

**REVISIONS TO RULE 1.525, F.R.C.P. – 30 DAY TIME LIMIT
FOR SERVICE OF MOTION FOR ATTORNEY’S FEES**

Revised 9/10/08

SUBCOMMITTEE REPORT

(Angela Adams, Laura Sundberg, Eric Virgil)

I. Background

Initially, Laura Sundberg raised the issue of the applicability of Rule 1.525 to trust proceedings in the Trust Law Committee.

The current rule is as follows:

Rule 1.525. Motions for Costs and Attorneys’ Fees

Any party seeking a judgment taxing costs, attorneys’ fees, or both shall serve a motion no later than 30 days after filing of the judgment, including a judgment of dismissal, or the service of a notice of voluntary dismissal.

Laura and Angela Adams were asked to review the issue and report to the Trust Law Committee. They concluded that the applicability of Rule 1.525 in trust actions depends upon the specific nature of the trust action. In other words, Rule 1.525, by its specific language, only applies in proceedings where one party is seeking to tax attorney’s fees against another party. Using the specific language of the Rule, they considered various types of trust actions and the applicability of the Rule to those actions.

The attached chart was created to analyze the applicability of the Rule to various types of trust proceedings. It was Sundberg and Adams’ conclusion, and the consensus of the Trust Law Committee, that Rule 1.525 should be made inapplicable to all trust proceedings except those to which F.S. 737.627 (an action challenging the proper exercise of a trustee’s power, i.e., surcharge) is applicable. The Trust Law Committee, in concept, approved the following proposed revision to Rule 1.525:

Proposed Rule 1.525. Motions for Costs and Attorneys’ Fees

Any party seeking a judgment taxing costs, attorneys’ fees, or both shall serve a motion no later than 30 days after filing of the judgment, including a judgment of

dismissal, or the service of a notice of voluntary dismissal. This rule shall not apply to trust proceedings unless the judgment taxing costs, attorneys' fees, or both is sought pursuant to F. S. Section 737.627.

However, the Trust Law Committee recognized the difficulty of trying to amend the Rules of Civil Procedure and was debating whether an amendment to F.S. 737.205 (which states that trust proceedings are governed by the Florida Rules of Civil Procedure) would accomplish the desired goal without the necessity of amending the Rule. The new Trust Code statute 736.0201 similarly applies the Rules to trust proceedings, with some limited exceptions not applicable here. At this point, the Chair of the Trust Law Committee concluded that this issue should be transferred to the Probate and Trust Litigation Committee for review and action since it is clearly related to litigation.

In the course of their review for the Trust Law Committee, Laura and Angela considered the following rules and statutes:

R. 1.525 Motions for Costs and Attorneys' Fees (No trust cases cited in the annotations.)

R. 1.010 Scope of Rules

F.S. 737.2041 Trustee's Attorney's Fees

F.S. 727.2035 Costs and Attorney's Fees in Trust Proceedings

F.S. 737.205 Trust Proceedings; Commencement

F.S. 737.627 Costs and Attorney's Fees

Although not directly on point, they also reviewed The Florida Bar Journal article by Jeffrey M. James, "Moving for Attorneys' Fees and Costs - Do It Right and Do It on Time" (January 2006 issue.).

Since that time, the Florida Legislature enacted the new Florida Trust Code, Chapter 736. The provisions of the new code that relate to the issue are analyzed below.

II. What the Rule Does

Prior to 2000, the rule required a party to file and serve fee and cost motions "within a reasonable time" after judgment. The discretionary language of the old rule led to uncertainty regarding what was a "reasonable time." Rule 1.525 was adopted to establish an explicit time requirement for service of fee and cost motions in order to resolve the uncertainties caused by the "reasonable time" standard. The party seeking fees may serve a motion as soon as entitlement is established. The motion, however, must be served no later than 30 days after filing of

the judgment. See Barco v. School Board of Pinellas County, ____ So.2d ____, No. SC07-261 (Fla. 2008).

The Florida Supreme Court, in Barco, set forth in detail the situations that gave rise to the Rule:

“Further, regarding the purpose, rule 1.525 was created to replace the "reasonable time" requirement established by prior case law with a "within 30 days after" requirement primarily to accomplish two goals: first, to cure the "evil" of uncertainty created by tardy motions for fees and costs, see Norris, 907 So. 2d at 1218; and second, to eliminate the prejudice that tardy motions cause to both the opposing party and the trial court...

In fact, as the Court explained in Stockman, "[t]he existence or nonexistence of a motion for attorney's fees may play an important role in decisions affecting a case. For example, the potential that one may be required to pay an opposing party's attorney's fees may often be determinative in a decision on whether to pursue a claim, dismiss it, or settle." 573 So. 2d at 837.”

III. Current Status of Subcommittee – State of Current Law

This subcommittee has since done research of all state court decisions, including Florida, to determine if any state courts have addressed the application of Rule 1.525, or similar rule, to trust proceedings. There are no Florida decisions related to trust proceedings and the subcommittee could not find any trust decisions applying a similar rule in other states. The Barco case, cited above, is the latest Florida Supreme Court case analyzing the Rule. The case of Estate of Paris, 699 So.2d 301 (Fla. 2d DCA 1997), which relates to taxing litigation attorney's fees in probate is also of interest. The Paris case is support from the probate experience for the limited application of the Rule. The court in that case found that the provision of the probate code relating to attorney's fees for benefiting the estate (F.S. Sec. 733.106) allowed for the taxing of fees in spite of the failure of the attorney to seek taxation of fees at the outset of the case, as is generally required under Stockman v. Downs, 573 So.2d 835 (Fla. 1991).

