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FILED

SID J. WHITE

NOV 16 1984

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

IN RE:)
EMERGENCY AMENDMENTS TO)
FLORIDA RULES OF PROBATE)
AND GUARDIANSHIP PROCEDURE)
-----)

EMERGENCY PETITION OF:
THE PROBATE AND GUARDIANSHIP RULES COMMITTEE OF THE FLORIDA BAR
FOR AMENDMENTS TO PROBATE AND GUARDIANSHIP RULES OF COURT.

The Probate and Guardianship Rules Committee of The Florida Bar, through its co-chairmen, with the concurrence of The Florida Bar Board of Governors by resolution approved November 2, 1984; with the approval (as to Count I only) of the Section of Real Property, Probate and Trust Law of The Florida Bar by resolution of its executive council adopted on October 12, 1984; and in accordance with Rule 2.130(e), Florida Rules of Judicial Administration, submits this Emergency Petition For Amendments to the Probate and Guardianship Rules of Court, as follows:

STANDING AND AUTHORITY

1. Rule 2.130(e), Florida Rules of Judicial Administration, states:

If, in the opinion of a committee, a proposal is of an emergency nature, and the Board of Governors concurs, proposals may be made at any time to the Supreme Court. If the Court agrees that an emergency exists, the Court may set a time for oral argument and consideration of the proposal.

COUNT I

2. This is a petition for an order adopting those portions of the Florida Probate Code (Chapters 731 to 735), Florida Guardianship Law (Chapter 744), Chapter 737, Trust Administration, and Chapter 738, Principal and Income, all of the Florida Statutes (hereinafter "Probate, Guardianship and Trust Statutes"), as amended by the Legislature to the present, pertaining to practice and procedure, as if they were rules promulgated by the Supreme Court.

3. The Supreme Court, under Article V, §2(a) of the Florida Constitution, has the exclusive power to adopt rules for the

practice and procedure in all courts of the State of Florida.

4. Professors Fenn and Koren, writing for the Spring 1975 issue of the University of Florida Law Review, Vol. XXVII, Number 3, at page 627, stated:

Under the 1974 Code, however, many of the procedural provisions found in the current probate code are eliminated, although many others are retained in order to provide continuity and thus a better understanding of the new law. The intent is that, after greater familiarity with the structure of the 1974 Code is attained, most procedural provisions will be removed from the statutes and full reliance placed upon the PGR. The attainment of this goal would represent a most important contribution to probate reform.

5. The Supreme Court opinion in In re Transition Rule 19, Florida Probate Code, 297 So.2d 307 (Fla. 1974):

- a. Acknowledged that the 1974 Florida Probate Code contained many provisions pertaining solely to procedure;
- b. Adopted Transition Rule 19, adopting all matters pertaining to practice and procedure, and contained in the 1974 Florida Probate Code, as if they were rules promulgated by the Supreme Court; and
- c. Provided that Transition Rule 19 shall automatically terminate upon adoption of new Probate and Guardianship rules by the Court.

6. The Supreme Court opinion in In re Florida Rules of Probate and Guardianship Procedure, 324 So.2d 38 (Fla. 1975), adopted new temporary Rules of Probate and Guardianship Procedure, (hereinafter "Rules") effective January 1, 1975 (the delayed effective date of the new Florida Probate Code), automatically terminating Transition Rule 19.

7. The Supreme Court opinion in The Florida Bar. In re Supplemental Petition for Changes in the Florida Rules of Probate and Guardianship Procedure, 344 So.2d 828 (Fla. 1977), revised the temporary Rules, and set forth the revised Rules in their entirety, thereby terminating Transition Rule 19 if not terminated by the opinion adopting the temporary Rules.

8. Additionally, Transition Rule 19 was specifically repeal-

ed June 14, 1979, effective July 1, 1979, in In re Florida Rules of Judicial Administration, 372 So.2d 449 (Fla. 1979).

9. The Supreme Court opinion in The Florida Bar. In re Florida Rules of Probate and Guardianship Procedure, 387 So.2d 949 (Fla. 1980), adopted changes to the Rules effective 12:01 a.m., January 1, 1981.

10. The Supreme Court opinion of September 13, 1984, The Florida Bar. Re: Amendment to Rules - Probate and Guardianship, No. 65,085, adopted changes to the Rules effective 12.01 a.m., January 1, 1985.

