

IN THE SUPREME COURT OF FLORIDA

**IN RE: AMENDMENTS TO
THE FLORIDA PROBATE RULES**

CASE NO.:

**BIENNIAL REPORT OF THE FLORIDA PROBATE RULES
COMMITTEE**

Tami Foley Conetta, Chair of the Florida Probate Rules Committee, and John F. Harkness, Jr., Executive Director of The Florida Bar, file this regular cycle report, under *Fla. R. Jud. Admin. 2.130(c)*.

The Committee proposes amendments to the rules as shown on the attached table of contents. The voting record for the committee for each amendment is shown in the table of contents. As required by *Fla. R. Jud. Admin. 2.130*, the Board of Governors of The Florida Bar has reviewed the proposed amendments. The Board's vote on each amendment is shown in the table of contents.

Notice of the amendments was published in *The Florida Bar News* on November 15, 2004, and also posted on The Florida Bar website. (See Appendix D, page 1.) No comments have been received in response to the publication.

The following attachments are included with this report:

Attachment A: Table of Contents.

Attachment B: Rules in legislative format.

Attachment C: Rules in two-column format.

Attachment D: Copies of relevant statutes and the publication notice from
The Florida Bar News.

A discussion of each rule change and the reasons for it follow.

RULE 5.040 NOTICE

Subdivision (a)(3)(A) of rule 5.040 is amended to remove the requirement that the chief judge of each circuit approve the commercial delivery services that may be used for service of formal notice, or notice given in the manner of formal notice. There is a lack of uniformity among the circuits as to which commercial delivery services may be used. Commercial delivery services, particularly national and international providers such as Federal Express and United Parcel Service, have evolved significantly in the last ten years and are generally believed to be very reliable. While some circuits authorize the use of such services, others do not absent a special petition and approval of the chief judge. The committee believes it is appropriate to remove the requirement of circuit-specific approval as a matter of convenience, uniformity, and reliability in delivery services. It is incumbent upon the attorney to choose a reliable service, as there are now many from which to choose.

RULE 5.041 SERVICE OF PLEADINGS AND PAPERS

The amendment of rule 5.041 is a response to the evolution of providing notice to interested persons. Subdivisions (b) and (f) are amended to specifically refer to service “in the manner provided for service of formal notice.”

As a result of the revision of the Probate Code in 2001, there is now a statutory direction to serve notice of administration on interested persons “in the manner provided for service of formal notice.”¹ This concept has been carried over to the Probate Rules in specific instances,² but has not previously been fully incorporated into the rules that address the procedural application of service, notice, and time calculations. This amendment, and the proposed amendment to rule 5.042 that follows, will do so.

The amendment also recognizes that many practitioners opt to provide notice to interested parties in the same manner as formal notice in instances when formal notice is not required. The practitioner will use the procedure of formal notice when it is necessary, or advisable, to have a written record that the notice was received by the interested party. This evolution coincides with the improvements

¹ See, §733.212(1), Fla.Stat. (2003) (Appendix D, page 5).

² See, Fla.Prob.R. 5.240, 5.360, and 5.404.

in commercial delivery services, allowing practitioners to expedite delivery of notice and track delivery of the notice via the Internet. The amendment also makes editorial changes to subdivisions (e) and (f).

RULE 5.042 TIME

Rule 5.042 is amended to clarify that when a motion, pleading, or other paper is served in the manner provided for formal notice, the date of delivery is the date of receipt, and the recipient is not allowed the additional 5 days that would ordinarily be allowed for responding to the item if served by mail. The date of delivery is used to compute any period of time prescribed or allowed by the rules for the recipient to respond, take action, or be in default.

RULE 5.240 NOTICE OF ADMINISTRATION

Subdivision (a)(3) is amended to comply with the 2003 change to section 733.212(1)(c), Florida Statutes (2003) (Appendix D, page 5). The statutory change sought to correct a potential conflict of interest when the personal representative is required to give notice to the trustee of certain trusts established by the decedent. The statutory change, and the corresponding rule change, requires notice to be given to the beneficiaries of such trusts when the trustee and personal representative are the same.

Subdivision (b)(5) amends the required text of the notice of administration to place the surviving spouse on notice that he or she has a limited period of time to exercise the right to an elective share. Section 732.2135, Florida Statutes (2001) (Appendix D, page 3) sets the time period for filing the election as within the earlier of 6 months of the date of service of a copy of the notice of administration on the surviving spouse or the legal representative of the surviving spouse, or 2 years after the date of the decedent's death.

