

## APPEALATE RULE PROJECT

### Background

By way of background, prior to the 1996 amendment to the Florida Rules of Appellate procedure, Rule 5.100 of the Florida Probate Rules governed when an order in a probate or guardianship case was appealable. Rule 5.100 provided in part that “all orders and judgments of the Court determining rights of any party in any particular proceeding in the administration of the estate of a decedent or ward shall be deemed final, and may, as a matter of right, be appealed to the appropriate district court of appeal.” The problem was, and really still is, that it is not clear exactly what qualifies as a final order and the case law does little to refine or define what finality is.

In 1996 the Rules of Appellate Procedure were amended to add Rule 9.110(a)(2), to take the place of Rule 5.100, and to govern the appealability of orders entered in probate and guardianship matters. It essentially provides that there may be an appeal 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.” This change has been viewed by the courts, in the 2d, 3d, and 4<sup>th</sup> DCA’s as a strengthening of the requirement of finality. But, at the same time that the need for finality was supposedly being strengthened, the committee note to the new rule provided that this new rule was “not intended to change the definition of final order for appellate purposes.”

While the committee note was not adopted as an official part of the rule it has nevertheless led to some confusion. Further, in at least two DCA’s (the 1<sup>st</sup> and 3<sup>rd</sup> DCA), the court has cited pre rule change cases favorably, and thus, has concluded that although the change in the rule was intended to strengthen the finality requirement, it has not done so. Thus, the 3d

DCA noted in its decision in *Delgado v. The Estate of Garriaga*, 870 So.2d 912, 914 n.5 (Fla. 3d DCA 2004),

Perhaps there should be further study of this problem with a view toward developing a rule further defining what constitutes a final order in a probate appeal. It appears wasteful to allow piecemeal appeals, one before and the other after the adversary action.

### **What Constitutes a Final Order**

While the language of Rule 9.110(a)(2) is seemingly straight-forward, the issue of when a person's right or obligation has been "**finally determined**" is the source of much confusion. As discussed above, the DCA's often have problems determining finality. This confusion has also resulted in conflicting decisions among the DCA's.

One standard that has been applied by the appellate courts to determine whether a right or obligation has been finally determined is whether the judicial labor of the probate court has been completed as to that issue or party. See *In re Estate of Baker*, 327 So.2d 205 (Fla. 1976); *Smoak v. Graham*, 167 So.2d 559 (Fla. 1964); *In re Estate of Elliot*, 798 So.2d 13 (Fla. 1<sup>st</sup> DCA 2001); and *Somogyi v. Nevai*, 920 So.2d 828 (Fla. 4<sup>th</sup> DCA 2006). For instance, in the case of *In re Estate of Elliot*, the 1<sup>st</sup> DCA held that an order granting a claimant an extension of time to file an independent action was a final appealable order. In determining the finality of a probate order, the Court held that the judicial labor of the probate court is complete at the point when the parties must resort to suit in another court or be forced to defend such an independent action in another court. *In re Estate of Elliot* at 799, citing *Smoak v. Graham*, 167 So.2d 559 (Fla. 1964).

By granting the claimant an extension of time to file an independent action, the probate court's efforts with regard to that particular claim had come to an end. Furthermore, the personal representative was forced to defend an independent action in another court as a result of the ruling. The appellate court found that this was a final determination of the personal

representative's right to the protection of F.S. section 733.702. *Elliot* at 799. It is interesting to note that the 1<sup>st</sup> DCA specifically found that the *Smoak* (a pre rule change case) was still good law and its analysis valid under new Rule 9.110.

Highlighting the confusion among the appellate courts, however, is the case of *Delgado v. the Estate of Dominga Freyre*, 870 So.2d 912 (Fla. 3<sup>rd</sup> DCA 2004). In that case, the probate court granted both an extension of time for a claimant to file a claim and an extension of time for the personal representative and a beneficiary to object to the claim. The parties appealed the ruling. The 3<sup>rd</sup> DCA reluctantly found that the orders under appeal were final appealable orders, stating "If we were writing on a clean slate, we would hold that the orders now under review are non-final, non-appealable orders." *Delgado* at 913. After reviewing the history of the change in the rules governing probate appeals, the Court held that it was bound by established precedence and that the orders at issue were final appealable orders. *Id.* The Court then inserted a footnote suggesting that a further study of what constitutes a final appealable order in probate would be helpful, "with a view toward developing a rule further defining what constitutes a final order in a probate appeal." *Id.* at 914 (footnote 5).

The 4<sup>th</sup> DCA apparently disagrees with the 1<sup>st</sup> and 3<sup>rd</sup> DCA regarding the finality of these types of orders. In *Estate of Lefkowitz v. Olsten Kimberly Qualitycare*, 679 So.2d 63 (Fla. 4<sup>th</sup> DCA 1996), the Court held that an order extending the time for filing a creditor's claim was not a final appealable order. The Court felt that this type of order lacked sufficient finality, with regards to the rights of any party, to be appealable. *Id.* Using the analysis employed by the 1<sup>st</sup> DCA in *Elliot*, however, we can easily come to a different result. By granting the claimant an extension of time to file the claim, the personal representative has been deprived of the protection of F.S. section 733.702. The personal representative will either pay the claim or file

an objection, and in the later scenario, the parties have to resort to a different court to resolve the claim in an independent civil action. Either way the probate court's efforts with regard to this particular claim have come to an end.

This issue was recently addressed by the Appellate Rules Committee of the Florida Bar ("ARC") on October 12, 2005, in the context of whether Rule 9.110 (a)(2) should be amended "to provide that an order extending the time to file claims in a probate case is appealable...." The consideration of making such change was requested by Judge Larry Klein of the Fourth District Court of Appeal.

After discussing the request, ARC voted to do nothing. They reached this conclusion largely because they perceived this to be an issue that was not causing enough confusion or trouble to the probate bar to merit any action.

The comments of certain members of ARC illustrate that there may be a lack of understanding the unique nature of probate and guardianship litigation. For example, one of the comments was that allowing such an appeal

is not consistent with the general policy against piecemeal review. The extension can always be reviewed in an appeal from the final judgment in the independent proceeding on the claim.

Another comment was that allowing such an appeal would create

two bites at the apple and [is comparable] to an order determining liability only, which was recently removed as an appealable non-final order.

Yet, if a determination has been made that a claimant is entitled to an extension of time to file a claim, there would appear to have been a determination of the right to an extension of time to bring the independent action in the estate proceeding. Moreover, while the issue could be addressed later on appeal of the outcome of the independent action, estate assets will have in the

meantime been spent, perhaps to the detriment of other interested persons who have taken no position on the requested extension of time and are not parties to the independent action.

Interestingly, ARC did conclude that while such an appeal is not currently authorized by Rule 9.110(a)(2), they agreed by a close vote (7-4) that as a matter of policy such an appeal should be authorized.

Another area which demonstrates the difficulty in determining the finality of a probate order is the new elective share statute. The statute now requires a bifurcated procedure. First, a determination is made as to the surviving spouse's entitlement to the elective share. After entitlement has been determined, the Court then determines the amount of the elective share and which assets should be used to satisfy this amount.

The 2<sup>nd</sup> DCA has addressed the issue and found that an order determining a surviving spouse is entitled to an elective share is not a final appealable order. *See Dempsey v. Dempsey*, 899 So.2d 1272 and *In re Estate of Magee*, 902 So.2d 909. The 2<sup>nd</sup> DCA reached this result due to the fact that judicial labor of the probate court with regard to the rights and obligations of the personal representative had not come to an end. The probate court still needed to determine the amount of the elective share, which assets would be used to satisfy the elective share and if contribution was necessary.

In this author's opinion, however, once the entitlement issue has been determined in favor of the surviving spouse, an interested person's rights or obligations have been finally determined and such an order should be appealable under Rule 9.110(a)(2). The right of the surviving spouse to the elective share and the obligation of the personal representative to pay the elective share are final. It is true that the amount and identity of the assets used to satisfy the elective share must still be determined by the court, however, that does not affect the finality of

the spouse's right to claim an elective share or the personal representative's obligation to satisfy it.

