Report by Workgroup #3: Blueprint for Dealing with Fee Issues

On April 30, 2010, the Chief Justice of the Supreme Court of Arizona, by Administrative Order 2010-52, established the *Committee on Improving Judicial Oversight and Processing of Probate Matters*, which built upon earlier initiatives to protect incapacitated and vulnerable persons, and directed the committee to make fee guideline recommendations to the Arizona Judicial Council. Workgroup #3 was tasked by the Committee to study and report on this issue.

The workgroup identified many causes that give rise to fee difficulties and concerns in Title 14 proceedings, including but not limited to:

1. Differing expectations on the prudent management of costs;
2. Anticipated costs outweighing probable benefits;
3. Lack of transparency concerning expected compensation, prevailing market rates for compensation, and relative qualifications of professional services in the marketplace;
4. Surprises about the magnitude of aggregate fees and costs, which interested parties or the court did not anticipate before expenses were incurred;
5. Lack of budgeting or disclosure of budgets;
6. Appearance of conflict in attorney-client relationships, when an attorney represents a fiduciary in one protective proceeding but is opposing counsel in another proceeding;
7. Lack of counsel to adequately advocate for protected person following appointment of a conservator, particularly regarding fees and expenses;
8. Lack of common reference points to determine whether fees are reasonable, including common standards on what time or expenses are compensable;
9. Annual accounting forms that are neither uniform nor particularly useful to spot trends, anticipate future shortfalls, or evaluate the fiduciary's performance;
10. Persons taking unreasonable positions in Title 14 proceedings do not reimburse the fees or costs incurred by the ward, protected person, decedent's estate, or trust;
11. Existing fiduciary removal statutes can result in contested proceedings that are contrary to the best interests of the ward or protected person; and,
12. Lack of probate training or experience among judicial officers, attorneys and non-licensed fiduciaries, can increase costs or frustrate the best interests of incapacitated and vulnerable persons.

After extensive study, Workgroup #3 finds that no single approach to fee guidelines, casually described as a "silver bullet", will improve the judicial oversight of probate cases without

creating new and serious problems, such as increased administrative costs, diminished quality of professional services, or underserved populations. For these reasons, Workgroup #3 respectfully recommends a holistic approach to the Committee, as set forth in the following Blueprint:

- COST VERSUS BENEFIT: In any Title 14 proceeding, the fiduciary and their attorney shall prudently manage costs and timely disclose if any projected costs may exceed the probable benefits to the ward, protected person, decedent's estate, or trust; and when appropriate, consistent with due process, the court shall enter or modify such orders as may protect or further the best interest of the ward, protected person, decedent's estate, or trust against costs that exceed benefits.[1]

- TRANSPARENCY ON FEES: In any Title 14 proceeding, any fiduciary, attorney or guardian *ad litem*, who intends to be paid by the estate, shall disclose in writing the basis for their fees (e.g., rate schedule) at the time of their first appearance in the action, such as a petition for appointment, notice of appearance, or acceptance of appointment. Fee changes following appointment are implemented in the same manner as budget approval; see *infra*, *Predictability of Costs (Budgets)*.

  In addition, licensed fiduciaries shall post the basis for their fees (e.g., rate schedule) and uniform biographical information with the Administrative Office of the Courts[2], so the information is readily available for the public and practitioners. If an individual licensed fiduciary is employed by a business that is a licensed fiduciary, the individual licensed fiduciary's disclosure may be made under the name of the business.

  Unless otherwise ordered by the court, any person entitled by law to an annual accounting shall receive a quarterly detailed billing statement from the fiduciary, and/or their attorney's billing statement, within thirty (30) days of written demand.

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[1] The prudent management of costs does not necessarily require the fiduciary to select the lowest cost provider, if reasonable cause exists for a given selection. However, market rates are a proper, ongoing consideration for the court, such as during the initial court-appointment of any fiduciary or attorney, any hearing on a budget objection, and any request to substitute a court-appointed fiduciary or attorney.

[2] The Administrative Office of the Courts may limit the opportunity for a licensed fiduciary to amend the disclosure on an established schedule.

- LOYALTY OF COUNSEL: An attorney shall not be or remain appointed as an attorney or guardian *ad litem* for the proposed ward or protected person, if that attorney has an existing attorney-client relationship with the nominated or appointed fiduciary.

  Absent good cause (such as a prior attorney-client relationship between an attorney and the proposed ward or protected person), a nominated or appointed fiduciary, the petitioner, or their attorney, should not recommend or nominate the appointment of a named attorney or guardian *ad litem* for the proposed ward or protected person.

