

PUBLIC COMMENT EMAILS PERTAINING TO FEES

If possible, you should compare the number of letters prepared by fiduciaries and attorneys in guardianship and conservatorship cases vs how many get mailed, faxed and revised.

I used to work for a fiduciary. One of the ways they milked the accounts was by many, many more revisions than needed to documents. The person I was secretary would revise every simple letter or document anywhere from 6 to 12 times. Many times, I used a boiler plate letter (one she had previously approved and only names and numbers needed to be substituted) but that individual would again revise it many times billing the client for every unnecessary revision ... before it was sent. This was an incredible waste of time but increase in revenue.

There ought to be some way to catch this trick when you are reviewing their accountings.

Thank you for your diligence in serving the public.

Having worked as both a legal secretary and paralegal specializing in Probate, Guardianships/Conservatorships and estate planning in the State of Arizona I have had the opportunity to observe the "system" from a unique perspective. While there is certainly much to be commended, there is clearly not enough oversight by the Court concerning the management of the estates of protected persons. Private fiduciaries and their attorneys are allowed to pay themselves in advance of approval of their fees by the Court which is neither appropriate nor in the best interests of the protected person. Families of the protected person frequently enter into prolonged litigation - at the expense of the protected person's estate - purely to protect what they consider to be their interest in the estate - not the welfare of the protected person - while the best interests of the protected person go unnoticed and unprotected and the estate becomes subject to waste and dissipation. Further, a considerable amount of litigation arises because the family of a protected person has issues with each other and which have nothing to do with the well-being of the protected person. These matters should NEVER be litigated at the expense of the estate. A more practical way to handle family disputes should be established which could include pre-litigation mediation wherein the parties are required to attempt to settle their disputes within a given, and very limited, time-period after which, if no settlement can be reached - litigation could be commenced, but not at the expense of the protected estate. A non-refundable mediation fee large enough to discourage frivolous or unwarranted lawsuits should be charged to cover the costs of such mediation. Legal or fiduciary fees incurred ONLY on the behalf of the protected person in such a case should be paid by the estate only after intense scrutiny by the court accountant and approval by the Court. Private fiduciaries who are licensed by the Supreme Court of the State of Arizona should not be entitled to charge their operating expenses to the estate (i.e., the mere physical act of sending or receiving a facsimile transmission and/or opening mail, taking a telephone message, etc.), as those expenses are the cost of doing business and should never be paid by the estate. Further, private fiduciaries should never be allowed to create a subsidiary which provides physical care-giving services to their own clients which is (or should be) a significant conflict of interest as it would seem impossible for a fiduciary to provide appropriate fiscal oversight when considering a billing statement the payment of which will ultimately be profitable to such fiduciary.

If one has been reading the articles in the Arizona Republic it appears that there have been serious problems in the probate court particularly with fees and costs of care in connection with certain elderly. While I realize that these problems may not be wide spread, it appears that one commissioner allowed lawyers to collect outrageous fees and also allowed care facilities to do the same. The complaints of her family were apparently ignored by all and remarks made which tended to blame the relatives for exercising their rights to address the situation and this is not acceptable conduct on the part of the court system.

It is apparent there needs to be closer supervision so that this will not be repeated. Also, some adjustment should be made so these people do not have to live in poverty just because lawyers and health care facilities took advantage of them.

Many older people have discussed these problems among themselves, and they have formed a very bad opinion of the probate court and the court system as a whole.

This matter needs to be addressed so it won't happen again.

From what I've seen, the situation with conservators/attorneys for the ward is a corrupt travesty in Maricopa County. Normal aging deficiencies such as forgetfulness seem to be enough to allow the probate to essentially steal the life of senior citizen while the attorneys bleed the estate. I'm an attorney myself and have practiced in Maricopa county for nearly 34 years. The hourly billing fees are obscene with no one protecting the interests of the ward. There is a limit to the value of an attorney's services irrespective of time. You cannot justify dissipating a large percentage of the estate in the name of "preserving" it.

Dear Sirs,

I have personal experience with a lady who has been declared incompetent and is collecting \$650 per month in Social Security. As she is incompetent her \$650 per month is sent to a service company who act as her payee, they look after her monthly rent and utilities for a small fee. She receives food stamps, she is on AHCCS and mental health care with Value Options. It works ok at a very reasonable cost. This is how the poor are treated.

I am horrified to read in the newspapers that a rich woman with \$1,300,000 who got declared as incompetent who went through the probate court system and her care was assigned to attorneys who managed to steal her \$1,300,000 in fees in less than two years, while she did not receive the care that she needed or deserved. Any court system that participates in and allows such an abuse should be abolished and replaced with some other system that protects the incompetent, not sets them up to be rip-off victims.

My experience has been that the legal industry has used the Arizona Probate Court system as a means to simply transfer economic wealth from those incapacitated or citizens requiring

guardianship to the members of the legal industry practicing probate law. First I do not believe that attorneys have the knowledge, education and financial experience to properly manage the financial assets of an individual or estate that is subject to the Probate System in Arizona. I think this function should be assigned to Certified Public Accountants and or Certified Financial Managers. Lawyers should practice only LAW and not be financial administrators and their fees should be limited to a max cap of 10% of the assets of the party or estate being subjected to the probate system.

When the courts assigns someone to take charge of some poor soul, that person should never be an attorney, because of the high fees they charge.

In the cases I have read about, there appears to have been collusion between the judge and the attorneys to enrich themselves. I am glad to see that

you have brought in the members of the public. I hope they are persons of good will, and integrity.

Regarding the Probate Court and appointing and paying conservators and attorneys: (1) Must limit the amount of money paid to both attorney and conservator, and my initial suggestion is why should they be paid more than a public defender? If a judge pro tem is called to sit in a justice court, or the Phoenix Municipal Court, he or she is not paid any more than about \$55.00 per hour. Why should the Probate Court allow more than they are paid? (2) In any event, the estate must be evaluated and an agreed amount set as to what is the value of the individuals estate. Then, the attorney and conservator should not be allowed payment (in full - over the lifetime of the appointment) exceeding more than 10 percent of the value of the estate. AND, the probate court judge should not simply "rubber stamp" the requests for payments submitted by the attorney and conservator. The court, I know is extremely busy, but I suggest someone be appointed by the probate court judge to examine and submit approval and/or disapproval to the court, PRIOR to any hearing for attorney and/or conservator fees. Regulation is sorely needed. What is actually going on, and public perception is that the attorneys and conservators are raping the estates and the probate court is approving it. This has to stop.

County of Residence: ----- Maricopa My Interest is from the following point of view: ----- Other If you selected "Other" above, please give us an idea of your connection to this process: -----
----- Interested citizen Your Comments: ----- Robbing people who are considered "incompetent" by allowing attorneys to deplete their estates through "legal fees" is criminal, and the attorneys involved should be prosecuted!

This should never be allowed to happen again!

It is absolutely outrageous that unsupervised attorneys can rob elderly/incompetent individuals by charging unconscionable fees that are not limited in any way by current law.

Since greed is the primary engine in this country today perhaps it's time to limit how much attorneys and probate officials can legally steal from their victims. Let's simplify the process with primary emphasis on the welfare of the litigant and justified and standard fees on their assets.

Guardian and conservator powers for incapacitated citizens can and have in fact been abused. A citizen's life savings can be quickly depleted by grossly excessive attorney fees somehow permitted by the probate court.

Additional oversight and controls must be established to ensure that conservators actually conserve the assets of the vulnerable instead of being able to absorb them with no one to limit legal costs to appropriate amounts.

The Probate Court process needs to be examined to eliminate waste. Judges ethics and exhorbitant attorneys fees should also be examined.

With sincere concern I believe it is of utmost important that a guideline be set by the State to protect an individual's funds that have been assigned for guardianship or conservatorship.

Cost and/or legal fees guidelines should be part of the process in order to protect the rights of the individual's funds.

There are several issues worth mentioning but the biggest by far is fees charged by fiduciaries and their attorneys. I see the following problems.

1. Failure of fee requests to be set forth in a manner which allows critical determinations. The typical affidavit of fees I see is an affidavit setting forth qualifications and a statement that the attached billing statements are fair and reasonable. Attached to the affidavit are billing statements of variable size. There is no report in the affidavit of what was actually done or accomplished and how much time was directed to each task. It would take 100 hours to comb through these billing statements for a critical review to be done. The burden of proving that the fees are fair and reasonable should be on the fiduciary and the attorney and these breakdowns should be done from the start by the fiduciaries.

2. I see too much extraneous billing which accomplishes nothing other than to line the pockets of the fiduciary and the attorney. The fiduciary is supposed to do the underlying work, not the attorney. The attorney is there to represent the fiduciary in court and to answer legal questions. If a fiduciary needs an attorney to handle all the managing tasks, what is the point of having a separate fiduciary? So I see the fiduciary billing to tell the attorney a problem (which the fiduciary should be handling by him/herself), the attorney billing for the conference with the fiduciary, the attorney then bills for writing the letter that the fiduciary should have written, the fiduciary then charges for reviewing and editing the letter that he/she should have written, then

the attorney charges for making the changes. A simple 10 minute letter becomes a two hour project.

I see fiduciaries charging \$150 - 200 per hour for tasks that do not involve skill such as waiting in line at banks, filing, reading bills and writing checks. Secretarial or filing work should not be billed at all and simple tasks should either be handled by lower billing staff or billed at a lower rate. I see attorneys billing secretarial work as paralegal work. I see attorneys acting as fiduciaries and billing their attorney rates rather than a fiduciary rate and then having another member of their firm be their "attorney" so they get to bill twice.

3. I see attorneys who have been hired by the fiduciary, trying to represent the fiduciary in every legal problem even if the attorney isn't competent or has a huge learning curve on the legal issues. I see hourly billing where contingency billing is more appropriate and vice versa.

4. I see the judiciary abandoning their jobs as the critical reviewers of fee applications and essentially rubber stamping the applications. There are many cases where the judiciary is the only possible objective reviewer (no one else to object) and yet no critical analysis is done.

5. I see the judiciary making it very difficult for an objection to be made or prosecuted. So court appointed attorneys or other parties are afraid to object because they will be put on the spot and/or they are afraid that their objection will only double the fees because the fiduciary and attorney will charge for defending their fees.

6. I see typical arguments made by fiduciaries and attorneys to justify fees such as "family fighting." There always is family fighting and it doesn't mean that thousands more has to be spent. There are professional ways to deal with family fighting and certain litigation does not have to cost tens of thousands. Also, litigation has to be justified. Just because there is a claim against a defendant does not mean that you are justified in pursuing it. It doesn't help to spend \$50,000 in fees to get at \$5,000 judgment.

I don't get this. The Bar has lots of procedures for having competent clients challenge fees including an inexpensive fee arbitration and yet incompetent people don't get as much protection. The process is expensive and potentially dangerous as you may incur the wrath of the judiciary. The bench and bar should be much more diligent at the fees charged against the estate of a protected person.

Fixes: (1) Some fixed billing rates for certain tasks; (2) requirement of the fee affidavits to describe the tasks accomplished and the hours billed against the specific task (much easier to critically examine) and any other specificity required by the bench; (3) the bench should be much more diligent at critically reviewing fees and there should be an easy way to object to fees which puts the burden on the fiduciary and attorney to justify those fees; (4) there has to be easy processes to object to fees: special masters or arbitration or other ways to get this done.

County of Residence: ----- Yavapai My Interest is from the following point of view:
----- Other If you selected "Other" above, please give us an

idea of your connection to this process: -----

----- Retired Pers Trust Executive w/ VNB/Bank One/JPMorgan Chase Your
Comments: ----- Given my close involvement with Probate Court matters over many
years, I followed the series of AZ Republic articles by Laurie Roberts with great interest. The
two cases that she focused on, while extreme in my experience, highlight several deficiencies in
the Guardianship/Conservatorship process in this state, and in particular with various Probate
Court practices.

I was particularly appalled by the Ravenscroft situation, since at one time I was personally
involved with the Ravenscroft family trusts before they were distributed to the beneficiaries,
including Edward.

The most blatant abuse in both of the profiled cases was the Judges' decisions permitting the court
appointed guardian/conservator (Sun) to hire itself, at what I can only categorize as outrageously
high fees, to provide day-to-day care to the ward. This is an obvious conflict of interest, rife with
the potential of over-charging. The easiest way to avoid this in the future is to change court rules
to specifically disallow any and all fees for caretaker services in these circumstances. Do not
give the judge any discretion to allow such fees.

Procedural changes are also necessary to avoid the seemingly exorbitant billings from various
attorney's involved in cases of this nature. There are a couple of possible alternatives. First,
attorneys should be required to apply to the court for prior approval of fees before bills are
submitted to and paid by the Conservator, rather than having their fees approved after the fact as
routinely happens now. Second, attorneys should be required to apply for approval of fees when
they hit a certain threshold (say \$25,000 or 5% of the ward's estate, whichever is greater),
regardless of time elapsed since the last application. Third, all billings which in the aggregate
exceed a second threshold (either a dollar amount or perhaps a percentage of the ward's estate, or
some combination thereof) should require a formal evidentiary hearing, where the judge would
be required to inquire into the reasonableness of the fees in totality, even in the absence of any
objection thereto. I believe the Court should be responsible to proactively protect the interests
and estate of the ward.

Another possible procedural change would be the creation of a special master position within the
Probate Court that would hear all fee requests, whether from attorneys or fiduciaries, and take
this function away from the judge assigned to hear substantive matters. In at least one of the
profiled cases, it seems clear that the judge who had handled the substantive matters in the case
had become too close to the attorneys for one of the parties, to the extent of the prohibited ex
parte communications, and merely rubber stamped hundreds of thousands of dollars in fees.

This same special master could also be charged with periodically reviewing accountings on
"active cases" (1) with significant contested matters, and/or (2) multiple parties and multiple
attorney representations, to assure that, as in the case of Marie Long, the ward's entire estate is
not dissipated before anyone even realizes it has happened.

I would also suggest that in such "active cases" the special master have the authority to require
semi-annual or even quarterly accountings, rather than the annual accountings currently required.
In the Long case, 12 months was enough time for hundreds of thousands of dollars in fees to be
expended.

I am sure that your Committee will identify and consider many worthwhile suggestions to correct
the apparent abuses that Ms. Roberts detailed. Clearly significant change needs to be
implemented to avoid such results in the future, and restore public confidence in the Probate
Court in particular, and our judicial system as a whole.

Consider a board with at least one volunteer taxpayer sitting on each case. Have the same across the board percentage fee allowed. This is a horrible injustice that has been done to so many vulnerable victims and it needs to stop! I personally would be willing to be one of those volunteers.

Although probate is a "necessary" legal process, the thought of having one's entire assets used up by lawyers and a select group of "care provider's" is shameful. The monies saved by the individual should be used for his/her care (a SMALL percentage to the lawyer's) not for lining the pockets of provider's at the expense of the person.

To Whom It May Concern:

The media may, of course, distort reality somewhat; however, it appears that the probate process is broken, allowing trustees or conservators in some cases to plunder the assets of the vulnerable. It's shameful and despicable, yet legal. Help those who cannot help themselves. Remember, just because it's legal does not mean it's moral or ethical.

Reference: "the committee wishes to receive input regarding problems encountered or observed in guardianship or conservatorship cases and any suggested solutions."

I used to work for a private family fiduciary in Arizona. As conservators or Trustees, I observed that they collaborated with their attorneys to milk the estates of their clients and stall settling estates. That fiduciary was usually decent in guardianship cases, however.

If that fiduciary didn't personally like a client, they deliberately tried to drain their assets quickly until there is nothing left to oversee. For example, they'd let an obnoxious client of minimum mental capacity and without a large estate, to buy 50 lbs of birdseed a month to feed the pigeons and allow him the highest\$ cable TV package, and generally let that client frivolously blow through his money, just so they'll be able to get rid of him soon.

If that private fiduciary has a client with a lot of money, that fiduciary is usually reluctant to part with enough money to truly improve the lives of those for which they are conservator. More so if that client isn't bright enough to be able to fight the fiduciary. That fiduciary is stingy with the clients and generous to themselves and their attorneys. They are masters of covering their greedy methods so nobody could legally pin the truth on them.

And that fiduciary LOVED it when an estate had contentious family members! The fiduciary strategically used that as an excuse to stall things, have elaborate meetings that served to feed the contentiousness and bill a lot for themselves and their attorney.

It should stand out to the probate courts when the fiduciary and attorneys receive ongoing, substantially larger fees than the beneficiaries receive in stipends, benefits and/or investments; perhaps on a % of the estate basis.

The courts should insist that the conservators build the estate; or at least not be allowed to drain an estate below a certain point without penalties such as fines or losing the conservatorship to another fiduciary.

The court should receive a copy of all requests made to the fiduciary from the clients. It could help the court better hear and adjudicate the complaints of clients assigned to a conservatorship. The court should be able and willing to re-assign a conservatorship or impose fines if there are ongoing complaints or suspicions of conservators stonewalling or being greedy in their duties.

I was amazed that the courts didn't question the fiduciary and attorney accountings when the case would drag on for years. Why is there no established timeline, or consequences (like fines), for unreasonably going past a timeline to settle estates? Does the court consider whether the estate and beneficiaries remain as solvent as they were when the fiduciary took the conservatorship? I observed a number of "dead" cases that should have and could have been closed. Some cases sit on that fiduciaries books for years with nothing done to or for them. What a shame to see the beneficiaries end up with little or nothing.

I hope the probate court can come up with a way to resolve this thorny problem.

There is a story on the news currently about an old woman who started out with nearly a million dollars and by the time the lawyers were finished with her she was broke. This should not be allowed to happen. Legal fees should be capped at a small percentage of the estate, or a fixed amount, or some other regulating method that prevents this kind of financial transfer. It's a shame that we have to talk about ways to protect people from the professionals that are PAID to protect them from themselves and others. Thanks for the opportunity to vent.

Hello,

My information comes from the newspaper but from what I read the action by the Court concerning those 2 individuals was a crime against them. The one lady who lost all her money to attorneys and is now indigent and the other wealthy guy {REDACTED INFORMATION} who lost much of his money to Court appointed attorneys was appalling. The attorney fees were alarmingly high and in many cases unwarranted, like several hundred dollars to go to the store to get the lady an item. Those attorney fees should be reversed by the judge and a schedule of fees then should be put in place for all such cases after reasonable discussion. Maybe in many cases an attorney is not required at all, just an ordinary taxi driver or something to do that, and I am sure the attorneys charged large fees while having their secretary do the work and charging for the secretary - I had an experience like that in California Probate where I had to pay the attorney, his secretary and another person to do something which in reality was done by the secretary - highway robbery. Possibly attorneys are not really needed in these cases and I am sure the public would respond with a suitable alternative if the Court said they were interested in some public company doing these tasks - attorneys just charge too much and really they should not be in the business of caretaker anyway as they have shown they are poor at it an unreasonable expensive. I am sure they themselves do not do it, they just charge for themselves and then hire someone to do it and charge for that too.

As long as it is an attorney driven process, the cost will be high and lengthy. A Living trust is in the public interest and should be offered by non lawyer providers. As an alternative, fees could be capped at a low percentage of the estate ie 10%.

I have sat in court and observed many hearings, in Yuma and Maricopa Counties, where unlicensed fiduciaries are serving without bond and requesting access to restricted assets. These cases are very costly and cumbersome. They should be held as non-appearance hearings, reviewed by court officials, and only set for hearing if the expenditure requests are questionable. There is no good done to a protected person's assets in having two attorneys and a judge review receipts or quotes in open court.

Thank you for allowing this input. I have practiced exclusively in the probate court for fifteen years and make the following recommendations:

1. If a fee dispute is brought in good faith, then the attorney or fiduciary whose fees are being disputed should not be permitted to charge the estate for the costs of defending the disputed fees. As of now, because the attorney and/or fiduciary routinely charges the estate for such disputes, there is little incentive to reduce fees and so persons who otherwise would like to bring legitimate disputes do not do so because the overall expense to the estate is increased by the dispute itself. However, there are some who would abuse this process and so it would be necessary to guard against disputes not brought in good faith.
2. Fiduciaries and attorneys charging fees that they know to be subject to approval should be required to put the fees before the court no less often than annually for a hearing, initially a nonappearance unless contested, either as a part of an accounting or separately. (Not all attorney and fiduciary fees are subject to court approval. In some cases, they are not subject to approval unless a party makes them so.) In at least one of the highly profiled cases, the fiduciary sought approval of at least two or more years' worth of fees and costs all at once, and during that time it was clear the fees would be contested. Therefore, too much water was under the proverbial bridge before the court ever reviewed those facts. Also, I have seen at least one court appointed attorney deliberately wait for more than two years before seeking approval of his fees because he knew all along they would be contested. Under the current system, some judicial officers believe that the fee issue is not "ripe" until the fiduciary or attorney seeks that approval, and so a party seeing unreasonable charges can do nothing in the meantime. If a party believes that unreasonable fees are being charged, the party should be able to request a hearing for review of those fees even if the attorney or fiduciary has not yet sought such approval. Under the existing rules, a hearing is obtained by filing a petition and requesting a hearing from probate administration and that hearing is set independently of any action by the judicial officer. In a highly profiled case, an attorney kept asking the judicial officer for a hearing and was never granted one, when all he had to do was file a petition and request the hearing from court administration. What is needed is a clear statement that anyone can bring the fee issue before the court with a petition even if the fiduciary or attorney has not yet done so.
3. Guidelines for court appointed counsel were written in 1997 by the probate study committee for Maricopa County and those guidelines should be but are not always observed. Every minute

entry issued in Maricopa County showing appointment of an attorney in a guardianship or conservatorship matters states that the attorney shall abide by the guidelines for court appointed counsel. Among other things, those guidelines require a court appointed attorney to advocate the client's position to the extent the client can understand the evidence and participate meaningfully in the process; otherwise the attorney shall act in the client's best interests (essentially as a GAL but without the title). The guidelines also state that the attorney should not ask for an evidentiary hearing if there is no evidence to support the client's position. All court appointed attorneys should be required to hold to this standard in order to maintain their right to hold a contract. That is not always the case now, and there appears to be no manner whatsoever of reviewing whether they do so or not with the office that grants the contracts for probate cases. Court appointed counsel might, for example, demand additional medical evidence where multiple doctors already agree on incapacity and then insist on multiple evidentiary hearings that have an outcome that all can predict with absolute certainty, all in the name of advocacy. In addition, a disturbing trend has occurred over recent years so that a GAL is now considered necessary in many cases where the client cannot meaningfully participate, even though the guidelines already provide for that situation. I was on the court appointed list for about six years and remember only one case where I felt the judge should appoint a GAL. In that case, I believed that was the only way the judge would hear certain facts that my client did not wish me to share and it appeared those facts were unlikely to come forth otherwise. Now, even though Title 14 requires that specific findings of fact must be made when appointing a GAL, it is extremely common to have both an advocate and a GAL in contested matters, and that brings an additional expense to the estate, especially when they are fighting each other. Litigation expenses would be reduced in many cases by holding the court-appointed attorneys to the written guidelines and appointing GALs only when required.

To summarize:

Attorneys and fiduciaries should not be authorized to defend their fees at the estate's expense as long as the dispute is brought in good faith.

If the fees are subject to court approval, that approval must be sought no less often than annually.

If a party to the case files a petition and sets a hearing related to a request for review of fees being charged by another party or attorney, the court shall hear the case even if the fiduciary or attorney has not yet sought the review.

Court-appointed attorneys should be required to abide by the guidelines for court appointed counsel (at least in Maricopa County) and the office of county counsel should provide a method of review and comment for those attorneys who do not abide by the guidelines, and should not issue contracts to attorneys who consistently fail to abide by those rules.

GALs should be appointed only in cases where it appears to the court that it will not be presented with all the facts necessary to render a just opinion.

Thank you for this opportunity.

Attorneys and fiduciaries should be paid AFTER, their fees are approved, not a year before the accounting is submitted. too many cronies in the system, and the enormous fees are forgotten as enormous.

In my opinion, big problem of the current Probate Courts is that lawyers and fiduciaries take too much (actually unlimited) money from incapacitated people.

They are like vultures, in my opinion.

One way to fix the problem is we put a limit on the attorney and fiduciary fees. For example, maximum 30% of the estate of the incapacitated person is allowed to pay the lawyers and fiduciaries.

Because our current system has no such limit, instead of protecting incapacitated people, we let these un-protected people sucked dry by the greedies.

----- Websters dictionary list a definition of Probate Court as , Guardianship, than it states under guardian, protects or takes care of another person.....so where does it say, strip them of every cent that they own, until they wind up on public assistance. The lawyers and judges that are amassing their wealth from those who have become incompetent should be stripped of their jobs and their dignity as they are doing to others. We should, as a society, treat those, who can no longer take care of themselves with dignity and respect, and not look upon their financial situation as a means to benefit ourselves. Let them pay reasonable amounts for services and continue their lives with the respect due them.

Although probate attorneys need to be paid for their services a reasonable fee should be in place with a cap based on the size of the estate. An example would be in a living trust compensation to the successor trustees typically starts at .50 basis points up to 5% of the value of the estate or a set amount plus expenses. A prudent man rule should also apply. For several probate attorneys to continue to "rape" an estate until little or no value is left for the person or their heirs is horrible. Several Estate Planning attorneys I work with suggest that when a client seeks advice from an attorney and their estate has value above \$350,000, instead of recommending a living trust which avoids probate, they instead write a will which is a list of instructions to the probate court. When the will reaches the court many times the lawyer who wrote the will is asked to probate the will which could be a built in retirement plan for the attorney. I think rules need to be put in place to protect the public as well as the probate court and the state of Arizona. Perhaps additional or new probate attorneys should be considered to represent the public.

----- The problem that pervades our court system in this area is nationwide. The failure of the Supreme Court and Bar to establish true safeguards as opposed to catering to the "in crowd" in the Probate Court system is both unfortunate and damaging to our whole profession.

I suggest we make use of the vast literal "army" of senior attorneys who are for the most part retired or no longer in "active" practice, to act in the capacity of guardians and trustees for these estates at reasonable, but set fees, which would bring both experience and competence, as well as empathy for the citizens they are asked to protect.

I speak as a senior attorney, age 78, who feels competent and yet not employable otherwise due to age, so I speak with some degree of prejudice for the position I represent, and yet I feel my suggestion is not only doable but the right step for our profession. As an "active" attorney, I am

called upon several times yearly to act as an arbitrator, and yet the contribution senior attorneys could bring to this sadly lacking area of law is ignored.

Here is what I have observed. There was no regard as to where my father (He lives with us) and where the attorney appointed was located .if you look at a map, we live in Glendale, AZ and the attorney was in Apache junction, the other end of the world. So when the attorney wanted to visit my dad in would cost us almost 1,000. This is totally lacking in caring and is absurd. The attorney could charge what he wanted and never informed us of any of his fees. The judge should make sure the we are informed by requiring the attorney to let us know what his charges are. The judge should set limits as to what ongoing cost would be. They really rape my father. Probate court should be a good thing but it is not and prays with people who have money and drains them.

Hope this helps.

Name: ----- Phone: ----- E-mail: ----- County of Residence: Maricopa

My Interest is from the following point of view: Other

If you selected "Other" above, please give us an idea of your connection to this process:
Conservator/guardian for now deceased mother

Your Comments: My mother had severe dementia and in order to get her the help she needed, I had to sue her in probate court, because she was then seeing me as her enemy, her court appointed atty would not agree to me as her guardian/conservator and appointed an outside company. The fees and attorney fees were legal robbery condoned by the court system. I finally went back to court a year later and won my case to be conservator/guardian and protect what assets were left. There really needs to be better oversight and a fee schedule that is reasonable, not open season on the assets of the incapacitated, as seems to be the case.

Several years back we had a 16 year old gal from Hong Kong living in our home. She was a high school student at the school my husband taught at. The home she was living in was not able to keep her due to an aging grandparent who needed to be moved in and cared for. We opened our home to the gal from Hong Kong, but we felt we should have guardianship papers drawn up so we could make decisions for her if her parents in Hong Kong could not be reached. We hired an attorney who took care of most of the paperwork. My husband was told that we would have to make payment with a money order, or cashiers check. The attorney told us how much it was going to cost. My husband went down to our bank and got a cashiers check. When he got to the downtown (we lived in Glendale then) where he was to pay for the guardianship he was told it was going to cost a different amount than what the attorney had told us. There was a \$1.00 difference between the two amounts. My husband reached in his pocket and got a dollar bill out to make up the difference. They would not take the one dollar bill, or a person check, and wouldn't accept the cashier's check because it was not made out for the correct amount. The person helping my husband told him to contact his attorney and have the attorney contact them. In the end the attorney sent a check to the courts, and my husband then repaid the attorney with a personal check.

