

IN THE SUPREME COURT OF FLORIDA

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

CASE NO.: SC16-

**FLORIDA PROBATE RULES COMMITTEE
THREE-YEAR CYCLE REPORT**

Matthew Triggs, Chair of the Florida Probate Rules Committee (“Committee”), and John F. Harkness, Jr., Executive Director of The Florida Bar, file this three-year cycle report under Florida Rule of Judicial Administration 2.140(b). All rule and form amendments have been approved by the full Committee and, as required by Rule 2.140, reviewed by The Florida Bar Board of Governors. The voting records of the Committee and the Board of Governors are attached as Appendix A.

The amendments to Florida Probate Rules 5.040 (Notice), 5.041 (Service of Pleadings and Documents), 5.042 (Time), 5.080 (Discovery and Subpoena), 5.345 (Accountings Other than Personal Representatives’ Final Accounting), 5.346 (Fiduciary Accounting), 5.550 (Petition to Determine Incapacity), 5.560 (Petition for Appointment of Guardian of an Incapacitated Person), 5.620 (Inventory), 5.690 (Initial Guardianship Report), and 5.696 (Annual Accounting) were published in the July 1, 2015, edition of *The Florida Bar News*. The proposed amendments to Rule 5.696 were published in the August 1, 2015, edition. All amendments were posted on The Florida Bar’s website. (*See* Appendix D.) The Committee received a comment from Dr. Sam Sugar which is addressed in the discussion for Rule 5.550. (*See* Appendix F.)

The proposed rule and form amendments, as shown in Appendix B (full page) and Appendix C (two-column), are proposed for the following reasons:

RULE 5.040. NOTICE

Rohan Kelley contacted the Committee and suggested that the Committee “stud[y] whether additional clarification is required in the rules as to when service in the manner of formal notice is complete....” (*See* Appendix E – 1.) The Committee proposes amending Florida Probate Rule 5.040 to provide clarity as to

RECEIVED, 01/28/2016 09:18:29 AM, Clerk, Supreme Court

when service is completed when serving a document in the manner provided for service of formal notice. The suggested amendments create a new subdivision (e) and state that service is completed upon receipt of a document filed in the manner provided for service of formal notice.

RULE 5.041. SERVICE OF PLEADINGS AND DOCUMENTS

The Committee proposes amending the committee notes to Florida Probate Rule 5.041 to reflect the amended title of Florida Rule of Civil Procedure 1.080 (Service of Pleadings and Documents) and change “papers” to “documents.”

RULE 5.042. TIME

The Committee proposes punctuation corrections to subdivision (b)(1) and a minor grammatical amendment to subdivision (b)(2) of Florida Probate Rule 5.042.

Tami Foley Conetta and Barry F. Spivey contacted the Committee and suggested that there may be a conflict between Rule 5.040 (Notice) and Rule 5.042 specifically in reference to the service of formal notice. (*See* Appendix E – 3-E – 14.) The Committee agreed that there could be confusion and proposes amendments to subdivision (d) to specify that subdivision (b) (Additional Time after Service by Mail or E-mail) of Florida Rule of Judicial Administration 2.514 (Computing and Extending Time) applies to service of documents under the Florida Probate Rules with the exception of service by formal notice or in the manner provided for service of formal notice.

RULE 5.080. DISCOVERY, AND-SUBPOENA, AND TAKING TESTIMONY

The Committee proposes amending subdivision (a) of Florida Probate Rule 5.080 to create new subdivision (a)(15). Proposed new subdivision (a)(15) would include a reference to Florida Rule of Civil Procedure 1.451 (Taking Testimony). The Committee proposes including the additional rule of civil procedure within the subset of rules of civil procedure that apply in all probate and guardianship proceedings in order to facilitate the taking of testimony through the use of audio or video communication equipment under certain circumstances, consistent with the procedures set forth in Rule 1.451. Additionally, the Committee proposes amending the title of Rule 5.080 to include “taking testimony.” Committee notes are updated accordingly.

RULE 5.345. ACCOUNTINGS OTHER THAN PERSONAL REPRESENTATIVES’ FINAL ACCOUNTINGS

The Committee proposes amending Florida Probate Rule 5.345 to change the reference from “papers” to “documents,” both in the title of subdivision (f) and in the body of the same subdivision, to conform the rule to Florida Rule of Judicial Administration 2.516 (Service of Pleadings and Documents). Committee notes are updated accordingly.

