that issuance of the stay will not substantially injure other parties interested in the proceeding, and (4) where the public interest lies. See Hilton v. Braunskill, 481 U.S. 770, 776 (1987). "The movant need not always show a probability of success on the merits; instead, the movant need only present a substantial case on the merits when a serious legal question is involved and show that the balance of the equities weighs heavily in favor of granting the stay." Ruiz v. Estelle, 650 F.2d 555, 565 (5<sup>th</sup> Cir. 1981). Ms. Marino submits that a stay pending appeal is warranted here.

#### **ARGUMENT**

##### **A. Absent a Stay, Ms. Marino Will Suffer Irreparable Harm**

11. The punishment which the Administrative Judge seeks to impose upon Ms. Marino will have a devastating, career ending impact upon her livelihood. The irreparable harm to Ms. Marino cannot be clearer. The decision of Judge Kelly to permanently remove Ms. Marino from the approved list of Professional Guardians (which would prevent her from serving as a professional guardian on future matters), coupled with the immediate removal from all of her existing seventeen cases, an effective retroactive removal, destroys Ms. Marino's legally

protected property interest, namely, her right to continue working in her occupation as a Professional Guardian.<sup>5</sup>

12. Moreover, Judge Kelly's directive that his decision be disseminated to other Federal and State agencies, including the U.S. Social Security Administration, the Center for Guardianship Certification, the New Hampshire Attorney General's Office, and the National Guardianship Association, likewise destroys Ms. Marino's ability to act as and earn a living as a paid trustee, representative payee, and as an estate administrator—all positions she currently holds. The overwhelming disastrous consequences to her livelihood that would result (inability not only to serve as guardian, but also to serve as a trustee or other fiduciary in matters even unrelated to guardianship) comes despite the fact that none of the findings below and none of the judges who criticized her work found any transgressions related to the work on her current guardianship cases. Indeed, these current cases were not the subject of this disciplinary process. What is more, the findings of breaches were not related to Ms. Marino's work in her capacity in other fiduciary positions (outside of guardianship). Essentially, Judge Kelly's broad order, to be disseminated to numerous organizations, will destroy her ability to work in any fiduciary capacity.

13. If Judge Kelly's Order is not stayed, Ms. Marino's ability to earn a living effectively comes to a screeching halt. If the Order is not stayed and yet she prevails on appeal, her ability to seek and gain employment in the future is likely to be severely impacted. Issuing a stay will preserve the status quo and allow Ms. Marino to continue serving in her many roles, including as Professional Guardian for her existing seventeen wards, some of whom she has

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<sup>5</sup> An individual is deprived of a protected liberty interest if he or she is prevented "from continuing to work in an occupation generally open to similarly educated or experienced individuals." See Petition of Preisendorfer, 143 N.H. 50, 52 (1998).

served as Professional Guardian for more than 10 years and many of whom, Ms. Marino asserts, would most likely object to her removal as guardian.

14. During the entire disciplinary process which began in 2014, Ms. Marino has continued to serve as Professional Guardian for her other cases without incident and notwithstanding additional oversight by the Court.<sup>6</sup> At no time during this process has the Administrative Judge or any other Circuit Court Judge sought to remove Ms. Marino from her other existing cases, and that status quo should be maintained.

15. Ms. Marino respectfully submits that the harm to the public perceived by Judge Kelly as stated in his Order is unsupportable, and the immediate removal from all existing cases is simply unnecessary given the numerous available alternative sanctions. For example, Ms. Marino could be required to seek court approval prior to relocating any ward. With respect to fees, again the issue which led to the discipline involved an accounting matter and not theft from a ward. This very process of taking disciplinary action against Ms. Marino will no doubt cause her to immediately correct her behavior to conform to the court rules and standards she was found to have violated. Moreover, Ms. Marino submits the violations were isolated – in none of Ms. Marino’s other guardianship matters has she been accused of improperly accounting for her fees. In fifteen years of practicing as a professional guardian Ms. Marino has never been disciplined, nor has there been a founded report or complaint.

**B. Ms. Marino Submits that she Will Succeed on the Merits of her Appeal**

16. The underlying disciplinary matters involving her actions with respect to J.L. and M.P. do not rise to the level of posing a serious threat to any ward. The issue in the Matter of J.L. involved whether Ms. Marino appropriately and timely accounted for and disclosed her

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<sup>6</sup> Indeed, during these proceedings, Judge Kelly and Judge Cassavechia had full access to, and apparently did review, Ms. Marino’s existing guardianship files.

guardianship fees and fees paid to the ward's attorney. Ms. Marino has never refused to cooperate by providing the court with whatever information was requested in order for the court to determine the reasonableness of the total fees sought. In addition, it was Ms. Marino herself who revealed to the court a \$4,800 payment—disclosed in a footnote within a motion to reconsider. This is not a case whereby funds were deliberately and unlawfully taken for personal gain. Ms. Marino paid herself fees due for services rendered from a retroactive Social Security benefit payable to her ward which if not spent down would have disqualified the ward from maintaining eligibility for Medicaid benefits.<sup>7</sup> Even viewing the evidence in a light most unfavorable to Ms. Marino, she is guilty of failing to properly account for the fees she received, poorly explaining her reasoning and intentions, and charging too much for her services. She did not, however, steal money from her ward or otherwise abuse her ward. This is not akin to an attorney misappropriating client funds or other severe transgression that would warrant decertification.

