

IN THE SUPREME COURT OF FLORIDA

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

CASE NO.

**REGULAR-CYCLE REPORT OF THE
FLORIDA PROBATE RULES COMMITTEE**

Peter A. Sachs, Chair of the Florida Probate Rules Committee (“Committee”), and John F. Harkness, Jr., Executive Director of The Florida Bar, file this regular-cycle report of the Committee, under *Fla. R. Jud. Admin.* 2.140(c).

The Committee proposes amendments to the rules as shown on the attached table of contents.¹ The voting record for the Committee for each amendment is shown in the table of contents. As required by *Fla. R. Jud. Admin.* 2.140, 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 June 15, 2006, and also posted on The Florida Bar website (*see* Appendix D, pages 1–3). Comments were received in response to the publication from Henry P. Trawick, Jr. by letter dated June 20, 2006 (*see* Appendix E, pages 1 and 2). After replying to Mr. Trawick by letter (*see* Appendix E, pages 3 and 4) and considering Mr. Trawick’s comments at subsequent meetings, the Committee further amended four previously published rules and republished those rules in *The Florida Bar News* on November 1, 2006, and posted those rules on The Florida Bar website (*see* Appendix D, page 4).

¹Currently pending with the Court is a “fast track “ report filed on October 30, 2006 by this Committee styled *In Re: Amendments to the Florida Probate Rules* (Case No. SC06-2148). That report proposes amendments to eleven rules, amendments to the committee notes for five rules (including Rules 5.040 and 5.041), and the addition of five new rules. The Court has not issued an opinion on that report as of the date of filing of this regular-cycle report. The committee notes for Rules 5.040 and 5.041 in this report are depicted as they currently appear in the rules. In addition, the fast track report contained multiple proposed amendments to Rules 5.560 and 5.680, some of which were originally noticed for publication as part of this regular-cycle report and which appear in the initial publication notice in Appendix D. Because those proposals were incorporated into the fast track report, they no longer form part of this triennial report.

The following attachments are included with this report:

Appendix A: Table of contents.

Appendix B: Rules in legislative format.

Appendix C: Rules in two-column format.

Appendix D: Copies of publication notices in Florida Bar *News* and Florida Bar website.

Appendix E: Copies of comments received after initial publication, and response from Committee.

Appendix F: Copies of relevant Florida statutes and background letters.

Appendix G: Certification that rules have been read against West's Florida Rules of Court

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

RULE 5.040 NOTICE

Subdivision (a) of rule 5.040 is amended to add new subdivision (a)(3)(A)(iv), providing that formal notice is to be served by sending a copy of the pleading or other document “to a minor whose disabilities of nonage are not removed, by serving the persons designated to accept service of process on a minor under chapter 48, Florida Statutes.” This language is added to the rule in response to a suggestion contained in footnote 1 of *Cason o/b/o Saferight v. Hammock*, 908 So. 2d 512, 516 (Fla. 5th DCA 2005), in which the district court made the following observation:

We note that prior to the changes to rule 5.040 adopted by the Florida Supreme Court in *In re Amendments to Florida Probate Rules*, 607 So.2d 1306 (Fla.1992), rule 5.040(a)(3)(A)(iv) specified how service was to be made on “incompetent” persons. The term “incompetent” is defined in section 731.201(19), Florida Statutes (2003), as it is today, as “a minor or a person adjudicated incompetent.” *See* § 731.201(19), Fla. Stat. (2004). Therefore, prior to 1992, the rule did provide for service on minors. The court, however deleted the term “incompetent” and substituted the term “incapacitated” and renumbered rule 5.040(a)(3)(A)(iv) to the current version of rule 5.040(a)(3)(A)(iii). We strongly suggest that the court consider amending rule 5.040 to once again include provisions specifying how minors should be served with formal service.

