Task Force on the Arizona Rules of Probate Procedure

Meeting Agenda

Friday, November 30, 2018
10:00 a.m. to 4:00 p.m.
State Courts Building * 1501 West Washington * Conference Room 345 * Phoenix, AZ

Item no. 1	**Call to Order**	*Hon. Rebecca Berch, Chair*
Item no. 2	**Approval of the November 16, 2018 meeting minutes**	*Justice Berch*
Item no. 3	**Consent agenda:** **Rule 2.1** ("Definitions") **Rule 7.1** ("Sealing and Unsealing Court Documents")	 *Judge Olson* *Judge Polk*
Item no. 4	**Workgroup reports and discussion of rules** **Workgroup 1: Rules 4, 4.1, 4.2, 5, 8, 10, 10.1 through 10.6, and 13** **Workgroup 2: Pending** **Workgroup 3: Revisit Rules 24+36, 30, 33, and 37**	 *Judge Polk* *Judge Olson* *Judge Mackey*
Item no. 5	**Approval of a petition requesting emergency adoption of Probate Rule 28.2**	*Justice Berch*
Item no. 6	**Roadmap** • **Next meeting: Friday, December 14 (Room 119)** • **Future meeting schedule: to be determined**	*Justice Berch*
Item no. 7	**Call to the Public** **Adjourn**	*Justice Berch*

The Chair may call items on this Agenda, including the Call to the Public, out of the indicated order.

Please contact Mark Meltzer at (602) 452-3242 with any questions concerning this Agenda. Persons with a disability may request reasonable accommodations by contacting Angela Pennington at (602) 452-3547. Please make requests as early as possible to allow time to arrange accommodations.

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.

A.R.S. Sup.Ct.Rules, Rule 42, Rules of Prof.Conduct, ER 1.14

ER 1.14. Client with Diminished Capacity

(a) When a client's capacity to make adequately considered decisions in connection with the representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.
(c) Information relating to the representation of a client with diminished capacity is protected by ER 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under ER 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Credits

Amended June 9, 2003, effective Dec. 1, 2003.

Editors' Notes

COMMENT [2003 AMENDMENT]

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See ER 1.2(d).

Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decisionmaking tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as; the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

Disclosure of the Client's Condition
[8] Disclosure of the client's diminished capacity could adversely affect the client's interest. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by ER 1.6. Therefore, unless authorized to do so the lawyer may not disclose such information. The lawyer may disclose information otherwise protected by ER 1.6 to the extent such disclosure may be required by law. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

Emergency Legal Assistance
[9] In an emergency where the health, safety or financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of the lawyer's relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible.

154 Ariz. 207
Supreme Court of Arizona, In Banc.

Mildred RASMUSSEN by Douglas P. MITCHELL, her Guardian ad Litem, Appellant,
v.
Robert FLEMING, Pima County Public Fiduciary, as Guardian for Mildred Rasmussen, Appellee.

No. CV–86–0450–PR.
|
July 23, 1987.

Synopsis

Public fiduciary brought action seeking appointment as guardian of nursing home patient in chronic vegetative state for purpose of consenting to removal of nasogastric tube and assertion of patient's right to refuse medical treatment with regard to "do not resuscitate" and "do not hospitalize" notations placed on patient's medical chart. The Superior Court, Pima County, Alice Truman, J., concluded that patient was "incapacitated" within meaning of statute, and appointed public fiduciary as guardian without restriction. Guardian ad litem appealed. The Court of Appeals, 154 Ariz. 200, 741 P.2d 667, considering case notwithstanding death of ward during pendency of appeal, held that guardian could assert ward's right to refuse medical treatment and enunciated procedural safeguards to follow in designating surrogate decision makers for incompetent patients. The Supreme Court granted guardian ad litem's petition for review and, by Gordon, C.J., held that: (1) state and constitutional rights to privacy encompassed right to refuse medical treatment; (2) public fiduciary as guardian had implied statutory authority to exercise patient's right to refuse medical treatment; (3) "best interests" standard governed surrogate decision making on part of incompetent patient; (4) trial court properly concluded that patient's best interests were served by placement and retention of "do not resuscitate" and "do not hospitalize" orders on medical chart; and (5) court would not prescribe "priority list" governing appointment of surrogate decision makers.