IV. Provisions of the Trust Code Potentially Affected

The subcommittee reviewed the application of the Rule to the new Trust Code. The provisions of the Trust Code that may be affected or implicated are:

736.1004 Attorney's fees and costs.--

(1)(a) In all actions for breach of fiduciary duty or challenging the exercise of, or failure to exercise, a trustee's powers; and

(b) In proceedings arising under ss. 736.0410-736.0417,

the court shall award taxable costs as in chancery actions, including attorney fees and guardian ad litem fees.

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

736.1005 Attorney's fees for services to the trust.--

(1) Any attorney who has rendered services to a trust may be awarded reasonable compensation from the trust. The attorney may apply to the court for an order awarding attorney's fees and, after notice and service on the trustee and all beneficiaries entitled to an accounting under s. 736.0813, the court shall enter an order on the fee application.

(2) Whenever attorney's fees are to be paid out of the trust, the court, in its discretion, may direct from what part of the trust the fees shall be paid.

(3) Except when a trustee's interest may be adverse in a particular matter, the attorney shall give reasonable notice in writing to the trustee of the attorney's retention by an interested person and the attorney's entitlement to fees pursuant to this section. A court may reduce any fee award for services rendered by the attorney prior to the date of actual notice to the trustee, if the actual notice date is later than a date of reasonable notice. In exercising this discretion, the court may exclude compensation for services rendered after the reasonable notice date but prior to the date of actual notice.

736.1006 Costs in trust proceedings.--

(1) In all trust proceedings, costs may be awarded as in chancery actions.

(2) Whenever costs are to be paid out of the trust, the court, in its discretion, may direct from what part of the trust the costs shall be paid.

736.1007 Trustee's attorney's fees.--

(1) If the trustee of a revocable trust retains an attorney to render legal services in connection with the initial administration of the trust, the attorney is entitled to

reasonable compensation for those legal services, payable from the assets of the trust without court order. The trustee and the attorney may agree to compensation that is determined in a manner or amount other than the manner or amount provided in this section. The agreement is not binding on a person who bears the impact of the compensation unless that person is a party to or otherwise consents to be bound by the agreement. The agreement may provide that the trustee is not individually liable for the attorney's fees and costs.

(2) Unless otherwise agreed, compensation based on the value of the trust assets immediately following the settlor's death and the income earned by the trust during initial administration at the rate of 75 percent of the schedule provided in s. 733.6171(3)(a)-(h) is presumed to be reasonable total compensation for ordinary services of all attorneys employed generally to advise a trustee concerning the trustee's duties in initial trust administration.

(3) An attorney who is retained to render only limited and specifically defined legal services shall be compensated as provided in the retaining agreement. If the amount or method of determining compensation is not provided in the agreement, the attorney is entitled to a reasonable fee, taking into account the factors set forth in subsection (6).

(4) Ordinary services of the attorney in an initial trust administration include legal advice and representation concerning the trustee's duties relating to:

(a) Review of the trust instrument and each amendment for legal sufficiency and interpretation.

(b) Implementation of substitution of the successor trustee.

(c) Persons who must or should be served with required notices and the method and timing of such service.

(d) The obligation of a successor to require a former trustee to provide an accounting.

(e) The trustee's duty to protect, insure, and manage trust assets and the trustee's liability relating to these duties.

(f) The trustee's duty regarding investments imposed by the prudent investor rule.

(g) The trustee's obligation to inform and account to beneficiaries and the method of satisfaction of such obligations, the liability of the trust and trustee to the settlor's creditors, and the advisability or necessity for probate proceedings to bar creditors.

(h) Contributions due to the personal representative of the settlor's estate for payment of expenses of administration and obligations of the settlor's estate.

(i) Identifying tax returns required to be filed by the trustee, the trustee's liability for payment of taxes, and the due date of returns.

(j) Filing a nontaxable affidavit, if not filed by a personal representative.

(k) Order of payment of expenses of administration of the trust and order and priority of abatement of trust distributions.

