Probate Rules Task Force

State Courts Building, Phoenix

Meeting Minutes: December 14, 2018

Members attending: Hon. Rebecca Berch (Chair), Marlene Appel, John Barron III, Hon. Julia Connors (by telephone), Robert Fleming, Jessica Fotinos, Hon. Andrew Klein, Hon. David Mackey, Hon. Robert Carter Olson, Hon. John Paul Plante, Hon. Jay Polk, Lisa Price (by telephone), Catherine Robbins, T.J. Ryan, Denice Shepherd

Absent: Colleen Cacy, Hon. Patricia Norris, Hon. Wayne Yehling

Guests: Chief Justice Scott Bales, Martin Lynch

AOC Staff: Mark Meltzer, Angela Pennington, Stacy Reinstein, Theresa Barrett

1. Call to order; preliminary remarks; approval of meeting minutes. The Chair called the tenth meeting of the Task Force to order at 10:04 a.m. She welcomed Chief Justice Scott Bales and invited him to address the members. The Chief Justice reminded members of the importance of their work, how much they have accomplished this year, and how their efforts will shape the resolution of future probate cases. He noted that earlier this week, the Court adopted, on an emergency basis, the Task Force's proposed rule concerning jury demands in guardianships and conservatorships. The Chief Justice thanked Task Force members for their service.

The Chair advised that the Court had appointed Ms. Fotinos as a member of the Task Force, replacing Mr. Nash as the Clerk's representative. Today's meeting will focus on the remaining rule issues and the draft rule petition. Before proceeding, the Chair asked members to review the November 30 meeting minutes. Judge Polk requested two corrections. First, at page 1 of those minutes, the discussion of Rule 7.1 should reflect that a fiduciary could obtain appointment orders in a sealed case, as well as letters of appointment. Second, on page 2, in the last full paragraph of the discussion regarding Rule 4, Judge Polk recalled that the straw vote concerned whether to keep only section (a) with a catchall provision, rather than adding a catchall to the entire rule.

Motion: With these corrections, a member moved to approve the November 30, 2018 meeting minutes. The motion received a second and it passed unanimously. **PRTF: 010**

2. Consent agenda.

Rule 10.6 ("prudent management of costs"): Judge Polk advised that he had rewritten this rule, as shown in the meeting materials, to conform to the discussion at the November 30 Task Force meeting. He asked the editorial group to add section titles to this rule. Judge Polk also reminded members that a reference to current Rule 10.1 in

A.C.J.A § 3-303 will need to be changed to Rule 10.6. Members approved the rule as modified.

3. **Workgroup 1**. The Chair asked Judge Polk to present his proposed revisions to Rules 4 and 4.1 concurrently with his proposed changes to Workgroup 2's Rule 2.

Rule 2 ("probate case and proceedings"), Rule 4 ("initiation and termination of probate cases"), and Rule 4.1 ("termination of probate proceedings initiated by petition"): Judge Polk began with Rule 4.1, which he revised after the Task Force's decision at the November 30 meeting disapproving draft Rule 4.2. Rule 4.1(b) ("separate hearings and severance") is new; it allows separate hearings or a severance when a non-probate proceeding has been consolidated with a probate case. Because a family law matter may be a non-probate proceeding, members added "petitioner" and "respondent" to the enumeration of parties in section (c) ("definition of party"). They also concluded that references to a "civil case" in section (a) ("requirements") did not adequately address the range of case types, and they changed these references to "non-probate proceeding." Finally, in recognition of case law holding that a personal representative or a trustee is the proper party, rather than an estate or a trust, they deleted a requirement in section (a) that the estate or trust must be a party. They discussed *in rem* scenarios, such as a forfeiture proceeding involving an estate or trust asset, where a personal representative or trustee is not a party, but they concluded this would not be a practical problem because the personal representative or trustee would probably intervene. With these modifications, members approved Rule 4.1.

