

**IN THE SUPREME COURT OF FLORIDA**

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

**CASE NO. SC11-**

**FAST TRACK AMENDMENTS REPORT OF THE  
FLORIDA PROBATE RULES COMMITTEE**

Tasha Pepper-Dickinson and John Christopher Moran, Co-Chairs of the Florida Probate Rules Committee ( the “Committee”), and John F. Harkness, Jr., Executive Director of The Florida Bar, file this fast track report under *Fla. R. Jud. Admin.* 2.140(e), reporting rule changes necessitated by statutory amendments passed by the 2011 Florida Legislature. The proposed amendments have been reviewed by the Board of Governors of The Florida Bar through its Executive Committee and passed by a vote of 11-0 following the committee’s approval by a vote of 23-0.

Because of the emergency nature of this report, the proposals have not been published for comment.

The text of the amendments is attached to this report in both full-page format (Appendix A) and two-column format (Appendix B).

The proposed amendments are the result of Chapter 2011-183 (CS/HB 325), which was approved by the Governor on June 21, 2011 (Appendix C). The portions of the legislative changes prompting the proposed amendments were effective upon approval by the Governor.

The proposed amendments, and explanations of the changes, are as follows:

**Rule 5.025. Adversary Proceedings**

Rule 5.025, Florida Probate Rules, applies the Rules of Civil Procedure to adversary proceedings within a probate or guardianship case. The 2011 legislation included two new statutes, sections 732.615 and 732.616, Florida Statutes, to authorize actions within a probate proceeding to reform a will or modify a will to achieve the testator’s tax objectives. In the course of reviewing Rule 5.025, the committee determined that actions to reform or modify a will should be treated as adversary proceedings. The committee also determined that an action to determine a pretermitted share should also be treated as an adversary proceeding. In each of

these proceedings, substantial rights are at issue and the formal procedures of a civil proceeding should apply. Subdivision (a) has been revised to add “reform a will,” “modify a will” and “determine pretermitted status.”

The committee also considered the unique nature of probate and guardianship matters. It is possible to have several cases within one case, with elective share rights, homestead rights, and will challenges each treated as separate proceeding. Following the reasoning of the Family Law Rules, subdivision (d)(2) has been modified to insure that an award of attorneys’ fees in a probate or guardianship proceeding follows the law and procedures established for such proceedings, rather than the law and procedures for civil proceedings. *See Amendments to the Florida Family Law Rules of Procedure (Rule 12.525)*, 897 So. 2d 467 (Fla. 2005).

The committee also recommends editorial changes to conform to the court’s guidelines for rules submissions as set forth in Administrative Order AOSC06-14. Committee Notes were also revised.

### **Rule 5.240 Notice of Administration**

Section 733.212, Florida Statutes, requires that a personal representative serve a notice of administration on various persons who are affected by the administration of the decedent’s estate. Subdivision (b)(2) sets forth information that must be included in the notice of administration and was amended to require a statement that “the fiduciary lawyer-client privilege in section 90.5021, Florida Statute, applies with respect to the personal representative and any attorney employed by the personal representative.”

Editorial changes have been made to conform to the court’s guidelines for rules submissions as set forth in Administrative Order AOSC06-14. A statutory reference to section 732.402, Florida Statute, has been added.

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

Respectfully submitted on August 15, 2011 by

/s/ Tasha K. Pepper-Dickinson  
TASHA K. PEPPER-DICKINSON  
Co-Chair  
Florida Probate Rules Committee  
505 S. Flagler Drive, Suite 1100  
West Palm Beach, Florida 33401-5950  
(561) 650-0439  
Florida Bar No. 122386

/s/ John F. Harkness, Jr.  
JOHN F. HARKNESS, JR.  
Executive Director  
The Florida Bar  
651 East Jefferson Street  
Tallahassee, Florida 32399-2300  
(850) 561-5600  
Florida Bar No. 123390

/s/ John Christopher Moran  
JOHN CHRISTOPHER MORAN  
Co-Chair  
Florida Probate Rules Committee  
777 S. Flagler Drive, Suite 500 E  
West Palm Beach, Florida 33401-6121  
(561) 650-0515  
Florida Bar No. 505072

### **CERTIFICATIONS**

I certify that these rules were read against West's *Florida Rules of Court – State* (2011).

I certify that this report was prepared in MS Word using 14 point Times New Roman Font.

/s/ Krys Godwin  
Krys Godwin  
Staff Liaison  
Florida Probate Rules Committee  
The Florida Bar  
Florida Bar No.: 2305

## **RULE 5.025. ADVERSARY PROCEEDINGS**

**(a) Specific Adversary Proceedings.** The following ~~must be~~are adversary proceedings unless otherwise ordered by the court: proceedings to remove a personal representative, surcharge a personal representative, remove a guardian, surcharge a guardian, probate a lost or destroyed will or later-discovered will, determine beneficiaries, construe a will, reform a will, modify a will, cancel a devise, partition property for the purposes of distribution, determine pretermitted status, determine pretermitted share, determine amount of elective share and contribution, and for revocation of probate of a will.

