Arizona Supreme Court

Committee on Improving Judicial Oversight and Processing of Probate Court Matters

Interim Report

to the Arizona Judicial Council

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Committee on Improving Judicial Oversight and Processing of Probate Court Matters

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I. Introduction

Approximately twenty-five percent of Arizona's citizens are fifty-five years of age or older. This demographic places unique challenges on the Judicial Branch, including increased filings in the areas of guardianship, conservatorship, and exploitation and abuse of vulnerable adults. Additionally, disabled children and their parents encounter unique legal and financial issues when the child reaches the age of majority, which necessitate court action. Protection of incapacitated and vulnerable individuals is an important concern of the Arizona Judicial Branch, as evidenced by key strategic initiatives in the Court's strategic agenda: "Justice 2020, A Vision for the Future of the Arizona Judicial Branch."

Much progress has been made to improve court processing and oversight of probate matters. In the late 1990s, Arizona began to regulate "professional fiduciaries," individuals and entities who serve as guardians, conservators, and personal representatives in probate cases for a fee. In June 2000, the Court appointed the Fiduciary Advisory Committee, which issued its Final Report to the Arizona Judicial Council ("AJC") in June 2001. A number of the Committee's recommendations resulted in changes to statutes, court rules, and procedures, including, for example, increased qualifications for licensed fiduciaries and authority for a judicial officer to issue a fiduciary arrest warrant. Other strategic efforts taken over the last decade include the implementation of random audits of

licensed fiduciaries and amendments to the statutory provisions regarding licensed fiduciaries serving as an agent under a power of attorney. Effective January 1, 2009, the Court adopted the Arizona Rules of Probate Procedure, which provide uniform, statewide practice standards for probate proceedings in the superior court.[1]

Although significant progress has been made over the past decade, additional efforts are needed to provide for the protection of vulnerable and incapacitated persons. Key initiatives contained in "Justice 2020" include simplifying the processing of guardianship cases and ensuring fiduciaries are held accountable for the services they provide to their vulnerable clients. To accomplish these goals, Chief Justice Rebecca White Berch issued Administrative Order No. 2010-52 on April 30, 2010, establishing the Committee on Improving Judicial Oversight and Processing of Probate Matters, which will exist until June 30, 2011.

Pursuant to the Administrative Order, the Committee is charged with the responsibility to consider and make recommendations regarding: (1) ways to streamline the process when an incapacitated or vulnerable child reaches the age of

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[1] The superior court in Arizona decides probate matters, among other case types. For ease of reference, courts and practitioners frequently refer to the superior court as the "probate court" when it decides these matters. Indeed, the name of this Committee includes the term. Use of this shorthand reference, however, may lead the public to mistakenly believe that a "probate court" exists separately from the superior court. In an attempt to dispel this impression, therefore, we refer to the "superior court" or the "court" in the body of this interim report.

majority and is in need of a guardian and/or conservator; (2) effective court oversight and monitoring of guardianships, conservatorships, and decedent estate cases; (3) statewide fee guidelines for professional fiduciaries and attorneys paid from a ward's estate; and (4) the process used by courts to review and award fiduciary's and attorney's fees, particularly when disputed. The Committee is not authorized to investigate particular cases and has not done so. Additionally, the Committee lacks time and resources for such an undertaking. The Committee, however, has received anecdotal input about problems faced in the superior court, and members of the Committee have observed others. Therefore, the Committee has considered the above-described issues with an eye towards how the current statutes, rules, procedures, and training regimens can be improved to foster the fair, efficient, and cost-effective handling of probate matters and further the best interests of vulnerable adults.

The Committee established and maintains a site on the Arizona Judicial Branch's website. In addition to posting pertinent documents for Committee and public view, the site invites public comment through use of a form or mailed letter. Additionally, the Committee sought public comment by identifying a list of stakeholders and asking those persons or groups to inform its members of the Committee's charge and invite comment. A list of stakeholders is set forth in Appendix A. For example, AARP sent out information to 100,000 Arizona

members soliciting comments. Further, the Committee asked the presiding judge in each county to post a notice of the request for comment outside the doors of any courtroom used for probate hearings and sent letters to all State senators and State representatives asking them to inform constituent groups about the Committee's request for input. Finally, the Committee's request was contained in an Arizona Republic newspaper article entitled, "Comments on Probate Court Sought," dated June 22, 2010. To date, the Committee has received approximately 160 written comments in addition to verbal comments made at public full-Committee meetings and to individual committee members outside meetings.

In the initial four months of its existence, the Committee met five times in public meetings. The Committee formed three workgroups to consider, respectively, (1) streamlining the transition for incapacitated minors to adult guardianships and conservatorships, (2) ensuring effective court oversight of probate matters, and (3) revising processes employed to review and award fiduciary's and attorney's fees. Pursuant to authority conferred by the Administrative Order, the Chair appointed non-Committee members to join Committee members in the workgroups. A list of each workgroup's membership is set forth in Appendix B. The Committee has done the bulk of its work through these workgroups, which have met publically approximately twice a month. To date, the workgroups have focused on examining potential statutory and rule

changes in order to provide both final and preliminary recommendations in this interim report. This report, which is submitted before the upcoming rule petition deadline and legislative session, will permit the AJC to (1) recommend the supreme court either proceed with or refrain from making rule changes and/or lobbying the legislature for any statutory changes, and (2) provide feedback to the Committee about the appropriateness of any alternative rule and statutory changes currently under consideration by the Committee. To accomplish their tasks, the workgroups have reviewed information from the National Center for State Courts and the laws and procedures used in courts in other states, among other things.

Although the Committee and its workgroups have acted with all deliberate speed, in light of the breadth of issues considered and the short time the Committee has existed, it is not possible to present final recommendations to AJC regarding the propriety of all rule and statutory changes under consideration. The debate concerning many of these critical issues has revealed that recommendations should not be offered impulsively merely in the interests of speed. Such action likely would prove foolhardy in the long run. Thus, in this interim report, the Committee recommends some immediate action to make statutory and rule changes but also informs AJC of issues which are under ongoing consideration by the Committee. The Committee welcomes feedback from AJC regarding the direction the Committee is taking on any issue.

At its meeting held September 20, 2010, the Committee voted to send this interim report to AJC.

II. Executive Summary

This interim report makes 12 recommendations to AJC outlining steps to take to better enable the judiciary to protect Arizona's vulnerable and incapacitated persons. Details of many recommendations remain under discussion by the Committee and are not in a position to be implemented immediately. These recommendations will be the subject of a future report. Other recommendations are complete and ready to be put into operation. To better assist AJC in distinguishing among these recommendations, the Committee has identified the following recommendations that warrant **immediate consideration and implementation** by the supreme court as no further consideration by the Committee is required:

- The supreme court should advocate for the legislature to expand the statutory "standby" guardianship provisions in the probate code. (See Recommendation 1, pages 14 - 18.)

- The supreme court should advocate for the legislature to include a statutory provision in the probate code that exclusively applies to incapacitated minors approaching adulthood. (See Recommendation 2, pages 18 - 19.)

- The supreme court should add a rule to the Arizona Rules of Probate Procedure ("Probate Rules") directing the superior court to create and conduct a funded program for random audits of conservatorship accountings to validate the accuracy of annual or biennial accountings currently required in all adult

conservatorship matters. Until promulgation of the rule, the supreme court should issue an administrative order immediately requiring such audits. (See Recommendation 4, pages 26 - 27.)

- The supreme court should develop statewide uniform training requirements for major participants in guardianship and conservatorship cases as follows:

  - ✓ Develop a training program and a bench book for judicial officers

  - ✓ Develop a mandatory, uniform, online, statewide training program for all non-licensed fiduciaries

  - ✓ Expand the Seniors and Probate website maintained by the judiciary to ensure all interested persons can obtain information about the duties of a fiduciary, the guardianship and conservatorship process, forms, and other resources for probate cases

  - ✓ Require any attorney wanting to be appointed as counsel or guardian ad litem for a proposed adult ward or protected person to complete a court-approved training program before accepting the first appointment

  - ✓ Develop a mandatory, statewide training program and require all superior court investigators to successfully complete it before their initial appointment to a case (See Recommendation 6, pages 28 - 33.)

- The supreme court should give priority to the development of automated case management systems that will substantially improve probate case monitoring and oversight by an efficient and cost-effective means. (See Recommendation 7, pages 34 - 35.)

- The supreme court should develop uniform, interactive and dynamic electronic probate forms through AZTurboCourt or another online website that will allow documents to be electronically generated and filed. The court should prioritize

phasing in AZTurboCourt for probate matters. (See Recommendation 8, pages 35 - 36.)