Judgment of trial court affirmed, opinion of Court of Appeals affirmed in part and reversed in part.

Feldman, V.C.J., concurred and filed opinion.

West Headnotes (30)

[1] **Mental Health**
Review

Controversy concerning application of public fiduciary to be appointed as guardian for purpose of consenting to removal of nasogastric tube from nursing home patient in chronic vegetative state became moot when patient died.

Cases that cite this headnote

[2] **Mental Health**
Review

Notwithstanding mootness of controversy due to death of patient, issues raised by application of public fiduciary to be appointed as guardian for purpose of consenting to removal of nasogastric tube and refusal of medical treatment for nursing home patient in chronic vegetative state were of significant public importance, capable of repetition but likely to evade review, and thus reviewable on appeal.

1 Cases that cite this headnote

[3] **Health**
Right of Patient to Refuse Treatment in General

Medical Treatment Decision Act did not provide nursing home patient in chronic vegetative state with statutory right to refuse medical treatment, since patient never executed required declaration under statute and since patient was not suffering from "terminal condition," as defined under statute, because her physicians were not administering any life-sustaining procedures without which she would have died. A.R.S. §§ 36–3201 to 36–3210, 36–3201, subd. 6,

36–3202, subd. A.

Cases that cite this headnote

[4] **Constitutional Law**
Right to Privacy

The right to privacy under the United States Constitution, although not specifically mentioned therein, emanates from penumbra of specific guarantees of particular amendments to the Constitution. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[5] **Constitutional Law**
Right to Refuse Treatment or Medication

The right to refuse medical treatment is a personal right sufficiently "fundamental" or "implicit in the concept of ordered liberty" to fall within the constitutionally protected zone of privacy under the United States Constitution and right of privacy encompasses right to refuse medical treatment. U.S.C.A. Const.Amend. 1.

7 Cases that cite this headnote

[6] **Constitutional Law**
Right to Refuse Treatment or Medication

"State action" was sufficiently established in action brought by public fiduciary to be appointed as guardian for nursing home patient in chronic vegetative state whereby fiduciary sought to assert patient's right to refuse medical treatment, to support assertion of constitutional right to privacy with regard to that refusal, based on state's authority to license and regulate hospital, medical, dental and optometric service corporations, health care institutions, and physicians, surgeons and nurses, and state's supervisory authority over guardianship of incapacitated persons. A.R.S. §§ 14–5301 et seq., 20–821 et seq., 32–1401 et seq., 32–1601 et seq., 32–1821 et seq., 36–401 et seq.

7 Cases that cite this headnote

[7] **Constitutional Law**
Right to Refuse Treatment or Medication

Right to privacy provided for in state constitution encompasses an individual's right to refuse medical treatment. A.R.S.Const. Art. 2, § 8.

5 Cases that cite this headnote

[8] **Health**
Informed Consent in General; Duty to Disclose

Doctrine of informed consent, embodying right to be free from nonconsensual physical invasions, permits an individual to refuse medical treatment.

1 Cases that cite this headnote

[9] **Health**
In General; Right to Die

The state's interest in preserving life is the most significant interest asserted by state as a limitation on individual right to refuse medical treatment. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[10] **Health**
Right of Patient to Refuse Treatment in General

Right of nursing home patient in chronic

vegetative state to refuse medical treatment outweighed state's interest in preserving life, where chance that any medical treatment would bring patient out of chronic vegetative state and return her to a cognitive state was minimal, if not nonexistent. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[11] **Health**
Right of Patient to Refuse Treatment in General

State's interest in preserving ethical integrity of medical profession was not a limiting factor to be considered in assessment of right of nursing home patient in chronic vegetative state to refuse medical treatment, where no member of the medical community opposed medical decision to place "do not resuscitate" and "do not hospitalize" orders on patient's chart.

