Probate Rules Task Force

State Courts Building, Phoenix

Meeting Minutes: November 16, 2018

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

Absent: Colleen Cacy, Hon. Andrew Klein, Hon. Wayne Yehling

Guests: None

AOC Staff: Mark Meltzer, Angela Pennington

1. Call to order; preliminary remarks; approval of meeting minutes. The Chair called the eighth meeting of the Task Force to order at 10:02 a.m. She thanked Judge Norris for serving as Chair during the October 26 meeting. She also expressed her appreciation for the workgroups' continuing diligence and the extended duration of their meetings. The Chair then asked members to review draft minutes of the October 26 Task Force meeting. There were two requested corrections. Judge Norris had noted during that meeting the absence of a definition in the rules of the word "month," and requested that the rules include that definition. For the three options noted in the discussion of Rule 28.2, Judge Olson asked the minutes to reflect that those options were listed in their preferred order.

Motion: A member then moved to approve the October 26, 2018 meeting minutes with the above corrections. The motion received a second and it passed unanimously. **PRTF: 007**

2. Consent agenda. Three rules were on the consent agenda.

Rule 2.1 ("definitions"): Judge Olson noted that the workgroup had added index definitions for "application," "petition," and "motion." (An example of an index definition is, "'Application' has the meaning described in Rule 16.'") The workgroup also added index definitions for "contested hearing" and "uncontested hearing," and a new definition for "Civil Rules," which is an abbreviated reference to the Arizona Rules of Civil Procedure. Although members did not object to these new definitions, Judge Olson asked that they defer approval of the rule because additional definitions might be added.

Rule 19 ("appointment of an attorney, medical professional, or investigator"): Judge Mackey advised that the workgroup revised Commissioner O'Connor's version B consistent with members' suggestions at the October 26 meeting and made the following

changes. In revised section (a) ("time and method"), the court can make appointments without a request. Judge Mackey noted the following:

- The word "investigator" was inadvertently omitted from the last sentence of section (a).
- New language in section (b) ("nomination of attorney") precludes the nomination of attorneys in specified circumstances.
- Under section (c) ("prohibited attorney appointments"), the court can appoint counsel notwithstanding a prior relationship after full disclosure.
- New section (d) ("nomination of physician, psychologist, psychiatrist, or registered nurse") was taken from version A. The word "psychiatrist" was included in section (d) even though a "physician" includes a psychiatrist.
- In section (e) ("proposed order"), "judicial division" was changed to "judicial officer."
- In section (f) ("notice to appointees"), the operative verb is "provide," which includes both mail and delivery.

For brevity, Judge Polk suggested changing all references to "proposed ward/protected person" to simply "subject person," and members concurred. Members made stylistic changes to section (a) but they did not complete them; completion will abide the Chair's comprehensive stylistic review in December. Judge Mackey requested that the final version clarify that requests for appointment can be in the petition or in a separate document filed with the petition. Members made other stylistic changes to section (e). Members discussed whether the adjective "independent" was appropriate in section (a) ("requests for the appointment of an independent attorney….") Some members thought the term was redundant to a statute, others believed it provided necessary emphasis. On a straw vote, a substantial majority agreed to retain "independent."

A member then raised a new issue: should this rule differentiate the appointment of a statutory representative under Rule 15.1 from appointments under Rule 19? A detailed discussion of the issue, which included several alternative proposals, concluded with a request by the Chair to Judge Mackey, Judge Polk, Ms. Appel, Mr. Fleming, and Mr. Ryan to draft and propose an appropriate provision differentiating Rules 15.1 and 19. This provision tentatively would be included within Rule 19. The Chair deferred approval of Rule 19 pending discussion of that additional provision.

Rule 28.1 ("disclosure and discovery"): Judge Olson revisited the members' previous discussion of this rule that focused on section (e) concerning "fiduciary subpoena authority." He reminded members that the fiduciary already has this authority while a petition is pending; section (e) would apply after the fiduciary's appointment, for example, when the fiduciary is marshalling assets, or requesting a ward's medical records, after the court has granted the petition. Judge Olson reviewed the latest workgroup's draft, which clarifies who has authority under section (e).