**(b) Declared Adversary Proceedings.** Other proceedings may be declared adversary by service on interested persons of a separate declaration that the proceeding is adversary.

(1) If served by the petitioner, the declaration ~~shall~~must be served with the petition to which it relates.

(2) If served by the respondent, the declaration and a written response to the petition ~~shall~~must be served at the earlier of:

(A) within 20 days after service of the petition, or

(B) prior to the hearing date on the petition.

(3) When the declaration is served by a respondent, the petitioner ~~shall~~must promptly serve formal notice on all other interested persons.

**(c) Adversary Status by Order.** The court may determine any proceeding to be an adversary proceeding at any time.

**(d) Notice and Procedure in Adversary Proceedings.**

(1) Petitioner ~~shall~~must serve formal notice.

(2) After service of formal notice, the proceedings, as nearly as practicable, ~~shall~~must be conducted similar to suits of a civil nature ~~and the Florida Rules of Civil Procedure shall govern, including entry of defaults. The Florida Rules of Civil Procedure govern, except for rule 1.525.~~

(3) The court on its motion or on motion of any interested person may enter orders to avoid undue delay in the main administration.

(4) If a proceeding is already commenced when an order is entered determining the proceeding to be adversary, it ~~shall~~must thereafter be conducted as an adversary proceeding. The order ~~shall~~must require interested persons to serve written defenses, if any, within 20 days from the date of the order. It ~~shall~~is not be necessary to re-serve the petition except as ordered by the court.

(5) When the proceedings are adversary, the caption of subsequent pleadings, as an extension of the probate caption, ~~shall~~must include the name of the first petitioner and the name of the first respondent.

### Committee Notes

The court on its initiative or on motion of any party may order any proceeding to be adversary or nonadversary or enter any order that will avoid undue delay. The personal representative would be an interested person in all adversary proceedings. A prescribed form for the caption is provided that will facilitate the clerks and the courts ability to segregate such adversary proceeding from other adversary proceedings and from the main probate file:

	Court
	Case #
	)
In Re Estate of John B. Jones	)
	)
Julia Jones,	)
	)
Petitioner,	)
	)
v.	)
	)
Harold Jones, as Personal	)
Representative, et al.,	)
	)
Respondents.	)

---

### Rule History

1975 Revision: New rule. 324 So. 2d 38.

1977 Revision: Editorial changes to (a)(1).

1984 Revision: Extensive changes, committee notes revised and expanded.

1988 Revision: Changes in (a) add proceedings to remove a guardian and to surcharge a guardian to the list of specific adversary proceedings and delete proceedings to determine and award the elective share from the list. Change in (b)(4) clarifies on whom the petitioner must serve formal notice. Editorial change in (d)(2) and (d)(5). Committee notes revised. Citation form changes in committee notes.

1992 Revision: Deletion of (b)(3) as unnecessary. Former (b)(4) renumbered as new (b)(3). Committee notes revised. Citation form changes in committee notes.

2001 Revision: Change in (a) to add determination of amount of elective share and contribution as specific adversary proceedings. Committee notes revised.

2003 Revision: Committee notes revised.

2008 Revision: Committee notes revised.

2011 Revision: Subdivision (a) revised to add “reform a will, modify a will” and “determine pretermitted status.” Subdivision (d)(2) modified to insure that an award of attorneys’ fees in a probate or guardianship proceeding follows the law and procedures established for such proceedings, rather than the law and procedures for civil proceedings. See Amendments to the Florida Family Law Rules of Procedure (Rule 12.525), 897 So. 2d 467 (Fla. 2005). Editorial changes to conform to the court’s guidelines for rules submissions as set forth in Administrative Order AOSC06-14. Committee Notes revised.

### **Statutory References**

§ 393.12, Fla. Stat. Capacity; appointment of guardian advocate.

§ 732.201-732.2155, Fla. Stat. Elective share of surviving spouse.

§ 732.301, Fla. Stat. Pretermitted spouse.

§ 732.302, Fla. Stat. Pretermitted children.

§ 732.507, Fla. Stat. Effect of subsequent marriage, birth, adoption, or dissolution of marriage.

§§ 732.6005-732.611, Fla. Stat. Rules of construction.

§ 732.615, Fla. Stat. Reformation to correct mistakes.

§ 732.616, Fla. Stat. Modification to achieve testator’s tax objectives.

§ 733.105, Fla. Stat. Determination of beneficiaries.  
§ 733.107, Fla. Stat. Burden of proof in contests; presumption of undue influence.  
§ 733.109, Fla. Stat. Revocation of probate.  
§ 733.207, Fla. Stat. Establishment and probate of lost or destroyed will.  
§ 733.208, Fla. Stat. Discovery of later will.  
§ 733.504, Fla. Stat. Removal of personal representative; causes for removal.  
§ 733.505, Fla. Stat. Jurisdiction in removal proceedings.  
§ 733.506, Fla. Stat. Proceedings for removal.  
§ 733.5061, Fla. Stat. Appointment of successor upon removal.  
§ 733.603, Fla. Stat. Personal representative to proceed without court order.  
§ 733.609, Fla. Stat. Improper exercise of power; breach of fiduciary duty.  
§ 733.619(2), (4), Fla. Stat. Individual liability of personal representative.  
§ 733.814, Fla. Stat. Partition for purpose of distribution.  
§ 744.3085, Fla. Stat. Guardian advocates.  
§ 744.474, Fla. Stat. Reasons for removal of guardian.  
744.477 Fla. Stat. Proceedings for removal of a guardian.