2 Cases that cite this headnote

[12] **Health**
Right of Patient to Refuse Treatment in General

Even if conflict had existed between patient in chronic vegetative state and medical profession, "do not resuscitate" or "do not hospitalize" orders placed on patient's chart would not have brought into disrepute ethical integrity of medical profession, and thus would not have implicated state's interest in preserving ethical integrity of the profession as a factor to be balanced against patient's right to refuse medical treatment.

Cases that cite this headnote

[13] **Health**
Right of Patient to Refuse Treatment in General

Nursing home patient's assertion of right to refuse medical treatment was not tantamount to committing suicide, for purposes of balancing state's interests against right of patient in chronic vegetative state to refuse medical treatment, where medical experts held out minimal, if any, chance for patient to return to a cognitive state.

1 Cases that cite this headnote

[14] **Health**
Substituted Judgment; Role of Courts, Physicians, Guardians, Family or Others

State's interest in preventing suicide did not limit patient's ability to assert his or her right to refuse medical treatment, for purposes of public fiduciary's application to be appointed as guardian for nursing home patient in chronic vegetative state. A.R.S. § 36–3208.

2 Cases that cite this headnote

[15] **Health**
Substituted Judgment; Role of Courts, Physicians, Guardians, Family or Others

Placement of "do not resuscitate" and "do not hospitalize" notations on chart of nursing home patient in chronic vegetative state did not constitute decision to commit suicide, and neither physicians, nurses, health care facility, guardian, guardian ad litem nor any similarly situated individual or entity could be charged with manslaughter by intentionally aiding another to commit suicide based on their agreement to placing those notations in patient's chart. A.R.S. § 13–1103, subd. A.

1 Cases that cite this headnote

[16] **Health**

Right of Patient to Refuse Treatment in General

Decision to forego medical treatment for nursing home patient in chronic vegetative state did not directly affect health, safety or security of others, and state's interest in protecting innocent third parties did not operate as a limitation on patient's right to refuse medical treatment, where patient had no children, and her only immediate family, three siblings, agreed to abide by decision of physician and guardian to terminate treatment.

Cases that cite this headnote

[17] **Health**
Substituted Judgment; Role of Courts, Physicians, Guardians, Family or Others

Right of nursing home patient in chronic vegetative state to refuse medical treatment existed despite her incompetency and failure to articulate her medical treatment desires prior to becoming incompetent, for purposes of public fiduciary's application to be appointed patient's guardian in order to assert refusal of treatment. A.R.S. §§ 14–5301 et seq., 36–3201 et seq.

9 Cases that cite this headnote

[18] **Health**
Substituted Judgment; Role of Courts, Physicians, Guardians, Family or Others

Court would not prescribe "priority list" of surrogate decision makers with regard to an incompetent patient's assertion of right to refuse medical treatment.

Cases that cite this headnote

[19] **Health**
Substituted Judgment; Role of Courts, Physicians, Guardians, Family or Others

Public fiduciary had standing to assert right of nursing home patient in chronic vegetative state to refuse medical treatment, on fiduciary's appointment as patient's guardian, even though patient herself was incompetent, and had not expressed her treatment desires prior to incompetency. A.R.S. §§ 14–1302, subd. A, par. 2, 14–5303, 14–5304, 14–5312, 14–5312, subd. A, par. 3.

Cases that cite this headnote

[20] **Health**
Substituted Judgment; Role of Courts, Physicians, Guardians, Family or Others

Introductory language of statute suggesting that guardian's duties were broader than those specifically enumerated in statute did not confer on public fiduciary as guardian of nursing home patient in chronic vegetative state the right to vicariously exercise patient's right to refuse medical treatment. A.R.S. §§ 14–5301 et seq., 14–5312, subd. A.

