IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO THE FLORIDA RULES OF APPELLATE PROCEDURE (THREE-YEAR CYCLE) **CASE NO.: SC11-192**

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COMMENTS REGARDING PROPOSED AMENDMENTS TO THE FLORIDA RULES OF APPELLATE PROCEDURE; SPECIFICALLY AS TO PROPOSED RULE 9.170

THE UNDERSIGNED, Michael R. Rollo, Esquire, a member in good standing with the Florida Bar since 1993, requests this Honorable Court and the Honorable Rules Committee to consider the following additions to proposed Rule 9.170 and the grounds and authorities supporting them, as more fully set forth below.

DISCLOSURE

The undersigned discloses that he has a professional and academic interest in the proposed Rule amendment as follows: the undersigned represents an interested-party client in a probate matter currently pending before this Court on a Petition for Direct Conflict Review (decisional and Fla.R.App.P. 9.110(a)(2) conflict) in SC10-2324. The Court's review is sought to resolve irreconcilable decisional authorities, and the anomalies and gaps in or interpreting Fla.R.App.P. 9.110(a)(2), with respect to the interim appealability of trial court orders either

approving or disapproving mediated settlement agreements between interested parties to a probate matter.

These very same conflicts, anomalies, and gaps appear to be precisely what proposed Rule 9.170(b)(1-24), addresses; accordingly, the undersigned has comments on ¶24, concerning the appealability of orders "approving a settlement agreement . . . . or authorizing a compromise . . . ." In addition to authorizing an interim appellate challenge to trial court orders approving - or disapproving - mediated settlement agreements or settlement agreements of any other kind, the undersigned suggests the proposed Rule must also address a party's right to take an interim appeal challenging either approved or disapproved private settlement agreements between the parties, as designated in §733.815, Florida Probate Code, discussed *infra*, as appealable orders that "finally determin[e] the right or obligation of an interested person" in a probate matter.

COMMENT, ARGUMENT, AND CITATIONS TO AUTHORITIES

1. The cases collected in the appellate treatises[1] discussing whether and when an appeal may be taken under (soon to be superseded) under Rule 9.110(a)(2)

[1] *See, generally*, Padovano, Philip J., *Florida Appellate Practice*, 2010 Ed., §22:4, Appeals from Final Orders; Final Orders and Judgments; authorities cited therein.

in a probate case, require[2] that, either in a case where a court-ordered mediated settlement agreement between the parties has been properly reached, reduced to writing, and executed, or where a settlement agreement with a third-party tortfeasor has been achieved by the Personal Representative, and the trial court then approves or (arguably), disapproves the settlement agreement, a challenging party has 30 days to take an appeal or the appellate jurisdiction is lost.

2. As an example, *please see*, *Val Bostwick v. Cowan's Estate*, 326 So.2d 454 (Fla. 1st DCA 1976), where a party challenging a trial court's order *approving* a settlement agreement between the interested parties in a probate matter, took an appeal on the issue at the ***conclusion*** of the case. Interpreting Appellate Rule 3.2(b) (precursor of Fla.R.App.P. 9.110(a)(2)), the District Court held:

> "We agree with appellees' contention that *this was a final order* from which 30 days was allowed for appeal by Rule 3.2(b), Florida Appellate Rules. *It was an order finally determining the rights of the parties in the administration of the estate of the decedent from which an appeal could have been taken . . . .*"

[2] "Require" means either: 1) cases interpreting the Rule hold that the orders approving settlement agreements must be taken immediately because the order finally determines the rights of the parties, and the passage of time in probate cases dilutes the remedy; or 2) cases interpreting the Rule are unclear whether the appeal must be taken immediately, and thus, an appeal must be taken immediately or the challenging party risks guessing wrong. The cases do not address appealing final trial court orders *dis*approving a settlement agreement that finally determines the rights and obligations of the parties, and which similarly dilutes the challenging party's remedies and wastes unnecessary time and judicial labor.

Val Bostwick, *supra*, 326 So.2d at 455. (Emphasis supplied).

3. Similarly, where a personal representative's suit on behalf of the estate against a third party tortfeasor settled and the trial court approved the settlement, the Fourth District Court concluded that the order was a final order determining the right of a party that had to be challenged on appeal within 30 days, or appellate jurisdiction on the issue would be lost. *See, e.g., Arzuman v. Estate of Bin*, 879 So.2d 675 (Fla. 4th DCA 2004):

> "The estate next argues that claimant was required to appeal the order approving the settlement when it was entered. Final orders in probate proceedings are defined under rule 9.110(a)(2), as orders which "finally determine a right or obligation of an interested person as defined in the Florida Probate Code." We conclude that the order approving the settlement of the tort claim did "finally determine a right" of this claimant . . . . We are of course aware that, when we decide that an appellant should have appealed an earlier order, it can result in grave consequences. ***In probate cases***, *however,* ***where the order of final discharge may not be entered for years after the opening of an estate, interim appeals of orders which finally determine rights or obligations are necessary for the orderly administration of the estate. If we were to review the order approving settlement at this late date, it is doubtful that any remedy would be available which would benefit claimant****."*