- ✓ Appoint a statewide taskforce to develop and implement uniform pleadings and documents

- The supreme court should add a Probate Rule or advocate for the legislature to include a statutory provision in the probate code that requires attorneys, fiduciaries, and others seeking fees from an estate in guardianship or conservatorship cases to do so within a specific time frame or be barred from doing so, absent good cause. (See Recommendation 10, page 45.)

- The supreme court should advocate for the legislature to adopt a fee-shifting statute specifically applicable to probate matters. The court should also promulgate a corresponding Probate Rule. (See Recommendation 11, pages 46 - 50.)

- The supreme court should advocate for the legislature to adopt a statute mandating arbitration for disputes concerning the reasonableness of fees of fiduciaries and all attorneys paid from the estate. (See Recommendation 12, pages 50 - 52.)

III. Assessments, Recommendations, and Notices of Pending Issues

A. Transition of Minors to Adult Guardianships and Conservatorships

1. Assessment

A number of issues are faced by parents and other custodial caregivers (collectively, "parents" for ease of reference) of incapacitated or vulnerable children who are nearing their eighteenth birthdays and are in need of guardianships or conservatorships:

(a) Parents often fail to consider the need for an adult guardianship or conservatorship until denied the right to act on behalf of their charge when, for example, visiting a physician for the first time after the child's eighteenth birthday. When this occurs, the parent is often forced to seek an emergency, temporary guardianship order from the court. The lack of action before the child's eighteenth birthday can cause unnecessary anxiety for the parent and adult son or daughter, place the latter's needs in a state of flux, and increase the cost and time expended by both the court, the parent, and the vulnerable young adult.

(b) Confusion reportedly exists among judicial officers whether proceedings for imposition of an adult guardianship can be started while the proposed ward is a minor. As a result, proceedings before such officers are not commenced until after the child's eighteenth birthday. Consequently, in these cases, a gap exists in custodial authority over a person who needs a general or limited guardianship and/or conservatorship.

(c) Conflicts often develop between divorced parents who serve as co-guardians to an adult incapacitated son or daughter or when only one parent serves as guardian. Both situations often upset the wards and necessitate the devotion of excessive court resources. Additionally, some confusion exists among judicial officers regarding their authority to act in these situations.

(d) The guardianship and conservatorship process is confusing for many people, which necessitates a devotion of undue time to the process, results in mistakes that hamper the parties and the court, unnecessarily compels some individuals to hire attorneys to gain an understanding of the process, and/or deters many people from engaging in the appropriate legal process.

(e) The guardianship and conservatorship process can be expensive for families, which can deter them from seeking general or limited guardianships and conservatorships. Although the court can waive fees based on the financial position of the proposed ward or protected person, the forms used by many courts to determine waiver eligibility are daunting and unfairly convey an impression that fee waiver is dependent on the entire family's finances. Fees mistakenly paid are not refunded.

(f) In 2003, the legislature amended the probate code by incorporating portions of the updated Uniform Probate Code ("UPC"), including adding provisions for limited guardianships, which give more autonomy to wards. The legislature did not include other provisions of the updated UPC, however, which emphasize that courts should consider limited guardianships before imposing unlimited guardianships. Many well-meaning parents are unaware of the availability of limited guardianships. Additionally, judicial officers may be less familiar with limited guardianships and therefore less likely to consider them.

2. Recommendations

Recommendation 1: The supreme court should advocate for the legislature to expand the statutory "standby" guardianship provisions in the probate code.

Currently, Arizona law permits the parent of an incapacitated person or the spouse of a married incapacitated person to appoint a guardian by will for the incapacitated person upon the death of the parent or spouse. The appointment becomes effective upon written acceptance filed in court by the new guardian and after written notice to the incapacitated person and the nearest adult relative at least seven days prior to filing such acceptance. The appointment automatically terminates upon written objection to the court; the court then proceeds to appoint a guardian under the applicable probate procedures. Ariz. Rev. Stat. ("A.R.S.") § 14-5301.

The Committee recommends expansion of the current testamentary appointment procedure by also allowing use of "other writings" to make such appointments that would take effect upon incapacity of the existing guardian, leaving no gap in custodial authority and providing peace of mind to parental and spousal guardians. These provisions would provide as follows:[2]

[2] The use of "XX" in a statute indicates that the current Arizona Probate Code does not contain a comparable statute.

A.R.S. § 14-53XX. Appointment and Status of Guardian

A person becomes a guardian of an incapacitated person by a parental or spousal appointment or upon appointment by the court. The guardianship continues until terminated, without regard to the location of the guardian or ward.

Source: UPC 5-301

A.R.S. § 14-5301. Appointment of Guardian by Will or Other Writing (proposed revision to existing statute)

(a) A parent, by will or other signed writing, may appoint a guardian for an unmarried child who the parent believes is an incapacitated person, specify desired limitations on the powers to be given to the guardian, and revoke or amend the appointment before confirmation by the court. Such appointments become effective only as set forth in A.R.S. section 14-5301.01(a).

(b) An individual, by will or other signed writing, may appoint a guardian for the individual's spouse who the appointing spouse believes is an incapacitated person, specify desired limitations on the powers to be given to the guardian, and revoke or amend the appointment before confirmation by the court. Such appointments become effective only as set forth in A.R.S. section 14-5301.01(a).

(c) The incapacitated person, the person having care or custody of the incapacitated person if other than the appointing parent or spouse, or the adult nearest kinship to the incapacitated person may file a written objection to an appointment, unless the court has confirmed the appointment under subsection (d). The filing of the written objection terminates the appointment. An objection may be withdrawn and, if withdrawn, is of no effect. The objection does not preclude judicial appointment of the person selected by the parent or spouse. Notice of the objection must be given to the guardian and any other person entitled to notice of the acceptance of the appointment. The court may treat the filing of an objection as a petition for the appointment of a temporary guardian under Section 14-5310 or the appointment of a limited or general guardian under Section 14-5303 and proceed accordingly.

(d) Upon petition of the appointing parent or spouse, and a finding that the appointing parent or spouse will likely become unable to care for the incapacitated person within two years, and after notice as provided in this section, the court, before the appointment becomes effective, may confirm the appointing

parent's or spouse's selection of a guardian and terminate the rights of others to object.

Source: Existing A.R.S. § 14-5301 and UPC 5-302

A.R.S. § 14-5301.01. Appointment of Guardian by Will or Other Writing: Effectiveness; Acceptance; Confirmation.

(a) The appointment of a guardian under Section 14-5301 becomes effective upon the death of the appointing parent or spouse, the adjudication of incapacity of the appointing parent or spouse, or a written determination by a physician who has examined the appointing parent or spouse that the appointing parent or spouse is no longer able to care for the incapacitated person, whichever first occurs.

(b) A guardian appointed under Section 14-5301 becomes eligible to act upon the filing of an acceptance of appointment, which must be filed within 30 days after the guardian's appointment becomes effective. The guardian shall:

(1) file the notice of acceptance of appointment and a copy of the will with the court of the county in which the will was or could be probated or, in the case of a signed writing created pursuant to Section 14-5301, file the acceptance of appointment and the signed writing with the court in the county in which the incapacitated person resides or is present; and

(2) give written notice of the acceptance of appointment to the appointing parent or spouse if living, the incapacitated person, a person having care or custody of the incapacitated person other than the appointing parent or spouse, and the adult nearest in kinship.

(c) Unless the appointment was previously confirmed by the court, the notice given under subsection (b)(2) must include a statement of the right of those notified to terminate the appointment by filing a written objection as provided in Section 14-5301.

(d) An appointment effected by filing the guardian's acceptance under a will probated in the State of the testator's domicile is effective in this State.

(e) Unless the appointment was previously confirmed by the court, within 30 days after filing the notice and the will or signed writing, a guardian appointed

under Section 14-5301 shall file a petition in the court for confirmation of the appointment. Notice of the filing must be given in the manner provided in Section 14-5309.

(f) The authority of a guardian appointed under Section 14-5301 terminates upon the appointment of a guardian by the court or the giving of written notice to the guardian of the filing of an objection pursuant to Section 14-5301, whichever first occurs.

(g) The appointment of a guardian under this section is not a determination of incapacity.

(h) The powers of a guardian who timely complies with the requirements of subsections (b) and (e) relate back to give acts by the guardian which are of benefit to the incapacitated person and occurred on or after the date the appointment became effective the same effect as those that occurred after the filing of the acceptance of appointment.

Source**:** UPC 5-303

Notes: The utility of these provisions is best summarized by this excerpt from the official comments to the UPC:

[T]his section is very useful, especially for parents of developmentally disabled children. For such parents, the need for a guardian for the developmentally disabled child often arises only on the parent's death or other event that necessitates that care be transferred to another. This section, by allowing a guardian of the parent's selection to step in immediately upon the necessitating event, can provide the parents with assurance of mind that care of their children will not be neglected. This section is also useful for a spouse of an individual stricken by Alzheimer's disease, when the spouse no longer is able to care for the Alzheimer's victim.