A member requested adding a special administration to subpart (e)(1). One member inquired why (e)(3) includes an attorney, because an attorney is axiomatically licensed and subject to court authority. Another member would add "public fiduciary." After discussion, members included in the list of authorized persons "a public fiduciary ordered by the court to conduct an investigation." Members discussed the purpose of this provision, which is to allow appropriately licensed individuals to request a subpoena without prior court authorization. As rewritten during the meeting, section (e) only requires an unlicensed fiduciary to obtain the court's express authorization before requesting a subpoena. However, a judge member believed that the revised provision unintentionally restricted a fiduciary's authority during the pendency of a petition. The member noted that the Task Force agreed on the intent of the provision, but the current language did not properly state that intent. The Chair concurred with this observation and returned the rule to the workgroup to clarify this point.

3. **Workgroup 3.** To accommodate a workgroup member's schedule, the Chair asked Judge Mackey to present Rules 34 and 37 out of order.

Rule 37 ("settlements and financial recovery involving minors or adults in need of protection") and Rule 34 (now, "distributions to minors, incapacitated persons, and protected adults," and as proposed, "abrogated"): Following discussion of Mr. Ager's memo, the workgroup included in subpart (a)(1) a new sentence that "a settlement of a minor's personal injury claim is not binding on the minor if a judicial officer has not approved it." Members did not believe this was inconsistent with A.R.S. §14-5103, facility of delivery, which allows payment of a sum less than $10,000 in settlement of a minor's claim. However, if funds are paid under this statute, the minor can reassert the claim upon reaching majority. Mr. Fleming also noted that the rule provision allows the court to authorize the petitioner to execute a release. Members discussed a reference in subparts (a)(2) and (3) to "a judicial officer assigned to hear matters under A.R.S. Title 14." They agreed that this provision might not have application in certain counties, especially rural counties, where judges might not have the delineated assignments of larger counties. Members agreed to change this provision by referring not to a judicial assignment, but rather, to a probate proceeding.

Judge Polk observed that section (a) does not include a provision for a settlement of less than $10,000 for a protected adult. He suggested that section (a) should include distinct provisions for minors and adults in these situations. Members agreed, and Judge Polk will draft these modifications. Members further noted that their revisions to section (a) should address the rampant confusion noted in Mr. Ager's memo. The revised rule should provide increase guidance to practitioners and distinguish those situations that require probate court approval, or the establishment of a conservatorship, from those that do not.

A new workgroup addition to section (c) requires the court to consider "the effect of the settlement on eligibility for public benefits or other resources which might be available ['which' should be changed to 'that']." Section (e), includes "duty to inform" provisions that were relocated from Rule 34. Members left unresolved a question whether the term "incapacitated person" referenced in this section requires a prior judicial determination of incapacity. Members also left to the court's discretion, but without adding another provision in Rule 37, whether to release funds in situations where a minor reaches age 18 but might be incompetent to manage the money.

Members approved Rule 37 subject to the modifications above and Judge Polk's further modifications.

4. **Workgroup 1.** Judge Polk presented the proposed changes.

Rule 7.1 ("sealing and unsealing court documents"): Mr. Nash recently provided a draft of this new rule and noted that although Civil Rule 5.4 and new Family Law Rule 17 address sealing, there is a need for a specialized rule on sealing in probate cases. The clerks prefer a uniform rule on sealing, but while the draft of Rule 7.1 is like FLR 17, there are differences. A significant difference is that Rule 7.1 begins with a new section (a) on "access to sealed documents." This section expressly states that sealed documents may only be examined by judicial officers. Judge Polk noted that only the assigned judicial officer has access; access by court staff or clerk staff will be determined by local administrative order. In addition, AOC staff would be allowed access as provided by Rule 7(b)(2)(E). Rule 7.1(b) ("motion to seal court documents; service") would allow a judge to seal an entire file only in exceptional circumstances. Rule 7.1(c) ("written findings required") identifies five findings a court must make before entering an order sealing a document. Judge Polk also reviewed draft Rule 7.1(d) ("motion to unseal") and Rule 7.1(e) ("objection to unsealing").

