OA. 4-12-91

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SID J. WHITE
APR 1 1991
CLERK, SUPREME COURT
By _____ Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

IN RE:	AMENDMENTS TO THE FLORIDA PROBATE RULES	)))	CASE NO: 77,086 FLORIDA BAR NO: 394408

COMMENTS AND SUGGESTIONS CONCERNING THE PROPOSED RULE 5.900

The firm of Shutts & Bowen submits the following comments and suggestions concerning proposed Rule 5.900.

Shutts & Bowen has been extensively involved in the litigation in this state concerning life-prolonging procedures. We represented the hospital and patient's family in John F. Kennedy Memorial Hospital v. Bludworth, 452 So.2d 921 (Fla. 1984). We represented the plaintiff, Thomas Corbett, in Corbett v. D'Alessandro, 487 So.2d 368 (Fla. 2d DCA 1986). We represented The Society for the Right to Die in its amicus curiae role in In re Guardianship of Browning, 568 So.2d 4 (Fla. 1990). We have also represented Miami Children's Hospital in numerous trial court proceedings in Circuit Court in Dade County to obtain court orders authorizing blood transfusions and other treatment for children.

We are pleased with the responsive way that Florida courts have addressed these issues with strong leadership from the Florida Supreme Court. We are also pleased that the Florida Supreme Court initiated the development of rules to expedite these important cases. However, we are concerned with one aspect of the proposed ruling - standing - which we suggest should be amended.

STANDING

Our concern is that the first sentence of the proposed rule states that a proceeding "may be brought by any adult person." This appears to grant standing to any adult person to initiate such a proceeding, regardless of the absence of any relationship to the patient or the situation. As explained more fully below, if any adult person were to have standing, then this would enable strangers who have only an ideological, philosophical or religious interest in the decisions to drag families and health care providers into court, undermining the Supreme Court's goal of not requiring routine court involvement in these decisions. In re Guardianship of Browning, 568 So.2d 4, 15 (Fla. 1990). The rule should be clarified to limit the scope of persons having standing to those having a legitimate interest in the matter.

The problem of standing can be addressed in several ways: (a) a simple amendment to the proposed rule with or without an explanation in the order adopting the rule, or (b) a more detailed amendment to the proposed rule.

SIMPLE AMENDMENT

The simplest way to accomplish this limitation would be to insert "interested" before "adult person." The court (a) could leave the development of the meaning of "interested" persons to future decisions or (b) could facilitate disposing with inappropriate cases by either (i) providing guidance in its order adopting the rule or (ii) adopting a more detailed amendment similar to the one set forth on pages 3 - 4 below.

The guidance could be similar to the following: Interested persons include health professionals and officials of institutions caring for the patient. Interested persons also include a guardian, a court-appointed health care surrogate, any person designated by the patient in a living will or health care surrogate document, the patient's spouse, any adult child of the patient, a parent of a minor patient, and any friend or more remote family member of the patient with actual knowledge of the patient's wishes. When an identified state interest is at stake, the state through its appropriate agencies, such as DHRS or a state's attorney, would be an interested person. Other outsiders with no knowledge of the patient's wishes or involvement in the patient's treatment cannot be interested persons.

DETAILED AMENDMENT

The above detail could be placed in the rule by, in addition to inserting "interested" before "adult person," inserting a new subsection defining "interested adult person":

(-) Interested adult person. The interested adult person who brings the proceeding must be one of the following:

(1) any guardian or court-appointed health care surrogate;

(2) any person designated by the patient in a living will, durable power of attorney, or health care surrogate document;

(3) the patient's spouse or one or more adult children;

(4) a parent of a minor patient;

(5) any friend or more remote family member of the patient with knowledge of the patient's wishes;

(6) any licensed health care professional who is caring for the patient;

(7) any official of a health care institution which is caring for the patient; or

(8) when an identified state interest is at stake, on behalf of the state, a state attorney for the district where the patient is located or a state official from an appropriate agency with responsibilities concerning welfare of patients of the type of the patient

EXAMPLE OF THE PROBLEM

The danger of not limiting standing to interested persons is illustrated by Weber v. Stony Brook Hospital, 60 N.Y.2d 208, 456 N.E.2d 1186 (1983). Baby Jane Doe was born with spina bifida and serious complicating disorders. After consultation with neurological experts, nurses, religious counselors and a social worker, the parents elected a conservative course of medical treatment involving no surgery.

A resident of a different state with no direct interest in or relationship to the family initiated a pro se proceeding seeking to compel surgery. The Attorney-General of New York unsuccessfully sought to have the proceeding dismissed. The trial court appointed the pro se initiator of the proceeding to be guardian ad litem and ordered surgery. The intermediate appellate court reversed the order of the surgery on the grounds that no medical deprivation had been shown. 95 A.D.2d 587, 467 N.Y.S.2d 685 (2d Dept. 1983). The highest court affirmed, but on different grounds. It ruled that the proceedings should have been dismissed because the stranger did not have standing to file the petition.

The Florida Supreme Court should not preclude the standing defense. The absence of a standing requirement will encourage strangers to inflict burdensome proceedings on families and health care providers. The court in Weber described the tactics as follows:

> It would serve no useful purpose at this stage to recite the unusual, and sometimes offensive, activities and proceedings of those who have sought at various stages, in the interests of Baby Jane Doe, to displace parental responsibility for and management of her medical care. 456 N.E.2d at 1187.

Mr. Weber is not unique. There are other individuals with strongly held personal views that life sustaining procedures should not be declined or stopped. It would not be consistent with the Court's interpretation of the Florida Constitution's Right of Privacy, Art. I, section 23, to permit private individuals to misuse the Courts to thwart or burden

the exercise of the right to decline medical treatment. In re Guardianship of Browning, 568 So.2d 4 (Fla. 1990); Public Health Trust v. Wons, 541 So.2d 96 (Fla. 1989); John F. Kennedy Memorial Hospital v. Bludworth, 452 So.2d 921 (Fla. 1984).

CONCLUSION

These comments and suggestions have been reviewed and endorsed by the Society for the Right to Die, Inc.

These comments and suggestions have also been reviewed and endorsed by our client, Miami Children's Hospital.

We respectfully request that the proposed rule be amended and clarified to limit the range of persons with standing to initiate such actions.

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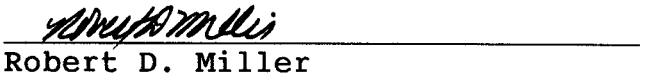
By: 
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served by U.S. mail this 28th day of March, 1991 to John F. Harkness, Jr., Executive Director, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300

By: Robert D. Miller
Robert D. Miller

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