

IN THE SUPREME COURT OF FLORIDA

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

CASE NO.: SC11-1575

THE FLORIDA PROBATE RULES
COMMITTEE'S RESPONSE TO COMMENTS FILED

John C. Moran and Tasha K. Pepper-Dickenson, Co-Chairs of the Florida Probate Rules Committee (“Committee”), and John F. Harkness, Jr., Executive Director of The Florida Bar, file this response to the comments filed in connection with the Court’s September 28, 2011, opinion in this case amending the Florida Probate Rules.

I. COMMENT SUBMITTED BY DOROTHY COLLINS SIMPSON

The first comment was submitted by Dorothy Collins Simpson, who filed her comment pro se and appears to be a resident of Georgia. *See* Appendix A. Ms. Simpson’s comment discusses the facts of various litigated proceedings in which she is, or was, involved. As a threshold matter, this rule amendment case is not the appropriate forum for reviewing the facts or result of any proceeding in which Ms. Simpson was a litigant.

Ms. Simpson’s comment states that there should be further amendments to *Fla. Prob. R. 5.025(d)(5)*. The Court should note, however, that the only amendment to this portion of *Rule 5.025* was an editorial change that replaced the word “shall” with “must” in conformance with the Court’s guidelines for rules submissions as set forth in Administrative Order AOSC06-14.

The last paragraph of Ms. Simpson’s comment requests that *Rule 5.025(d)(5)* be further amended “to include a separate Adversary case file Number separate from the decedent’s original case file Number.” (Appendix A, p. 14) This proposal falls outside the scope of the Committee’s Fast Track Amendments Report, in which the only revision to *Rule 5.025(d)(5)* sought was an editorial word change. Accordingly, the Committee does not recommend any modification of the rule amendment in response to Ms. Simpson’s comment.

II. COMMENT SUBMITTED BY CAROL KAYL FREEMAN

The second comment was submitted by Carol Kayl Freeman, a Florida attorney. *See* Appendix B. Ms. Freeman raises an issue regarding the effective date of the amendment to *Rule* 5.025(d)(2). Specifically, Ms. Freeman states that this amendment should apply to “all cases currently open or reopened as of the effective date or later if reopened after the effective date, not just to cases opened on or after the effective date.” (Appendix B, p. 1)

The Committee agrees that a clarification regarding the application of this particular amendment will help avoid confusion, litigation, and the possibility of inconsistent application of *Rule* 5.025(d)(2).

By way of background, on March 3, 2005, this Court adopted *Fla. Fam. L. R. P.* 12.525, which simply provides that “Florida Rule of Civil Procedure 1.525 shall not apply in proceedings governed by these rules.” *Amendments to the Florida Family Law Rules of Procedure (Rule 12.525)*, 897 So. 2d 467 (Fla. 2005). As referenced in the Fast Track Amendments Report, the proposed amendment to *Rule* 5.025(d)(2) follows the same rationale this Court employed in eliminating the application of *Rule* 1.525 to family law proceedings. *Id.* at 467-68. For example, there is already a well-established body of statutory and decisional authority regarding the award of attorneys’ fees and costs in probate and guardianship matters. In addition, probate and guardianship matters are unique because it is possible to have multiple companion proceedings, both adversary and non-adversary, within one case. For example, actions to remove a personal representative or guardian, determine elective share rights, or set aside a will may each be treated as separate proceedings within a pending case. *See, e.g., Rule* 5.025(a).

Following the enactment of *Rule* 12.525, several Florida district courts issued conflicting opinions regarding the application and effective date of *Rule* 12.525. On one hand, the Second and Fifth District Courts of Appeal concluded that *Rule* 12.525 did not apply to cases that were pending on the date of its enactment. *See Ponce v. Minda*, 923 So. 2d 1250 (Fla. 2d DCA 2006), *rev. dism.* 944 So. 2d 346 (Fla. 2006); *Nicoletti v. Nicoletti*, 902 So. 2d 215 (Fla. 2d DCA 2005); *Reddell v. Reddell*, 900 So. 2d 670 (Fla. 5th DCA 2005). On the other hand, the First and Third District Courts of Appeal opined that *Rule* 12.525 did apply to cases pending on the date of its enactment. *Montello v. Montello*, 937 So. 2d 1154 (Fla. 3d DCA 2006); *Smith v. Smith*, 902 So. 2d 859 (Fla. 1st DCA 2005).

