

**STATE OF VERMONT
VERMONT SUPREME COURT
_____ TERM, 2012**

Order Promulgating Amendments to the Vermont Rules of Civil Procedure

Pursuant to the Vermont Constitution, Chapter II, Section 37, and 12 V.S.A. § 1, it is hereby ordered:

1. That Rule 28(d) of the Vermont Rules of Civil Procedure is amended to read as follows (deleted matter struck through; new matter underlined):

RULE 28. PERSONS BEFORE WHOM DEPOSITIONS MAY BE TAKEN

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(d) **Depositions for Use in Foreign Jurisdictions a Court of the United States or in Another Country.** Whenever the deposition of any person is to be taken in this state ~~pursuant to the laws of another state or~~ for use in a civil action in a court of the United States or pursuant to the laws of another country for use in proceedings there, any ~~Superior Judge of the superior court~~ Superior Judge of the superior court may, upon petition to the civil division of the superior court in the county unit where the deponent resides or is employed or transacts business in person, make an order directing issuance of a subpoena as provided in Rule 45, in aid of taking the deposition, and may make any order in accordance with Rule 30(d), 37(a), or 37(b)(1).

Reporter's Notes—2012 Amendment

V.R.C.P. 28(d), providing for depositions to be taken in Vermont for use in another jurisdiction, is amended to limit its applicability to depositions that are to be taken for use in civil actions in a U.S. district court or in proceedings in another country under that country's laws. Promulgation of V.R.C.P. 45(f), incorporating the provisions of the Uniform Interstate Depositions and Discovery Act (UIDDA), on August 30, effective October 31, 2011, rendered the provisions of Rule 28(d) for depositions to be used in another state superfluous. The Uniform Act and V.R.C.P. 45(f), by their terms, apply only between state courts, not federal district courts sitting in states, and are not intended to apply to courts of foreign countries. See UIDDA, § 2, Comment, 13 ULA, Part II, 64 (Supp. 2011). See Reporter's Notes to V.R.C.P. 45(f). In any event, resort to the Vermont rule will presumably not be necessary in the usual case, since Federal Rule 45(a)(2)(B) provides that a subpoena for a deposition is to issue from the court of the district where the deposition is to be taken.

2. That Rule 72 of the Vermont Rules of Civil Procedure be amended to read as follows (deleted matter struck through; new matter underlined):

RULE 72. APPEALS FROM THE PROBATE COURTS

(a) **Notice of Appeal; Appellee's Appearance.** Any party entitled thereto by law may appeal to a ~~the~~ the civil division of the superior court from a decision of a probate court by filing with the register of the probate court a notice of appeal in the manner and within the time provided in Rules 3 and 4 of the Rules of Appellate Procedure as modified herein. The appellant shall serve a copy of the notice upon each person who is considered a party at the time of commencement of the proceeding pursuant to Rule 17 of the Vermont Rules of Probate Procedure and shall transmit a copy of the notice to the clerk of the ~~superior court~~ civil division to which the appeal is taken. The running of the time for filing a notice of appeal is terminated by a timely motion pursuant to a Rule of Probate Procedure equivalent to those Rules of Civil Procedure listed in Rule 4 of the Rules of Appellate Procedure. The appellee and any other party shall cause that party's appearance to be entered with the clerk of the ~~superior court~~ civil division within 20 days after service of the notice of appeal.

(b) **Stay; Bond.** During the time for filing a notice of appeal and pending the appeal if a notice is filed, the decree of the probate court shall be stayed as provided in Rule 62 of the Rules of Probate Procedure. Rules 7 and 8 of the Rules of Appellate Procedure shall govern appeals under this rule, so far as applicable.

(c) **Record on Appeal.** The record on appeal shall consist of the papers and exhibits filed in the probate court, a statement of the questions which the appellant desires to have determined, and any transcript of the proceedings furnished by the parties. No pleadings shall be required in the ~~superior court~~ civil division. Within 30 days after the filing of the notice of appeal the register of the probate court shall transmit the papers and exhibits filed to the clerk of the ~~superior court~~ civil division in the manner provided in Rule 11(b) of the Rules of Appellate Procedure, and the appellant shall file a statement of questions with the clerk of the ~~superior court~~ civil division and serve it upon all other parties in accordance with Rule 5. The appeal shall be docketed and the record deemed complete as provided in Rule 12 of the Rules of Appellate Procedure. Any party desiring a transcript of any portion of the proceedings in the probate court to be included in the record on appeal shall order it by the method specified in Rule 10(b) of the Rules of Appellate Procedure. The transcript shall be filed in the probate court, delivered and paid for as provided in Rule 11(b) of the Vermont Rules of Appellate Procedure. The party receiving the transcript shall file it forthwith in the ~~superior court~~ civil division.