Futhermore, the proceedings to determine the amount of the elective share and which assets are to be used to satisfy it can be extremely complex, time consuming and expensive. For example, if the decedent's estate contains a closely held business, the value of that asset for purposes of the elective share can result in fierce disagreement. A battle of the experts is certain to ensue and even the preparation of the federal estate tax return becomes contested. If the probate court improperly determined entitlement, a significant amount of judicial labor, not to mention estate assets, have been squandered. It seems illogical to wait until the conclusion of this litigation to appeal the entitlement issue. Due to the unique nature of probate proceedings and the need to preserve the estate assets for the creditors and beneficiaries of the estate, the application of the "end of judicial labor" standard to determine finality seems inappropriate.

The uncertainty and inconsistency among the courts also results in the filing of protective appeals. If the appellate court determines the order is not a final order, the appeal will be dismissed. However, there will be an opportunity to file an appeal when a final order is entered. If the order is final, however, and no appeal is filed, the party will have lost its right to appellate review. Without a more definitive standard to determine finality, this issue will continue to be a problem for probate practitioners and appellate courts alike. Furthermore, estate assets will continue to be needlessly wasted on litigation which may have been avoided by allowing an appeal in appropriate circumstances.

Thus, this has led to inquiry by some probate practitioners whether the appealability of probate and guardianship orders should be further addressed by the creation of a non-exclusive

list of types of orders that would be considered appealable for probate and guardianship purposes.

**Proposed Rule**

One approach to resolving this problem is to supplement the existing appellate rule with a non-exclusive list of types of probate and guardianship orders that would be included as orders that “determine a right or obligation of an interested person.” These “types” of orders would be identified by what they do rather than what they are called. In that regard research was done of the appellate rules of the other forty-nine states to determine what has been codified by other states in their appellate rules as appealable probate or guardianship orders. As a result of that research certain state appellate rules were identified as including a listing of what are considered to be appealable probate and guardianship orders in those jurisdictions. A comparison was then made of those types to what is considered to be an appealable probate or guardianship order under Florida case law. From that comparison a list was compiled that included the types of orders that Florida Courts have deemed to be appealable, types of orders that the identified other states’ rules deem to be appealable, and types of orders that the subcommittee thought should be considered for inclusion in such a list. To illustrate the concept being proposed, the following is a comparison of the current rule with a proposed rule that might include a non-exclusive list of types of orders that would be deemed appealable based on what they do rather than on what they are titled.

**A. Current 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.

? ? ?

**B. Concept of 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:

**California**

- (A) granting or revoking letters of administration to a personal representative;
- (B) admitting a will to probate or revoking the probate of a will;
- (C) determining heirship, succession, entitlement, or the persons to whom distribution should be made;

**Idaho**

- (D) settling an account of an executor, administrator or guardian;

**Kansas**

- (E) appointing, refusing to appoint, removing or refusing to remove a fiduciary other than a special administrator;
- (F) granting or denying restoration to capacity;
- (G) granting or denying discharge of a personal representative;

**Minnesota**



- (H) relating to or affecting estate taxes or refusing to amend, modify, or vacate such an order, judgment, or decree;

### **Florida**

- (I) requiring distribution;
- (J) denying a claimant's motion to strike objections to his or her claim against the estate;
- (K) extending to an executor time within which to file objections to claims presented against the estate;
- (L) discharging a guardian and discharging the surety from further liability;
- (M) admitting a will to probate and appointing an executor;
- (N) determining that the estate has no interest in certain property;
- (O) finding that a person was the common-law spouse of the decedent;
- (P) approving a settlement agreement between the parties;
- (Q) fixing an attorney's fee;

### **Further Additions**

- (R) determining entitlement to elective share;
- (S) granting or denying an enlargement of time to file a claim against the estate;
- (T) granting or denying an enlargement of time to file an independent action on a claim filed against the estate.

## APPEALABLE RULE PROJECT – TABLE OF CASES

I. Below are cases for the time period from January 1, 2000 to May 4, 2006, organized by subject matter, discussing appealable orders in probate proceedings where the issue of the appealability of a particular order was addressed.

### Type of Order

### Court Analysis

#### A. Orders Summarily Disposing of Cases

1. Order granting motion to dismiss petition to revoke probate is not final appealable order

Estate of Hirshberg  
913 So.2d 1249  
(Fla. 1<sup>st</sup> DCA 2005)

Appellant challenged a probate orders which granted a motion to dismiss the appellant's petition to revoke probate.

The 1<sup>st</sup> DCA held that the mere granting of a motion to dismiss does not result in a final order or an appealable non-final order. See Benton v. Moore, 655 So.2d 1272 (Fla. 1st DCA 1995). The appeal was dismissed for lack of jurisdiction.

2. Order on Motion to Dismiss Supplemental Petition for Revocation of Probate of Will does not finally determine a right or obligation of an interested person

Sanchez v. Masterhan  
837 So.2d 1161  
(Fla. 1<sup>st</sup> DCA 2003)

Appellant challenged a probate order dismissing a supplemental petition for revocation of probate.

The 1<sup>st</sup> DCA held that the order did not finally determine a right or obligation of an interested person, citing Fla. R. App. P. 9.110(a)(2). The order merely denied a motion to dismiss and did not revoke the probate of a will.

#### B. Elective Share Orders

1. Order determining entitlement of elective share is not a final appealable order

Dempsey v. Dempsey  
899 So. 2d 1272  
(Fla. 2<sup>nd</sup> DCA 2005)

Personal Representative filed an objection to the election for elective share and probate court entered an order determining that the widow was entitled to the elective share.

The 2<sup>nd</sup> DCA held that an order determining widow's entitlement to an elective share is not a final, appealable order. Florida Rule of Appellate Procedure 9.110(a)(2) authorizes appellate review "of orders entered in probate ...

matters that finally determine a right or obligation of an interested person as defined in the Florida Probate Code."

The question of finality "must be viewed from the perspective of the appellant who is challenging the order." "Termination of judicial labor" had not come to an end.

2. Order determining entitlement to elective share is a nonfinal and nonappealable order

In Re Estate of Magee  
902 So.2d 909  
(Fla. 2<sup>nd</sup> DCA 2005)

Beneficiary of a revocable trust appealed order denying her objection to surviving spouse's claim for elective share.

2<sup>nd</sup> DCA relied on *Dempsey v. Dempsey*, 899 So. 2d 1272(Fla. 2<sup>nd</sup> DCA 2005) (holding that an order determining the surviving spouse's entitlement to elective share is a nonfinal and nonappealable order.

### C. Orders on Settlements

1. Order approving proposed settlement is a final appealable order

Brunson v. McKay  
905 So.2d 1058  
(Fla. 2<sup>nd</sup> DCA 2005)

Personal representative filed petition to approve proposed settlement of wrongful-death action and the Decedent's children objected.

Court concluded that it had jurisdiction under Fla. R.App. P. 9.030(b)(1)(A), 9.110(a)(2) and *Arzuman v. Estate of Bin*, 879 So.2d 675 (Fla. 4<sup>th</sup> DCA 2004)

"Substantial rights test"

2. Order approving wrongful death settlement is a final appealable order

Arzuman v. Estate of Bin  
879 So.2d 675  
(Fla. 4<sup>th</sup> DCA 2004)

Personal Representative filed petition for discharge and approval of accounting and Claimant appealed. The Personal argued that the claimant was required to appeal the order when it was entered.

The 4<sup>th</sup> DCA concluded that an order approving the settlement of a tort claim "did finally determine a right" of the claimant. The Court relies on Rule 9.110(a)(2) as orders which finally determine a right or obligation of an interested person" that pursuant to Representative Time for claimant to appeal order approving settlement of wrongful death

action starts to run when trial court approves settlement. Once order approving settlement is entered, the Personal Representative is absolved from liability.

#### D. Claims Orders

1. Order denying motion to strike late filed objection to claim is appealable

Estate of Garriga  
870 so.2d 912  
(Fla. 3<sup>rd</sup> DCA 2004)

Decedent's common law husband filed a claim against the estate and Circuit Court entered an order granting extension of time for foreign heir to object to purported husband's claim and an order denying purported husband's motion to strike Personal Representative's objection to claim.