RULE 5.346. FIDUCIARY ACCOUNTING

The Committee proposes amending Florida Probate Rule 5.346 to clarify that this rule does not apply to guardian accountings. Specifically, the Committee suggests adding “other than a guardian accounting” to subdivision (a). The Committee is proposing significant amendments to Rule 5.696 to detail the accounting standards to be used in guardianship cases and the proposed amendment to Rule 5.346 will clarify when each standard should be used. The amendments to Rule 5.696 are discussed in more detail below. In the notes to the Summary form in Appendix A to Rule 5.346, the Committee proposes amending the reference to the title of Chapter 12, Practice Under Florida Probate Code, to “Fiduciary Accountings” in order to correctly reflect the chapter’s title. In Schedule E of Appendix A, the Committee proposes adding a comma in the parenthetical sentence. Committee notes are updated accordingly.

RULE 5.550. PETITION TO DETERMINE INCAPACITY

Mr. Franklin Jack Burr, II, requested that the Committee amend the Florida Probate Rules to reflect that “the court must first have knowledge that an ‘Advance Directive exists,’ and that the principal has designated a health care Surrogate [in order to include] in its order and letters of guardianship any language that would modify or revoke the authority of the surrogate.” (*See* Appendix E – 18.)

The Committee considered Mr. Burr’s request and noted that Florida law (specifically, section 744.331(6)(b), Florida Statutes) requires a court to determine whether there are alternatives to guardianship that will sufficiently address the problems of an incapacitated person. In order to facilitate that process, the Committee proposes adding new subdivision (a)(8) in order to require the disclosure of possible alternatives to guardianship in a petition to determine incapacity. The Committee proposes punctuation changes and deleting “and” from subdivision (a)(6) and moving it to the end of subdivision (a)(7) to allow for the inclusion of subdivision (a)(8).

The Committee received a comment on its proposed amendment to Rule 5.550 from Dr. Sam Sugar. Dr. Sugar expressed concerns that the Committee's proposed amendments were not specific enough and should refer to "surrogate" instead of "advance directives." The Committee discussed the comment during its September 17, 2015, meeting and determined that no additional amendment was necessary and that its amendments were sufficiently clear.

Committee notes are updated accordingly.

RULE 5.560. PETITION FOR APPOINTMENT OF GUARDIAN OF AN INCAPACITATED PERSON

In his request for amendment, Mr. Burr also recommended similar changes to Florida Probate Rule 5.560. Having considered the matter, the Committee proposes amending subdivision (a)(9) in order to enumerate some of the common alternatives to guardianship and to clarify that a petitioner should disclose all known alternatives, rather than make a unilateral determination that a particular alternative is in some way inadequate or insufficient. As proposed, subdivision (a)(9) would reference possible alternatives to guardianship such as trust agreements, powers of attorney, or advance directives and eliminate the qualifier found in the existing rule. Committee notes are updated accordingly.

RULE 5.620. INVENTORY

The Committee proposes amending subdivision (c) of Florida Probate Rule 5.620 to change "paper" to "document," both in the subdivision title and in the body of the subdivision, to conform the rule to Florida Rule of Judicial Administration 2.516 (Service of Pleadings and Documents). Committee notes are updated accordingly.

RULE 5.690. INITIAL GUARDIANSHIP REPORT

The Committee proposes amending the second sentence of the committee note to change "paper" to "document" to conform the rule to Florida Rule of Judicial Administration 2.516 (Service of Pleadings and Documents). Committee notes are updated accordingly.

RULE 5.696. ~~ANNUAL~~ GUARDIAN ACCOUNTING

The Committee proposes significant amendments to Florida Probate Rule 5.696. The Committee suggests renaming the rule "Guardian Accounting" to more

clearly indicate which type of accounting is governed by the rule. The Committee's proposed amendments also include replacing the contents of subdivision (a) with an applicability provision. As suggested by the Committee, current subdivisions (b) and (c) are renumbered as subdivisions (f) and (g) respectively. New subdivision (b) would more clearly delineate the required contents of the guardian accounting and would create new subdivisions (b)(1)–(b)(4). Subdivision (b)(1) would require a statement of the starting balance at the beginning of the accounting period. Subdivision (b)(2) would require the inclusion of a full and correct account of the receipts and disbursements. Subdivision (b)(3) would require a schedule of assets from the end of the accounting period to be included in the accounting. Subdivision (b)(4) would require, in the case of annual accountings, that copies of any annual or year-end statements of any cash accounts from each institution where cash is deposited be included in the accounting. The Committee proposes these amendments and the new Appendix A in order to clarify what should be included in a guardianship accounting. It was the Committee's belief that a guardian accounting should be materially different from other fiduciary accountings because the distinctions between income and principal that are otherwise necessary with respect to other fiduciary accountings do not have applicability in a guardianship setting. The same holds true with respect to the reporting of distributions that might otherwise be referenced in a fiduciary accounting.