(d) **Trial.** The questions contained in the appellant's statement of questions shall be tried to a jury if one is demanded in accordance with Rule 38. Otherwise such questions shall be tried to the court. Proceedings under this rule shall be ripe for listing upon the hearing calendar in accordance with Rule 40(a) when the time for filing the record provided in subdivision (c) of this rule, and any extension thereof, have expired.

(e) **Certificate of Decision.** Thirty-five days after the entry of judgment, if no notice of appeal to the Supreme Court has been filed, the clerk shall certify the decision of the ~~superior court~~ civil division to the probate court, returning therewith any original

document transmitted as part of the record on appeal. Upon receipt of such certification, the same proceedings shall be had in the probate court as though the decision had been made in that court.

(f) Appeal of Interlocutory Order by Permission under 14A V.S.A. § 201(d).

(1) Motion for Permission To Appeal. Upon motion of any party in a probate action concerning the administration of a trust under Title 14A of the Vermont Statutes Annotated, the presiding probate judge shall permit an appeal to be taken to the civil division of the superior court from any interlocutory order or ruling if the judge finds that the order or ruling involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the termination of the litigation. The motion shall be filed and served upon each person who is considered a party at the time of commencement of the proceeding pursuant to Rule 17 of the Vermont Rules of Probate Procedure within 10 days after the entry of the order or ruling appealed from. The appeal shall be limited to questions of law. The order permitting or denying appeal shall contain a statement of the grounds upon which appeal has been permitted or denied.

(2) Review by Civil Division of Denial of Motion. If the motion is denied, the moving party may, within 10 days after the entry of the order of denial, file the motion in the civil division, together with a statement setting forth the question of law asserted to be controlling, the facts necessary to an understanding of the question, and the reasons why an interlocutory appeal should be permitted. Copies of the motion and statement shall be served upon all parties upon whom the original motion was served. The order from which an appeal is sought, and the order of denial, shall be filed and served with the motion or as soon thereafter as is practicable. Within 5 days after service of the motion, an adverse party may file and serve an answer in opposition to the motion. The matter shall be determined upon the motion and answer without oral argument unless the civil division otherwise orders.

(3) Proceedings on Appeal. The order permitting appeal shall be filed and served and a copy thereof, together with the docket entries and entry fee if any, mailed to the clerk of the civil division in the manner provided for notice of appeal in Rule 3 of the Rules of Appellate Procedure. The record shall thereupon be transmitted and the action entered, heard, and determined in the civil division as provided by this rule for other appeals.

(4) Motion To Dismiss in the Civil Division. At any time after the docketing of the appeal in the civil division, any appellee may move to dismiss the appeal on the grounds that permission to appeal was improvidently granted. The motion shall contain a statement of the facts necessary to an understanding of the question of law found controlling by the probate judge and a statement of the reasons why an interlocutory appeal should not have been permitted on such

question. The civil division may order immediate hearing of the motion or may defer hearing until the time set for oral argument on the appeal. If at any time, upon such motion or upon its own motion, the civil division finds that no controlling question of law as to which there is substantial ground for difference of opinion has been presented or that a decision on such question would not materially advance the termination of the litigation, it may dismiss the appeal.

(fg) **Rules of Civil Procedure To Apply.** Except as modified by this rule, the Rules of Civil Procedure, so far as applicable, shall govern proceedings under this rule.

Reporter's Notes—2012 Amendment

V.R.C.P. 72(f) is adopted to provide a procedure comparable to that of V.R.A.P. 5(b) for interlocutory appeals by permission of the probate judge from the Probate Division to the Civil Division of the Superior Court on controlling questions of law in trust cases. The amendment implements 14A V.S.A. §201(d), enacted in 2009 as part of the adoption of the Vermont Trust Code. Note that 12 V.S.A. § 2386(a), as amended by Act 154 of 2009 (Adj. Sess.) §§ 74, 74a, appears to permit a direct interlocutory appeal from the Probate Division to the Supreme Court on questions of law as provided in rules adopted by the Supreme Court. See also 12 V.S.A. § 2551 and V.R.A.P. 13. In the absence of guidance from the Legislature, the direct Supreme Court appeal is presumably an alternative to be used when the importance of the question dictates that the greater expense and delay of such a proceeding is warranted.

V.R.C.P. 72(a), (c), (e), have been amended to insert “civil division” where appropriate. Former V.R.C.P. 72(f) has been redesignated as (g).

3. That this rule, as amended, is prescribed and promulgated to become effective on _____. The Reporter's Notes are advisory.

4. That the Chief Justice is authorized to report these amendment to the General Assembly in accordance with the provisions of 12 V.S.A. § 1, as amended.

Dated in Chambers at Montpelier, Vermont, this ____ day of _____, 2012.

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Marilyn S. Skoglund, Associate Justice

Brian L. Burgess, Associate Justice

Beth Robinson, Associate Justice

PROPOSED