The 3<sup>rd</sup> DCA held that an order of the circuit court that determines a right, an obligation, or the standing of an interested person as defined in the Florida Probate Code may be appealed before the administration of the probate or guardianship is complete and the fiduciary is discharged.

- The 3<sup>rd</sup> DCA follows 1<sup>st</sup> DCA (see In re: Estate of Elliott, 798 So.2d 13 (Fla. 1st DCA 2001) on the issue of what constitutes an appealable order; Messner v. Dedeo, 826 So.2d 453, 454 n. 1 (Fla. 3rd DCA 2002).
- Smoak v. Graham, 167 So.2d 559 (Fla.1964) In Smoak the Florida Supreme Court rejected the idea "that the judicial labor of the probate court upon the controverted claim is not complete until same is ultimately ordered paid if and when claimant obtains a favorable judgment by independent action." 167 So.2d at 560. Sutton v. Stear, 264 So.2d 838 (Fla.1972) Florida Supreme Court ruled that an order extending the time for objections is an appealable order. 264 So.2d at 841.
- The 3<sup>rd</sup> DCA concluded that the judicial labor of the probate court is complete,

for purposes of review of a ruling under [former] Section 733.18(2), at the point when recourse to suit in another court or defense of such independent action is required as a condition to any further consideration of the claim in probate. A time extension under the statute is logically unassailable thereafter in that or any other trial court, and the right of appeal should and does then accrue.

Note: Court goes on to state that “Perhaps there should be further study of this problem with a view toward developing a rule further defining what constitutes a final order in a probate appeal. It appears wasteful to allow piecemeal appeals, one before and the other after the adversary action. Further, since rulings on extensions of time are subject to review under an abuse of discretion standard, it seems likely that most appeals of rulings on motions for extensions of time will result in affirmance. At least in those cases in which the adversary action is filed in a Florida circuit court, there does not appear to be a sound reason to allow an immediate appeal when the ultimate appeal can come at the conclusion of the adversary action.”

2. Final Order on Motion for Summary Judgment is final appealable order

Jordan v. Fehr  
902 So.2d 198  
(Fla. 1<sup>st</sup> DCA 2005)

Probate court denied Decedent’s companion's motion for summary judgment, and awarded summary judgment to daughter on ground that will attempted to create a trust that was too indefinite and Decedent’s companion appealed and daughter cross-appealed.

1<sup>st</sup> DCA held that it had jurisdiction over the cross-appeal. In so holding, the Court stated that the order under appeal was a final order under rule 9.110(a)(2). Because appellate jurisdiction over the final order on motions for summary judgment was properly invoked by the timely filing of the notice of appeal, pursuant to rule 9.110(h), Florida Rules of Appellate Procedure, the Court could review any ruling or matter occurring prior to the filing

3. Order allowing for extension of time to file action is final and appealable

Richey v. Hurst  
798 So.2d 841  
(Fla. 5<sup>th</sup> DCA 2001)

4. Order sustaining personal representative's objection to claim is appealable final order

Messner v. Dedeo  
826 So.2d 453  
(Fla. 3<sup>rd</sup> DCA 2002)

#### F. Distribution of Orders

1. Order compelling personal representative to submit a plan of distribution is not a final nor a non-final appealable order

Thiel v. Theil  
770 So.2d 240  
(Fla. 1<sup>st</sup> DCA 2000)

2. Distribution of estate assets is a final appealable order for purposes of appellate review

of the notice.

Personal representatives of decedent's estate petitioned for determination of beneficiaries of marital trust.

"[a]ll orders and judgments of the court that finally determine a right or obligation of an interested person may be appealed as provided by Florida Rule of Appellate Procedure 9.110(a)(2)."

Appeal from order sustaining personal representative's objection to claim is appealable final order.

Appealable final order pursuant to 9.110(a)(2) and *Estate of Elliott*, 798 So.2d 13 (Fla. 1<sup>st</sup> DCA 2001)

Personal Representative was directed to submit an Amended Plan of Distribution for court approval and personal representative appealed. The 1<sup>st</sup> DCA held that the appealed order was neither a final order nor a non-final, appealable order. Court dismissed appeal for lack of jurisdiction. *See* Fla. R.App. P. 9.110(a)(2) (requiring *final* determination of parties' rights in probate proceedings); Fla. R.App. P. 9.130(a)(3)(c)(ii) (requiring right to *immediate* possession of property). Dismissal without prejudice upon trial court's entry of a final appealable order.

Order is not appealable because pursuant to 9.110(a)(2), in order for an order to be appealable, there must be a final determination of parties' rights

Court construed Rule 5.100 of Florida Probate Rules and 9.110(a)(2) and concluded that although the notice of appeal referred to the trial court's order as "non-final," it was final for purposes of appellate review.

Pearson v. Cobb  
701 So.2d 649  
(Fla. 5<sup>th</sup> DCA 1997)

Rule 9.110(a)(2) similarly states that appeal proceedings to review "final orders of lower tribunals" include review of orders entered in probate proceedings that finally determine a right or obligation of an interested person. Court construed rules together and concluded that although the notice of appeal referred to the trial court's order as "non-final," it was final for purposes of appellate review.

### G. Miscellaneous

1. Order determining entitlement to attorney's fees is not appealable final order

Swartz v. Lieberman  
712 So.2d 479  
(Fla. 4<sup>th</sup> DCA 1998)

Court agrees with Fifth DCA in holding that order adjudging mere entitlement to attorneys fees without a determination as to amount is a non final non-appealable order because it does not "finally determine a right

2. Will construction is a final and appealable order

Romaniello v. Romaniello  
760 So. 2d 1083  
(Fla. 5<sup>th</sup> DCA 2000)

In a Petition for Construction of Will litigation case, the lower Court's order "finally determine[s] a right or obligation of an interested person as defined in the Florida Probate Code," as such, jurisdiction was granted pursuant to Florida Probate Rule 5.100 and Florida Rules of Appellate Procedure 9.030(b)(1)(A) and 9.110(a)(2).

3. Personal Representative could appeal order for civil contempt

Jensen v. Estate of Gambidilla  
896 So.2d 917  
(Fla. 4<sup>th</sup> DCA 2005)

Civil contempt order was reserved due to its failure to include a finding that the violator had the ability to comply with the order.

4. Order granting extension of time to file independent action is final and appealable order.

Estate of Elliott  
798 So. 2d 13  
(Fla. 1<sup>st</sup> DCA 2001)

Claimant filed a motion for extension of time to file independent action after personal representative objected to claimant's claim. Claimant's motion was granted and the Personal representative appealed. The 1<sup>st</sup> DCA held that the order of the circuit court granting claimant extension of time to file independent action was final and appealable.

1<sup>st</sup> DCA relied on *Smoak v. Graham*, 167 So.2d 559 (Fla. 1964) (appealable when judicial labor of probate court is complete...or when defense of independent action is required as a condition to any further consideration of the claim) .

5. Order vacating family allowance is appealable

Determination of family allowance is final determination of property rights and is appealable under 9.110(a)(2)

Valdez v. Valdez  
913 So.2d 1229  
(Fla. 3<sup>rd</sup> DCA 2005)

6. Appointment of co-personal representative is not an appealable order

To be appealable an order must determine the final rights or obligations of a party

Garces v. Montano  
834 So.2d 194  
(Fla. 3<sup>rd</sup> DCA 2002)



II. Below are cases for the time period from January 1, 2000 to May 4, 2006, organized by the standard applied by each DCA, discussing appealable orders in probate proceedings where the issue of the appealability of a particular order was addressed.