This Court finally resolved this conflict with its opinion in *Montello v.*

Montello, 961 So. 2d 257 (Fla. 2007). In *Montello*, the Court concluded that Rule 12.525 applied to all cases that were pending on the date of its enactment. *Id.* at 259. See also *Saia Motor Freight Line, Inc. v. Reid*, 930 So. 2d 598, 600 (Fla. 2006) (Fla. R. Civ. P. 1.525 applied to all cases pending on date rule took effect); but see *Natkow v. Natkow*, 696 So. 2d 315, 317 (Fla. 1997) (rules of procedure are prospective unless specifically provided otherwise).

In light of the litigation and conflicting opinions issued following the enactment of the similar family law rule, the Committee agrees that the Court's opinion in this case should be revised to include language clarifying the application and effective date of the amendment to *Rule 5.025(d)(2)*. Specifically, it is the view of the Committee that the amendment to *Rule 5.025(d)(2)* should apply to all proceedings commenced on or after the date of its enactment (*i.e.*, September 28, 2011). Furthermore, the Committee believes that the amendment should apply to all proceedings that were pending on the date of its enactment, but only as to all judgments, orders, or notices filed on or after such date. This distinction is important because, although a probate or guardianship proceeding may have been pending on the effective date, it is not the intent of the Committee to re-open proceedings in which there was filed before the effective date any judgment, order, or notice as to which a party's motion for attorneys' fees or costs would have been governed by the deadline set forth in *Fla. R. Civ. P. 1.525*. The Committee believes that this approach is fair and will avoid uncertainty in the application of *Rule 5.025(d)(2)*.

Accordingly, although the Committee does not believe that the text of the rule itself requires further amendment, the Committee agrees that the Court's opinion in this case should be revised to include the following clarification regarding the application of *Rule 5.025(d)(2)*:

The amendment to *Rule 5.025(d)(2)* became effective immediately upon release of this Court's September 28, 2011, opinion in this case and applies to all proceedings commenced on or after the date of its enactment. Furthermore, the amendment applies to all proceedings that were pending on the date of its enactment, but only as to all judgments, orders, or notices filed on or after the date of its enactment (*i.e.*, September 28, 2011).

Respectfully submitted on December ____, 2011 by:

John C. Moran, Co-Chair
Florida Bar No.: 505072
Florida Probate Rules Committee
Gunster Yoakley & Stewart, P.A.
777 S. Flagler Dr., Ste. 500 E.
West Palm Beach, FL 33401-6121
(561) 650-0515

John F. Harkness, Jr.
Florida Bar No. 123390
Executive Director
The Florida Bar
651 East Jefferson St.
Tallahassee, Florida 32399-2300
(850) 561-5600

Tasha K. Pepper-Dickinson, Co-Chair
Florida Bar No.: 122386
Florida Probate Rules Committee
Jones Foster Johnston & Stubbs, P.A.
505 S. Flagler Dr., Ste. 1100
West Palm Beach, FL 33401-5950
(561) 650-0439

CERTIFICATE OF SERVICE

True copies of The Florida Probate Rules Committee's Response to Comments Filed were furnished via U.S. Mail on _____ of December, 2011 to:

Ms. Dorothy Collins Simpson
5173 Highpoint Road
Union City, Georgia 30291

Carol Kayl Freeman, Esq.
473 Mariner Boulevard
Spring Hill, Florida 34609

Krys Godwin, Staff Liaison
Florida Bar No. 2305
Florida Probate Rules Committee
The Florida Bar
651 E. Jefferson Street
Tallahassee, FL 32399
(850) 561-5702