Proposed new subdivisions (c)(1)–(c)(5) would detail the accounting standards to be used in guardian accounting. Subdivision (c)(1) would require that accountings be stated in a manner that is understandable to persons who are not familiar with practices and terminology peculiar to the administration of guardianships. Subdivision (c)(2) would require that the accounting begin with a concise summary of its purpose and content. Subdivision (c)(3) requires the disclosure of any significant transactions occurring during the accounting period. As suggested, subdivision (c)(4) requires both the carrying or acquisition value and the estimated current value for all assets to be listed in the accounting. Subdivision (c)(5) would require gains and losses to be reflected separately in the same schedule.

The Committee's proposed new subdivision (d) refers the reader to the model form for an accounting in proposed new Appendix A. In proposed subdivision (e), the Committee proposes a verification requirement.

New subdivision (f) would contain the contents of existing subdivision (b) with the only changes being the deletion of "annual" and the addition of

“guardian” in the first and second sentences to be consistent with the renaming of the rule. New subdivision (g) retains the contents of existing subdivision (c) with the only change being the deletion of “annual” and the addition of “guardian” in the sentence to be consistent with the renaming of the rule.

The Committee also proposes the inclusion of Appendix A, Accounting of Guardian(s), for Rule 5.696, based on the form in Appendix A of Florida Probate Rule 5.346 (Fiduciary Accounting). The form consists of a Summary sheet and Schedules A–D. Schedule A would show all receipts, Schedule B would show all disbursements, Schedule C would show all capital transactions and adjustments, and Schedule D would show the assets on hand at the end of the accounting period. The Committee thinks the form will be helpful to practitioners because it is closely tailored to information that is relevant in a guardianship setting.

Finally, the Committee recommends a new Appendix B, Guardian Accounting Principles, to explain the principles of guardianship accounting. The proposed Appendix B to Rule 5.696 is similar to Appendix B to Rule 5.346 (Fiduciary Accounting) but is specific to the standards for accountings in guardianship cases. Committee notes are updated to reflect the significant amendments.

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

Respectfully submitted on January 28, 2016.

/s/ Matthew Triggs
Matthew Triggs, Chair
Florida Probate Rules Committee
2255 Glades Road
Suite 421A
Boca Raton, FL 33431-7379
561/241-7400
Florida Bar No. 865745
mtriggs@proskauer.com

/s/ John F. Harkness, Jr.
John F. Harkness, Jr.
Executive Director
The Florida Bar
651 East Jefferson Street
Tallahassee, FL 32399-2300
850/561-5600
Florida Bar No. 123390
jharkness@flabar.org

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was furnished by e-mail, via the e-Portal, on January 28, 2016, to:

Dr. Sam Sugar
ssugarmd@msn.com

Franklin Jack Burr, II
P.O. Box 14431
Clearwater, FL 33766
nodopamine@hotmail.com

Barry F. Spivey
Spivey & Fallon, P.A.
1515 Ringling Blvd., Suite 885
Sarasota, FL 34236-6765
barry.spivey@spiveyfallonlaw.com

Tami Foley Conetta
The Northern Trust Company
P.O. Box 4097
Sarasota, FL 34230-4097
tfc1@ntrs.com

Rohan Kelley
The Kelley Law Firm, PL
3365 Galt Ocean Drive
Ft. Lauderdale, FL 33308-7002
rohan@estatelaw.com

CERTIFICATE OF COMPLIANCE

I certify that these rules were read against *West's Florida Rules of Court—State* (2015 Revised Edition).

I certify that this report was prepared in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

/s/ Heather Savage Telfer
Heather Savage Telfer, Staff Liaison
Florida Probate Rules Committee
The Florida Bar
651 East Jefferson Street
Tallahassee, FL 32399-2300
850/561-5702
Florida Bar No. 139149
htelfer@flabar.org