### **Rule References**

Fla. Prob. R. 5.040 Notice.  
Fla. Prob. R. 5.270 Revocation of probate.  
Fla. Prob. R. 5.360 Elective share.  
Fla. Prob. R. 5.365 Petition for dower.  
Fla. Prob. R. 5.440 Proceedings for removal.  
Fla. Prob. R. 5.649 Guardian advocate.  
Fla. Prob. R. 5.660 Proceedings for removal of guardian.  
Fla. Prob. R. 5.681 Restoration of rights of person with developmental disability.  
Fla. R. Civ. P. 1.140 Defenses.  
Fla. R. Civ. P. 1.160 Motions.  
Fla. R. Civ. P. 1.200 Pretrial procedure.  
Fla. R. Civ. P. 1.280 General provisions governing discovery.  
Fla. R. Civ. P. 1.290 Depositions before action or pending appeal.  
Fla. R. Civ. P. 1.310 Depositions upon oral examination.  
Fla. R. Civ. P. 1.340 Interrogatories to parties.  
Fla. R. Civ. P. 1.380 Failure to make discovery; sanctions.

## **Rule 5.240. Notice of Administration**

**(a) Service.** The personal representative shall promptly serve a copy of the notice of administration on the following persons who are known to the personal representative and who were not previously served under section 733.2123, Florida Statutes:

(1) the decedent's surviving spouse;

(2) all beneficiaries;

(3) a trustee of any trust described in section 733.707(3), Florida Statutes and each qualified beneficiary of the trust as defined in section 736.0103(14), if each trustee is also a personal representative of the estate; and

(4) persons who may be entitled to exempt property

in the manner provided for service of formal notice. The personal representative may similarly serve a copy of the notice on any devisee under another will or heirs or others who claim or may claim an interest in the estate.

**(b) Contents.** The notice shall state:

(1) the name of the decedent, the file number of the estate, the designation and address of the court in which the proceedings are pending, whether the estate is testate or intestate, and, if testate, the date of the will and any codicils;

(2) the name and address of the personal representative and of the personal representative's attorney, and that the fiduciary lawyer-client privilege in section 90.5021, Florida Statutes, applies with respect to the personal representative and any attorney employed by the personal representative;

(3) that any interested person on whom the notice is served who challenges the validity of the will, the qualifications of the personal representative, venue, or jurisdiction of the court ~~is required to~~ must file any objections with the court in the manner provided in the Florida Probate Rules within the time required by law or those objections are forever barred;

(4) that any person entitled to exempt property ~~is required to~~ must file a petition for determination of exempt property within the time provided by law or



the right to exempt property is deemed waived; and

(5) that an election to take an elective share must be filed within the time provided by law.

**(c) Copy of Will.** Unless the court directs otherwise, the personal representative of a testate estate ~~shall~~must, upon written request, furnish a copy of the will and all codicils admitted to probate to any person on whom the notice of administration was served.

**(d) 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 qualifications of the personal representative shall follow the form and procedure set forth in these rules pertaining to removal of a personal representative. Objections to the venue or jurisdiction of the court shall follow the form and procedure set forth in the Florida Rules of Civil Procedure.

**(e) Waiver of Service.** For the purpose of determining deadlines established by reference to the date of service of a copy of the notice of administration in cases in which service has been waived, service on a person who has waived notice ~~shall~~beis deemed to occur on the date the waiver is filed.

## Committee Notes

### Rule History

1977 Revision: Former subdivision (c) is deleted as being substantive rather than procedural. 1984 Revision: Editorial changes; new requirement to file proof of publication; new requirements as to form of objections to will and qualifications of personal representative. Committee notes revised.

1988 Revision: The obligation to mail notice of administration to all known or reasonably ascertainable creditors has been added to comply with the dictates of *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 108 S. Ct. 1340, 99 L. Ed. 2d 565 (1988). This rule does not require sending notice of administration to creditors in estates where the time for filing claims has expired before the effective date of this rule. However, no opinion is offered whether such claims are barred by the provisions of section 733.702, Florida Statutes.

Committee notes revised. Citation form changes in committee notes.

1991 Revision: Subdivision (a) modified to make it consistent with recent changes to sections 733.212 and 733.702, Florida Statutes. Those statutes were amended to comply with the dictates of *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 108 S. Ct. 1340, 99 L. Ed. 2d 565 (1988). For the same reason, subdivision (e) was eliminated.

1992 Revision: Former subdivision (e) revised and reinstated to emphasize need for personal representative to determine all known or reasonably ascertainable creditors. Editorial changes; committee notes revised; citation form changes in committee notes.