If supreme court is inclined to pursue inclusion of these provisions, the Committee recommends consideration of similar standby guardianship provision for minors who are not incapacitated. *See* A.R.S. § 14-5202 (testamentary appointment of guardian of minor). Because issues related to guardianships for

such minors are not within the scope of the Committee's charge, the Committee takes no position on including the provisions but simply notes the issue.

Recommendation 2: The supreme court should advocate for the legislature to include a statutory provision in the probate code that exclusively applies to incapacitated minors approaching adulthood.

To counter the confusion about the court's authority to appoint a guardian or conservator for incapacitated minors or minors in need of protection before their eighteenth birthdays, and to streamline the guardianship/conservatorship process for parents of incapacitated minors or minors in need of protection, the Committee recommends adoption of the following provision:

A.R.S. § 14-53XX. Judicial Appointment of Guardian: Special Provision for Incapacitated Minors Approaching Adulthood

(a) Any party interested in the welfare of a minor who is at least seventeen years and six months old and alleged to be incapacitated may initiate guardianship proceedings pursuant to this article and request that any guardianship order take effect immediately on the minor's eighteenth birthday.

(b) The petitioner under this statute may provide with the petition a report of an evaluation of the minor by a physician, psychologist or registered nurse that meets the requirements of A.R.S. § 14-5303(D). If the evaluation was conducted within six months of the date the petition is filed with the court, the petitioner may ask in the petition that the court accept this report in lieu of ordering any additional evaluation pursuant to A.R.S. § 14-5303(C), and the court may grant the request.

Source: Modeled roughly on Kan. Stat. Ann. § 59-3060(c).

A.R.S. § 14-54XX. Judicial Appointment of Conservator or Protective Order: Special Provision for Incapacitated Minors Approaching Adulthood

Any party interested in the welfare of a minor who is at least seventeen years and six months old and alleged to be in need of protection may petition the court for appointment of a conservator or request an appropriate protective order pursuant to A.R.S. § 14-5404 and request that any conservatorship order or protective order take effect immediately on the minor's eighteenth birthday.

Notes: These provisions clarify the court's authority and give parents and others a clear mechanism to follow to get a guardianship and conservatorship in place for incapacitated children approaching adulthood. This guardianship provision likely also would eliminate the need for many emergency guardianship proceedings used by parents of young adult incapacitated persons. These provisions apply to anyone interested in the welfare of a minor – not just a custodial parent or adult sibling. The guardianship provision also provides a shortcut in proceedings by possibly eliminating the need for a second professional evaluation, although the mandatory use of an investigator and attorney appointment remains.

3. Notice of Pending Issues

The Committee is currently considering the following issues but has not yet formulated recommendations:

(a) Should the legislature adopt other provisions of the UPC, particularly those that emphasize the preference for consideration of limited guardianships and conservatorships before imposition of general guardianships and conservatorships?

Specifically, should the UPC's definitions of "incapacitated" and "professional evaluation" be adopted? For ease of reference, should a definition of "respondent" be created to designate an individual for whom the appointment of a guardian or conservator or other protective order is sought?

(b) How can parents be guided in the guardianship/conservatorship process before their incapacitated child's eighteenth birthday?

(c) How can the process for seeking a guardianship or conservatorship be simplified through the use of "smart forms" in AZTurboCourt? In particular, can the process for applying for a fee waiver be streamlined?

(d) Is a statute or rule needed to authorize a judicial officer to resolve a conflict that arises between divorced parents who are seeking a guardianship or serve as guardians for their son or daughter? Similarly, is a statute or rule needed to authorize a judicial officer to resolve a conflict that arises between divorced parents when only one parent serves as a guardian?

(e) What training should be required of judicial officers concerning the transition of incapacitated minors to adult guardianships?

(f) Should a statute authorize the court to confirm an existing conservatorship as the minor protected person approaches his/her eighteenth birthday in order to avoid any gap in protection of property or require any unnecessary repetition of process? If so, what process should be followed?

B. Judicial Oversight

1. Assessment

The number of probate cases (guardianships, conservatorships, trusts and decedent estates) pending in Arizona's courts presents challenges to providing effective judicial oversight. For example, as of the end of June 2009 (the last time fiscal year-end statistics were posted for the judiciary), 41,520 guardianships and conservatorships and 25,806 trust and decedent estate cases were pending in the superior court statewide. *See* http://www.azcourts.gov/Portals/39/2009DR/GJ_SuperiorCourt.pdf. As of the end of June 2010, the Arizona Supreme Court had oversight responsibilities for 230 licensed fiduciaries and 48 licensed fiduciary businesses, which include the 15 county public fiduciaries and the Arizona Department of Veterans Affairs. Courts in 13 of Arizona's 15 counties do not have specialized departments to consider and decide probate cases but instead include probate cases among other case types for decision.

The Committee has identified the following issues affecting judicial oversight of guardianship and conservatorship cases:

(a) Judicial officers are not required to participate in training specific to deciding probate cases before presiding over such cases. Because most judicial

officers did not practice as attorneys in probate cases, the learning curve can be sharp.

(b) Non-licensed family members or friends who petition to become guardians often lack critical information about what the position entails. Thus, post-appointment, they may realize belatedly they are ill-equipped for the position and/or fail to adequately perform their duties.

(c) Court-appointed attorneys, guardians ad litem, and court investigators are not required to participate in training specific to their roles in guardianship and conservatorship cases.

(d) The judiciary's auditing procedures are not sufficient to oversee all guardianships and conservatorships.

(e) The process for obtaining guardianships and conservatorships can be daunting to parties involved in such proceedings, which either deters use of the system or causes confusion.

(f) Confusion exists regarding the respective roles of court-appointed attorneys, guardians ad litem, and fiduciaries.

(g) Alternative dispute resolution is not always available or used when disputes arise.

(h) Only guardians are required to visit wards post-appointment, and no mechanism exists for periodic visits and reports by others to ensure the guardian or conservator is performing his or her duties appropriately.

(i) The courts often lack sufficient resources to provide needed oversight and protection of Arizona's vulnerable adults.

2. Recommendations

Recommendation 3: The Committee recommends the supreme court add a rule to the Probate Rules that requires funded, ongoing, unannounced post-appointment visitation of wards and protected persons. Until promulgation of the rule, the supreme court should issue an administrative order immediately requiring such visitation.

The probate code currently provides for a court investigator or court visitor to conduct an evaluation and prepare a report for the court pertaining to the need for a proposed guardianship or conservatorship and the suitability of the proposed appointee to serve as a fiduciary. There is no mechanism for requiring annual unannounced visits and reports to the court and other interested parties by someone other than the guardian, however.[3] In order to better detect when wards and protected persons are abused or neglected, the Committee recommends that unannounced in-person visits be conducted annually to evaluate the welfare and

[3] The superior court in Maricopa County voluntarily operates the "Guardianship Review Program," which uses volunteer court visitors to check on the welfare of wards and protected persons and report to the court. The Committee is additionally aware that Tarrant County, Texas has a well-developed court visitation program.

condition of vulnerable adults under the court's protection. These visits should be documented in a report to the court. If available resources cannot support annual visits and reports, the Committee alternatively recommends a longer period of time between visits but not less than biennially.

The Committee's recommendation mirrors one made by a Joint Task Force of the Conference of Chief Justices and the Conference of State Court Administrators on Elders and the Courts, in conjunction with the National Center for State Court's Center for Elders and the Courts, and reported in the Adult Guardianship Court Data and Issues Results from an Online Survey dated March 2, 2010 ("NCSC Report").[4] Recommendation 3 in the NCSC Report provides: "Each state court system should implement procedures for monitoring the performance of guardians and conservators and the well-being of incapacitated persons."

The Committee recognizes that resources are at a premium. The Committee, however, stresses the need to fund this important program. The Committee is still debating a recommendation for post-appointment visits and reporting. The following constitutes a list of options currently under consideration. The selection of these or any proposals depends on a cost-benefit analysis the Committee is not equipped to undertake:

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[4] Administrative Order No. 2010-52 instructed the Committee to review and consider the NCSC Report and "determine if any of its recommendations should be implemented in Arizona."

(i) A court-appointed visitor or investigator will conduct a visit of the ward or protected person not less than biennially to ensure the status of that individual is as represented in reports filed with the court and is as represented by guardians and/or conservators, OR;

(ii) The court-appointed attorney shall remain on a case following the appointment of a guardian and/or conservator and shall visit his/her client at least annually to determine the status of the ward and/or protected person and to ensure the information being reported annually by guardians and conservators adequately reflects the actual condition, needs, and living circumstances contained in the fiduciary's reports, OR;

(iii) A court-appointed volunteer special visitor will be assigned to conduct a visit of the ward or protected person not less than biennially to ensure the status of that individual is as represented in reports filed with the court and is as represented by guardians and/or conservators. A background check will be conducted of all such volunteers and training will be implemented to provide these volunteers with the information and resources necessary to appropriately carry out the duties of a court visitor; OR

(iv) The court will solicit bids from appropriate government agencies and private entities to create rosters of flat-fee contractor services to conduct post-appointment visitations of wards and protected persons as assigned

and directed by the court. Government agencies to be considered for such services may include Adult Protective Services, and private entities could include the Fraternal Order of Police and the Arizona Fiduciary Association. The court would establish in the solicitation bid training requirements, contract requirements, and fee schedules for such services.