17. With respect to the Matter of M.P., Ms. Marino was found to have moved her ward from one facility to another without properly involving her existing care team and family members, and “tricking” her incapacitated ward into relocating under the guise of taking her to lunch. The method by which M.P. was moved to the new facility may have been improper (as found by the court), but there was no evidence or even a claim that M.P. suffered any lasting detrimental effect or that the new facility would not provide for her needs. M.P. suffered from severe dementia and Ms. Marino used tactics which in her judgment would have caused the least stress and anxiety to her ward, a method that is an accepted method within clinical and

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<sup>7</sup> Medicaid eligibility requires that the beneficiary not have more than \$2,000 in countable assets.

professional guardianship literature.<sup>8</sup> The Matter of M.P. did not involve physical abuse or harm to the ward. Indeed, there is no evidence or even any claims or allegations that Ms. Marino has ever in her 15 year career physically or mentally abused a ward.

18. Ms. Marino has contemporaneously filed with this motion her Notice of Appeal. As set forth in that Notice, Ms. Marino has raised numerous areas in which she maintains the Circuit Court erred in this matter. Ms. Marino respectfully requests that this Court consider those issues set forth in the Notice as it looks now to her ability to succeed on the merits of her appeal.

19. Given the lack of disciplinary guidelines under New Hampshire law, and given what Ms. Marino submits is a sanction far exceeding what might be justified based on her transgressions as found by the court, Ms. Marino seeks to challenge the sanction imposed by Judge Kelly. In New Hampshire, there is no established procedure for disciplining professional guardians. Judge Cassavechia recognized this in his Recommendation Order. Neither Ms. Marino nor the court were provided any established structure, procedure, burden of proof guidance, or appeal prospects. As such, it is fair to say that both Ms. Marino and the court were “flying blind” without any fixed statutory or other legal authority to govern these disciplinary proceedings. Faced with this lack of authority, Judges Kelly and Cassavechia applied a version of the analysis of the standard utilized in attorney discipline matters in New Hampshire (In re: Richard’s Case, 153 N.H. 729, 743 (2006)). Using this framework as guidance, the purpose of discipline is not to inflict punishment for a particular offense, but rather its purpose is to protect the public. Id. Where there are multiple violations, the sanction imposed should at least be

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<sup>8</sup> Ms. Marino testified during the hearing before Judge Cassavechia that she relied on certain literature from a Dartmouth Professor and Geriatric Psychiatrist that even suggested, in order to minimize stress and confusion on the part of an individual suffering from severe dementia in transferring an individual to a care facility, an appropriate approach would be to merely tell the individual that she would be going to lunch, when the real purpose of an outing was to transfer to a facility. That is what Ms. Marino did.



consistent with the sanction for the most serious instance of misconduct. In re Wyatt's Case, 159 N.H. 285, 306 (2009).

20. Judge Kelly determined that the most serious offense was the relocation of M.P. and Ms. Marino's failure to "treat her with dignity and respect."<sup>9</sup> Ms. Marino submits that the sanction of permanently removing her from the list of approved guardians and from otherwise removing her from her current guardianship matters (a sanction akin to attorney disbarment), is significantly disproportionate to her misconduct, particularly in light of the alternate forms of sanctions that are available. In addition, the disciplinary process under the authority of the Administrative Judge was devoid of a formal process afforded to other professionals. The Circuit Court did not allow a re-examination of the underlying factual issues in the two matters before the court.

21. Judge Kelly states that he believes the fiduciary responsibility of a guardian is significantly different than that of an attorney toward a client, and that guardians should be held to an even higher standard. Both Judge Cassavechia and Judge Kelly chose to apply the same standards used in attorney disciplinary matters. Judge Cassavechia rejected Ms. Marino's request to apply the same standards used in sanctioning a guardian *ad litem*. Yet in both attorney and guardian *ad litem* matters there is a well-defined disciplinary process consisting of procedures for conducting the investigation and hearing, as well as listed forms of sanctions that are available and standards to consider in deciding the type of sanction to impose. There is no such process afforded to Professional Guardians.

22. This lack of a well-defined process which has resulted in the most severe form of punishment without precedent in similar matters must be closely scrutinized by this Court on appeal.

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<sup>9</sup> Administrative Order 2016-007 (Kelly, J.), at p. 5.