My husband had taken a half day off work to take care of this. Fortunately, our attorney followed through so he didn't have to take another half day off work.

QUESTION: Is this still the procedure used for payment of guardianship? Is there some other way payment could be made with a personal check, or even a debit card tied to a checking account? We thought it very strange that they wouldn't accept cash.

Dear Judge Berch,

I'm disappointed there is no one on the Committee representing the interests of Corporate Fiduciaries. Corporate Fiduciaries would have a different perspective than the private fiduciaries. My concern is that proposed fee guidelines may have the effect of causing corporate fiduciaries to decline to serve in conservatorship or other court-ordered trusts. Corporate fiduciaries already charge their fees based on a percentage of the assets they are managing so there is already a built-in limiting factor. With corporate fiduciaries, perhaps the court could approve the proposed fee schedule at the time of the appointment, thereby allowing the corporate fiduciary to charge their fees monthly as is customary. If the corporate fiduciary wanted to change the fee schedule for a given matter, they could present it to the court for approval at the time of an annual accounting. If the new fee was not approved, the corporate fiduciary could continue to charge under the old schedule or resign in favor of a new fiduciary

Thank you for your time.

Name: ----- Phone: ----- E-mail: ----- County of Residence: Maricopa

My Interest is from the following point of view: Attorney

Your Comments: I believe that if you establish fee limits for attorneys in probate matters, the quality of the attorneys will decline. In no other section of the bar, are the fees set at a specified amount. I also think that being a "court appointed attorney" should not be that individual's main source of income. I believe that every attorney who is a member of the probate section should be asked to serve as court appointed counsel. If the person has a conflict or is unable or unwilling to serve, he/she can decline. The public views the "court appointed" as if the person is a government employee, not a private attorney who makes a living from these appointments. It should be a civic obligation. If the list will remain limited, then assignments need to make sense, ie, where does the court appointed have an office. There is no reason to assign an attorney in gilbert to a case assigned to the northeast court house. That is a waste of the Ward's money. Having said all of this, I think the probate matters work very well. I believe that both the bench and the bar have the best interests of the ward in mind during proceedings. I think the air of cooperation serves everyone in the proceedings well. These are emotionally difficult cases and there is no reason to make them more difficult for the families we serve.

Y:\BOARDS COMMITTEES COMMISSION\COMMITTEE ON IMPROVING PROBATE COURT MATTERS\PUBLIC COMMENTS FROM PCC MAILBOX\Probate Emails Listed Under FEE COMMENTS.docx



ENTRUST FIDUCIARY SERVICES, INC.

LICENSED FIDUCIARY NO. 20545

P. O. BOX 249 YUMA, AZ 85366-0249

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LISA M. PRICE

LICENSED FIDUCIARY

LICENSE NO. 20120

NATIONAL CERTIFIED GUARDIAN

LISA.PRICE@ENTRUSTFIDUCIARY.COM

August 19, 2010

Honorable Rosa Mroz
Committee on Improving Judicial Oversight and
Processing of Probate Court Matters
1501 West Washington Street
Phoenix, Arizona 85007

VIA EMAIL: PROBATECOURTCOMMITTEE@COURTS.AZ.GOV

Re: Workgroup #3: Fee Guidelines/Fee Awards and Fee Dispute Resolution

Dear Judge Mroz:

I was in attendance at the July 30, 2010 meeting of Workgroup #3 and wish to share some of my comments from that meeting.

One piece that appears to be missing from all of the committee meetings is the attempt to determine IF there is a problem with the probate system and to identify the actual problem. It seems to me that we cannot propose solutions to a problem if we have not identified the actual problem. I continually hear members of the committee and the public address articles written in newspapers as their source for identification of the problems with the probate court system, but where is the data? Where is the attempt to actually review accountings/billing statements/processes to determine what, if anything, needs to be corrected? I believe that if the committee continues down this path that recommendations will be made to address problems that do not actually exist and we will miss out on an opportunity to actually improve the probate system.

While I can understand the hesitancy of opening the workgroup meetings to comments from the public, particularly when discussing a difficult topic such as fees, I feel that it is a disservice to the workgroup members, the committee members and stakeholders to not allow public comments. The purpose of a workgroup is to identify and resolve any potential concerns of the stakeholders. Such work should be completed at the workgroup level; not the committee level. The workgroup should be able to flesh out many of the stakeholder's concerns prior to submitting a product to the committee. If we must wait to make public comments or express concerns until the recommendations are presented to the committee, this will result in little to no

Honorable Rosa Mroz
August 19, 2010

stakeholder input into the process. My experience with these types of committees in the past has been that the majority of time the committee will adopt the recommendations of the workgroup during the meeting leaving stakeholders no opportunity to comment until the public comment portion at the end of the meeting which is typically well after the committee has already made a decision. I would ask that you please reconsider this position as I believe that many members of the public would be able to offer constructive input in the process and recommendations of the workgroup.

I have received a copy of the Draft Guardianship/Conservatorship Case Management Plan and would like to offer my comments and recommendations regarding this draft. I understand that Judge Harrington's workgroup may also be considering this document so I have copied him on my letter to you.

In reviewing this document I am unable to determine how this document would benefit the ward, interested parties or the court. Most of this information is already contained in the inventory and appraisal, annual accounting and/or the annual guardianship report. I find it somewhat ironic that there is a recommendation from a workgroup reviewing fees to reinstitute this form, supplying essentially duplicative information, which will result in more fees to the estate.

I believe that a better way to approach this would be to require that a budget be submitted with the inventory and appraisal and annual accounting. I prepare budgets for all of my wards at least annually and more often if necessary. In order for fiduciaries to make appropriate placement and investment decisions they should already be preparing an annual budget for their wards so this approach will not result in any additional fees to the ward. It is a very simple one page spreadsheet which should not take more than 20-30 minutes to complete. I have attached a copy to this letter for your review.

Most of the information contained in the health care/personal care section of the draft plan is already contained in the annual guardianship report. What is not contained could simply be added with one or two additional paragraphs. Again, this would not result in any additional fees to the estate as the fiduciary must already submit this form to the court. I have attached a draft of the guardianship report with revisions to this letter for your review.

Recommending changes to the annual guardianship report and requiring the submission of an annual budget will also address the concern of submitting the case management plan when only acting as guardian or only acting as conservator. Fiduciaries acting in only one role will not likely have access to the remaining information being requested on this form.

Should the workgroup still recommend the establishment of this plan, I cannot understand why it is being recommended that the public fiduciaries and the Arizona Veterans Service Commission be exempt from this requirement. As we all know, the public fiduciaries and ADVS are not exempt from mistakes and wrong-doing. Additionally, there have been very large cases of theft by those offices, just as there has by from private fiduciaries. The belief that the public fiduciaries and ADVS do not manage estates with significant asset value is inaccurate. Many

Honorable Rosa Mroz
August 19, 2010

public fiduciary offices, but particularly the Maricopa County Public Fiduciary, manage estates with significant value. If it is going to be argued that this form would provide benefit to the ward, interested parties and the court, I cannot imagine how it could be argued that such benefit is invalid simply because the case is managed by the public fiduciary or ADVS.

Additionally, should this form be reinstated there would need to be changes made the Arizona Rules of Probate Procedure, Rule 7, to include this document in the list of confidential documents.

There was also a document circulated which contained a number of potential statutory and administrative rules. One proposed statute would be to allow the court (I am assuming the Superior Court as that was not identified) to order an audit of the estate. The Administrative Office of the Courts already has audit authority over licensed fiduciaries and the court already has the authority to order an investigation by the public fiduciaries into cases handled by non-licensed fiduciaries. Such a statute would seem duplicative and place an unnecessary burden on the Superior Court.

Lastly, I appreciate the tone of the discussion with regard to the proposed attorney fee guidelines. I believe that the discussion of the workgroup moved in the right direction during the July 30, 2010 meeting. I particularly agreed with the position that the terms "shall" and "will" be removed from the document as it was to be presented as a guideline and not a requirement. One question I had in reviewing the guidelines and Administrative Order 2010-52 is that the administrative order indicates that the committee is to make recommendations regarding fiduciary fees and court-appointed attorney fees. It appears that the draft being considered by the workgroup goes well beyond the scope of the administrative order as it encompasses all attorney fees.

I appreciate the opportunity to voice these concerns and recommendations. I am happy to answer any questions you or the workgroup members may have about the documents I have submitted for your review.

Best Regards,



Lisa M. Price, NCG
Licensed Fiduciary
Principle Fiduciary for Entrust Fiduciary Services, Inc.

Encl.

CC: Judge Charles Harrington (w/enclosures)
Via Email: probatecourtcommittee@courts.az.gov

In the [Guardianship/Conservatorship/Trust] of [Ward]
Annual Budget

Anticipated Income

Income Source	Monthly Amount
Pension	
Social Security	
Total Monthly Income	\$0.00

Cash Accounts	Value on (Date)
Checking Account	
Savings Account	
Brokerage Account	
Total Cash	\$0.00

Anticipated Expenses

	Monthly Amount
Assisted Living/Nursing Home	
Mortgage	
Home/Auto Insurance	
Property Taxes	
Income Taxes (Federal and State)	
Vehicle Loan	
Supplemental Health Insurance	
Medicare Part D	
Medications	
Cable	
Telephone	
Electricity	
Water/Trash	
Groceries and Personal Needs	
Administrative Expenses (Fiduciary/Attorney)	
Total Monthly Expenses	\$0.00
Excess of Expenses over Income	\$0.00
Total Cash Required for First Year	\$0.00
Cash Available for First Year	\$0.00
Total Remaining Cash after the First Year	\$0.00

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF _____

In the Matter of the Guardianship of <and
Conservatorship of>

_____,

An Adult.

Case No.: _____

Division No. _____

ANNUAL REPORT OF GUARDIAN

Pursuant to Arizona Revised Statutes ("A.R.S.") §14-5315, _____,
("Guardian"), the guardian of <WARD>, hereby submits the annual report as follows:

1. The type, name, and address of the home or facility where the Ward lives, and the
name of the person in charge of the home are as follows:

Type of home/facility:

Name of home/facility:

Address:

Phone Number:

Administrator:

1 2. How many times has the Guardian seen the Ward in the last twelve (12) months?

2 3. The Guardian last saw the Ward on the following date:

3 4. The name and address of the Ward’s physician is:

4 Name:

5 Address:

6 Telephone Number:

7 5. The ward is seen by the following specialists:

8 Name:

9 Specialty:

10 Address:

11 Telephone Number:

12 ~~5-6.~~ The Ward was last seen by a physician on the following date:

13 ~~6-7.~~ A copy of the Ward’s physician’s report to the Guardian is attached hereto as

14 Exhibit A, or, if none exists, a summary of the physician’s observations on the ward’s physical
15 and mental condition is as follows:

16 8. Major changes in the Ward’s physical or mental condition observed by the
17 Guardian in the last year are as follows:

18 9. The Guardian anticipates the following medical services will be provided to the
19 Ward during the next year:

20 ~~7-10.~~ The Guardian anticipates the following change to the Ward’s residential
21 placement during the next year:

22 ~~8-11.~~ The Guardian’s opinion as to whether the guardianship should be continued is as
23 follows:

24 12. A summary of the services provided to the Ward by a governmental agency and
25 the name of the individual responsible for the Ward’s affairs with that agency is as follows:

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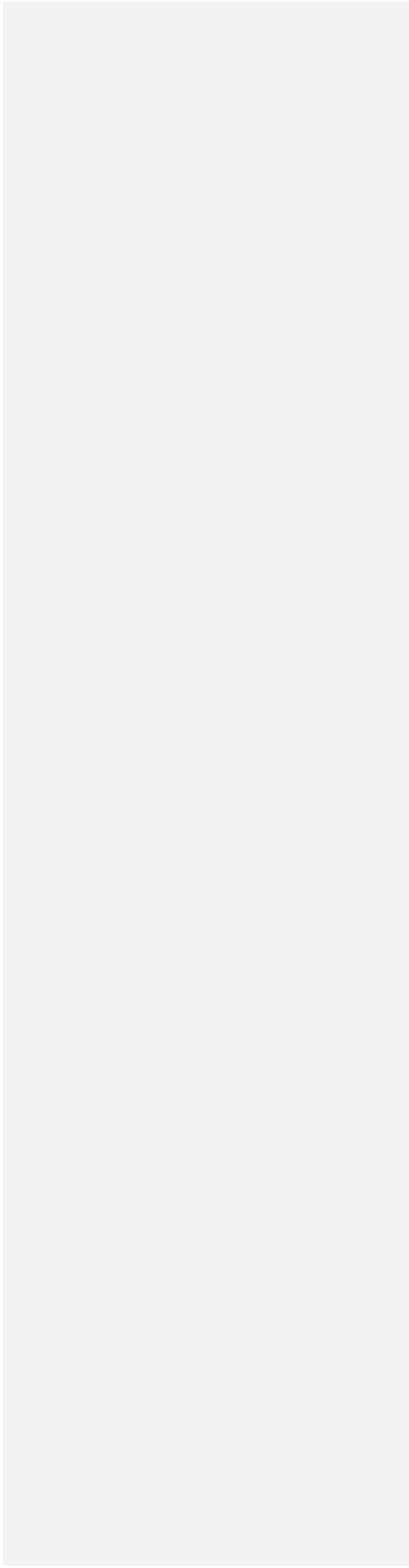
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9.

RESPECTFULLY SUBMITTED this _____ day of _____,

20__.



County of Residence: Yavapai

My Interest is from the following point of view: an advocate for the elderly

Your Comments:

I have been involved in a couple of fiduciary cases. I see no accountability for the fiduciary's actions. In one of the cases, the fiduciary has her husband as an attorney for her fiduciary company. I find this a conflict of interest as they are charging the ward's account for every little piece of paper written. To me it reeks of conflict, putting the ward's money in their own pockets. Although they state that the courts hold them accountable for the finances they spend doing tasks for the ward, I find some of the charges unreasonable. Such as taking the ward shopping and charging 380.00 for 2 hours of shopping or balancing a checkbook that costs 200.00. There perhaps should be someone appointed to make sure that the fiduciary really is acting on the ward's best interest instead of making as much money as possible off of them and then when the money is gone, dropping them.

County of Residence:-- Pima

My Interest is from the following point of view: Fiduciary

Your Comments: - I recently had a conversation with a war combat veteran who had received mental health care. He related that without court notification he was assigned a fiduciary who was charging \$500.00 dollars a month to serve this veteran. He related that this same fiduciary had a number of other war combat veterans as clients. Service to these compensated veterans at that cost is unthinkable. I have researched the regulation of fiduciaries and found that the regulation under a committee of other fiduciaries

County of Residence: Maricopa

My Interest is from the following point of view: My husband and I are conservator/guardian for my 90 year old mother.

Your Comments: When my mother began to show signs of dementia (getting lost while driving, money scams - she sent \$9,000 to Canada, forgetfulness, hoarding, entering every contest/ mailing list imaginable, getting her days and nights mixed up, calling me by another name, extravagant spending, bouncing checks, etc.) I had to go to court to protect what assets she had left. Her court appointed attorney blatantly ignored the reports of her neurologist and the court investigator, and did not speak with the people caring for her in assisted living. Instead, he had her evaluated by a neuropsychologist in Scottsdale. That one appointment cost my mother \$3,000! Also he wanted an outside fiduciary company to handle her finances instead of me - her only

child. For everything the CAA did, our lawyer had to try to undo. This went on for months and months, and lawyer bills increased and increased. Meanwhile, mother's bills went unpaid because I had no access to her money. Finally I was appointed guardian, and my husband a "limited" conservator, which turned out to be worthless. Mother's bank would not honor a "limited" conservatorship. So back to court where our lawyer sought an emergency court order to allow us to pay her bills. Again, the CAA fought that, and would only agree to a 30 day time period for us to access her funds. This has been nothing short of a nightmare! The CAA scrutinizes and questions and objects to everything we do, and in the midst of all this he raised his fees from \$250/hour to \$300/hour! After two short years over \$36,000 of my mother's limited funds have gone to lawyer fees --- that's a whole year of her group home fees at \$3,000/month. My suggestion would be that CAAs need to be monitored VERY closely and there should be caps on fees they can charge...they should be there to protect the ward, not steal from them!!

County of Residence: Maricopa

My Interest is from the following point of view: Am a court appointed guardian for my son.

Your Comments: As a participant in the court guardianship process, it appears that court appointed attorneys have little impact on the care of the incapacitated person. Their fees are higher than private attorneys hired by the guardian to oversee trust funds, daily care, etc. There should be a standard fee schedule for court appointed lawyers and other caregivers.

County of Residence: Maricopa

My Interest is from the following point of view: Attorney

Your Comments: The probate mediation project in Maricopa County, which was in place from about the year 2000 until several years ago, was extremely successful in every aspect but one. After proving the success of the program for approximately 1 1/2 years, the committee that led the project, of which I am a founding member, was unable to persuade the then presiding probate judge (who was not the presiding judge who gave his blessing to the committee) to agree to implement an administrative rule allowing the mediators to be paid from the estates that had sufficient funds to pay them. The program, however, was initiated on the premise that if the value of the program could be proven to the court, such a rule would naturally follow. The mediators, who came into the program with the minimum 40-hours mediation training, took the ADR's advanced probate mediation training (adapted from the University of Michigan at Ann Arbor's Advanced Guardianship Mediation Program) in exchange for volunteering to mediate only a certain number of cases, I believe a dozen. The cases were referred directly from the bench to the ADR division, which scheduled the mediations. After about a year and a half of 75% or better settlement rate for the program and extremely

favorable reviews from the probate bench, the request for the rule authorizing payment was nonetheless turned down flatly. Eventually, volunteer mediators, some by then having done 20-30 mediations, stopped volunteering and the decision was made for the ADR division to turn to settlement conferences done by judge pro tems. The consensus I have heard is that the probate mediation program came to a halt because it was not workable, but it was never intended to be carried by a perpetual stream of volunteer probate attorney mediators, as that is not a rational expectation. The program can be restarted and most of the graduates of the program would return if a payment rule was implemented. Most mediations take one-half day and payment is solely for that time. The participant mediators were for the most part willing to have their fees set by rule and even to volunteer for cases where there were no funds (they do exist) if they could be paid from the estates that could afford payment. The September 26th article in the Arizona Republic noted a considerable drop in mediated cases and this is why. Mediations are largely sought privately, often with attorneys who gained their experience in the probate court's program. Given the significant fees paid in disputed cases, as highlighted in that article, this committee should consider whether the probate mediation program should be reinstated as described in this comment.

County of Residence: Maricopa

My Interest is from the following point of view: Physician, often involved in end-of-life matters

Your Comments:

After noting the article in today's AZ Republic, I feel compelled to put in my "2 cents worth". Two cents is a laughably low amount of money compared to what gets spent at the discretion of public fiduciaries. Having said that, however, I should point out that in my experience the fees that fiduciaries charge the system is ALSO laughably small compared to what gets spent. That is because of the decisions that I see fiduciaries making; prolonging life, suffering --and cost-- in situations where further, usually very expensive, medical care is futile. It is my experience, and that of many other physicians, that fiduciaries ALWAYS tell us to go on with treatments, even in situations where loving, thoughtful family members would make the decision to go to comfort measures. Such decisions result in the spending of hundreds of millions of dollars each year on futile treatments such as ICU care. An often-expressed perception among my colleagues is that this happens because if we go to comfort measures a patient may die a month or two earlier and the fiduciary will lose the monthly fee they get. This monthly fee

is perhaps a more tangible thing for your committee to go after, and certainly less politically charged than addressing the actual decisions fiduciaries make. However -- let's face it -- it's laughably small. It is not the mere amount of the fee but the reward system for fiduciaries itself that I think is the issue. I realize that fiduciaries are charged with acting as the patients' advocates. It is a slippery slope indeed for the state to start interfering with their decisions, (I disagree with much of what Sarah Palin has to say about "death panels", but there is both a valid point and potential for political hysteria in her comments.) Perhaps taking away the incentive to mindlessly prolong suffering could address the matter somewhat without removing the very protection we are seeking for these vulnerable people. That would of course have to be balanced with adequately reimbursing people for often heartbreaking work. It will not serve the greater good to make the job so unattractive that you only attract people who won't do it well.

County of Residence: Pima

My Interest is from the following point of view: Legal Secretary

Your Comments: I have noticed that court appointed attorney's fees are often submitted to the court for payment. Many times the alleged protected ward's family is more than able to pay those fees. There should be some kind of financial affidavit regarding the ward's family financial status for court inspection only that would determine if court appointed attorney should be paid directly by the family or the court. Many many times the ward's family is very well off but those fees are submitted to the court for payment. This is not fair to the court appointed attorneys or tax payers. The responsibility of all fees and costs incurred in pursuing a guardianship or conservatorship belongs to the ward's family or ward himself.

Comments to Committee on Probate Procedures and Fees

The Supreme Court, in convening the Committee on Improving Probate Court Matters, proceeds on presumptions that are not established, and which statistically are likely false presumptions. These presumptions may not be borne out in the experiences of many attorneys who, for many years have made probate related matters the emphasis in their law practices. From this perspective, the Committee seeks to make "improvements" which may not be warranted, and which may add additional layers of proceedings and resulting expenses which accomplishes the opposite of the objectives intended. In the 1970s, Arizona State University professor Richard Effland lead the efforts of the American Law Institute in promulgating the Uniform Probate Code, which successfully streamlined matters related to the administration of Wills and Trusts, and the establishment and administration of guardianships and conservatorships properly within the parameters of constitutional due process guarantees. Since its adoption by Arizona in the mid 1970s, and in light of Arizona's large senior and retirement

populations, the Arizona Probate Code has been used as a model nation-wide for its qualities. Probate related matters necessarily involve family members. Whether in the administration of a decedent's estate or a trust, or the establishment and maintenance of protective proceedings, family of the decedent or prospective protected person, are "interested persons" as defined by A.R.S. § 14-1201(26). However, the factual circumstances which arise in decedent's estate, trust, or protective proceedings are of vast and unlimited variety. Similarly, the actual relationships between family members also cannot be generalized. The history of love, trust, acts and omissions among family members spans the entire spectrum of human interactions. Thus, "family" cannot be generalized, and difficulties in analyzing family dynamics are compounded by the death of the decedent, or by the cognitive diminishment of a proposed protected person. These truths can be confirmed by committee members Judge O'Neill, Judge Myers and Judge Donahoe, each of whom have served as a judicial officer in the Probate Division. It is equally true that some "family," asserting they are acting in the best interests of a proposed protected person or the wishes of a decedent regarding the transmission of the decedent's wealth, are often deemed to be acting in their own self interest in direct contravention of the ward or decedent. If "family" was always best, the courts would have no need for non-family intervention, and court proceedings and resulting fees would be minimized. As these experienced Judges can confirm, that is often not the case. Additionally, legal services are expensive, and litigation increases the legal services required by parties. Attorneys are not related to the decedent or the ward, and have clients to whom they owe ethical duties. While the assets of a ward or an estate may be limited, private fiduciaries appointed, or attorneys retained by fiduciaries to represent such clients in legal proceedings owe no duty to perform any services for free. Those proceedings are within the control and authority of the court to which the matter is assigned. Court filing fees, appearance fees and judicial salaries are not discounted because a ward has modest assets. Likewise, utility bills, groceries, medical services, transportation costs, gasoline prices, repairs and maintenance costs are not discounted in the marketplace in recognition of the limited resources of the ward or estate. Each such service provider, retailer or industry must be profitable or it cannot survive to provide such goods or services. Fiduciaries and their attorneys are no exception. They must be able to pay fair compensation to their employees, and be current on their expenses from the fees charged and received in exchange for the services they render. Mortgage holders, landlords, utility providers, insurers, gas stations, grocery stores, and others have no special discounts for fiduciaries or their attorneys acting in connection with an estate or ward with limited resources. However, such fiduciaries and their attorneys willingly practice in an area in which their fees and costs are subjected to review and scrutiny by the court and to persons legally deemed to be "interested persons," and objections (both meritorious and nonmeritorious) by such interested persons. They submit themselves to the court for its determination of whether such fees incurred and for which approval is requested are reasonable, regarding whether:

- a. The rates charged are indicative of the marketplace;
- b. The services specifically described were warranted; and
- c. The time incurred in performing such services was supportable.

To ensure the interests of the estate, or the ward are protected, and the interests of the beneficiaries, the creditors, and the "interested persons," a knowledgeable and experienced judiciary is an absolute necessity. At best, judicial rotations create instability and inconsistency in the proceedings, which, in the case of some guardianships and conservatorships which can continue for many years, can itself cause an increase in fees and costs, especially if a person seeks to take advantage of the lack of experience of the new judicial officer with the facts and circumstances of the matter, to re-assert claims which otherwise would be deemed meritless. Thus, limiting

the judicial rotations in the Probate Division, and when making such rotations, keeping intact sufficient judicial officers who have accumulated the knowledge and experience to mitigate the adverse effects on both particular cases, and all pending and future cases overall. In the history of the Probate Court, its experienced and knowledgeable judges and commissioners have been extraordinarily effective in properly policing the conduct of fiduciaries (family, public or private) and their attorneys, including ensuring that fees and costs sought to be paid from estates or conservatorships, are supportable, reasonable and warranted by existing law. Any plan by this Committee to remove such discretionary authority from an experienced and knowledgeable judiciary, would not only be counterproductive regarding the objectives sought to be achieved, but will create additional procedures, proceedings, judicial obligations, and more fees and costs, than the status quo. There are always going to be persons, be they close family, remote relatives, boyfriends, girlfriends, long-standing friends, new friends, mere acquaintances, "hangers-on," and others seeking to interject themselves into matters related to the estate or protective proceedings. Sometimes, such persons have the best interest of the estate or ward at heart. However, sometimes they seek to advance their own personal interests under the mere guise of acting for the estate or ward. In both circumstances, such persons always have the potential to be vocal, persistent, sometimes relentless and unyielding even in the face of evidence contrary to their position. Neither a fiduciary nor the fiduciary's attorney has authority to unilaterally:

- a. Deny such person's access to the courts; or
- b. Limit the scope of such person's claims or assertions; or
- c. Limit the nature of the proceedings to adjudicate such claims or assertions.

Such authority is within the sole purview of the court. Arizona's Probate Code grants broad jurisdiction to the Probate Court, including A.R.S. § 14-1302(B). Efforts by the Committee to remove discretionary authority from the court, and to standardize remedies for perceived deficiencies in the Probate Court would achieve the opposite result. No rule changes, or procedure changes, or standardization will have any effect on the necessity of a fiduciary and its attorney from responding to claims, and engaging in proceedings, commenced by such persons. Ultimately, notwithstanding efforts to the contrary, such authority will always remain with the court. We note that there is very little representation on the Committee by individuals and/or representatives of a private fiduciary who accepts requests for appointment from the court to serve as fiduciary in matters involving significant family conflict and discord related either to the administration of an estate or trust, or the establishment or administration of a guardianship or conservatorship. Ms. Johnston has tried very hard to represent the private fiduciary community, however, even her practice is mainly limited to matters that do not involved the level of litigation that have been featured in the news of late. It is imperative for the Committee to understand that private fiduciaries cannot appoint themselves to any case. In such circumstances, the court had deemed the family members and the existing parties to be unacceptable or otherwise disqualified for the appointment, and a private fiduciary is sought either by stipulation of the parties or prayer for relief of one or more of the parties or by the exercise of discretion by the court. Although they represent only a small percentage of cases in the Probate Court, these are the very types of cases which foster vociferous complaints by the very persons whom the court has denied appointment. They are the types of cases which attract media attention and the types of cases in which the court, the fiduciary and its attorneys are subjected to criticism and attack. Such criticism and attacks are generally based on "selective" facts, circumstances, and court rulings. The full record, or those facts which undermine the dubious theme, are ignored. Nonetheless, the estates require administration or the interests of the wards require protection. The courthouse doors are open to any person having standing to bring their concerns to the court by

appropriate petition or motion. If the court does not grant the relief they requested, they can appeal. Neither the court nor the fiduciary or its attorney can limit the ability of such persons to take their complaints to the media, nor can they place parameters on the media's handling of such matters. They generally do so when the court has rejected their claims or assertions. As stated, private fiduciaries do not appoint themselves, and their fees and those of their attorneys are subject to review and approval by the court. Hopefully, it is by the same judicial officer who presided over the matter. In item number 6 of her submission entitled "What Can Be Done to Improve Probate," attorney Candess Hunter asserts, among other things: "Now, the two largest fiduciary companies have gotten much more sophisticated – they and their attorneys do not steal from the protected persons's estate, but "bill" until the Estate is gone, the same end result for the Ward [as theft]. These fiduciary companies often hire attorneys that also are *pro tem* judges in the probate court to represent them, and no one thinks it's a conflict. Often, the incoming judges and commissioners are "trained" by these same attorneys, who *pro tem* and represent fiduciaries in the probate court. Not surprisingly, the Courts Simply rubber stamp this decimating of estates, and seem to think that it is too bad, but there is nothing they can do about it. Everyone seems to think it is ok if the Ward then has to go on public assistance. When fiduciaries get in a dispute with the family, they consistently separate the Ward from their family members, with the Court's blessing." Judges and commissioners in the Probate Division have historically and consistently carefully reviewed Rule 5.7 and Rule 33 attorney fee statements, and sometimes they approve the fees in toto, sometimes they deny fees, and sometimes they partially approve and partially deny fees. It is likely that any of the matters that have received recent scrutiny by the press involve the level of family discord alluded to herein. Further, it is likely that the facts and circumstances involved would provide ample support for the action taken by the judiciary. When a court, or parties, request a private fiduciary in a highly charged case involving feuding family members concerning an estate or a - protected person, the court is literally asking the fiduciary to enter an existing war zone created by the intense and emotional intra-family dispute; and for the fiduciary to become the focus of the ire; the target of the attacks of those previously attacking each other. In this environment, the private fiduciary is to act in furtherance of the estate administration or the protection of the protected person. In this environment, there is no action by the private fiduciary which is not subjected to the scrutiny of the warring family members and the court. However, the mere appointment of a private fiduciary by the court in such circumstances, or even admonishments from the court itself, may not be sufficient to mitigate continuing and costly litigation, and the proceedings necessary for the ultimate judicial decision. It also does not delay or mitigate the expenses associated with the care of an incapacitated protected person. The incurrence of fees, and its effect on the decedent's estate or the assets of a protected person is in the shared hands of two persons in control:

- a. The family members themselves; and
- b. The court.