Recommendation 4: The supreme court should add a Probate Rule directing the superior court to create and conduct a funded program for random audits of conservatorship accountings to validate the accuracy of annual or biennial accountings currently required in all adult conservatorship matters. Until promulgation of the rule, the supreme court should issue an administrative order immediately requiring such audits.

The Committee recommends random audits be conducted (i) by the court's own designated staff; (ii) by independent contractors solicited and retained for this purpose as court services providers; or (iii) by independent licensed fiduciaries who have contracted with the court to perform such services.

The scope of conservatorship cases subject to court-ordered random audits may be limited to cases above a certain threshold unrestricted asset amount, such as $100,000 or $200,000.

The court should exempt from audit licensed fiduciaries, which include a county public fiduciary, the Arizona Department of Veterans Services, and private professional fiduciaries. These licensed fiduciaries are already under regulatory

oversight of the Arizona Supreme Court and subject to random audit pursuant to Arizona Code of Judicial Administration § 7-201(D)(2)(b)(4).

Recommendation 5: The Committee recommends exploration of funding sources for conducting periodic visitations, reporting, training, and random audits.

Statewide programs to conduct periodic visitations, reporting, training, and random audits will require the expenditure of resources. Rather than forego implementation of these programs due to budget constraints, the supreme court should develop funding sources to support these programs in addition to making requests to the legislature to appropriate general funds for support. Under existing probate code provisions, the court could establish fees that will flow into a designated Probate Fund that can only be used to support post-appointment visitations, reporting, and audits. For example, currently in Maricopa County, a Court Investigator's fee of $400 is paid upfront at the initiation of an adult guardianship or conservatorship case to compensate court investigators assigned to conduct initial evaluations as required by statute. Similarly, a Court Accounting Fee of $300 is required each time an accounting is filed for court approval that must be reviewed by a court accountant. The court should consider adopting an annual guardian report fee that would offset the cost of conducting post-appointment visitations and reports to the court, and imposing fees on fiduciaries who belatedly file required reports. Finally, the court should explore

applying for grant monies to fund all or part of these programs or any pilots used to preliminarily test the programs.

Recommendation 6: The supreme court should develop statewide uniform training requirements for major participants in guardianship and conservatorship cases as follows:

(i) Develop a training program and a bench book for judicial officers

A well-trained judiciary is the first line of defense against fraud and abuse by fiduciaries. While the judiciary cannot be expected to prevent all fraud and abuse by fiduciaries, utilization of appropriate orders and monitoring techniques can deter fraud and abuse and result in protection of assets. In order to assure that every judicial officer in the superior court handling probate cases has sufficient knowledge of the statutes and best practices for handling these cases, the supreme court should develop a training program and require these judicial officers to complete it before presiding over a probate case. Additionally, the court should require existing judicial officers deciding probate cases in the superior court to complete the training in a timely manner. Judges deciding probate cases should take a refresher training course no later than every five years; those judges who completed the training but sit in counties with probate divisions should take a refresher course before beginning an assignment in the probate division. Any court can require more frequent training, as needed. Training should include familiarity with the National Probate Standards previously adopted by the supreme court. The

Committee's recommendations coincide with recommendation 7 of the NCSC Report, which states that training materials should be developed for judges who oversee the guardianship process.

The supreme court should develop a statewide comprehensive bench book for use as a reference by judicial officers deciding probate cases. The Committee recommends the bench book include best practices that, at a minimum, embrace but are not limited to the practices set forth in Appendix C.

(ii) Develop a mandatory, uniform, online, statewide training program for all non-licensed fiduciaries

Licensed fiduciaries handle a relatively small percentage of the cases in court. Most often, a non-licensed person, such as a parent, relative, or friend of the ward, protected person, or decedent serves as the fiduciary. Many of these people likely have little or no idea of the requirements for serving as a fiduciary. Therefore, the supreme court should advocate for adoption of a statute or create a Probate Rule similar to A.R.S. § 25-351 *et seq*. (requiring all parents involved in a dissolution proceeding to complete a parenting class) that requires all non-licensed fiduciaries to complete a training program, unless an emergency exists, prior to being appointed by the court as a fiduciary. The Committee suggests the training program should not be more than 90 minutes in length, be available for viewing at all courthouses as well as Internet-based, and that an online assessment test be given and a certificate issued upon successful completion of the course. This

recommendation coincides with recommendation 2 of the NCSC Report, which suggests each court system "develop written and online materials to inform non-professional guardians and conservators about their responsibilities and how to carry out those responsibilities effectively."

Should the supreme court prefer to achieve this recommendation by court rule rather than by urging enactment of a new statutory section, the Committee suggests that a rule be incorporated into the Probate Rules as Rule 27 under part IV, "Procedures Relating to the Appointment of Fiduciaries." In order to maintain uniformity with the style and structure of the existing rules, it is suggested that the proposed rule read as follows:

Rule 27.1. Training for Non-Licensed Fiduciaries.

A. Any person who is neither a licensed fiduciary under A.R.S. § 14-5651 nor a financial institution shall complete a training program approved by the Arizona Supreme Court before letters to serve as a guardian, conservator, or personal representative are issued unless the appointment was made pursuant to Sections 14-5310(A), 14-5401.01(A) or 14-5207(c).

B. If the appointment was made because an emergency existed, the fiduciary shall complete the training program within thirty days of appointment or before the permanent appointment of the fiduciary, whichever is earlier. For good cause, the Court may extend the time period for the fiduciary to complete the training program.

C. For purposes of this Rule, "financial institution" means a bank that is insured by the federal deposit insurance corporation and chartered under the laws of the United States or any state, a trust company that is owned by a bank holding company that is regulated

by the federal reserve board, or a trust company that is chartered under the laws of the United States or this state.

(iii) Expand the Seniors and Probate website maintained by the judiciary to ensure all interested persons can obtain information about the duties of a fiduciary, the guardianship and conservatorship process, forms, and other resources for probate cases

Help desks or self-service centers are not uniformly available throughout the State. By providing better resources to self-represented parties, the court will improve probate case processing and monitoring. By providing an online self-help center concerning probate issues, the supreme court likely would enhance the ability of non-licensed fiduciaries and self-represented interested parties to learn about the process, avoid missteps, and spot abuses to point out to the court. A fine example of a self-help center for probate is Ramsey County, Minnesota's website found at http://www.mncourts.gov/district/2/?page=524. See also online self-service center tools developed by Los Angeles County, California, http://www.lasuperiorcourt.org/probate/selfhelp.htm, and the California Administrative Office of the Courts, http://www.courtinfo.ca.gov/selfhelp/ Currently, the judiciary maintains a Seniors and Probate website that can be expanded to fulfill these purposes. http://www.azcourts.gov/PublicServices/SeniorsProbateLaw.aspx In addition, a collaborative effort between the Arizona Foundation for Legal Services and Education and the supreme court resulted in the production and ongoing funding of

the Law for Seniors website, www.LawforSeniors.org, which is found on the Seniors and Probate website and can be expanded to provide additional information for seniors and for those who care for them.

(iv) Require any attorney wanting to be appointed as counsel or guardian ad litem for a proposed adult ward or protected person to complete a court-approved training program before accepting the first appointment

Attorneys play vital roles in many probate cases, particularly when appointed to represent a proposed ward or protected person or to serve as a guardian ad litem. Therefore, the supreme court should create a Probate Rule requiring any attorney wanting to be appointed as counsel for a proposed adult ward or protected person or guardian ad litem for a proposed adult ward or protected person to first complete a statewide training program.[5] The Rule should require attorneys with existing appointments to complete the training as soon as practicable. All attorneys accepting appointments should re-certify with a refresher training course no later than every five years. The Committee suggests the training program be Internet-based, an online assessment test be given, and a certificate issued upon successful completion of the course.

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[5] An exception to this requirement might be made when a proposed ward or protected person wishes to hire his or her own attorney, and insufficient time exists to complete the training before assumption of the representation. The Committee will continue to discuss this issue and make a recommendation in a future report.

The Committee is not charged with responsibility for addressing issues relating to minor conservatorships. Nevertheless, the supreme court may wish to create a similar rule requiring training for attorneys appointed to minor guardianship and conservatorship matters.