1 Cases that cite this headnote

[21] **Health**
Substituted Judgment; Role of Courts, Physicians, Guardians, Family or Others

Public fiduciary, as guardian of nursing home patient in chronic vegetative state, had implied statutory authority to exercise patient's right to refuse medical treatment. A.R.S. §§ 14–5301 et seq., 14–5312, 14–5312, subd. A, par. 3.

Cases that cite this headnote

[22] **Health**
Substituted Judgment; Role of Courts, Physicians, Guardians, Family or Others

Surrogate decision maker appointed for incompetent patient is to utilize "best interests" standard in deciding whether to refuse any or all medical treatment for patient, assessing what treatment would be in patient's best interest, as determined by such objective criteria as relief from suffering, preservation or restoration of functioning and quality and extent of sustained life.

13 Cases that cite this headnote

[23] **Health**
Right of Patient to Refuse Treatment in General

Trial court properly concluded that best interests of incompetent nursing home patient in chronic vegetative state would be served by placement and retention of "do not resuscitate" and "do not hospitalize" orders on her medical chart, under "best interests" standard, where medical probability that patient would ever return to a cognitive sapient state, as distinguished from chronic vegetative existence, was virtually nonexistent.

2 Cases that cite this headnote

[24] **Mental Health**
Powers, Duties, and Liabilities

Procedural duties of guardian ad litem in proceeding to appoint guardian for a patient in chronic vegetative state for purpose of exercising patient's right to refuse medical treatment include drafting and mailing to all interested parties any legal documents affecting the incapacitated person, and receiving and responding to all legal documents mailed to the incapacitated person, but not necessarily to act as patient's guardian's adversary. A.R.S. §§ 14–1403, subd. 4, 14–5301 et seq., 14–5303.

Cases that cite this headnote

[25] **Mental Health**
Powers, Duties, and Liabilities

Principal substantive duty of guardian ad litem in guardianship proceeding instituted for purpose of authorizing guardian to exercise incompetent patient's right to refuse medical treatment is to discover all facts relevant to medical treatment of patient and report such facts to the court. A.R.S. §§ 14–1403, subd. 4, 14–5301 et seq., 14–5303.

1 Cases that cite this headnote

[26] **Mental Health**
Powers, Duties, and Liabilities

If, from his factual findings, guardian ad litem in guardianship proceeding initiated for purpose of exercising incompetent patient's right to refuse medical treatment, concludes that patient's best interests will not be served by guardian's proposed actions, the guardian ad litem as "counsel" for patient/ward can challenge guardian's conduct during appointment proceedings and throughout the appellate process. A.R.S. §§ 14–1403, subd. 4, 14–5301 et seq., 14–5303.

1 Cases that cite this headnote

[27] **Health**
Substituted Judgment; Role of Courts, Physicians, Guardians, Family or Others

In guardianship proceeding concerning guardian's assertion of an incapacitated patient's right to refuse medical treatment, once court resolves matters of guardianship and incompetency, its encroachment into substantive decisions concerning medical treatment should be limited to resolving disputes among patient's family, attending physicians, independent physician, health care facility, guardian and guardian ad litem, and where all affected parties

concur in proposed plan of medical treatment, court approval of plan is neither necessary nor required. A.R.S. §§ 14–5301 et seq., 14–5303.

12 Cases that cite this headnote

[28] **Mental Health**
Jurisdiction

Court properly exercised jurisdiction over guardianship proceeding concerning refusal of medical treatment on behalf of nursing home patient in chronic vegetative state, where guardian ad litem opposed plan of medical treatment agreed upon by all other interested parties. A.R.S. §§ 14–5301 et seq., 14–5303.

Cases that cite this headnote

[29] **Health**
Weight and Sufficiency of Evidence

Disputes among interested parties concerning proposed plan of medical treatment and right to refuse treatment of incompetent patients are to be resolved by clear and convincing evidence. A.R.S. § 14–5301 et seq.