11. The Probate, Guardianship and Trust Statutes presently contain many provisions which pertain, or arguably pertain, to practice and procedure, which provisions are not present in the Rules.

12. No opinion has adopted procedural aspects of the Guardianship Law (Chapter 744) or of Chapter 737 pertaining to Trust Administration or of Chapter 738 pertaining to Principal and Income, all of the Florida Statutes.

13. The provisions of the Florida Probate, Guardianship and Trust Statutes pertaining to practice and procedure are invalid under Article V, §2(a), Florida Constitution.

14. The Supreme Court has considered and adopted the Rules, and changes to the Rules, and to the extent the Supreme Court adopts procedural provisions of the Probate, Guardianship & Trust Statutes as rules under the present emergency circumstances, where conflict exists between a provision of the Probate, Guardianship & Trust Statutes and the Florida Rules of Probate and Guardianship Procedure, the provision of the Rules should control.

15. The Probate and Guardianship Rules Committee intends to distill the procedural aspects from the Probate, Guardianship and Trust Statutes and recommend to this Court at its regular quadrennial review of the Rules, such procedure in the form of Rules.

16. Temporary adoption of the Probate, Guardianship & Trust

Statutes as rules of this Court, to the extent of the procedure therein, will avoid multiple appeals and confusion in the operation of the Courts.

WHEREFORE, Petitioner requests that this Court enter an order, to be effective immediately or, alternatively, nunc pro tunc to January 1, 1976 (or, partially, to any later date on which any applicable statute was amended):

A. Temporarily adopting those portions of the Florida Probate Code, Chapters 731 to 735 of the Florida Statutes, the Florida Guardianship Law, Chapter 744 of the Florida Statutes, Chapter 737 of the Florida Statutes pertaining to Trust Administration and Chapter 738 of the Florida Statutes pertaining to Principal and Income, (all as amended by the Legislature to the present date), to the extent they are procedural, as Rules of this Court.

B. Stating that where conflict exists between the Rules of Probate and Guardianship Procedure and a provision of the Florida Probate Code, Chapters 731 to 735 of the Florida Statutes, the Florida Guardianship Law, Chapter 744 of the Florida Statutes, Chapter 737 of the Florida Statutes pertaining to Trust Administration and Chapter 738 of the Florida Statutes pertaining to Principal and Income, the provision of the Rules (including those portions to become effective January 1, 1985) shall control.

C. Directing the Rules Committee to present its recommendations in 1988 for changes to the Rules to incorporate specifically the procedural portions of the Florida Probate Code, Chapters 731 to 735 of the Florida Statutes, the Florida Guardianship Law, Chapter 744 of the Florida Statutes, Chapter 737 of the Florida Statutes pertaining to Trust Administration and Chapter 738 of the Florida Statutes pertaining to Principal and Income into the Florida Rules of Probate and Guardianship Procedure.

COUNT II

17. This is a petition to amend rule 5.340(a) of the Rules of Probate and Guardianship Procedure (hereafter "Rules") to reinstate the mandatory requirement for filing the inventory with the Clerk of the Circuit Court and to require such filing within 60 days of issuance of the letters of administration.

18. Rule 5.340(a) was amended by this Court's opinion of September 13, 1984, The Florida Bar. Re: Amendment to Rules - Probate and Guardianship, No. 65,085, to provide that "The personal representative shall file an inventory as required by law" (with other amendments to that rule and other rules which are not relevant here).

19. Florida Statutes §733.604(1) has been amended by Chapter 84-106 Laws of Florida, to delete the prior requirement for filing the inventory (with the Clerk of the Circuit Court) and instead (in subsection [2] of that statute) substituted a service requirement on various specified persons.

20. The requirement of law for filing of the inventory having been eliminated from the statute, the Rule is now left without substance. The Rule (effective January 1, 1985) provides for filing the inventory "as required by law". ("The personal representative of the estate shall file an inventory of the estate as required by law.") One possible interpretation of the Rule is that filing of the inventory is still required and the phrase, "as required by law", refers only to the second sentence of Florida Statute §733.602(4) (as amended by Chapter 84-106, Laws of Florida) mandating confidentiality. If the latter construction (a continued filing requirement) is the correct interpretation, the filing date (60 days after issuance of the letters) has been deleted from both the Rule and the statute.