A. **1<sup>st</sup> DCA**

**Court Analysis**

1. Standard: Judicial labor of probate court must be complete

Estate of Elliott  
798 So. 2d 13  
(Fla. 1st DCA 2001)

Order granting extension of time to file independent action is final and appealable

*Smoak v. Graham*, 167 So.2d 559 (Fla. 1964)  
(appealable when judicial labor of probate court is complete...or when defense of independent action is required as a condition to any further consideration of the claim)

2. Standard: None

9.110(a)(2)

Jordan v. Fehr  
902 So.2d 198  
(Fla. 1st DCA 2005)

Final Order on Motion for Summary Judgment is final appealable order

The order under appeal is a final order under rule 9.110(a)(2). Because appellate jurisdiction over the final order on motions for summary judgment was properly invoked by the timely filing of the notice of appeal, pursuant to rule 9.110(h), Florida Rules of Appellate Procedure, this court may review any ruling or matter occurring prior to the filing of the notice.

3. Standard: Final determination of a party's rights.

Thiel v. Theil  
770 So.2d 240  
(Fla. 1st DCA 2000)

Order compelling Plan of Distribution is not a final nor a non-final appealable order.

The trial court directed the personal representative to submit an Amended Plan of Distribution for court approval, and court ruled that the appealed order was neither a final order nor a non-final, appealable order. Court dismissed appeal for lack of jurisdiction. *See* Fla. R.App. P. 9.110(a)(2) (requiring *final* determination of parties' rights in probate proceedings); Fla. R.App. P. 9.130(a)(3)(c)(ii) (requiring right to *immediate* possession of property).

4. Standard: Final determination of a party's rights.

Sanchez v. Masterhan  
837 So.2d 1161  
(Fla. 1st DCA 2003)

Order on Motion to Dismiss Supplemental Petition for Revocation of Probate of Will does not finally determine a right or obligation of an interested person

Appeal was dismissed for lack of jurisdiction. The order on appeal, Order on Motion to Dismiss Supplemental Petition for

Revocation of Probate of Will did not “ *finally* determine a right or obligation of an interested person,” Fla. R.App. P. 9.110(a)(2) (emphasis added), where it merely denies a motion to dismiss, and does not revoke the probate of the will.

5. Standard: None.

Estate of Hirshberg  
913 So.2d 1249  
(Fla. 1st DCA 2005)

Order granting motion to dismiss the appellant's petition to revoke probate is not appealable.

The mere granting of a motion to dismiss does not result in a final order or an appealable non-final order. See Benton v. Moore, 655 So.2d 1272 (Fla. 1st DCA 1995). The appeal from the order granting the motion to dismiss the petition to revoke probate was dismissed for lack of jurisdiction.

6. Standard: Final determination of a party’s rights and judicial labor of probate court must be completed.

Estate of Elliott  
798 So. 2d 13  
(Fla. 1st DCA 2001)

Order granting extension of time to file independent action is final and appealable order.

Order finally determined personal representative's right to cut off claim against estate after designated period of time after objection to claim. § 731.201(21), 733.705(4); R.App.P.Rule 9.110(a)(2).

Relies on Smoak v. Graham, 167 So.2d 559 (Fla.1964) (judicial labor of the probate court is complete)

**B. 2<sup>nd</sup> DCA**

**Court Analysis**

1. Standard: Final determination of a party’s rights and a termination of judicial labor.

Estate of Dempsey  
899 So. 2d 1272  
(Fla. 2nd DCA 2005)

Order determining entitlement of elective share is not a final appealable order.

L9.110(a)(2) authorizes appellate review "of orders entered in probate ... matters that finally determine a right or obligation of an interested person as defined in the Florida Probate Code." Owens v. Swindle (In re Estate of Nolan), 712 So.2d 421, 423 (Fla. 2d DCA 1998).

2. Standard: Final determination of a party’s rights and a termination of judicial labor.

In Re Estate of Magee  
902 So.2d 909  
(Fla. 2nd DCA 2005)

Order determining entitlement to elective share is a nonfinal and nonappealable order.

Dempsey v. Dempsey, 899 So.2d 1272 (Fla. 2d DCA 2005).

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| <p>3. Standard: Extraordinary remedies</p> <p>Fassy v. Crowley<br/>884 So.2d 359<br/>(Fla. 2nd DCA 2004)</p>  | <p>Urgent interlocutory orders are appealable nonfinal orders.</p> <p>Nonfinal orders are reviewable only on plenary appeal of the final order disposing of case.</p> <p>Certiorari review of nonfinal orders under 9.030(b)(2)(A) is “an extraordinary remedy which should not be used to circumvent the interlocutory appeal rule which authorizes appeal from only a few types of nonfinal orders.”</p> |
| <p>4. Standard: Substantial rights test and relies on 4<sup>th</sup> DCA case.</p> <p>Brunson v. McKay<br/>905 So.2d 1058<br/>(Fla. 2nd DCA 2005)</p> | <p>Order approving proposed settlement is a final appealable order</p> <p>Court concluded that it had jurisdiction under Fla. R.App. P. 9.030(b)(1)(A), 9.110(a)(2) and <i>Arzuman v. Estate of Bin</i>, 879 So.2d 675 (Fla. 4<sup>th</sup> DCA 2004)</p>  |
| <p>5. Standard: None.</p> <p>In re Guardianship of Schiavo<br/>792 So.2d 551<br/>(Fla. 2nd DCA 2001)</p>  | <p>A final order that is entered in a guardianship adversary proceeding and requires the guardian to discontinue life-prolonging procedures may be challenged by an interested party at any time prior to the death of the ward on the ground that it is no longer equitable to give prospective application to the order. Rule 1.540(b)(5).</p>   |

C. **3<sup>rd</sup> DCA**

**Court Analysis**

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| <p>1. Standard: Judicial labor must be completed and follows 1<sup>st</sup> DCA.</p> <p>Estate of Garriga<br/>870 so.2d 912<br/>(Fla. 3rd DCA 2004)</p> | <p>Extension of time to file order is appealable</p> <p>Court follows 1<sup>st</sup> DCA (see In re: Estate of Elliott, 798 So.2d 13 (Fla. 1st DCA 2001), on the issue of what constitutes an appealable order; Messner v. Dedeo, 826 So.2d 453, 454 n. 1 (Fla. 3rd DCA 2002).</p> <p>Smoak v. Graham, 167 So.2d 559 (Fla.1964) In Smoak the Florida Supreme Court rejected the idea "that the judicial labor of the probate court upon the controverted claim is not complete until same is ultimately ordered paid if and when claimant obtains a favorable judgment by independent action.</p> |
| <p>2. Standard: Final determination of party’s rights.</p> <p>Valdez v. Valdez<br/>913 So.2d 1229<br/>(Fla. 3<sup>rd</sup> DCA 2005)</p>                | <p>Order vacating family allowance is appealable.</p> <p>Determination of family allowance is final determination of property rights and is appealable under 9.110(a)(2)</p>  |

3. Standard: None.

Garces v. Montano  
834 So.2d 194  
(Fla. 3<sup>rd</sup> DCA 2002)

Appointment of co-personal representative is not an appealable order To be appealable an order must determine the final rights or obligations of a party.

4. Standard: Final determination of party's rights.

Messner v. Dedeo  
826 So.2d 453  
(Fla. 3<sup>rd</sup> DCA 2002)

Appeal from order sustaining personal representative's objection to claim is appealable final order.

Appealable final order pursuant to 9.110(a)(2) and *Estate of Elliott*, 798 So.2d 13 (Fla. 1<sup>st</sup> DCA 2001)

D. 4<sup>th</sup> DCA

Court Analysis

1. Standard: None.

Estate of Gambidilla  
896 So.2d 917  
(4<sup>th</sup> DCA 2005)

Motion for Extension of Time to File Action is appealable as a final order.

Court relies on *In re Odza's Estate*, 432 So.2d 740, 741 (Fla. 4th DCA 1983) (classifying an order removing a personal representative as a final, appealable order).

2. Standard: Final determination of party's rights.

Fromvald v. Wolfe  
760 So.2d 1020  
(Fla. 4<sup>th</sup> DCA 2000)

Revocation of letters testamentary of all three personal representatives of estate and one personal representative appealed.

Final determination of a party's rights is appealable. *See* Fla.Prob.R. 5.100. A final order revoking letters testamentary may be appealable where all rights of the person to administer the estate are terminated by the court's order. *See* *In re Baker's Estate*, 327 So.2d 205, 207 (Fla.1976)

3. Standard: None.

Arzuman v. Estate of Bin, 879  
So.2d 675 (Fla. 4<sup>th</sup> DCA 2004)

Order approving wrongful death settlement is a final appealable order.