Judge Polk asked members to consider Rules 2 and 4 together, as sequential rules. He proposed modifications to the previously approved draft of Rule 2. One modification would relocate the definition of "probate case" to the end of the rule, which he considered more logical. He revised the definition of a "non-probate proceeding" to simply encompass anything that was not a "probate proceeding," as the latter term was described in another section. He also removed the words "meaning of" in the section titles. Other members expressed concern about these revisions. They particularly thought the previously approved definition more clearly explained the term "non-probate proceeding" and better aligned with Rule 3, which concerns the rules that apply in non-probate proceedings. They also believed that the more detailed explanation provided better direction for individuals, including attorneys, who appear infrequently in probate court. One member proposed that the entire rule should simply advise that a non-probate proceeding could be filed in a probate case, but this proposal gained no support. However, the members solidly supported retaining the previously approved explanation of a non-probate proceeding. On the question of whether the definition of "probate case" should appear at the beginning of the rule, as previously approved, or at the end, as suggested by Judge Polk, 11 members preferred to keep it at the beginning. A judge member parenthetically noted that the word "qualifying," which appears in the

approved version of Rule 2(d), should also be added to the first sentence of Rule 4.1(a) ("a qualifying non-probate proceeding may be filed…").

Members then proceeded to Rule 4, which is based on current Rule 4. At the November 30 meeting, some members preferred to retain only section (a) ("generally") of this rule. Judge Polk today proposed an alternative that would delete section (a), but would add new sections on initiation and termination, with short descriptions for each. The draft recognizes that proceedings involving decedent's estates are initiated by an application or a petition, whereas other probate proceedings are commenced by petition. The provision on termination includes a reference to Civil Rule 54(c) ("judgment as to all claims and parties").

Members questioned the premise that other probate proceedings are initiated by petition. One member gave an example of a testamentary guardianship of a minor, which begins with the filing of an acceptance. Another noted that some cases are terminated by the registrar — for example, the denial of an application for informal probate — and the draft rule does not cover these situations. Yet another member asked whether Civil Rule 54(c) would cover all the permutations for terminating a probate proceeding. One member observed that when the Task Force includes lists in a draft rule, there is a greater possibility that the rule will omit a scenario. Members then discussed the necessity of including Rule 4 in their draft. One member noted that statutes describe how a probate proceeding begins and ends. On a straw vote, 10 members agreed that there was no need for a rule that describes how probate proceedings terminate.

Regarding case initiation, one member proposed a rule that simply said that a probate proceeding is initiated by filing a document authorized by statute. Judge Polk was concerned that this would be inadequate guidance for infrequent filers; for example, without direction, they might not understand that a party cannot file a motion to probate a will. Members concurred that these filers would probably consult court rules before they consulted statutes, and that the rules should provide guidance on how to initiate a probate proceeding. On the other hand, and as noted above, a list of case initiating events in a rule poses a danger of omitting an event. After further discussion, the Chair requested a straw vote on whether to delete the entirety of Rule 4. A majority of 9 members favored deleting the rule.

4. Workgroup 2. Judge Olson presented on behalf of the workgroup.

Rule 2.1 ("definitions"): The most recent draft of this rule includes the workgroup's annotated recommendations. Judge Olson advised that the workgroup would defer action on those recommendations to the editorial group.

Rule 28.2 ("demand for jury trial"): The Chair noted that the emergency rule on demand for a jury trial is limited to guardianship and conservatorship proceedings and asked whether the forthcoming draft should continue to include this limitation. On the one hand, expanding the rule's application to all probate proceedings might undercut the rationale for the rule, i.e., parties in other proceedings presumably have the capacity to

waive a jury. On the other hand, a broader rule would promote consistency in probate court proceedings and might mitigate issues about whether there is a right to a jury in some probate cases. Moreover, a jury trial is an expense that, if automatically afforded by the rules, might reduce the assets of probate estates. On a straw vote, only a single member wanted to retain the emergency rule version; the other members preferred a rule that would require a jury demand in any probate proceeding.

5. **Workgroup 3.** Judge Mackey and Mr. Fleming presented the workgroup's rules.

Rule 19 ("appointment of an attorney, medical professional, or investigator"): Mr. Fleming advised that the informal group recommended adding the following new section (g) to Rule 19:

> **(g) Role of Counsel.** The attorney for a proposed ward/protected person shall act as advocate for the client's wishes, to the extent the attorney is able to determine those wishes. The attorney shall, as far as possible, maintain a normal client-lawyer relationship with the client. In addition, the attorney shall act to protect the substantive and procedural due process rights of the client.

The group believed this new section summarizes an attorney's ethical obligation in these situations. The second sentence of this section is derived from ER 1.14. A member proposed changing the word "determine" to "ascertain." No one objected to this change. Another member proposed relocating this new section to Rule 10.3 ("duties of counsel for the subject person of a guardianship or conservatorship proceeding"). Members also agreed with that change.