3 Cases that cite this headnote

[30] **Health**
Burden of Proof

In actions concerning right of incompetent patient to refuse medical treatment, burden to prove that patient does not wish to continue receiving medical treatment rests on party or parties desiring to terminate treatment.

2 Cases that cite this headnote

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Opinion

GORDON, Chief Justice.

Not long ago the realms of life and death were delineated by a bright line. Now this line is blurred by wondrous advances in medical technology—advances that until recent years were only ideas conceivable by such science-fiction visionaries as Jules Verne and H.G. Wells. Medical technology has effectively created a twilight zone of suspended animation where death commences while life, in some form, continues. Some patients, however, want no part of a life sustained only by medical technology. Instead, they prefer a plan of medical treatment that allows nature to take its course and permits them to die with dignity.

As more individuals assert their right to refuse medical treatment, more frequently do the disciplines of medicine, law, philosophy, technology, and religion collide. This

interdisciplinary interplay raises many questions to which no single person or profession has all the answers. Thus, we approach this case of first impression involving the right to refuse medical treatment with extreme caution and humility, mindful **679 *212 of the profound and overwhelming sense of responsibility that accompanies the power to resolve what in this and similar future medical treatment cases are all too often life-and-death issues.

FACTS

Mildred Rasmussen was admitted to the Posada Del Sol Nursing Home in Tucson in 1979 at the age of 64. Before her admission she had led an independent life, formerly practicing as a chiropractor. After admission, Rasmussen's physical and mental conditions deteriorated to the point where she received fluids and nourishment through a nasogastric tube.

The Pima County Public Fiduciary commenced a proceeding in Pima County Superior Court in May 1985 to be appointed as guardian for the purpose of consenting to removal of the nasogastric tube.[1] The court, acting pursuant to A.R.S. § 14–5303, appointed a guardian ad litem as counsel for Rasmussen, a physician to examine Rasmussen, and a "visitor"[2] to visit Rasmussen. Rasmussen's immediate family members, three siblings residing in Iowa, were notified of the guardianship proceedings.

[1] For some reason, Rasmussen's physician removed the nasogastric tube after the petition for guardianship was filed and was surprised to learn that Rasmussen could swallow food on her own. The nursing staff, however, still had to place the food into Rasmussen's mouth. The record does not indicate whether the tube was ever reinserted.

[2] "[A] visitor is ... a person trained in law, nursing or social work and is an officer, employee or special appointee of the court designated as a court investigator with no personal interest in the proceedings." A.R.S. § 14–5308 (Supp.1986).

Testimony at the guardianship proceedings indicated that Rasmussen had suffered three strokes and was suffering from a degenerative neural muscular disease and/or an organic brain syndrome. She was unable to care for herself and remained in bed in a fetal position. Nurses administered basic care and medication. After considering Rasmussen's diagnosis and prognosis, her treating physician had placed on her chart a "do not resuscitate" (DNR) order and a "do not hospitalize" (DNH) order. The DNR order directed that Rasmussen not be resuscitated if she suffered cardiac arrest or a similar condition. The DNH order permitted medical personnel to provide only basic comfort care. Certain diseases, such as pneumonia, gangrene, and urinary tract infections, were to run their natural course. Although Rasmussen's siblings did not take an active role in the determination of Rasmussen's treatment, they expressed a willingness to abide by the decision to place DNR and DNH orders on Rasmussen's medical chart. The guardian ad litem objected to the appointment of the Public Fiduciary as guardian unless there was an affirmative order that the guardian remove the DNR and DNH orders from the medical chart.