4. Standard: Final determination of a party's rights and a termination of judicial labor.

Somogyi v. Nevai  
920 So.2d 828  
(Fla. 4<sup>th</sup> DCA 2006)

Order denying motion to dismiss is not a final determination of rights; not appealable.

Order does not finally determine a right or obligation of an interested person under Fla. R.App. P. 9.110(a)(2), *Sanchez v. Masterhan*, 837 So.2d 1161 (Fla. 1st DCA 2003).

5. Standard: None.

Swartz v. Lieberman  
712 So.2d 479  
(Fla. 4<sup>th</sup> DCA 1998)

Order determining entitlement of attorney's fees is not appealable final order Court agrees with Fifth DCA in holding that entitlement of fees is a non final order.

E. 5<sup>th</sup> DCA

Court Analysis

1. Standard: Final determination of party's rights.

Richey v. Hurst  
798 So.2d 841  
(5<sup>th</sup> DCA 2001)

Personal representatives of decedent's estate petitioned for determination of beneficiaries of marital trust.

"[a]ll orders and judgments of the court that finally determine a right or obligation of an interested person may be appealed as provided by Florida Rule of Appellate Procedure 9.110(a)(2)."

2. Standard: Final determination of party's rights.

Romaniello v. Romaniello  
760 So. 2d 1083  
(Fla. 5<sup>th</sup> DCA 2000)

Petition for Construction of Will appeal.

Order which determines an interested person's final rights, is appealable pursuant Florida Probate Rule 5.100 and Florida Rules of Appellate Procedure 9.030(b)(1)(A) and 9.110(a)(2).

3. Standard: Final determination of party's rights.

Pearson v. Cobb  
701 So.2d 649  
(Fla. 5<sup>th</sup> DCA 1997)

Rule 5.100 of Florida Probate Rules states that all orders and judgments entered in probate proceedings which finally determine a right or an obligation of an interested party are appealable as provided in rule 9.110(a)(2) of the Florida Rules of Appellate Procedure.

Rule 9.110(a)(2) similarly states that appeal proceedings to review "final orders of lower tribunals" include review of orders entered in probate proceedings that finally determine a right or obligation of an interested person.

Below are relevant cases as referenced in Section I with expanded factual background and rulings.

**COURT RULING/CASE  
INFORMATION**

**COURT ANALYSIS/  
RELIANCE ON OTHER CASES**

**1<sup>st</sup> DCA Cases**

1. Order granting extension of time to file independent action is final and appealable

Estate of Elliott  
798 So. 2d 13  
(Fla. 1<sup>st</sup> DCA 2001)

2. Final Order on Motion for Summary Judgment is final appealable order

Jordan v. Fehr  
902 So.2d 198  
(Fla. 1<sup>st</sup> DCA 2005)

**Final Orders**

*Smoak v. Graham, 167 So.2d 559 (Fla. 1964)*  
(appealable when judicial labor of probate court is complete...or when defense of independent action is required as a condition to any further consideration of the claim)

Claimant against decedent's estate filed motion for extension of time to file independent action after personal representative objected to claim. The probate court granted the motion and Personal representative appealed. The Court held that: (1) order of circuit court granting claimant extension of time to file independent action was final and appealable, and (2) claimant did not show "good cause" for extension of time to file.

After decedent's daughter was appointed personal representative of decedent's intestate estate, decedent's companion filed purported will naming companion as executor and bequeathing bulk of estate to companion, and an adversary proceeding was commenced. The probate court denied companion's motion for summary judgment, and awarded summary judgment to daughter on ground that will attempted to create a trust that was too indefinite. Companion appealed, and daughter cross-appealed. Court held that it had jurisdiction over the cross-appeal.

The order under appeal is a final order under rule 9.110(a)(2). Because appellate jurisdiction over the final order on motions for summary judgment was properly invoked by the timely filing of the notice of appeal, pursuant to rule 9.110(h), Florida Rules of Appellate Procedure, this court may review any ruling or matter occurring prior to the filing of the notice.

## 1<sup>st</sup> DCA Cases

1. Order compelling Plan of Distribution is not a final nor a non-final appealable order

Thiel v. Theil  
770 So.2d 240  
(Fla. 1<sup>st</sup> DCA 2000)

2. Order on Motion to Dismiss Supplemental Petition for Revocation of Probate of Will does not finally determine a right or obligation of an interested person

Sanchez v. Masterhan  
837 So.2d 1161  
(Fla. 1<sup>st</sup> DCA 2003)

3. Order granting motion to dismiss the appellant's petition to revoke probate is not appealable.

Estate of Hirshberg  
913 So.2d 1249  
(Fla. 1<sup>st</sup> DCA 2005)

4. Order denying motion to dismiss is not a final determination of rights; not appealable.

Somogyi v. Nevai  
920 So.2d 828  
(Fla. 4<sup>th</sup> DCA 2006)

## Non Final Orders

The trial court directed the personal representative to submit an Amended Plan of Distribution for court approval, and court ruled that the appealed order was neither a final order nor a non-final, appealable order. Court dismissed appeal for lack of jurisdiction. *See* Fla. R.App. P. 9.110(a)(2) (requiring *final* determination of parties' rights in probate proceedings); Fla. R.App. P. 9.130(a)(3)(c)(ii) (requiring right to *immediate* possession of property). Dismissal without prejudice upon trial court's entry of a final appealable order.

Requirement is a final determination of a parties' rights

Requirement is a final determination of a parties' rights

Appeal was dismissed for lack of jurisdiction. The order on appeal, Order on Motion to Dismiss Supplemental Petition for Revocation of Probate of Will did not “*finally* determine a right or obligation of an interested person,” Fla. R.App. P. 9.110(a)(2) (emphasis added), where it merely denies a motion to dismiss, and does not revoke the probate of the will.

Appellant challenged two probate orders. The appeal as to the first order, which granted a motion to dismiss the appellant's petition to revoke probate, was dismissed because it was not appealable.

The mere granting of a motion to dismiss does not result in a final order or an appealable non-final order. See *Benton v. Moore*, 655 So.2d 1272 (Fla. 1st DCA 1995). The appeal from the order granting the motion to dismiss the petition to revoke probate was dismissed for lack of jurisdiction.

We grant appellee's motion to dismiss this appeal for lack of jurisdiction. The “Order Denying Motion to Dismiss Petition for Revocation of Portions of Will and Related Relief” does not finally determine a right or obligation of an interested person under Fla. R.App. P. 9.110(a)(2), where it merely denies a motion to dismiss and does not revoke the probate of the will. *See* *Sanchez v. Masterhan*, 837 So.2d 1161 (Fla. 1st DCA 2003).

5. Order granting extension of time to file independent action is final and appealable

Estate of Elliott  
798 So. 2d 13  
(Fla. 1<sup>st</sup> DCA 2001)

Claimant against decedent's estate filed motion for extension of time to file independent action after personal representative objected to claim. Court held that order of court granting claimant extension of time to file independent action was final and appealable.

Probate order of circuit court allowing claimant against decedent's estate extension of time to file independent action against estate was final and appealable, where personal representative affected by order was "interested party," and order finally determined personal representative's right to cut off claim against estate after designated period of time after objection to claim. § 731.201(21), 733.705(4); R.App.P.Rule 9.110(a)(2).

Relies on *Smoak v. Graham*, 167 So.2d 559 (Fla.1964) holding that the "judicial labor of the probate court is complete, for purposes of review of [such] a ruling ... at the point when recourse to suit in another court or defense of such independent action is required as a condition to any further consideration of the claim in probate. A time extension under the statute is logically unassailable thereafter in that or any other trial court, and the right of appeal should and does then accrue".

## 2<sup>nd</sup> DCA Cases

1. Order determining entitlement of elective share is not a final appealable order

Estate of Dempsey  
899 So. 2d 1272  
(2<sup>nd</sup> DCA 2005)

## Non Final Non Appealable

The Personal Representative filed an objection to the election of elective share and the probate court entered an order determining that the Widow was entitled to the elective share. Court held that order determining widow's entitlement to an elective share was not a final, appealable order.

