Probate Rules Task Force

State Courts Building, Phoenix

Meeting Minutes: July 27, 2018

Members attending: Hon. Rebecca Berch (Chair), Marlene Appel, John Barron III, Colleen Cacy, Hon. Julia Connors (by telephone), Robert Fleming, Hon. Andrew Klein, Hon. David Mackey, Aaron Nash, Hon. Patricia Norris, Hon. John Paul Plante, Hon. Jay Polk, Catherine Robbins personally and by her proxy Heidi Harris, Denice Shepherd

Absent: Hon. Robert Carter Olson, Lisa Price, T.J. Ryan, Hon. Wayne Yehling

Guests: Maridel Soileau

AOC Staff: Jodi Jerich, Mark Meltzer, Angela Pennington, Theresa Barrett

1. Call to order; preliminary remarks; approval of meeting minutes. The Chair called the fourth Task Force meeting to order at 10:05 a.m. She introduced a guest, Maridel Soileau, who is the probate registrar for the Superior Court in Maricopa County, and Heidi Harris, a proxy for Ms. Robbins. The Chair then asked members to review draft minutes of the third Task Force meeting.

Motion: A member moved to approve the June 15, 2018 meeting minutes, the motion received a second, and it passed unanimously. **PRTF: 003**

2. Consent agenda. Two rules previously presented to the Task Force were returned to their respective workgroup for consideration of members' comments. These rules were subsequently revised by the workgroups and were placed on today's consent agenda for abbreviated discussion. The Chair assented to Judge Plante's request to remove one of those rules, Rule 16, from the consent agenda to allow a fuller discussion

Rule 6 (currently "Probate Information Form," and as proposed, "Probate Information Form and Notice of Change of Contact Information Form"): Judge Polk advised that Workgroup 1 removed the trust form from the draft and made several other minor changes. After the workgroup meeting, Judge Polk noted that the workgroup had omitted a "duty to correct" provision that had been in the previous draft, and he added that to the revised draft as a new subpart (b)(5). Members were concerned that the duty to correct was overbroad. After discussion and a tied straw vote, they narrowed petitioner's duty to correct only an incorrect date of birth or social security number on a previously filed probate information form. With this revision, members approved the updated draft of Rule 6, including the associated forms.

3. Workgroup 3. The Chair then invited Judge Mackey to present Workgroup 3's rules. Ms. Soileau participated in the discussion of Workgroup 3's Rules 22 and 26, and Workgroup 2's Rule 16.

Rule 22 (currently, "orders appointing conservators, guardians, and personal representatives; bonds and bond companies; restricted assets," and as proposed, "order appointing guardian, conservator, personal representative, or special administrator"): The Task Force had previously reviewed Rule 22 and returned the rule to the workgroup with comments. Judge Mackey reviewed the workgroup's most recent revisions.

The previous version included Rule 22(b), titled "bonds." The subparts of that provision required a bond to include the name and address of the bonding company's statutory agent and required the company to notify the court if this information changed. The workgroup deleted section (b) because the subject of bonds did not fit well within the scope of Rule 22. (A draft Rule 22.1 titled "bonds" was also deleted.) Moreover, the subject of bonds is covered by statute, and incorrect information concerning the statutory agent's address for service of process is rare in probate cases.

Because of the deletion of section (b), former draft Rule 22(c) ("restrictions on authority and accounts") became the new section (b) ("restrictions on authority"). Judge Mackey explained that the language for restrictions in subpart (b)(1) regarding real property, monetary assets, and guardians are examples. These examples are not all-inclusive, and judges can add other language on a case-by-case basis. Under subparts (b)(2) and (b)(3), a fiduciary is responsible for assuring that proof of a restricted account is filed, and the fiduciary's attorney is responsible for assuring that the account is established and properly titled.