Debra Douthitt, a case investigator for the Pima County Public Fiduciary, testified that although Rasmussen occasionally opened her eyes upon being touched, she could not visually track or respond to Douthitt's commands. Douthitt also testified that nurses thought Rasmussen still retained some cognitive functioning because Rasmussen would make throaty sounds or spew mucus when the nasogastric tube was removed and reinserted. Lynn Peterson, Rasmussen's advocate-friend, testified that Rasmussen would respond to certain questions or other stimuli by moving her eyes or making humming or grunting noises. Peterson believed that Rasmussen still had the ability to think but simply could not express her thoughts. Stephen Cox, medical director of the long-term care division of the Department of Aging and Medical Services of Pima County, medical director at Posada Del Sol, and Rasmussen's former physician, testified that Rasmussen had been in a nonverbal and essentially vegetative state since 1983. Dr. Cox had never been able to elicit a response to stimulus that would indicate a real cognitive basis for the response. In his opinion, Rasmussen existed in a chronic vegetative state from which she had a zero probability of returning to a higher level of **680 *213 functioning. William Masland, a court-appointed neurologist, testified that Rasmussen existed in a profound vegetative state from which she would never recover. According to Dr. Masland, Rasmussen was brain-dead because all parts of her brain necessary for any sort of cognitive function, self-awareness, and perception of surroundings no longer functioned. Masland also stated that stimulus response did not necessarily indicate cognitive perception. In Masland's opinion, the stimulus responses suggested during earlier testimony were no more than primitive reflexive movements.

After the two-day evidentiary hearing, the trial court in its findings of fact concluded that Rasmussen had existed in a chronic vegetative state since May 1983 and that Rasmussen's wishes regarding her present care could not be determined from evidence presented. As a matter of law, the trial court concluded that Rasmussen was incapacitated as statutorily defined;[3] a guardian of an incapacitated person has the authority to exercise the ward's right to refuse care; the proper method for a guardian to determine the appropriateness of refusing care for the ward is the "substituted judgment" approach whereby the guardian's decisions are guided by the ward's prior acts, writings, and statements concerning medical care; if the guardian is unable to apply the "substituted judgment" approach, then his decisions should be guided by the ward's "best interests"; and the guardian's decision to withhold care for a ward is subject to court review. The trial court then appointed the Public Fiduciary as Rasmussen's guardian without restriction.

[3] A.R.S. § 14–5101 defines "incapacitated person" as
> any person who is impaired by reason of mental illness, mental deficiency, mental disorder, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication or other cause, except minority, to the extent he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person.

The guardian ad litem appealed the trial court's decision to appoint the guardian without restriction. Before the court of appeals rendered its decision, Rasmussen died from complications following pneumonia. The court nevertheless retained the matter for decision because "[t]he issues presented here are of great importance to legal practitioners, families, guardians, doctors, hospitals and nursing home staff who face similar situations on a daily basis...." *Rasmussen v. Fleming,* 154 Ariz. 200, 201, 741 P.2d 667, 668 (App.1986). The court then held: (1) the Medical Treatment Decision Act was inapplicable in this case; (2) the right to refuse medical treatment is based upon the federal and state constitutional right of privacy; (3) no state interests were sufficient to counterbalance Rasmussen's right of privacy; (4) either a family member or a guardian could assert Rasmussen's right to refuse medical treatment; and (5) in this and future cases where the incompetent patient has never expressed her medical desires, decisions concerning the patient's medical treatment are to be guided by the "best interests" standard. The court also enunciated certain procedural safeguards to follow in similar cases when determining which types of persons can make decisions for individuals incapable of making decisions.

We granted the guardian ad litem's petition for review and have jurisdiction pursuant to Ariz. Const. art. 6, § 5(3), and Rule 23, Ariz.R.Civ.App.Proc., 17A A.R.S. (1986 Supp.).

MOOTNESS

[1] This particular controversy became moot when Rasmussen died. We have discretion, however, to decide questions which have become moot. *See State v. Valenzuela,* 144 Ariz. 43, 44, 695 P.2d 732, 733 (1985); *Miceli v. Industrial Commission,* 135 Ariz. 71, 73, 659 P.2d 30, 32 (1983).