23. Notwithstanding that a sanction should not be used as a form of punishment, Ms. Marino respectfully submits that Judge Kelly's Order can only be viewed in that light—as severe punishment.<sup>10</sup> Judge Kelly's Order does not discuss alternative forms of sanction, and the rejection of Judge Cassavechia's recommendation of a lesser sanction underscores the punitive nature of the decision to order permanent removal. Judge Cassavechia—who was in the best position to assess Ms. Marino's credibility—recommended a harsh two year removal from the list of approved guardians. Judge Kelly, although agreeing with Judge Cassavechia's findings, took the sanction to a whole new level—permanent removal, permanent ban, and reporting to numerous agencies which will effectively prevent her from working even outside the guardianship world.<sup>11</sup>

24. In nearly every other profession involving professional licensure there are many different forms of discipline available. For example, the regulations for attorney discipline contemplate (a) public censure, (b) reprimand, (c) suspension, (d) disbarment, (e) monetary

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<sup>10</sup> Judge Kelly writes: “[Ms. Marino’s] assertion that her removal as trustee was the ‘result of an agreed Stipulation’ was nothing short of a bold-faced lie made directly to [me].” Administrative Order 2016-007 (Kelly, Jr.), at p. 3.

“Finally, if the findings cited above were not enough to cause one to distrust Ms. Marino’s truthfulness, there was her obvious lie to me in the course of my initial investigation cited earlier in this Order.” *Id.*, at p. 6.

“The damage to J.L. was no less severe in its own right and equally demonstrative of a very disturbing attitude on the part of this guardian that, frankly, reeks of arrogance.” *Id.*, at p. 6.

“In addition, of course, are the further aggravating factors noted earlier concerning the lies and subterfuge she used toward other professionals, as well as the trial courts, and me in the course of my initial investigation.” *Id.*, at p. 7.

<sup>11</sup> Indeed, in at least one of the attorney discipline cases Judge Kelly cites in his Order, the Court imposed a lesser sanction than disbarment for similar transgressions involving intentional misrepresentations. See *In re Kalil*, 146 N.H. 466, 467-68 (2001) (in case involving misrepresentation to court, imposing three-month suspension from practice of law in light of many years of practice, lack of disciplinary history, and expression of remorse). Similarly, here Ms. Marino has worked diligently as a professional guardian for seventeen years, with no extensive history of disciplinary actions, and has expressed remorse for her actions to Judge Cassavechia. Administrative Order 2016-007, p. 7.

sanctions, and (f) mandatory or voluntary participation in a diversion program to address the cause of the misconduct.

25. Similarly, the administrative code for disciplinary actions against a Guardian *ad litem* in New Hampshire set forth eight (8) forms of sanctions, to wit: (a) revocation, (b) suspension, (c) supplemental training, (d) supervised training, (e) supplemental education, (f) a fine, (g) treatment and counseling (for alcohol and substance abuse issues), and (h) a written reprimand.

26. Based upon the foregoing, Ms. Marino submits that the most severe sanction here was not warranted, not supported, and constitutes an unsustainable exercise of the Circuit Court's discretion. A sanction short of suspension or removal from the list of approved guardians is warranted and would provide the protection to wards that the court desires. Given the harsh punishment imposed here, the effect such immediate punishment will have on Ms. Marino's career and livelihood, and given the unsettled nature of the law governing the underlying proceedings, a stay is warranted.

**C. A Stay Will not Injure Other Parties or the Public Interest**

27. As noted, since September 2014 and throughout these disciplinary proceedings, Ms. Marino has continued to serve as a Professional Guardian, without any finding that she has violated any guardianship standards or that she has otherwise failed in her dealings with her wards or with the court. In deciding whether to grant a stay, this Court has the power to grant a stay with conditions. For example, this Court could order that appropriate administrative oversight of Ms. Marino's cases be implemented, such as requiring court approval before relocating the residence of any ward, a closer review of her files on a regular basis, etc. Such

oversight would protect the public while affording Ms. Marino her right to appeal. The requested stay, especially with this additional oversight, will not injure any parties or her wards.

28. Furthermore, Ms. Marino submits that, without a stay in this case, her wards may be adversely affected. Judge Kelly's Order requires the immediate removal of Ms. Marino and the immediate transfer of her cases to the Office of Public Guardian. Ms. Marino has served as guardian for these individuals for many years, some longer than ten years. Her immediate removal will cause hardship to the wards and to their caregivers and providers. Transferring a ward from one guardian to another can be traumatic and confusing for the incapacitated individual, and should these transfers occur now, only to be again changed should Ms. Marino prevail on appeal, it may likely result in further confusion and potential harm.

WHEREFORE, the Appellant, Jeannette Marino, respectfully requests that this Court:

- A. Issue an order staying in its entirety Administrative Orders 2016-007 and 2016-008, both dated May 6, 2016, pending this appeal; and
- B. Grant such other and further relief as this Court deems just and equitable.

Respectfully Submitted,


JEANNETTE MARINO

By her attorneys,

**DEVINE, MILLIMET & BRANCH,  
PROFESSIONAL ASSOCIATION**

Dated: May 9, 2016

By:

  
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