(v) Develop a mandatory, statewide training program and require all superior court investigators to successfully complete it before their initial appointment to a case

Section 14-5308, A.R.S., provides that each court investigator appointed by the court in an action seeking appointment of a guardian or conservator for an adult "shall have a background in law, nursing or social work and shall have no personal interest in the proceedings." The investigators serve as the eyes and ears of the judicial officers. Thus, the supreme court should create a rule requiring any person wanting to be appointed as an investigator and meeting the statutory qualifications to complete a statewide training program. The Rule should require investigators with existing appointments to complete the training as soon as practicable. All investigators accepting appointments should re-certify with a refresher training course no later than every five years. The Committee suggests the training program be Internet-based, an online assessment test be given, and a certificate issued upon successful completion of the course.

Recommendation 7: The supreme court should give priority to the development of automated case management systems that will substantially improve probate case monitoring and oversight by an efficient and cost-effective means.

The management of probate cases in Arizona is currently facilitated by several different database systems across the State: in Pima County, the AGAVE system, in Maricopa County, the iCIS system, and in the remaining 13 counties the AJACs system. The ongoing development of AZTurboCourt by the Administrative Office of the Courts encompasses a statewide system of online forms generation and electronic filing.

The Committee recommends development of automated case management to substantially improve probate case monitoring and oversight through an efficient and cost-effective means. Enhancement of these systems will maximize administrative oversight with limited need for staff "hands-on" involvement. Specifically, the Committee urges the supreme court to build "triggers" or "risk indicators" into the systems that would alert the court to flaws concerning various probate events, including issuance of letters of appointment, filing of court-ordered bonds, annual accountings, annual guardian reports, and proof of restricted account from depository. For example, the management system may alert the court that a random audit is in order for a case with two or three flagged risk indicators such as the existence of disproportionate or unusually large transactions, late or no accountings, and no family members. As another example, the court could be

alerted by an amended inventory that increased the estate amount to re-examine the bond amount previously set. Also, the system could automatically reject unbalanced fiduciary reports, inform fiduciaries that a balanced report is required, or alert judicial staff to the issue. A list of possible risk indicators is set forth in attached Appendix D.

The Committee recommends the supreme court appoint a statewide team comprised of persons knowledgeable about case management systems and persons knowledgeable about probate procedures to construct a set of rules to establish critical triggers for risk indicators to include in existing systems.

Recommendation 8: The supreme court should develop uniform, interactive and dynamic electronic probate forms through AZTurboCourt or another online website that will allow documents to be electronically generated and filed. The court should prioritize phasing in AZTurboCourt for probate matters.

Currently, the judiciary is in the process of launching a statewide e-filing system known as AZTurboCourt in phases according to case types. The Committee has been informed that AZTurboCourt is in the process of being implemented for family court matters. The Committee strongly urges the supreme court to make probate filings its next priority.

The Committee recommends the supreme court appoint a statewide task force to develop and implement uniform pleadings and documents for probate proceedings filed through AZTurboCourt and consider whether non-standardized

forms or attachments to forms should be permitted and, if so, under what circumstances. Initially, such standardized forms should include the following:

- Reports of guardian
- Accountings
- Probate case management plan
- Inventory and appraisement
- Report of physician, psychologist or registered nurse
- Court investigator's report
- Proof of restricted account from depository
- Receipt of funds
- Order to: guardian, conservator, personal representative
- Notice of non-compliance
- Advance notice to guardian and/or conservator regarding: report due
- Probate information form

3. Notice of Pending Issues

(a) Should the pro tem judicial officers in superior court who decide probate matters be appointed from the ranks of attorneys who practice probate? Should limits be placed on the practice?

(b) Should guidelines be developed for attorneys paid from a ward's or protected person's estate that, among other things, distinguish among the roles of fiduciary, attorney, and guardian ad litem? Should rule changes be made to identify these roles? Should rule changes be made to clarify the circumstances under which a guardian ad litem should be appointed and the duration of the appointment?

(c) Should new procedures be employed to remove a conservator, including possibly a one-strike provision, particularly when that conservator is continuously clashing with the ward and/or other family members?

(d) What best practices should be employed in accountings, reports, audits, and visits to maximize the judiciary's ability to effectively oversee probate cases? Should the judiciary involve community agencies in developing some of these practices?

(e) Should statewide guidelines be adopted for court accountants, court visitors, court investigators, and any volunteer visitor program that is adopted?

(f) Should a central auditing office be used on a statewide basis?

(g) Should the judiciary adopt others recommendations made in the NCSC Report?

(h) Can the use of attorneys by fiduciaries be limited? If so, under what circumstances? Who should choose the attorney? Should the court pre-approve the rate charged by the attorney?

(i) What additional training is needed for judicial officers presiding over probate cases?

(j) Should fiduciaries be required to notify the court of significant changes in the ward's or protected person's circumstances? If so, what are those circumstances?

(k) What type of statistical data should the judiciary gather and report regarding probate matters?

C. Fees Paid to Fiduciaries and Attorneys from Estates

1. Assessment

Arizona law and due process requirements mandate an attorney be appointed to represent any adult for whom a guardianship or conservatorship appointment is sought.[6] In instances, the petition seeking appointment of a guardian or conservator nominates a licensed fiduciary to serve in this capacity. In addition, fiduciaries may retain attorneys to provide legal advice when the fiduciary serves as guardian, conservator, or personal representative. Attorneys and licensed fiduciaries are entitled to reasonable compensation for their services.

To date, the Committee has identified the following issues regarding the judiciary's ability to prevent expenditure of excessive fees from a ward's or protected person's estate:

(a) Fees are usually reviewed and approved by the court after expenditures have occurred; no mechanism exists to pre-approve a maximum fee, hourly rates, or set a range of permissible fees. When the fiduciary submits the annual accounting report, a judicial officer typically approves and disapproves fiduciary fees, and fees incurred by the fiduciary's attorney, the court-appointed

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[6] *See* A.R.S. §§ 14-5303(C), 14-5401.01(C), 14-5707.

attorney, and the guardian ad litem, which are all paid from the estate. In some cases, there may be significant expenditures from an estate before a judicial officer reviews and approves the accounting.

(b) Any interested party may object to fees by anyone paid out of the estate. Because proceedings to consider the objection may further unreasonably deplete estate assets, however, many objections are not raised to the court. Typically, fees are scheduled for approval by the court on a non-appearance calendar, which means no party needs to appear at the hearing. Probate Rule 12. Unless the court receives an objection to the fees prior to the scheduled hearing date, the court will review the fees for reasonableness and enter an order accordingly. Even in the few counties that have court accountants to review annual accountings that reflect fee expenditures, these accountants do not assist the judicial officers in reviewing fees.

(c) Disputes over fees can be time consuming and costly, resulting in expenditures of significant fees by fiduciaries and attorneys that are typically charged to an estate. Alternatives to the current procedure are needed to provide for the timely and efficient resolution of fee disputes.

(d) There is no time limitation governing when fee requests can be submitted or approved. For example, an attorney may submit a fee request for approval by the fiduciary or court years after services were performed.

(e) No statewide guidelines exist to assist judicial officers in reviewing annual accountings and fee petitions to determine the reasonableness of fees charged.

(f) Third parties can pursue a course of action that does not directly benefit the ward or protected person but nevertheless can result in significant costs to that person's estate. For example, family members can make unreasonable demands on the fiduciary or repeat reasonable requests through daily telephone calls. As another example, some family members reportedly initiate court proceedings solely or primarily to preserve an inheritance. In such cases, the estate typically bears the costs of the fiduciary and its attorney.

(g) On occasion, a good faith dispute arises among the fiduciary and third parties, such as family members, regarding a variety of matters. The cost of resolving such disputes in court, however, can drain the estate. Although alternative dispute resolution ("ADR") tools are available to an extent, barriers exist to their use. For example, many courts have a limited availability of resources to conduct settlement conferences, and parties and judicial officers are not familiar with available ADR tools in probate matters, such as short trials. Additionally, no mechanism currently exists to mandate cost-saving dispute resolution methods such as binding arbitration or summary trial.

2. Recommendations

Recommendation 9: The supreme court should adopt statewide fee guidelines for attorneys and fiduciaries paid from an estate.

Administrative Order No. 2010-52 requires the Committee to "develop statewide fee guidelines for professional fiduciaries and court-appointed attorneys in probate matters." The Chief Justice orally clarified upon inquiry by the Committee Chair that "court-appointed attorneys" include any attorneys paid from the estate of a ward or protected person. Additionally, because most fiduciaries are non-licensed and in need of guidance about the amount of appropriate compensation, the Committee recommends adoption of guidelines for these fiduciaries.

