

Does Florida Rule of Civil Procedure 1.525 Apply to Probate and Trust Proceedings?

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When the Supreme Court of Florida created Florida Rule of Civil Procedure 1.525, effective January 1, 2001, the landscape of civil procedure changed with regard to the timing of serving requests for attorneys' fees. The rule now states that "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." It is certain that the Supreme Court of Florida intended that the rule be concise, unambiguous and explicit. As applied to a standard civil case, mission probably accomplished. However, it is a different story when one attempts to apply the rule to the various probate and trust attorney fee proceedings.

How does a Florida Rule of Civil Procedure apply to a probate or trust proceeding? The Florida Trust Code states that subject to a few exceptions, "proceedings concerning trusts shall be commenced by filing a complaint and shall be governed by the Florida Rules of Civil Procedure."¹ In probate, certain proceedings are deemed adversary or can be declared adversary, and if they are so deemed or declared then the Florida Rules of Civil Procedure do apply.²

The Background

A trial court has continuing jurisdiction, within a reasonable time, to entertain a post-judgment motion for attorneys' fees.³ F.R.C.P. 1.525 was created "to cure the evil" of uncertainty created by tardy motions for fees and costs; and second, to eliminate the prejudice that tardy motions cause to both the opposing party and the trial court."⁴ By establishing an explicit time to serve a motion for attorneys' fees and costs, the rule eliminated the uncertainty created by the reasonable time rule.⁵

F.R.C.P. 1.525 works well in a standard civil litigation case where there are plaintiffs and defendants and maybe some counterclaimants as well. However, attorney fee proceedings in the probate and trust arena present some unique circumstances not addressed by the rule. Specifically, in certain probate and trust cases a non-party (attorney) might have a right to recover fees for services provided on behalf of the estate or trust. Additionally, the interested person who may bear the ultimate responsibility for payment of the fees may not have been a party to the

underlying proceeding. Further, in civil litigation the method of taxing attorneys' fees and costs is based on prevailing party considerations.⁶ That is not necessarily the case in probate and trust attorney fee proceedings.

The uncertainty concerning the application of the rule to probate and trust attorney fee proceedings has boiled over into the lower courts, mainly because some probate and trust practitioners have incorrectly assumed the rule does not apply. The goal of this article is to assist the practitioner in wading through the various statutes and the relevant case law to provide some thoughts regarding the applicability of F.R.C.P. 1.525 to the various probate and trust attorney fee proceedings.

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Breach of Fiduciary Duty Actions

One of the most frequently litigated issues in the probate and trust area is whether a fiduciary has breached its fiduciary duty to the interested persons. Both the Florida Trust Code and the Florida Probate Code contain statutes that address the taxation of attorneys' fees and costs upon completion of the lawsuit. The Florida Trust Code provides in pertinent part that in all actions for breach of fiduciary duty

or challenging the exercise, or failure to exercise, a trustee's powers, the court shall *award taxable costs* as in chancery actions, including attorney fees.⁷ The statute also applies to various trust modification and reformation proceedings.⁸

The Florida Probate Code provides that in actions for breach of fiduciary duty or challenging the exercise or failure to exercise a personal representative's powers, the court shall *award taxable costs* as in chancery actions, including attorneys' fees.⁹

A review of the plain language of the statutes reveals that these proceedings involve the taxation of costs, including attorneys' fees, against the opposing party, and, therefore, fall within F.R.C.P. 1.525. Hence, it is clear that a party seeking fees or costs under the provisions in either the Florida Trust Code or the Florida Probate Code would indeed be required to serve its motion within thirty days of the judgment.

There is one potential trap of which a trustee ought to be aware: in some instances, the trustee may have been able to pay his attorneys from trust assets during the pendency

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of the proceeding. While it may seem that it would not be necessary to file a motion for attorneys' fees at the conclusion of the case if those fees have been paid, such an assumption could be a costly mistake for the trustee. Both the statutory provisions referred to above permit the court to direct payment against a party's interest in the estate or trust or against that party's other property.¹⁰ Therefore, even if the trustee's attorney has been paid from trust assets, the trustee may still need to file a motion to assess the fees against the opposing party's share of the trust. The trustee should be certain to file that motion within the given thirty day time limit so that beneficiaries who did not participate in the litigation are not taxed attorneys' fees and costs against their shares.