The Committee feels that the proposed reference to service under chapter 48 of the Florida Statutes (“Process and Service of Process”) adequately addresses the court’s concern. (A similar change is proposed in subdivision (b) of rule 5.041, as noted below.)

RULE 5.041 SERVICE OF PLEADINGS AND PAPERS

The proposed amendment in subdivision (b) of rule 5.041 (“Service; How Made”) adds the following sentence: “If the interested person is a minor whose disabilities of nonage are not removed, and who is not represented by an attorney, then service shall be on the persons designated to accept service of process on a minor under chapter 48, Florida Statutes.” This change is suggested for the same reason as the change suggested for rule 5.040(a)(3)(A), as explained above, and relevant statutory references have been added to both rules.

RULE 5.095 GENERAL AND SPECIAL MAGISTRATES

Proposed new rule 5.095 provides for the appointment of general magistrates “as the [probate] court finds necessary” and special magistrates “for any particular service required by the court.” The proposed rule, which closely tracks current *Fla. R. Civ. P.* 1.490, contains nine subdivisions. Subdivision (a) gives the court the authority to appoint a general magistrate and requires that the magistrate take an oath. Subdivision (b) gives the court authority to appoint a special magistrate, who may or may not be a member of The Florida Bar, and who will not be required to take an oath unless specifically required to do so. Subdivision (c) provides that referral to a magistrate requires the consent of the parties, who may request a hearing on the matter. Subdivision (d) provides that the magistrate is to act “under the direction of the court,” that any process issued by a magistrate “shall be directed as provided by law,” and that “grounds for disqualification of a judge shall apply to magistrates.” Subdivision (e) allows the court to require a bond if the magistrate is appointed to dispose of real or personal property. Subdivision (f) sets out detailed procedures for the conduct of hearings by magistrates. Subdivision (g) requires that the magistrate’s report is to contain “a description of the matters considered and the magistrate’s conclusions and any recommendations,” but precludes the magistrate from reporting “any statement of facts, account, charge, deposition, examination, or answer used before the magistrate.” Subdivision (h) addresses the filing and service of the report, and requires parties to serve exceptions thereto within 10 days of the time the report is served on them. Subdivision (i), which is the only subdivision without a counterpart in rule 1.490,

provides that the proposed rule “shall not apply to the appointment of magistrates for the specific purpose of reviewing guardianship inventories, accountings, and plans as otherwise governed by law and these rules.”

The Committee feels the proposed rule is necessary because there is no specific authorization in the rules for a probate judge to appoint general or special magistrates. The Committee initiated its examination of the need for this rule after reviewing the case of *In re Russo*, 516 So. 2d 101(Fla. 4th DCA 1987). In that case, the Fourth District held that, because the Rules of Probate and Guardianship Procedure included no provision for the appointment of a master, the master’s finding of incompetency in that case was void. The Honorable Hugh D. Hayes, Circuit Judge of the 20th Judicial Circuit, wrote the Committee to express his view that the availability of magistrates for all probate and guardianship proceedings should be expanded. (See Appendix F, page 6.) Judge Hayes communicated to the Committee the unanimous approval on that point by the Judicial Conference of the Florida Conference of Circuit Judges. Judge Hayes suggested that this end could be accomplished through an amendment of rule 5.080 by the addition of a provision that incorporated by reference rule 1.490 of the Florida Rules of Civil Procedure.

The Committee ultimately determined that the better approach would be to recommend adoption of a new rule 5.095, which includes the substance of the provisions of rule 1.490. A new rule would obviate the need for practitioners to refer to rule 1.490, and it also ensures that the rule uses nomenclature applicable to probate and guardianship proceedings.

In connection with the adoption of rule 5.095, the Committee reviewed rule 5.697, which provides for review of all guardianship accountings and plans (see below). The Committee was advised by members of the judiciary that it is especially important to the administration of justice for magistrates to be available to review guardianship inventories, accountings, and plans, as these reviews can be time-consuming procedures. Given the apparent importance of magistrates filling this role, the Committee adopted subdivision (i) of the proposed rule 5.095 and added the term “inventories” to the title and body of rule 5.697.

