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## PROCEDURAL CONSIDERATIONS

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## I. [§1.1] INTRODUCTION

Although the procedures involved in different types of probate proceedings are discussed in other chapters of this manual, certain basic observations are discussed below inasmuch as they form the foundation for probate litigation. Many of these topics also are discussed in PRACTICE UNDER FLORIDA PROBATE CODE (Fla. Bar CLE 4th ed. 2005), and the reader is urged to consult that manual as a primary reference work when handling the administration of an estate.

## II. [§1.2] PROCEDURE VS. SUBSTANCE

The Florida Constitution, in Article V, §2(a), vests the Supreme Court with the power to adopt rules for practice and procedure in all courts. The legislature has the power to repeal a rule adopted by the Supreme Court by a two-thirds vote, *id.*, but the legislature “has *no constitutional authority* to enact any law relating to practice and procedure” [emphasis added]. *In re Clarification of Florida Rules of Practice & Procedure (Florida Constitution, Article V, Section 2(a))*, 281 So.2d 204 (Fla. 1973). Any statute or portion of a statute that impermissibly contains procedural aspects is constitutionally infirm, and to the extent that the procedure cannot be severed from the substance, the entire statute is unconstitutional. *Milton v. Leapai*, 562 So.2d 804 (Fla. 5th DCA 1990), *rev'd on other grounds* 595 So.2d 12; *Johnson v. State*, 308 So.2d 127 (Fla. 1st DCA 1975), *aff'd* 346 So.2d 66.

In a perfect world, therefore, practitioners should be able to look to the statutes for the substantive law and turn to the corresponding rules for the applicable procedure. The determination of what constitutes procedure and what constitutes substance is often difficult and many statutes do contain subject matter lying in the gray area between procedure and substantive law. The inherent difficulty of making this determination is illustrated by the Supreme Court’s characterization of the area as a “twilight zone.” *In re Florida Rules of Criminal Procedure*, 272 So.2d 65 (Fla. 1973).

The Florida Probate Code, *F.S.* Chapters 731–735 (the Code), which contains the substantive law governing the areas most often involved in probate litigation, became effective on January 1, 1976. Its enactment necessitated a complete revamping of the probate and guardianship rules to implement the substantive changes made in the probate law by the Florida Legislature. The revisions to the probate rules (as opposed to the guardianship rules) were completed and approved by the Florida Supreme

Court in 1988. See *The Florida Bar. In re Rules of Probate & Guardianship Procedure*, 537 So.2d 500 (Fla. 1988); see also *Watson v. First Florida Leasing, Inc.*, 537 So.2d 1370, 1371 note (Fla. 1989).

In virtually every session thereafter, the legislature made further amendments to various portions of the Code, including significant revisions in 1992 (Ch. 92-200, Laws of Fla.), 1995 (Ch. 95-401, Laws of Fla.), 1999 (Ch. 99-343, Laws of Fla.), and 2001 (Ch. 2001-226, Laws of Fla.). The 2001 changes were the first major revision of the entire Code since its promulgation. Aside from major substantive changes in the statutes, the 2001 changes were part of a continuing effort to eliminate procedure from the statutes that properly belongs in the probate rules. These statutory revisions have in turn led to numerous amendments to the rules to implement procedure deleted from the Code or to otherwise bring the rules into conformity with the revisions to the statutes. See §§1.3–1.5.

### III. HISTORY OF RULES PROMULGATION

#### A. [§1.3] Original Adoption Of Rules Of Procedure

In *In re Florida Rules of Probate & Guardianship Procedure*, 324 So.2d 38 (Fla. 1975), temporary rules were adopted by the Supreme Court without following the usual notice procedure concerning rules of procedure, so that procedural rules governing matters in probate could take effect as of the effective date of the new Florida Probate Code, *F.S. Chapters 731–735*. The rules were adopted on the recommendation of the Probate and Guardianship Rules Committee of The Florida Bar (now called the Florida Probate Rules Committee), with the approval of the Court Rules Steering Committee and the Board of Governors of The Florida Bar.

After adoption of the temporary rules in 1975, the Probate and Guardianship Rules Committee received input from the judiciary and Bar as to the practical application of the rules. As a result of this input the committee prepared a set of suggested changes to the rules and committee notes and recommended that they be adopted as the permanent Rules of Probate and Guardianship Procedure. A supplemental petition was filed by The Florida Bar in the Supreme Court and the court adopted the entire Florida Rules of Probate and Guardianship Procedure, together with revised committee comments from 1975 and 1977 that were published in the appendix to its order. *The Florida Bar. In re Supplemental Petition for Changes in Florida Rules of Probate & Guardianship Procedure*, 344 So.2d 828 (Fla. 1977).

## B. Revisions To Rules

### 1. [§1.4] 1988 Amendments

The Probate and Guardianship Rules Committee, in reviewing the Florida Probate Code, determined that the Code contained considerable procedure along with the substantive law, which procedure should properly be contained in the rules. The Florida Supreme Court was advised in that matter and by opinion, reported at 460 So.2d 906 (Fla. 1984), the court directed the rules committee to review the Florida Probate Code and prepare rules or amendments to rules for submission to the court that would include in the rules all the procedure contained in the Code. The committee's work product was submitted to the Supreme Court in the quadrennial petition for amendments to the Rules of Probate and Guardianship Procedure. The court adopted all of the amendments to the rules proposed by the committee to become effective on January 1, 1989. *The Florida Bar. In re Rules of Probate & Guardianship Procedure*, 537 So.2d 500 (Fla. 1988). After the petition was submitted, the decision of the United States Supreme Court in *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988), necessitated additional amendments to the rules as they related to notice to creditors. At the court's request, the committee subsequently submitted a proposed amendment to *Rule 5.240* and the addition of *Rule 5.495* to accommodate the requirements of *Pope*. *Pope* held that a creditor may not be barred by publication of notice if that creditor was actually known to or reasonably ascertainable by the personal representative, and the personal representative failed to give notice to the creditor by mail or other means to ensure actual notice. Those additional changes were included in the proposed amendments approved in the court's order of September 29, 1988. *Rule 5.495* was deleted the following year because portions were considered substantive and there were already provisions in the rules to cover the procedural aspects.

Many of the 1988 rule changes contained new procedural provisions that already were being followed by probate practitioners, but previously were found only in the Florida Probate Code. The 1988 changes, as well as subsequent revisions of the rules (particularly the changes implemented in 2002 and 2003, see §1.5), incorporated various procedural aspects of the Code.

### 2. [§1.5] Subsequent Revisions

Since the 1988 revisions to the Florida Probate Rules, there have been several noteworthy additions or amendments to the rules to address statutory changes.