A member inquired how the draft rule would deal with requests to seal a case initiating document. A lodging process exists under Civil Rule 5.4, but members asked whether lodging would be feasible in a court that has a high volume of case initiating documents. Members then discussed whether Rule 7.1 should provide a process whereby a motion to seal could be lodged with a case initiating document and submitted to a judicial officer before filing. Most members favored this. Judge Polk advised that the workgroup would consider the text on lodging in Civil Rule 5.4 and incorporate the necessary language in Rule 7.1.

Members also discussed a process by which a law firm member or employee could obtain a copy of sealed letters of appointment, without a request to unseal and even when the person who would retrieve the document from the clerk was not the attorney of record. Language to accomplish this was added to section (b). Judge Polk also addressed situations where minor conservatorships are sealed, typically because the insurance

carrier requires confidentiality. This is not usually a ground for sealing a file, but because it is a matter for judicial education, it does not need to be covered in Rule 7.1. Members' approval of Rule 7.1 is pending the workgroup's additional text on lodging.

Rule 15.1 (now, "statutory representatives"): The workgroup's revised draft includes the members' suggestions from the previous meeting. The revised draft no longer includes the words, "the court may not appoint a guardian ad litem [GAL]." However, the revised definition of statutory representative in section (a) expressly mentions that it "includes the role traditionally described as a [GAL]." The rule now requires the appointment order in section (f) to specify "whether the representative will represent the person or the best interests of the person." Judge Polk suggested that the Task Force retain the first paragraph of the proposed comment, but without language that the rule no longer authorizes the appointment of a GAL. Although a few members believed the comment was unnecessary, a majority agreed to retain it. Members approved the rule as modified.

5. **Workgroup 2.** Judge Olson presented Rules 3 and 3.1.

Rule 3 ("applicability of other rules") and Rule 3.1 ("contested and uncontested hearings"): The workgroup, with Judge Thumma in attendance, reconsidered the memo prepared by Judge Thumma and others concerning Rule 3. The workgroup agreed that the language of Rule 3 should not diverge from language used in other sets of procedural rules. Accordingly, the workgroup reorganized Rule 3 as the memo recommended.

Rule 3.1 is new. It describes when a hearing is contested, and when it is uncontested. This new rule provides guidance for applying Rule 3(a)(2) ("rules of evidence"), which states in part that the Arizona Rules of Evidence do not apply in uncontested hearings, but that they apply in contested hearings unless all parties and the court agrees that they will not apply. Members discussed whether parties in contested proceedings should be required to demand that the Evidence Rules apply, i.e., invoke the rules, or if they should be required to waive their application. The straw vote on the issue of whether the Evidence Rules should presumptively apply in contested proceedings was substantially in favor of applying them unless waived. The rule petition will note the minority view on this issue.

Members discussed three additional matters. First, they considered but rejected a suggestion to consolidate Rules 3 and 3.1 into a single rule. Second, in Rule 3(a)(1), which now says that the Civil Rules apply in probate proceedings "unless they are inconsistent with these probate rules or statutes," members agreed that the provision should instead say, "unless they are inconsistent with these probate rules or Title 14, A.R.S." Third, because Rule 12 already says that a contested hearing includes a trial, the title of subpart (a)(2)(A) ("trials and contested hearings") can be shortened to "contested hearings."

6. **Workgroup 3**. Judge Mackey then presented additional Workgroup 3 rules.

