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March 29, 1991

The Honorable Sid J. White, Clerk
Supreme Court of Florida
Tallahassee, Florida 32399-1927

Re: In The Supreme Court of Florida, Case No. 77,086; Amendments to the Florida Probate Rules/Expedited Judicial Intervention Concerning Life-Prolonging Procedures

Dear Mr. White:

The following are comments directed to the proposed Probate Rule 5.900, "Expedited Judicial Intervention Concerning Life-Prolonging Procedures." As a result of representing Estelle Browning's interests before the court, I have had the opportunity to represent and consult with numerous families in cases to refuse or have withdrawn unwanted medical treatment. Due to this background, some of my comments are directed to practical considerations which may arise in the implementation of the Rule.

Persons to Whom Notice is Given

Subsection (c) of the proposed Rule lists those persons upon whom notice of the petition and preliminary hearing shall be served. It is suggested that the adult children of the patient be included among the persons to be notified, and that "all other persons the petitioner may believe may have information concerning the expressed wishes of the patient" as stated in subsection (c)(6), be deleted.

In the majority of cases that the undersigned has handled regarding a patient's medical treatment choices, the principal family operative involved has been an adult child of the patient. In many cases the patient has survived his or her spouse. Even in situations where the patient's spouse is available for decision making, the spouse may not be the natural parent of the patient's adult children. For

these and other obvious reasons, it is appropriate and useful to notify the patient's adult children of the petition and preliminary hearing.

In Browning, the undersigned and Mrs. Browning's sole relative expended much effort in contacting Mrs. Browning's friends and associates to discover any statements or expressions she may have made concerning her health care wishes. As a result of this inquiry, between five and ten friends of Mrs. Browning were located who had information concerning her wishes. Her friends were elderly, and many lived out of county and out of state. Under the proposed Rule, all of these persons would have to be served with notice of the petition and preliminary hearing. This is not only impractical, but not necessary. The petitioner under subsection (a)(4) of the proposed Rule is required to state in the petition the names of such "other persons" having information concerning the expressed wishes of the patient. By including this information in the petition, the interested parties will have an opportunity to contact said "other persons" and may take a statement from such a person or arrange for their appearance at the hearing.

Therefore, it is suggested that Rule 5.900(c) provide for service of the notice of the petition and the preliminary hearing upon the patient's adult children, but not require such service on "all other persons the petitioner believes may have information concerning the expressed wishes of the patient."

Manner in Which Notice is Served

The proposed Rule does not specify whether the "notice" to be given is formal or informal. Therefore, under Florida Probate Rule 5.040(c), informal notice is intended:

> "(c) 'Notice' Defined. In these rules, the Florida Probate Code, and the Florida Guardianship Law 'notice' shall mean informal notice unless formal notice is specified."

Under Florida Probate Rule 5.041 informal notice may be accomplished by mail, and "service by mail shall be complete upon mailing." As a result, because the preliminary hearing on the petition under the proposed Rule must be held within seventy-two hours after filing the petition, the subject persons entitled to receive notice, may not receive actual notice prior to the preliminary hearing. It is thus suggested that formal notice be served in the manner specified in Florida Probate Rule 5.040(a)(3).

Therefore, it is suggested that subsection (c) of the proposed Rule be amended to read as follows:

> **"Notice. Unless waived by the court, notice of the petition and the preliminary hearing shall be served pursuant to Florida Probate Rule 5.040(a)(3) on the following persons who have not joined in the petition or otherwise consented to the proceedings..."**

Establishing the Need for Expedited Judicial Intervention

Subsection (a)(5) of the proposed Rule requires the petitioner to state in the petition the "facts sufficient to establish the need for expedited judicial intervention." There is no reason for the petitioner to establish the need for expedited judicial intervention, and it is suggested that this part of the proposed Rule be omitted. The court in Browning has already determined that cumbersome judicial procedures to effectuate the subject medical treatment decisions are inappropriate because they often result in the death of the patient during the course of litigation and otherwise impede families from pursuing the patient's wishes. Therefore, because the court has already found the need for an expedited judicial procedure, the petitioner need not so establish the same in the petition.

It is therefore suggested that the petitioner not be required to establish the need for expedited judicial intervention in the petition and that subsection (a)(5) of the proposed Rule read as follows:

> **"(a) Petition. Any proceeding...shall be**

commenced by the filing of the verified petition which states:

(5) Facts sufficient to establish the need for the relief requested."

Title of Rule

The title of the Rule as well as subsection (a) refer to "life-prolonging" procedures. It is suggested that the phrase "life-prolonging" not be used and that either "medical treatment," or "health care" be used in its place. The court in Browning has held that the fundamental constitutional right to refuse medical treatment "encompasses all medical choices...regardless of [the patient's] medical condition." 568 So.2d at 10. Utilizing the phrase "life-prolonging" may be interpreted to restrict the applicability of the proposed Rule to only certain types of treatment decisions. Therefore, because the constitutional interest encompasses all medical treatment decisions, and the purpose of the Rule is to help effectuate those decisions, the Rule should not be limited only to those treatment decisions which are "life-prolonging."

Further, the term "life-prolonging procedure" may be misconstrued because of its definitional use in Chapter 765, the Life Prolonging Procedure Act of Florida. It is the settled law in this state that the constitutional right to refuse or have withdrawn unwanted medical treatment is broader than that afforded under Chapter 765. Browning, 568 So.2d at 9, Corbett v. D'Alessandro, 487 So.2d 368, 370 (Fla. 2d DCA 1986). As a result, certain medical treatment decisions are not permitted under Chapter 765 because the subject treatment is not defined as a "life-prolonging procedure" under the Act. As the proposed Rule is certainly not intended to apply only to treatment decisions which may be authorized under Chapter 765, the phrase "life-prolonging" should not be used in the Rule in order to prevent any needless confusion.

Therefore, it is suggested that proposed rule 5.900 be titled "expedited judicial intervention concerning medical treatment procedures," or, "expedited judicial intervention concerning health care procedures," and that the phrase "life-prolonging" also be so changed in subsection (a) of the rule.

Pursuant to the official notice published regarding the proposed Probate Rule, seven copies of these comments are included herein, and a copy has been mailed this date to The Florida Bar. I am available to discuss the above comments or answer any questions regarding the same which may be raised by The Florida Bar or any other interested party. In addition, I am available to appear before the court at oral argument should the court wish to inquire about the above.

Thank you for the opportunity to comment on this matter.

Respectfully,

GEORGE J. FELOS

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Copies to:
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