During a discussion of these revisions, members agreed to remove from subpart (b)(1) a sentence that said, "Any such restriction [in an order] must be included, in the same language, in the letters." They did so because Rule 26, which concerns the issuance of the letters, contains a similar provision. Judge Mackey reiterated that the three restrictions in section (b) (regarding real property, monetary assets, and guardians) are suggested language, and the court may modify the language as appropriate in the circumstances. Members discussed whether the restriction example for real property should begin with the words, "no real property," as stated in the draft, or whether it should be rephrased to refer to "all" or "the following" real property (or, "[specified] real property may not be sold, encumbered, or conveyed, etc.") They agreed to the rephrased version, and if the property is specified, it might also be useful when the letters are recorded. Because the restrictions are examples rather than directives, a member suggested relocating them as a comment to Rule 22. Although one member believed that the examples were unnecessary, even in the comment, another member thought it would be helpful to retain these examples to assist the attorneys who prepare appointment orders. Members concurred with the suggestion to move the restrictions to the comment.

Regarding the proof of restricted account in Rule 22(b)(2), a member proposed adding the words "unless the court orders otherwise" after the requirement that proof

must be filed within 30 days. The member noted there are instances where 30 days is not realistic. Members agreed to this change. The member also noted that the Supreme Court has on its website a proof of restricted account form; the member suggested that the rule refer to the form. However, some financial institutions routinely use their own forms. Members agreed to add language that the form that is used must be "substantially similar" to the Court's form.

A final comment addressed bracketed language in draft Rule 22(a)(3), which says in part, "If the court orders a bond [or a bond is required by law], the order must state the bond amount…." It appears that it is the court rather than a statute that sets the bond amount, and sometimes the registrar specifies the amount. Accordingly, members agreed to delete the bracketed language and add the words, "or registrar," after "court."

Rule 26 (currently, "Issuing and Recording of Letters," and as proposed, "Issuing and Recording Letters of Appointment"): Judge Mackey noted the retitling of this rule. The draft rule improves on the current rule by adding titles for each section. The workgroup added a new section (a) concerning "scope" and a new section (b) that provides a definition of "letters of appointment." Section (c) tracks language of the current rule regarding the duration of an appointment. Section (d), "limitation of authority," requires the letters to include language in the order that restricts the fiduciary's authority and ties in to the previously discussed provisions on restrictions in Rule 22. Sections (e) ("certified copies") and (f) ("recording") also track language of the current rule. Judge Mackey noted that the workgroup discussed adding a list in this rule that described what the clerk must do before issuing letters but decided against it because of the difficulty of making the list all-inclusive, and because clerks maintain their own lists. The workgroup deleted the comment to the current rule.

A member asked what should happen if there is an inconsistency between an order, or a signed minute entry that is effectively an order, and the letters. Members believe these are rare occasions — and the clerk will issue amended letters to conform to the order on those occasions — and agreed that a rule provision that addressed this circumstance was unnecessary. Members also discussed a provision in draft section (c) that requires a conservator to file a copy of recorded letters with the court that appointed the conservator within 30 days. The draft provision did not include a time limit for recording the letters, and members concurred with adding a requirement that the letters be recorded with the County Recorder within 10 judicial days. The members were evenly split on whether the rule should then require the filing of a copy of the recorded letters (one member believed the rule was often ignored), or whether it was sufficient to file a notice of recording rather than a copy of the recording. They concluded that it was the court's responsibility to monitor the conservator's compliance with this requirement, and they retained the requirement of filing a copy of the recorded letters. They increased the time to do this, however, from 30 days to 45 days. Members had no other changes to Rule 26 and they approved the rule with the revisions noted above.

4. **Workgroup 2.** The Chair asked Workgroup 2 to present its revisions to Rule 16 while Ms. Soileau was still present. Mr. Barron led the presentations on behalf of the workgroup.

Rule 16 (currently, "Applications," and as proposed, "Applications in Probate Proceedings"): There were two residual issues with draft Rule 16, which had been previously presented to the Task Force. One issue concerned the requirement that applications not only be submitted to the clerk, but that they be filed. The other issue revolved around the time the registrar should be allowed to act on an application.