Often, the private fiduciary is subject to attack irrespective of its decision. This is easily illustrated by item number 5(d) of Attorney Hunter's essay on "What Can Be Done to Improve Probate." Therein, in advocating a fiduciary "code of conduct," she asserts: "d. The fiduciary shall not remove the ward from the home of the ward or separate the ward from family and friends unless this removal is necessary to prevent substantial harm. The fiduciary shall make every reasonable effort to ensure the ward resides at home or in a community setting." With respect to residential placement for a ward, the fiduciary is subject to criticism in any event. To incapacitated adults, any placement outside of their home represents "the unknown," and can initially result in fear and avoidance. However, in making a decision regarding residential placement, a fiduciary

must consider the overall circumstances of the ward and the recommendations of family, medical professionals, cognitive professionals, and financial professionals. While a ward may object to a placement in a group home, or an assisted living facility, regardless of the amenities and benefits, sometimes a fiduciary must select an appropriate option for placement outside of the ward's residence. Professionals may recommend placement outside the ward's residence in order to increase the activities and socialization available to the ward, to stimulate the ward and mitigate his or her continuing physical, emotional, and cognitive decline. From a purely financial standpoint, home placement may subject the ward and his assets to extraordinary expenses associated with in-home care. The ward may initially require only part-time companion care, but if the care requirements increase significantly (perhaps to round-the-clock care, by more skilled care providers), the costs of such care, even for a short period of time, operate as a tremendous expenditure. Such expenses can threaten the ward's long-term financial well-being by exhausting his or her assets and leaving the fiduciary with little or no alternatives other than Arizona Long Term Care System (ALTCS) for the remainder of the ward's life. Under such circumstance, the fiduciary can be criticized for maintaining the ward in his residence, and approving such expenditures for in-home care, on the grounds that exhaustion of such assets could have been avoided by the significantly less expensive "fixed costs" associated with assisted living. The argument is often made that, for far less than the in-home care, that the ward could have been placed in a "high-end" assisted living facility with many perks and amenities which the ward could enjoy which were not available to the ward under residential placement. Significant costs could be avoided, while the ward's life is enhanced. If given fair opportunity the ward would abandon his or her initial resistance to assisted living, and would quickly form a positive attitude about the change and the benefits associated with it. In the alternative, the fiduciary can be just as easily criticized for any appropriate placement of the ward outside of the home, irrespective of the financial, social, emotional and cognitive benefits associated with assisted living. The argument is, "the ward does not want to leave his or her home, and that his or her assets (which the ward has worked a lifetime to acquire) should be applied (and perhaps exhausted during the ward's lifetime) for his or her care irrespective of the costs. Of course, the criticism here is also that the fiduciary opted for assisted living to save the ward's money for the benefit of greedy heirs, devisees or beneficiaries, rather than spending the ward's money for the benefit of the ward (i.e., maintaining the ward's residential placement). To avoid the criticism, the fiduciary may petition the court for instructions – to have the court decide giving the fiduciary the power of a court order for whichever placement is determined. Of course, the court could then inquire as to why it is being asked to make a decision which is within the purview and authority of the fiduciary appointed by the court to make such decisions. This is a fair question from the court, but it must be considered in the context of litigation arising from the decision of the fiduciary (or even the decision of the court) regardless of whether residential placement or assisted living placement was determined to be in the best interest of the ward. Certainly increasing judicial instructions would give clear instructions to the fiduciary, while adding many proceedings to the court's calendar, but it is unlikely that it would mitigate litigation and the expenses associated therewith, especially in matters involving significant intrafamily disputes. While the petitioning fiduciary will simply request judicial instructions, the warring family members will weigh-in creating contested proceedings between them, which by definition will increase fees significantly. Arizona's Probate Code and the current procedural rules are all sufficient to provide protection to estates and to protected persons when private or public fiduciaries are appointed. Such appointments are made by the court based upon evidence, and the actions and fees of such fiduciaries and their attorneys are submitted to the court and

the parties for scrutinization. Under existing law and procedure, the court has full power and authority regarding such matters. Such fiduciaries are required to prepare and submit detailed accountings to the court, the interested persons and the Office of the Court Accountant, setting forth all expenditures including Rule 5.7 or Rule 33 statements setting forth with particularity the fees and costs requested by the fiduciary and its attorney to be paid from the estate. The following are suggestions to remedy the perceived problems for which this Committee was empowered:

- a. Minimize judicial rotations which operate to undermine the knowledge, experience and understanding of probate matters;
- b. Specify that the court's authority under A.R.S. § 14-1302(B) includes the authority to apportion fees and costs in matters which come before it, including the "shifting" or apportioning fees and costs in probate litigation to persons appearing in the matter as the court sees fit. Efforts to compel fiduciaries or attorneys to provide gratuitous services, or discounted rates, will fail to achieve the objectives of the Committee. Efforts to add additional requirements such as additional interim accountings or entitlement to change appointed fiduciaries will fail to achieve the objectives of the Committee. All perceived "ills" forming the basis of the loud complaints of a few persons, are already within the purview of the court. If persons with standing disagree with judicial rulings, the appellate court is available to them. However, if this Committee believes that their efforts, however well meaning and considered, will quiet the few alleging systemic problems in the Probate Division, we respectfully assert that the Committee will be disappointed. It will only have tried to fix something which was not broken. Unfortunately the Committee will be successful in causing the cost to handle a routine matter before the probate court to increase 10 fold for the 98% of cases that benefit from the relative ease Professor Effland had envisioned, all to try and correct the issues with the 2% of cases that are the cause for the current controversy.

Respectfully submitted,

There are two items that immediately come to mind.

1. I think the legal community needs to address the question of over billing by attorneys and other professionals. While the professionals should be fairly compensated for their services, there should be guidelines when those fees are challenged by opposing parties and the court itself. I think that when fees are questioned in most cases, the cost of the objection should be born by the person charging the fees or the objecting party, and not the incapacitated protected person. There are no guidelines in that regard.
2. Consideration should be given to putting in place a rule allowing a licensed professional fiduciary to appoint another agent to serve in the capacity of guardian/conservator when the licensed professional is temporarily incapacitated or indisposed.
 - A. What is an appropriate time period for another licensed professional to step in and help;
 - B. Under what circumstances should there be a required temporary guardian
 - C. Can a licensed professional create a power of attorney to cover for the individual when he or she is away (Tibet, Laos, New Guinea, etc) on vacation and needs someone to make healthcare decisions for her wards during her absence.
 - D. The rules under 14-5301 et seq are scant about appointment of an agent to assist in guardianship decisions.
 - E. Are there duties that are not delegable? I hope these help.

To Whom It May Concern:

I am a solo practitioner in Phoenix, Arizona who does special needs planning and necessarily practices in probate court. I've been in practice in this area for 15 years. I have been awaiting a report and recommendations on these matters so that I may have an opportunity to review and comment. The Interim Report to the Arizona Judicial Council was first made available today, September 7, 2010, the deadline by which to submit comments concerning same. This does not

afford the public sufficient time to adequately review and make meaningful comments to the committee before the Report is presented to the Arizona Judicial Council to act upon this legislative session or with respect to rulemaking this year. I noted several proposals that, in my opinion, are positive but a number that require further investigation and consideration. I am concerned that the proposals are being made in haste and in reaction to a handful of cases that are not the norm. It would be helpful if the committee(s) would identify the specific problems or issues that they are attempting to address. If the committee(s) are unable to identify specific problems or issues other than generally stating that "there is a problem", this brings into question whether systemic problems in fact exist. Surprisingly, the various recommendations will result in increased cost to the estates of protected persons and the courts, which is contrary to what I understood the objectives of this task force to be in part. This will result in a majority of cases brought in probate court ultimately bearing the cost of the minority of cases that are atypical in terms of the resources required, both public and private, to resolve such cases. I truly want to trust the process but find it hard to do so given the timing in terms of the genesis of this task force, and the speed at which the many dimensions of probate are being reviewed and recommendations for its overhaul are being proposed. I trust and hope that the time for public comment will be extended in light of the fact that it is not possible to comment in detail on the many recommendations contained in the Interim Report the very same day that such report was first made available to the public.

County of Residence: Maricopa

My Interest is from the following point of view: ordinary citizen recently experienced guardianship & conservatorship process

Your Comments:

My recent experience with the guardianship & conservatorship process was very expensive. My Mother had basically no estate and no money. I also had no money. But it was very necessary to use an attorney. I could not afford an accountant which ended up costing me more money. I will still be paying for my attorney and my Mother's court-appointed attorney for at least another year, a total of five years. Technically, the documents can be completed and filed by an ordinary person, however, the process is actually quite complicated. The self-help attorney I contacted from the website list was not available. Yes, there must be safeguards for the elderly but there should be an easier process for indigent people.

County of Residence: Maricopa

My Interest is from the following point of view: prior experience with an incapacitated parent

Your Comments:

I found the process to be very expensive, and the attorneys know that, and unless you have alot of money, or more money than the incapacitated parent, you cannot win. I used all my savings and equity in my house, then when I ran out of money, filed on my own till I ran out of money. Once that happened, I lost all ability

to determine what my parents future would be. Also,incapacitated adults are given a 'mini-mental status test' by the attorneys to determine their mental status, which frequently is not the same as an eval from a healthcare professional. Lastly, these attorneys frequently have local feduciaries they refer to for 'doing the heavy lifing' in these type of cases, in housing the parent for instance in a group home for their safety ,and many other reasons to take up guardianship or primary control of the monies of the parent from the adult children, and end up gutting the accounts having their own agendas. There are many doctors locally who are also on the feduciary/attorney payrolls who basically do as they want them to do with regard to the parent.The incapacitated parent gets confused by all the shuffling around in court and group homes, and come to view their adult children as untrustworthy because 'they' let it all happen. The judges in these courts do as the attorneys want and rarely do anything with respect to the adult childrens wishes,and only hear issues with regard to the feduciary wants and needs. The feduciary group comes between the child and the parent, the attorneys take all that they can and leave both parent and child feeling betrayed. It is a horrible process and greatly needs to be overhauled.

Lectori salutem:

1) First of all, there should be a series of articles published in the AZ Republic making it very clear how to avoid getting entangled with the probate court in case one becomes incapacitated. For example, is it wise to make a long list of possible powers-of-attorney, in case one or more cannot serve?

2) If the matter does end up in court, such an incapacitated person basically needs a business manager: this does not have to be an attorney making \$ 300. an hour.

3) The appointing judge should send the request to another (perhaps non-profit?) organization that carries out this type of work and not directly appoint the administrator. The administrator should NOT be in the same professional group as the judge, as for example that SV group.

4) The manager should have a fiduciary duty to his ward: to make the best possible plans for his/her future medical and housing needs and care of his/her money. This manager should earn a modest honorarium for his time. Things like charging a lot of money to go pick up hearing aids, for example, should be forbidden.

5) Wlthin the organization, a supervisor should from time to check on the managers, to be sure none of them are charging exorbitant amounts or neglecting the needs of their wards.

In short, this functionary should come from an organization dedicated to seeing to the needs of the elderly and infirm, and not be a court official.

I hope you on the committee realize how terrifying it is to those of us who will be aging in Arizona to read how quickly your entire estate can be sucked dry if it falls into the hands of the court. I think Laurie Roberts has done an enormous service to the people of Arizona by bringing this all to light.

Personally I have experience only with one particular administrator and that was very damaging: he was extremely arrogant, unhelpful and only interested in the money.

Hopefully you will not be charging me \$ 300/hr to read this e-mail...

County of Residence: Pima

My Interest is from the following point of view: Attorney

Your Comments: There are several issues worth mentioning but the biggest by far is fees charged by fiduciaries and their attorneys. I see the following problems.

1. Failure of fee requests to be set forth in a manner which allows critical determinations. The typical affidavit of fees I see is an affidavit setting forth qualifications and a statement that the attached billing statements are fair and reasonable. Attached to the affidavit are billing statements of variable size. There is no report in the affidavit of what was actually done or accomplished and how much time was directed to each task. It would take 100 hours to comb through these billing statements for a critical review to be done. The burden of proving that the fees are fair and reasonable should be on the fiduciary and the attorney and these breakdowns should be done from the start by the fiduciaries.

2. I see too much extraneous billing which accomplishes nothing other than to line the pockets of the fiduciary and the attorney. The fiduciary is supposed to do the underlying work, not the attorney. The attorney is there to represent the fiduciary in court and to answer legal questions. If a fiduciary needs an attorney to handle all the managing tasks, what is the point of having a separate fiduciary? So I see the fiduciary billing to tell the attorney a problem (which the fiduciary should be handling by him/herself), the attorney billing for the conference with the fiduciary, the attorney then bills for writing the letter that the fiduciary should have written, the fiduciary then charges for reviewing and editing the letter that he/she should have written, then the attorney charges for making the changes. A simple 10 minute letter becomes a two hour project. I see fiduciaries charging \$150 - 200 per hour for tasks that do not involve skill such as waiting in line at banks, filing, reading bills and writing checks. Secretarial or filing work should not be billed at all and simple tasks should either be handled by lower billing staff or billed at a lower rate. I see attorneys billing secretarial work as paralegal work. I see attorneys acting as fiduciaries and billing their attorney rates rather than a fiduciary rate and then having another member of their firm be their "attorney" so they get to bill twice.

3. I see attorneys who have been hired by the fiduciary, trying to represent the fiduciary in every legal problem even if the attorney isn't competent or has a huge learning curve on the legal issues. I see hourly billing where contingency billing is more appropriate and vice versa.

4. I see the judiciary abandoning their jobs as the critical reviewers of fee applications and essentially rubber stamping the applications. There are many cases where the judiciary is the

only possible objective reviewer (no one else to object) and yet no critical analysis is done.

5. I see the judiciary making it very difficult for an objection to be made or prosecuted. So court appointed attorneys or other parties are afraid to object because they will be put on the spot and/or they are afraid that their objection will only double the fees because the fiduciary and attorney will charge for defending their fees.

6. I see typical arguments made by fiduciaries and attorneys to justify fees such as "family fighting." There always is family fighting and it doesn't mean that thousands more has to be spent. There are professional ways to deal with family fighting and certain litigation does not have to cost tens of thousands. Also, litigation has to be justified. Just because there is a claim against a defendant does not mean that you are justified in pursuing it. It doesn't help to spend \$50,000 in fees to get at \$5,000 judgment. I don't get this. The Bar has lots of procedures for having competent clients challenge fees including an inexpensive fee arbitration and yet incompetent people don't get as much protection. The process is expensive and potentially dangerous as you may incur the wrath of the judiciary. The bench and bar should be much more diligent at the fees charged against the estate of a protected person.

Fixes: (1) Some fixed billing rates for certain tasks; (2) requirement of the fee affidavits to describe the tasks accomplished and the hours billed against the specific task (much easier to critically examine) and any other specificity required by the bench; (3) the bench should be much more diligent at critically reviewing fees and there should be an easy way to object to fees which puts the burden on the fiduciary and attorney to justify those fees; (4) there has to be easy processes to object to fees: special masters or arbitration or other ways to get this done.

County of Residence: Maricopa

My Interest is from the following point of view:

Semi-retired attorney working for nonprofits to maximize their bequests and also mediating trust and estate disputes plus occasional expert witness engagements.

Your Comments:

To Workgroups 2 and 3:

Generally, the process works. The bench just doesn't see it. There are a few factors that contribute to the problems that do occur.

First, the replacement of the pre-1974 probate system with its judicial involvement and effective fee cap of 2% meant the judges do not see the routine estates and fees need not bear any

relationship to an "efforts + results" analysis - one, perhaps, but not both.

Second, Maricopa County's policy of appointing a probate judge and, usually, probate commissioners that have no probate or estate planning experience may yield the benefit of no prejudging of cases, but it also robs the bench of any knowledge of the field and how it functions in practice.

The result is that any planned estate is settled outside the judicial system and disputes are mediated, not referred to the bench. Bench sees only messes, usually involving modest estates.

1) Suggest that the probate bench have more hands on probate and trust experience 2) Suggest that a Mar Cty Rule 5.2 affidavit for fiduciaries and lawyers be sent to benes in ALL estate and trust settlements with easy review process.

3) Suggest, in light of 14-5652 repeal of Fickett, Shano etc that some fiduciary protection of benes be put in place.

4) Suggest limits on professional fees for secretarial tasks and overhead.

Hope Committee consults a few estate and trust specialists before conclusion. ACTEC, Bar Section Council, Corp Fiduciary estate settlement officers etc



2010 NOV 29 PM 1:36

November 23, 2010

Members of the Committee on Improving Probate Matters
Members of Workgroup on Fees for the Committee

Re: Guidelines for Determining Reasonableness of Fiduciary Fees

Esteemed Committee Members:

As you can imagine, this committee's work is of great interest to me, since I am a sole proprietor of a small professional fiduciary firm in which 50-75% of my caseload is serving clients in the semi-rural, lower-income area of Yuma. Yuma is an area where there are few resources for individuals and most individuals are not by any means affluent.

I have reviewed many of the committee's recommendations and commend the difficult work that is being undertaken. The one proposal that gives me great trepidation is the mathematical, percentage-based formula that would cap fiduciary fees at a set annual amount based on the size of the estate among other difficult (if not so impossible as to be complete fiction) calculations such as "life expectancy." I can say without a hint of alarmism or exaggeration that this proposal will drive a small firm like me serving people with very small estates completely out of business. In fact, it seems to be a proposal specifically designed to effectively end the fiduciary profession for private individuals and to relegate all but the highest-value estates to the Public Fiduciary offices, because only public offices with a county budget to fall back on could afford to take on the complex cases of neglect, exploitation, hoarding, mental illness, and behavioral disturbance that necessitate a referral to a fiduciary wherein the person served was not so wealthy as to have a virtually inexhaustible estate.

Simply stated: There are *no* "ordinary" cases in which a fiduciary is involved; every case is "extraordinary," or the call wouldn't have been made to our office in the first place. I'll admit to the committee members unabashedly that I could not really even begin to calculate which cases I'd be able to take and which ones I wouldn't under a mathematically-driven, life-expectancy based, estate-sized structure, but I can tell you that, based on the examples of estate liquid assets and maximum annual "setup" fee I have seen come out of the committee, I would never have taken on 90-95% of the cases that I have served on in Yuma County. In most cases, not only do the first year's fees vastly exceed those being proposed under this structure, in many cases the fees can exceed the proposed maximums in *the first month alone*.

Moreover, basing case acceptance decisions on the estate size is quite simply a noxious, disgusting idea to me. Capping fees at a maximum would ensure that only the wealthiest

members of our society were protected by competent fiduciaries, and all the rest would go to firms who will cut corners and provide inferior management or to the already overburdened, under-staffed and under-funded Public Fiduciary offices.

A real life example that I have handled is a case that was a conservatorship only, and it was a case of gross fiduciary breach by a family conservator who had moved the protected person from a contiguous state to Yuma. The liquid assets of the estate at the time the professional fiduciary took over were less than \$100,000, and there was real property valued at about \$140,000. The protected person was seriously mentally ill, in jail at the time of the referral, and had not been set up with any services, medical, mental health or otherwise, by the family conservator which is why the protected person ended up in jail. In the first year, our office had to deal with:

1. Advocating before the Adult Probation Department
2. Paying Restitution and Court Fees
3. Coordinating a place to live, clothing, medications, mental health and medical services, furnishing an apartment within one week's time between the fiduciary's appointment and the protected person's discharge from the Adult Detention Center, all *during the week before Christmas in a small town that in many ways shuts down over the holidays.*
4. Attempts at mediation and concurrent litigation against the former conservator in two jurisdictions in two separate states
5. Dealing with a mental health de-stabilization and re-stabilization, which resulted in an eviction from one care home and re-location to another, all of which the fiduciary firm had to coordinate.

Total fiduciary fees on this case exceeded \$14,000 in the first year. Given all that was accomplished for the protected person and the complexity of the case, this was more than reasonable, especially given that the fiduciary **recovered \$50,000 in a settlement with the previous conservator's surety company.** Even after paying attorneys in two states, the protected person netted over \$30,000 that year as a direct result of the fiduciary's efforts.

There is no consideration for a scenario like this in a flat fee or flat percentage based structure. Under such a structure, I would never have taken the above case; indeed, under such a structure, only the wealthiest people who have been exploited will have a dedicated, competent advocate from the private sector. I do not come from an affluent family, I do not live an affluent lifestyle, and I will *never* base case-acceptance decisions on the affluence of the person needing my help. Quite simply, such a structure will put me – the only professional serving as guardian of persons in Yuma County outside of the Public Fiduciary's office – out of business and will force every person in need of protection onto the already overburdened public office. Implementing a "fee schedule," which this proposal effectively is, will have the unintended consequence of driving all but the most greed-motivated private fiduciaries out of an already dwindling field.

Incidentally, the committee is undoubtedly aware that in 2006 there were only just over 350 licensed fiduciaries in private practice in the state of Arizona, and to date that number has dwindled to just about 275. Given that our aging population is set to explode, the fact that the professional fiduciary industry is not only *failing to grow* to meet society's increasing need but is *shrinking* should be alarming to anyone concerned with the probate system. I would strongly discourage measures that further contribute to this attrition. Without a doubt, flat-fee schedules will hasten it.

I understand the perceived need to implement a simple formula to determine reasonableness, but I would argue that there is no actual need. I would like to believe that by and large the judiciary is competent just as by and large fiduciaries are fair and ethical and are called to do this daunting, difficult, challenging, and – at times – emotionally and spiritually draining work by something other than profit motivation. I believe that a competent

judiciary already has the legal empowerment and intellect to determine what is “reasonable” and I know that the tools are already available to disgorge fees to an estate if they are found unreasonable.

If the committee feels committed to a flat or capped fee type of structure -- *although I feel very strongly that this is a misguided approach that will have disastrous unintended consequences to the very people intended to protect* -- I would implore it to at least incorporate into that a matrix that scores on complexity of the case based on real-world factors, such as:

- **The first year should be excluded for any type of fee-capping structure.** The first year is the one that requires the most work, the most diligence, and the most skill. Often we don't have any idea that a case is going to be complex until we start the formal intake and case set-up. We may think we have a simple case of home-based services for a low-maintenance client whose estate consists of a house, checking account, savings account, and pensions. Once we have legal authority to obtain information, we may discover that there are assets out of state that need to be marshaled which are co-owned by a spouse that we never knew existed; furthermore, we discover that the individual is far more impaired than our initial assessment revealed, requiring far more intensive services. Why should we be penalized or forced to work for free when these types of cases involve small estates? Why should we be penalized and forced to work for free because we are diligent in the first year of our duties? Often the cases that cost the most during the first year stabilize such that fiduciary fees on a monthly basis in subsequent years cost less than the client's Medigap policy. Often the more diligent we are in our case investigation and discovery, set-up, and documentation, the *less the costs are down the line*. Do we really want to set up a system that discourages thorough work?
- **Is the ward mentally ill or suffering from behavioral problems?** These are the most time intensive cases across the board, regardless of estate size. The committee should not set up a fee system that discourages people who need help the most from obtaining protection.
- **How many persons are subject of the guardianship?** In many cases, husbands and wives are managed under a single case filing; it does not make sense to set up a system whereby fiduciaries will be encouraged to file separate petitions for each spouse in need of protection -- unnecessarily increasing fees to the estate -- just so they aren't forced by a mathematical formula to offer a 2-for-1 special on their work.
- **How much community resource drain will continue without proper management?** Private fiduciaries will want to avoid the most challenging cases if there is a cap on fees. Many times these complex, demanding cases involve habitual, repeated contact with police, paramedics, emergency room staff, social services, etc. -- all at a great cost to society. We should consider not just the cost to the estate with proper management, but the cost to the individual and to society without it. A simple formula of life expectancy compared to estate size ignores the often daunting reality of the situations we are called in to untangle.
- **Is there a reasonable chance of recovering stolen, wasted, or misappropriated assets, or did the fiduciary actually recover assets?** In the conservatorship case outlined above, the fiduciary was able to negotiate a significant settlement against an exploiter. Together with my business associate, we have recovered over \$1 million in assets for those we serve in 6.5 years in business. This is a remarkable accomplishment in a low income area of which we are proud. Estate recovery requires diligent discovery, investigation, financial and staff resources. If I can't afford to cover my time spent in investigating due to an annual cap on fees, I will be far less likely to accept cases requiring me to attempt to recover assets; therefore the unintended consequence of such a fee structure will be that exploiters go scot free with the assets they have stolen and possibly continue the exploitation until the incapacitated person is forced into the welfare and Medicaid system. Again, we should consider not only the cost to the protected person's estate with proper management, but the cost to society without it.
- **What results did the fiduciary produce?** Results should not only be measured monetarily. Often the result is that the ward lives longer, takes fewer medications, has a near-100% reduction in hospitalizations, 911 calls, contacts with law enforcement, courts, social services, etc. The person who would have wasted away in unhealthy, unsanitary conditions without fiduciary management lives longer

and indeed the result of that often is that they run out of money. The fact that they ran out of money doesn't necessarily mean the fiduciary charged too much – we can't pick and choose which of our statutory obligations to ignore in order to stay within fee guidelines, and we should not be forced to work for free. Fee schedules should not be calculated based on whether or not the person outlives their money or the finite number of assets owned when the very time consuming tasks the fiduciary is legally obligated to undertake include stopping misappropriation, obtaining appropriate services, cleaning up environmental disaster areas that hoarder homes become, etc. A fiduciary should not be penalized or forced to work for free because they increased a person's expenses due to obtaining appropriate and needed services. The committee should never forget in formulating regulations that we serve *people*, not estates. The actual results to the person served are not in any way able to be valued in monetary terms.

These are but a few of the considerations that should guide any well-considered formula to determine "reasonableness" of fees. The proposal that I have reviewed lists as one of its purposes "to make attorney and fiduciary fees consistent for persons in similar situations." I respectfully assert that the proposal itself would accomplish exactly the opposite ... it does not take into account the "situations" that our wards are in; only their liquid net worth and their life expectancy. It may not be the committee's intent to set up a system whereby a very wealthy paranoid schizophrenic's fiduciary can charge 10x the amount the fiduciary of a similar client with 1/10th the liquid assets, but that's exactly what it appears is being developed. This seems contrary to the spirit of equal protection and equal opportunity that I would hope each committee member, as an American citizen, embraces.

Because I think it's important to offer alternatives to consider when offering feedback that a particular approach is -- although well-intentioned -- misguided, I would like to offer some suggestions on how I have managed to avoid "sticker shock" at annual accountings and so far have not encountered a formal fee dispute:

- **I provide my billing statements, which provide considerable detail about all activities, to the attorneys or designated family members on a monthly or bi-monthly basis with an invitation for them to contact me with any concerns about fees charged or activities described.** This ensures that the attorney has the opportunity to review all activities undertaken on behalf of the client on a regular basis and to understand *why* issues impacting fees are occurring and *what is being done* to address those issues.
- **I provide my fee schedule to attorneys for protected persons, referring parties, and to protected persons who have the mental capacity to comprehend them.** On the occasions where changes are made to that fee schedule, memos are sent out to the attorneys and designated family members. I believe that surprises may be nice on your birthday, but they're not good in business.
- **Billing statements are run and sent out for review at regular, consistent intervals.** The information is being provided frequently in small increments to those in a position to object rather than overwhelming them with information at the end of the year during the annual accounting. If my client's attorney knows I'm charging \$2000 a month but *sees I'm also producing results*, he is less likely to object to my fees at the end of the year. Again, avoiding surprises is often all that is needed to avoid disputes; and often a dispute occurs not because fees were unreasonable, but because they weren't anticipated and aren't understood.