21. If the inventory is not required to be filed, the following disadvantages are perceived.

- a. The Clerk of the court is unable to verify the correct amount of the filing fee.

- b. The inventory is a historical document which is useful in future times for beneficiaries, after personal copies of the document have been lost or discarded, to indicate the date of death values of various assets which then relate to cost basis for tax purposes of inherited assets.
- c. The accounting requires a starting list of assets which represents the point of beginning for the accounting, and this makes meaningful the balance of the accounting, and provides the basis for an ending balance of cash to other assets in kind.
- d. The court, without order, has additional information available in the file on which to base judicial activity including: supervision of the administration to the extent desired by the court; determination of fees for personal representatives, attorneys, appraisers and others; and provides a list of assets which a personal representative is charged to account for.
- e. Exempt property is less easily identified.
- f. The presence or absence of assets which are the subject of a specific devise cannot be determined until the conclusion of the administration in the schedule of distribution (unless such schedule itself is waived).
- g. Nothing in the file may be used by the court to determine, in the face of a petition to require partial distribution (Rule 5.380) whether assets will be needed for other purposes in the administration (e.g. taxes, administrative expenses, family allowance, claims, etc.).
- h. The court is unable to determine from the court file whether an estate is insolvent.
- i. In a situation involving a removed, resigned or deceased personal representative, the court has no document in the court file to identify the estate assets. (Note there is also no requirement of a termination accounting where a personal representative dies during the administration.) Commingled assets are more difficult to identify.

22. The suggested change to the referenced rule, indicated in legislative format, is:

Rule 5.340. INVENTORY

(a) Contents and filing. The personal representative shall file an inventory of the estate as required by law within 60 days after issuance of letters.

(b) through (e), no further change.

23. The Legislature, by adopting Chapter 84-106 Laws of Florida, added new subsection (4) to Florida Statutes §733.604, effective October 1, 1984, the second sentence of which provides ".... Any inventory or amended or supplementary inventory filed

shall be subject to inspection only upon order of the court upon good cause shown." All inventories now being filed are subject to the confidentiality requirements determined to be advisable by the Legislature. Any change in the Rule, as proposed, would not affect this confidentiality requirement.

24. The Rules Committee, in giving its approval to proceed with this Count II, stated its specific intention that this change in no way implied any effect on §733.604 (4) Florida Statutes (Supp. 1984) and requested that the committee note to Rule 5.340 also be amended as follows:

Committee Notes

However, they
~~Inventories are still required to be filed, however, once filed, are subject to the confidentiality provisions found in Fla. Stat. §733.604 (4) (Supp. 1984).~~

subsection Florida Statutes (Supp. 1984).

Constitutional homestead real property is not necessarily a probatable asset (See Basic Practice Under Florida Probate Code, 2d Ed. (1981), pp. 718-721). Disclosure on the inventory of real property appearing to be constitutional homestead property informs interested persons of the homestead issue.

Interested persons are entitled to reasonable information about estate proceedings on proper request, including a copy of the inventory, an opportunity to examine appraisals, and other information pertinent to their interests in the estate. The personal representative must also ~~send~~ serve a copy of the inventory to on the Florida Department of Revenue. ~~Fla. Stat. §193.052 (Supp. 1984).~~

§ 193.052, Fla. Stat. (Supp. 1984).

Rule History

1980 Revision: Eliminated the time limit in requesting a copy of the inventory by an interested person or in furnishing it by the personal representative.

1984 (First) Revision: Extensive changes. Committee notes revised.

Paragraph
1984 (Second) Revision: ~~Language of~~ (a) modified to clarify or re-insert continued filing requirement for inventory.


[no additional changes]

WHEREFORE, Petitioner requests that this Court enter an order further amending Florida Rule of Probate and Guardianship Procedure 5.340(a) as set forth above.


PETITIONER ALSO REQUESTS that this Court, in its opinion, republish the entire current set of Rules (and "committee notes"), for the reason as stated in this Court's opinion adopt-

ing the 1977 amendments, supra, "... so that the entire Probate and Guardianship Rules may appear in a given publication."

THE FLORIDA BAR PROBATE AND GUARDIANSHIP RULES COMMITTEE



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Committee Co-chairmen

I certify that a copy hereof has been furnished to The Florida Bar by mail this 9th day of November, 1984.



Attorney