RULE 5.200 PETITION FOR ADMINISTRATION

Subdivision (h) of this rule is amended to delete the following phrase:

The petition for administration shall be verified by the

petitioner and shall contain:

* * *

(h) in an intestate estate, a statement that after the exercise of reasonable diligence the petitioner is unaware of any unrevoked wills or codicils, or if the petitioner is aware of any unrevoked wills or codicils, a statement why the wills or codicils are not being probated, ~~or otherwise a statement of the facts concerning any such will or codicil;~~

This deletion was made because the Committee deemed the last clause of subdivision (h) to be superfluous given the immediately preceding clause requiring “a statement why the wills or codicils are not being probated.” In addition, the phrase “will or codicil” in subdivision (i) is amended to read “wills or codicils” for stylistic consistency.

RULE 5.210 PROBATE OF WILLS WITHOUT ADMINISTRATION

The rule, which currently provides what a petition for administration is to contain, is amended to provide more procedural guidance to practitioners by adding new subdivision (b), addressing service of the petition, and subdivision (c), addressing objections. Subdivision (b) states that service of the petition “shall comply with rule 5.240 [the notice of administration rule] with regard to service of a copy of the petition,” and is intended to standardize service requirements whether or not the probate involves subsequent administration. The Committee feels that those persons listed in rule 5.240(a) as being entitled to service of the notice of administration are also entitled to notice of a proceeding to admit a decedent’s will even though administration of that will is not contemplated at the time of filing.

Proposed subdivision (c) of rule 5.210 provides as follows:

(c) Objections. Objections to the validity of the will shall follow the form and procedure set forth in these rules pertaining to revocation of probate. Objections to the venue or jurisdiction of the court shall follow the form and procedure set forth in the Florida Rules of Civil Procedure.

This language tracks verbatim the language of subdivision (d) of rule 5.240, with the necessary omission of the reference to objections to qualification of the

personal representative contained in the latter rule, since rule 5.210 does not contemplate appointment of a personal representative. The Committee feels there should be a provision addressing objections in rule 5.210 because a party can object to a will that is probated without administration just as it can object to a will that is probated with administration. The procedure for making objections to a will without administration should follow the same procedure as objections made to a will with administration. To avoid confusion and assist the practitioner, the Committee feels the subdivision addressing objections should be set forth in full in both rule 5.210 and rule 5.240.

Because of the proposed addition of subdivisions (b) and (c), the existing text of the rule has been lettered and titled as “(a) Petition and Contents” and an editorial change for stylistic consistency has been made in renumbered (a)(7).

RULE 5.241 NOTICE TO CREDITORS

Subdivision (a), addressing publication and service of the notice to creditors, is amended to make the following editorial change: “Service of the notice shall be either ~~in the manner provided for~~ by informal notice, or in the manner provided for service of formal notice at the option of the personal representative.” This deletion is made because there is no distinction between “in the manner provided for informal notice” and “by informal notice.” This contrasts with the distinction between the “in the manner provided for service of formal notice,” which is accomplished by delivery and a receipt as provided by rule 5.040(a)(3), and “by service of formal notice,” which, although also accomplished by delivery and a receipt, includes the formal notice language set out in rule 5.040(a)(1).

RULE 5.490 FORM AND MANNER OF PRESENTING CLAIMS

The Committee amends subdivision (a) editorially to add “. . .whether a claim is currently due. . .”. Subdivision (f) is added to address the situation in which a personal representative files a claim against the estate individually or in any other capacity that creates a conflict of interest between the personal representative and any other interested person. If this occurs, the proposed subdivision provides that, when filing the claim, the personal representative must “serve all interested persons with a copy of the claim and notice of the right to object to the claim. The notice shall state that an interested person may object to a claim as provided by law and rule 5.496.” The subdivision also provides for the method of service of this notice. The Committee deemed subdivision (f) necessary

because there is no other provision in the rules ensuring that interested persons would receive notice of a claim filed by the personal representative.