[2] The novel and difficult issues underlying this proceeding transcend the physical problems that afflicted Rasmussen and did not perish with her. The underlying issues are of significant public importance and are capable of repetition but are likely to evade full review, even when review is expedited.

****681 *214** Other jurisdictions have declined to rely on the death of the real party in interest and the mootness doctrine to avoid resolving issues raised in medical treatment cases.[4] We follow in their footsteps and exercise our jurisdiction to confront the issues and reach the merits of this case.

[4] *See, e.g., Matter of Farrell,* 212 N.J.Super. 294, 514 A.2d 1342 (1986), *affirmed,* 108 N.J. 335, 529 A.2d 404 (N.J.1987); *Matter of Conroy,* 98 N.J. 321, 486 A.2d 1209 (1985); *Bartling v. Superior Court,* 163 Cal.App.3d 186, 209 Cal.Rptr. 220 (1984); *John F. Kennedy Memorial Hospital, Inc. v. Bludworth,* 452 So.2d 921 (Fla.1984); *In re L.H.R.,* 253 Ga. 439, 321 S.E.2d 716 (1984); *Matter of Guardianship of Hamlin,* 102 Wash.2d 810, 689 P.2d 1372 (1984); *Eichner v. Dillon,* 73 A.D.2d 431, 426 N.Y.S.2d 517 (N.Y.App.Div.1980), *modified on other grounds sub nom., Matter of Storar,* 52 N.Y.2d 363, 420 N.E.2d 64, *cert. denied, Storar v. Storar,* 454 U.S. 858, 102 S.Ct. 309, 70 L.Ed.2d 153 (1981); *Superintendent of Belchertown State School v. Saikewicz,* 373 Mass. 728, 370 N.E.2d 417 (1977).

RIGHT TO REFUSE MEDICAL TREATMENT

We first address whether Rasmussen had a statutory, constitutional, or common-law right to refuse medical treatment.

A. Statutory Right

[3] In 1985 the Arizona legislature enacted the Medical Treatment Decision Act (MTDA). *See* A.R.S. §§ 36–3201 to –3210. The MTDA provides: "A person may execute a declaration directing the withholding or withdrawal of life-sustaining procedures in a terminal condition." A.R.S. § 36–3202(A). "Terminal condition" is defined as "an incurable or irreversible condition from which, in the opinion of the attending physician, death will occur without the use of life-sustaining procedures." A.R.S. § 36–3201(6).

The MTDA did not provide Rasmussen with a statutory right to refuse medical treatment for two reasons. First, Rasmussen never executed the required declaration. Second, Rasmussen was not suffering from a "terminal condition" as defined above because her physicians were not administering any life-sustaining procedures without which she would have died.[5]

5 Because the record does not indicate that Rasmussen's physicians ever reinserted the nasogastric tube prior to her death, we express no opinion on whether insertion of a nasogastric tube places a patient in a "terminal condition" as statutorily defined.

B. Federal Constitutional Right

[4] The U.S. Constitution does not expressly mention privacy or a right of privacy. Nevertheless, "the [Supreme] Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." *Roe v. Wade,* 410 U.S. 113, 152, 93 S.Ct. 705, 726, 35 L.Ed.2d 147 (1973). This right to privacy emanates from the penumbra of specific guarantees of particular amendments to the Constitution. *Id.* Although the parameters of the right to privacy never have been clearly defined, "personal rights found in this guarantee of personal privacy must be limited to those which are 'fundamental' or 'implicit in the concept of ordered liberty.' " *Paul v. Davis,* 424 U.S. 693, 713, 96 S.Ct. 1155, 1166, 47 L.Ed.2d 405 (1976). Matters relating to marriage, procreation, contraception, family relationships, and child rearing and education generally have been encompassed by this penumbral right.[6] *Id.; accord State v. Murphy,* 117 Ariz. 57, 60, 570 P.2d 1070, 1073 (1977).