Fiduciary Attorneys' Fees

Both the Florida Probate Code and the Florida Trust Code provide statutory provisions that address reasonable compensation for the fiduciary's counsel for services performed in the estate and trust administration.¹¹ The statutes permit an interested person to petition the court to review the compensation paid or to be paid to a fiduciary's

attorney and increase or decrease fees for ordinary services or award compensation for extraordinary services.¹² Further, the statutes provide a list of factors for the court to consider when determining reasonable compensation.¹³ Proceedings brought under these provisions are a part of the estate and trust administration process.¹⁴ They are separate proceedings that have nothing to do with a post-judgment proceeding seeking the taxation of fees or costs against an opposing party. Therefore, F.R.C.P. 1.525 does not apply.

A word of caution. The provisions address extraordinary services which can include litigation related services.¹⁵ Nothing in the aforementioned provisions would alleviate the fiduciary's responsibility to serve a timely motion for attorneys' fees and costs if it was otherwise required to do so under F.R.C.P. 1.525. For example, a trustee who neglects to seek timely reimbursement for attorneys' fees from the opposing beneficiary after successfully defending a breach of trust action should not be able to use this provision to recover those fees from the trust.

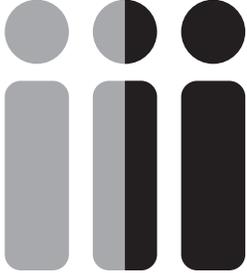
In addition to the above proceedings, both the Florida Probate Code and the Florida Trust Code contain provisions that allow the court to review the propriety of employment of any person employed by the fiduciary and the reasonableness of any compensation paid to that person or to the fiduciary.¹⁶ For many of the reasons discussed above, this is also a separate proceeding that would not invoke F.R.C.P. 1.525 because it is not a proceeding involving the taxation of fees or costs against an opposing party. This type of proceeding is an independent proceeding brought to determine reasonable compensation, and not the type of matter that would be decided on a post-judgment motion for attorneys' fees.

Another word of caution. These statutory provisions do permit the fiduciary, or the person employed by the fiduciary, to recover its costs, including attorneys' fees, incurred litigating the fee matters.¹⁷ This is commonly referred to as "fees on fees." The one exception to "fees on fees" is when the fiduciary's requested compensation is determined to be substantially unreasonable.¹⁸ Seeking "fees on fees" moves the fiduciary into the post-judgment arena and may potentially invoke F.R.C.P. 1.525. The prudent practitioner will serve any motions for "fees on fees" within thirty days of the date that the final order is rendered.

Attorneys' Right to Fees

Both the Florida Probate Code and the Florida Trust Code provide that an attorney who has provided services that benefit an estate or a trust may be awarded reasonable compensation from the estate or trust.¹⁹ While there are no appellate decisions that directly address the applicability of F.R.C.P. 1.525 to these statutory sections, arguably the rule does not apply. Rule 1.525 applies to a party. The rule begins by stating that "any party seeking a judgment..." The statutory provisions apply to the attorney, not the party. Thus the conclusion can be drawn that perhaps Rule 1.525 does *not* apply.

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2.505(h) states that an attorney is the agent of the client (party), the attorney, when seeking fees under these provisions, is not acting as an agent of the party. However, what if the attorney has already received compensation and currently is seeking reimbursement for his client from the estate or trust assets? In that instance, one could argue that the attorney is acting as the agent for the client, and therefore, the rule should apply. Since the right seems to belong to the attorney, it is unlikely that an analysis of whether F.R.C.P. 1.525 applies will turn on whether or not the attorney is seeking actual payment for herself versus reimbursement for her client.

Further, when analyzing the applicability of F.R.C.P. 1.525 to these statutory provisions it may be significant that the right to fees involves more than simply determining the prevailing party.²⁰ It involves a determination that the attorney's services actually benefited the estate or trust.²¹

Also, fees under the statutory provisions are not limited to fees for litigation services. Presumably, a beneficiary's attorney who provided valuable tax advice to the fiduciary would be able to recover a fee under these provisions. F.R.C.P. 1.525 would not apply in that situation.