Florida Rule of Appellate Procedure 9.110(a)(2) authorizes appellate review "of orders entered in probate ... matters that finally determine a right or obligation of an interested person as defined in the Florida Probate Code." The question of finality "must be viewed from the perspective of the appellant who is challenging the order." *Owens v. Swindle (In re Estate of Nolan)*, 712 So.2d 421, 423 (Fla. 2d DCA 1998). In this case, the finality of the order on appeal is controlled by the nature of the proceedings established in the Florida Probate Rules.



“Termination of judicial labor” standard  
(rights and obligations of Personal Representative have not come to an end)

2. Order determining entitlement to elective share is a nonfinal and nonappealable order

In Re Estate of Magee,  
902 So.2d  
909 (Fla. 2<sup>nd</sup> DCA 2005)

The beneficiary of a revocable trust created by her now-deceased father, appealed the order denying her objections to the elective share claimed by Edna Magee, the surviving spouse.

As explained in *Dempsey v. Dempsey*, 899 So.2d 1272 (Fla. 2d DCA 2005), an order determining the surviving spouse's entitlement to an elective share is a nonfinal and nonappealable order. In this case, the nonappealable nature of the order is further demonstrated by the circuit court's ruling that one of the claims, regarding whether the elective share statute was an unconstitutional impairment of contracts, was premature because it was too soon to tell whether trust assets would be needed to satisfy the elective share. Appeal was dismissed.

3. Urgent interlocutory orders are appealable nonfinal orders

Fassy v. Crowley  
884 So.2d 359  
(Fla. 2<sup>nd</sup> DCA 2004)

Representative of estate of deceased developmentally disabled person brought action against doctor and professional association, for alleged breach of statutory duty to keep developmentally disabled person free from harm, based on death of decedent due to excessive pain medication. The Court denied the motion to dismiss filed by the doctor and professional association. Doctor and professional association filed petition for certiorari review.

Nonfinal orders are reviewable only on plenary appeal of the final order disposing of case.

Certiorari review of nonfinal orders under 9.030(b)(2)(A) is “an extraordinary remedy which should not be used to circumvent the interlocutory appeal rule which authorizes appeal from only a few types of nonfinal orders.”

## 2<sup>nd</sup> DCA Cases

1. Order approving proposed settlement is a final appealable order

## Final Orders

Children of the Decedent were the survivors under a state Wrongful Death Act and objected to a proposed settlement. Personal representative filed petition to approve proposed settlement of wrongful-death action

Brunson v. McKay  
905 So.2d 1058  
(Fla. 2<sup>nd</sup> DCA 2005)

and the Decedent's children objected. After Court struck children's objection and approved settlement, the children appealed.

Court concluded that it had jurisdiction under Fla. R.App. P. 9.030(b)(1)(A), 9.110(a)(2) and *Arzuman v. Estate of Bin*, 879 So.2d 675 (Fla. 4<sup>th</sup> DCA 2004)

“Substantial rights test”

2. In re Guardianship of Schiavo  
792 So.2d 551  
(Fla. 2<sup>nd</sup> DCA 2001)

Ward's parents filed motion for relief from guardianship court's judgment discontinuing life-prolonging procedures. The Circuit Court denied the motion. The parents also filed a motion for a temporary injunction requiring the guardian to resume the treatments and the motion was also denied. Guardian then filed motion to enforce mandate of prior decision upholding order to terminate the procedures. Parents and guardian appealed.

The District Court of Appeal held that: (1) as a matter of first impression, parents as interested parties had standing to request relief from the judgment; (2) the parents could challenge the judgment at any time prior to the death of the ward on the ground that it is no longer equitable to give prospective application to it; (3) they failed to show new circumstances making it no longer equitable to enforce the order; and (4) Judge was required to transfer the independent action to the guardianship court.

A final order that is entered in a guardianship adversary proceeding and requires the guardian to discontinue life-prolonging procedures may be challenged by an interested party at any time prior to the death of the ward on the ground that it is no longer equitable to give prospective application to the order. Rule 1.540(b)(5).

### 3<sup>rd</sup> DCA Cases

1. Extension of time to file order is appealable

Estate of Garriga  
870 so.2d 912  
(Fla. 3<sup>rd</sup> DCA 2004)

### Non Final Orders

An order of the circuit court that determines a right, an obligation, or the standing of an interested person as defined in the Florida Probate Code may be appealed before the administration of the probate or guardianship is complete and the fiduciary is discharged.

Court follows 1<sup>st</sup> DCA (see In re: Estate of Elliott, 798 So.2d 13 (Fla. 1st DCA 2001), on the issue of what constitutes an appealable order; Messner v. Dedeo, 826 So.2d 453, 454 n. 1 (Fla. 3rd DCA 2002).

Smoak v. Graham, 167 So.2d 559 (Fla.1964) In Smoak the Florida Supreme Court rejected the idea "that the judicial labor of the probate court upon the controverted claim is not complete until same is ultimately ordered paid if and when claimant obtains a favorable judgment by independent action." 167 So.2d at 560. Sutton v. Stear, 264 So.2d 838 (Fla.1972) Florida Supreme Court ruled that an order extending the time for objections is an appealable order. 264 So.2d at 841.

Court concluded that the judicial labor of the probate court is complete, for purposes of review of a ruling under [former] Section 733.18(2), at the point when recourse to suit in another court or defense of such independent action is required as a condition to any further consideration of the claim in probate. A time extension under the statute is logically unassailable thereafter in that or any other trial court, and the right of appeal should and does then accrue.

Note: Court goes on to state that "Perhaps there should be further study of this problem with a view toward developing a rule further defining what constitutes a final order in a probate appeal. It appears wasteful to allow piecemeal appeals, one before and the other after the adversary action. Further, since rulings on extensions of time are subject to review under an abuse of discretion standard, it seems likely that most appeals of rulings on motions for extensions of time will result in affirmance. At least in those cases in which the adversary action is filed in a Florida circuit court, there does not appear to be a sound reason to allow an immediate appeal when the ultimate appeal can come at the conclusion of the adversary action."

2. Order vacating family allowance is appealable

Valdez v. Valdez  
913 So.2d 1229 Fla. 3<sup>rd</sup> DCA  
2005

Determination of family allowance is final determination of property rights and is appealable under 9.110(a)(2)

3. Appointment of co-personal representative is not an appealable order

Garces v. Montano  
834 So.2d 194  
(Fla. 3<sup>rd</sup> DCA 2002)

To be appealable an order must determine the *final rights* or obligations of a party

### 3<sup>rd</sup> DCA Cases

1. Appeal from order sustaining personal representative's objection to claim is appealable final order

Messner v. Dedeo  
826 So.2d 453  
(Fla. 3<sup>rd</sup> DCA 2002)

### Final Orders

Notice to nonresident claimant regarding change of date for hearing on claim against estate, telephonically conveyed by personal representative's counsel to a secretary in office of claimant's local counsel, was insufficient, and thus deprived claimant of due process of law, requiring reversal of order entered at hearing and remand.

Appealable final order pursuant to 9.110(a)(2) and *Estate of Elliott*, 798 So.2d 13 (Fla. 1<sup>st</sup> DCA 2001)

### 4<sup>th</sup> DCA Cases

1. Motion for Extension of Time to File Action is appealable as a final order

Estate of Gambidilla  
896 So.2d 917  
(4<sup>th</sup> DCA 2005)

### Final Orders

Note: Not on point, but Court states that it is without jurisdiction to address any procedural irregularities that led up to the order removing the personal representative because she failed to timely appeal that order, which was a final, appealable order. See Fla. R.App. P. 9.110(b) (stating notice of appeal must be filed within thirty days of rendition of the order to be reviewed)

Court relies on *In re Odza's Estate*, 432 So.2d 740, 741 (Fla. 4th DCA 1983) (classifying an order removing a personal representative as a final, appealable order).