- (l) Distribution of income or principal to beneficiaries or funding of further trusts provided in the governing instrument.
- (m) Preparation of any legal documents required to effect distribution.
- (n) Fiduciary duties, avoidance of self-dealing, conflicts of interest, duty of impartiality, and obligations to beneficiaries.
- (o) If there is a conflict of interest between a trustee who is a beneficiary and other beneficiaries of the trust, advice to the trustee on limitations of certain authority of the trustee regarding discretionary distributions or exercise of certain powers and alternatives for appointment of an independent trustee and appropriate procedures.
- (p) Procedures for the trustee's discharge from liability for administration of the trust on termination or resignation.
- (5) In addition to the attorney's fees for ordinary services, the attorney for the trustee shall be allowed further reasonable compensation for any extraordinary service. What constitutes an extraordinary service may vary depending on many factors, including the size of the trust. Extraordinary services may include, but are not limited to:
- (a) Involvement in a trust contest, trust construction, a proceeding for determination of beneficiaries, a contested claim, elective share proceedings, apportionment of estate taxes, or other adversary proceedings or litigation by or against the trust.
- (b) Representation of the trustee in an audit or any proceeding for adjustment, determination, or collection of any taxes.
- (c) Tax advice on postmortem tax planning, including, but not limited to, disclaimer, renunciation of fiduciary commission, alternate valuation date, allocation of administrative expenses between tax returns, the QTIP or reverse QTIP election, allocation of GST exemption, qualification for Internal Revenue Code ss. 303 and 6166 privileges, deduction of last illness expenses, distribution planning, asset basis considerations, throwback rules, handling income or deductions in respect of a decedent, valuation discounts, special use and other valuation, handling employee benefit or retirement proceeds, prompt assessment request, or request for release from personal liability for payment of tax.
- (d) Review of an estate tax return and preparation or review of other tax returns required to be filed by the trustee.
- (e) Preparation of decedent's federal estate tax return. If this return is prepared by the attorney, a fee of one-half of 1 percent up to a value of \$10 million and one-fourth of 1 percent on the value in excess of \$10 million, of the gross estate as finally determined for federal estate tax purposes, is presumed to be reasonable compensation for the attorney for this service. These fees shall include services for routine audit of the return, not beyond the examining agent level, if required.
- (f) Purchase, sale, lease, or encumbrance of real property by the trustee or involvement in zoning, land use, environmental, or other similar matters.

- (g) Legal advice regarding carrying on of decedent's business or conducting other commercial activity by the trustee.
 - (h) Legal advice regarding claims for damage to the environment or related procedures.
 - (i) Legal advice regarding homestead status of trust real property or proceedings involving the status.
 - (j) Involvement in fiduciary, employee, or attorney compensation disputes.
 - (k) Considerations of special valuation of trust assets, including discounts for blockage, minority interests, lack of marketability, and environmental liability.
- (6) Upon petition of any interested person in a proceeding to review the compensation paid or to be paid to the attorney for the trustee, the court may increase or decrease the compensation for ordinary services of the attorney for the trustee or award compensation for extraordinary services if the facts and circumstances of the particular administration warrant. In determining reasonable compensation, the court shall consider all of the following factors giving such weight to each as the court may determine to be appropriate:
- (a) The promptness, efficiency, and skill with which the initial administration was handled by the attorney.
 - (b) The responsibilities assumed by, and potential liabilities of, the attorney.
 - (c) The nature and value of the assets that are affected by the decedent's death.
 - (d) The benefits or detriments resulting to the trust or the trust's beneficiaries from the attorney's services.
 - (e) The complexity or simplicity of the administration and the novelty of issues presented.
 - (f) The attorney's participation in tax planning for the estate, the trust, and the trust's beneficiaries and tax return preparation or review and approval.
 - (g) The nature of the trust assets, the expenses of administration, and the claims payable by the trust and the compensation paid to other professionals and fiduciaries.
 - (h) Any delay in payment of the compensation after the services were furnished.
 - (i) Any other relevant factors.
- (7) The court may determine reasonable attorney's compensation without receiving expert testimony. Any party may offer expert testimony after notice to interested persons. If expert testimony is offered, an expert witness fee may be awarded by the court and paid from the assets of the trust. The court shall direct from what part of the trust the fee is to be paid.
- (8) If a separate written agreement regarding compensation exists between the attorney and the settlor, the attorney shall furnish a copy to the trustee prior to commencement

of employment and, if employed, shall promptly file and serve a copy on all interested persons. A separate agreement or a provision in the trust suggesting or directing the trustee to retain a specific attorney does not obligate the trustee to employ the attorney or obligate the attorney to accept the representation but, if the attorney who is a party to the agreement or who drafted the trust is employed, the compensation paid shall not exceed the compensation provided in the agreement.

(9) Court proceedings to determine compensation, if required, are a part of the trust administration process, and the costs, including fees for the trustee's attorney, shall be determined by the court and paid from the assets of the trust unless the court finds the attorney's fees request to be substantially unreasonable. The court shall direct from what part of the trust the fees are to be paid.

(10) As used in this section, the term "initial trust administration" means administration of a revocable trust during the period that begins with the death of the settlor and ends on the final distribution of trust assets outright or to continuing trusts created under the trust agreement but, if an estate tax return is required, not until after issuance of an estate tax closing letter or other evidence of termination of the estate tax proceeding. This initial period is not intended to include continued regular administration of the trust.

736.0201 Role of court in trust proceedings.--

(1) Except as provided in subsection (5) and s. 736.0206, proceedings concerning trusts shall be commenced by filing a complaint and shall be governed by the Florida Rules of Civil Procedure.

(2) The court may intervene in the administration of a trust to the extent the court's jurisdiction is invoked by an interested person or as provided by law.

(3) A trust is not subject to continuing judicial supervision unless ordered by the court.

(4) A judicial proceeding involving a trust may relate to the validity, administration, or distribution of a trust, including proceedings to:

(a) Determine the validity of all or part of a trust;

(b) Appoint or remove a trustee;

(c) Review trustees' fees;

(d) Review and settle interim or final accounts;

(e) Ascertain beneficiaries; determine any question arising in the administration or distribution of any trust, including questions of construction of trust instruments; instruct trustees; and determine the existence or nonexistence of any immunity, power, privilege, duty, or right;

(f) Obtain a declaration of rights; or

(g) Determine any other matters involving trustees and beneficiaries.