None of the above are required of me as a fiduciary, but they are practices that I feel have helped to improve communication, provide better advocacy, and avoid controversy. Additionally, none of these practices burden the court in any way. I believe that the simple act of requiring the fiduciary to produce a fee schedule and to provide billing statements on a regular basis to designated individuals would do more to unburden the courts than imposing a fee formula wherein there would be more exceptions than not, as virtually every case can be defended by a competent fiduciary as "extraordinary": *All cases requiring a private fiduciary are extraordinary or they wouldn't be in probate court in the first place.*

Furthermore, requiring regular notice to designated individuals would allow earlier intervention in the atypical cases in which unreasonable fees *are* being charged without formally capping fees, because the designated party could ask the court to take action well before the annual accounting.

The committee should give strong preference to solutions that do not involve direct court contact, but provide opportunities for court intervention when out-of-court notifications are not being given. Why should we burden the court with quarterly reports, as has been proposed, when there is no controversy? Requiring reports to be filed with the court increases costs; as professionals we are bound by the Fiduciary Code of Conduct to have an attorney involved to file pleadings with the court. If we can just provide regular (e.g. quarterly) reports on fees charged to designated individuals and allow the individuals to notify the court, *pro-per* on self help forms, if those requirements aren't being met, think of the fees that could be saved?

Likewise, the committee should consider ways in which costs for ordinary filings can be reduced. For example, we all are required to file an annual guardianship report and accounting in a guardianship and conservatorship estate. A non-professional can file those reports *pro-per* whereas the licensed fiduciary has to have an attorney prepare routine reports. This means that the costs to persons served by a professional is increased due to no fault of the fiduciary. The committee may consider suggesting that rules be amended to allow professional fiduciaries to file certain routine pleadings (e.g. 90 day inventory, annual accounting, annual report of guardian) on standard forms without requiring them to be certified document preparers to do so; this alone would significantly reduce costs to the estate.

In fact, this would allow individuals who are currently "falling through the cracks" to be protected: As a professional in my 7th year of business, I can tell you for certain that there is a huge percentage of the population that desperately needs fiduciary protection, but the costs of the statutory requirements of probate process are so great that they would completely deplete the estate, yet the estate does have some assets so both the private and public offices refuse to take it. What happens to these cases is that their assets are wasted until nothing is left and they end up the charges of the public offices anyway, albeit in far more desperate condition; that is *if* they survive that long: Many simply die from self-neglect.

I would also encourage the committee to spend more time gathering data and analyzing it before proposing implementation of radical changes that would have far-reaching unintended, negative consequences not only to the public and private fiduciary profession and the people in need of protection that we would be unable to effectively serve. There appears to be little actual data about the fiduciary profession and the non-professionals serving as fiduciary, and little ability to analyze what data is available. I know that I am not alone in offering to cooperate with whatever statistical studies the committee would undertake.

One study that should be undertaken is a cost comparison of court supervised cases vs. private arrangements. I can assure you that there is no less controversy in private arrangements and probably there isn't any less litigation and/or mediation, but I am 100% confident that an industry wide study would show that administrative costs to the private arrangements are *substantially less* due to the absence of regulations requiring repeated involvement of attorneys and filings and appearances before the court for routine matters that are the product of regulation and oversight. Regulation itself increases costs, therefore the committee should give a preference for recommendations that require communication between parties vs. appearances before the court for routine, non-controversial matters such as when there is no dispute over fees and all parties agree that they are reasonable and necessary.

I know that formulas are appealing on their face because they seem to simplify things, but I would urge the committee to consider the unintended consequences and abandon consideration of the formula that has been proposed. The fiduciary practice is not simple. We don't have any simple answers to the dilemmas we are faced with on behalf of people who cannot solve their own dilemmas. We don't have an easy formula to determine whether or not to pursue a medical treatment or whether or not to try to recover from an exploiter. If we had easy formulas that worked, there would probably be a lot less controversy, sure. But you cannot simplify something as

complex as a human life to a mathematical formula. Likewise, the work we do does not lend itself to simple calculations to determine reasonableness.

As a professional I do encourage guidelines that improve our practice and thereby the best interest of those we serve. Flat, annually-capped fees would, I feel very strongly, accomplish the exact opposite. I urge you to reconsider.

Respectfully,

2010 DEC -8 PM 1:21

December 7, 2010

To the Members of the Committee on Improving Probate Matters
and the Members of Workgroup on Fees for the Committee:

Re: Response to Updated Guidelines from
Hon. Gary Donahoe and Hon. Robert Myers
Dated December 3, 2010.

I appreciate the time this Committee has taken previously with our firm's comments on these issues. Having received a more recent version of the "Attorney and Fiduciary Fee" Guidelines, from the Honorable Gary Donahoe and Honorable Robert Myers, I again felt it important to share my outlook, and the outlook of many of my colleagues on the negative impact of this proposed schedule.

I realize my prior letter inundated you all with a great deal of text and examples, so I will try to keep this reply brief. Particularly, I want to address the argument included, that we've seen repeatedly before, that this type of rigid fee schedule for fiduciary and attorney fees can work because it is analogous to the child support guidelines.

There is of course, a huge difference between the two. Whatever one's philosophical feeling as to a "rough justice" approach on a schedule for child support payments, they are mandatory, involuntary obligations ordered by the court. However, fiduciary and attorney fees are instead fees paid to professional businesses who must voluntarily take on matters. If a fiduciary or attorney determines it cannot fulfill its duties for those set fees, they will simply not take the case.

So, what are the results if this fee schedule provides that no fee is allowable, or the allowed fee is such that a professional fiduciary and/or attorney cannot, as a business, afford to take the case?

1. A client may be left with an appropriate family member as Guardian or Conservator. However, that family member, even if well meaning and responsible, unable to hire an attorney, is much more likely to fail in their duties, prepare an inaccurate accounting, and otherwise cause problems for the protected person. (Or at the very least, increase the burden upon the court system to get that person's obligations straightened out.);
2. A client may very well be left with an *inappropriate* family member, without guidance or counsel, which is even worse;
3. Without the ability to pay for a professional fiduciary, a client with no willing family would then need to turn to the public fiduciary, which would be under increasingly strained resources under this situation and unable to adequately take care of the person;
4. Or, a client may be left with no fiduciary at all, despite being in need of such, leaving him or her without necessary care and oversight. That person would be particularly vulnerable to neglect and lack of medical care, with no one responsible for him or her, and much more in danger of financial exploitation. This is going to be the worst result of these type of limitations, keeping people outside the light of the probate court where there is some oversight and reporting, in the shadows where exploiters can truly drain and neglect them without any voice for the victims.

That is the almost certain result for many individuals in need of the protection of the probate court under this type of rigid schedule. The result of these fee limitations is *not* that the professionals involved will keep doing their job and simply do it for less money. The professional fiduciaries and attorneys who practice in this area may have the best intentions of helping people, but they are not charities, they are professional *businesses*, and that means that if the guidelines imposed by this Committee make it uneconomical for them to accept certain cases, those cases will not be managed. Were these guidelines to pass, each County's probate court would immediately be swamped with cases from which professional fiduciaries are immediately resigning, and/or many other cases where the necessary services of an attorney would no longer be available to an individual fiduciary. I ask you all to consider this impact on the protected parties and the courts.

This results in a terrible impact for the individuals the probate court is supposed to protect, as well as ultimately increasing an unmanageable burden on the court themselves. This does not serve this Committee's purpose of protecting individuals from waste, neglect, and exploitation; instead it will lead to unintended, but no less real, increases of all of those situations.

I know, certainly, from reviewing the publicly posted comments for this Committee on its website, as well as those posted to the interrelated newspaper articles, the loud voices of those complaining about the utter corruption of the system, with the increasingly prevalent suggestions to

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Page 3

“kill all the lawyers” and “abolish the probate court.” I know from the viewpoint of those individuals, ANY “resistance” on behalf of lawyers or fiduciaries to proposed changes such as this fee schedule is nothing more than obstructionist self-interest, perhaps even evidence itself of our dishonesty. No words, explanation, or arguments I could make could ever convince such people otherwise. I do not believe, however, they represent the public at large, or the majority of the clients and individuals with whom we work.

I ask all of you to consider the recommendations of the fee workgroup, and the viewpoints in this letter, as to what is a reasonable way to address the problems in the probate court, as opposed to a fee schedule which will make things so much worse for the people we are all charged with protecting.

Sincerely,

November 15, 2010

2010 NOV 16 PM 1:05

Re: Committee on Improving Probate Matters

Dear Ms. Swetnam:

Enclosed is a letter I sent to the members of the Committee on Improving Probate Matters on Friday, November 12; Because I am unable to obtain the addresses for the members listed below, I am asking that you please forward the enclosed letter to them.

You may send this letter, and/or publish or provide it to any other interested parties, with my name on it and I ask that it not be made anonymous or be provided anonymously.

The names of the committee members are as follows:

Catherine Robbins, Esq - Mohave County Public Fiduciary;
Jacob Schmitt - Child Welfare;
Mark Salem;
Thomas L. Davis; and
John R. Evans, Esq.

Thank you for your time.

Enclosure

NOV 16 11 05 AM '10

November 12, 2010

Committee on Improving Probate Matters
Attn: All Members
Arizona Supreme Court

Dear Committee Members:

Enclosed is a letter I submitted to the AJC a few weeks ago in response to this Committee's Interim Report. In talking to some of the members themselves, I realized this letter may not have been circulated to all of you, or may have been provided anonymously. I apologize if you have already seen this letter, but I wanted to make sure all had received it.

Our firm has represented clients for twenty-six years in the areas of estate planning, probate, trust administration, elder law, and fiduciary representation. Our firm is also a licensed fiduciary, with a significant portion of our practice involving acting as guardian, conservator, trustee, and personal representative.

Please consider the comments in my letter as you consider both the "big picture" as well as the details of your recommendations. I also have recently received the proposed fiduciary fee schedule which is being considered, and I will be providing all of you with a detailed response to that proposal very soon.

Please let me know if I can answer any questions or provide further information. I, and many of my colleagues, both within and without this firm, are extremely interested in the results of this critical process, and look forward to having whatever input we can.

Thank you for your time and consideration.

Enclosure

October 14, 2010

Arizona Judicial Council
Arizona Supreme Court
1501 West Washington
Phoenix, AZ 85007

RE: Committee on Improving Judicial Oversight and
Processing of Probate Court Matters

This response, on behalf of the attorneys at our law firm, is to the October 2010 Interim Report from the Committee Improving Judicial Oversight and Processing of Probate Court Matters, to the Arizona Judicial Council.

Our law firm practices in the area of probate, trust administration, guardianship and conservatorship, special needs planning, elder law, estate tax issues, and regularly serving as a licensed fiduciary. The firm has been in existence for 27 years, three of the attorneys are licensed fiduciaries, three of the attorneys have passed the exam and have submitted applications for licensure, three of the attorneys are certified specialists in trust and estate law by the Arizona board of legal certification. Our combined practice involves the issues being addressed in these reports.

While I fundamentally address the need and approach for new rules, I will say that having served on various State Bar committees and similar organizations, I recognize the effort and time that has gone into what this Committee addresses.

Comments on Fundamental Approach

While I fear a Committee that has spent too much time and done too much work to completely reassess its overall need and approach, I have to comment on the overall need for comprehensive reforms, rules, and regulations to address the perceived problems. Put bluntly, the impetus behind these needs is based upon a few of the worst cases out there, there are plenty of existing rules and statutes that could have adequately addressed the problems that existed in those cases, and if those rules and statutes weren't enough, then a sweeping new fabric of rules still isn't going to eliminate these problematic situations.

When I speak of impetus, I of course cannot ignore the repeated columns in the Arizona Republic authored by Laurie Roberts regarding two or three egregious Phoenix cases, which are extrapolated to find that the system is fundamentally flawed. Reading the comments posted to her articles I find an almost uniformly consistent tone of angry individuals expressing sweepingly virulent conspiracy theories about the system which, based on in depth individual experience, is completely inaccurate and unfair, and yet is becoming the driving force to determine an unnecessary level of additional policy and procedure. I know from reading such comments that any possible defense is nothing more than the crooks in charge of this fraudulent system keeping a good thing going by hiding from the public eye. and I'm sure this letter would be seen by such commentators as a good example of that.

In the 16 years that I have personally practiced law in this area. I have seen an ever increasing number of forms required in conventional probate matters, doubling the amount of pleadings in any given case from when I first started. And yet, apparently the problems with the bad apples in the system hasn't been solved, or there wouldn't be the need for the focus of the Committee. I ask all of you to deeply consider whether, given the nature of human beings in these situations, these rules are going to help the perceived problems, or whether they are going to add another layer of complexity that drives up fees and costs for everyone (including the 95% of the situations where family members or other trusted individuals take on the difficult role of legal responsibility for an incapacitated individual, follow the rules, look out for the best interests of the protected person, and do not get involved in litigation).

While there are and always will be attorneys, fiduciaries, family members, and other human beings who are dishonest, unprofessional, unfair, ineffective, wasteful, and violate fiduciary duties, this is something that cannot be completely avoided when there are human beings involved, and I can guarantee that the additional set of rules you propose will not eliminate them, and I doubt they will substantially reduce them.

I believe another fundamental difference I have with the impetus behind the proposed changes is the concept that the probate judges don't have every tool necessary to manage these cases, reduce fees awarded, limit litigation, etc. I have never doubted for a second, nor has any attorney I worked with, that the court has the power to reduce an attorneys or fiduciary's fees charged against a protected party's estate if they are excessive and unreasonable. The court's power to issue a fiduciary arrest warrant, and the fact that we have seen fiduciaries jailed for wrong-doing has never left me any doubt that the court has the ability to address the "bad apples" in as strong and effective a manner as necessary. If this is not being done effectively, rather than a wide-cast new set of rules and regulations, some appropriate training for judges and commissioners to address these situations more effectively and cut-off problems would be a much more effective means of addressing such issues.

I feel without doubt that whatever the variations put into effect by this Committee, to the extent they are another layer of complexity added to the existing statutes, state uniform probate rules, fiduciary licensing rules, will have one result, and that is not to eliminate the problem cases, but to drive up cost, time, and difficulty for all of those who seek to assist those who are incapacitated through the probate court. I do not question that this Committee has the best intentions, and good

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ideas as to what should help these situations, but in reality, I believe it's the unintended consequences which will be realized without accomplishing the goals. However, in your recommendations themselves there are directly and indirectly referenced costs for such programs.

Specific Comments on 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.

This recommendation seems to take the court's required level of oversight to a rather ridiculous level. To essentially presume that each guardian appointed may be surreptitiously putting their ward in a position of possible neglect or danger is an approach I do not think appropriate, efficient, or workable. The thought that, after everything that goes into the guardianship selection and appointment process, for the person who seeks the correct legal process and pursues guardianship, to be subject to the intrusion, interference, and attendant expenses of these random visits in the hopes of catching some incident of wrong-doing is terribly misplaced. As we know and can imagine, the cases of physical neglect are most likely to take place by someone not acting as the de jure guardian. This is an additional burden that the probate system, the families, and the protected parties do not need.

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.

This rule seems to assume there is not adequate reporting and monitoring requirements for conservators. In addition to the annual accountings, which are subject to the additional scrutiny of a court accountant in Maricopa County, we are required to provide copies of statements delivered to the judicial officer. Also keeping in mind that each conservator must be bonded for any unrestricted assets, there are more than appropriate levels of monitoring and oversight available. To add yet another layer is, again, to increase the cost to the taxpayers, the cost to the families, and the costs to the protected parties.

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

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

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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 postappointment visitations and reports to the court, and imposing fees on fiduciaries who belatedly file required reports.

As indicated above, without becoming an exhaustive scholar of the problematic cases in the Maricopa County Probate Court, it seems a significant issue were the fees charged. I find it disturbing that the Committee is considering so many steps that will increase the costs for protected persons and their families, to deal with the 1% or 5% of "bad apples" that they may or may not catch through such methods. Whether it is direct fees such as proposed here, or additional time charged by the attorney, professional fiduciary, or otherwise, the combined result will be a significant addition to the cost of all procedures, and I believe that is inappropriate and unnecessary.

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

As indicated above, I do think this is a good idea, because without creating additional rules, and at hopefully a relatively minimal and indirect cost, the judicial officers can not only learn or brush up on the basics of the law, but work on effective strategies to avoid the problematic results in those messiest of litigation cases.

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

This requirement, however, is redundant and unnecessary. The courts now require each appointed fiduciary to sign a "General Order" instructing them as to the highlights of their various duties. Fiduciaries represented by an attorney have that guidance. To add yet another level of mandated training, for every family member who gets appointed as a Personal Representative, will make the process more cumbersome and/or more expensive. Selfishly, this would probably help licensed fiduciaries because it will provide disincentive for family members to serve, but despite the fact it might bring our law firm more business, I don't believe it is the right thing to do.

(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

The recommendations here seem at cross-purposes. At one point, you are going to require additional fees for more oversight and scrutiny. At the same time, you try and encourage individuals to try "self-service" rather than have legal representation, which is truly necessary to understand the specifics of their duties as they apply to the case at hand. This type of approach is one that will lead to more of the problems and errors the system attempts to avoid.

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

As a law firm, it is likely this method of payment would increase attorneys' fees received. Again, just because that would be in our best interest, does not make it right. In every state that has developed some schedules of "maximum" fees or otherwise, those have without doubt become "minimum fees." The method of calculation would determine this for certain, but even if such maximum fees somehow provided a beneficial limit in the problematic cases, it would raise the fees involved for all the simpler cases for which the families and beneficiaries might otherwise pay less. Again, unintended consequences and more expenses for the families, the protected parties and the estate.

The complexity of factors expressed in the Committee's discussion highlight the difficulty in coming up with a "simple" "common-sense" fee that will fit every situation. The judges and judicial officers have power to adjust fees, and I believe all practitioners in this area have been involved in some case where the court had to address the reasonableness of fees and whether they should be reduced or not. As a fiduciary, and as an attorney, I always feel my fees are subject to scrutiny and possible questioning. Why isn't that sufficient?

It is possible, of course, that the fees involved will be "capped" in such a manner that they are far below the level currently being charged, and, in such, actually reduce fees the attorneys and fiduciaries are paid. That will, of course, lead to many better practitioners changing their area of practice away from such an area with an artificial fee level, and, while some on the comment boards would herald this as a great triumph, I believe it will lead to people not being served.

If there are maximum hourly rates charged, etc., you are either going to (a) ensure every attorney's rate is that maximum rate, even if it would have otherwise been less in the open market, or (b) drive out some of the better attorneys who feel their appropriate rate is higher. Either would assume that every attorney's ability, efficiency, skill, and background are equal, and I do not believe that to be the case, and if the maximum amount charged is capping the hourly rate, it encourages those who take longer and draw out their work over those who can more efficiently accomplish the goals for their clients.

Again, the strongest argument against this is the "success" it has in any of the states that have schedules of fees and, in every case, that means more money ultimately going to attorneys and fiduciaries. So, if against our protestations and recommendations, such guidelines are established, you will probably benefit firms like ours across the board. Once again, the fact that this would personally benefit us, does not make it the right thing to do.

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.

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Of course, this concept is already provided for in statutes, such as A.R.S. §§ 14-5314, 14-5414, and 14-11004(B). While there can be such benefit to such a statute, it requires the judicial officer to appropriately effect it, and as noted, there already exist substantial tools at their disposal already. And, keep in mind in almost any significantly contested case, it would result in an additional layer of litigation determining whether to apply the English rule on attorney's fees, which will ultimately increase the amount of fees charged. Although the fee shifting could charge those against a "wrong" party, if that really can be determined, much of that will still typically come out of the protected person's estate.

Conclusion

I will say unabashedly that I am proud of the work our law firm does. I believe we have built a successful, professional business assisting families and individuals through some of the most difficult events and stages of life, whether as an attorney or as a fiduciary. I have seen tremendous benefit provided to our clients and their families and beneficiaries through our services.

Furthermore, as self-serving as that sounds, I see the same general tenor in the professionals serving in this field with whom I have worked for many years, attorneys, fiduciaries, and otherwise. No one individual is perfect, nor is any particular field, but I do know that the ugliest cases brought to light in the newspaper articles are the aberration, not the rule, and it is disappointing to feel policy driven forward for everyone based on those situations, as if an additional layer of rules and regulations could solve the fundamental problems of such a situation.

I respectfully request looking at most of the proposals, to consider whether the unintended consequences of greater costs and fees to clients, or to taxpayers, is going to greatly exceed any potential benefits.

Thank you for your consideration.

CONFIDENTIAL
2010 NOV 19 PM 1:08

November 18, 2010

Re: Letter regarding Fiduciary Fee Guidelines

Dear Ms. Swetnam:

If you could please pass a copy of the enclosed letter to the following Committee Members, whose contact information I do not have. I would greatly appreciate it; and as previously, please include the full copy of our letter, with our name and information when forwarding. You can also post or provide this document as a public comment, with our contact information intact.

- Catherine Robbins, Esq. - Mohave County Public Fiduciary
- Jacob Schmitt - Child Welfare
- Mark Salem
- Thomas L. Davis
- John R. Evans, Esq.

Thank you very much for your time.

Sincerely,

Enclosure

November 18, 2010

To the Members of the Committee on Improving Probate Matters
and the Members of Workgroup on Fees for the Committee:

Re: Fiduciary Fee Guidelines

This letter is in response to the recently proposed “Fiduciary Fee Guidelines” where a specific fee schedule is proposed for all fiduciaries.

We have followed, with great interest, the reports and progress of this Committee and its Workgroups in its goal of improving the probate court process, and considering the best interests of those persons in need of protection. With regards to the consideration of streamlined proceedings for minor-to-adult guardianships, and similar proposals, we can see great benefit for the individuals who turn to the court to help them care for their family members with special needs.

Additionally, having reviewed the “fee shifting” and related statutes that have been submitted to the legislature, and which we understand have their genesis in this Committee, we believe that you have provided a valuable mechanism to address and hopefully avoid the worst probate cases, where estates and trusts have been unnecessarily dissipated and consumed through litigation fees and expenses. That approach seems the most direct and effective way to address the problematic matters we have seen and which have received great publicity.

However, in addition to concerns we have shared previously about some of the issues this Committee has addressed, having recently received a proposal regarding a fixed, maximum fee schedule for all fiduciaries, we have even stronger concerns about that proposal, both in basic principle, and in its implementation.

While we know this Committee’s goal is to preserve the best interests of those in need of protection, and to make sure the court has sufficient resources to adequately address its duties, we feel strongly that this type of maximum fee schedule will not serve those purposes. Completely putting aside any interest that the attorneys and

professional fiduciaries have in such limits, the result of such fee schedules will be a loss of appropriate services, fiduciaries, and court supervision for the protected parties, and ultimately work tremendously against the best interests of those this court is tasked with protecting. Additionally, these results will mean more problems, more unrepresented parties, and more exploitation which will ultimately find its way to the probate court, and that means that the burden on the court system will far exceed any judicial resources putatively conserved through a streamlined, fixed fee determination.

We can understand the appeal of having a simple means of accurately calculating a fee to avoid disputes and have a bright line rule. However, despite that sounding easier, both the specifics of the "Fiduciary Fee Guidelines" proposal, as well as the general idea of any rigid type of price controls on fiduciary or attorney fees in this system, are things that will ultimately wreak great harm upon the system and upon many of the people it is intending to protect.

Please do not take our strong recommendation against the proposed types of fee caps to mean that every fiduciary should be the final arbiter of his or her "reasonable compensation." That is not the law and situation now, nor should it be. Interested parties can raise objections to the fees, and judges, either sua sponte or in light of objections, can consider the reasonableness of such fees, all of which are currently required to be filed with affidavits.

We have never doubted that the court has the power to reduce an attorney's or fiduciary's fees charged against a protected party's estate if such fees are excessive and unreasonable. Streamlining factual determinations of "reasonableness" through arbitration, or developing procedures for the judges to consider these issues more efficiently would be far better solutions to address concerns or arguments over reasonableness, especially when the ultimate power is already with the court under existing statutes and rules.

Given the number of cases for which there is a need for a fiduciary to serve, and given the vital role in which fiduciaries (including individuals, businesses, or the public fiduciary) serve to ensure the best possible care and living for vulnerable residents in our state, it is essential that fiduciaries be fairly compensated for their time and efforts. There are many cases in which a professional fiduciary is very valuable to the ward or protected person such as:

- A. Many persons have retired in Arizona and have no one else nearby to serve in such roles;
- B. Many children or other family members are too busy or located too far away to serve in this vital role;
- C. Family disputes can often be resolved by having an independent party to serve as fiduciary to lessen family tension and conflict;

- D. Professional fiduciaries have the skills and knowledge of the community and its resources to immediately fill the fiduciary role, often in emergency situations; and
- E. A professional fiduciary is the advocate for the vulnerable person, attends physician and other appointments, makes placement decisions, ensures proper care, and manages finances to provide secure growth of assets and appropriate income to meet the needs of the ward or protected person.

What follows are our comments with respect to the proposed fiduciary fee schedule, all of which detail why we believe this is not an appropriate change to make to our existing system.

1. At the most fundamental level, we feel that fee caps are not an appropriate mechanism, especially in an area this complex, and will have a great deal of unintended consequences. By holding fees unreasonably low in many cases, and even eliminating compensation in some cases as shown below, there will be a flight of quality fiduciaries from this area, and less qualified, low budget fiduciaries will remain to fill the void. This will directly harm the most vulnerable persons who need the greatest protection. There is no reason why incapacitated persons should not have highly qualified, but appropriately compensated, professionals available to serve them in their time of greatest need. And there is no reason to believe that the rule that sometimes you get what you pay for does not apply to this business as it does to any other.
2. The only possible benefit we see from this arrangement is having a “bright line” rule to determine fees. But even if this schedule could determine a total fee without ambiguity, that single potential benefit does not outweigh the disadvantages of this arrangement.
3. Problematic definitions or calculations will arise—the most immediate that come to mind are “life expectancy,” as discussed below, and “living expenses,” which may be difficult to theoretically categorize. But even if we could absolutely define what those include, any attempt to calculate them, especially years in advance, becomes so inaccurate as to be almost meaningless.
4. Professionals serving in this area are entitled to reasonable compensation. An incapacitated party requires the extra level of court supervision *already in place*, to make sure compensation is reasonable. However, these proposed guidelines will not result in reasonable compensation in many situations. The ultimate loser under such a system will be the ward or protected person, who will either have no qualified professional to serve, thus being cared for by a diligent yet overwhelmed public fiduciary, or will have to settle for a low budget provider that will minimize expenditures for the vulnerable person and time spent on such cases. Even in cases in which a family member will serve, that family member may not be

able to serve without adequate compensation because doing so often means a loss of income from other sources by taking on such a role.

5. One unintended consequence of this proposed schedule is that, in many cases, professionals will be unable or unwilling to serve. This will lead to a vast amount of additional cases either handled by the public fiduciaries, or not handled by anyone. It is impossible to conceive, given the public fiduciaries' current workload, they would be able to handle what would be a tidal wave of additional cases. Have the public fiduciaries in Pima, Maricopa, and other counties weighed in on how this schedule would impact them?
6. The net effect of this fee schedule is to place the administrative expenses of fiduciary fees (and, as indicated below, there is some question what this includes, and may be construed to include attorneys' fees as well) as the absolute last priority for payment from the estate of a protected person, not just on any sort of current basis, but to the extent that long term, hypothetical care expenses of the person's entire projected lifetime take precedence over current, discrete, fiduciary and administrative fees. This is contrary to specific current Arizona law, but more important, absolutely opposite to some other similar laws and the general concepts behind that, as the following paragraphs illustrate:
 - A. A.R.S. §§14-5414 and 14-5314 clearly indicate that a conservator, as well as other professionals involved, are entitled to "reasonable" compensation. As shown in the examples below, where the maximum fees are \$0 despite significant assets under management, implying significant work, responsibility, and liability, that cannot be reasonable compensation. As this is applied to trusts, when they are for any reason brought before the court, then this will drive away trust business from the state of Arizona in an already highly competitive market among the states for trust business. There have been many steps taken by states such as Alaska, Delaware, Nevada and South Dakota, among numerous others, to bring trust business to those states with favorable laws and rules. This sort of fee schedule, which could easily be applied to trusts with incapacitated beneficiaries, will be a strong deterrent to bringing trusteeships to the state of Arizona, and will nullify much of the benefit of the recently enacted Arizona Trust Code to make Arizona an attractive jurisdiction in which to do business.
 - B. While a conservatorship does not have the exact same nature of final claims and expenses as a probate estate does, the priority of claims under that situation, and the reasoning therefore, is still relevant to "lifetime" fiduciary compensation and similar expenses of administration for a living person. In a probate estate, pursuant to A.R.S. §14-3805, the highest priority of claims against an estate is for the administrative expenses. This provision, which is taken from the Uniform Probate Code, exists because it is in the interest of public policy to have such matters administered

competently, and giving priority to the expenses to undertake such work is necessary to attract qualified and competent fiduciaries. While it is not appropriate for the fiduciary fees of a conservator to have priority over other expenses for a protected person, the basic notion that it is good public policy to have the very best protection available for people in need, by encouraging professionals to undertake a necessary role with reasonable compensation, argues against making these administrative expenses absolutely last in priority, after a lifetime of hypothetical expenses. Such an approach will discourage or prevent professionals from being able to take on necessary responsibilities. The effect will be great harm to the people we are trying hardest to protect.