Currently, Rule 33(e) permits the superior court to "adopt fee guidelines designating compensation rates that may be used in determining the reasonableness of fees" payable to licensed fiduciaries. Rather than leaving adoption of guidelines to the discretion of each county's superior court, the Committee recommends adoption of statewide guidelines. Such guidelines would provide uniform standards for use by a judicial officer in evaluating fees and annual accountings in probate matters. They would also apply to attorneys seeking payment from an estate. As with the current child support guidelines, the judicial officer could vary from the standards in a particular case as fairness and justice demand.

The Committee is in the initial stages of developing suggested guidelines for attorney's fees and for fiduciary's fees. The Committee is considering the following topics and issues:

<u>Attorney's fees</u>

(i) It is the court's duty to ensure that estates of wards and protected persons pay only "reasonable" attorney's fees. A.R.S. §§ 14-5314 and 14-5414.

(ii) The factors to be considered in determining the reasonableness of attorney's fees are established in the Arizona Rules of Professional Conduct, E.R. 1.5(a), case law, and the comments to Probate Rule 33. The draft guidelines should incorporate these listed factors including, for example, the time and labor required, the novelty and difficulty of the questions involved, and the fee customarily charged in the locality for similar legal services.

(iii) Time expended should not be the exclusive criterion for determining fees. Mere record of time expended should not warrant an award of fees in excess of the worth of the services performed. Conversely, the court can consider approving fees in excess of time expended when the fee is justified by the responsibility undertaken, the results achieved, the difficulty of the task, and the size of the matter.

(iv) In determining whether a rate charged is reasonable, the court may also consider other factors including, for example, whether the estate is so small that the requested fee would consume most of the estate.

(v) An attorney-fiduciary may seek attorney's fees *only for legal services*. An attorney-fiduciary should not be paid attorney's fees for *fiduciary services*.

(vi) Clerical and secretarial services must not be paid at a legal assistant, paralegal, or attorney rate even if such services are performed by these persons. Such services are included within the attorney's overhead, for which an attorney is reimbursed at his or her hourly rate.

(vii) The draft guidelines should address reimbursement for other charges, including copies and faxes, computerized legal research, preparation of attorney's fees petitions, deliveries, and travel by the attorney and staff. Further, the guidelines should identify what costs are included in an attorney's overhead and would not be eligible for separate reimbursement.

Fiduciary's fees:

(i) Courts have adopted a case-by-case approach to reviewing fiduciary's fees. *In re Estate of Gordon*, 207 Ariz. 401, 87 P.3d 89 (App. 2004). The statutes and applicable regulations require that fiduciary's fees be reasonable and necessary. A.R.S. §§ 14-3719, -5314, -5414, and 14-10805; Standards 4i and

5a, Fiduciary Code of Conduct. *See also In re Smith's Estate*, 131 Ariz. 190, 191, 639 P.2d 380, 381 (1981). Courts have interpreted statutes to allow courts to consider both the fiduciary's and the estate's circumstances in determining the reasonableness and necessity of fees.

(ii) The Committee is considering whether to recommend that a fiduciary may or must submit a fee schedule to obtain prior approval of the rates to be charged by the fiduciary and any attorney retained by the fiduciary. This initial fee schedule could be presumed by the court to be reasonable and would remain in effect until a revised fee schedule is proposed.

(iii) In considering the reasonableness of fiduciary's fees, the court may consider a number of factors, including (a) the experience, training and expertise of the fiduciary, (b) the fiduciary code of conduct, which requires only a licensed fiduciary perform some services, (c) whether a non-licensed staff member could perform the same level of service at a lesser rate (e.g. routine matters like paying bills), (d) difficulties encountered by the fiduciary in marshalling, inventorying, or managing the assets and (e) the benefits derived by the estate, trust, ward, protected person, or beneficiaries from the service.

(iv) No statute or rule currently requires attorneys, fiduciaries, or others seeking administrative fees from an estate to submit billings or seek approval of fees from the court within a specified period of time. As a result, fee

requests can be made long after services were rendered. The gap in time between rendering a service and billing for it can hinder a fiduciary's ability to plan and the court's ability to oversee an estate.

> **Recommendation 10: The supreme court should add a Probate Rule or advocate for the legislature to include a statutory provision in the probate code that requires attorneys, fiduciaries and others seeking fees from an estate in guardianship or conservatorship cases to do so within a specific time frame or be barred from doing so, absent good cause.**

Although the Committee has not yet formulated a recommendation regarding the time by which attorneys, fiduciaries, and others must seek any fees from an estate, it is currently discussing a limit of one year to eighteen months as a ceiling. The Committee will also identify a recommended starting point from which to calculate the time limit and specify whether the requesting party satisfies the requirement by submitting the request to the fiduciary, the court, or both. Finally, the Committee will consider whether a time limit should be imposed for requests by attorneys, fiduciaries, and others for fees from a decedent's estate.

If the supreme court is inclined to pursue this recommendation, the Committee recommends consideration of a similar time limit for attorneys, fiduciaries, and others seeking fees from a trust. Because issues related to trusts are not within the scope of the Committee's charge, the Committee takes no position on including a similar provision for these case types but simply notes the issue.

Recommendation 11: The supreme court should advocate for the legislature to adopt a fee-shifting statute specifically applicable to probate matters. The court should also promulgate a corresponding Probate Rule.

Arizona follows the "American rule," under which each party to a lawsuit bears that party's own attorney's fees unless a specific statute, court rule, or contractual provision provides otherwise. *See generally* State Bar of Arizona, *Arizona Attorneys' Fees Manual* § 2.2 (5th ed. 2010). Statutory authority exists for a judicial officer to award attorney's fees against a party who has appeared in a case and has taken unjustified or abusive action, generally. *See* A.R.S. §§ 12-341.01(c), -349; Ariz. R. Civ. P. 11, 37; *see also* Probate Rule 3 (making rules of civil procedure applicable in probate matters unless otherwise stated or to the extent inconsistent). Moreover, other fee-award statutes can apply in probate matters when, for example, the contested matter arises from a contract. A.R.S. § 12-341.01(a). Currently, however, no statute or rule directly authorizes an award of attorney's fees against the unsuccessful party in a probate case dispute. Perhaps as a consequence, parties and judicial officers often appear unaware that remedial fee provisions and sanction provisions are available in probate matters. As a result, the best interests of the ward or protected person are harmed when the estate is required to bear the expenses of conflicts even though the ward or protected person prevailed in the conflict. The result can be especially inequitable when a dispute is brought by a party with a nominal role in the probate matter.

The best interests of the ward or protected person can also be harmed when the estate is forced to pay fiduciary's fees and attorney's fees incurred as a result of unreasonable demands by non-parties to a probate matter that nevertheless require the fiduciary or attorney to respond. Although the court is authorized to enjoin extreme actions, *see* Ariz. R. Civ. P. 65, which arguably includes the ability to impose a mandatory injunction to order reimbursement of fees to an estate, no authority exists to explicitly authorize a judicial officer to shift the burden of unnecessary fees by ordering the non-party to reimburse the estate.

Adoption of both a fee-shifting statute and authority to permit the court to order reimbursement to an estate by a non-party in limited circumstances would serve the best interests of the ward or protected person by preventing unnecessary depletion of the estate and discouraging persons from acting unreasonably.

The Committee recommends the following statute:

A.R.S. § 14-XXXX. Remedies for Unreasonable or Abusive Conduct

A. If the court finds that a decedent's estate or trust has incurred professional fees or expenses as a result of unreasonable conduct, the court shall order the person who engaged in such conduct to pay the decedent's estate or trust for some or all of such fees and expenses as the court deems just under the circumstances.

B. In a guardianship or conservatorship case, if the court finds that a ward or protected person has incurred professional fees or expenses as a result of unreasonable conduct, the court shall order the person who engaged in such conduct to pay the ward or protected person for some or all of such fees and expenses as the court deems just under the circumstances. In addition, if the court finds the person engaged in vexatious conduct, the court may do either or both of the following:

1. Order that the person is no longer entitled to notice of, and may not participate as a party in, any future proceedings concerning the ward or protected person brought under this title.

2. Order that the ward's or protected person's fiduciary, fiduciary's attorney, court-appointed attorney, or representative has no duty to respond to future requests made by the person for information concerning the ward or protected person and to future court filings made by such person, unless explicitly ordered by the court.

C. Before making a request for a remedy under this section, a party shall notify the offending party in writing of the party's intent to seek such remedy if the offending conduct is not terminated within a reasonable time.

D. The remedies permitted under this section are in addition to any other civil remedy or any other provision of law. The remedies permitted under this section should be made to mitigate the financial burden on a ward, protected person, decedent's estate, or trust incurred as a result of unjustified court proceedings or unreasonable or excessive demands made upon a fiduciary, court-appointed attorney, or representative.

E. For purposes of this section:

1. "Court-appointed attorney" means an attorney appointed pursuant to § 14-5303(C), § 14-5310(C), § 14-5401.01(C), or § 14-5407(B).