Arzuman, supra, 879 So.2d 675, 676 - 677. (Emphasis supplied).[3]

[3] *See, also, Brunson v. McKay*, 905 So.2d 1058, 1061 (Fla. 2nd DCA 2005) (decedent's widow's settlement of a wrongful death claim against a third party - over objection of the decedent's interested children - was held to be a final, appealable order determining the rights of an interested party [right of the children to contest the

4. Proposed Rule 9.170(b)(1-24), attempts to codify the decisions interpreting Fla.R.App.P. 9.110(a)(2), which recognize that probate procedure requires interim appeals in more varying contexts than in other civil cases. The fundamental concern justifying an interim probate appeal under ¶24 is that the final rights and obligations of interested parties are determined by a settlement agreement and triggered by the court's approval - or arguably, disapproval of it - and any available remedies to the challenging party will be lost and/or diluted over the often extended passage of time needed to dispose of probate cases.

5. However, the undersigned believes that the Honorable Committee may have failed to consider that, in cases where a settlement agreement is validly executed by the parties, where the final rights and obligations of the parties are delineated, negotiated, compromised, reduced to writing, executed and witnessed, and where the trial court subsequently *disapproves* the settlement and sets it aside, the respective rights of the parties are as final and dispositive as to those issues and as to the parties as equally as they would be if the settlement agreement had been approved by the court. In the undersigned's opinion, it is therefore as equally important for a party adversely affected by a trial court's disapproval of a settlement

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adequacy of the settlement], and was properly before the appellate court as an interim appeal), citing *Arzuman*, *supra*.

agreement, to be able to challenge that order - then - or risk losing appellate jurisdiction over the settlement agreement, the litigation issues related to it, the final rights negotiated and resolved by it, and to obtain any remedies available to correct an outlier order without suffering the remedies' demise over a prolonged passage of time until the conclusion of the case.

6. Civil settlement agreements between private parties are highly favored at law, and are governed by the rules of contract interpretation.

This Court and the District Courts subscribe to this firmly established rule of law. E.g., *Robbie v. City of Miami*, 469 So.2d 1384, 1385 (Fla.1985); *ABC Liquors, Inc. v. Centimark Corp*., 967 So.2d 1053, 1056 (Fla. 5th DCA 2007); *Nichols v. Hartford Ins. Co. of the Midwest*, 834 So.2d 217, 219 (Fla. 1st DCA 2002). Former chancellory cases are treated no differently under the law than any other type of civil settlements. "A marital settlement agreement as to alimony or property rights which is entered before the dissolution of marriage is binding upon the parties." *Dowie v. Dowie*, 668 So.2d 290, 292 (Fla. 1st DCA 1996). Like all other types of settlement agreements, they are construed pursuant to contract law. *Zern v. Zern*, 737 So.2d 631, 633 (Fla. 1st DCA 1999)("Marital settlement agreements are subject to the same rules of construction as is any other contract."); *Bingemann v. Bingemann*, 551 So.2d 1228, 1231 (Fla. 1st DCA 1989) (same). Probate settlement agreements between interested parties are treated no differently. "Heirs and beneficiaries may

formally agree to alter their prescribed interests in an estate, but such an agreement must be in writing and comply with section 733.815, Florida Statutes." *Clifton v. Clifton*, 553 So.2d 192, 194 (Fla. 5th DCA 1989).

7. Because settlement agreements of all types are highly favored at law, it is the clear policy of this Court and of all District Courts, to enforce them whenever possible.

This Court and the District Courts have held in innumerable cases that it is the policy of this state to encourage settlements and that courts must enforce them whenever it is possible to do so. *Robbie v. City of Miami*, 469 So.2d 1384, 1385 (Fla.1985) (finding that "settlements are highly favored and will be enforced whenever possible"); *Hernandez v. Gil*, 958 So.2d 390, 391 (Fla. 3rd DCA 2007) (same). Courts enforcing that unambiguous policy have ruled that it is fundamental that "[a] stipulation properly entered into and relating to a matter upon which it is appropriate to stipulate ***is binding upon the parties and upon the Court***." *Dorson v. Dorson*, 393 So.2d 632, 633 (Fla. 4th DCA 1981), quoting this Court in *Gunn Plumbing, Inc. v. Dania Bank*, 252 So.2d 1, 4 (Fla.1971) (Emphasis supplied); *Antar v. Seamiles, LLC*, 994 So.2d 439, 442 (Fla. 3rd DCA 2008)(same). Settlements between the parties also conserve judicial labor and resources. "Settlement agreements are favored as a means to conserve judicial resources. Courts will enforce them when it is possible to do so." *Spiegel v. H. Allen Holmes, Inc.*, 834

So.2d 295, 297 (Fla. 4th DCA 2002). This firmly entrenched public policy requires validly executed settlement agreements in all types of cases to be upheld and given effect by the courts, and could not be clearer.