7. Pro Bono work is appropriate, and our firm, as well as many others we know, continues to serve as a fiduciary in cases when a client runs out of money. But overall, we are private, professional practices that are in business to pay expenses, pay employees, and earn our own income, in a manner consistent with our ethics and the best interests of our clients always in mind. We cannot afford to continue to operate in a great deal of cases where the involuntary and arbitrary fee caps will make administration unprofitable. The proposed schedule economically assumes the *supply* of these professional services are *fixed*, and they will not be reduced by a drastic reduction of fees in particular cases. That is not what will happen under the most basic economic theory. The end result will be many cases that otherwise could have been handled, for the protected person's benefit, in an effective and efficient manner, will not be handled, leaving clients without fiduciaries or representation, or with the public fiduciary (without sufficient resources), or with inadequate fiduciaries and representation. As we look at the system and process, it is clear that the unintended consequences of this schedule will leave individuals unprotected, outside the system, without a representative, and far more subject to financial loss, exploitation, and loss of care than under the current system.
8. Economically, if we take this concept to its conclusion, why not make all care and expenses subject to the same calculation? If this is a good idea for professional fiduciary services to have this sort of price control in place, why not mandate as well what nurses, physicians, caregivers, assisted living homes, and hospitals can charge?

“Dear Assisted Care Home, because Mr. Jones has only \$60,000, and a life expectancy of five years, you can charge him only \$1,000 per month, because otherwise he will run out of money.” Does that seem fair or equitable? If not, why is the same solution appropriate for fiduciaries, attorneys, and other professionals involved in the legal aspects of assisting individuals with needs? Like many aspects of fee caps, the basic concept might sound beneficial, but the practical implementation may be disastrous.

Our firm often charges a fixed percentage of 1.5% annually of the assets. Using the method that is currently in place, it will never be our fees that will cause the estate to be depleted. It will always be other expenses that will cause a ward or protected person to run out of funds, and, because our fee is calculated as a percentage of the value of the estate, we will always have an incentive to avoid depleting the estate.

9. A rigid structure such as the one that is proposed does not take into account the inherent individuality, complexity, and diversity that is the essence of these cases and the vulnerable persons needing services. There are no “normals” and there are few “simple” cases. We can say that, within the past TWO WEEKS alone, we have been involved with the following events in fiduciary cases for our firm:
 - A. We had been trustee and conservator for a quadriplegic for more than twenty years when we received a call that his main caregiver for more than twenty years was found dead that morning. So, our care manager immediately had to begin dealing with police and, more important, had to find an emergency substitute to provide caregiving for our client.
 - B. We had a beneficiary of a trust, for which we provided services, and he became unresponsive to calls, letters, and other attempts to contact him. Our care manager kept checking in at his home, and, finally was given indication that the beneficiary was deceased within the home, which necessitated meeting with the police to find the beneficiary’s body.
 - C. We had clients for whom we act as fiduciary, who have no close relatives and none at all within Tucson—a husband and wife both with varying degrees of dementia. The husband had to be hospitalized twice, and, because the wife was unable to stay alone, we had to find immediate substitute, temporary living and care arrangements for her as we tried to determine what was the appropriate placement for them both.
 - D. We had a client for whom we are conservator, who, based on his recent actions, we had to not only petition the court for emergency guardianship, but had to prevent him from driving, for his own protection and for the safety of others.

These examples give some idea of what fiduciaries deal with for clients, the emergencies that happen all the time in varying situations which are not unusual. This is what you deal with when you serve as a fiduciary. Certainly other professional fiduciaries have just as many of these types of challenging, unique, exigent situations which they must address day after day, week after week. What this is intending to highlight is how unique, complex, and extraordinary these duties are, and how ill suited they are to price controls based upon rigid criteria. We would urge that any of the Committee members considering significant changes

to our system accompany a fiduciary or one of their care managers for a day at work, to get a feeling for what is involved.

10. In addition to the type of descriptive instances referenced above, the quintessential, inherent duties of a fiduciary are, by their nature, complex and involve a critical balancing act. Most of our fiduciary clients are not unresponsive, but are active people with varying degrees of compromised abilities that makes communicating with them in a respectful, meaningful, and comforting way a challenge, when balanced against their impairment, their best interests, and our legal duties. The client who continually asks the same questions due to comprehension limits. The client who, when you discuss his or her wishes, changes drastically from day to day, sometimes based upon which family member last spoke with them. Even in the most "typical" case, a fiduciary's service does not lend itself to cold, concrete, rigid decisions and calculations.
11. The proposed fee limits arbitrarily make a great differentiation between the person's liquid assets and non liquid assets. Why should the fee be substantially less where the protected person owns a great deal of real estate which cannot be "readily" sold for cash? The real estate, especially if it cannot be sold readily, takes far more time and effort, and involves more complexity than a liquid brokerage account, especially when, for purposes of looking at the value of the protected person's estate, they are the same. If this system goes into effect, then the value of the estate should include all assets, not just liquid assets.

Example 1: An individual in need of protection, with \$1,000,000 in a brokerage account, a life expectancy of 10 years, income of \$1,000 per month, and expenses of \$4,000 per month.

Liquid Assets:	\$1,000,000
Income (assumed over life expectancy):	\$120,000
Projected Expenses:	\$480,000
Net Estate Value: (\$1,120,000 - \$480,000) =	\$640,000

Percentage from Table 1: (3%= \$19,200), \$20,000 minimum

Set up fee: \$2,000

So that fiduciary would receive \$20,000 per year. By contrast, if a firm simply charges 1.5% for that client's total estate, which may be very reasonable, the net fees would be \$15,000.

Example 1 spreadsheet:

	Monthly	Annual	Total
Liquid Assets			\$1,000,000
Life Expectancy			10
Income	\$1,000	\$12,000	\$120,000
Expenses	\$4,000	\$48,000	\$480,000
Net Estate value			\$640,000
Fee from Table			\$20,000
Set Up Fee			\$2,000

Example 2: An individual in need of protection, with \$300,000 in a brokerage account, \$700,000 in a family real estate partnership, a life expectancy of 10 years, income of \$1,000 per month, and expenses of \$4,000 per month.

Liquid Assets: \$300,000
Income (assumed over life expectancy): \$120,000

Projected Expenses: \$480,000

Net Estate Value: (\$420,000 - \$480,000) = - \$40,000

Percentage from Table 1: 0
Set up fee: \$0

Example 2 spreadsheet:

	Monthly	Annual	Total
Liquid Assets			\$300,000
Life Expectancy			10
Income	\$1,000	\$12,000	\$120,000
Expenses	\$4,000	\$48,000	\$480,000
Net Estate value			-\$40,000
Fee from Table			\$0
Set Up Fee			\$0

So that fiduciary would receive \$0. Now, unfortunately, that means no one but the public fiduciary would be able to afford to take that case, even though the ultimate value of that person's estate (i.e., as the IRS would calculate it) is exactly the same as the prior case where we could pay the fiduciary \$20,000 per year! Now, while this could possibly be ameliorated by tweaking the concepts of liquid and illiquid assets, we think it still points out the problems with this approach.

12. The higher the living expenses, the less the fiduciary fee, under this schedule. If anything, the greater the expenses involved, the more duties, time, and complexity that the fiduciary will take on, and the more services necessary. A fiduciary may be able to afford to take a case at the same fixed fee even where expenses are higher, but they certainly can't handle them for a great deal less when they involve more responsibility.
13. Professionals are reasonably guided by self-interest, in terms of earning income, but also are motivated by fulfilling their fiduciary duties with reasonable compensation in light of the circumstances and doing the best for their clients. While there are exceptions to this, such exceptions will result in a profession with humans and their successes and failures no matter what rules, schedules, and laws are adopted. But whether you think professionals are going to reasonably consider their business and income, or you think they are going to selfishly take whatever they can out of estates, the system will lead to certain cases being highly sought-after, based on this schedule. Conversely, there will be other cases that no one will want, and thus the harm will fall arbitrarily on those most in need who have no control over this outcome. If we are to assume unreasonable self-serving actions by some fiduciaries, which is a *raison d'être* of the Committee's project and its resulting proposed schedule, this will lead to fiduciaries chasing certain clients and the emergence of other "games" such as waiting until clients have a lower life expectancy and then allocating as much as possible to "expenses" instead of fiduciary fees. And it will be a strong incentive to fiduciaries to skimp on the expenses, and thus the needs of the ward or protected person could be neglected, to maximize fees.
14. This proposed standard schedule assumes that all fiduciaries are entitled to equal compensation, based upon the income, asset and expense numbers for an individual. This does not take into account how vastly different the services provided by each fiduciary can be. Some fiduciaries will handle only the core duties of their specific fiduciary role, either not handling certain additional duties, or engaging other professionals to handle such responsibilities by delegating such duties. Other fiduciaries may, depending upon the case, and depending on whether they are attorneys, be able to include as part of their fiduciary role additional related services for the client's benefit, such as legal documents, tax return preparation, care management, emergency on-call availability, and real estate management.

Either paradigm may be wholly appropriate for that fiduciary and/or the particular client, and currently, either fiduciary can charge for their services in a reasonable matter that takes into account how much they can do or how much they pay other professionals to do. The fiduciary, the court, the family members, and the clients can work together to provide something that is in the best interests of the protected person. However, with a single, fixed fee schedule for all fiduciaries, either one fiduciary is going to do much more work for the same fee than the other, or the more expansive services will be curtailed until every fiduciary can only afford to perform their minimum required fiduciary duties for the fixed fee, which would result in the loss of beneficial additional services for the client.

Under our current system, fiduciaries can look toward an appropriate and reasonable means of calculating their fees, based on the individual circumstances, including any innovative means and flexible methods which are determined as reasonable. Sometimes percentage fees may be appropriate, sometimes hourly rates are necessary, sometimes the percentages, rates and methods may differ, but that is most appropriate for cases, clients, and a system where every case and every individual is unique.

For example, based on the calculation above, there is NO difference in fees based on who the fiduciary is, what their qualifications are, and how much they do. Currently, one professional fiduciary may only handle the assets in the conservatorship, and have to pay other professionals to oversee care management, legal work, etc. A second professional fiduciary may instead have a more inclusive practice where they have care managers, lawyers to perform legal work, and have all that provided as part of their fees. In our current system, both fiduciaries can adjust their fees to what they feel is appropriate in light of what they do and other expenses that are reduced, and the court, or the individuals nominating them, can decide which model works best in any given circumstance.

Under the proposed fee schedule, both fiduciaries make the same money, period. The second fiduciary is going to be paid the same fiduciary fee as the first. So, they would probably determine it's no longer appropriate to perform ANY additional duties not strictly part of their fiduciary roles, and hire outside professionals for that additional work, even though it may cost the client more or provide inferior service.

And, no matter what, there will be additional fees, expenses, etc. that may not be appropriately included in the fiduciary's services and fees, but which are necessary, and yet may not fall under the definition of living expenses.

15. This schedule leaves open how you compensate multiple fiduciaries, which is a very common situation. For instance:
 - A. What if a fiduciary is serving as both a conservator and guardian? Does that fiduciary receive double the fees? Or do they only receive the same amount of fees

as someone who is only the conservator? What if there are two different fiduciaries serving as a conservator and a guardian?

- B. What if a fiduciary is conservator, and there is also a trustee acting? What if the conservator is in place to handle income and protect the incapacitated person, but most of the “liquid assets” estate is in the trust? How is that to be calculated?
16. The value used for setting the fee, net of all potential projected hypothetical expenses, is in no way close to the value that is used “against” the fiduciary, such as the amount of the bond required, or the amount of the estate used for calculating malpractice premiums with an insurance company. Plaintiff’s counsel will certainly take into account the entire gross value of an estate, liquid and illiquid, and not net of future anticipated expenses, in assessing the liability of a fiduciary.
17. Therapeutically, there is a minimizing tenor to this type of calculation, that eschews the complexity and individuality of the life of each individual for whom a fiduciary is needed, as if all their needs and life can be reduced to a simple mathematic formula. There is something emotionally harmful about an individual being told, “You will only live for another five years, so we’re going to spend a lot more of your money.”
18. Life expectancy. How is this to be calculated? Simple actuarial value based on the age of the individual, such as the current IRS tables that are used by them for various calculations, which do not take into account in any way the individual’s health, prognosis, care, and physical condition? (Even for IRS rules, in certain situations, such as the calculation of a private annuity, they may not rely on the tables for a terminal individual, see for example Federal Treasury Regulation §1.7520-3(b)(3).)

Are we going to use a similar bright line calculation that is unrealistic to the person’s situation? Or do we have to have some form of trial or hearing in each case to determine that individual’s actual life expectancy?

19. This calculation based on life expectancy seems especially problematic when dealing with younger individuals, and a very substantial part of a fiduciary’s practice deals with minor children with conservatorship, some with significant special needs and care issues, some without. Not only is the long life expectancy extremely inaccurate with individuals this young, as well as making it very hard to provide for any fiduciary fees, but the concept of “guessing” average monthly or annual expenses for 50 years seems so inaccurate as to be of no value. Some of these children will require a lifetime of special care, some may be able to find employment and not require extraordinary expenses, so the situations are terribly different, but to try and calculate this for a five-year old is nigh impossible. Would a calculation to age 18 have to be made for fees paid to that age and then another calculation made at that time for fees thereafter?

Example 3: An incapacitated child is 5 years old, with \$2,000,000 in liquid assets, \$1,000 in monthly income and \$2,000 in monthly expenses.

Using the default IRS tables, we have prepared a spreadsheet on the following page to return these factors, based on the child's life expectancy of 72 years.

Example 3 spreadsheet:

	Monthly	Annual	Total
Liquid Assets			\$2,000,000
Age			5
Life Expectancy			72
Income	\$1,000	\$12,000	\$868,800
Expenses	\$4,000	\$48,000	\$3,475,200
Net Estate value			-\$606,400
Fee from Table			\$0
Set Up Fee			\$0

This is not an unusual example, or bizarre situation, by any means, and, in fact, it is assuming a best case scenario in terms of computing these fees. This example shows that, even for a child with very significant assets, this is not even close to something that will allow a fiduciary to be paid a single cent under these guidelines. How can this possibly function?.

Even with an older client, there are many circumstances where the maximum fee would be nothing.

Example 4: An incapacitated woman who is 40 years of age with a life expectancy of 39 years (according to the IRS tables). If her income is \$1,000 per month, her expenses are \$4,000 per month, and she has liquid assets of \$1,200,000, the maximum fee would be \$0.

Example 4 spreadsheet:

	Monthly	Annual	Total
Liquid Assets			\$1,200,000
Age			40
Life Expectancy			39
Income	\$1,000	\$12,000	\$465,600
Expenses	\$4,000	\$48,000	\$1,862,400
Net Estate value			-\$196,800
Fee from Table			\$0
Set Up Fee			\$0

20. Even a very typical fact situation with an 80-year old protected person can yield no minimum fee.

Example 5: An 80-year old (whose IRS life table expectancy is 8 years), with \$400,000 in liquid assets, and \$1,000 in monthly income versus \$5,000 in monthly expenses, this yields no minimum fee.

Example 5 spreadsheet:

	Monthly	Annual	Total
Liquid Assets			\$400,000
Age			80
Life Expectancy			8
Income	\$1,000	\$12,000	\$100,800
Expenses	\$5,000	\$60,000	\$504,000
Net Estate value			-\$3,200
Fee from Table			\$0
Set Up Fee			\$0

While it is true that this person will run out of funds if she lives her life expectancy, or beyond, that does not mean that no funds should be spent on reasonable compensation for a fiduciary during the time she has money, to maximize her care, perhaps find ways to save funds for her, help her into a situation where she will be able to qualify for necessary government benefits when she runs out of money (which she may, even if NO fiduciary fees are charged.) But that is the result of this fee schedule. If you are likely to ever run out of money, a fiduciary can never be paid on your behalf.

21. This is not intended to be facetious in asking about what comprises liquid assets, what are “expenses,” how is life expectancy computed, etc. The reference to the Tax Code is also not flippant, because these illustrate that when real life examples are presented, using the proposed calculations, there will be grey areas about how money is calculated, and that will lead to disputes, arguments, and the need for the court to make the ultimate determination.
22. Family members and friends may unfortunately be discouraged from seeking court appointment if they realize the draconian rules of the court system will not allow them to be reasonably compensated for their time and effort, leading to more de facto fiduciary management outside of court control, which is not in the best interest of the protected parties.
23. Unpleasant, Unavoidable Trust #1: The court cannot control every case, prevent every abuse, or safeguard absolutely everyone with a fiduciary. This is an unpleasant, but undeniable truth that has to be recognized. We wish this were not the case, and we lived in a perfect world where some system could perfectly protect all those who were in need of protection, even from aberrational cases where the person charged with protection does something wrong, just like we wish the police could prevent all crimes. However, that is unfortunately not reality. No matter what bright line rules (such as this fee schedule) are drawn, people will still be exploited, fiduciaries will fail their duties in small and large ways, and the court will not prevent all those situations. To look at a system and perceive that because of limited resources, the courts or legislature must create rules and schedules that are fundamentally unfair, because a bright line rule is a little easier and takes less resources to enforce, is to make the system worse without really fixing the problems. The courts, like the professionals, and society in general, must simply do their best to address the cases they have, have REASONABLE steps to oversee the situation, and address problems and failings when they occur. From a certain point of view, the Committee needs to understand that perfect control of this system is impossible, and these rules will not change things for the better, but rather, they will just make the basics worse for EVERYONE. They will also, ultimately, result in more burdens on the judicial system, not less.
24. Despite the fact that, unfortunately, the court cannot catch every failure or wrongdoing of a court appointed fiduciary, our understanding is that the most famous cases that helped inspire this Committee were ones where the cases were in front of the court. There was substantial litigation, opposing parties, and the judges had these cases front and center. So the problem does not seem to be something that slipped-by in the dark of night.
25. Unpleasant, Unavoidable Truth #2: People will run out of money. This is another undeniable truth that has to be recognized. Some person’s needs and expenses, which include not just necessary “expenses” like medical care, housing, and food (expenses which, by implication in this fee schedule, are more acceptable and less in need of scrutiny), but necessary expenses to have a fiduciary see to their care and protection as much as possible, could deplete many estates over time. Now, if a fiduciary or attorney charges unreasonably against an estate, that is a problem, a violation, and something for which there are already certain and significant remedies. But, if a fiduciary charges reasonably for its services, like other care providers, it just may be unfortunate that some people do not have enough money to sustain private

payment of their extraordinary needs for their lifetime. And, as previously mentioned, if, for example, a fiduciary charges an annual percentage fee, it will never be that fee that will cause the premature depletion of funds.

Our Firm

was formed in 1984, was previously the Pima County Public Fiduciary, and the law firm and its individual attorneys, in addition to representing and advising fiduciaries, has served as Trustee, Conservator, Guardian, and Personal Representative since its inception, and this represents a major area of its practice. The firm itself is an Arizona licensed fiduciary, while its attorneys are Arizona licensed fiduciaries. The firm includes three attorneys who are Certified Specialists in Trust and Estate Law with the State Bar of Arizona, two attorneys who are Certified Elder Law Attorneys by the National Elder Law Foundation, and two attorneys are Fellows of the American College of Trust and Estate Counsel.

Members of the firm include the prior chair of the Executive Council for the Probate and Trust Section of the State Bar and the current chair of the Executive Council for the Elder Law and Mental Health Section. One of our attorneys is the current chair of the Estate and Trust Advisory Committee which oversees and tests applicants for certification in this area by the State Bar of Arizona, and another of our attorneys previously held that position.

We appreciate your time and consideration as to our concerns, and would welcome the opportunity to provide additional information and input into this process.

Sincerely,

Chief Judge Ann Timmer
Arizona Court of Appeals Division One
1501 West Washington
Phoenix, AZ 85007

Re: Public Comment : Committee of Improving Judicial Oversight and Process of Probate Court Matters

Dear Judge Timmer

My name is [redacted] and I would like to thank the Committee on Improving Judicial Oversight and Probate Court Matters ("the Committee) for its efforts on behalf of the senior population. I would also like to thank you for taking comments on the various proposals that the Committee is developing. Your task is a tough, often thankless but incredibly important one.

By way of introduction, I am a certified public accountant in Arizona and have been involved as a financial and community development professional in Arizona since 1991. In the late 1990's and early 2000's I was a divisional vice president with the Del Webb Corporation in Phoenix and Las Vegas. As such I became sensitized to the issues that Arizona seniors face. I participated in various community meetings as the Webb organization worked to develop amenity rich communities to meet the social and recreational needs of the "active adult" population. I found my experiences at Del Webb to be rewarding but I also noted the challenges that many seniors that are separated from family face in their newly adopted home state. Without the support of family, many seniors became isolated and others were the targets of various abusive schemes. As our residents aged in place, I saw the need for the development of support programs to assist seniors as they attempted to maintain their independence and dignity.

During the last three years I have been increasingly personally involved (using Powers of Attorney and Trust Arrangements) in the care of four family members living in the Sun City area. This experience has again exposed me to the challenges that our senior population faces particularly in the areas of maintaining appropriate, cost effective and impactful health care options and in obtaining appropriate Alzheimer's and dementia care.

The fact that many of the people that live in active adult communities do not have family close at hand that can assist them as they age came into clearer focus as I made this personal journey through this system. It is for these reasons that I have begun to become more active in understanding the specific issues that seniors in need of Fiduciary services face. As a result of this developing interest, I have been following the activity of the Committee and recently I analyzed the fiduciary and legal fee proposal that was submitted to the Committee for consideration on December 3. My findings are detailed in the attached analysis.

Thank you again for giving me the opportunity to share my comments with you. As you proceed in your efforts I would like to offer services to the Committee on a pro-bono basis. Please contact me at [redacted] if an opportunity in this regard is identified.

Very truly yours, [redacted]

cc. Members of the Committee (20 copies)

EXECUTIVE SUMMARY

My bias - Arizona needs its current Four Legged Support System for Incapacitated Persons

The current support system for incapacitated persons in Arizona currently consists of four legs.

The first leg, **family care**, is perhaps the most important. Carried on with Durable and Health Care Powers of Attorney, this leg provides support to the majority of incapacitated individuals in Arizona.

The second leg, **private fiduciary services** is provided by bank trust companies and licensed fiduciaries to individuals that have the means and ability to use those services.

A third leg, **the Public Fiduciary**, is the public funded system which is designed to meet the needs of individuals that cannot access family and private sector services.

The fourth leg (which actually fits between the second and third) consist of **COURT APPOINTED LICENSED FIDUCIARIES**.

This fourth leg is the subject of this analysis and the fee proposal. I believe that all four legs of this four legged support system are required to meet the diverse needs of Arizona's incapacitated population.

The Basis of the Analysis

The analysis that I performed uses the assumptions set forth in the recommended fee proposal for court appointed fiduciaries. It projects the impact of that proposal on those fiduciaries. As a result of the analysis, I will demonstrate that the proposed fee structure would create an environment in which very few incapacitated persons will be able to obtain **COURT APPOINTED** private fiduciary services. Without the ability to earn sufficient fiduciary fees, I believe that many licensed fiduciaries will be forced to severely curtail their court appointed caseloads to a very small group of higher net worth individuals. **This is especially true because fees earned will not bear a relationship to services provided but instead will be linked primarily to "ability to pay"**. This disconnect between the cost of providing services and the linkage of cost to fees charged will, I conclude, result in a gradual dismantling of one leg of the current four legged support system that has developed to serve the incapacitated in Arizona.

The results

Since my analysis shows that licensed fiduciaries will be unable to earn sustainable and reasonable fees for a large majority of their clients under the proposed fee structure and since I am convinced that Arizona needs all four legs of its current support system, I believe that the fee proposal will result in a series of unintended consequences. These consequences will result in the eventual unacceptable shift of individuals who are currently being cared for by court appointed fiduciaries from those fiduciaries to the charge of the Public Fiduciary or, more likely given the degree to which public resources are currently overburdened, to unserved status. As public resources continue to remain stressed and as the number of individuals that will need guardianship and conservatorship services increases throughout Arizona, contraction of the fourth leg of the stool would, in my opinion, be a serious mistake at this time.

THE ANALYSIS

Working backwards from the framework that Judges Donahue and Myers have developed, I have created a spreadsheet, attached, which shows the required value of assets that an incapacitated person would need in order to support payment of fiduciary fees of \$4,800, \$7,200, \$12,000 and \$18,000 per year. The spreadsheet performs the calculation for four groups of incapacitated individuals aged 20, 40, 60, and 80 years old. The model uses Social Security Administration life expectancies and assumes declining income (due to more limited work opportunities as incapacity becomes more severe) and increased life expenses (to reflect increased costs) as the level of incapacity increases.

I believe that these assumptions are reasonable benchmarks but would welcome the opportunity to **work on a pro-bono basis** with the Committee to develop additional scenarios based on any assumptions that are developed by the Committee. It is my opinion that even substantial changes to the assumptions will still yield results that are similar to the results below because of **certain inherent characteristics** of the fee proposal. These **inherent characteristics are discussed below** but first the results of the model.

The Scenarios

The scenarios that I have developed use income and projected living expense assumptions which are designed to reflect four types of clients (a “**basic needs scenario** (person in a community living arrangement)”, a “**intermediate services scenario** (person may need some home health care and care management services)”, an “**advanced services scenario** (person lives in an assisted living facility)” and an “**intensive services scenario**”. As the level of incapacity increases, service levels increase and fees and life expenses increase to reflect the costs of those increased services. I ran these scenarios for incapacitated persons aged 20, 40, 60 and 80. The results are detailed in the attached spreadsheet and demonstrate that for all but the most basic services, the proposed fee structure will not likely result in many individuals that do not have sufficient assets to sustainably support the engagement of **COURT APPOINTED** fiduciary services. The results are summarized as follows:

Assets required by age and level of service (Green asset requirement of less than \$1 Million and Red is asset requirements of more than \$1 Million)

Level of Service	20	40	60	80
Basic Needs	\$80,000	\$80,000	\$80,000	\$80,000
Intermediate Services	\$1,120,000	\$816,000	\$528,000	\$288,000
Advanced Services	\$2,130,000	\$1,560,000	\$1,020,000	\$570,000
Intensive Services	\$4,260,000	\$3,120,000	\$2,040,000	\$1,140,000

What services can Court Appointed Licensed Fiduciaries Sustainably Provide Under the Proposed System

If we assume that there are not likely to be many incapacitated persons with estates in excess of \$1,000,000, the results above show that court appointed fiduciaries can be sustainably used to provide **basic needs care for all adults, intermediate services for all age groups of incapacitated persons with the exception of young adults and assisted living services for seniors over 80 ONLY**. It also shows that incapacitated persons in these age cohorts with **intensive service needs will not be served** as none of the individuals in the modeled age cohorts have sufficient assets to support the assumed level of life and professional service care needs associated with intensive service level needs.

THE INHERENT ISSUES WITH THE CURRENT PROPOSAL

The "Last Dollar in Line Issue"

The proposed fee model meets life care needs over the incapacitated person's expected life span. The manner in which this life span is estimated is not stated but since the fee proposal operates from this assumption, "projected living expenses" are budgeted at assumed constant costs and income is budgeted at a constant level over the entire life expectancy of the individual.