After the previous Task Force meeting, Mr. Nash surveyed several clerks, representing about a fourth of Arizona's counties. He noted that not all clerks are registrars, and in at least one county the registrar is a judge. None of the individuals he contacted believed that acting on the application within two hours, as the draft rule provided, was feasible. On the other hand, they had no objection to the proposed requirement for filing applications. Ms. Soileau advised that the Superior Court in Maricopa County generally receives between 20 and 30 applications daily. She is the only official who can act on the applications, and she can review no more than 22 applications in a single day. She tries to process every application within one or two days, but she needs a third day as a cushion when necessary. Judge Plante added that Yuma clerks don't want the rule to specify a time limit, because if there is a delay in processing an application, there is a reason for it. Maricopa and Yavapai counties mail a declination letter or denial slip to an applicant, but Yuma does not. In the event of a declination, Pima County telephones the applicant, which is quicker than sending the declination by mail. In Maricopa County, a rejected application does not receive a case number, nothing is filed, and there is no filing fee.

One member proposed deleting Rule 16(c) ("action upon an application") in its entirety because the issue it purports to address arises predominantly in Maricopa County. The member added that a better solution to Maricopa's issue might be adding more personnel in the registrar's office. Another member observed that declining an application is an informal process, that functions best when it is flexible, and the rule should not unduly restrict how the registrar conducts the process. On the matter of filing applications, a member emphasized the benefits of making and preserving a court record.

The Chair then took a straw vote on whether to retain draft Rule 16(c)(2) (action by the registrar, including a requirement that the registrar act promptly and within two business hours). By a margin of 2:1, members favored retaining the provision, but with the deletion of "but within two business hours." Members also concurred with the filing requirement in Rule 16(c)(1) (action by the clerk), but they agreed to delete the word "immediately" in the phrase "immediately file and retain the application" because "immediately" in subpart (c)(1) did not contrast well with "promptly" in subpart (c)(2).

Finally, members revised draft Rule 16(a)(6), which stated that the registrar "may enter any other order that the registrar is authorized by statute to issue," because the registrar does not enter orders. As revised, the provision states that the registrar may "take any other action authorized by statute."

5. Workgroup 3 (continued). Members then returned to Judge Mackey's presentation of Workgroup 3 rules.

Rule 25 ("Order to Fiduciary"): The workgroup's draft rule adds a new section (a) ("generally,") followed by four sections that respectively concern orders to a personal representative, a guardian, a conservator, and a guardian and conservator. The workgroup deleted the current rule's references to "forms in the Arizona Code of Judicial Administration ['ACJA']" in anticipation that the forms' location might change. The workgroup's draft clarifies that the fiduciary must sign the acknowledgement on the form before the court enters the order. The revised rule includes a reference to Form 3M, which is currently in the ACJA but is not referenced in the current rule. The workgroup found that the current form for guardians of adults also works for guardians of minors, so a new form for the latter was unnecessary. Draft section (a) states that "the court will not issue letters," which is not entirely accurate, and members agreed to change this to say, in the passive voice, "letter will not be issued to a personal representative [etc.]" Also, in that section, members agreed to change "filed an order" to "entered an order." With these revisions, members approved the rule.

Rule 35 (currently, "Civil Arrest Warrants, Orders to Show Cause, and Fiduciary Arrest Warrants," and as proposed, "Enforcement of Court Orders in Probate Cases"): Judge Mackey noted that a new section (a) in this rule clarifies the power of the court to enforce its orders in a probate case. The remaining three sections re-order the provisions of the current rule so orders to show cause follow warrants. Judge Mackey also observed that the draft rule includes certain statutory requirements, notably a requirement for actual notice of an order.