8. Probate settlement agreements are no different to any other types of civil settlement agreements, and are similarly binding and enforceable.

Private contracts for settlements in probate matters are treated no differently than any other mediated settlement agreements, and in fact, are *specifically encouraged* under a specific designation of the Florida Probate Code. In §733.815, Florida Statutes, the legislature has provided that

> "733.815. Private contracts among interested persons
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> Subject to the rights of creditors and taxing authorities, ***interested persons may agree among themselves to alter the interests, shares, or amounts to which they are entitled in a written contract executed by them.*** The personal representative shall abide by the terms of the contract, subject to the personal representative's obligation to administer the estate for the benefit of interested persons who are not parties to the contract, and to pay costs of administration." (Emphasis supplied).

To adequately clarify existing Rule Fla.R.App.P. 9.110(a)(2), proposed Rule 9.170 should acknowledge ***the legislature's*** specially designated provision, and should include the court's approval ***or*** disapproval of these type of settlement agreements (called "private contracts" here) in the list of final orders that must be appealed within 30 days.

9. Because a trial court's inquiry into settlement agreements of any kind and the authority to modify the terms or set them aside is strictly limited by the specifically articulated public policy of this Court and the District Courts, either approved ***or*** disapproved settlement agreements must be brought under the 30 day rule.

Courts are held to a strict, narrowly defined standard when they attempt to disregard, discard, disapprove, or set aside a mediated settlement agreement. A court's "inquiry on a motion to set aside an agreement reached through mediation is limited to whether there was fraud, misrepresentation . . . , or coercion." *Griffith v. Griffith*, 860 So.2d 1069, 1072 (Fla. 1st DCA 2003); *Crupi v. Crupi*, 784 So.2d 611, 612 (Fla. 5th DCA 2001). In fact, this Honorable Court has held:

> "[T]he fact that one party to the agreement apparently made a bad bargain is not a sufficient ground, by itself, to vacate or modify a settlement agreement. The critical test in determining the validity of marital agreements is whether there was fraud or overreaching on one side . . . . If an agreement that is unreasonable is freely entered into, it is enforceable."

Griffith, *supra*, at 1072 (Fla. 1st DCA 2003), citing this Court in *Casto v. Casto*, 508 So.2d 330, 334 (Fla.1987).

Thus, absent fraud, coercion, or misrepresentation, or some sort of clearly identifiable overreaching, "[a] court may not deviate from the terms of a voluntary contract either to achieve what it might think is a more appropriate result or to relieve one of the parties from the apparent hardship of an improvident bargain . . . ." *McCutcheon v. Tracy*, 928 So.2d 364 (Fla. 3rd DCA 2006); *Beach Resort Hotel*

Corp. v. Wieder, 79 So.2d 659, 663 (Fla.1955); *Windham v. Windham*, 152 Fla. 362, 11 So.2d 797 (1943). Neither may a court reform a private, unambiguous contract to its liking, based on its perception of reasonableness. "It is never the role of the trial court to rewrite a contract to make it more reasonable for one of the parties or to relieve a party from what turns out to be a bad bargain." *Feldman v. Kritch*, 824 So.2d 274, 277 (Fla. 4th DCA 2002); *Barakat v. Broward County Hous. Auth.*, 771 So.2d 1193, 1195 (Fla. 4th DCA 2000).

10. Therefore, without a finding of fraud, coercion, misrepresentation, or a party's overreaching, ***a trial court may not ignore, set aside, reform, deviate from or construe an unambiguous settlement agreement in any type of civil case***. Instead, it must dutifully follow the expressed public policy of this Honorable Court and the District Courts, and enforce the agreement. When a court does not enforce the agreement, and ignores the parties' rights that were negotiated, compromised, and settled, along with the litigation issues and considerations resolved and finally determined by the agreement, and instead sets the settlement aside - at worst - the parties' final rights under the settlement are entirely lost at that moment; at best, they are subjected to loss, diminution, court-imposed adverse change, and to the long and winding gauntlet of protracted litigation, expense of judicial labor, loss of time, and additional costs.

11. Time is not on the side of the party challenging an unambiguous, properly executed settlement agreement that has been disapproved by the trial court, and if an appeal is required to be taken at the end of the case, in addition to protracted judicial labor, inefficiency, dissipation of estate assets, mis-steps and improvident rulings, lost time, and costs to the parties, it is quite likely that the challenging party will not have an effective remedy.