There is also an editorial change to subdivision (a).

RULE 5.241 NOTICE TO CREDITORS

Subdivision (a) is amended to clarify that creditors' claims may be filed only if not otherwise time-barred. In addition, the manner of serving notice to creditors has been amplified to allow service in the manner of formal notice in addition to service by informal notice. The personal representative has the option to use either, or both, forms of notice, or a combination of the two. This change is to provide the practitioner the option of serving notice to creditors in a manner that creates a paper trail, and a means of proving receipt and the date of receipt, if necessary.

RULE 5.270 REVOCATION OF PROBATE

Subdivision (b) is amended to change "devises" to "beneficiaries" to conform the terminology used in the Probate Rules to the terminology used in the Probate Code since the 2001 revision. Section 733.109(2), Florida Statutes (2001) (Appendix D, page 4) specifically refers to persons interested in the estate as "beneficiaries."

**RULE 5.345 ACCOUNTINGS OTHER THAN PERSONAL
REPRESENTATIVES' FINAL ACCOUNTINGS**

Subdivision (h) is added to require that the accountings be verified by the fiduciary in accordance with rule 5.020, as a procedural safeguard to ensure the accuracy of the accounting.

RULE 5.346 FIDUCIARY ACCOUNTING

Subdivision (d) is added to require that the accountings be verified by the fiduciary in accordance with rule 5.020, as a procedural safeguard to ensure the accuracy of the accounting.

RULE 5.360 ELECTIVE SHARE

Subdivisions (a)(1) and (a)(2)(C) are amended to require service in the manner provided for service of formal notice. The change is necessary to conform the method of service to the contemporaneous changes made in rules 5.041, 5.042, and 5.241.

Subdivision (b)(3) is amended to provide a specific time period in which the personal representative must serve notice of the surviving spouse's election on other interested persons. Members of the committee expressed a concern that unless a time period was specified there could be unnecessary delays in the elective share procedure. The rule currently provides that service be made promptly, but does not specify a time. Editorial changes are also made to this subdivision.

The committee expressed the same concern for timing and the need to keep the elective share procedure moving forward with the amendment of subdivision (d)(2). This amendment requires the personal representative to serve the petition to determine the amount of the elective share and the elective share inventory within 60 days after the court enters the order of entitlement. No time frame was previously specified in the rule. The amendment also specifies that the petition and inventory be served in the manner provided for service of formal notice.

RULE 5.400 DISTRIBUTION AND DISCHARGE

Subdivision (f) is deleted to avoid duplication with subdivision (a)(1)(E) of rule 5.180, which specifically provides that any interested person may waive disclosure of prior or proposed distributions from the estate. Rule 5.180 is also included in the Rule References for rule 5.400. See also, generally, section 731.302, Florida Statutes (Appendix D, page 2) for waiver provisions.

RULE 5.402 NOTICE OF LIEN ON PROTECTED HOMESTEAD

This is a proposed companion rule to existing rule 5.404 (Notice of Taking Possession of Protected Homestead) and new proposed rule 5.403, described below.

Section 733.608(2), Florida Statutes (2001) (Appendix D, page 7) authorizes the personal representative to take possession of protected homestead when it is not occupied by a person who appears to have an interest on the property, for the limited purpose of preserving, insuring, and protecting it for the person or persons who have an interest. This provision was added as part of the 2001 Probate Code revision. Rule 5.404 prescribes the procedure to give notice to interested persons

that the personal representative has taken possession of the property.

Section 733.608(3), Florida Statutes (2001) provides that the personal representative is entitled to a lien on the property and its revenues if the personal representative expends funds or incurs obligations to preserve, maintain, insure, or protect the property. Section 733.608(4), Florida Statutes (2003) sets forth the requirements for a recorded notice of lien in the official records of the county where the property is located. This section also requires that the notice of lien be filed in the probate proceeding. Proposed rule 5.402 creates the method by which the personal representative complies with the probate filing requirement, including the contents of the notice and service requirements.

**RULE 5.403 PROCEEDINGS TO DETERMINE AMOUNT OF LIEN
ON PROTECTED HOMESTEAD**

This is a proposed companion rule to existing rule 5.404 (Notice of Taking Possession of Protected Homestead) and proposed rule 5.402, discussed above. Section 733.608(3)(a), Florida Statutes (2001) (Appendix D, page 7) provides that the personal representative or any other interested person may petition the court having jurisdiction of the administration of the decedent's estate to determine the amount of the debt. Proposed rule 5.403 creates the procedure for this petition, including the required contents and service requirements.