(5) A proceeding for the construction of a testamentary trust may be filed in the probate proceeding for the testator's estate. The proceeding shall be governed by the Florida Probate Rules.

736.0206 Proceedings for review of employment of agents and review of compensation of trustee and employees of trust.--

(1) After notice to all interested persons, the court may review the propriety of the employment by a trustee of any person, including any attorney, auditor, investment adviser, or other specialized agent or assistant, and the reasonableness of any compensation paid to that person or to the trustee.

(2) If the settlor's estate is being probated, and the settlor's trust or the trustee of the settlor's trust is a beneficiary under the settlor's will, the trustee, any person employed by the trustee, or any interested person may have the propriety of employment and the reasonableness of the compensation of the trustee or any person employed by the trustee determined in the probate proceeding.

(3) The burden of proof of the propriety of the employment and the reasonableness of the compensation shall be on the trustee and the person employed by the trustee. Any person who is determined to have received excessive compensation from a trust for services rendered may be ordered to make appropriate refunds.

(4) Court proceedings to determine reasonable compensation of a trustee or any person employed by a trustee, if required, are a part of the trust administration process. The costs, including attorney's fees, of the person assuming the burden of proof of propriety of the employment and reasonableness of the compensation shall be determined by the court and paid from the assets of the trust unless the court finds the compensation paid or requested to be substantially unreasonable. The court shall direct from which part of the trust assets the compensation shall be paid.

(5) The court may determine reasonable compensation for a trustee or any person employed by a trustee without receiving expert testimony. Any party may offer expert testimony after notice to interested persons. If expert testimony is offered, a reasonable expert witness fee shall be awarded by the court and paid from the assets of the trust. The court shall direct from which part of the trust assets the fee shall be paid.

(6) Persons given notice as provided in this section shall be bound by all orders entered on the complaint.

(7) In a proceeding pursuant to subsection (2), the petitioner may serve formal notice as provided in the Florida Probate Rules, and such notice shall be sufficient for the court to acquire jurisdiction over the person receiving the notice to the extent of the person's interest in the trust.

736.0410 Modification or termination of trust; proceedings for disapproval of nonjudicial acts.--

(1) In addition to the methods of termination prescribed by ss. 736.04113-736.0414, a trust terminates to the extent the trust expires or is revoked or is properly distributed pursuant to the terms of the trust.

(2) A proceeding to disapprove a proposed modification or termination under s. 736.0412 or a trust combination or division under s. 736.0417 may be commenced by any beneficiary.

(3) A proceeding to disapprove a proposed termination under s. 736.0414(1) may be commenced by any qualified beneficiary.

736.04113 Judicial modification of irrevocable trust when modification is not inconsistent with settlor's purpose.--

(1) Upon the application of a trustee of the trust or any qualified beneficiary, a court at any time may modify the terms of a trust that is not then revocable in the manner provided in subsection (2), if:

(a) The purposes of the trust have been fulfilled or have become illegal, impossible, wasteful, or impracticable to fulfill;

(b) Because of circumstances not anticipated by the settlor, compliance with the terms of the trust would defeat or substantially impair the accomplishment of a material purpose of the trust; or

(c) A material purpose of the trust no longer exists.

(2) In modifying a trust under this section, a court may:

(a) Amend or change the terms of the trust, including terms governing distribution of the trust income or principal or terms governing administration of the trust;

(b) Terminate the trust in whole or in part;

(c) Direct or permit the trustee to do acts that are not authorized or that are prohibited by the terms of the trust; or

(d) Prohibit the trustee from performing acts that are permitted or required by the terms of the trust.

(3) In exercising discretion to modify a trust under this section:

(a) The court shall consider the terms and purposes of the trust, the facts and circumstances surrounding the creation of the trust, and extrinsic evidence relevant to the proposed modification.

(b) The court shall consider spendthrift provisions as a factor in making a decision, but the court is not precluded from modifying a trust because the trust contains spendthrift provisions.

(4) The provisions of this section are in addition to, and not in derogation of, rights under the common law to modify, amend, terminate, or revoke trusts.

736.04115 Judicial modification of irrevocable trust when modification is in best interests of beneficiaries.--

(1) Without regard to the reasons for modification provided in s. 736.04113, if compliance with the terms of a trust is not in the best interests of the beneficiaries,

upon the application of a trustee or any qualified beneficiary, a court may at any time modify a trust that is not then revocable as provided in s. 736.04113(2).

(2) In exercising discretion to modify a trust under this section:

(a) The court shall exercise discretion in a manner that conforms to the extent possible with the intent of the settlor, taking into account the current circumstances and best interests of the beneficiaries.

(b) The court shall consider the terms and purposes of the trust, the facts and circumstances surrounding the creation of the trust, and extrinsic evidence relevant to the proposed modification.

(c) The court shall consider spendthrift provisions as a factor in making a decision, but the court is not precluded from modifying a trust because the trust contains spendthrift provisions.

(3) This section shall not apply to:

(a) Any trust created prior to January 1, 2001.

(b) Any trust created after December 31, 2000, if:

1. Under the terms of the trust, all beneficial interests in the trust must vest or terminate within the period prescribed by the rule against perpetuities in s. 689.225(2), notwithstanding s. 689.225(2)(f).

2. The terms of the trust expressly prohibit judicial modification.

(4) For purposes of subsection (3), a revocable trust shall be treated as created when the right of revocation terminates.

