

IN THE SUPREME COURT OF ALABAMA
December 6, 2012

ORDER

IT IS ORDERED that Rule 1(a), Rule 45(b)(1), and Rule 82(d)(3), Alabama Rules of Civil Procedure, be amended to read in accordance with Appendices A, C, and E, respectively, and that Rule 58(d), Alabama Rules of Civil Procedure, be adopted to read in accordance with Appendix G;

IT IS FURTHER ORDERED that the Committee Comments to the Amendment to Rule 1(a) Effective January 1, 2013, the Committee Comments to the Amendment to Rule 45(b)(1) Effective January 1, 2013, and the Committee Comments to the Amendment to Rule 82(d)(3) Effective January 1, 2013, be adopted to read in accordance with Appendices B, D, and F, respectively, and that the Committee Comments to the Adoption of Rule 58(d) Effective January 1, 2013, be adopted to read in accordance with Appendix H;

IT IS FURTHER ORDERED that the amendment of Rule 1(a), Rule 45(b)(1), and Rule 82(d)(3), the adoption of Rule 58(d), and the adoption of the comments are effective January 1, 2013;

IT IS FURTHER ORDERED that the following note from the reporter of decisions be added to follow Rule 1, Rule 45, Rule 58, and Rule 82:

"Note from the reporter of decisions: The order amending, effective January 1, 2013, Rule 1(a), Rule 45(b)(1), and Rule 82(d)(3), and adopting effective January 1, 2013, Rule 58(d) and the Committee Comments to the Amendment to Rule 1(a) Effective January 1, 2013, the Committee Comments to the Amendment to Rule 45(b)(1) Effective January 1, 2013, the Committee Comments to the Adoption of Rule 58(d) Effective January 1, 2013, and the Committee Comments to the Amendment to Rule 82(d)(3) Effective January 1, 2013, are published in that volume of

Alabama Reporter that contains Alabama cases from
___ So. 3d."

Malone, C.J., and Woodall, Stuart, Bolin, Parker,
Murdock, Shaw, Main, and Wise, JJ., concur.

I Robert G. Esdale, Sr., as Clerk of the Supreme Court
of Alabama, do hereby certify that the foregoing is
a full, true and correct copy of the instrument(s)
herewith set out as same appear(s) of record in said
Court.

Witness my hand this 6th day of December, 2012

Robert G. Esdale, Sr.
Clerk, Supreme Court of Alabama

APPENDIX A

Rule 1(a), Alabama Rules of Civil Procedure.

(a) Scope. These rules govern procedure in the circuit courts and in courts of full, like jurisdiction, in the district courts as provided in subparagraph "(dc)" of each rule, in the small claims courts as provided in Rule N of the Alabama Small Claims Rules, in probate courts so far as the application is appropriate and except as otherwise provided by statute, and in all other courts where appeals lie directly to the Supreme Court or the Court of Civil Appeals, in all actions of a civil nature, including those in which the State of Alabama or a political subdivision thereof is a party, whether cognizable as cases at law or in equity before the adoption of these Rules of Civil Procedure, and in proceedings enumerated in Rule 81.

APPENDIX B

Committee Comments to the Amendment to Rule 1(a) Effective January 1, 2013

This amendment deletes the exception providing that the Rules of Civil Procedure govern procedure in all courts as specified "except probate courts not exercising statutory equitable jurisdiction." This exception, adopted when the Rules took effect in 1973, is outdated and outmoded. Since 1973, the legislature has adopted numerous statutes applying the Alabama Rules of Civil Procedure in probate courts. See, e.g., Ala. Code 1975, §§ 18-1A-70 (regarding procedure in eminent-domain proceedings, adopted in 1985); 26-2A-33 (regarding guardianship proceedings, adopted in 1987); and 26-10A-37 (regarding adoptions, adopted in 1990). Thus, by virtue of such statutes, the Rules of Civil Procedure frequently apply in probate courts except when other specific statutory procedures create exceptions. This amendment acknowledges and generalizes that fact.

Section 12-13-12, Ala. Code 1975, states: "The provisions of this code in reference to ... pleading and practice ... in the circuit court, so far as the same are appropriate, ... in the absence of express provision to the contrary, are applicable to the proceedings in the probate court." That Code provision has been in the Alabama Code since 1852. Until the adoption of the 1975 Code, it referred to pleading and practice provisions in the Code. However, after the adoption of the Rules of Civil Procedure in 1973, those Code pleading and practice provisions were not carried forward into the 1975 Code, but the provision now codified as § 12-13-12 was carried forward. This created ambiguity as to whether § 12-13-12 incorporated the Rules of Civil Procedure by reference. The Court of Civil Appeals held that it did. In re Morrison, 388 So. 2d 1014 (Ala. Civ. App. 1980); McGallagher v. Estate of DeGeer, 934 So. 2d 391, 399 (Ala. Civ. App. 2010); and other similar cases. However, both In re Morrison and McGallagher, like other cases from the Court of Civil Appeals decided after the 1975 amendment to Rule 1(a) making the rules applicable to probate courts possessing equitable jurisdiction, ignore the fact that the Rules were already applicable in those proceedings because those cases originated in Mobile County, a county where the probate court was vested with equitable jurisdiction. The references in those opinions to § 12-13-12 were therefore unnecessary but nevertheless furthered the

ambiguity between § 12-13-12 and the general exception in Rule 1(a) of probate courts from the scope of the Rules. Deleting this exception removes this ambiguity and effectuates the legislative intent that the pleading and practice provisions for circuit courts will apply in probate courts as appropriate and except where purposeful statutory exceptions exist.