Fromvald v. Wolfe  
760 So.2d 1020  
(Fla. 4<sup>th</sup> DCA 2000)

Revocation of letters testamentary of all three personal representatives of estate and one personal representative appealed. The District Court of Appeal held that trial

court could not revoke letters testamentary without notice.

Court held that it had jurisdiction because the order decided whether the Personal Representative should have her letters testamentary revoked, which thereby “determine[s] a right or obligation of an interested person.” *See* Fla.Prob.R. 5.100. A final order revoking letters testamentary may be appealable where all rights of the person to administer the estate are terminated by the court's order. *See* *In re Baker's Estate*, 327 So.2d 205, 207 (Fla.1976) (holding that district court had jurisdiction over appeal from order revoking letters where the order in question terminated all rights of the mother to administer the estate); and *cf.* *In re Price's Estate*, 129 Fla. 467, 176 So. 492 (1937) (no question raised as to appellate jurisdiction over order revoking letters testamentary).

#### **4<sup>th</sup> DCA Cases**

1. Order approving wrongful death settlement is a final appealable order

*Arzuman v. Estate of Bin*  
879 So.2d 675  
(Fla. 4<sup>th</sup> DCA 2004)

*Somogyi v. Nevai*  
920 So.2d 828  
(Fla. 4<sup>th</sup> DCA 2006)

#### **4<sup>th</sup> DCA Cases**

1. Order determining entitlement of attorney's fees is not appealable final order
2. To be appealable, an order must determine the final rights

#### **Final Non Appealable Orders**

Personal Representative filed petition for discharge and approval of accounting. Time for claimant to appeal order approving settlement of wrongful death action runs when trial court approves settlement. Once order approving settlement is entered, the Personal Representative is absolved from liability.

Appellee's motion to dismiss appeal for lack of jurisdiction was granted. The “Order Denying Motion to Dismiss Petition for Revocation of Portions of Will and Related Relief” does not finally determine a right or obligation of an interested person under Fla. R.App. P. 9.110(a)(2), where it merely denies a motion to dismiss and does not revoke the probate of the will. *See Sanchez v. Masterhan*, 837 So.2d 1161 (Fla. 1st DCA 2003).

#### **Non Final Non Appealable Orders**

Court agrees with Fifth Circuit in holding that entitlement of fees is a non final order

*Swartz v. Lieberman*, 712 So.2d 479 (Fla. 4<sup>th</sup> DCA 1998)

Personal representatives of decedent's estate petitioned for determination of beneficiaries of marital trust.

or obligations of a party

Richey v. Hurst  
798 So.2d 841  
(5<sup>th</sup> DCA 2001)

Probate court ruled that beneficiaries under decedent's other trust should take assets earmarked for marital trust and beneficiary under marital trust only appealed. The District Court of Appeal held that, after disclaimer by decedent's husband, marital trust never came into being.

"[a]ll orders and judgments of the court that finally determine a right or obligation of an interested person may be appealed as provided by Florida Rule of Appellate Procedure 9.110(a)(2)."

3. Will construction is appealable. To be appealable, an order must determine the final rights or obligations of a party

Romaniello v. Romaniello  
760 So. 2d 1083  
(Fla. 5<sup>th</sup> DCA 2000)

This appeal arises from the lower court's Order Concerning Petition for Construction of Will. Because the order "finally determine[s] a right or obligation of an interested person as defined in the Florida Probate Code," jurisdiction granted pursuant Florida Probate Rule 5.100 and Florida Rules of Appellate Procedure 9.030(b)(1)(A) and 9.110(a)(2).

Pearson v. Cobb  
701 So.2d 649  
(Fla. 5<sup>th</sup> DCA 1997)

Rule 5.100 of Florida Probate Rules states that all orders and judgments entered in probate proceedings which finally determine a right or an obligation of an interested party are appealable as provided in rule 9.110(a)(2) of the Florida Rules of Appellate Procedure.

Rule 9.110(a)(2) similarly states that appeal proceedings to review "final orders of lower tribunals" include review of orders entered in probate proceedings that finally determine a right or obligation of an interested person. Court construed rules together and concluded that although the notice of appeal referred to the trial court's order as "non-final," it was final for purposes of appellate review.

III. Below is an updated compilation of cases cited in *Litigation Under Florida Probate Code Chapter 15 of Appellate Practice in Probate* authored by James A. Herb. This update includes a search covering time period from January 2000 to and including May 4, 2006.

**A. Examples of Appealable Final Orders**

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| 1. Adjudicating a woman to be a common-law wife, determining her status relative to the decedent's estate  | In re Estate of Jerrido, 339 So.2d 237 (Fla. 4th DCA 1976)   |
| 2. Admitting a will to probate and appointing an executor  | Biederman v. Cheatham, 161 So.2d 538 (Fla. 2d DCA 1964)  |
| Appointing a curator to preserve estate property, rather than appointing the personal representative specified in the will   | In re Estate of Miller, 568 So.2d 487 (Fla. 1st DCA 1990)  |
| Appointing an administrator ad litem/appointing administrator ad litem to investigate and, if necessary, contest will already admitted to probate/appointing administrator ad litem to determine liability of attorney | Sine v. Davidson, 530 So.2d 506 (Fla. 3rd DCA 1988)<br>In re Estate of Cordiner, 458 So.2d 418 (Fla. 2d DCA 1984)<br>Woolf v. Reed, 389 So.2d 1026 (Fla. 3rd DCA 1980)<br><br>Conflicts with: In re Estate of Bierman, 587 So.2d 1163 (Fla. 4th DCA 1991) were it was held that <i>an order setting aside a summary judgment removing a personal representative and appointing an administration was a nonfinal nonappealable order.</i> |
| 3. Approving a settlement agreement and dismissing with prejudice a petition to revoke probate of a will   | Val Bostwick v. Estate of Cowan, 326 So.2d 454 (Fla. 1st DCA 1976)<br><br>See also Fritsevich v. Estate of Voss, 590 So.2d 1057 (Fla. 3 <sup>rd</sup> DCA 1991) where appeal was taken from order dismissing petition to vacate order determining heirs. The District Court of   |

Appeal held that prior filing of petition to determine heirs by one who knew or should have known that she was not entitled to inherit any portion of the estate and that there were others with a less remote relationship to the decedent would have constituted a fraud on the court to which one-year limitations period for relief from judgment would not apply. Reversed.

4. Award of attorneys' fees Southeast Bank, N.A. v. David A. Steves, P.A., 552 So.2d 292 (Fla. 2d DCA 1989)  
  
If the order does not set the amount and only determines entitlement, the order is not final for purposes of appeal. If the order sets the amount of fees, but reserves jurisdiction to decide at a future date who should pay the award, it is not appealable as a final or nonfinal order.  
  
See Swartz v. Lieberman, 712 So.2d 479 (Fla. 4th DCA 1998). Regarding an order determining entitlement to attorney's fees in a probate proceeding, with the amount to be determined after an evidentiary hearing. Fourth district agreed with the fifth district that an order which only determines entitlement to fees does not "finally determine a right or obligation of an interested person as defined in the Florida Probate Code." Fla.R.App.P. 9.110(a)(2). See also Rehman v. Estate of Frye, 692 So.2d 956 (Fla. 5th DCA 1997).  
  