A member suggested, based on a reading of case law, adding the word "inherent" to a phrase in the first sentence of section (a) so that it says, "the court has inherent power to enforce compliance [etc.]." In the second sentence of section (a), the member suggested making "statute" plural in the phrase "the sanctions provided by statute." The last sentence of section (a) says, "This rule does not govern criminal contempt sanctions imposed to punish an offender or to vindicate the authority of the court." The member suggested putting a period after "sanctions" and deleting the remainder of the sentence. Members agreed with all three suggestions.

Rule 37 (currently, "Settlements Involving Minors or Incapacitated Adults," and as proposed, "Settlements Involving Minors or Adults in Need of Protection"): Judge Mackey observed that the workgroup's changes to this rule permit a broader range of investment options and authorize the court to approve those options. The workgroup deleted the comment to the current rule. Mr. Fleming reviewed the workgroup's

significant additions to this rule. New section (c) ("procedure on hearing") allows the court to appoint, if appropriate or necessary to assure that a settlement is fair and just, a guardian ad litem or a Civil Rule 53 master to address four described factors. New section (d) also allows the court to order, after considering specified factors, the establishment of a trust, a 529 account, an ABLE account, or a distribution under the Uniform Transfer to Minors Act, among other things.

One member inquired why section (a) is limited to settlements of personal injury or wrongful death claims. Mr. Fleming responded that the rule could be revised to encompass other claims; it has this limitation for the time being because it is in the current rule. Another member suggested that a conservator could not continue to withhold funds held on behalf of a minor after the individual attains the age of majority, regardless of the individual's lack of good judgment. Mr. Fleming believes that certain investment vehicles such as a trust or a 529 account could nonetheless continue to retain the funds. A member suggested adding a conservator in section (b) as someone who could file a petition under this rule, as well as changing "interested party" in that section to "interested person," and members agreed with these changes. Members made other suggestions that will necessitate the workgroup's further consideration of this rule, including the following:

- Should the rule include a specific reference to structured settlements?
- Are there other investments options that section (d) should include?
- Should the rule exclude minimal claims, i.e., under a certain dollar amount?
- Should the rule be expanded to encompass other claims, for example, claims related to an inheritance or a life insurance policy?
- Should section (a)'s "generally" provision be replicated in the civil rules?
- Using the factors specified in Rule 37, should a judge on a civil assignment have authority to approve settlements? (One member was cautious about this suggestion and would permit civil judges to have this authority only when they were knowledgeable about probate, or after they consulted on the case with a probate judge.)

Members were generally supportive of the concepts in revised Rule 37, but the workgroup will consider the members' suggestions and return the rule to the Task Force with further revisions.

6. **Workgroup 1.** Judge Polk presented Workgroup 1's rules.

Rule 11 ("Telephonic and Video Attendance and Testimony"): This was third meeting at which members considered Rule 11. Judge Polk noted that the workgroup added the words "and video" to the rule's title. The workgroup may in the future propose changing the word "proceeding" in this rule to "court event," but "proceeding" suffices for now. A partial comment to the rule has been preserved.

The primary issue today was consideration of two options in Rule 11(d), "time for making request" for telephonic attendance. Option 1 would require that a request be

made "in a timely manner considering the circumstances at the time the request was made," and identifies several circumstances for the court's consideration. Option 2 would require that a request be made "no later than 30 days before the proceeding." Judge Polk proposed a third option: that the time for making a request be established by local rules.

Members declined local rules as a standalone alternative, but they discussed using it in combination with options 1 and 2. Members also discussed logistical issues; one member suggested using something like California's "court call" system, but this is not something the Task Force could include in its procedural rule. Another member spoke in support of option 2 to avoid the surprise of a last-minute telephonic appearance of a witness. One member proposed a pared-down version of option 1 that would retain the first sentence but eliminate the specified circumstances. And another member suggested adding the words "or not" in the second circumstance, i.e., "whether or not it [the proceeding] is contested or evidentiary," which the members supported. Finally, a member submitted that adoption of option 2 with a local rule alternative would probably result in a dozen rural counties adopting local rules, whereas fewer counties would find a need to adopt local rules under option 1. On a straw vote, and by a margin of 2:1, members favored submitting only option 1, but with the addition of the prefatory words, "unless allowed by local rule."