In short, as a general rule, the Rules of Civil Procedure apply in the probate court, when such application is appropriate and except when particular statutes provide otherwise. This amendment expressly preserves such statutory exceptions and is not intended to override them as allowed under Ala. Const. 1901, Art. VI, § 150 (Off. Recomp.), and Ala. Code 1975, § 12-1-1.

Contemporaneous with this amendment is an amendment to Rule 58, Ala. R. Civ. P. Probate courts are not at this time participants in the State Judicial Information System, so the provision in Rule 58(c) regarding the entry of judgments into the State Judicial Information System cannot apply in the probate court.

APPENDIX C

Rule 45(b)(1), Alabama Rules of Civil Procedure.

(b) Service.

(1) A subpoena issued on behalf of any party may be served by the sheriff, a deputy sheriff, or any other person who is not a party and is not less than 18 years of age or by certified mail pursuant to the provisions of Rule 4. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person or by leaving a copy at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein and, if the person's attendance at a place more than 100 miles from the person's residence is commanded, by tendering to that person the fees for one day's attendance and an amount to reimburse the mileage allowed by law. Prior notice of intent to secure the issuance of a subpoena to command production of documents and things or inspection of premises before trial under the procedure set forth in subparagraph (a)(3) of this rule shall be served on each party in the manner prescribed by Rule 5(b).

APPENDIX D

Committee Comments to Amendment to
Rule 45(b)(1) Effective January 1, 2013

Rule 45(b)(1) is amended to include service of a subpoena by certified mail pursuant to the applicable provisions of Rule 4. In 1977, an amendment to then Rule 4.1 allowed service of a summons and complaint by certified mail, but Rule 45 was never amended to extend that practice to subpoenas. In practice, subpoenas are often served by certified mail, and it is reasonable for service of a subpoena to be no more restrictive than service of a summons and complaint or other process.

APPENDIX E

Rule 82(d)(3), Alabama Rules of Civil Procedure.

(3) Procedure on Transfer. In the event the venue of the action is or has become improper and venue is appropriate in more than one other court, a defendant sued alone or multiple defendants, by unanimous agreement, shall have the right to select such other court to which the action shall be transferred and, where there are multiple defendants who are unable to agree upon a transferee court, the court may transfer the action to any such other court. Transfer of the action and notice thereof shall be in accord with § 6-3-22, Code of Alabama 1975. Alternatively, the clerk may electronically transfer the case file, including the docket sheet, together with all orders, pleadings, motions, or other papers in the action through the State Judicial System's e-filing system. The clerk of the court to which the action has been transferred shall provide notice of the transfer to all parties of record as provided in the Alabama Rules of Civil Procedure.

APPENDIX F

Committee Comments to Amendment to
Rule 82(d)(3) Effective January 1, 2013

The amendment to Rule 82(d)(3) provides for electronically transferring case files in accord with current practice.

APPENDIX G

Rule 58(d), Alabama Rules of Civil Procedure.

(d) Entry of Order or Judgment in Probate Court. Upon rendition of an order or a judgment in the probate court as provided in subdivision (a)(1)-(4) of this rule, the judge or clerk of the probate court shall forthwith enter such order or judgment in the court record. The entry of the judgment or order shall not be delayed for the taxing of costs. Interest upon a judgment runs from the date the probate court renders the judgment.

APPENDIX H

Committee Comments to the Adoption of Rule 58(d) Effective January 1, 2013

This amendment is adopted contemporaneously with the amendment to Rule 1(a), pursuant to which the Rules of Civil Procedure are now presumed to apply in the probate court absent a statutory exception. Because the probate courts are not on the State Judicial Information System, the provisions of Rule 58(c) cannot apply in the probate court. For statutory provisions regarding probate-court records, see, e.g., Ala. Code 1975, §§ 12-13-40(5) (allowing a probate court to complete minute entries and judgments when they are incomplete because of a failure to make the entries when they should have been made and providing that such entries are valid and binding "as if they had been made at the proper time"), 12-13-41(2) (requiring the probate judge to keep minutes of official acts and proceedings and to record them within three months thereafter), and 12-13-41(4) (requiring a docket showing entries necessary to show the true condition of all proceedings pending in the court). Because these provisions are somewhat inconsistent, a procedural rule cannot create a uniform means of the entry of judgments in probate courts.