1996 Revision: Subdivision (a) amended to require service of notice of administration on trustees of certain revocable trusts as defined by Florida statute. Editorial changes.

2002 Revision: Procedures for notifying creditors are now governed by new rule 5.241. Committee notes revised.

2003 Revision: Change in title of (a) to reflect elimination of publication of notice. Committee notes revised.

2005 Revision: Subdivision (a)(3) amended to make it consistent with 2003 change to section 733.212(1)(c), Florida Statutes, regarding when service on trust beneficiaries is required, and clarifying editorial change made in (a). New subdivision (b)(5) added regarding notice to file election to take elective share. Committee notes revised.

2007 Revision: Subdivision (a)(3) amended to replace reference to “beneficiary” with “qualified beneficiary” and to change reference from former section 737.303(4)(b) to new section 736.0103(14), which defines that term. Subdivision (b)(5) amended to delete the reference to the surviving spouse filing the election as another person can file the election on behalf of the surviving spouse. New subdivision (e) added to provide a deadline for objection by a person who waives service. Committee notes revised.

2011 Revision: Subdivision (b)(2) amended to conform to amendment to section 732.212, Florida Statutes, relating to attorney-client privilege for fiduciaries and their attorneys. Editorial changes to conform to the court’s guidelines for rules submissions as set forth in Administrative Order AOSC06-14.

Statutory reference to section 732.402, Florida Statutes, added. Committee Notes revised.

### **Statutory References**

- § 731.201(23), Fla. Stat. General definitions.
- § 731.301, Fla. Stat. Notice.
- § 731.302, Fla. Stat. Waiver and consent by interested person.
- § 732.2135, Fla. Stat. Time of election; extensions; withdrawal.
- § 732.402, Fla. Stat. Exempt property.
- § 732.5165, Fla. Stat. Effect of fraud, duress, mistake, and undue influence.
- § 733.101, Fla. Stat. Venue of probate proceedings.
- § 733.109, Fla. Stat. Revocation of probate.
- § 733.212, Fla. Stat. Notice of administration; filing of objections.
- § 733.2123, Fla. Stat. Adjudication before issuance of letters.
- § 733.302, Fla. Stat. Who may be appointed personal representative.
- § 733.303, Fla. Stat. Persons not qualified.
- § 733.305, Fla. Stat. Trust companies and other corporations and associations.
- § 733.504, Fla. Stat. Removal of personal representative; causes for removal.
- § 733.506, Fla. Stat. Proceedings for removal.

### **Rule References**

- Fla. Prob. R. 5.025 Adversary proceedings.
- Fla. Prob. R. 5.040 Notice.
- Fla. Prob. R. 5.050 Transfer of proceedings.
- Fla. Prob. R. 5.180 Waiver and consent.
- Fla. Prob. R. 5.270 Revocation of probate.
- Fla. Prob. R. 5.440 Proceedings for removal.
- Fla. R. Civ. P. 1.060 Transfers of actions.

## Proposed rule amendment

## Reason for change

**RULE 5.025. ADVERSARY PROCEEDINGS**

**(a) Specific Adversary Proceedings.** The following ~~shall~~ bear adversary proceedings unless otherwise ordered by the court: proceedings to remove a personal representative, surcharge a personal representative, remove a guardian, surcharge a guardian, probate a lost or destroyed will or later-discovered will, determine beneficiaries, construe a will, reform a will, modify a will, cancel a devise, partition property for the purposes of distribution, determine pretermitted status, determine pretermitted share, determine amount of elective share and contribution, and for revocation of probate of a will.

Amended in compliance with AOSC06-14.

Amended subdivision (a) to incorporate additional adversary proceedings to achieve the testator's tax objectives as permitted in sections 732.615 (Reformation [of a Will] to Correct Mistakes) and 732.616 (Modification [of a Will] to Achieve Testator's Tax Objectives), Florida Statutes.

Amended to include the action of determining pretermitted status as an adversary proceeding.

**(b) Declared Adversary Proceedings.** Other proceedings may be declared adversary by service on interested persons of a separate declaration that the proceeding is adversary.

(1) If served by the petitioner, the declaration ~~shall~~ must be served with the petition to which it relates.

Amended in compliance with AOSC06-14.

(2) If served by the respondent, the declaration and a written response to the petition ~~shall~~ must be served at the earlier of:

Amended in compliance with AOSC06-14.

(A) within 20 days after service of the petition, or

(B) prior to the hearing date on the petition.

(3) When the declaration is served by a respondent, the petitioner ~~shall~~ must promptly serve formal notice on all other interested persons.

Amended in compliance with AOSC06-14.

(c) [No change]

**(d) Notice and Procedure in Adversary Proceedings.**

(1) Petitioner ~~shall~~must serve formal notice.

Amended in compliance with AOSC06-14.

(2) After service of formal notice, the proceedings, as nearly as practicable, ~~shall~~must be conducted similar to suits of a civil nature ~~and the Florida Rules of Civil Procedure shall govern,~~ including entry of defaults. The Florida Rules of Civil Procedure govern, except for rule 1.525.