See Brake v. Swan, 767 So.2d 500 (Fla. 3rd DCA 2000)
5. Denying a claimant's motion to strike objections to a claim against an estate Epperson v. Rupp, 157 So.2d 537 (Fla. 3rd DCA 1963)  
  
See Devine v. Kirkovich, 754 So.2d 789 (Fla. 3<sup>rd</sup> DCA 2000) holding that when claimant filed statement of claim against estate and court entered order extending time for claimant to bring independent action against estate without supporting evidence showing good cause the order was reversed.
6. Denying the motion of a creditor to extend the time to file a notice of independent action Ricciardelli v. Faske, 505 So.2d 487 (Fla. 3rd DCA 1987)



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| 7. Denying a personal representative's petition to strike an estate creditor's claim as untimely/Denying a personal representative's petition to extend the time for filing an objection to a creditor's claim | In re Estate of Bartkowiak, 645 So.2d 1082 (Fla. 3rd DCA 1994); Baldwin v. Lewis, 397 So.2d 985 (Fla. 3rd DCA 1981)   |
| 8. Denying a personal representative's motion to strike and dismiss a petition to revoke probate   | In re Estate of Pavlick, 697 So.2d 157 (Fla. 2d DCA 1997); see also Sanchez v. Masterhan, 837 So.2d 1161 (Fla. 1st DCA 2003)  |
| 9. Determining homestead   | In re Estate of McGinty, 243 So.2d 191 (Fla. 4th DCA 1971)<br><br>See In re Estate of Hamel, 821 So.2d 1276 (Fla. 2 <sup>nd</sup> DCA 2002). Personal representative of testator's estate appealed after order entered denying his petition to determine homestead. Second district held that homestead rights vested in devisees at time of testator's death and reversed order. |
| 10. Determining that the court had no jurisdiction to require the personal representative to perform an accounting or return assets to the probate estate  | Moore v. Moore, 577 So.2d 1359 (Fla. 2d DCA 1991)   |
| 11. Determining that an estate had no interest in certain property and that the widow was sole owner of that property  | Pratt v. Gerber, 330 So.2d 552 (Fla. 3rd DCA 1976).   |
| 12. Directing sale of property   | Diana v. Bentsen, 677 So.2d 1374 (Fla. 1st DCA 1996).   |
| 13. Discharging the guardian and relieving the surety from further liability   | In re Guardianship of Straitz, 112 So.2d 889 (Fla. 2d DCA 1959).  |

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| 14. Dismissing a representative's petition for approval of trust company's employment and reasonableness of fees | In re Estate of Winston, 610 So.2d 1323 (Fla. 4th DCA 1992)  |
| 15. Fixing attorneys' fees   | In re Estate of Cook, 245 So.2d 694 (Fla. 2nd DCA 1971)  |
| Awarding attorneys' fees based on a fee contract with the original personal representative                       | In re Estate of Beeman, 391 So.2d 276 (Fla. 4th DCA 1980)  |
| 16. Granting an extension of time to file an objection to a claim  | Sutton v. Stear, 264 So.2d 838 (Fla. 1972).<br>See also In re Estate of Elliott, 798 So.2d 13 (Fla. 1st DCA 2001)    |
| 17. Removing a mother as administratrix and voiding letters of administration                                    | In re Estate of Baker, 327 So.2d 205 (Fla. 1976).<br>See also Fromvald v. Wolfe, 760 So.2d 1020 (Fla. 4th DCA 2000). |
| 18. Requiring a claimant to resort to prosecution of an independent action on the claim.                         | In re Estate of Hamlin, 157 So.2d 844 (Fla. 2nd DCA 1963), quashed on other grounds 167 So.2d 559                    |
| 19. Construing a will to finally determine the personal representative's obligation                              | In re Estate of Walters, 700 So.2d 434 (Fla. 4th DCA 1997)   |
| 20. Denying a motion to substitute the defendant's personal representative in a paternity suit                   | M.R. v. A.B.C., 739 So.2d 118 (Fla. 3rd DCA 1999)  |
| 21. Determining distribution of certain assets   | Pearson v. Cobb, 701 So.2d 649 (Fla. 5th DCA 1997)   |
| 22. Refusing to appoint the personal representative named by the testator  | Schleider v. Estate of Schleider, 770 So.2d 1252 (Fla. 4th DCA 2000)   |
| 23. Denying a petition for further administration of a closed estate   | Kaplan v. Estate of Kaplan, 780 So.2d 135 (Fla. 4th DCA 2000)  |

24. Administratively closing an estate based on failure to prosecute      Dribin v. Estate of Nolan, 801 So.2d 249 (Fla. 4th DCA 2001)

## B. Examples of Nonappealable Orders

1. Declining to dispense with appraisers, denying a petition to remove a co-administrator/Denying the co-executors' motion for substitution of counsel  
In re Estate of Maxcy, 165 So.2d 446 (Fla. 2nd DCA 1964)  
In re Estate of Leterman, 238 So.2d 695 (Fla. 2nd DCA 1970)
2. Denying a motion for a continuance  
Biederman v. Cheatham, 161 So.2d 538 (Fla. 2nd DCA 1964).
3. Denying a motion to quash constructive service of process and to discharge a court-appointed guardian ad litem, attorney ad litem  
Konieczpolski v. Stelnicki, 571 So.2d 577 (Fla. 5th DCA 1990)
4. Determining how the burden of proof should be carried  
In re Estate of Dorsey, 114 So.2d 430 (Fla. 2nd DCA 1959)
5. Discussing the procedure to be pursued in future conduct of proceedings (an advisory order)  
In re Estate of Hortt, 149 So.2d 907 (Fla. 2nd DCA 1963)
6. Denying an executor's motion for dismissal of a widow's petition for construction of a will  
In re Peterson's Estate, 73 So.2d 225 (Fla. 1954)
7. Extending the time for filing a creditor's claim  
Estate of Lefkowitz v. Olsten Kimberly Qualitycare, 679 So.2d 63 (Fla. 4th DCA 1996)
8. Permitting a claim to be filed when the personal representative could still object  
Tyler v. Huggins, 175 So.2d 239 (Fla. 2nd DCA 1965)
9. Deferring a ruling on the government's motion for payment of its claim  
United States v. Dahlberg, 115 So.2d 86 (Fla. 3rd DCA 1959)
10. Quashing a subpoena duces tecum  
In re Est of Zaloudek, 356 So.2d 1326 (Fla. 4th DCA 1978)

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| 11. Recognizing the right of dower but not assigning it<br><i>Determination of entitlement of elective share is not appealable</i>   | In re Estate of Rogers, 199 So.2d 741 (Fla. 4th DCA 1967)<br>Dempsey v. Dempsey, 899 So. 2d 1272 (Fla. 2 <sup>nd</sup> DCA 2005) <i>holding that determination of entitlement of elective share is not appealable</i>  |
| 12. Requiring an executor to file an inventory of assets and to file an amended final return and providing that an interested party should have 30 days after the filing of the inventory and amended accounting to file objections                | In re Estate of Sager, 171 So.2d 580 (Fla. 2nd DCA 1964)   |
| 13. Revoking an order of discharge and reopening the estate administration   | In re Estate of Daughtry, 376 So.2d 1223 (Fla. 4th DCA 1979)   |
| 14. Setting aside a summary judgment removing the personal representative and designating intestate administration. The court also appointed an administrator ad litem to maintain the status quo until the parties could litigate their positions | In re Estate of Bierman, 587 So.2d 1163 (Fla. 4th DCA 1991) (The reader should note that there is a conflict between the districts regarding whether an order appointing an administrator ad litem is a final or a nonfinal order. Bierman holds that it is a nonfinal order and not appealable.<br><br>The following three cases hold that it is a final order and appealable:<br>Sine v. Davidson, 530 So.2d 506 (Fla. 3rd DCA 1988)<br>In re Estate of Cordiner, 458 So.2d 418 (Fla. 2nd DCA 1984)<br>Woolf v. Reed, 389 So.2d 1026 (Fla. 3rd DCA 1980) |
| 15. Striking a demand for a jury trial in a probate proceeding   | Howard v. Baumer, 519 So.2d 679 (Fla. 1st DCA 1988)  |
| 16. Determining entitlement to an attorney's fee, with the amount to be determined later after an evidentiary hearing  | Swartz v. Lieberman, 712 So.2d 479 (Fla. 4th DCA 1998); Rehman v. Estate of Frye, 692 So.2d 956 (Fla. 5th DCA 1997).   |

17. Disqualifying the personal representative's counsel      Larkin v. Pirthauer, 700 So.2d 182 (Fla. 4th DCA 1997)
18. Requiring the personal representative to file an amended plan of distribution      Thiel v. Thiel, 770 So.2d 240 (Fla. 1st DCA 2000)
19. Appointing a co-personal representative to serve with a previously appointed PR      Garces v. Montano, 834 So.2d 194 (Fla. 3rd DCA 2002)