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February 14, 1991

0/A 4-12-91
FILED

SID J. WHITE

FEB 15 1991

CLERK, SUPREME COURT

By

Deputy Clerk

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Mr. Sid White, Clerk
Florida Supreme Court
Tallahassee, Florida 32399-1927

Re: Case No. 77,086, In Re: Amendments to
the Florida Probate Rules

Dear Mr. White:

I have the following comments concerning the proposed rules that have been submitted by the Probate Rules Committee of The Florida Bar:

1. Proposed Rule 5.590(a)(2)

Proposed Rule 5.590(a)(2) provides that an application for appointment as guardian shall be filed with the petition to determine incapacity. This is inconsistent with the 1990 revision of Chapter 744, Florida Statutes. Section 744.3201(3) was amended in 1990 to delete the 1989 requirement that a petition to determine incapacity be accompanied by a petition for appointment of a guardian. As amended, section 744.3201(3) provides that "[a] copy of any petition for appointment of guardian or emergency temporary guardian shall be filed with the petition to determine incapacity." (Emphasis supplied.) As amended in 1990, section 744.344(3) also contemplates that no petition for appointment of a guardian may have been filed at the time an order adjudicating incapacity is entered.

Further, in the proposed rules, Rule 5.550(b) has been deleted. Rule 5.550(b) currently requires that a petition to determine incapacity be accompanied by a petition for appointment of a guardian.

Because both Chapter 744 and Proposed Rule 5.550 have been amended to allow for the possibility that a petition to determine incapacity may be filed at a time when no one is seeking appointment as guardian, it is inconsistent to require that an application for appointment as guardian be filed with the petition to determine incapacity.

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I understand that the application for appointment is different than the petition for appointment. Nevertheless, the filing of either the application or the petition requires that there be a willing candidate for serving as guardian. Both the Florida Statutes and Proposed Rule 5.550 allow for the possibility that there may not be a willing candidate for serving as guardian when the petition to determine incapacity is filed.

I recommend changing Proposed Rule 5.590(a)(2) to provide either that the application for appointment shall be filed before an order appointing the guardian is entered, or that it shall be filed with or before the filing of the petition for appointment as guardian.

2. Proposed Rule 5.635(a)(3)

In Proposed Rule 5.635(a)(3), the term "incapacitated person" should be changed to "ward." The use of "incapacitated person" here is inconsistent with the other proposed rules. Specifically, compare the usage in Proposed Rule 5.635(b)(2) and (c). The term "incapacitated person" is defined by section 744.102(10), Florida Statutes (Supp. 1990), to mean a person who has been judicially determined to lack the capacity to manage at least some of the property or to meet at least some of the essential health and safety requirements of such person. This is not necessarily the same as a "ward," which is defined in section 744.102(18) as a person for whom a guardian has been appointed. Proposed Rule 5.635(b)(2) plainly contemplates that a guardian would have been appointed at this point. Therefore, the correct term in Proposed Rule 5.635(a)(3) is "ward," and not "incapacitated person."

I have noted that section 744.3725, Florida Statutes, also pertaining to the procedure for extraordinary authority, refers to an "incapacitated person" rather than to a "ward." However, section 744.3725 could apply before or after appointment of a guardian.

I recommend that Proposed Rule 5.635 be modified either (a) by changing all references to the "ward" to the "incapacitated person" if this rule is intended to apply under section 744.3725, Florida Statutes, and further modifying Proposed Rule 5.635(b)(2) to allow for the possibility that there may not

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be a guardian; or (b) by changing "incapacitated person" to "ward" in subsection (a)(3) if this rule is intended to apply to other situations.

Respectfully,

L. Kathleen Horton-Brown

L. KATHLEEN HORTON-BROWN

CERTIFICATE OF SERVICE

I HEREBY certify that a copy of the foregoing has been furnished to the following people on this 14 day of February, 1991, by U.S. Mail, postage prepaid:

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