2. "Fiduciary" means an agent under a durable power of attorney, an agent under a health care power of attorney, a guardian, a conservator, a personal representative, a trustee, a guardian ad litem, or a representative appointed pursuant to § 14-1408.

3. "Fiduciary fees and expenses" includes the fiduciary's attorney's fees and expenses, as well as the fees of any other professionals hired by the fiduciary.

4. "Person who engaged in such conduct" includes a fiduciary, attorney or representative.

5. "Professional" means an accountant, an attorney, a fiduciary, a physician, a psychologist, a registered nurse, a representative, or an expert witness.

6. "Representative" means a person appointed pursuant to § 14-1408 and includes a guardian ad litem.

7. “Vexatious conduct” includes litigation solely or primarily for the purpose of harassment; litigation solely or primarily to further the person’s own interests rather than the interests of the ward or protected person; unreasonably expanding or delaying court proceedings; court actions brought or defended without substantial justification; engaging in abuse of discovery; and a pattern of making unreasonable or excessive requests for information from a ward’s or a protected person’s fiduciary, court-appointed attorney, or representative. “Vexatious conduct” does not include any of the following:

a. A proceeding brought by or on behalf of the ward or protected person against another person when such other person defends the claim in good faith.

b. A proceeding brought in good faith by a person against a ward or protected person to establish a claim against the ward or protected person.

c. A proceeding brought in good faith by or against the ward’s or the protected person’s fiduciary or court-appointed attorney, including but not limited to a proceeding to establish the fiduciary’s or the court-appointed attorney’s liability to the ward or protected person or entitlement to compensation.

The Committee additionally recommends a corresponding Probate Rule to govern the timing of a request for relief under this statute or any other fee-shifting statute, as follows:

Probate Rule 33(G)

G. Unless otherwise ordered by the court:

1. A request for an award of attorney fees and expenses made pursuant to A.R.S. § 14-XXXX shall not be subject to the requirements of Rule 54(g), Arizona Rules of Civil Procedure, and, instead, shall be governed by this rule.

2. In a conservatorship case, any party wishing to seek an award of fees and expenses under A.R.S. § 14-XXXXX shall make such a request not later than when the conservator files the conservator’s annual accounting for the accounting period during which such fees and expenses were incurred. If the

person against whom such award is sought is a party to the case, the request may be made in the petition for approval of the annual accounting; otherwise, the request shall be made in a separate petition.

3. In all other cases, any party wishing to seek an award of fees and expenses under A.R.S. § 14-XXXX shall make such a request not later than one year after such fees and expenses were incurred. The request shall be made in a petition.

4. Any request for a remedy under A.R.S. § 14-XXXX shall be accompanied by a separate, sworn statement certifying that the party making such request complied with A.R.S. § 14-XXXX.

Recommendation 12: The supreme court should advocate for the legislature to adopt a statute mandating arbitration for disputes concerning the reasonableness of fees of fiduciaries and all attorneys paid from the estate.

Alternative dispute resolution can serve as a cost-effective and efficient method of resolving disputes. Often, the costs involved are lower for the parties, the matter is resolved more quickly than in a court proceeding, and the court's resources are saved for other matters. Currently, many types of civil cases are required to proceed to arbitration. The Committee recommends a similar mechanism for fee disputes meeting certain criteria.

Although the Committee is continuing to debate the language of a mandatory arbitration provision, it is considering something resembling the following:

A.R.S. § 14-XXXX. Arbitration of Fiduciary and Attorney Fee Disputes

A. The superior court shall require arbitration of all disputes relating to the reasonableness of fiduciary fees and expenses and attorney fees and expenses.

B. The provisions of subsections (B) through (K) of § 12-133 shall apply to the arbitration of disputes relating to the reasonableness of fiduciary fees and expenses and attorney fees and expenses under this section.

C. For purposes of this section:

1. "Attorney" means an attorney appointed pursuant to § 14-5303(C) or § 14-5407(B), an attorney representing a fiduciary, or any other attorney who has been, or is seeking, compensation from a protected person's estate, a ward's estate, a decedent's estate, or a trust.

2. A "dispute" occurs when a party has filed with the superior court a written objection to the fees charged by a fiduciary or attorney in connection with a proceeding brought pursuant to this title.

3. "Fiduciary" means an agent under a durable power of attorney, an agent under a health care power of attorney, a guardian, a conservator, a personal representative, a trustee, a guardian ad litem, or a representative appointed pursuant to § 14-1408.

Notes: The proposed statute is intended only to cover disputes concerning the *reasonableness* of fiduciary and attorney's fees and is not intended to cover disputes concerning the *entitlement* to fees. Entitlement to fees is generally a legal issue that typically can and should be resolved fairly quickly by a judicial officer without the need for an evidentiary hearing. In contrast, the reasonableness of fees is a factual issue that typically requires an evidentiary hearing, which can be a time-consuming and expensive process. The proposed statute is intended to

minimize the amount of attorney's fees incurred to resolve disputes concerning reasonableness of fees.

Mandatory arbitration would apply to any fiduciary's or attorney's fees that are sought to be paid or have been paid from the estate of a ward, protected person, or decedent or from a trust, including, for example, the fees of a lawyer who represented a protected person or ward in connection with a personal injury claim.

The Committee further recommends adoption of rules like Arizona Rules of Civil Procedure 72, et seq., which govern arbitration in civil cases. The Committee will recommend these rules in a future report.

3. Notice of Pending Issues

(a) Should all fee requests be approved by the court before payment by the estate? If so, should Rule 33 be amended to explicitly set forth this procedure? If not, should Rule 33 be amended to explicitly acknowledge that payment may be had without prior court approval?

(b) Should the supreme court adopt a rule requiring a case management plan/budget in conservatorship/guardianship cases to be filed at or near the commencement of the matter? What use should be made of the budget/plan? Should such a plan contain a maximum amount to withdraw monthly for fees unless approved by the court?

(c) Should the superior court require quarterly accountings during the first year of a guardianship or conservatorship?

(d) Should the court be authorized to order binding arbitrations, summary trials for disputes, or other alternative dispute resolution procedures? If so, what are the impediments to such a system and how can they be overcome?

(e) Should standard, hourly rates be set for fiduciaries, their attorneys, court-appointed attorneys, guardians ad litem, and their non-clerical assistants?

(f) Should attorneys and fiduciaries be required to disclose their fee schedules and hourly rates prior to commencing an appointment?

Appendix A

Stakeholders Contacted

AARP
Sylvia Stevens
7130 E. Saddleback St., #20
Mesa, AZ 85207
(email blast to all members of AARP and publication in the September 2010 Bulletin which is mailed to AARP members in the western states only.)

Area Agency on Aging
1366 E. Thomas Rd., #108
Phoenix, AZ 85014

Arizona Alliance for Retired Americans
Doug Hart, President
P.O. Box 5661
Goodyear, AZ 85338

Arizona Association of Providers for People with Disabilities
2034 E. Southern Ave., 3G
Tempe, AZ 85282

American Bar Association
Commission on Law and Aging
Charles P. Sabatino, Director
ABA Commission on Law and Aging
American Bar Association
740 15th St. N.W.
Washington, DC 20005-1022

Arizona Center for Disability Law
5025 E. Washington, #202
Phoenix, AZ 85034

Arizona Center for Law in the Public Interest
Timothy M. Hogan, Esq.
Anne C. Ronan, Esq.
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Tucson Office
Joy Herr-Cardillo, Esq.
2205 E. Speedway
Tucson, AZ 85719

Arizona Consortium for Children with Chronic Illness
Karen Van Epps, President
2034 E. Southern Ave., #G
Tempe, AZ 85282

Arizona Fiduciaries Association
Charity Taylor-Antal, Executive Director
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Scottsdale, AZ 85267-3314

Arizona Foundation for Legal Services and Education
4201 N. 24th Street
Phoenix, AZ 85016

Senior Citizens Law Project
1818 S. 16th Street
Phoenix, AZ 85034-5304

Arizona State Planning Council on Developmental Disabilities
Larry Clausen, Executive Director
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Autism Society of America
Greater Phoenix Chapter
P.O. Box 10543
Phoenix, AZ 85064

Beacon Group
Steven King, President
P.O. Box 50544
Tucson, AZ 85703

Council for Jews With Special Needs
Becca Hornstein, Director
12701 N. Scottsdale Road, #205
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Department of Economic Security, Division of Developmental Disabilities
Melissa Kushner
Child Welfare Integration Specialist
Division of Developmental Disabilities
1789 West Jefferson, 4th Floor
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Kim D. Simmons
Director, Staff Development and Training
Arizona Department of Economic Security
Division of Developmental Disabilities
1789 West Jefferson
Phoenix, Arizona 85007

Elder Law & Mental Health
Stacey L. Johnson, Esq.
8877 N. 107th Ave., #302 PMB 618
Peoria, AZ 85345-7474