(5) The provisions of this section are in addition to, and not in derogation of, rights under the common law to modify, amend, terminate, or revoke trusts.

736.04117 Trustee's power to invade principal in trust.--

(1)(a) Unless the trust instrument expressly provides otherwise, a trustee who has absolute power under the terms of a trust to invade the principal of the trust, referred to in this section as the "first trust," to make distributions to or for the benefit of one or more persons may instead exercise the power by appointing all or part of the principal of the trust subject to the power in favor of a trustee of another trust, referred to in this section as the "second trust," for the current benefit of one or more of such persons under the same trust instrument or under a different trust instrument; provided:

1. The beneficiaries of the second trust may include only beneficiaries of the first trust;

2. The second trust may not reduce any fixed income, annuity, or unitrust interest in the assets of the first trust; and

3. If any contribution to the first trust qualified for a marital or charitable deduction for federal income, gift, or estate tax purposes under the Internal Revenue Code of 1986, as amended, the second trust shall not contain any provision which, if included in the first trust, would have prevented the first trust from qualifying for such a deduction or would have reduced the amount of such deduction.

(b) For purposes of this subsection, an absolute power to invade principal shall include a power to invade principal that is not limited to specific or ascertainable purposes, such as health, education, maintenance, and support, whether or not the term "absolute" is used. A power to invade principal for purposes such as best interests, welfare, comfort, or happiness shall constitute an absolute power not limited to specific or ascertainable purposes.

(2) The exercise of a power to invade principal under subsection (1) shall be by an instrument in writing, signed and acknowledged by the trustee, and filed with the records of the first trust.

(3) The exercise of a power to invade principal under subsection (1) shall be considered the exercise of a power of appointment, other than a power to appoint to the trustee, the trustee's creditors, the trustee's estate, or the creditors of the trustee's estate, and shall be subject to the provisions of s. 689.225 covering the time at which the permissible period of the rule against perpetuities begins and the law that determines the permissible period of the rule against perpetuities of the first trust.

(4) The trustee shall notify all qualified beneficiaries of the first trust, in writing, at least 60 days prior to the effective date of the trustee's exercise of the trustee's power to invade principal pursuant to subsection (1), of the manner in which the trustee intends to exercise the power. A copy of the proposed instrument exercising the power shall satisfy the trustee's notice obligation under this subsection. If all qualified beneficiaries waive the notice period by signed written instrument delivered to the trustee, the trustee's power to invade principal shall be exercisable immediately. The trustee's notice under this subsection shall not limit the right of any beneficiary to object to the exercise of the trustee's power to invade principal except as provided in other applicable provisions of this code.

(5) The exercise of the power to invade principal under subsection (1) is not prohibited by a spendthrift clause or by a provision in the trust instrument that prohibits amendment or revocation of the trust.

(6) Nothing in this section is intended to create or imply a duty to exercise a power to invade principal, and no inference of impropriety shall be made as a result of a trustee not exercising the power to invade principal conferred under subsection (1).

(7) The provisions of this section shall not be construed to abridge the right of any trustee who has a power of invasion to appoint property in further trust that arises under the terms of the first trust or under any other section of this code or under another provision of law or under common law.

736.0412 Nonjudicial modification of irrevocable trust.--

(1) After the settlor's death, a trust may be modified at any time as provided in s. 736.04113(2) upon the unanimous agreement of the trustee and all qualified beneficiaries.

(2) Modification of a trust as authorized in this section is not prohibited by a spendthrift clause or by a provision in the trust instrument that prohibits amendment or revocation of the trust.

(3) An agreement to modify a trust under this section is binding on a beneficiary whose interest is represented by another person under part III of this code.

(4) This section shall not apply to:

(a) Any trust created prior to January 1, 2001.

(b) Any trust created after December 31, 2000, if, under the terms of the trust, all beneficial interests in the trust must vest or terminate within the period prescribed by the rule against perpetuities in s. 689.225(2), notwithstanding s. 689.225(2)(f), unless the terms of the trust expressly authorize nonjudicial modification.

(c) Any trust for which a charitable deduction is allowed or allowable under the Internal Revenue Code until the termination of all charitable interests in the trust.

(5) For purposes of subsection (4), a revocable trust shall be treated as created when the right of revocation terminates.

(6) The provisions of this section are in addition to, and not in derogation of, rights under the common law to modify, amend, terminate, or revoke trusts.

736.0413 Cy pres.--

(1) If a particular charitable purpose becomes unlawful, impracticable, impossible to achieve, or wasteful, the court may apply the doctrine of cy pres to modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's charitable purposes.

(2) A proceeding to modify or terminate a trust under this section may be commenced by a settlor, a trustee, or any qualified beneficiary.

736.0414 Modification or termination of uneconomic trust.--

(1) After notice to the qualified beneficiaries, the trustee of a trust consisting of trust property having a total value less than \$50,000 may terminate the trust if the trustee concludes that the value of the trust property is insufficient to justify the cost of administration.

(2) Upon application of a trustee or any qualified beneficiary, the court may modify or terminate a trust or remove the trustee and appoint a different trustee if the court determines that the value of the trust property is insufficient to justify the cost of administration.

(3) Upon termination of a trust under this section, the trustee shall distribute the trust property in a manner consistent with the purposes of the trust. The trustee may enter into agreements or make such other provisions that the trustee deems necessary or appropriate to protect the interests of the beneficiaries and the trustee and to carry out the intent and purposes of the trust.