Amended subdivision (d)(2) to insure that the award of attorneys' fees in probate and guardianship cases follow the Family Law Rules of Procedure rather than the Florida Rules of Civil Procedure.

(3) The court on its motion or on motion of any interested person may enter orders to avoid undue delay in the main administration.

(4) If a proceeding is already commenced when an order is entered determining the proceeding to be adversary, it ~~shall~~must thereafter be conducted as an adversary proceeding. The order ~~shall~~must require interested persons to serve written defenses, if any, within 20 days from the date of the order. It ~~shall~~is not ~~be~~ necessary to re-serve the petition except as ordered by the court.

Amended to comply with AOSC06-14.

(5) When the proceedings are adversary, the caption of subsequent pleadings, as an extension of the probate caption, ~~shall~~must include the name of the first petitioner and the name of the first respondent.

Amended to comply with AOSC06-14.

**Committee Notes**

[No change]

**Rule History**

1975—2008 Revisions [No change]

2011 Revision: Subdivision (a) revised to add “reform a will, modify a will” and “determine pretermitted status.” Subdivision (d)(2) modified to insure that an award of attorneys’ fees in a probate or guardianship proceeding follows the law and procedures established for such proceedings, rather than the law and procedures for civil proceedings. See Amendments to the Florida Family Law Rules of Procedure (Rule 12.525), 897 So. 2d 467 (Fla. 2005). Editorial changes to conform to the court’s guidelines for rules submissions as set forth in Administrative Order AOSC06-14. Committee Notes revised.

Rule history provided.

### **Statutory References**

§ 393.12, Fla. Stat. Capacity; appointment of guardian advocate.

§ 732.201-732.2155, Fla. Stat. Elective share of surviving spouse.

§ 732.301, Fla. Stat. Pretermitted spouse.

§ 732.302, Fla. Stat. Pretermitted children.

§ 732.507, Fla. Stat. Effect of subsequent marriage, birth, adoption, or dissolution of marriage.

§§ 732.6005-732.611, Fla. Stat. Rules of construction.

§ 732.615, Fla. Stat. Reformation to correct mistakes.

§ 732.616, Fla. Stat. Modification to achieve testator’s tax objectives.

§ 733.105, Fla. Stat. Determination of beneficiaries.

§ 733.107, Fla. Stat. Burden of proof in contests; presumption of undue influence.

§ 733.109, Fla. Stat. Revocation of probate.

§ 733.207, Fla. Stat. Establishment and probate of lost or destroyed will.

New statutory reference included.

§ 733.208, Fla. Stat. Discovery of later will.

§ 733.504, Fla. Stat. Removal of personal representative; causes for removal.

§ 733.505, Fla. Stat. Jurisdiction in removal proceedings.

§ 733.506, Fla. Stat. Proceedings for removal.

§ 733.5061, Fla. Stat. Appointment of successor upon removal.

§ 733.603, Fla. Stat. Personal representative to proceed without court order.

§ 733.609, Fla. Stat. Improper exercise of power; breach of fiduciary duty.

§ 733.619(2), (4), Fla. Stat. Individual liability of personal representative.

§ 733.814, Fla. Stat. Partition for purpose of distribution.

§ 744.3085, Fla. Stat. Guardian advocates.

§ 744.474, Fla. Stat. Reasons for removal of guardian.

§ 744.477, Fla. Stat. Proceedings for removal of a guardian.

### **Rule References**

[No change]

**Rule 5.240. Notice of Administration**

(a) [No change]

(b) **Contents.** The notice shall state:

(1) the name of the decedent, the file number of the estate, the designation and address of the court in which the proceedings are pending, whether the estate is testate or intestate, and, if testate, the date of the will and any codicils;

(2) the name and address of the personal representative and of the personal representative's attorney, and that the fiduciary lawyer-client privilege in section 90.5021, Florida Statutes, applies with respect to the personal representative and any attorney employed by the personal representative;

(3) that any interested person on whom the notice is served who challenges the validity of the will, the qualifications of the personal representative, venue, or jurisdiction of the court ~~is required to~~ must file any objections with the court in the manner provided in the Florida Probate Rules within the time required by law or those objections are forever barred;

(4) that any person entitled to exempt property ~~is required to~~ must file a petition for determination of exempt property within the time provided by law or the right to exempt property is deemed waived; and

(5) that an election to take an elective share must be filed within the time provided by law.

Amended subdivision )b)(2) to include information about fiduciary privilege as defined in section 90.502, Florida Statutes.

Amended in compliance with AOSC06-14.

Amended in compliance with AOSC06-14.



**(c) Copy of Will.** Unless the court directs otherwise, the personal representative of a testate estate ~~shall~~must, upon written request, furnish a copy of the will and all codicils admitted to probate to any person on whom the notice of administration was served.

Amended in compliance with AOSC06-14.

**(d)** [No change]

**(e) Waiver of Service.** For the purpose of determining deadlines established by reference to the date of service of a copy of the notice of administration in cases in which service has been waived, service on a person who has waived notice ~~shall be~~is deemed to occur on the date the waiver is filed.