RULE 5.496 FORM AND MANNER OF OBJECTING TO CLAIM

There is an editorial change in (a) to eliminate the redundancy in the phrase “. . . shall be in writing and ~~shall be filed.~~ . . .” In (b) the Committee proposes to add a new sentence: “The objection shall include a certificate of service.” The Committee deemed this addition necessary so that it will be apparent for anyone in reviewing the court file that the objection has not only been filed but also served, and the certificate will clarify on whom the objection is served.

RULE 5.498 PERSONAL REPRESENTATIVE’S PROOF OF CLAIM

Subdivision (b) is amended as follows: “The proof of claim shall be served at the time of filing or promptly thereafter on all interested persons ~~and all claimants listed in the proof of claim at the time of filing, or immediately thereafter.~~” Deletion of the reference to “all claimants listed in the proof of claim” is deemed appropriate because it is unnecessary to have to serve claimants who have already been paid, as they are no longer deemed interested persons under the Probate Code. The retained term “interested persons” adequately addresses those claimants listed as “to be paid” since they may have to appear in the proceeding to defend their claims.

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

The extensive amendments to this rule clarify the procedure found in section 733.705, Florida Statutes (see Appendix F, page 1), with respect to a proof of claim filed by the personal representative, and draw 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. The proposed amendments are made to eliminate the confusion in the prior rule with respect to

the objections to claims that have been paid by the personal representative as opposed to claims the personal representative proposes to pay. Members of the bar had contacted various members of the committee to express their confusion. The proposed amendments clarify how the objections should be handled.

Subdivision (e) (formerly (c)) is amended to make service of objections more convenient and cost efficient for the personal representative. The committee determined that it makes little sense to require a personal representative to serve an objection on a claimant who has already been paid. Once that claimant is paid, it is no longer an interested person in the estate and the personal representative should not be required to expend estate resources to serve that claimant. The requirement of a certificate of service was included so that there is record evidence that a claimant listed as to be paid receives a copy of an objection to its claim. Under the existing rule, because copies of objections need only be served by informal notice, there may be no record evidence that an objection is served on the creditor.

RULE 5.530 SUMMARY ADMINISTRATION

The rule is completely rewritten to require substantially the same information required to be stated in a petition for administration and to require specification as to why summary administration is appropriate. This rule would now parallel and be consistent with rule 5.200 which, like the language proposed in this amendment, sets forth in detail the required contents of the petition. The committee feels that it is beneficial to a practitioner for the rules on petitions for administration and petitions for summary administration to be both consistent and specific in their requirements. By complying with the procedural requirements of rule 5.530(a), a practitioner is assured that the proposed summary administration qualifies for such treatment as provided in chapter 735, Florida Statutes. Moreover, the proposed amendment to subdivision (a) benefits the court and interested persons by requiring the petitioner to specify facts showing entitlement to summary administration rather than make merely conclusory statements that the petitioner is entitled to summary administration.

New subdivision (b) is added to require formal notice of the petition to any beneficiary or known or reasonably ascertainable creditor who has not joined in or consented to the petition. This language is added to ensure compliance with the fundamental requirements of due process regarding service on beneficiaries and all known or reasonably ascertainable creditors.

RULE 5.645 **MANAGEMENT OF PROPERTY OF NONRESIDENT
WARD BY FOREIGN GUARDIAN**

Proposed new rule 5.645 addresses the management of Florida property of a nonresident ward. Subdivision (a) allows a guardian of property of a nonresident ward to file a petition for authority to manage Florida property owned by the ward. Subdivisions (b) and (c) require the guardian to designate a resident agent and file an oath. Under subdivision (d), the guardian also must file authenticated copies of letters of guardianship or other authority, and copies of any bond or other security. If the Florida court determines that the bond or other security is insufficient, subdivision (e) provides that the court may require a new bond. That subdivision also provides that the “order shall authorize the guardian to manage the property and shall specifically describe the property.” That sentence is included to make it clear that the Florida procedure does not constitute an ongoing guardianship and that there would be no requirement to file accountings and plans in Florida because the foreign guardian is filing those papers in the jurisdiction where the guardianship is located.