Rule 33 (currently, "compensation for fiduciaries and attorneys; statewide fee guidelines," and as proposed, "compensation for fiduciaries and attorneys"): Judge Mackey noted that for greater prominence, the workgroup relocated a provision on "waiver," formerly numbered as section (e), to subpart (a)(1). A reference in the rule to GAL was changed to special representative. The workgroup considered incorporating within Rule 33 significant provisions of § 3-303 of the Arizona Code of Judicial Administration, but it settled on including a simple cross-reference to § 3-303 in Rule 33(e) ("fee guidelines"). (Judge Mackey also noted that § 3-303 was currently being reviewed by another stakeholder group.) Rule 33(f) ("personal representatives") clarifies that neither a personal representative nor the representative's attorney are required to file a petition for approval of their fees, but the court can still require a petition. The Chair opened the draft rule for comments.

Members discussed the workgroup's proposed language in section (b) ("fee statements"), which says that "fee statements submitted must cover the period for which fees have actually been paid, not accrued." Judge Mackey explained that the workgroup believed this language clarified the current rule, which refers to statements that "match the charges reported in the annual accounting" and the need for "reconciliation of the fee statement to the accounting." A member thought that even the workgroup's draft language was unclear. Another member proposed adding a comment that accrued fees should be included in the account form, which already has a space for this information, and deleting a reference to accrued fees in the body of the rule. However, fees that are accrued have not been paid, and the workgroup intended approval of only paid fees. A judge member further referred to the second paragraph of the comment to the current rule and said that accrued fees not be included because the court will not approve accrued fees; accrued fees muddy the accounting. Another member disagreed and said that it is useful to include accrued fees in the account, and the court can and does in fact approve them as an accrued liability. This can be appropriate when the estate does not have sufficient liquid assets to contemporaneously pay fees as they are earned. The member added that it helps the court to review fees close in time to when they accrue, rather than significantly later when they are eventually paid.

One member suggested that to improve organization, section (b) should be moved to subpart (a)(2) ("approval of compensation"). Another member said that the draft rule, perhaps unintentionally, removed certain details about the content of a petition to approve fees that are contained in the current rule; the member proposed adding elements of § 3-303 to Rule 33. Members discussed another issue that concerns different procedures for guardianship/conservatorship cases and for decedents' estates/trust cases. A judge member suggested adding a catch-all provision to Rule 33, or a new provision in soon-to-be abrogated Rule 34, that includes circumstances that Rule 33 does

not now address, for example, trusts. Another member noted an issue of when the court would order the filing of a petition under section (f); would it follow a beneficiary's request for judicial review? A judge member thought a judge would do it independently if the judge had a concern that fees were excessive. Another judge would like a requirement that beneficiaries receive fee statements, even when there is no petition to approve them, to facilitate informed objections. But another judge thought objections would follow the filing of a petition for discharge before the case concludes. And another judge member questioned the part of section (d) ('objections") that requires "a specific basis for each objection." He submitted that a general objection to an excessive fee should be sufficient. The Chair proposed removing the word "each" or the word "specific" from this phrase. But the draft language is based on the current rule and helps narrow the area to which the objection pertains. On a straw vote, most members would leave the draft language unchanged.

The Chair requested the workgroup to revise its draft based on the discussion.

Rule 30 ("conservator's inventory, budget, and account"): During a prior meeting, members requested that the workgroup add a sustainability provision to Rule 30 because the Task Force had abrogated Rule 30.2, which concerned sustainability. The workgroup's draft Rule 30(d)(2) ("sustainability") is modeled on the abrogated rule, but it does not include the entire text of Rule 30.2, which merely repeats what is in the form. In subpart (d)(2)(A) (whether annual expenses exceed annual income), Judge Olson suggested adding the word "recurring," i.e., "recurring annual expenses" and "recurring annual income." Members concurred with the suggestion.