Amended in compliance with AOSC06-14.

### Committee Notes

#### Rule History

1977—2007 [No change]

2011 Revision: Subdivision (b)(2) amended to conform to amendment to section 732.212, Florida Statutes, relating to attorney-client privilege for fiduciaries and their attorneys. Editorial changes to conform to the court's guidelines for rules submissions as set forth in Administrative Order AOSC06-14. Statutory reference to section 732.402, Florida Statute, added. Committee Notes revised.

Rule history updated.

#### Statutory References

§ 731.201(23), Fla. Stat. General definitions.  
§ 731.301, Fla. Stat. Notice.

§ 731.302, Fla. Stat. Waiver and consent by interested person.

§ 732.2135, Fla. Stat. Time of election; extensions;  
withdrawal.

§ 732.402, Fla. Stat. Exempt property.

§ 732.5165, Fla. Stat. Effect of fraud, duress, mistake, and  
undue influence.

§ 733.101, Fla. Stat. Venue of probate proceedings.

§ 733.109, Fla. Stat. Revocation of probate.

§ 733.212, Fla. Stat. Notice of administration; filing of  
objections.

§ 733.2123, Fla. Stat. Adjudication before issuance of letters.

§ 733.302, Fla. Stat. Who may be appointed personal  
representative.

§ 733.303, Fla. Stat. Persons not qualified.

§ 733.305, Fla. Stat. Trust companies and other corporations  
and associations.

§ 733.504, Fla. Stat. Removal of personal representative;  
causes for removal.

§ 733.506, Fla. Stat. Proceedings for removal.

New statutory reference included.

### **Rule References**

[No change]

ENROLLED  
CS/HB 325

2011 Legislature

1                                   A bill to be entitled  
2           An act relating to estates; creating s. 90.5021, F.S.;  
3           providing a fiduciary lawyer-client privilege; providing  
4           that the section is inapplicable to a specified crime or  
5           fraud exception to lawyer-client privilege; amending s.  
6           732.102, F.S.; revising provisions relating to the  
7           intestate share of a surviving spouse; creating s.  
8           732.615, F.S.; providing a right to reform the terms of a  
9           will to correct mistakes; creating s. 732.616, F.S.;  
10          providing a right to modify the terms of a will to achieve  
11          tax objectives; creating s. 733.1061, F.S.; providing for  
12          a court to award fees and costs in reformation and  
13          modification proceedings either against a party's share in  
14          the estate or in the form of a personal judgment against a  
15          party individually; amending s. 732.5165, F.S.; clarifying  
16          that a revocation of a will is subject to challenge on the  
17          grounds of fraud, duress, mistake, or undue influence;  
18          amending s. 732.518, F.S.; specifying that a challenge to  
19          the revocation of a will may not be commenced before the  
20          testator's death; amending s. 733.212, F.S.; providing for  
21          notice of fiduciary lawyer-client privilege in a notice of  
22          administration; amending s. 736.0207, F.S.; clarifying  
23          when a challenge to the revocation of a revocable trust  
24          may be brought; amending s. 736.0406, F.S.; providing that  
25          the creation of a trust amendment or trust restatement and  
26          the revocation of a trust are subject to challenge on the  
27          grounds of fraud, duress, mistake, or undue influence;  
28          amending s. 736.0813, F.S.; providing for notice of

ENROLLED  
CS/HB 325

2011 Legislature

29 | fiduciary lawyer-client privilege by a trustee; amending  
30 | s. 744.441, F.S.; limiting the circumstances under which a  
31 | guardian of an incapacitated person may bring a challenge  
32 | to a settlor's revocation of a revocable trust; amending  
33 | s. 736.0201, F.S.; clarifying that certain payments by a  
34 | trustee from trust assets are not taxation of attorney's  
35 | fees and costs subject to a specified Rule of Civil  
36 | Procedure; providing effective dates.

37 |  
38 | Be It Enacted by the Legislature of the State of Florida:

39 |  
40 | Section 1. Section 90.5021, Florida Statutes, is created  
41 | to read:

42 | 90.5021 Fiduciary lawyer-client privilege.—

43 | (1) For the purpose of this section, a client acts as a  
44 | fiduciary when serving as a personal representative or a trustee  
45 | as defined in ss. 731.201 and 736.0103, an administrator ad  
46 | litem as described in s. 733.308, a curator as described in s.  
47 | 733.501, a guardian or guardian ad litem as defined in s.  
48 | 744.102, a conservator as defined in s. 710.102, or an attorney  
49 | in fact as described in chapter 709.

50 | (2) A communication between a lawyer and a client acting  
51 | as a fiduciary is privileged and protected from disclosure under  
52 | s. 90.502 to the same extent as if the client were not acting as  
53 | a fiduciary. In applying s. 90.502 to a communication under this  
54 | section, only the person or entity acting as a fiduciary is  
55 | considered a client of the lawyer.