The Committee feels that there is a need for procedure in the rules to give guidance to a foreign guardian who may need to deal with the ward’s Florida-situs property, and to provide some protection to creditors in Florida, and that this new rule adequately addresses these concerns.

RULE 5.650 **RESIGNATION OR DISQUALIFICATION OF
GUARDIAN; APPOINTMENT OF SUCCESSOR**

The Committee recommends deletion of subdivision (i) of the rule, which provides that the successor guardian and other interested persons may waive service of various documents in connection with a guardian’s petition for resignation and discharge. Subdivision (i) is unnecessary because the right to waive is substantive. *See, e.g.*, section 731.302, Fla. Stat. (Appendix F, page 1). The procedure governing waiver is addressed in rule 5.180, which has general application to all probate and guardianship proceedings, and which was recently proposed to be amended to remove any reference to the substantive right of waiver. (That proposal is currently before the Court in the fast track report filed on October 30, 2006, in Case No. SC06-2148. *See* the footnote on page 1 of this report.)

RULE 5.670 **TERMINATION OF GUARDIANSHIP ON CHANGE OF
DOMICILE OF RESIDENT WARD**

The Committee recommends deletion of subdivision (i) of the rule, which provides that the successor guardian and other interested persons may waive service of various documents in connection with a guardian's petition for resignation and discharge. This change is suggested for the same reason as the change suggested for rule 5.650, as explained above.

RULE 5.697 MAGISTRATES' REVIEW OF GUARDIANSHIP INVENTORIES, ACCOUNTINGS, AND PLANS

The title of the rule and subdivision (a) are amended to include the term "inventories" as an item that the court may appoint a general magistrate to review. The Committee feels that inventories are items that are closely related to accountings and plans and that the rule logically should encompass all three types of reports. (*See also* the discussion of proposed new rule 5.095, "General and Special Magistrates," on pages 3 and 4 above.) The only other suggested change to the rule is in subdivision (f); the last sentence is amended to read: "All timely filed exceptions [to a magistrate's report] ~~may~~ shall be heard by the court on reasonable notice by any party." The Committee is of the opinion that a hearing under these circumstances is mandatory.

RULE 5.710 REPORTS OF PUBLIC GUARDIAN

This rule currently consists of only one sentence: "The public guardian, as the guardian of a ward, shall submit reports as required by law to the chief judge of the circuit and file a copy." The Committee proposes to delete the phrase "submit reports as required by law to the chief judge of the circuit and file a copy" and to provide more specificity as to exactly which reports the public guardian is required to file under the Public Guardianship Act (*see* section 744.708, Florida Statutes, in Appendix F, page 4) and as otherwise required by law (*see* sections 744.362 and 744.367, Florida Statutes, in Appendix F, page 3): (1) an initial report; (2) annual reports; (3) a report within six months of appointment listing efforts made to locate someone to act as the ward's guardian, and an assessment of the ward's "potential to be restored to capacity"; (4) an annual report on the operations of the Office of Public Guardian; and (5) a report of an independent audit by a certified public accountant that will include an investigation into the practices of the office for managing the person and property of wards.

The Florida Probate Rules Committee respectfully requests that the Court amend the Florida Probate Rules as outlined in this report.

Respectfully submitted on January 29, 2007.

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CERTIFICATION OF FONT COMPLIANCE

I certify that this report was prepared in compliance with the font requirements of *Fla. R. App. P.* 9.210(a)(2).

/s/J. Craig Shaw

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