By modeling in this fashion, the fee calculator theoretically budgets for a projected medical expense to be incurred at age 80 by a now 20 year old incapacitated adult before the first dollar is made available for fiduciary and legal fees. **This "last dollar in line assumption" made by the model will make it virtually impossible for fiduciaries to earn fees in year one while health care, food and other needs are THEORETICALLY budgeted for far into the future.**

I believe that without fiduciary services, an incapacitated person with even moderate needs will not be able to survive to benefit from the medical appointment that is budgeted at age 80 in the fee calculator. The "last dollar in line scenario" that has been created to determine fiduciary and legal fees is not workable for this reason. Until fiduciaries can earn reasonable fees throughout the life expectancy of the incapacitated person, limited services will be available only to high net worth individuals as is shown in the summary table above. Licensed fiduciaries will simply not accept court appointments on an other than pro-bono basis.

THE MODEL IS SUBJECTIVE BY DEFINITION

Life Expectancy

One of the goals of the fee proposal is to create an objective means of calculating maximum fees for fiduciaries. During my time with Del Webb, I supervised the preparation of pro-forma models for real estate projects with revenues in the hundreds of millions of dollars, I know **that a model is only as objective as its assumptions.** With that said, how can we assess the life expectancy of an incapacitated person?

In determining life expectancy, one could argue that their incapacity frequently is accompanied by certain comorbidities that reduce life expectancies when compared with the overall population but, on the other hand, many elderly incapacitated individuals have already superannuated.

The social security life expectancy estimates are, therefore, not objective and a recent study at Harvard University showed that doctors that are treating terminal patients also cannot come up with objective and reliable measures of life expectancy. That study showed that doctors treating terminally ill patients are likely to overestimate life expectancy in over 63% of cases and are likely to provide estimates of life spans that are 530% in excess of actual lifespans experienced by terminal patients. (New Yorker Magazine, August 2, 2010).

Since the life expectancy assumption is critical to determining when life expenses are met (and hence when fiduciaries can earn their first dollar), **the fact that the assumption of life expectancy is obviously subjective dooms the whole model to subjectivity.** In assessing this model, it is important not to confuse mathematical simplicity with objectivity.

Other Assumptions are also Subjective

As mentioned above, lifetime income and expenses that reflect straight line extensions of current expenses are also subjective. To try to attach inflation rates to these income and expense levels is also impossibly subjective. As we all know, 80 year old American citizens have experienced certain years during their lifetime in which annual inflation was in the high double digits and, recently, years with close to zero inflation. How can a subjective model be developed given this history?

Since it is impossible to come up with objective income and expense estimates over long periods of time. As a result, the whole model becomes subjective.

The fact of the matter is that we need “to get from here to there”

Given the fact that we have determined that many incapacitated individuals will run out of money before they die even in the unlikely event that they will be cared for by fiduciaries on a pro-bono basis, we are faced with a “chicken and egg” issue. If we provide for all of the life care needs of a 20 year old incapacitated person with assets of \$250,000 and negative cash flow of \$16,000 per year, **that person will run out of money before they turn 80 no matter what we do.** If the person needs fiduciary services and those services can only be acquired with “reasonable compensation” then the first year fiduciary fees (“the chicken”) will not be paid while by the 30th year the “egg” will still run out of money. The fact of the matter is that **people need to get from here to there** and if they cannot get fiduciary services, they cannot do that. For this reason the model does not work and it cannot work in most of the cases to which it will be applied. As noted above, **the problem is inherent with the manner in which the model works**, not the assumptions that are used to operate the model.

Ethical Issues

Another problem that I am concerned about is the incentive system that is created by the calculator. By putting fiduciary fees last in line, the court is creating an unacceptable conflict of interest in the system even for high net worth individuals. Fiduciaries, by and large, cannot work pro bono. If the fee structure is based on assets, the fiduciary has a natural conflict of interest to keep assets high when the interests of the incapacitated person indicate that expenses should be incurred to create an appropriate environment. The ethical standards of the profession require fiduciaries to seek the most appropriate living situation for the incapacitated person but if doing so increases costs, assets go down and hence compensation goes down. What are the ethical considerations of deciding between a \$10,000 per month home health care option for an individual that wants to stay in their home and a \$4,000 per month assisted living facility option that will also provide safe conditions?

In certain segments of the financial services industry, financial consultants eliminate a similar problem by becoming “fee only advisors”. The corollary to the fee only financial advisor is the hourly compensated fiduciary or the fiduciary that is compensated on a fixed price level based on services that are actually provided. **The proposed fee structure speaks only in terms of maximums. It does not address fees for service or even better yet, fees for results.** This is true because if the maximum fee that results from the fee calculator is zero, the fee will be zero regardless of actual costs incurred. In view of this fact, the ethical issues mentioned above result from the proposed fee structure and this is an unacceptable conflict to impose on the licensed fiduciary profession.

CONCLUSION

In summary, I believe that this proposal would have the very negative effect of eventually dismantling one leg of the current support system without creating a replacement support mechanisms for this burgeoning population. For that reason, **I recommend that you consider other options that will better link actual benefits provided to the incapacitated person to sustainable and reasonable fees for the court appointed licensed fiduciaries that provide those services.**

Thank you again for the opportunity to share my thoughts with you.

Assets Required to Support Various Levels of Fiduciary Fees
Asset Based Fee System Proposed by 12/3/10 Fee Proposal

Basic Services (fee at \$400 per month) - Fiduciary Provides basic services only

Age of Ward	20	40	60	80	
"Liquid Assets"	\$80,000	\$80,000	\$80,000	\$80,000	To Summary Table
Income	\$1,464,000	\$1,008,000	\$576,000	\$216,000	
Projected Living Expenses	\$1,464,000	\$1,008,000	\$576,000	\$216,000	
"Net Estate Value"	\$80,000	\$80,000	\$80,000	\$80,000	
Proposed Percentage Fiduciary	6.00%	6.00%	6.00%	6.00%	
Life Expectancy (per SSA)	61	42	24	9	
Assumptions (yellow can be changed)					
"Liquid Assets"					
Income	\$24,000	\$24,000	\$24,000	\$24,000	Assumes some capability to work
Projected Living Expenses	\$24,000	\$24,000	\$24,000	\$24,000	Assumes limited living expenses
Target Fiduciary	\$4,800	\$4,800	\$4,800	\$4,800	

Intermediate Services (fee at \$600 per month) - Fiduciary provides care management and other basic services

Age of Ward	20	40	60	80	
"Liquid Assets"	\$1,120,000	\$816,000	\$528,000	\$288,000	To Summary Table
Income	\$1,220,000	\$840,000	\$480,000	\$180,000	
Projected Living Expenses	\$2,196,000	\$1,512,000	\$864,000	\$324,000	
Proposed Percentage Fiduciary	\$144,000	\$144,000	\$144,000	\$144,000	
Percentage Fiduciary	5.00%	5.00%	5.00%	5.00%	
Life Expectancy (per SSA)	61	42	24	9	
Assumptions (yellow can be changed)					
"Liquid Assets"					
Income	\$20,000	\$20,000	\$20,000	\$20,000	Assumes very limited capability to work
Projected Living Expenses	\$36,000	\$36,000	\$36,000	\$36,000	Assumes some supplemental living expenses
Target Fiduciary	\$7,200	\$7,200	\$7,200	\$7,200	

Advanced Services (at \$1,000 per month proposed fee) - requires assisted living. Fiduciary provides full conservatorship and guardianship services

Age of Ward	20	40	60	80	
"Liquid Assets"	\$2,130,000	\$1,560,000	\$1,020,000	\$570,000	To Summary Table
Income	\$1,098,000	\$756,000	\$432,000	\$162,000	
Projected Living Expenses	\$2,928,000	\$2,016,000	\$1,152,000	\$432,000	
"Net Estate Value"	\$300,000	\$300,000	\$300,000	\$300,000	
Proposed Percentage Fiduciary	4.00%	4.00%	4.00%	4.00%	
Life Expectancy (per SSA)	61	42	24	9	
Assumptions (yellow can be changed)					
"Liquid Assets"					
Income	\$18,000	\$18,000	\$18,000	\$18,000	Assumes no capability to work
Projected Living Expenses	\$48,000	\$48,000	\$48,000	\$48,000	Assisted living type care at \$3,000 per month plus other expenses
Target Fiduciary	\$12,000	\$12,000	\$12,000	\$12,000	

Intensive Services (proposed fee at \$1,500 per month) - total incapacity. Fiduciary provides most intensive level of conservatorship and guardianship services

Age of Ward	20	40	60	80	
"Liquid Assets"	\$4,260,000	\$3,120,000	\$2,040,000	\$1,140,000	To Summary Table
Income	\$732,000	\$504,000	\$288,000	\$108,000	
Projected Living Expenses	\$4,392,000	\$3,024,000	\$1,728,000	\$648,000	
"Net Estate Value"	\$600,000	\$600,000	\$600,000	\$600,000	
Proposed Percentage Fiduciary	3.00%	3.00%	3.00%	3.00%	
Life Expectancy (per SSA)	61	42	24	9	
Assumptions (yellow can be changed)					
"Liquid Assets"					
Income	\$12,000	\$12,000	\$12,000	\$12,000	Assumes total incapacity
Projected Living Expenses	\$72,000	\$72,000	\$72,000	\$72,000	Skilled Nursing level care at \$5,000 per month plus other expenses
Target Fiduciary	\$18,000	\$18,000	\$18,000	\$18,000	

December 12, 2010

Members of the Committee on Improving
Judicial Oversight and Processing of Probate Court Matters
1501 West Washington Street
Phoenix, AZ 85007

Re: Public Comments for the December 14, 2010 Committee Meeting

Dear Committee Members:

This letter is written on behalf

approximately 100

attorney members in Arizona whose practices population, persons with disabilities, and individuals who are otherwise incapacitated or vulnerable. A vast majority of the members regularly practice in probate court on guardianship and conservatorship cases and in probate and trust administration matters. Therefore, our members have been following with great interest the discussions of this Committee and its recommendations, as well as the public comment and media attention devoted to these issues.

Although no one can deny there is room for improvement in the probate system, as there is in any system, organization, or process that involves or concerns human beings, we have an overall concern that problems highlighted in a handful of cases are the driving force behind proposed large systemic changes, despite these cases not being representative of what happens in the majority of cases. We are further concerned that in a majority of cases brought in probate court the estate the additional costs that will result from any new requirements established to address the fee or other problems that have arisen in a few publically highlighted cases and/or the taxpayers will ultimately bear that are atypical in terms of the resources that were required, both public and private, to resolve those cases. Many of the Committee's recommendations are positive, but the financial feasibility of implementing the recommendations is questionable particularly given these challenging economic times. Other recommendations that may appear effective on their face may have unintended consequences that warrant further investigation and consideration. As much as the public and others want to see immediate change, it is extremely dangerous to act too hastily to primarily satisfy those who are putting public pressure on

the decision makers.

With the foregoing in mind, wants to take this opportunity to comment as follows on the issues being considered by the Committee and the various proposals on the table:

Removal or Change of Fiduciary

The law clearly provides for removal of a fiduciary for cause. At the other end of the spectrum is removal with frequency and for no reason at all. Somewhere in the middle is the answer. Removal for cause is pejorative and has a negative connotation such as malfeasance that a fiduciary will likely feel compelled to defend itself against. On the other hand, removal for any reason and with frequency may be

detrimental to the ward or protected person in terms of interrupting the continuity of care and increasing the expense to the estate associated with introducing a new fiduciary to the equation.

For the above reason, _____ recommends that there be grounds specifically set forth in the law for replacement of a fiduciary, if it is established by clear and convincing evidence that replacement of the existing fiduciary is in the best interest of the ward or protected person and regardless of whether the fiduciary has committed any act of misfeasance, malfeasance, or nonfeasance, and a suitable successor fiduciary is available. Note the terminology: "replacement" rather than "removal." Language is everything. "Replacement" does not have the same connotation as "removal" and, with that, a fiduciary may not be as resistant and more amenable to stepping down. Factors to consider in determining whether replacement of the fiduciary is in the best interest of the ward or protected person need to be identified, such as a substantial change in circumstances or the person who sought the fiduciary's appointment intentionally misrepresented material facts in the proceedings leading to the appointment. In addition, the law should expressly provide for a fiduciary's resignation as a basis for his replacement which, in and of itself, would not result in a finding that reflects poorly on the fiduciary.

Role of Guardian ad Litem versus Court-Appointed Counsel

Much confusion surrounds the role of the Guardian ad Litem (GAL) versus Court-Appointed Counsel (CAC) in probate matters. Unfortunately, this confusion has seemingly resulted in a trend to have more split-duty appointments, which drives up the costs of proceedings. Our probate code requires the appointment of an attorney or CAC for an alleged incapacitated adult or protected person in guardianship and conservatorship proceedings. It does not require the appointment of a GAL. So, when is it appropriate to appoint both a CAC and GAL or a GAL rather than a CAC? Guidelines need to be developed as to the foregoing, as well as the continuing duties and responsibilities.

Our Rules of Professional Conduct provide for an attorney's representation of an individual with diminished capacity, suggesting that a GAL should only be appointed in limited circumstances. If a GAL is appointed it should be with a specific assignment and his role should be limited in scope and duration. A GAL should be appointed sparingly and, in the event CAC is of the opinion that his client cannot give him direction, he can move to convert or change his role from CAC to GAL.

Many sources exist within and outside the probate rules and statutes that can assist in reiterating or further defining the role of GAL versus CAC, such as Probate Rule 2(H) for definition of GAL, Probate Rule 18(B) regarding motion for appointment of GAL, Civil Rule 17(g) regarding the appointment of GAL in civil cases, A.R.S. Section 14-1408 for statutory authority for appointment of "representative" in proceedings under Title 14, and Family Law Rule 10 regarding representation of children, minors, and "incompetent" persons. With more clearly developed guidelines regarding the respective duties and expectations of CAC and GALs, the likelihood that both a CAC and GAL will be appointed in a case and the associated expense will be minimized.

As for the continued role of CAC or a GAL, we recommend that the CAC and/or GAL appointment be for a duration ordered by the court not to exceed one year. Before the expiration of the ordered period of representation, the CAC or GAL would be required to file a motion to withdraw setting forth the reasons why he believes the appointment is no longer necessary, or a motion for extension of the appointment setting forth why the ward or protected person, if represented by a CAC, believes that continued representation is desired by the ward or protected person, or in the case of a GAL, why the GAL believes his continued involvement is in the ward or protected person's best interests. This ensures that the court and the parties are doing their jobs in terms of assessing the ward or protected person's current circumstances and ongoing needs, as well as the financial considerations attendant to continuing representation.

Monitoring Guardianship and Conservatorship Cases

It is . . . s understanding that post-appointment visitation of wards and protected persons, as well as random audits of conservatorship accountings are being recommended. What tangible benefit will result from the foregoing? Is there any statistical data that provides a cost-benefit analysis of implementing such a recommendation? Of particular concern is the expense, whether it is an additional expense to that particular estate or an additional fee assessed everyone involved in probate court. It is unfair to the individual who is randomly selected for a visit or audit to pay such expense, and it is equally unfair to make everyone pay for the random visit or audit of another. We believe that if a ward/protected person is represented by counsel, or there is a GAL, \on an extended basis for reasons established by court order, that the GAL or CAC can be trusted to visit the ward or request audits as needed, and can also move the court to have the court investigator conduct an investigation for good cause shown. Certainly ongoing training of GALs, CACs and court investigators will help to ensure that proper monitoring and follow up occurs.

Training

is in support of the recommendation to provide training for non-professional (family) fiduciaries, CAC and GALs, and judicial officers. We have nearly 100 attorney members, some of whom also serve as fiduciaries. Our members have substantial and varied experience. We offer our expertise and assistance, technical or otherwise, in developing and/or conducting the proposed trainings.

Attorney and Fiduciary fees

wants to focus on three areas in which specific recommendations are being made, specifically, the fee-shifting statute, resolving fee disputes, and attorney and fiduciary fees. supports the proposed fee-shifting statute as it will serve to provide a disincentive to litigate unmeritorious claims that dissipate and consume an estate in litigation fees and costs. encourages the Committee to go further in two respects to enhance the desired disincentive: (1) Assess or charge fees against a distributive share of a contentious devisee in a decedent's estate matter; and (2) preclude additional filings on issues that have already been adjudicated by requiring the filing party to establish, as a prerequisite to filing, the change in circumstances warranting the court to review a particular issue again, for example, whether a guardian should be removed for cause.

also supports the increased use of alternative dispute resolution (ADR), such as arbitration and mediation, to resolve fee disputes if it resolves them more quickly and cost effectively. One concern is with making ADR mandatory is if the effort or process will prove futile. An option may be to require ADR unless the parties can convince the court otherwise. Whether ADR or not, ultimately, the fee dispute itself should not cost the estate more than what is at issue.

It has become apparent in the dialogue that where there is the least consensus is with respect to attorney and fiduciary fees. does not support the use of fee schedules, calculators, or maximums/caps. On their face, these tools may appear to simplify the process of determining the reasonableness of fees, and in so doing serve the best interests of wards and protected persons. However, such mechanisms will likely have the unintended consequence of limiting the availability of qualified fiduciaries and attorneys to assist in small estate or complex matters. The factual circumstances in individual guardianship and conservatorship cases vary greatly and thus are not very amenable to uniform fee standards. We believe that judges and attorneys can be trusted to monitor fees adequately particularly when more specific fee guidelines are established. Taking away too much discretion from judges and in the way fees are billed will result in increased inadvertent negative outcomes for the wards/protected persons. We believe that increased scrutiny of fees in the courts is already occurring as a result of the negative publicity about the attorney and fiduciary fees billed in probate cases.

Of particular concern is the proposal of use of a "calculator," which would determine a maximum annual fiduciary fee based on a percentage of the "net estate value". The "net estate value" is arrived at, in part, by estimating the protected person's life expectancy. This is not a basis on which to arrive at a net estate value nor ultimately, a maximum fee. First, many can and likely would if relied upon in this context disagree on what an individual's life expectancy is. Fees will be unnecessarily expended in litigating this point if it serves as the basis for determining a maximum fee. Second, reliance on estimated life expectancy falsely presumes that every protected person has sufficient funds to begin with to provide for a lifetime of needs. That probably is not the case in most cases. What about the 20 year old who is rendered permanently disabled in a car accident where the only source of recovery is policy limits of \$50,000 yet he has a normal life expectancy? No doubt \$50,000 is insufficient to provide for this individual's needs for his lifetime. The use of a calculator or maximum fee does not take into account the smaller cases or those that are complicated. Oftentimes, the smaller cases are the more complicated. Is it fair to deprive the ward or protected person with a smaller estate that may be complex of competent representation? In the absence of competent representation, the estate may be more rapidly wasted and dissipated which defeats the very purpose of proposing limits on fiduciary and attorney's fees.

Rules already exist that define reasonable compensation, and a process is in place by which interested persons can object to a professional's fees. The court has discretion, as well it should, to reduce or discount a professional's fees if deemed unreasonable. In fact, on December 6th, the Arizona Republic highlighted the court's recent and increased scrutiny of professional fees. The tools already exist to address concerns in this area, and with the enactment of a fee-shifting statute, nothing further needs to be done. Former Probate Rule 5.7 (which was replaced by Probate Rule 33 in an effort to make the fee approval process more cost-effective) along with the renown China Doll case delineates specific factors that must be considered in determining the reasonableness of fees. To assist in this determination, one avenue to consider is to require every fee statement to address each of these factors.

Although the position of _____ that requiring by rule that fiduciaries and attorneys address specific factors in their fee statements to establish the reasonableness of their fees should be sufficient, would not be opposed to an additional requirement that every conservator include with its inventory and annual accounting a proposed budget, which would include an estimate of projected fiduciary and attorneys' fees for the upcoming year. The fiduciary and attorneys would be bound or limited by their estimate. If they have incurred the estimated fees before the accounting period ends, the fees could not be paid by the fiduciary without a prior court order. If, due to extraordinary or unanticipated circumstances, the estimate proves to be inaccurate, the fiduciary or attorney can petition the court to modify the estimate accordingly. The downside to this approach is that, ironically, the work load and costs of the court, clients, attorneys and fiduciaries will increase in the effort to monitor fees more closely. Whether the net result is an overall reduction in fees and costs remains to be seen.

The advantage of the expense and fee budget proposal is that the budget would put all parties and the court on notice of what to anticipate in terms of fiduciary and attorneys' fees on an annual basis. If a party or the court is concerned about the estimate, a hearing can be requested or set. The parties and court can also be assured that professional fees beyond that which was originally estimated will not be paid without a modification or a prior court order, giving the parties and the court the opportunity to weigh in before the fees are paid. This will presumably ensure that fiduciaries and attorneys will assess what will be required of them up front, and increase the likelihood that they will more cost effectively perform their duties. At the same time, it will not unnecessarily limit the fiduciary or attorney's ability to be fairly compensated for performing their duties and responsibilities, nor create a disincentive for qualified fiduciaries and attorneys to take on matters whether due to estate size or complexity.

Additional Recommendations

has the following additional recommendations that have not been proposed by or are not currently before the Committee:

1. Improved use (by judicial officers as well as parties) of Rule 16.1 case management conferences in highly contested litigation matters in probate court.
2. Adoption of most or all of the more modern Uniform Guardianship and Protective Proceedings Act (what used to be Chapter 5 of the Uniform Probate Code, which is what Arizona adopted in 1973).

Thank you for your consideration of comments. We trust and hope that our comments will aid in the process, and result in positive changes.

Sincerely yours,

cc: Arizona Judicial Council

To the Members of the Committee on Improving Probate Matters and the Members of the Fiduciary Fees Workgroup:

Comments Regarding Fiduciary Fee Guidelines/Proposals

This letter is in response to recently proposed fiduciary fee guidelines and the general concept that there is a problem related to fiduciary fees that can effectively be addressed through additional regulation of Arizona fiduciaries. I will try to be brief.

Discussion

I have been actively engaged in the discussions regarding how additional regulation of a fiduciary's fees might curtail unreasonable and unnecessary costs to an estate. Despite the concerted effort of numerous experienced and well-educated persons, I have yet to see a perfect solution proposed. In fact, most solutions will, as articulated in a number of examples detailed by [redacted] in its December 6, 2010 "Response to Fiduciary Fee Schedule", result in a number of unintended consequences.

Most persons, with a significant stake in this discussion, have agreed that the resolve to "do something" appears to be more compelling than the resolve to do the right thing. Faced with the dilemma and false logic that to propose nothing is to (by implication) propose that the status quo cannot be improved upon without imposing new regulation, we (fiduciaries) have labored to propose a solution that improves on the competent administration of the current system.

Proposals

I believe you should recommend only those proposals that will have the effect of improving on the current system. I also urge that for each such proposal you consider who will ultimately bear the cost to impose/implement the solution. Any proposal that will substantially increase the uncertainty of payment of reasonable & necessary fiduciary fees should be rejected. Please be willing to do nothing, if the alternative does not evidently and/or objectively improve on the competent administration of the current system.

Recommendation

In all cases, fiduciary services should be both reasonable and necessary. If fiduciaries are put in a position to make decisions to provide services under any other criteria, the incapacitated and/or protected person, or their estates, will not be best served. I believe that if every Workgroup member affords due consideration to this issue, it will be self-evident that only the current system, properly administered, will ensure a competent provision of fiduciary services in Arizona. The only change I recommend at this point is that if a judicial officer finds that a fiduciary has not adequately documented that their services were reasonable and necessary, that they be required to do so within thirty days of a Court order, or should expect that the fees for inadequately documented services will not be approved by the Court.

Sincerely,

December 14, 2010

Members of the Committee on Improving Judicial Oversight
and Processing of Probate Court Matters
1501 W. Washington Street
Phoenix, AZ 85007

Re: Comment on pending Committee matters

Dear Committee Members:

as you probably already realize, the only statewide organization of professional fiduciaries. We are vitally concerned with maintaining high standards of professional conduct for members of our profession. Where it is possible to improve the fiduciary practice we are eager to participate -- in fact, to lead.

The proposals aired by various workgroups of the Committee (some of which have been endorsed by the entire Committee) both excite and concern us. Some we wholeheartedly endorse; others, though well-intentioned, are misguided and would ultimately harm the profession and the public. We have the unique perspective of actually being involved in a large percentage of guardianship, conservatorship, probate and trust administration matters, and we are of course responsible for the day-to-day administration of those we are involved with. Please consider our input in formulating final recommendations that will dramatically affect our ability to continue to provide excellent service in an important arena.

and its members are delighted to see the Committee focus on the importance of training. In order to receive and maintain our licenses, we are required to participate in professional training germane to the subjects involved in fiduciary work. We have no aversion to those educational requirements, and are happy to participate in reviewing, improving and making programs more widespread.

It has not escaped our attention that neither family members (who serve as fiduciaries in most cases) nor judicial officers (who are involved in virtually every fiduciary case) are required to undergo any formal training

specific to fiduciary issues. Even those with formal legal training and professional business management experience may not be familiar with the accounting requirements and nuances of fiduciary administration. Therefore, we wholeheartedly endorse the Committee's consideration of expanded and mandatory training sessions, and offer our assistance in designing, administering and reviewing any such offerings.

already provides its members at least two annual educational meetings. We are experienced with both introductory educational offerings and more advanced continuing education. Some of our leaders have already approached the Workgroup considering the expansion of educational requirements and offered to assist; that offer has been well-received and we look forward to continuing to work with the Committee and its members in development, implementation and even funding for an ongoing educational program.

Guardianship for Recent Adults

We certainly understand the frustrations many family members feel with the cumbersome process of securing guardianship, especially for a child with a disability who has recently attained majority. The process can be confusing and daunting for family members, and the cost of court-appointed counsel, formal investigations, filing fees and annual reviews can all seem unnecessary in cases where the incapacity is obvious, long-standing and permanent. We endorse efforts to streamline that process, with due respect for protection of the rights and interests of the wards.

In this regard several suggestions have been made. We could certainly endorse a system of formal standby guardianship, and/or of parental nomination of guardians. Expansion of the existing provisions of A.R.S. section 14-5202 might be one way to make the process simpler for family members, and we look forward to specific language suggestions in that regard.

One reality we feel needs to be considered: the existing testamentary appointment mechanism for appointment of guardians of minors is almost never actually used. Few of us are familiar with even a single instance of it being implemented. That may be because it is too narrowly drawn, it is unfamiliar to lawyers practicing in the area, or it is not in fact much more efficient in practice -- or all of those. For whatever reason, its disuse suggests that simply providing an automatic appointment process might not actually improve matters. Perhaps a review of actual cases might help isolate any problems that could be tackled.

In the meantime, we certainly endorse smaller steps like expressly allowing petitions for adult guardianship to be filed in the year before majority, or entry of orders that will not take effect until majority. Those might make the process seem less threatening to parents, though of course they do not directly address the cost or cumbersome nature of guardianship in what might be viewed as simple and straightforward family situations.

We think that there are a number of ideas that might be considered in addition. Most of us have been involved as conservators of minors who, upon turning 18, receive outright distributions of their funds and promptly dissipate them. There is no mechanism for retaining any court restrictions on an 18-year-old who does not suffer from any mental

disorder, yet it is commonly understood that most 18-year-olds lack the maturity and sophistication to deal with any significant assets.

A.R.S. section 14-5424(D) specifically authorizes the court to approve a trust (or a structured settlement) at the time of settlement of a personal injury claim, and A.R.S. section 14-5409 authorizes the court to approve establishment of a trust in any case. Neither of those statutes, however, addresses the precise issue we see on a regular basis. We would suggest that the Committee consider addition of a statutory provision that clearly permits the court to approve establishment of a trust that extends past the end of the ward's incapacity, and specify some of the factors (such as age, size of estate, probable needs for care, sophistication of the ward, etc.) that the court should consider in approving such a trust.

A.R.S. section 36-3231 spells out a statutory list of family members and others who can make health care decisions for a patient who is "unable to make or communicate health care treatment decisions." Perhaps that statute could be expanded to permit some sort of informal court proceeding to establish the authority of a person to handle such decisions without the necessity of a full-blow guardianship. It would be a challenge to specify which kinds of decisions ought to be permitted and what the proceeding would look like, but in cases where the dominant questions are ability to secure emergency treatment and access to providers' records and information, the cost and court supervision inherent in a full-blow guardianship proceeding seem excessive.

Fees

Much of the attention focused on the work of the Committee and its workgroups has, of course, been devoted to the question of fees. We endorse the notion that fees can be excessive, at least in some instances. We doubt whether the problem is endemic, or even widespread, but we wholeheartedly support any effort to ascertain what is actually taking place in real cases.

We are acutely aware that there are already mechanisms in place to address the fees of fiduciaries, attorneys (whether the fiduciary's, the ward's or representing interested parties, and regardless of whether they are retained or appointed). We have all seen cases where even minor disputes have ended up with all parties being paid from the ward's estate, and probably every one of our members has been involved in at least one case where the resulting costs have been troubling.