KARE CENTERS throughout the State

Joanna Marroquin
KARE Family Intergenerational Center
1625 N. 39th Avenue
Phoenix, AZ 85009

Julie Wood
KARE Family Program – Coconino County
906 W. University Ave., Building B, #130
Flagstaff, AZ 86001

Laurie Melrood
KARE Family Center of Tucson - Pima County
4710 E. 29th St., #7
Tucson, AZ 85711

KARE Family Program – Pinal/Gila Counties
2066 W. Apache Trail, #111
Apache Junction, AZ 85220

Sherie Gifford
KARE Family Program – Yavapai County
440 N. Washington Ave.
Prescott, AZ 86301

Virginia Villaneda

KARE Family Program – Yuma County
3780 S. 4th Ave. Extension
Yuma, AZ 85365

Maricopa County Bar Association
Estate Planning, Probate & Trust Section
303 E. Palm Lane
Phoenix, AZ 85004

Mental Health America of Arizona
Barbara A. Dawson, JD – Executive Director
6411 E. Thomas Road
Scottsdale, AZ 85251

National Academy of Elder Law Attorneys
Yvette N. Banker, President
Arizona Chapter
16211 N. Scottsdale Rd., #A6A-485
Scottsdale, AZ 85254

Northern Arizona Regional Behavioral Health Authority
1300 S. Yale Street
Flagstaff, AZ 86001

Pima Council on Aging
Jim Murphy, President & CEO
8467 E. Broadway
Tucson, AZ 85710

Southwest Autism Research & Resource Center
Campus for Exceptional Children
300 N. 18th Street
Phoenix, AZ 85006

State Bar of Arizona
Probate & Trust Law
4201 N. 24th Street
Phoenix, AZ 85016

Appendix B

Workgroup Membership**

Workgroup #1

Minor to Adult Guardianships

Chair: Hon. David L. Mackey
Superior Court in Yavapai County

Becca Hornstein**
Director, Jews with Special Needs

Jon D. Kitchel**
Attorney

Melissa Kushner**
Child Welfare Integration Specialist, Division of Developmental Disabilities

Jay M. Polk
Attorney

Jacob Schmitt
Child Welfare Program Administrator

Kim D. Simmons**
Director, Staff Development and Training, Division of Developmental Disabilities

Hon. Ann A. Scott Timmer
Arizona Court of Appeals, Div. 1

**Pursuant to Administrative Order 2010-52, Committee Chair Ann A. Scott Timmer appointed these persons to the workgroups, although they are not members of the full Committee.

Workgroup #2

Judicial Oversight of Probate Matters

Chair: Hon. Charles Harrington
Superior Court in Pima County

Diana Clarke
Probate Court Counsel, Superior Court in Maricopa County

Hon. Julia Connors
Superior Court in Pima County

Faustina Dannenfelser
Program Administrator, Adult Protective Services

Hon. Gary Donohoe
Superior Court in Maricopa County

Elizabeth Evans**
Probate Court Administrator, Superior Court in Maricopa County

John R. Evans
Attorney

Beverly Frame
Superior Court Clerks' Association Representative

Hon. Robert D. Myers (Retired)
Public/Attorney Member

Marcus Reinkensmeyer**
Court Administrator, Superior Court in Maricopa County

Catherine Robbins
Mohave County Public Fiduciary

Mark Salem
Public Member, Tempe

Sylvia Stevens
AARP Representative, Mesa

Workgroup #3

Fee Guidelines/Fee Awards and Fee Dispute Resolution

Chair: Hon. Rosa Mroz Superior Court in Maricopa County

Diana Clarke
Probate Court Counsel, Superior Court in Maricopa County

Thomas L. Davis
Public Member

Honorable Robert Carter Olson**
Superior Court in Pinal County

Pamela Johnston
Licensed Fiduciary

Honorable William J. O'Neil
Superior Court in Pinal County

Jay M. Polk
Attorney/State Bar Representative

Jonathan W. Reich**
Attorney

Catherine Robbins
Mohave County Public Fiduciary

Mark Salem
Public Member

Denice Shepherd
Licensed Fiduciary/Attorney

Michael D. Strauber**
Attorney

Tico Glavas
Intern

Appendix C

Minimum Best Practices

A. ADULT GUARDIANSHIP CASES

i. Annual Guardianship Reports

1. Order guardian to file annual reports
2. Direct guardian to file the annual report of a guardian at the appointment hearing
3. Set filing deadlines in appointment and in all subsequent guardian report review hearing orders
    a. Judge should warn guardian of possible sanctions for non-compliance with court orders
        (i) Monetary fines, including costs of an alternative fiduciary, assessed against guardian personally
        (ii) Suspension of Letters
        (iii) Removal
        (iv) Fiduciary arrest warrant
4. Provide Annual Report of Guardian forms and filing instructions
    a. In court at the appointment hearing
    b. At the Clerk's office, law library, self-service forms center
    c. On the court's website
    d. At the local bar association office

B. ADULT CONSERVATORSHIP CASES

ii. Bonds and Restricted Accounts

1. Order conservator to post bond, record Letters and give filing deadline
2. Order bond posted prior to Letters of Conservator being issued
3. If no bond, or in a partially bonded estate, order all non- bonded assets be restricted and give filing deadline of Proof of Restricted Account

4. Confirm that appropriate bond has been posted by appropriate tickler such as non-appearance hearing
5. Order appointing conservator should <u>always</u> contain the following warning language: **"<u>This Order does not authorize any transaction. Letters of Conservator must be issued.</u>"**
6. Confirm that conservator accounts are established with appropriate restrictions where applicable
   a. Order conservator to file a Proof of Restricted Account in an appropriate format and give filing deadline
   b. Consider periodic requirement of filing an updated Proof of Restricted Account to confirm balance of funds

ii. Inventory and Appraisement
1. Order conservator to file Inventory and Appraisement within 90 days of the appointment hearing
2. Confirm Inventory is filed by implementing automation of case monitoring event

iii. Annual Account of Conservator
1. Order conservator to file the annual accounting at the initial appointment hearing
2. Set filing deadlines in appointment hearing by implementing automation of case monitoring event
3. Warn conservator of possible sanctions for non-compliance with court orders
   a. Fines - Costs of referral to alternate fiduciary assessed against conservator personally
   b. Suspension of Letters
   c. Removal
   d. Fiduciary Arrest Warrant
4. Provide Annual Account of Conservator forms and filing instructions
   a. In court at the appointment hearing
   b. At the clerk's office, law library, self-service forms center
   c. On the court's website
   d. At the local bar association office

Appendix D

Risk Indicators

The intent of the following list is to identify those situations when more attention to a fiduciary, professional or family member, and/or a case may be prudent. The existence of one or more risk indicators is not meant to imply there are problems. It simply indicates that more scrutiny may be advisable. This list is not intended to be all inclusive, as other risk factors may be evident in a case. [7]

1. No family members
2. Large estate
3. Unprotected assets – unrestricted or nonbonded assets
4. Dispute among the parties, whether family or professional fiduciary
5. Late or no inventory
6. Late or no accountings
7. Late or no annual guardianship reports
8. Inaccurate record keeping, no automation
9. No record keeping
10. Unacceptable accounting practices
11. Disproportionate or unusual large transactions
12. NSF checks or late charges
13. Use of ATMs and/or gift cards
14. Guardianship only appointment but handling assets
15. Health, business or personal problems of fiduciary – professional or family fiduciary
16. Financial difficulty of fiduciary, tax liens, judgments or bankruptcy
17. Difficulty in acquiring bond, especially with a professional fiduciary
18. Failure to renew bond, pay bond premium or bond revoked
19. For the professional, failure to renew license
20. Disciplinary action by a professional licensing agency – family or professional
21. Questionable fiduciary
22. Questionable attorney
23. Fiduciary with limited experience
24. Singular responsibility and control of information by fiduciary
25. Poor or no supervision of staff by professional fiduciary principal
26. Ignore request by court, including OSC

[7] This list was developed by the Arizona Supreme Court, Administrative Office of the Courts.

27. Pattern of rebuffing requests for information by parties or attorneys
28. No court appointed attorney
29. Petition to withdraw by attorney
30. Unauthorized gifts and/or loans
31. Large fees – especially in relationship to overall assets and tasks accomplished
32. No notice to interested parties or lack of documentation
33. Pattern of complaints against the fiduciary
34. Fiduciary exclusively utilizes one vendor instead of a pool of vendors.
35. Transfer between bank accounts, especially near inventory or accounting due dates
36. Professional fiduciary does not maintain written policies and procedures
37. Expenditures not appropriate for client's level of care and market rate for services
38. Payment of interest or penalties in accounting summaries in addition to NSF charges
39. Fiduciary not visiting client when appointed as guardian