Finally, the argument that F.R.C.P. 1.525 does not apply may be further bolstered by the fact that interested persons may bear the burden of the fees awarded even if those interested persons were not parties or participants to the underlying proceeding. In that instance, the court would not have sufficient jurisdiction over the interested person to rule on a post-judgment motion. The attorney's application for a fee under the statutory provisions could very well require the filing of a separate complaint (trust) or a separate proceeding by formal notice (probate) to join all the interested persons if those interested persons were not joined in the original proceeding.

Proponent of Will

The Florida Probate Code has a provision that may permit a proponent of a will, even if probate of that will is ultimately denied or revoked, to recover costs and attorneys' fees from the estate as long as the proponent acted in good faith in offering the will for probate.²² The proponent seeking fees under this provision is not a prevailing party.

The determination of entitlement turns not on prevailing party considerations but upon whether the proponent acted in good faith. Denial or revocation of probate may not even be a result of litigation. For example, there may be a proponent who voluntarily withdraws the petition for administration upon learning the will was forged. Finally, the provision is not necessarily designed to seek fees against an opposing party or their particular interest in the estate, although that could be the case. Therefore, F.R.C.P. 1.525 probably does not apply to this statutory provision.

Costs

A motion for costs must be served within the thirty day time limit as provided in F.R.C.P. 1.525. In addition to the specific provisions addressed above, the Florida Trust Code²³ and the Florida Probate Code²⁴ both contain provisions which address the award of costs. Under either section, the court may direct from what part of the estate or trust the costs shall be paid.

There are no surprises here. However, if the fiduciary has been paying costs from the estate or trust during the pendency of the litigation, the fiduciary may be required to serve its motion within thirty days in order to have the court direct from what part of the estate or trust the costs should be allocated.

Conclusion

Because there is still confusion as to whether F.R.C.P. 1.525 applies to certain probate and trust attorneys' fee proceedings, it is highly recommended that the practitioner serve the motion for fees and costs within thirty days of entry of the final judgment. If everyone follows this advice, the issue will disappear. While a fiduciary may not be required to file a motion in every situation, very careful analysis is suggested before arriving at that conclusion. ■

Endnotes:

- 1 F.S. 736.0201(1)
- 2 Fla. Prob. R. 5.025(d)(2)
- 3 *Martinez v. Giacobbe*, 951 So. 2d 902, 904 (Fla. 3d DCA 2007), citing *Finkelstein v. North Broward Hospital District*, 484 So. 2d 1241 (Fla. 1986).
- 4 *Barco v. School Board of Pinellas County*, 975 So. 2d 1116, 1123 (Fla. 2008).
- 5 *Id.*
- 6 *Amendments to the Florida Family Law Rules of Procedure (Rule 12.525)*, 897 So. 2d 467 (Fla. 2005).
- 7 F.S. 736.1004
- 8 *Id.*
- 9 F.S. 733.609(1)
- 10 F.S. 733.609(2); F.S. 736.1004(2)
- 11 F.S. 733.6171; F.S. 736.1007; With one exception, every personal representative in Florida is required to be represented by counsel to assist in the administration of the estate. A trustee is not required to have representation, but many do, especially in the initial administration of the trust
- 12 F.S. 733.6171(5); F.S. 736.1007(6)
- 13 F.S. 733.6171(5); F.S. 736.1007(6)
- 14 F.S. 733.6175(2); F.S. 736.1007(9)
- 15 F.S. 733.6171(4); F.S. 736.1007(5)
- 16 F.S. 733.6175; F.S. 736.0206
- 17 F.S. 733.6175(2); F.S. 736.1007(9); F.S. 736.0206(4)
- 18 F.S. 733.6175(2); F.S. 736.1007(9); F.S. 736.0206(4)
- 19 F.S. 733.106(3); F.S. 736.1005.
- 20 See *Estate of Garvey*, 212 So. 2d 790, 791 (Fla. 3d DCA 1968) writ discharged, *Garvey v. Garvey*, 219 So. 2d 685 (Fla. 1969).
- 21 *Estate of Brock*, 695 So. 2d 714, 717 (Fla. 1st DCA 1996).
- 22 F.S. 733.106(2)
- 23 F.S. 736.1006
- 24 F.S. 733.106(1)