A member then proposed that the Rule 10 series include a rule on the role of statutory representatives. One member thought the statutes on statutory representatives would include this information, although stakeholders would probably also look to these rules for that information. Another member requested that Rule 10.3 include a provision that would preclude court-appointed counsel's role to morph into the role of statutory representative — for example, if the protected person is or becomes incommunicado — without court authorization. But Mr. Fleming cautioned that it might be difficult to encapsulate this concept in a rule and recommended that counsel and judges should review the ethical rules for guidance on this issue.

Before proceeding to the next rule, Judge Olson recommended a global review of the sequence and numbering of the proposed probate rules and suggested that new rules need not remain in the current location if there is a better one. However, rules that are commonly cited, such as Rules 7 and 33, should keep their current numbers.

Rule 27.1 ("training for non-licensed fiduciaries"): Rule 27.1 will need to be relocated. Otherwise, Judge Mackey advised that he had consulted with Judge Polk, and they agreed that the earlier concerns about the meaning of "financial institution" have been resolved. This was done by including a definition of the term in Rule 2.1; the Rule

2.1 definition includes a reference to A.R.S. § 14-5651, which contains a provision on the meaning of the term. The rule as it now stands confirms that the training requirement for fiduciaries does not apply to financial institutions. Member had no additional questions concerning this rule and approved it.

Rules 24 + 36 consolidated (now, "guardian's inpatient psychiatric authority"): Judge Mackey reminded members that these consolidated rules are currently numbered "X" and will need to be relocated. By consolidating these rules, Rule X can address both the petition regarding inpatient authority (in section (a)), and renewal of that authority (in section (b)). Judge Mackey noted the challenge of writing a rule based on a statute (A.R.S. § 14-5312.01) that is complex and unclear. For example, the statute does not provide a renewal process; it only specifies what happens when the authority is not renewed. He also noted that the title and text of the rule changed the term "inpatient mental health authority" to "inpatient psychiatric authority."

The members' discussion of this rule focused on two areas. The first area concerned the meaning of an "inpatient psychiatric facility." The current rule does not include a definition, but proposed subpart (a)(1) does. Historically, the pertinent institutions were designated as Level One facilities, but that nomenclature is no longer used. The proposed subpart identifies certain facilities as included within the meaning of inpatient psychiatric facility, but it does not purport to identify every such facility. One member suggested tying the definition to that used in the Arizona Administrative Code, but members concluded that if the Administrative Code definition changed in the future, the probate rule might be incorrect or inaccurate. The members' challenge in rewriting a new definition for this subpart was to avoid being overly inclusive. For example, members did not want to include a locked Alzheimer's memory unit or a secured unit in a skilled nursing facility, but they wanted to include regional behavioral residential facilities, which are mentioned in subpart (a)(1). Members concluded that whatever definition they drafted would probably be imprecise, and they concurred that the definition subpart should be deleted from the draft.

The second area concerned proposed subpart (a)(5), which would permit the court to enter an emergency order. The text of the draft provides that prior to entering such an order, the court must make the requisite statutory findings and appoint counsel for an unrepresented ward. The court must also set a prompt hearing on the petition. Members discussed what would constitute an emergency; would it require, for example, a finding of immediate harm? Members concluded that an emergency order is one that the court can enter immediately, before giving notice or providing a hearing. Some members believed this subpart duplicated the court's authority to appoint a temporary guardian under A.R.S. § 14-5310(B). Other members believed the surrogacy provisions of A.R.S. § 36-3231 might have application to emergency orders under the proposed rule. But emergency requests for inpatient mental health authority apparently come before the court with some regularity, and judicial officers as well as stakeholders should have the added guidance of a provision in this proposed rule. After a straw vote, 12 members

agreed to keep proposed subpart (a)(5) as drafted. However, they also agreed to change the title of the subpart from "emergency order" to "order without notice."

The proposed rule would apply not only to a ward who already has a guardian, when the guardian needs the additional authority contemplated by this rule, but also to petitioners requesting new appointments as guardians. Subpart (a)(4) requires guardians in both circumstances to sign an acknowledgment of the guardian's power. Judge Mackey prepared a draft form based on an order he currently enters. The form would duplicate some of the provisions of Form 2 ("order to guardian and acknowledgment"). Members discussed whether there should instead be a supplemental acknowledgment, which can be used by itself when there is a pre-existing guardianship, and in conjunction with Form 2 on a new guardianship proceeding. Members preferred the supplemental form approach.