ENROLLED  
CS/HB 325

2011 Legislature

56           (3) This section does not affect the crime or fraud  
57 exception to the lawyer-client privilege provided in s.  
58 90.502(4) (a).

59           Section 2. Effective October 1, 2011, subsections (2) and  
60 (3) of section 732.102, Florida Statutes, are amended, and  
61 subsection (4) is added to that section, to read:

62           732.102 Spouse's share of intestate estate.—The intestate  
63 share of the surviving spouse is:

64           (2) If the decedent is survived by one or more descendants  
65 ~~there are surviving descendants of the decedent,~~ all of whom are  
66 also ~~lineal~~ descendants of the surviving spouse, and the  
67 surviving spouse has no other descendant, the entire intestate  
68 estate the first \$60,000 of the intestate estate, plus one-half  
69 ~~of the balance of the intestate estate. Property allocated to~~  
70 ~~the surviving spouse to satisfy the \$60,000 shall be valued at~~  
71 ~~the fair market value on the date of distribution.~~

72           (3) If there are one or more surviving descendants of the  
73 decedent who, ~~one or more of whom~~ are not lineal descendants of  
74 the surviving spouse, one-half of the intestate estate.

75           (4) If there are one or more surviving descendants of the  
76 decedent, all of whom are also descendants of the surviving  
77 spouse, and the surviving spouse has one or more descendants who  
78 are not descendants of the decedent, one-half of the intestate  
79 estate.

80           Section 3. Effective July 1, 2011, section 732.615,  
81 Florida Statutes, is created to read:

82           732.615 Reformation to correct mistakes.—Upon application  
83 of any interested person, the court may reform the terms of a

ENROLLED  
CS/HB 325

2011 Legislature

84 will, even if unambiguous, to conform the terms to the  
 85 testator's intent if it is proved by clear and convincing  
 86 evidence that both the accomplishment of the testator's intent  
 87 and the terms of the will were affected by a mistake of fact or  
 88 law, whether in expression or inducement. In determining the  
 89 testator's original intent, the court may consider evidence  
 90 relevant to the testator's intent even though the evidence  
 91 contradicts an apparent plain meaning of the will.

92 Section 4. Effective July 1, 2011, section 732.616,  
 93 Florida Statutes, is created to read:

94 732.616 Modification to achieve testator's tax  
 95 objectives.—Upon application of any interested person, to  
 96 achieve the testator's tax objectives the court may modify the  
 97 terms of a will in a manner that is not contrary to the  
 98 testator's probable intent. The court may provide that the  
 99 modification has retroactive effect.

100 Section 5. Effective July 1, 2011, section 733.1061,  
 101 Florida Statutes, is created to read:

102 733.1061 Fees and costs; will reformation and  
 103 modification.—

104 (1) In a proceeding arising under s. 732.615 or s.  
 105 732.616, the court shall award taxable costs as in chancery  
 106 actions, including attorney's fees and guardian ad litem fees.

107 (2) When awarding taxable costs, including attorney's fees  
 108 and guardian ad litem fees, under this section, the court in its  
 109 discretion may direct payment from a party's interest, if any,  
 110 in the estate or enter a judgment which may be satisfied from  
 111 other property of the party, or both.

ENROLLED  
CS/HB 325

2011 Legislature

112 Section 6. Section 732.5165, Florida Statutes, is amended  
113 to read:

114 732.5165 Effect of fraud, duress, mistake, and undue  
115 influence.—A will is void if the execution is procured by fraud,  
116 duress, mistake, or undue influence. Any part of the will is  
117 void if so procured, but the remainder of the will not so  
118 procured shall be valid if it is not invalid for other reasons.  
119 If the revocation of a will, or any part thereof, is procured by  
120 fraud, duress, mistake, or undue influence, such revocation is  
121 void.

122 Section 7. Section 732.518, Florida Statutes, is amended  
123 to read:

124 732.518 Will contests.—An action to contest the validity  
125 of all or part of a will or the revocation of all or part of a  
126 will may not be commenced before the death of the testator.

127 Section 8. Paragraph (b) of subsection (2) of section  
128 733.212, Florida Statutes, is amended to read:

129 733.212 Notice of administration; filing of objections.—

130 (2) The notice shall state:

131 (b) The name and address of the personal representative  
132 and the name and address of the personal representative's  
133 attorney, and that the fiduciary lawyer-client privilege in s.  
134 90.5021 applies with respect to the personal representative and  
135 any attorney employed by the personal representative.

136 Section 9. Section 736.0207, Florida Statutes, is amended  
137 to read:

138 736.0207 Trust contests.—An action to contest the validity  
139 of all or part of a revocable trust, or the revocation of part

ENROLLED  
CS/HB 325

2011 Legislature

140 of a revocable trust, may not be commenced until the trust  
 141 becomes irrevocable by its terms or by the settlor's death. If  
 142 all of a revocable trust has been revoked, an action to contest  
 143 the revocation may not be commenced until after the settlor's  
 144 death., ~~except~~ This section does not prohibit such action by the  
 145 guardian of the property of an incapacitated settlor.