Rule 12 (currently, "Non-Appearance Hearing," and as proposed, "Initial Hearing on a Petition"): Judge Polk explained that while current Rule 12 refers to a "non-appearance" hearing, the rule does not define it or distinguish it from an appearance hearing. This led the workgroup to draft a Rule XX, which Judge Polk mentioned at the June 15 Task Force meeting, concerning court events. In turn, Rule XX became Rule 12 in today's meeting packet. Judge Polk envisioned a series of Rule 12's (12.1, 12.2, 12.3, etc.), each describing a particular court event, i.e., the initial hearing, conferences, oral argument, settlement conferences, final hearings on petitions, compliance and order to show cause hearings, other hearings, and divisional review, all following the structural model of draft Rule 12. Judge Polk then reviewed draft Rule 12. The draft provides that an initial hearing is an appearance hearing unless it is set as a non-appearance hearing. Rule 12 uses the term "opposition" rather than "objection" to be consistent with Rule 17.

One member thought that Rule 12 was redundant to Rule 17. Another member questioned the merit of adopting several new rules as a supplement to a single existing rule. On the other hand, "non-appearance hearing" is an embedded term, and no one had a more descriptive substitute (although one member proposed "summary disposition"). Judge Polk added that civil rules describing court events aren't adequate in probate cases because they lack information about such matters as providing notice, serving documents, and submitting an opposition. The Chair believed Rule 12 was helpful but noted redundancy in sections (c) and (d) and asked the workgroup to consider consolidating them. Members agreed that the rule should refer to an initial hearing on a petition, but not necessarily define it with the terms "appearance" and "non-

appearance." A member suggested using the word "attendance" rather than "appearance." Members agreed that it is useful to have a court event such as a non-appearance hearing where attorneys do not need to appear if there is no opposition to a petition. Members did not support a rule-by-rule explanation of the other court events proposed by Judge Polk because stakeholders know what these events are, and the terms are not confusing. They especially felt there was no need to refer to a divisional review, which is utilized only in Maricopa County. Judge Polk advised that the workgroup would revise the draft after considering today's discussion and would consider incorporating in the next version certain provisions of Rule 9 regarding notice.

7. **Workgroup 2 (continued).** Mr. Barron made presentations on Rules 17 and 18, which the Task Force had considered at previous meetings, and he made the initial presentations on Rules 27, 28, and 29.

Rule 17 ("Petitions in Probate Proceedings") and Rule 27 ("How a Probate Proceeding Becomes Contested"): Mr. Barron noted that in section (g), the workgroup changed "a petitioner may not file a reply" to "a party may not file a reply." Members agreed with this change but deferred to a later date a discussion about counterpetitions.

At the beginning of section (e) ("response to a petition"), the workgroup added the words, "A proceeding becomes contested when a party opposes a petition as follows." The phrase fits well in the context of Rule 17 and adding it would allow the Task Force to delete current Rule 27. Members agreed with this addition to section (e) and with the abrogation of Rule 27.

Rule 18 ("Motions in Probate Proceedings"): The Task Force previously suggested that the workgroup add a second sentence to this rule, which it did as follows: "Unless required by the Civil Rules, a judicial officer may rule on a motion without a hearing or oral argument." Although workgroup members did not favor retaining this sentence, they asked Task Force members whether it might be helpful for self-represented litigants. One Task Force member proposed abrogating the entirety of Rule 18, but other members agreed that it serves the purpose of contrasting motions with petitions and applications. The definition of a motion therefore belongs in Rule 18 rather than Rule 2.1. Members approved Rule 18 with the additional second sentence.

Rule 28 ("Pretrial Procedures"): This rule was on the agenda for general discussion rather than a discussion of specific text. The workgroup requested this discussion because of civil justice reform amendments to the civil rules that became effective on July 1, 2018. A newly adopted Civil Rule 26.2, establishes a three-tier system for discovery that is primarily based on the dollar value at issue in the case.