(4) The existence of a spendthrift provision in the trust does not make this section inapplicable unless the trust instrument expressly provides that the trustee may not terminate the trust pursuant to this section.

(5) This section does not apply to an easement for conservation or preservation.

736.0415 Reformation to correct mistakes.—

Upon application of a settlor or any interested person, the court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intent if it is proved by clear and convincing evidence that both the accomplishment of the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement. In determining the settlor's original intent, the court may consider evidence relevant to the settlor's intent even though the evidence contradicts an apparent plain meaning of the trust instrument.

736.0416 Modification to achieve settlor's tax objectives.—

Upon application of any interested person, to achieve the settlor's tax objectives the court may modify the terms of a trust in a manner that is not contrary to the settlor's probable intent. The court may provide that the modification has retroactive effect.

736.0417 Combination and division of trusts.--

(1) After notice to the qualified beneficiaries, a trustee may combine two or more trusts into a single trust or divide a trust into two or more separate trusts, if the result does not impair rights of any beneficiary or adversely affect achievement of the purposes of the trusts or trust, respectively.

(2) Subject to the terms of the trust, the trustee may take into consideration differences in federal tax attributes and other pertinent factors in administering the trust property of any separate account or trust, in making applicable tax elections, and in making distributions. A separate trust created by severance must be treated as a separate trust for all purposes from the date on which the severance is effective. The effective date of the severance may be retroactive to a date before the date on which the trustee exercises such power.

V. Approach of Other Sections

The Family Law Rules Committee filed a petition with the Florida Supreme Court to eliminate the application of Rule 1.525 to family proceedings. That petition was granted pursuant to new Family Law Rule 12.525. A copy of the Supreme Court decision implementing the rule and explaining the decision is attached. Much of the logic applicable to the family law rule may be applicable to trust proceedings, as well.

VI. Issues for Discussion

The issue addressed at Bonita Springs was as follows:

With regard to trust law, should a change be sought to exempt trust proceedings from the application of the Rule unless the order taxing costs, attorneys' fees, or both is sought pursuant to F. S. Section 736.1004 (breach of trust claim), 736.1005 (1) (attorney for non-trustee party rendered services to the trust, 736.1005 (2) and 736.1006 (2) (fees and costs of litigation are charged against the interest of a beneficiary), and 737.1006 (1) (costs are awarded to the prevailing party)?

The initial issue is whether this is really a problem worth devoting the time and energy of this Committee to solving.

The Committee decided that a fix should be discussed.

The subcommittee considered the various scenarios in which payment of attorney's fees and costs should and should not be subject to the Rule, and concluded that the Rule should not apply to circumstances where the trustee is paying his/her/its attorney fees and costs pursuant to F.S. Section 736.1007 (administration of the trust).

With that in mind, here are some proposals for review:

1. An amendment to Rule 1.525 as suggested by the Trust Law Committee keeps Rule 1.525 applicable only in the surcharge context. Upon further consideration, that proposal is probably too narrow. There is no reason the Rule should not be applicable in circumstances where an attorney who is not representing a trustee seeks fees and costs from the trust for having rendered services to the trust or where fees and costs of litigation are sought to be charged against a beneficiary's interest in the trust.

An amendment as suggested by the Trust Law Committee might look like this:

Rule 1.525. Motions for Costs and Attorneys' Fees

Any party seeking a judgment taxing costs, attorneys' fees, or both shall serve a motion no later than 30 days after filing of the judgment, including a judgment of dismissal, or the service of a notice of voluntary dismissal. This rule shall not apply to trust proceedings brought under Chapter 736 of the Florida

Statutes unless the judgment taxing costs, attorneys' fees, or both is sought pursuant to F. S. Section 736.1004 (1)(a).

A better proposal would be to make the Rule clearly inapplicable to the payment of the trustee's attorney's fees and costs for expenses of administration. For example:

Rule 1.525. Motions for Costs and Attorneys' Fees

Any party seeking a judgment taxing costs, attorneys' fees, or both shall serve a motion no later than 30 days after filing of the judgment, including a judgment of dismissal, or the service of a notice of voluntary dismissal. This rule shall not apply to the payment of the trustee's attorney's fees and costs for expenses of administration of a trust [pursuant to F.S. Section 736.1007].

2. An alternative to amending the Rule would be to have the following language added as a comment to Rule 1.525:

This rule is not intended to apply to the payment of the trustee's attorney's fees and costs for expenses of administration of a trust [pursuant to F.S. Section 736.1007].

It appears that a problem has occurred when judges mistakenly apply the Rule so as to bar trustees from paying their attorneys from the trust for expenses of administration. A comment to the Rule should provide clarification, and may be more palatable to the Civil Rules Committee than amending the Rule.

3. Amendment to Rule 1.525 to completely exempt trust proceedings from the rule, analogous to the Family Law Rule.

Rule 1.525. Motions for Costs and Attorneys' Fees

Any party seeking a judgment taxing costs, attorneys' fees, or both shall serve a motion no later than 30 days after filing of the judgment, including a judgment of dismissal, or the service of a notice of voluntary dismissal. This rule shall not apply to trust proceedings brought under Chapter 736 of the Florida Statutes.