  In any conservatorship proceeding, unless otherwise ordered by the court, counsel for the protected person shall continue to represent the protected person for the duration of a conservatorship, until and unless the court finds that the cost of continued representation exceeds the probable benefit to the protected person. Counsel for the protected person shall be reasonably and timely compensated, may rely on the integrity of the financial reports of the conservator, and shall bring concerns and objections to the court's attention.

- PREDICTABILITY OF COSTS (BUDGETS): Unless otherwise ordered by the court, a conservator shall file a proposed annual operating budget, after making a good faith effort to consult with the attorney for the protected person and any guardian *ad litem*, which shall include line-items for any compensation and costs to any fiduciary, attorney and/or guardian *ad litem* who intends to be paid by the estate. The proposed first year budget shall be filed no later than the time for filing an inventory, and the proposed budget for any subsequent year shall be filed no later than the deadline for the annual accounting. A proposed budget shall list the general categories of income and expense, in a format approved by the court, which shall be served (typically by mail) on any person entitled by law to an annual accounting.

  Unless otherwise ordered by the court, a proposed budget is approved as filed, without hearing, unless an interested person files a written objection within fourteen (14) days of service of the proposed budget. In the case of an objection, or upon the court's own motion, the court may adopt, modify or reject a contested budget category, but any uncontested budget category is approved as proposed. To amend a budget category, the conservator must give notice within thirty (30) days of reasonably projecting that any expenditure category will deviate from the approved budget by more than 10% or $2,000, whichever is greater, unless a different threshold for amendment is set by the court. A proposed amendment shall be approved in the same manner as the original budget.

  When considering the annual accounting of a conservator, the burden is on the conservator to show good cause for deviating from any approved budget expenditure

category by more than 10% or $2,000, whichever is greater, unless a different threshold for amendment is set by the court. Expenditures that are within this parameter are presumed reasonable and necessary, while expenditures that exceed this parameter are presumed not reasonable or necessary. This presumption is rebuttable by a preponderance of evidence.

- FEE GUIDELINES: Establish fee guidelines to help courts and parties assess whether fiduciary, guardian *ad litem,* and attorney fees are reasonable. Guidelines are a reference point and will address issues, such as whether a fiduciary may charge for clerical tasks and, if so, under what circumstances, so fees and costs are comparable between fiduciaries and attorneys. Proposed fee guidelines are attached in draft form and incorporated herein.

- SUMMARY REPORTING FORM: Replace the current annual accounting forms by adopting a uniform summary report and supplemental schedules, which reflect the same categories of income and expense that are included in the approved budget, presenting the actual operating results of the prior period, the budget and actual results for the period just ended (including a summary of any payables), the proposed budget for the period just beginning, and the projected income and expenses in the following period. Such a report can show trends, actual performance in relation to budgets, and assist with long-term planning. This summary report is supplemented by a history of current year budget amendments, inventory, and transaction log; the transaction log is grouped by categories that correspond to the summary report, which essentially reorganizes the information provided in the current annual accounting forms so it is more informative. A prototype summary report is attached in draft form and incorporated herein.

- CLAIM DEADLINE FOR FEES AND COSTS: In any guardianship, conservatorship, or protective proceeding, unless otherwise ordered by the court, any claim for compensation or costs payable to attorneys and guardians *ad litem* is waived if not submitted to the fiduciary within four (4) months of rendering the service, incurring the cost, or the initial appointment of the fiduciary, whichever is later.

  In any guardianship, conservatorship, or protective proceeding, unless otherwise ordered by the court, any claim for compensation or costs incurred during an accounting period, payable to the fiduciary, is waived if not disclosed in the annual accounting or an amended annual accounting, filed within three (3) months of the due date of the annual accounting.

- FEE-SHIFTING: Implement a general fee-shifting statute for unreasonable conduct, such as previously recommended to the Arizona Judicial Council by the Committee.

- FIDUCIARY SUBSTITUTION: Authorize the court to substitute a guardian or conservator upon a finding that a substitution is in the ward or protected person's best interest, including financial considerations or irreconcilable differences between interested parties, without requiring a showing of misfeasance or malfeasance. Substitution, in and of itself, does not create a reportable event for a fiduciary unless ordered by the court.

- TRAINING FOR JUDICIARY, ATTORNEYS, & NON-LICENSED FIDUCIARIES: Develop standard training curricula, a means for delivery, and training requirements, as approved by the Arizona Judicial Council.