Among the questions posed by members during the discussion were the following: Should tiering apply to some but not all probate cases? Are the monetary limits in Rule 26.2 useful in probate litigation, or should some types of probate cases be exempt from the tiering system? Should tiering apply only to ligation involving decedent's

estates? Should the Task Force in a probate rule modify the criteria in Civil Rule 26.2 so they are more applicable to probate? If there are tiering requirements in probate, should parties be allowed to waive them? Should there be a fourth tier solely for probate cases? Should every probate case be exempt from tiering?

Members noted that most probate cases are not contested. In cases that are contested, the court generally requires a proposed scheduling order or a case management order, either of which could provide limits for discovery in the case without reference to a tier. A judge member observed that in civil litigation, parties frequently are of unequal financial means, which can result in a prolonged discovery period. However, this is less common in probate cases. The judge member thought a tiering system might be too rigid for probate, and instead proposed the adoption of a general rule that specified that discovery must be proportional to what was at issue in the case. Finally, a member noted a recent amendment to A.R.S. § 14-1304 (Laws 2018, Chapter 102): "Unless specifically provided to the contrary in this title or unless inconsistent with its provisions, the rules of ~~civil~~ probate procedure ~~including the rules concerning vacation of orders and appellate review~~ govern formal proceedings under this title." Accordingly, the probate rules are primary in formal probate proceedings, although the probate rules can, and do, incorporate the civil rules by reference. This amendment might open the door for the probate rules to be exempt from the civil tiering rules. The workgroup will consider this discussion and present its proposed Rule 28 at a future meeting.

Rule 29 ("Alternative Dispute Resolution"): The workgroup's proposed version of this rule is significantly shorter than the current rule because it omits section (c) ("report to the court") and (d) ("other duties"). The three sections of the proposed rule are titled "generally," "duty to confer and participate," and "arbitration." In the "generally" section, members agreed to remove "mediation" in the phrase "such as mediation, a settlement conference, or [etc.]" and to change the concluding words of the section from "private dispute resolution" to "private mediation or arbitration." Members approved the rule with these changes.

8. Other matters. The Chair deferred a discussion of Rule 38 ("forms") to a future meeting.

The Chair noted that a July 19, 2018 letter signed by 10 Yuma County probate attorneys was distributed to Task Force members. The Chair welcomes comments from stakeholders. The Chair observed that the July 19 letter raises some valid concerns about simplifying forms and other issues. The letter indicated that the attorneys would provide a written proposal, and the Task Force will review this; the Chair requested that their proposal be submitted as soon as practicable. The Chair added that the Task Force is aware of the complexity of certain rules, and it is attempting to simplify them while also assuring that the rules adequately protect the public.

A judge member noted that e-filing could have an impact on the probate rules, but it is not known when e-filing might become available in probate cases.

9. **Roadmap.** Based on a previous staff poll of members, the Chair confirmed Friday, August 24 as the next Task Force meeting date. Other proposed dates, all of which are Fridays, are September 28, October 26, November 16, and December 14. Some members are unavailable on certain proposed dates, but the Chair asked that members schedule these dates on their calendars.

The Chair stated that the Task Force made good progress at today's meeting, but it is not progressing as quickly as initially anticipated. More than half of the rules have not yet been considered by the Task Force, and the petition filing deadline is January 10, 2019. Moreover, a considerable amount of additional work needs to be done before filing, such as preparing the petition and any appendices. It also would be helpful to obtain prefiling vetting of the proposed rules; this allows the Task Force to modify the rules based on issues — large or small — that stakeholders may raise before the petition is filed. In sum, the Chair encouraged members to expedite work on the rules as the Task Force needs sufficient lead time to draft and vet the petition and proposed rules before the filing date.

10. **Call to the public.** There was no response to a call to the public.

11. **Adjourn.** The meeting adjourned at 3:47 p.m.