

HOT GUARDIANSHIP BENCH

Foster v. Radulovich, 331 So.3d 281 (Fla. 2d DCA 2021)

PROTECTING THE RIGHTS OF THOSE WE SEEK TO PROTECT

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Innocent until proven guilty and the right to counsel in preparing a defense—fundamental rights protected by the United States' Constitution. However, could it be that those accused of felonies have more rights than one alleged to be incapacitated? In *Foster v. Radulovich*, 331 So. 3d 281 (Fla. 2d DCA 2021), the right of an alleged incapacitated person ("AIP") to select his counsel was center stage. Similar to a criminal proceeding, once a petition to determine incapacity is filed, the trial court is required to appoint an attorney for the AIP. Thereafter, Florida law permits an AIP to substitute counsel until incapacity is proven by clear and convincing evidence. A process that seems straightforward, right?

For Mr. Foster, the process was anything but simple. Mr. Foster became an AIP when a petition for appointment of plenary guardian over the person and property was filed by Adult Protection Services (APS). The petition sought the appointment of an emergency temporary guardian ("ETG") pending an adjudication of incapacity. Court-appointed counsel for Mr. Foster attended the hearing and stipulated, without consulting Mr. Foster, the appointment of an ETG. Among other rights, Mr. Foster's right to contract was delegated to the ETG. When Mr. Foster tried to hire his own attorney, APS and the ETG opposed the act and argued that Mr. Foster's right to contract with his own attorney had been removed. The trial court conducted a hearing on the motion seeking appointment of Attorney Denman as counsel for Mr. Foster, where Mr. Foster explained to the court that after meeting with and discussing the guardianship case with Attorney Denman, he wanted Attorney Denman to represent him. The trial court denied the motion and did not permit Mr. Foster to have Attorney Denman represent him. On September 21, 2020, the day after the ETG letters expired, Attorney Denman filed a notice of appearance. The trial court then, on its own accord, entered amended ETG letters nunc pro tunc September 20, 2020, denied the motion to substitute counsel, and struck the notice of appearance as a nullity.

Editor's Note: *Nunc pro tunc* is Latin for "now for then," this refers to changing back to an earlier date of an order.

Following the denial of Mr. Foster's right to select counsel of his choice, a petition for writ of certiorari was filed with the Second District Court of Appeal. During the pendency of

the appeal, Mr. Foster's guardianship proceeding continued as though the issue of his right to select counsel was of no importance and without merit. The trial court proceeded to allow court-appointed counsel to represent Mr. Foster, despite Mr. Foster's statements in court that he was not satisfied with the representation. During the pendency of the appeal, Mr. Foster was adjudicated incapacitated and his rights were removed.

Almost a year after the appeal was filed, the Second DCA issued an opinion finding that "a person subject to an emergency temporary guardianship remains an alleged incapacitated person until such time as he is adjudicated incapacitated and is free to exercise all rights not otherwise delegated to a guardian pursuant to an emergency temporary guardianship, including the right to substitute counsel."

Following the opinion, Attorney Denman filed a motion for substitution of counsel with the trial court and a memorandum of law on the effect of the opinion from the Second DCA. Opposition argued that the Second DCA did not intend to grant Mr. Foster the right to select his own counsel in this proceeding and that due to the appointment of a guardian, the opinion was moot. Again, Mr. Foster was unable to exercise his right to counsel.

Mr. Foster sought clarification from the Second DCA on the effect of its opinion. On December 17, 2021, the court reiterated its prior opinion, stating that ignoring or denying Mr. Foster's motion to appoint counsel of his choosing would be in defiance of the opinion and remanded the proceeding to void the finding of incapacity that occurred during the pendency of the appeal. Finally, over a year after Mr. Foster sought to select his own counsel, the now 96-year-old, was permitted to exercise a fundamental right that is given to alleged felons every day. At the crux of this issue is remembering who the guardianship system is built to protect-- the alleged incapacitated person. It is axiomatic that the criminal justice system, built to protect members of society from crimes, wouldn't provide greater rights to the accused than the guardianship system provides to AIPs. After all, Nelson Mandela once said "[t]o deny people their human rights is to challenge their very humanity."