AN EDUCATIONAL UPDATE FROM
THE SOUTHEAST LAW INSTITUTE™, INC.

To: **SLI Supporters**
Date: **September 2015**
From: **A. Eric Johnston**
Re: **A Matter of Life and Death: Application of Alabama's Surrogate Law**

Usually our sanctity of life work is related to the abortion issue. Recently we were able to provide services to a family on an end-of-life issue. Also, in the 2015 legislative regular session, we provided drafting, testimony and advice on a bill that would prohibit physician (healthcare) assisted suicide. Unfortunately, that bill did not pass, but we will return to it next year.

In the mid 1990s we engaged in a five year effort (four in the Legislature and one in court) to strengthen Alabama's advance directive for healthcare law. §§ 22-2A-1, *et sequel*, 1975 *Code of Alabama.* An advance directive provides instructions on what to do in an end-of-life situation. That is, when is it appropriate to remove life-sustaining procedures (ventilators, surgeries, *etcetera)* or artificially provided nutrition and hydration (food and water through a tube or an IV), if you have a terminal illness or injury, or you are permanently unconscious? An advance directive also permits a person to appoint a "healthcare proxy." Everyone should have an advance directive on file with his or her physician or available in the event of a test or surgery requiring anesthesia.

Section 22-2A-11 deals with procedures for a "surrogate," that is a person who would be making healthcare decisions for you, if you had not prepared an advance directive. The hierarchy of surrogacy is (1) a judicially appointed guardian with requisite authority, (2) spouse, (3) adult child, (4) parent, (5) adult sibling, (6) your closest relative, or (7) a committee of persons outlined in the statute. A family member who may disagree with a surrogate's decision has a right to court review.

If there is no advance directive and there is a question of removing life support, several steps must be taken: (1) the surrogate and attending physician must determine if the patient is no longer able to direct his or her treatment and has no hope of regaining the ability; (2) two physicians, including the attending, must determine that the patient is terminally ill or injured, or permanently unconscious; (3) there is no advance directive; and (4) removing life support will not result in undue pain. If these are met, life support may be removed, except that if artificially provided nutrition and hydration is removed, there must be clear and convincing evidence of the patient's prior wishes that would permit that. The patient's religious, spiritual, personal, philosophical and moral beliefs and ethics must be considered.

In a recent case, the siblings of a 65 year old sister contacted us saying that while on dialysis she suffered a heart attack. She did not recover consciousness and her husband instructed that the ventilator be turned off, but she continued to breath. He then instructed that her food and water through a tube be stopped, which it was. Her siblings objected and wanted to continue food and water. There was an impasse in the family. She did not have an advance directive.

We were requested to file a lawsuit that would order life support restored to the woman. We spent an entire Friday of concentrated time on phone calls, research, and preparation to obtain an emergency temporary restraining order restoring food and water, with the expectation of a hearing on the merits the following week. We had all the pleadings prepared and ready to go to court.

Through the process of many phone calls, we ultimately were able to have a conference call with the aggrieved family members and the attending physician. The physician assured the family that the woman had significant brain injury as a result of the heart attack and would never fully awaken. Because of that, she did not qualify for dialysis and therefore her kidneys would soon fail and result in death. Finally, her body was not able to properly metabolize the nutrition and hydration she was receiving. This explanation satisfied the family and they withdrew their request for the lawsuit. We agreed with their decision.

These types of cases do not occur often. We are certainly glad that our efforts in the mid-1990s resulted in a procedure so that even if a surrogate makes a decision, an aggrieved family member has the right to dispute that decision and obtain a declaratory judgment and injunctive relief in court. Even though we did not actually file the lawsuit, the threat of doing so brought the hospital and doctor to the table to fully inform everyone. It may not be possible to fully know all the circumstances in a case like this. However, using our best efforts and judgment, with the authority of the law, we are hopeful that a proper decision is always made. We are grateful that we could participate in this case and although the woman would not survive, we are hopeful that we, at least, brought closure for the family, as well as reconciliation.