There is no practical distinction in the necessity of challenging by interim appeal a trial court's *disapproval* of a settlement agreement between interested parties, from challenging the trial court's approval of a settlement agreement.[4] After all, the clear policy presumption is that ***every*** settlement agreement between private parties is to be given effect by the courts if possible to do so, and they are not to be set aside (authorities, *supra*). Moreover, the parties' negotiated final rights and obligations are concluded at the instant of the execution of the settlement

[4] Under either type, the settlement resolves the "final rights and obligations of the parties," ***by agreement***. In cases where the court *approves* the settlement, the party disagreeing with the settlement may challenge it immediately, and strong public policy and case law controls the result; where the court *disapproves* the settlement, a party must be enabled to immediately challenge the sufficiency of the reasons for the set-aside (whether *sua sponte* by the court, or on a reneging party's request), ***because the exact same strong public policy reasons and case law equally control the result.*** In short, because the parties have declared that the agreement finally determines their rights, ***it is the parties - not the court*** - who drive the application of the pubic policy to uphold their privately reached settlement agreements. Thus, there is no logical reason why a party on the *dis*approving side of the equation should have to wait until the conclusion of the case to have its rights enforced by the same public policy, while risking the loss of an adequate remedy by a protracted trial court litigation process.

agreement itself - and not in the court's subsequent approval or disapproval of it. Thus, since courts have limited authority to either approve or disapprove a settlement agreement, either order should trigger the 30 day period to challenge it. If the order is approved by the trial court, the challenging party must appeal then; if it is disapproved, there should be no difference. The public policy of this Court and the District Courts either explicitly or impliedly requires this synchronicity, again, given the presumptive favor of settlement agreements.

Thus, because settlement agreements finally determine the negotiated rights of the parties, the same policy reasons requiring interim appeals must apply with equal force to disapproved or approved settlement agreements, in order to prevent the negotiated points and issues from becoming further entangled, confused, intertwined, and bound up with subsequent trial court order piling upon order, in protracted litigation. In fact, if not immediately appealable, all of the issues determined in the subsequent litigation will have to be addressed and ***unwound*** by the appellate court - ***in many cases, years later at the case's conclusion*** - if the agreement should have been instead approved by the trial court. It is the undersigned's opinion that this phenomena diminishes private, final rights rather than vindicates them, runs contra to the public policy articulated by the courts, and wastes judicial time, resources, and labor.

If the Rule is not corrected as suggested, the undersigned has a reasonable fear that appellate courts - because appellate judges and justices are quite human, and because of the press and din of growing dockets and ever expanding court business - quite naturally will be reluctant, inhibited and disinclined to overturn years of needless litigation and multiple orders, even to remedy an obvious wrong that should have never occurred. Respectfully, the appellate courts will be tempted to take the shortcut path of least resistance in these protracted and convoluted cases - realizing that the cost and procedure of setting the balance sheet aright at that juncture will often be a monumental task below - and they will be tempted to distinguish the facts (expanding the rule instead of contracting it), will declare "the costs of reversal too high," or will simply "per curiam, affirm" to the same unfortunate effect.

In short, there is no limit to the amount judicial labor, inefficiency, dissipation of estate assets, mis-steps and improvident rulings, lost time, costs to the parties, diminution of rights, and lost remedies that will be required to "undo" a trial court order improvidently setting aside a valid settlement agreement years later, if a challenge must languish until the conclusion of the probate case. Failing to include all of these types of cases under the Rule to be timely challenged by an interim appeal, will perpetuate uncertainty, arbitrariness, and unfairness in the judicial system, and will expand the Rule and litigation under it, instead of contracting it.

CONCLUSION OF COMMENTS

Proposed Appellate Rule 9.170(b)(1-24), must clearly identify, address, and include *dis*approved settlement agreements, whether mediated under the Rules of Civil Procedure, or settled pursuant to §733.815, Florida Probate Code, along with approved settlement agreements, as final orders which must be appealed within 30 days, or the interested parties' right to challenge the settlement agreement/private contract is lost.

My thanks to the Honorable Court, and to the Honorable Committee for indulging my comments.

Respectfully submitted,

/s/ Michael R. Rollo

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished to John Granville Crabtree, Esquire, Committee Chair, 240 Crandon Blvd., Ste. 234, Key Biscayne, FL 33149-1624, and to Thomas M. Karr, Esquire, 2 S. Biscayne Blvd., Ste. 3400, Miami, FL 33131-1807, by regular U.S. Mail, and an electronic PDF copy was furnished to jcrabtree@crabtreelaw.com and to tkarr@gunster.com, on this the 28th day of March, 2011.

/s/ Michael R. Rollo
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