It needs to be pointed out, however, that the system already has checks and balances sufficient to address this problem. The multiple factors to be considered in assessing the reasonableness of fees are well-known, thoroughly articulated in the case law, and understood by professional fiduciaries. Last week's Court of Appeals decision in *Sleeth v. Sleeth* makes clear that they are also well understood -- and readily applied -- by the appellate courts in Arizona.

Contrary to assertions by some, the factors to be assessed in reviewing fees of fiduciaries and their attorneys are easy to apply. True, there is subjectivity involved -- but we would rather live in a world of rationally subjective analysis than one of punitive formalism.

Meanwhile, we are very troubled by some of the proposals that have been circulated. One suggestion has involved the vastly more complicated use

of a fee "calculator." Though it is touted as being a simple approach, it is both complex and subject to extreme manipulation and miscalculation. It would require the application of a number of fictions that would not result in a just application to individual facts.

Among the shortcomings of the fee calculator approach:

1. Life expectancy. Are we to use actuarial tables, or somehow project actual life expectancies of our individual wards? If the former, then the calculator will make it impossible to handle the case of a modestly wealthy, young but very ill individual, while permitting someone with identical facts but thirty or forty years older to have a private fiduciary.

2. Costs of care. Are we to use the past year's, or past two years' costs as a gauge? If so, what of the case (our most common case, by the way) in which we do not know last year's costs upon our initial involvement? Is there to be an adjustment for the higher start-up costs (both for medical care and for fiduciary services) in the first year of our involvement? What of the ward who is slowly slipping into more-expensive care? Are we to guess what those care levels will be for future years, or ignore them? If the former, is there no concern about manipulation of the outcome by choice of factors (even innocent manipulation)? If the latter, what is the value of using the calculator approach at all?

3. Income. We might be a little more able to project income than expenses, but the past two years' financial experience has taught us all that there is no such thing as an accurate and reliable future projection of investment income.

4. Age bias. Virtually no child of modest wealth but real needs will be able to pay a professional fiduciary's fee under the current articulation of the fee calculator. On the other hand, the elderly and modestly wealthy individual may have a fee calculation that is well in excess of the current costs of most fiduciaries in such cases.

What might be done to improve control over fees? We have a number of suggestions, some of which have circulated before:

1. Budgeting. We can support a proposal to require the fiduciary to submit an annual budget. The budget could include a provision for anticipated fees -- the fiduciary's and those of counsel. A Court rule could require prior court approval before payment of any sums in excess of those budgeted amounts. There are number of questions about such a budget rule that must be addressed, but they are manageable. When should the budget be required? Probably at the time of inventory and with each annual accounting thereafter. How should the fees be calculated for the budget? They could be set as a fixed percentage of assets, or simply at the discretion of the fiduciary -- though the latter would obviously require the court to review and approve the budgeted amount each year.

2. Simplification of contested proceedings. We believe that increased judicial reliance on the existing civil rules could streamline the administration of contested cases. Arizona Rule of Civil Procedure 16.1 already mandates settlement conferences, and Rule 16.2 encourages good faith settlement hearings. Probate judges should be encouraged to use those rules to drag contentious parties into settlement mode.

Experimental Rule 16.3, or something very much like it, might be useful to allow probate judges to take control of those cases in which the lawyers (or the parties) are unnecessarily dragging out or complicating the proceedings.

3. Fee-shifting. We endorse the efforts and discussions about shifting fees in cases where one party has inappropriately complicated probate proceedings. It is an unfortunate reality that sometimes the amount at stake for a litigant has been little enough that there is no incentive to act reasonably and responsibly; a fee-shifting statute and/or rule could help.

4. Mandatory mediation and arbitration. In addition to the existing provisions of Rule 16.1, the probate courts could consider developing a probate-specific mediation and/or arbitration alternative. In some cases the estate and litigants could bear the (much lower) cost of paying for such alternative dispute resolution, saving thousands of dollars in chargeable fees and costs and freeing court resources to deal with other cases.

Summary

We appreciate that the review of probate court procedures has been testy and very public. We applaud the good-faith efforts of all who have participated, and especially Committee members. We hope that our suggestions will be accepted in the spirit in which they are offered: we want the fiduciary practice to be viewed as an honorable profession, and in fact to be an honorable profession. We think we act honorably, and we do not dodge either review or constructive criticism. When you have completed your difficult and challenging considerations, we hope - - with you -- that the result will be a better probate court in which the valuable work we do can still be accomplished.

December 13, 2010

Arizona Judicial Council
Arizona Supreme Court
1501 West Washington
Phoenix, AZ 85007

*Re: Committee on Improving Judicial Oversight and
Processing of Probate Court Matters*

Dear Committee Members:

This letter is being sent on behalf of member financial organizations _____ have reviewed the proposed draft of the Interim Report of Judicial Oversight Committee regarding Probate Court matters relative to wards and decedents' estates. The review and comments below are offered in the best interest of wards and decedents' estates.

Our member banks, that have trust powers granted by the State of Arizona or the Office of the Comptroller of the Currency, provide conservatorship, trust and estate administration services to a large number of Arizona clients and, thus, are an integral part of these essential services in Arizona. We work closely with other professionals in these areas, and we are frequently before the Probate Court in all matters relating to these services. We are often the only neutral party in such matters and, thus, our involvement greatly promotes the resolution of same. At times, we take a position defending the ward or decedent's estate to promote the grantor's intent and the best interest of the ward. We often bring matters to the Court to resolve when various parties disagree.

It is clear that we will be affected by changes to the legal process affecting various fiduciary services and have an interest in taking an active role in the review of same. The focus of our suggestions is the same as yours, that any changes to the existing procedures further the best interests of wards, beneficiaries and decedent's estates.

THE PROBATE BENCH

Our first comments relate to the probate bench, in that we support continued efforts to maintain and promote an informed and experienced judiciary. The services relating to conservatorships, guardianships, trusts and settling decedent's estates involve many different disciplines, such as estate and trust administration, probate administration and procedure, taxation, real estate management, asset protection, investment management, care services, and elder and special

management that is provided. Discretionary investment management fees are routinely charged on a percentage fee - never on an hourly basis. Further, [REDACTED] disclose fees in published fee schedules, and routinely provide them to and discuss them with clients even before involvement in their estate, trust or conservatorship matters. Such fees, based on percentage of the estate, have regularly been approved as reasonable by the Probate Court. Indeed, such fee structures are efficient and clear. There are no surprises.

FIDUCIARY TRAINING

Our last comments relate to the current exemption from mandated training provided to [REDACTED] granted by the Arizona legislature. We urge continuing this long-standing policy. By their nature and governance, corporate fiduciaries regularly require extensive training of their employees. Our regulatory agencies routinely audit our services, as do our own internal auditors. In addition, [REDACTED] have policies and procedures that provide their administrators and portfolio managers with a framework to best serve the needs of wards and beneficiaries. We provide and encourage extensive training and development both internally and from external sources not only to comply with regulatory audits, but also to manage the high level of risk associated with our services. Further, [REDACTED] often have attorneys, certified public accountants, certified trust professionals and licensed investment professionals on staff. Those employees are required to complete regular training and continuing education due to their professional affiliations. Wards and beneficiaries benefit from the regulatory and internal controls as well as the training that is required of employees of [REDACTED].

We look forward to working with you, in the best interests of wards, beneficiaries and decedent's estates, to develop a coherent and thoughtful process for reviewing the judicial oversight of fiduciary services. We also encourage you to consider the appointment of one of our member officers to serve on the Committee, as we are notably absent from same currently. Collectively, we administer hundreds of conservatorships, trusts and decedent's estates in Arizona and, thus, have significant involvement in the issues at hand.

Your consideration of our comments and suggestions set forth herein is greatly appreciated.

Sincerely,

A.S.T.

AUG 26 2010

LETTER OF CONCERN

Maricopa County Superior Court Probate Division
Presiding Judge Rosa Mroz
125 W. Washington
Phoenix, AZ 85003

re: Probate Advisory Committee Workgroup 3
Fee Guidelines/Fee Awards and Fee Dispute Resolution

Dear Judge Mroz:

As you are aware Administrative Order 2010-52 has been amended to 2010-56, the mandate by which the State Supreme Court Chief Judge Rebecca White Berch has issued in her directive and mandate regarding improving probate matters as it impacts the lives and families of the Vulnerable Adult Community.

I was recently noticed by a well known probate lawyer, Candess Hunter regarding the actions taken by Workgroup 3 from the actions of the group in writing proposals impacting "fee" structure for attorneys and fiduciaries charged the trusts and estates of Wards and families. I find what I have read unacceptable by Jay Polk. Attached is his 5 pages of continuous argument regarding what and how Wards and families are charged for that which he proposes in Probate. Attached are Candess Hunter's 5 pages of recommendation for you and your Work Group to adopt. If Mr. Polk cannot accept it, he should resign immediately and allow her the opportunity to replace him on committee. Mr. Polk was on the Rules Committee in the State Supreme Court in 2006 where the concept of "fiduciary grade accounting" was hatched. It is a known fact that such an amorgous and amalgroupous concept of accounting does not exist and that he has used it to damage and injure his opposition in probate.

We the concerned are concerned that he will cause even greater damage in the Court if his proposals are adopted which eventually will lead to fall out of this committee and you its Presiding Judge in the Media and continued dissatisfaction with Probate.

cc: Chief Justice Rebecca White Berch
COA Chief Justice Anne Timmer

EXHIBIT "A"

Families torn apart, financial ruin and extreme emotional toll & all taking place in a Maricopa court

PHOENIX - Edward Abbott Ravenscroft said his faith helped him in the fight of his life. It was a fight against a guardian who was appointed by the court to protect him.

He called it a nightmare.

□ It took me a lot of money, effort, 11 different court hearings to get rid of these people, □ Ravenscroft said. □ Bottom line is, it □s all about the money. □

The ABC15 Investigators found excessive fees are just one part of a major review into how Maricopa County probate court works.

The State Supreme Court ordered Judge Ann Timmer to head up that investigation.

□ Are the fees excessive? Who's looking at that? What guidelines are there out there for judges to be able to be awarding or approving fees? □

These are just a few of the questions Judge Timmer wants covered in the task force reviewing probate court.

In Ravenscroft's case, Sun Valley Group of Tempe was appointed conservator.

His attorney, Peter Williams, called the fees □ excessively high □ and □ abnormal □ at almost \$12,000 a month going to Sun Valley Group and its attorneys to administer Ravenscroft's finances.

□ That doesn't include any care, any food, any shelter, any clothing, anything along those lines. That's simply the legal process of making sure there's a fiduciary in place. I've never seen a case like this, □ Williams said.

Probate court is different from other courts. It is common practice for the parties and attorneys involved to bill the estate of the person they're appointed to protect.

□ There's a big problem in probate," Williams said.

Under state law, there is no requirement to provide monthly statements.

□ They won't tell me what they're charging me, and I thought that's & that doesn't make sense. An honest fair practice would give a monthly statement, or a monthly accounting, □ Ravenscroft said.

In the cases we reviewed, the guardians and the attorneys spend the money, charge the estate and get it approved by the court after the fact □ up to a year later.

In another Sun Valley Group case we examined, all of Marie Long's \$1.4 million estate was spent on her care. In one court hearing alone, we counted 12 attorneys representing various parties.

The ABC15 Investigators found other areas of potential conflicts of interest after speaking in-depth with many of the families involved. These issues are not part of the investigation into probate court

For instance, probate attorneys are allowed to fill in as judges including attorneys who work for guardians. They could be making decisions on guardian issues like approving fees.

Half of the 15 Maricopa County probate attorneys who serve as fill-in judges told us they thought it was not a conflict of interest. The other half wouldn't comment. Only one said it gives the appearance of impropriety.

The issue was addressed by the state court in a 2004 administrative order. The order says a pro tem judge or fill-in judge who works more than 40 hours on a bench cannot serve as an attorney in that court.

Another potential conflict of interest involves court investigators who help decide whether guardians are necessary.

The ABC15 Investigators uncovered that a contracted court investigator, Heather Frenette, is also part owner of Sun Valley Group.

Patti Gomes told us that Frenette investigated her mother's case. Then Frenette's company, Sun Valley Group became guardian.

□Everybody just hires an attorney, and they just start billing the estate! And nobody stops it, □ Patti said. □I mean its bizarreness going on. I had no input at all. □

Attorneys claimed Patti □s mother had a million dollar estate. Ravenscroft is an heir to Abbott laboratories. He's worth millions.

Frenette told ABC15 she does not think her position as court investigator is a conflict of interest, the court asked her to do it and she has never recommended Sun Valley Group to be fiduciary in any of her cases.

To see the first two stories, click on the links underneath the photo.

Sent: Mon, Apr 26, 2010 12:48 pm
Subject: arizona's violations of constitutional due process

Professor J.B. Gould, Thank you for taking the time to read this e-mail. There is a ongoing conspiracy in the state of Arizona's state courts to illegally probate private trusts to the detriment of the legal beneficiaries through assigned third parties appointed by the Supreme Court of Arizona. These third parties operate without any legal perceivable enforcement from the body{Supreme Court} that has authorized their existence. They are not held to the laws that they are charged to comply with rather they act like a corrupt criminal organization systematically looting the trusts, taken from the rightful heirs and trustees, as fast as possible then leaving a legal bill for "services" and consequently sticking the taxpayers with the medical legacy for the indigent, destitute, survivors. Professor this situation has been ongoing for a long time that I have knowledge of, over ten, [10], years. There are many families devastated by the status quo that robs the rightful heirs and beneficiaries of their constitutional rights. In my case PB2005-001011 I was held i civil contempt for not complying with an order to provide the court with "fiduciary grade accounting" that does not exist. It was a ruse to try to make a precedent out of some deviant lawyers imagination. The worst part, after being held in civil contempt for something that did not exist, was there is no legal remedy, appeal or recourse for civil contempt. The imaginary statute had real reprobate conclusions as the judge threatened me with jail time for six [6] months in Sheriff Joe's outdoor pink pajama enclosure. That would have been paramount to a death sentence as I am a disabled railroad conductor with sleep apnea and require a c-pap machine to sleep. Joe doesn't make those accommodations. I am asking for your expertise in constitutional law to assist with my legal matters concerning the Arizona state courts with this matter. Any help is appreciated.

EXHIBIT "B"

What Can be Done to Improve Probate

1. **Removal of Fiduciary.** The provision for removal of a fiduciary for “good cause” is not well defined, and is now construed to mean that you have to “prove” the wrongdoing of the fiduciary. It needs to be redefined – good cause should relate to what’s best for the Ward, emotionally and financially. Also, while there is a provision for the ward to choose at the outset (which is often ignored) there is no provision for the ward to simply want another fiduciary that he can work better with. The “good cause” provision is:

A.R.S. § 14-5415. Death, resignation or removal of conservator

The court may remove a conservator for **good cause**, upon notice and hearing, or accept the resignation of a conservator. After his death, resignation or removal the court may appoint another conservator. A conservator so appointed succeeds to the title and powers of his predecessor.

THE FIX: I think we need a statute that gives a ward, as a matter of right, the authority to make a one time per year removal of a fiduciary, like a notice of judge. Written with 30 or 60 days notice, no cause, just a matter of right. The Ward would have to have a successor private fiduciary that has agreed in writing to take over. This would stop the pillaging of the Ward’s estate, but allow the ward to get a fiduciary he wanted to work with. As to who could exercise this power, it should be the ward OR the ward’s attorney OR the GAL OR the ward’s family. The cost of transferring from one fiduciary to another is very small compared to the cost of these court battles.

2. **Financial information to Ward and Ward’s family.** Currently the Ward and the family do not know the amounts the fiduciary has expended on fees until a year or so after the fact.

THE FIX. The fiduciary should have to give a simple, informal accounting

of income received and expenditures paid from the Ward's funds to the Ward (and or his family) on a monthly basis.

3. **Derivative Fiduciary Duty.** Case law developed over the years which identified that a fiduciary's attorney had a "derivative fiduciary duty" to the Ward (not just a duty to the fiduciary). Two probate lawyers promoted ARS 14-5652 to eliminate the derivative fiduciary duty to the ward by the fiduciary's attorney that was developed in *Fickett, Shano and Fogleman*. The new statute which eliminated the derivative fiduciary duty to the Ward by the fiduciary's attorneys says:

14-5652. Attorneys; fiduciary duties

A. **Absent an express agreement to the contrary**, the performance by an attorney of legal services for a fiduciary, settlor or testator does **not** by itself establish a duty in contract or tort or otherwise to any third party. For the purposes of this subsection, third party does not apply to the personal representative, settlor or testator.

B. An attorney who acts as a personal representative or trustee shall disclose to all adult persons who have an interest in the estate or trust the names of any person who has an interest in that estate or trust to whom the attorney is currently rendering or has in the past rendered legal services. The attorney must make this disclosure in writing within a reasonable time after learning that a client or former client has an interest in the estate or trust. The representation of an interested person by that attorney is not grounds for removing the attorney as the personal representative or trustee unless the attorney is unable to perform the fiduciary duties as personal representative or trustee without violating the attorney's ethical responsibilities to the client or former client.

This means that the fiduciary's attorney has no duty to the Ward, and that if the attorneys' client is exploiting the ward, the attorney has no

duty to the Ward to do anything about it.

THE FIX. The derivative Fiduciary duty needs to be restored. The statute needs to be revised so that the fiduciary's attorney has the "derivative fiduciary duty" to the Ward that was expressed in the Fickett, Shano and Fogelman cases.

4. Guardian ad Litems ("GALs") on contract receive flat fees UNLESS they can be paid from an estate. The flat fee for a Best Interest attorney for an adult is \$2,350; the flat fee for a GAL in criminal cases is \$300; the flat fee for an adult probate is \$1410. There are also flat fees in Juvenile. However, in probate, court appointed GAL's fees run into huge amounts. For example, the GAL was paid more than \$228,000 in PB2005-001273. This is not unusual.

THE FIX. I propose that the GAL's contracts in probate should specify that if there are funds in an estate (so that the GAL can be paid from the ward's estate), their fees would be hourly but capped at \$5,000/year. That is still more than double what they would be paid under any of the contracts, but would stop the GAL abuse.

5. **Fiduciary Code of Conduct.** I understand that there is a movement to water down the fiduciary "code of conduct" to remove the mandatory language. The Code of Conduct, if followed, would protect the Ward. Many provisions of the Code of Conduct are consistently ignored by the abusive fiduciaries, including but not limited to the these current provisions:

- a. The fiduciary shall make all decisions in a manner that promotes the civil rights and liberties of the ward or protected person and maximizes independence and self-reliance.
- b. The fiduciary shall manage and protect the personal and monetary interests of the ward or protected person and foster growth, independence and self reliance to the maximum degree.
- c. The fiduciary shall avoid self-dealing or the appearance

of a conflict of interest.

d. The fiduciary shall not remove the ward from the home of the ward or separate the ward from family and friends unless this removal is necessary to prevent substantial harm. The fiduciary shall make every reasonable effort to ensure the ward resides at home or in a community setting.

e. The fiduciary shall ensure all fees and expenses incurred for the protected person by the fiduciary, including compensation for the services of the fiduciary are reasonable in amount and necessarily incurred for the welfare of the protected person.

THE FIX. Instead of watering down or ignoring the Code of Conduct, it needs to be even MORE explicit, that when a fiduciary relationship with a ward and/or the ward's family breaks down, that the fiduciary has an affirmative duty to step aside and have the court appoint another fiduciary.

6. **Courts.** Years ago, judges, fiduciaries and attorneys all understood that the point of a protective proceeding was to protect the "protected person" and their assets. Years ago, some fiduciaries simply stole from their wards, were arrested and jailed.

Now, the two largest fiduciary companies have gotten much more sophisticated—they and their attorneys do not steal from the protected person's estate, but "bill" until the Estate is gone, the same end result for the Ward. These fiduciary companies often hire attorneys that also are *pro tem* judges in the probate court to represent them, and no one thinks it's a conflict. Often, the incoming judges and commissioners are "trained" by these same attorneys, who *pro tem* and represent fiduciaries in the probate court. Not surprisingly, the Courts simply rubber stamp this decimating of estates, and seem to think that it is too bad, but there is nothing they can do about it. Everyone seems to think it is ok if the Ward then has to go on public assistance. When the fiduciaries get in a dispute with the Ward's family, they consistently separate the Ward from their family members, with the Court's blessing.

THE FIX. The Commissioners and Judges need to understand that **THEIR JOB** in a “protective proceeding” is to **PROTECT** the ward **AND** his assets. They have the robe, the gavel and get to make the decisions. When they see a battle emerging between the Ward, the family, the attorneys and the fiduciary, it is a simple matter to change fiduciary and court appointed attorneys and GALs **BEFORE** the Ward’s estate is decimated. You can’t change the family, but you can find fiduciaries and attorneys that can work cooperatively with the family and Ward. If the first can’t, find another. The Courts need to be proactive and not just wait until all the assets are gone and everyone stops fighting.

The conflict with attorneys who are *pro tem* judges (and who participate in the training of judges and commissioners) and who also represent fiduciaries should be recognized.

These changes will go a long way to eliminate the current abuses in Probate. A by-product of the changes will be that the most successful fiduciary companies will be those that are kind to the Wards and their families and earn their trust and confidence.

EXHIBIT "C"

Proposed Changes for Dealing with Attorney & Fiduciary Fee Issues

by

Jay M. Polk

August 2010

I. Fee Shifting Statute & Statute to Limit Person's Standing

A. Explanation

Arizona follows the "American rule," under which each party to a lawsuit pays that party's own attorney fees unless a specific statute, court rule, or contractual provisions provides otherwise. *See generally* State Bar of Arizona, *Arizona Attorneys' Fees Manual* § 2.2 (5th ed. 2010). Application of the American rule in probate cases can be inequitable because it can result in someone who was not a direct party to the litigation incurring substantial fiduciary and attorney fees regardless of that person's nominal role in the litigation.

The purpose of a guardianship/conservatorship proceeding is to protect a person (the "subject person") who, as a result of some type of physical or mental impairment, is unable to protect himself. Sometimes, however, the subject person's estate is forced to incur attorney and fiduciary fees that do not directly benefit the subject person. This frequently occurs when a third party (i.e., someone other than the guardian/conservator or the subject person) takes an unreasonable position or unreasonable action. For example, a family member of the subject person may make unreasonable demands upon the fiduciary for information (e.g., daily telephone calls or weekly requests for accountings). Likewise, a person may initiate court proceedings solely or primarily to further the person's personal interests rather than to benefit the subject person (such as when the person is motivated by a desire to preserve an inheritance or when a family member uses the protected person as a pawn in litigation against another family member, similar to when divorcing parents use their child to "get even" with one another). In such cases, the protected person's estate typically bears the costs of the fiduciary's time and expense (including the fiduciary's attorney fees) to deal with such unreasonable third party actions/positions, even when the fiduciary prevails in litigation against the third party. While this result might seem to be unfair to the subject person (who did not cause the fees to be incurred), it is equally unfair to deny the fiduciary and the fiduciary's attorney compensation for taking actions they legally were obligated to take.

A similar type of issue can arise in connection with the administration of a decedent's estate or a trust. A beneficiary of the estate/trust may make unreasonable demands upon the personal representative/trustee, thereby causing the estate/trust to incur unnecessary fiduciary and attorney fees, which ultimately

end up being borne by all the beneficiaries (through a reduced inheritance as a result of the fiduciary and attorney fees being paid "off the top" of the estate/trust).

One solution to these problems is to allow the court to order the offending party (i.e., the party that has taken the unreasonable position or made unreasonable demands) to reimburse the subject person's estate, the decedent's estate, or the trust for the fiduciary and attorney fees incurred to respond to the offending party's unreasonable demands or unreasonable positions taken in litigation. Such a fee-shifting statute could be used both to mitigate the burden of the expense of the litigation and to encourage interested persons (as that phrase is defined in Arizona Revised Statutes section 14-1201) to make a more careful analysis of the demands they make upon fiduciaries and the positions they take in litigation. *Cf.* Ariz. Rev. Stat. § 12-341.01(B) (describing purpose of A.R.S. § 12-341.01(A), which allows the court to award the prevailing party reasonable attorney fees in an action arising out of contract); State Bar of Arizona, *Arizona Attorneys' Fees Manual* § 2.2 (describing purposes of A.R.S. § 12-341.01(A)).

Another solution to these problems, particularly in guardianship/conservatorships cases, is to allow the court to order that the offending party is no longer entitled to notice of, and to participate in, future proceedings relating to the ward/protected person. To reduce the drain on the ward/protected person's assets caused by excessive demands on the fiduciary's or court-appointed attorney's time, the court also should be permitted to order that the fiduciary or court-appointed attorney has no duty to respond to continuing requests made by persons who have engaged in a pattern of making excessive or unreasonable requests of the fiduciary or court-appointed attorney.

B. Proposed Statute

§ 14-XXXX. Remedies for Abusive Conduct

A. If the court finds that a ward, a protected person, a decedent's estate, or a trust has incurred fiduciary fees and expenses or attorney fees and expenses as a result of unreasonable or excessive requests made upon a fiduciary or court-appointed attorney or as a result of an unreasonable position taken by a person in a proceeding brought under this title, the court may order the person who made such unreasonable or excessive requests or who took such unreasonable position to pay the ward, the protected person, the decedent's estate, or the trust for some or all of such fiduciary fees and expenses and attorney fees and expenses incurred as a result of such conduct. For purposes of this subsection, "person" includes a person serving as a fiduciary or a court-appointed attorney.

B. In a guardianship or conservatorship case, if the court finds that a person has engaged in vexatious litigation, litigation solely or primarily for the purpose of harassing a fiduciary or court-appointed attorney,

litigation solely or primarily to further the person's own interests rather than the interests of the ward or protected person, or a pattern of making unreasonable or excessive requests for information from the ward's or the protected person's fiduciary or court-appointed attorney, the court may do any combination of the following:

1. Order the person to pay the ward or the protected person for some or all of the fiduciary's fees and expenses and the court-appointed attorney's fees and expenses incurred in connection with such litigation or in connection with responding to such unreasonable or excessive requests.

2. 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.

3. Order that the ward's or protected person's fiduciary 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.

C. Subsection B of this section shall not apply to any of the following:

1. 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.

2. 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.

3. 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 establish the fiduciary's or the court-appointed attorney's liability to the ward or protected person or entitlement to compensation.

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

E. For purposes of this section:

1. "Court-appointed attorney" means an attorney appointed pursuant to § 14-5303(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 fees and expenses, as well as the fees of any other professionals hired by the fiduciary.

4. "Professional" means an accountant, a physician, a psychologist, a registered nurse, or an expert witness.

C. Notes

- Subsection A is very loosely based on A.R.S. § 25-324(A), which provides that the court, "from time to time, after considering the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings, may order a party to pay a reasonable amount to the other party for the costs and expenses of maintaining or defending any proceeding" under chapter * and chapter 4, article 1, of title 25.
- Subsection B is very loosely based on A.R.S. § 25-411(G), which requires the court to assess attorney fees and costs against a party who seeks modification of child custody "if the court finds that the modification action is vexatious and constitutes harassment."
- Subsection D is very loosely based on A.R.S. § 12-341.01(B).
- Do we want to couch things in terms of an award of "reasonable" fees? I'm not sure this is necessary as: (a) I think "reasonable" is already implied, and (b) the proposed language gives the court the discretion to award "some or all of" the fees so the court can limit the awarded fees to only those that are reasonable.
- We will need to add to the probate rules a rule that states that a claim for attorney fees under this statute is exempt from Civil Rule 54(G). We might also consider drafting a rule that states specifically how/when a claim for fees under this statute is to be made.
- Look at 14-11004(B) to see whether it should be repealed or modified.

II. Statute for Mandatory Arbitration of Fee Disputes

A. Explanation

*

B. Proposed Statute

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

A. The superior court, by rule of court, shall do both of the following:

1. Establish jurisdictional limits of not to exceed sixty-five thousand dollars for submission to arbitration of disputes relating to the reasonableness of fiduciary fees and expenses and attorney fees and expenses.

2. 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.

C. For purposes of this section:

1. "Attorney" means an attorney appointed pursuant to § 14-5303(C) or § 14-5407(B) or employed by a fiduciary.

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.

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.

C. Notes

- Subsection A is a slightly modified version of A.R.S. section 12-133(A). The current cap for mandatory arbitration of disputes in general civil cases is currently \$65,000.00
- This statute is intended only to cover disputes concerning the reasonableness of fiduciary and attorney fees and, specifically, is not intended to cover disputes concerning the entitlement to fees. The reason for this distinction is that the entitlement to fees is generally a legal issue that typically can be (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

Unintended Consequences of Percentage Fee Guidelines and Recommendations for Monitoring Fees

While the creation of percentage fee guidelines for legal and fiduciary fees – on the surface – sounds like a reasonable plan, it is actually not reasonable and will create consequences the authors and the proponents never would intend, and perhaps have not considered. Below are some examples and recommendations.