Members discussed subpart (d)(2)(B), and language about the assets being sufficient "to sustain the conservatorship during the time the protected person needs care or fiduciary services." Although this language mirrors current Rule 30.2, members questioned how anyone could determine the subject person's lifespan. But Judge Olson emphasized that the purpose of this provision is to alert the court when a conservatorship is not sustainable based on its "burn rate" so the estate can make necessary adjustments to extend its viability. Another member stressed that a sustainability provision was important to allow the conservator to formulate an alternative plan before the estate's assets were depleted. Members concurred with both points, and they agreed to add a new subpart (d)(2)(C) that expressly requires the annual account to include, "if the assets are not sustainable, a discussion of the available options." And in subpart (d)(2)(B), members agreed to change the phrase "during the time the protected person needs care or fiduciary services" to "for the protected person's foreseeable needs."

Judge Olson also noted that the workgroup relocated a provision, which allows the court to order variations in the requirements of this rule and associated forms, from the end of the rule to a new section (a) ("court authority"), where it is more prominent. Section (a) now includes a "good cause" foundation for ordering a variation; Judge Olson

would not use this language because it otherwise defaults to the existing forms. He would prefer that the rule specify that the court consider what should be required in each case. He believes that when the court exercises prudent management and oversight, it should also consider whether a budget is appropriate rather than requiring a budget by default. Members were concerned about the impact of Judge Olson's preferences on uniform practices, but they also noted that a budget is not included with simplified Form 9. Some members would be satisfied with a default to Form 9 and its simplified reporting requirements. One member proposed specifying a dollar amount that would serve as a threshold for using Forms 5-8. Judge Olson suggested that one percent of the cases would require those forms, ten percent might require Form 9, and in about ninety percent of the cases, merely a bank statement might be a sufficient accounting. Most members agreed that a change to the current rule's requirements had merit but were concerned about unwinding protections the court adopted during the past decade. On a straw vote, most members would use Form 9, the middle ground, as the default, and the court could require more, or less, information as warranted by circumstances. Members agreed to change the text of Rule 30(c)(1)(A) (timing of the budget) so that a budget is required only "if ordered by the court." This clarifies when the court would order the conservator to use a form other than Form 9. The Chair proposed renumbering Form 9 so it is not the last form, but there was no support for that.

Rules 24+36 (now, "guardian's inpatient mental health authority"): Judge Mackey provided an overview of the workgroup's most recent revisions to a combined Rule 24 + 36. The rule was combined because while current Rule 24 addresses the initial petition for authority and current Rule 36 deals with a request for extension of that authority, both rules concern the same subject area. Judge Mackey noted that the combined rule is now numbered "X" and it will be assigned a number before the petition is filed.

A significant issue under the current rule involves the time for filing an annual guardian's report vis-à-vis the guardian's request to extend inpatient mental health authority, because the request to extend might not be concurrent with the annual reporting cycle. The combined rule addresses this by requiring the filing of an annual report with the renewal request if the report is due within one month of renewal; otherwise, the request may refer to the last annual report and simply provide an update. On the initial request, the draft rule requires the guardian to sign an acknowledgement of the guardian's power. A member asked if a new acknowledgement will be necessary when the authority is renewed. Also, the draft rule requires the court to "promptly" review the annual guardian report. Judge Polk noted that due to case volumes in Maricopa County, these reports are reviewed by court administration. He asked whether that review would be sufficient under the draft rule. Judge Mackey said the workgroup would consider these comments and present the rule for further discussion at the next meeting.

7. **Roadmap.** The Chair noted the next meeting date: Friday, November 30. The final Task Force meeting of 2018 is set for December 14. The Chair requested that workgroups present any rules not previously presented to the Task Force at the November 30 meeting. In addition, the Task Force can consider at this meeting any rules it previously returned to workgroups for modification. The December 14 meeting will be reserved for rules that were first presented on November 30 and returned for modification, and for consideration of a draft rule petition. After the December 14 meeting, the Chair, Judge Norris, Judge Polk, and staff will meet to comprehensively review and proofread the rules.

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

9. **Adjourn.** The meeting adjourned at 4:05 p.m.