IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO THE FLORIDA PROBATE RULES **CASE NO.: SC16-168**

THE FLORIDA PROBATE RULES COMMITTEE'S AMENDED RESPONSE TO COMMENTS RECEIVED TO ITS THREE-YEAR CYCLE REPORT

The Florida Probate Rules Committee ("Committee") responds to the March 15, 2016 comments submitted by Franklin Jack Burr II ("Mr. Burr") and to the January 28 and 29, 2016 comments received from Dr. Sam Sugar ("Dr. Sugar") to the Committee's Three-Year Cycle Report as follows:

1. For the reasons expressed herein, the Committee believes no changes are necessary to the proposed text of Rules 5.550 and 5.560.

2. By way of procedural background, Mr. Burr previously submitted an "Emergent Request for Amendment to of [sic] Florida Probate Rules, Part III," to the Florida Supreme Court, a copy of which is submitted as Appendix A. In that submission, Mr. Burr proposed changes to Rule 5.550[1] to allow a trial court to consider whether an alleged incapacitated person had previously executed an advance directive "and/or designated a [s]urrogate under Chapter 765."

[1] Although the submission advocated for changes to Rule 5.550 (Petition to Determine Incapacity), Mr. Burr also argued for changes to petitions for the appointment of a guardian, a petition that is governed by Rule 5.560.

3. Pursuant to Florida Rule of Judicial Administration 2.140(a)(2), the Florida Supreme Court forwarded Mr. Burr's submission to the Committee on March 4, 2014.

4. Mr. Burr presented to the Committee in person during its June 25, 2014, meeting, following which the Committee assigned Mr. Burr's submission to a subcommittee for further consideration.

5. Following the subcommittee's report and recommendation, the Committee voted to propose amendments to Rule 5.550 (Petition to Determine Incapacity) and Rule 5.560 (Petition for Appointment of Guardian of an Incapacitated Person) to better facilitate a trial court's consideration as to whether alternatives to guardianship exist. The Committee notes that section 744.331(6)(b), Florida Statutes, requires a trial court to consider whether alternatives to guardianship exist that will sufficiently address the problems of the incapacitated person. Consistent with that mandate, the existing language of Rule 5.560(a)(9) requires a petitioner to state "whether there are alternatives to guardianship known to the petitioner that may sufficiently address the problems of the alleged incapacitated person in whole or in part."

6. After hearing from Mr. Burr, the Committee concluded that Rules 5.550 and 5.560 should be amended to specifically set forth some of the common alternatives to guardianship, namely: trust agreements, powers of attorney, and

advance directives. The Committee also concluded that it should not be left to a petitioner to determine whether such alternatives to guardianship sufficiently address the needs of an alleged incapacitated person. Instead, the Committee concluded that it should be incumbent upon a petitioner to disclose all alternatives that are known to exist—without qualification—and that only the trial court should decide whether those alternatives are sufficient to address the needs of the alleged incapacitated person. It is the Committee's belief that its proposed amendments to Rules 5.550 and 5.560 accomplish both objectives.

7. The Committee's proposed amendments to Rules 5.550 and 5.560 were published in the July 1, 2015, edition of The Florida Bar *News*. In response, the Committee received a comment from Dr. Sugar, which was duly considered by the Committee, referenced in its Three-Year Cycle Report and attached as an Appendix F thereto. It was the Committee's conclusion at that time, and remains the Committee's conclusion, that no further changes to Rules 5.550 and 5.560 were necessary.

8. Following the Committee's filing of its Three-Year Cycle Report, the Committee received additional comments from Mr. Burr and Dr. Sugar (hereinafter, the "Three-Year Cycle Comments"). As the Three-Year Cycle Comments reveal, Mr. Burr and Dr. Sugar continue to object to the Committee's proposed amendments

because, among other reasons, the amendments do not specifically use the word "surrogate."

9. It is the Committee's view that there is no need to include the word "surrogate." The reference to an "advance directive" is preferrable because an advance directive is specifically defined in chapter 765 to include a "health care surrogate." § 765.101(1), Fla. Stat. ("'Advance directive' means a witnessed written document or oral statement in which instructions are given by a principal or in which the principal's desires are expressed concerning any aspect of the principal's health care or health information, and includes, but is not limited to, the designation of a health care surrogate, a living will, or an anatomical gift made pursuant to part V of this chapter."). The term "advance directive," while specifically including a "surrogate" also includes other types of advance directives which need to be brought to the attention of the Court. Thus, the inclusion of a reference to a surrogate in Rules 5.550 or 5.560 would be at least redundant and possibly result in confusion to the reader.

10. The Committee notes that Mr. Burr and Dr. Sugar also object to the proposed amendment to Rule 5.550 because the rule does not seek to require a petitioner to certify a "diligent inquiry" with respect to the existence of a surrogate. It is the Committee's belief that there is no need for such additional language because the statute governing petitions to determine incapacity (section 744.3201,

Florida Statutes) does not require such an obligation. Moreoever, Rule 5.550 already requires a petitioner to verify the contents of the petition under penalty of perjury, and the proposed amendments do not change that obligation.

Respectfully submitted on April 1, 2016.

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CERTIFICATE OF COMPLIANCE

I certify that this notice was prepared in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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