146 Section 10. Section 736.0406, Florida Statutes, is amended  
 147 to read:

148 736.0406 Effect of fraud, duress, mistake, or undue  
 149 influence. ~~A trust is void~~ If the creation, amendment, or  
 150 restatement of a the trust is procured by fraud, duress,  
 151 mistake, or undue influence, the trust or any part so procured  
 152 ~~of the trust is void. if procured by such means, but~~ The  
 153 remainder of the trust not procured by such means is valid if  
 154 the remainder is not invalid for other reasons. If the  
 155 revocation of a trust, or any part thereof, is procured by  
 156 fraud, duress, mistake, or undue influence, such revocation is  
 157 void.

158 Section 11. Paragraphs (a) and (b) of subsection (1) of  
 159 section 736.0813, Florida Statutes, are amended to read:

160 736.0813 Duty to inform and account.—The trustee shall  
 161 keep the qualified beneficiaries of the trust reasonably  
 162 informed of the trust and its administration.

163 (1) The trustee's duty to inform and account includes, but  
 164 is not limited to, the following:

165 (a) Within 60 days after acceptance of the trust, the  
 166 trustee shall give notice to the qualified beneficiaries of the  
 167 acceptance of the trust, ~~and~~ and the full name and address of the



ENROLLED  
CS/HB 325

2011 Legislature

168 trustee, and that the fiduciary lawyer-client privilege in s.  
169 90.5021 applies with respect to the trustee and any attorney  
170 employed by the trustee.

171 (b) Within 60 days after the date the trustee acquires  
172 knowledge of the creation of an irrevocable trust, or the date  
173 the trustee acquires knowledge that a formerly revocable trust  
174 has become irrevocable, whether by the death of the settlor or  
175 otherwise, the trustee shall give notice to the qualified  
176 beneficiaries of the trust's existence, the identity of the  
177 settlor or settlors, the right to request a copy of the trust  
178 instrument, ~~and~~ the right to accountings under this section, and  
179 that the fiduciary lawyer-client privilege in s. 90.5021 applies  
180 with respect to the trustee and any attorney employed by the  
181 trustee.

182  
183 Paragraphs (a) and (b) do not apply to an irrevocable trust  
184 created before the effective date of this code, or to a  
185 revocable trust that becomes irrevocable before the effective  
186 date of this code. Paragraph (a) does not apply to a trustee who  
187 accepts a trusteeship before the effective date of this code.

188 Section 12. Subsection (11) of section 744.441, Florida  
189 Statutes, is amended to read:

190 744.441 Powers of guardian upon court approval.—After  
191 obtaining approval of the court pursuant to a petition for  
192 authorization to act, a plenary guardian of the property, or a  
193 limited guardian of the property within the powers granted by  
194 the order appointing the guardian or an approved annual or  
195 amended guardianship report, may:

ENROLLED  
CS/HB 325

2011 Legislature

196 (11) Prosecute or defend claims or proceedings in any  
 197 jurisdiction for the protection of the estate and of the  
 198 guardian in the performance of his or her duties. Before  
 199 authorizing a guardian to bring an action described in s.  
 200 736.0207, the court shall first find that the action appears to  
 201 be in the ward's best interests during the ward's probable  
 202 lifetime. There shall be a rebuttable presumption that an action  
 203 challenging the ward's revocation of all or part of a trust is  
 204 not in the ward's best interests if the revocation relates  
 205 solely to a devise. This subsection does not preclude a  
 206 challenge after the ward's death. If the court denies a request  
 207 that a guardian be authorized to bring an action described in s.  
 208 736.0207, the court shall review the continued need for a  
 209 guardian and the extent of the need for delegation of the ward's  
 210 rights.

211 Section 13. Subsection (1) of section 736.0201, Florida  
 212 Statutes, is amended, and subsection (6) is added to that  
 213 section, to read:

214 736.0201 Role of court in trust proceedings.—

215 (1) Except as provided in subsections ~~subsection~~ (5) and  
 216 (6) and s. 736.0206, judicial proceedings concerning trusts  
 217 shall be commenced by filing a complaint and shall be governed  
 218 by the Florida Rules of Civil Procedure.

219 (6) Rule 1.525, Florida Rules of Civil Procedure, shall  
 220 apply to judicial proceedings concerning trusts, except that the  
 221 following do not constitute taxation of costs or attorney's fees  
 222 even if the payment is for services rendered or costs incurred  
 223 in a judicial proceeding:

ENROLLED  
CS/HB 325

2011 Legislature

224        (a) A trustee's payment of compensation or reimbursement  
225 of costs to persons employed by the trustee from assets of the  
226 trust.

227        (b) A determination by the court directing from what part  
228 of the trust fees or costs shall be paid, unless the  
229 determination is made under s. 736.1004 in an action for breach  
230 of fiduciary duty or challenging the exercise of, or failure to  
231 exercise, a trustee's powers.

232        Section 14. Except as otherwise expressly provided in this  
233 act, this act shall take effect upon becoming a law and shall  
234 apply to all proceedings pending before such date and all cases  
235 commenced on or after the effective date.