4. Concerns have been raised that the Rule is also problematic in probate proceedings. With respect to proposals 1 and 2, above, the amendment could be slightly modified to include estates as follows:

Rule 1.525. Motions for Costs and Attorneys' Fees

Any party seeking a judgment taxing costs, attorneys' fees, or both shall serve a motion no later than 30 days after filing of the judgment, including a judgment of dismissal, or the service of a notice of voluntary dismissal. This rule shall not apply to the payment of the trustee's attorney's fees and costs for expenses of administration of a trust or estate.

New Comment:

This rule is not intended to apply to the payment of the trustee's attorney's fees and costs for expenses of administration of a trust or estate.

If the Committee desires to remove probate proceedings from the Rule, Such a change could fit in F.P.R. 5.025 (d)(2) and might look like this:

Rule 5.025. Adversary Proceedings

...

(d) Notice and Procedure in Adversary Proceedings.

(1) Petitioner shall serve formal notice.

(2) After service of formal notice, the proceedings, as nearly as practicable, shall be conducted similar to suits of a civil nature and the Florida Rules of Civil Procedure shall govern, including entry of defaults, except that Florida Rule of Civil Procedure 1.525 shall not apply in proceedings governed by these rules.

Supreme Court of Florida

No. SC04-1652

AMENDMENTS TO THE FLORIDA FAMILY LAW RULES OF PROCEDURE (RULE 12.525)

[March 3, 2005]

PER CURIAM.

The Family Law Rules Committee has filed an out-of-cycle petition proposing the creation of a new Florida Family Law Rule of Procedure. We have jurisdiction. See art. V, § 2(a), Fla. Const.; Fla. R. Jud. Admin. 2.130(e).

The committee proposes creating new rule 12.525, Motions for Costs and Attorneys' Fees, which succinctly provides, "Florida Rule of Civil Procedure 1.525 shall not apply in proceedings governed by these rules." The proposal was published by the The Florida Bar and the Court in the March 1, 2004, and the October 1, 2004, editions of The Florida Bar News, respectively, and comments were invited. Three comments were filed, all in favor of the proposed new rule.

ANALYSIS

Currently, under Florida Family Law Rule of Procedure 12.020, the Florida Rules of Civil Procedure apply in all family law matters except as otherwise provided in the family law rules. Rule of Civil Procedure 1.525, Motions for Costs and Attorneys' Fees, provides:

Any party seeking a judgment taxing costs, attorneys' fees, or both shall serve a motion within 30 days after filing of the judgment, including a judgment of dismissal, or the service of a notice of voluntary dismissal.

The committee states it is proposing new rule 12.525 because rule 1.525 is ill-fitting to family law matters, and this ill fit may be causing the circuit courts and the district courts of appeal to apply or interpret the rule inconsistently in the context of family law proceedings. Compare Wentworth v. Johnson, 845 So. 2d 296 (Fla. 5th DCA 2003) (rejecting an argument in a family law matter that a reservation of jurisdiction to award attorneys' fees and costs in a final judgment entitles a party to an automatic extension of the 30-day time period to file a motion seeking to tax attorneys' fees), with Fisher v. John Carter & Associates, Inc., 864 So. 2d 493 (Fla. 4th DCA 2004) (holding that in a civil case a reservation of jurisdiction in a final judgment extends the time for filing a motion for attorneys' fees).

We agree that rule 1.525 should not apply in family law proceedings. The method of taxation of attorneys' fees and costs in family law cases is quite

different from that in civil litigation. Whereas the former is based on need and ability of the parties to pay, the latter is based on prevailing party considerations. Moreover, section 61.16, Florida Statutes (2004), already governs the award of attorneys' fees and costs in family law cases. See also Rosen v. Rosen, 696 So. 2d 697, 699 (Fla. 1997) (noting that “[a]ny determination regarding an appropriate award of attorney's fees in proceedings for dissolution of marriage, support, or child custody begins with section 61.16, Florida Statutes”).

Because the application of rule 1.525 in family law cases could be creating confusion among the courts, and because there already is a well-established body of statutory and case law authority regarding the award of attorneys' fees and costs in family law matters, we agree with the committee's proposal. Accordingly, we hereby adopt new Florida Family Law Rule of Procedure 12.525 as reflected in the appendix to this opinion. In adopting this rule, we express no opinion as to its constitutionality. As all of the language is new, we forego the usual underlining and strike-through type format. The new rule shall become effective immediately.

It is so ordered.

PARIENTE, C.J., and WELLS, ANSTEAD, LEWIS, QUINCE, CANTERO, and BELL, JJ., concur.

THE FILING OF A MOTION FOR REHEARING SHALL NOT ALTER THE EFFECTIVE DATE OF THIS AMENDMENT

Original Proceeding – The Florida Family Law Rules of Procedure (Rule 12.525)

Jeffrey P. Wasserman, Chair, Family Law Rules Committee, Boca Raton, Florida
and John F. Harkness, Jr., Executive Director, The Florida Bar, Tallahassee,
Florida,

for Petitioner

Evan Marks of Marks and West and Scott L. Rubin of Fogel, Rubin and Fogel on
behalf of the Family Law Section of The Florida Bar, Miami, Florida; Cynthia
Stump Swanson, Pro se, Gainesville, Florida; and Scott R. McHenry, Pro se,
Maitland, Florida,

Responding with comments

APPENDIX

RULE 12.525 MOTIONS FOR COSTS AND ATTORNEYS' FEES

Florida Rule of Civil Procedure 1.525 shall not apply in proceedings governed by these rules.