**RULE 5.404 NOTICE OF TAKING POSSESSION OF PROTECTED
HOMESTEAD**

Subdivision (b)(2) is amended to change "heirs and beneficiaries" to "heirs and devisees" as a more accurate reflection of the legal status of persons interested in a protected homestead. Section 733.608(2), Florida Statutes (2001) (Appendix D, page 7) also refers to an "heir or devisee" as opposed to a "beneficiary."

RULE 5.475 ANCILLARY ADMINISTRATION, SHORT FORM

The 2001 Probate Code revision amended section 734.1025, Florida Statutes (2001) (Appendix D, page 15) to make short form ancillary administration available only in testate estates. The proposed amendments to rule 5.475 remove

the reference to intestate estates in subdivision (a)(2), and make minor editorial changes throughout. The other substantive change is in subdivision (b), making the publication of notice to creditors permissive rather than mandatory, in accordance with subsection (2) of the statute.

RULE 5.496 FORM AND MANNER OF OBJECTING TO CLAIM

Procedure references to the personal representative's proof of claim are removed, and have been incorporated into new proposed rules 5.498 and 5.499, described below. Subdivision (b) [formerly subdivision (c)] is amended to remove references to service by mail or delivery, as well as service upon the claimant's attorney. Both procedural matters are adequately addressed by rules 5.040 and 5.041, and both rules are included in the Rule References. Editorial changes are also proposed.

RULE 5.498 PERSONAL REPRESENTATIVE'S PROOF OF CLAIM

Proposed rule 5.498 is a new rule implementing section 733.703(2), Florida Statutes (2001) (Appendix D, page 11). This is a companion rule to proposed rule 5.499, described below. The statute authorizes the personal representative to file a proof of claim of all claims the personal representative has paid or intends to pay. The proof of claim serves as a substitute for the claimant filing a claim on its own behalf. This proposed rule addresses the required contents of the proof of claim filed by a personal representative and the service requirements.

RULE 5.499 FORM AND MANNER OF OBJECTING TO PERSONAL REPRESENTATIVE'S PROOF OF CLAIM

This is a proposed companion rule to proposed rule 5.498, discussed above. This proposed rule is an implementation of the procedure found in section 733.705(4), Florida Statutes (2001) (Appendix D, page 12) for objecting to a personal representative's proof of claim. The proposed rule draws a distinction between items listed as paid (or actually paid subsequent to the filing) and those items listed as to be paid. Any interested person may object to an item listed as to be paid, and serve the objection on the personal representative and the claimant. The claimant must then pursue the claim as any other claim to which an objection

has been filed. If, however, an interested person objects to a claim listed on the proof of claim that has already been paid by the personal representative, the proper procedure is not to file an objection, but rather to determine the personal representative's liability for paying the claim in a proceeding for accounting or surcharge. A claimant who has been paid by the personal representative is not required to litigate the merits of the claim.

RULE 5.530 SUMMARY ADMINISTRATION

Subdivision (a)(3) is amended to include an alternative allegation that the petitioner has made diligent search and reasonable inquiry for any known or reasonably ascertainable creditors, and identify each of the creditors. This amendment is made to conform to the requirements of section 735.206(2), Florida Statutes (2001) (Appendix D, page 16).

RULE 5.620 INVENTORY

Editorial changes are made to subdivision (d) of the rule to conform the term "safe-deposit" to the style employed in rule 5.342 and throughout the Florida Statutes.

**RULE 5.625 NOTICE OF COMPLETION OF GUARDIAN
EDUCATION REQUIREMENTS**

This is a new proposed rule to implement the requirement of Florida Statute section 744.3145 (Appendix D, Page 18) that each person appointed by the court to be a guardian, except parents who are guardians of the property of a minor child, must receive a minimum of 8 hours of instruction and training. The proposed rule requires the guardian to file a notice of completion and specifies the information required in the notice. The statutory requirement and the proposed rule specifically do not apply to professional guardians.³

WHEREFORE, the Florida Probate Rules Committee and The Florida Bar respectfully request that the Court adopt these proposed amendments to the Florida

³ The education requirements for professional guardians are set forth in section 744.1085, Florida Statutes (2004).

Probate Rules.

Respectfully submitted this 27th day of January, 2005.

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