Finally, and based in part on Maricopa County practices, members agreed to remove a provision in a previous draft of the renewal provisions that would have required a judicial officer to promptly review a guardian's report.

Rule 37 ("settlements and financial recovery involving minors or adults in need of protection"): Although members had previously approved Rule 37, Judge Plante had a residual concern. Judge Plante noted two places in section (a) of the approved draft that required settlements to "be submitted for approval by a judicial officer assigned to hear matters under A.R.S. Title 14." Judge Plante believes this language is imprecise, especially in smaller counties where a judge may not have a formal probate assignment. Judge Plante proposed substituting for that language the phrase, "must only be brought in a proceeding under A.R.S. Title 14." After discussion, members agreed with this change. However, some members still had concerns about a civil judge approving a settlement, because the civil court does not track funds and it typically does not enter an order releasing the funds. A judge member observed that "probate proceeding" is now a defined term and proposed adding the word "probate" before "proceeding" to address this concern. The member also suggested adding after the words "guardian ad litem" in section (b) the words "under Civil Rule 17." Members agreed with these changes.

The Task Force discussed an amendment to the Civil Rules corresponding to Rule 37. The Task Force decided it would not include a Civil Rule amendment in its petition, but it will propose to the State Bar's Civil Practice and Procedure Committee that it consider such an amendment.

6. <u>Draft rule petition.</u> The Chair reviewed staff's draft rule petition. She suggested adding text stating that some rules were restyled but included no substantive changes, then simply listing those rules. This would permit the petition to omit a discussion of those rules in subsequent sections. A member suggested that each proposed rule include its source in the current rules. Another member recommended that a table include this information. A judge member noted the lengthy discussions members had regarding the introductory rules and suggested a more detailed summary

of those issues. One member observed that some draft rules use the term "self-represented," while others use "unrepresented," and requested consistent use of terminology.

The Chair advised that the editorial group (the Chair, Judge Norris, Judge Polk, and staff) will meet on December 21, 2018 for a global review of the rules. This group will carefully proofread the rules and correct grammatical and syntactical errors. It may relocate certain rules or provisions as requested by the Task Force or as needed to improve the rules' organization. The Chair advised that as the editorial group works on the rules, it might reach out to individual members for assistance with certain rules or issues. The editorial group might also make a few substantive changes, which will be consistent with the sense of the Task Force, but which will not be subject to a full vote. The Chair therefore asked the members for their authority to revise the rule petition, the proposed rules, and ancillary documents.

> **Motion:** A member then moved to give the Chair, working with the editorial group and with other members as necessary, the authority to revise and finalize the petition, rules, and associated documents, and to file it on or before January 10, 2019. The motion received a second and it passed unanimously. **PRTF: 011**

The Chair requested that members make no changes to the rules on OneDrive pending the filing of the rule petition. Staff will endeavor to provide members with copies of the finalized documents before filing them.

7. Roadmap. After the rule petition is filed, the Court will open it for public comments. Under Supreme Court Rule 28, as revised with an effective date of January 1, 2019, the comment period will conclude on May 1. The Task Force will then reconvene to discuss the comments and to prepare a reply. The reply, which will be due on June 1, may include modifications to the proposed rules. With the members' agreement, the Chair scheduled the next Task Force meeting for Friday, May 17, 2019. The Court will consider the petition, comments, and reply at its annual rules agenda in late August or early September 2019. Rules adopted at the annual rules agenda generally become effective on January 1, 2020. However, the Chair asked members to consider implementation issues before the next Task Force meeting, and whether the reply should request a modified effective date for all rules or any particular rule.

Some members will be attending the State Bar's annual probate and trust seminar on May 3, and other members will be attending a conference of the Arizona Fiduciaries' Association, which also will be held in May. The Chair requested that members reach out to interested stakeholders at these and other events and request their formal as well as informal comments on the proposed rules.

The Chair concluded the meeting by expressing her appreciation for the members' service on this project.

8. **Call to the public.** Martin Lynch responded to a call to the public and offered remarks concerning the right to a jury trial.

9. **Adjourn.** The meeting adjourned at 3:08 p.m.