TYPE OF CLAIM OR PROCEEDING	WILL FLA. R. CIV. P. 1.525 APPLY SO AS TO REQUIRE A MOTION SEEKING TO TAX COSTS, ATTORNEY'S FEES, OR BOTH, TO BE SERVED WITHIN 30 DAYS AFTER THE FILING OF THE JUDGMENT?
<p>Action for breach of fiduciary duty or challenging the exercise of, or failure to exercise, a trustee's powers (i.e., breach of trust claim against trustee)</p> <p>Prevailing party (whether trustee or non-trustee) seeks an award of attorney's fees and costs pursuant to F.S. 736.1004(1)(a)</p>	<p>Yes. Clearly, a motion seeking to tax attorney's fees and/or costs pursuant to F.S. 736.1004(1)(a), must comply with the requirements of R. 1.525.</p>
<p>Proceedings under F.S. 736.0410 - 736.0417 for modification or termination of trust, invasion of principal by trustee, reformation, combining or dividing trusts, etc., under F.S. 736.1004(1)(b)</p> <p>Prevailing party (whether trustee or non-trustee) seeks an award of attorney's fees and costs pursuant to F.S. 736.1004(1)(b)</p>	<p>Yes. Clearly, a motion seeking to tax attorney's fees and/or costs pursuant to F.S. 736.1004(1)(b), must comply with the requirements of R. 1.525.</p>

<p>Proceeding where no breach of trust by the trustee is alleged (e.g., construction, determination of beneficiaries, trust contest):</p> <ol style="list-style-type: none"> Trustees or trustee's attorney seeks to be paid from assets of the trust Trustee seeks to charge its fees and expenses of litigation against the interest of a non-prevailing beneficiary who is a party to the litigation pursuant to F.S. 736.1005(2) (or to charge costs only pursuant to F.S. 736.1006(2)) Attorney for non-trustee party seeks to recover attorney's fees from trust assets pursuant to F.S. 736.1004(1) (having rendered services to the trust) Non-trustee prevailing party in litigation seeks award of costs from trust assets under F.S. 736.1006(1) 	<p>No. These fees and costs should be ordinary or extraordinary expenses of administration payable without court order under 736.1007(1) and (5).</p> <p>Probably. For example, if a trust beneficiary brings an action contesting the validity of the trust and the beneficiary does not prevail under F.S. 736.1005(2), the court may charge the trustee's attorney's fees against the interest of the non-prevailing beneficiary. Although no judgment for fees and costs will be entered against the non-prevailing beneficiary, the effect of charging the trustee's attorney's fees against his or her share of the trust is a taxation of fees and costs against the non-prevailing beneficiary.</p> <p>The result is unclear. The attorney is not a "party" and would not fall within the scope of R. 1.525. However, Barry Spivey has successfully argued that R. 1.525 does apply in such circumstances.</p> <p>Yes.</p>
<p>Proceeding for review of compensation of trustee and persons employed by trustee pursuant to F.S. 736.0206(4)</p> <p>Prevailing trustee seeks to recover attorney's fees and costs from the trust pursuant to F.S. 736.0206(4)</p>	<p>Probably. F.S. 736.0206(4) states that "costs, including attorney's fees, of the person assuming the burden of proof of . . . reasonableness of the compensation shall be determined by the court and paid from the assets of the trust," unless the compensation is found to be unreasonable. Therefore, the trustee's attorney's fees and costs are not paid as part of the administration of the trust until the court determines the amount of fees and costs.</p>
<p>Non-trustee renders services to trust but no court proceeding is filed</p>	<p>No. If there is no litigation, R. 1.525 never comes into play.</p>

Proposed Rule 9-110(a)(2)

- (a) Applicability. This rule applies to those proceedings that
- (2) Seek review of orders entered in probate and guardianship matters that finally determine a right or obligation of an interested person as defined in the Florida Probate Code, and include, but are not limited to the following orders:
- (A) determining a petition or motion to revoke letters of administration or letters of guardianship;
 - (B) determining a petition or motion to revoke probate of a will;
 - (C) granting or denying a petition for administration pursuant to section 733.2123;
 - (D) determining heirship, succession, entitlement, or the persons to whom distribution should be made;
 - (E) removing or refusing to remove a fiduciary;
 - (F) refusing to appoint a personal representative or guardian;
 - (G) determining a motion or petition to restore capacity;
 - (H) determination of apportionment or contribution of estate taxes;
 - (I) determining an estate's interest in any property;
 - (J) making distributions to any beneficiary;
 - (K) determining entitlement to elective share;
 - (L) determining amount and ordering contribution in satisfaction of elective share;
 - (M) determining a motion or petition for enlargement of time to file a claim against an estate;
 - (N) determining a motion or petition to strike an objection to a claim against an estate;
 - (O) determining a motion or petition to extend the time to file an objection to a claim against an estate;
 - (P) determining a motion or petition to enlarge the time to file an independent action on a claim filed against an estate;

ITEM 4

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- (Q) settling an account of a personal representative, guardian, or other fiduciary;
 - (R) discharging a fiduciary or discharging the fiduciary's surety;
 - (S) approving a settlement agreement on any of the matters listed above in (A) through (R) or authorizing a compromise pursuant to Florida Statutes § 733.708.

WPB 995555.1