1) Unintended Consequences: An Individual's Net Worth Does Not Forecast the Cost of Meeting Care Needs, Especially in an Emergency Situation that Requires a Guardianship/Conservatorship.

The cost of appropriately meeting the immediate needs of a person without viable family, with urgent legal, medical and financial management needs, often bears no relationship to the individual's net worth.

For example, below is a description of a situation that arises frequently, unfortunately. Imagine a hypothetical incapacitated person with a net worth of \$100,000, and an income of \$2,500 per month and it comes to light that this person is unable to manage his or her own affairs. This situation is often brought to light by some triggering event, but it has usually been manifesting itself at an ever-increasing pace over a period of months or even years.

The person's plight may come to the attention of Adult Protective Services, a neighbor, a banker, a health care provider, a minister, or, often, an emergency department at a local hospital.

Typical problems to be addressed by a petitioning, and subsequently-appointed, fiduciary often include:

- Filthy living environment – hoarding;
- lack of food, or lack of nutritious food, in the home;
- poor general health because of lack of any primary care medical services – multiple untreated and often painful, life-threatening conditions;
- improper medication usage;
- anxiety and depression;
- lack of appropriate safety and/or mobility equipment (walker/wheelchair) for fall prevention and independence;
- lack of dental care – multiple abscesses and pain;
- impaired vision caused by untreated eye ailments, often reflecting a need for cataract surgery;
- impaired hearing;
- broken or lost glasses/dentures;
- need for psychiatry and/or neuropsychological assessment;
- incontinence;

- financial exploitation such as recent purchase of impractical annuities, theft, embezzlement and other detrimental financial activities;
- extensive credit card debt / predatory reverse mortgages;
- multiple redundant medical/life and other insurance policies – high premiums with no benefit to the incapacitated person;
- lost/stolen car titles and property deeds requiring time spent to have reissued;
- need to apply for services such as ALTCS, Medicare Part D;
- resistance to assistance;
- language barriers; and
- feuding, litigious family members.

To properly address the incapacitated person's needs, the fiduciary must immediately begin to help the protected person, alleviate harmful medical, and possibly mental health, conditions, bring relief from pain and chaos and provide safety and financial stability.

Immediately upon appointment, if not sooner, in a typical fiduciary practice:

- the fiduciary's nurse begins addressing medical issues, obtaining medical, mental health, vision and/or dental care, and appropriate medical equipment;
- the estate administrator halts inappropriate expenditures, implements timely bill payment, files medical claims, often for an extended retroactive period, and puts the protected person's financial world on an even keel;
- the property manager protects the real estate, addresses often hazardous hoarding issues, deals with storage of personal property, protects valuables, conducts the court-ordered inventory and appraisal and coordinates a move to a safe environment;
- the fiduciary investigates all financial matters and recovers funds lost because of poor decision-making and financial exploitation, when applicable; and
- the fiduciary communicates with family, appropriate interested persons and the court appointed counsel and makes sure that all staff activities are supervised and documented.

If the fiduciary's services are capped at a percentage of the incapacitated person's net worth during the first year, the fiduciary may be in the position of having to postpone or ignore crucial problems – despite the fact that the client has funds available.

If service fees are capped, the fiduciary may have to decide:

- whether a person's need to have skin cancers removed is more important than long delayed dental treatment;
- whether the fiduciary should spend time recovering money lost to financial exploitation or work with a psychiatrist to treat the client's mental illness, anxiety and/or paranoia;
- whether the fiduciary should invest time in negotiating with credit card companies to reduce the debt or have broke dentures repaired; or

- whether the fiduciary should facilitate needed cataract surgery or work to restore the protected person's home to a habitable state.

Incapacity – and solving the problems caused by incapacity – is extremely difficult, time-consuming and very expensive.

In the case of the hypothetical client with a net worth of \$100,000, many times the critical issues routinely encountered by a newly appointed fiduciary cannot be addressed for \$25,000. In essence, the fiduciary would be ordered to protect and help the person, but denied access to the funds to accomplish it. The fiduciary's responsibility and liability under Title 14 A.R.S. would not diminish, but the ability to successfully carry out the fiduciary duty would evaporate.

All fiduciaries provide services on a *pro bono* basis, but no private fiduciary practice can routinely pay employees to work for the benefit of the ward without realistic reimbursement to the fiduciary practice.

2) Unintended Consequences of Percentage Guidelines: The Percentage Guidelines May Often Unintentionally Prevent Funds From Being Used As The Incapacitated Person Expects Them To Be Used.

Many people save money to make sure they will receive good care in the event of a decline in health and a supportive network of family or friends. Upon incapacity and the appointment of a professional fiduciary, if the court limits the amount of care and services the guardian/conservator can provide in a calendar year – the person is in actuality denied the care for which he or she saved money.

3) The Furor that Resulted in the Proposed Percentage Fee Guidelines Arose From Extraordinarily Litigated Guardianship/Conservatorship Cases.

A case cannot be evaluated in hindsight by looking only at the fees. The newspaper reported the fees and then looked for people to blame. The newspaper chose, and continues to choose, to use heat, not light, in an unhelpful manner designed more to frighten than enlighten.

Everyone involved in the publicized cases could and should have done better. Parties could have cooperated and settled the cases through alternative dispute resolution. There were, no doubt, other things that would have helped, in hindsight. The costs could have been shifted to the litigious parties. The judge could have simply stopped awarding fees, or demanded to have an explanation of how the legal and fiduciary fees were benefiting the protected person. Anyone who has been involved in furious litigation knows that it takes on a life of its own, and it takes huge effort, will and wisdom to stop it.

4) The Arizona Court of Appeals Decision, Sleeth v. Sleeth , ICA-CV 100093, December 9, 2010, Is a Recipe for Reason.

The ingredients to fashion reasonable outcomes and curtail legal and fiduciary fees, when appropriate, have been in place for years. Now, with the Sleeth decision, probate practitioners and judicial officers have a clear recipe. Responsible application of the factors utilized in the Sleeth decision will cause reason to prevail. The situations where a protected person's assets are appropriately being used for her care will move forward—irrespective of the percentage of the estate

used to take provide care and pay those who ensure she is safe and has the best quality of life possible under the circumstances.

With this well-reasoned and carefully crafted decision now in place, perhaps the proposed percentage fee guidelines can be held in abeyance for a period of time, while practitioners and judicial officers follow the guidelines of the Sleeth decision.

5) Mediation.

Mediation works—even when the parties hold out little hope for its success because they are so intensely embroiled in the emotion and the controversy. Judicial officers can make suggestions for, and can refer to private mediators. Judicial settlement conferences can also be of tremendous help, but realistically, the judicial officers who have the appropriate skills often do not have the time in their busy calendars to conduct mediations or even settlement conferences.

Many other states in the U.S. have highly successful private and volunteer probate mediation programs. Given other areas of foresight and innovation demonstrated at the Superior Court level, it is puzzling and frankly rather disgraceful that Arizona lags so far behind in implementing this cost-efficient problem solving approach.

Interest is from the following point of view: ----- Attorney
Your Comments: ----- I understand that the "bedrock goal of the maximum fee guidelines is to reserve sufficient estate assets to pay the protected person's reasonable living expenses for his or her estimated life span." The proposal does not study or address the economics of running a law practice; nor does it look at the real value of legal services. Good lawyers will move on to other areas of practice unless they are fairly compensated.

If fee maximum's are adopted, why don't we do it differently? An order resulting from the fee guidelines could result in the lawyer or the fiduciary being paid contemporaneously up to the maximum fee. However, the order would also approve, if otherwise reasonable under the "status quo factors to be considered by the Court in reviewing a fee application", legitimately earned fees which may be collected from the estate of the protected person ONLY at her death.

I am troubled by the maximum fee guidelines approach for other reasons:

a. What if most of the protected person's wealth is in his home, and what if the protected person lives in a facility? Do we count the value of the home as a liquid asset? Let us assume that we do not count the home's value, consistent with the idea that we do not want to deprive the protected person of private pay care during her lifetime. When the protected person dies, still owning the home, what is then the rationale for limiting the claim that a fiduciary or an attorney may have against the protected person's estate for the full amount of fees?

b. What if the protected person is a veteran, (or the spouse of a veteran), likely entitled to a monthly VA pension (between \$1200 and \$1800) for which they have neglected to apply? How would that figure into the calculation of the net estate value? This will be a common problem as Vietnam era baby boomers age into conservatorships.

c. What if the protected person is in the hospital and cannot return home? Would it not be in the fiduciary's interest to undertreat by recommending placement in assisted living rather than in a Skilled Nursing Facility so as to cut in half the projected living expenses and permit a larger fee to a fiduciary?

d. If the children (or other likely beneficiaries of the protected person's probate estate) apply for conservatorship, do these rules create an incentive for them not to reveal all assets of the conservatorship, so as to minimize the professional fees that can be charged along the way?

November 22, 2010

The Arizona Judicial Council
Arizona Supreme Court
1501 W. Washington St.
Phoenix, AZ 85007

**Re: Committee on Improving Judicial Oversight in
Processing of Probate Court Matters**

Gentlemen and Ladies:

The undersigned responds to the October 2010 Interim Report from the Committee on Improving Judicial Oversight in Processing of Probate Court Matters directed to the Arizona Judicial Council.

Although I am not a specialist in trust and estate law, I have regularly practiced in the field of probate trust administration, guardianship and conservatorship and have been engaged in litigation in those areas throughout my entire 50-year career.

I join in the comments addressed to the Committee by [redacted] of [redacted] and I endorse the comments that [redacted] and his partners have expressed to the Committee concerning various portions of the report. In particular, I would like to provide additional comments on Recommendation #9, concerning the adoption of statewide fee guidelines for attorneys and fiduciaries that are paid from an estate. Ignoring the constitutional issues, as well as the possible potential violation of federal trade regulation statutes involved in a fixed fee schedule, it is my considered opinion that such a plan, if adopted by the Supreme Court and placed into practice, would be an unmitigated disaster. Standardization penalizes the experienced, competent and efficient lawyer while it rewards the incompetent or barely competent, inexperienced and inefficient lawyer. The Court, if it has the will to exercise the powers it has, can easily regulate the fees that are charged to estates, based upon the *China Doll* criteria. In my experience, the abuses that I have encountered in estates are the result of the Trial Court

November 22, 2010

Page 2

abdicated its responsibilities by either a trusting reliance upon unworthy counsel or by failing to check the required fee documentation for other reasons. I have been able to obtain significant savings in counsel fees from diligent judges and have had to defend my fee requests from attacks by disgruntled heirs. The tools for doing such exist without further rule making by the Court. While the practice in the probate area has remained virtually unchanged since I commenced practice in 1960, the paperwork load in the estate area has increased geometrically during that same period of time. This is not the time for the Court to heap additional rules upon the practice. This is the time for the Court to insist that probate and trial lawyers persuade the Court of the reasonableness of their position.

December 10, 2010

Members of the Committee on Improving Probate Matters
Members of Workgroup on Fees for the Committee

Re: Fiduciary Fee Guidelines

Dear Committee Members:

Thank you for your time and efforts in serving on the main committee and fee sub-committee.

The matter of fiduciary fees can be answered by one question. What is more important, quality or cost? The quality of a fiduciary firm stems from its staff's experience, training, integrity and its desire to serve. Fiduciary firms incur ongoing expense related to staff training and education, professional liability insurances, seperation of duties, dual control and overall compliance to ensure quality control and protect the estates and the welfare of the clients and wards we serve. At the same time fiduciary firm employers must offer competitive wages and benefits. Quality comes at a price.

Lowered fees result in untrained, uneducated, inexperienced, and possibly untrustworthy fiduciary service providers or some public fiduciary offices, which are already overloaded with too many cases and who may not be able to give the time and attention needed. Lowered fees will result in high-quality fiduciary firms refusing to take on court appointed cases and a mass exit of high-quality private fiduciaries from the industry. What about the future when more baby boomers need fiduciary services? Who will the providers be and will the quality be there?

The statutes already express fees must be reasonable. The present systems does work if the parties involved review each case independently as to reasonableness of fees based on the particulars of the case. Submitting fee schedules with petitions (more private fiduciaries are doing this already), a budget within a period of time after initial appointment, more frequent fee filings (Rule 33), more education within the judicial system for judges and commissioners are all good ideas. Keep in mind additional filings will cause greater time and thus more fees.

There are no typical or normal cases. Each case is unique and has its own set of unknown factors and circumstances that are realized after appointment. Capping fees in any way shape or form will be disastrous to the persons most in need of protection. It takes at least a full year to understand the cash flow and financial status of each case. The health of a ward can change at any time and is often unpredictable.

You are welcome to spend a day or several days in our office to see what the life of a private fiduciary firm is like. Many privates use their own discretion to discount and pro-bono time on smaller sized estates. Most privates do exercise good judgment, do what is only absolutely necessary and in a way that is the least expensive without subjecting risk to their clients and wards or their estates. Please realize there may be severe consequences to the people in need of protection by choosing to cap or lower fiduciary fees in any way other than letting each judicial court determine reasonableness as already expressed in the statutes. Thank you for your time and attention.

Respectfully,

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**THE COMMITTEE FOR JUDICIAL ACCOUNTABILITY,
REFORM & JUSTICE (CJARJ)sm**

P.O. Box 4261
Phoenix, Arizona 85030-4261
www.stopguardianabuse.org

January 28, 2011

ARIZONA STATE SUPREME COURT
Supreme Court Chief Justice Rebecca Berch
Probate Advisory Committee
Chairperson, Ann Timmer, COA Chief Justice
1501 W. Washington
Phoenix, AZ 85007-3231

Dear Justices Berch; Timmer & Probate Advisory Committee Members:

On March 22nd & 26th, 2010 letters were distributed to the State Supreme Court regarding the unlawful conduct being sustained by the State Supreme Court from the media coverage by the *Arizona Republic* of the exploitation of vulnerable adults within the State Court System of Arizona; particularly the Probate Division of the Maricopa County Superior Court. Since then, it is no longer an issue of felony conduct, but a fact that demands further investigation by the law enforcement community.

The membership of *The Committee For Judicial Accountability, Reform & Justice (CJARJ)*, believes the time has come for the State Supreme Court to include members from CJARJ on the Probate Advisory Committee because the need is great to get alignment of State Probate with Legislative Initiatives being introduced by Legislative Committee for statute.

Therefore, our membership does not believe that this committee will succeed reforming the Probate Administration without public participation on committee from the original SSC Directive Administrative Order No. 2010 - 52. Our group has concerns that Key Initiatives contained in "Justice 20/20" will not be simplified of guardianship cases and ensuring fiduciaries are held accountable for the services they provide to their vulnerable adults and the financial and emotional exploitation that results from them and therefore continuing to being exploited by that group and their Association of Fiduciaries.

The membership also requests that the final report be delayed and extended past June 2011 to give our membership more time for investigation and recommendation to correct the problems with the State Probate System. Members have voiced their concerns to this committee and feel they have been ignored. Now, we request that our concerns and reforms be acknowledged and granted. Our membership considers this matter in the Public Interest & Public Safety. Adm. Order No. 2010-52 & 56 attached.

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:)	
)	
APPOINTMENT OF ADDITIONAL)	Administrative Order
MEMBERS TO THE COMMITTEE ON)	<u>No. 2010 - 56</u>
IMPROVING JUDICIAL OVERSIGHT)	(Amending Administrative Order
AND PROCESSING OF PROBATE)	No. 2010-52)
COURT MATTERS)	
)	

On April 30, 2010, via Administrative Order No. 2010-52, Chief Justice Rebecca White Berch established the Committee on Improving Judicial Oversight and Processing of Probate Court Matters and appointed members to the Committee. Administrative Order No. 2010-52 specifies that the Chief Justice may appoint additional members to the committee.

Therefore, pursuant to Article VI, Section 3, of the Arizona Constitution,

IT IS ORDERED appointing Denice Shepherd as a licensed fiduciary/attorney member, and Faustina Dannenfeler, as an Adult Protective Services representative, to this committee.

IT IS FURTHER ORDERED adopting the attached "Appendix A," replacing the original membership list adopted by Administrative Order No. 2010-52.

Dated this 12th day of May, 2010.

REBECCA WHITE BERCH
Chief Justice

APPENDIX "A"
MEMBERSHIP

The Honorable Ann A. Scott Timmer, Chair
Chief Judge, Arizona Court of Appeals, Div. 1
Phoenix

John R. Evans
Attorney/Representative of the Attorney General's Office
Tucson

The Honorable Julia Connors
Commissioner, Probate Division
Superior Court in Pima County
Tucson

Beverly Frame
Superior Court Clerks' Association Representative
Yuma

The Honorable Gary Donahoe
Superior Court in Maricopa County
Phoenix

Pamela Johnston
Licensed Fiduciary
Sun City

The Honorable Charles Harrington
Presiding Judge, Probate Bench
Superior Court in Pima County
Tucson

Jay M. Polk
Attorney / State Bar Representative
Phoenix

The Honorable David L. Mackey
Superior Court in Yavapai County
Prescott

Sherry Reed
Navajo County Public Fiduciary
Holbrook

The Honorable Rosa Mroz
Superior Court in Maricopa County
Phoenix

Catherine Robbins
Mohave County Public Fiduciary
Kingman

The Honorable Robert D. Myers (Retired)
Public/Attorney Member
Phoenix

Jacob Schmitt
Child Welfare Program Administrator
Phoenix

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

Denice Shepherd
Licensed Fiduciary/Attorney
Tucson

Diana Clarke
Probate Court Counsel
Superior Court in Maricopa County
Phoenix

Sylvia Stevens
AARP Representative
Mesa

Faustina Dannenfeller
Program Administrator for Adult Protective Services
Phoenix

PROPOSED

**COMMITTEE ON IMPROVING JUDICIAL OVERSIGHT
AND PROCESSING OF PROBATE COURT MATTERS**

**MEETING SCHEDULE
FOR
CALENDAR YEARS 2010/2011**

**All meetings are held at the
Arizona State Courts Building
1501 W. Washington St.
Phoenix, AZ 85007-3231**

All Meetings are Open to the Public

HEARING ROOM 109 - 1st Floor

DATE	TIME	HEARING ROOM
Monday, May 24, 2010	12:30 - 4:00 p.m.	109
Monday, June 21, 2010	10:00 a.m. - 2:00 p.m.	109
Monday, August 16, 2010	10:00 a.m. - 2:00 p.m.	109
Wednesday, September 8, 2010	10:00 a.m. - 2:00 p.m.	109
Thursday, October 28, 2010	10:00 a.m. - 2:00 p.m.	109
Tuesday, December 14, 2010	10:00 a.m. - 2:00 p.m.	109
Friday, January 28, 2011	10:00 a.m. - 2:00 p.m.	109
Friday, February 18, 2011	10:00 a.m. - 2:00 p.m.	109
Friday, March 25, 2011	10:00 a.m. - 2:00 p.m.	109
Friday, April 8, 2011	10:00 a.m. - 2:00 p.m.	109
Friday, May 6, 2011	10:00 a.m. - 2:00 p.m.	109

August 16, 2010

STATE SUPREME COURT STATE OF ARIZONA
Chief Justice Rebecca White Berch
1501 W. Washington
Phoenix, AZ 85007-3231

re: Probate Advisory Committee

Dear Chief Justice Berch:

Attached are copies of today's documents distributed in Committee to those parties participating in today's activities on the Board. Please take time to review them.

This case is in response to the proceedings at the FCP from several complaints neither listed nor prosecuted by that agency. As you know, several complaints for some time have been submitted to several different law enforcement agencies for failure to enforce criminal law within Probate Administration. As a result, activities that normally would be held accountable in normal life are considered legal in Judicial Circles. This must stop! **NO ONE IS ABOVE THE LAW INCLUDING JUDGES WHO ARE BOTH ELECTED & APPOINTED PAID EMPLOYEES FOR THE STATE AND SUBJECT TO RECALL, INITIATIVE & REFERENDUM BY THE PEOPLE.**

As a result, we the concerned will continue to file significant litigation in Federal Court bringing attention to the problems in State Court including damages and recovery from the State of Arizona.

We believe there are still not enough qualified persons at this time who are members with the experience and knowledge to correct the Probate Administration and handling of Vulnerable Adults, their trusts, estates, and health care issues especially arising by the Judicial Misconduct of those throughout the State Court System State of Arizona.

Candidly,

cc: COA Chief Justice Anne Timmer, Chairman, Probate Advisory Committee.

Public Forum

JOIN THE DISCUSSION AT WWW.NEWSZAP.COM

Post Your Opinions
Have a comment, opinion or question about a public issue? Post anytime at your community's or state's Public Forum at WWW.NEWSZAP.COM

Citizens urged to fight corruption in judicial system

Many assume the function of probate court is to protect the widow, orphans and trust beneficiaries whose estates are the subject of proceedings, which are administrative in nature.

The reality, however, is the opposite of this.

The probate court's chief function is really to enrich the lawyers who cavalierly plunder these estates. (<http://www.citynationalstory.com/probate.htm>).

This is what is occurring in Maricopa County Probate Court where the judges are engaged in racketeering through various tricks turning simple court actions into complicated legal ordeals enriching the "judicial insider club" consisting of judges, attorneys, guardians and fiduciaries.

NOTES

The reason is simple: Money. Less than 10 percent of all practicing lawyers have an actual job with a guaranteed paycheck showing up at the end of every week or month.

"Judges can be counted on to rule in favor of anything that protects and empowers lawyers," says the New York federal judge Dennis C. Jacobs, quoted by Adam Liptak in his Aug. 27, 2007, *New York Times* sidebar article, "With the bench cozied up to the bar, the lawyers can't lose."

Within the legal system there exists and spreads like a disease, the abnormal paradigm of practice

of law, according to anything goes; laws are bent and twisted and the court are bent and twisted and the lines of demarcation are blurred and secretly crossed (<http://cesar-lebel.blogspot.com/2007/11/judicial-corruption.html>).

Every citizen should be outraged to learn that in the United States of America, we have a "rigged" judicial system that destroys the lives of its citizens. This is a problem of national scope and affects everyone in this country either directly or indirectly.

"It is a long-standing practice that invites unfettered financial abuse of the incapacitated, incompetent and the elderly," Marie Long's attorneys wrote.

"This practice must stop." (azcentral.com/blogs-Laurie Rob-

erts, June 27, 2010.)

The citizens of the State of Arizona need to join together, form a political action committee by filing proper paperwork with the Arizona Secretary of State, begin disseminating petitions for signatures to put an initiative on the ballot for 2012.

The initiative will be "Creation of a Citizens Board of Judicial Accountability and Discipline."

In addition, those citizens who have been victims of financial exploitation by the Maricopa County Probate Court need to file RICO lawsuits. Attorney Grant Goodman of Goodman, P.A. Phoenix, has filed several RICO lawsuits and would be a good contact person.

Christine L. Porter
Paradise Valley

Comments on Probate Court sought

by Pat Kossan - Jun. 22, 2010 12:00 AM
The Arizona Republic

A judicial committee formed to recommend reforms in state Probate Court procedures has invited the public to file comments and suggestions online.

The committee, made up of judges, attorneys and fiduciaries, also announced Monday that two members of the public will join the group.

The new members are Mark Salem, a Yavapai County business owner, and Tom Davis, a former Department of Public Safety officer who lives in Phoenix.

The Arizona Supreme Court, prompted in part by columns in *The Arizona Republic*, created the Committee on Improving Probate Court Matters. The columns described cases in which people were declared incapacitated and placed under the protection of the Maricopa County Superior Court's Probate and Mental Health Department; their estates were tapped to pay for hundreds of thousands of dollars in attorney and fiduciary fees.

To send comments or suggestions to the probate committee, go to www.azcourts.gov/pcc and click on "Feedback Form" on the left-hand side.

"Several People Have Commented That There Needs To Be Much More Public Participation In These Proceedings From People Who Have Been Directly Impacted By The Policies Of The Probate System and Those Serving In The State Supreme Court. Board Members Should Be Selected From Those Directly Impacted By The Probate System And Demand Reforms That Consider Their Concerns Being REPORTED by The MEDIA. Attached Is A List Of Proposals To Be Inacted By Those On The Board."

ANN A. SCOTT TIMMER
CHIEF JUDGE

(602) 542-1479



Court of Appeals
STATE OF ARIZONA
DIVISION ONE
STATE COURTS BUILDING
1501 WEST WASHINGTON STREET
PHOENIX, ARIZONA 85007

May 28, 2010

VIA FACSIMILE AND U.S. MAIL:

Thank you for your letter dated May 25, 2010. _____
informed me after the meeting on Monday that she was willing to
join the Committee on Improving Judicial Oversight and
Processing of Probate Court Matters. As I informed her,
although I chair the Committee, only Chief Justice Rebecca White
Berch has appointment authority. Although you have sent a copy
of your letter to Chief Justice Berch, I will bring the issue to
her attention as well as I anticipate that she will make any
additional appointment in the near future.

Thank you for your interest in this very important matter.

Very truly yours,

A handwritten signature in black ink, appearing to read "Ann A. Scott Timmer".

Ann A. Scott Timmer, Chief Judge

AST/lms

cc: Chief Justice Rebecca White Berch

private citizen who has been executor of two estates and fiduciary for one

I think it is absolutely outrageous that this state allows people to be bled dry by a system that is clearly out of control regarding fees allowed to be charged and judges that allow them. It seems like everybody is looking out for themselves rather than their client. Fees should be capped at a much lower rate. Perhaps a new system should be in place for people to be able to be fiduciaries. Clearly something needs to be done to safeguard peoples' finances.

Residence: ----- Yavapai My Interest is from the following point of view: -----
----- Judge Your Comments: ----- I am a retired judge from another jurisdiction. I spent fourteen years on the bench dealing with, among other things, guardianships and conservatorships of both minors as well as adults. During that time, which admittedly ended nearly 20 years ago, there was never an instance of any suspicion on my part of a guardian or conservator taking undue advantage of his or her ward. We limited fees and any expenditures exceeding a set amount had to have prior approval. Obviously, that makes the private fiduciary business considerably less attractive but we also had a public fiduciary who was an elected official of the County who could take on the cases no one else wanted. All attorneys understood that they would not get approval of exorbitant fee applications. In short, being a private fiduciary was not a growth industry. In my experience in Arizona, the attorneys who typically represent the private fiduciaries are extremely jealous of their territory and I have been threatened with a bar complaint if I tried to get someone other than their client appointed. Severe limits on fees to fiduciaries and attorneys will take the fun out of it for them.

(As read aloud during public opinion forum at the Jan. 28, 2011 Probate Advisory Committee meeting)

Chief Justice Timmer, and fellow Committee Members.....

To date, there has been some level of accountability regarding the high fees that have been charged by fiduciaries and attorneys. However, the problem is not limited to the rates of the fees charged. What is also draining the "ward's" bank accounts are all of the issues that arise from the violations of the current laws and guidelines that are occurring.

I feel that it is the judge's responsibility to "protect" the rights of the families who come before the court. By protect, I mean that they will not "allow" the fiduciaries and attorney's to take advantage of the parties before the court from the start of the case, and if they do receive information that there are violations occurring, they will act swiftly to correct the problem. This would cut down on the amount of fees being charged to estates considerably.

The failures stemming from the bench have not been addressed, or at least thoroughly discussed at this point in time, and the problems with the fiduciaries and fees actually start here. When a fiduciary fails to perform their required duties or abide by the laws, or an attorney fails to properly represent their client (especially when the client is, in fact, the ward) families have to keep coming back to the court for help, which they DON'T get, and the fees keep going up. No American should have to pay for their liberty to be returned!

Here are my findings:

1. When a person has executed their directives, the court should enforce the person's directives and protect that person unless the court finds there is 'clear and convincing evidence' why the appointed person(s) should not be allowed to perform these duties.
2. The State should stay out of family disagreements and not allow malicious and frivolous lawsuits to come into their courts. Hearsay should never be a reason enough to tear apart a family, force a private citizen to undue intrusion, and drain personal savings. (As this may be slightly off the initial point, it still is a problem and another way to cut down on the fees charged to estates AND lives being torn apart.)

The U.S. Supreme Court has ruled that judges are NOT immune from prosecution when they 'act maliciously or corruptly'. They have taken an **Oath** to 'support the Constitution of the United States and the Constitution and laws of the State of Arizona'. This is what 'we the people' will, or rather DO, demand!

The problem starts with the judge on the bench either being UN-educated in the laws OR having a complete disregard for those laws and the people they are supposed to be protecting OR both. I believe that more consideration and discussion be emphasized on these matters, which are quite frequently occurring in probate cases, as doing so will appeal for a better end result while change, or reform, is being accomplished.

Thank you.

HAND DELIVERED

FEB 22 2011