6 *See, e.g., Carey v. Population Services International,* 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977) (child rearing and education); *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) (abortion); *Eisenstadt v. Baird,* 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972) (contraception); *Stanley v. Georgia,* 394 U.S. 557, 89 S.Ct. 1243, 32 L.Ed.2d 542 (1969) (possession of obscene material in own home); *Loving v. Virginia,* 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967) (marriage); *Prince v. Massachusetts,* 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944) (family relationships); *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942) (procreation). *But see Bowers v. Hardwick,* 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986) (right to privacy does not encompass right to engage in homosexual sodomy in own home); *State v. Murphy,* 117 Ariz. 57, 570 P.2d 1070 (1977) (federal constitutional right to privacy does not encompass right to possess or ingest marijuana in own home).

[5] [6] The Supreme Court has yet to hold that the right to privacy encompasses ****682 *215** the right to refuse medical treatment.[7] Nevertheless, numerous state courts have reasoned from Supreme Court decisions that the right to privacy is broad enough to grant an individual the right to chart his or her own medical treatment plan.[8] We agree with our sister states. The right to refuse medical treatment is a personal right sufficiently "fundamental" or "implicit in the concept of ordered liberty" to fall within the constitutionally protected zone of privacy contemplated by the Supreme Court.[9]

7 *But see Doe v. Bolton,* 410 U.S. 179, 213, 93 S.Ct. 739, 758, 35 L.Ed.2d 201 (1973) (Douglas, J., concurring) ("*[T]he freedom to care for one's health and person* " is constitutionally protected.) (emphasis in original).

8 *See, e.g., Bouvia v. Superior Court,* 179 Cal.App.3d 1127, 225 Cal.Rptr. 297 (1986); *Brophy v. New England Sinai Hospital, Inc.,* 398 Mass. 417, 497 N.E.2d 626 (1986); *Farrell,* 212 N.J.Super. at 294, 514 A.2d at 1342; *Foody v. Manchester Memorial Hospital,* 40 Conn.Sup. 127, 482 A.2d 713 (1984); *Matter of Welfare of Colyer,* 99 Wash.2d 114, 660 P.2d 738 (1983); *Severns v. Wilmington Medical Center, Inc.,* 421 A.2d 1334 (Del.1980); *Matter of Spring,* 380 Mass. 629, 405 N.E.2d 115 (1980); *Leach v. Akron General Medical Center,* 68 Ohio Misc. 1, 426 N.E.2d 809 (1980); *Satz v. Perlmutter,* 362 So.2d 160

(Fla.Dist.Ct.App.1978), *affirmed,* 379 So.2d 359 (Fla.1980); *Superintendent of Belchertown State School v. Saikewicz,* 373 Mass. 728, 370 N.E.2d 417 (1977); *Matter of Quinlan,* 70 N.J. 10, 355 A.2d 647, *cert. denied sub nom., Garger v. New Jersey,* 429 U.S. 922, 97 S.Ct. 319, 50 L.Ed.2d 289 (1976).

[9] An individual successfully can assert his or her constitutional right to privacy only against governmental acts and not against acts of a private defendant unless "state action" exists. *See Polin v. Dun & Bradstreet, Inc.,* 768 F.2d 1204, 1207 (10th Cir.1985). "State action" is present when "there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345, 351, 95 S.Ct. 449, 453, 42 L.Ed.2d 477 (1974). We believe that the state's authority to license and regulate hospital, medical, dental and optometric service corporations (A.R.S. §§ 20–821 *et seq.*), health care institutions (A.R.S. §§ 36–401 *et seq.*), and physicians, surgeons, and nurses (A.R.S. §§ 32–1401 *et seq.,* 32–1601 *et seq.,* 32–1821 *et seq.*), and its supervisory authority over the guardianship of incapacitated persons (A.R.S. §§ 14–5301 *et seq.*) are factors that taken together are sufficient to establish state action herein. *See Colyer,* 99 Wash.2d at 120, 660 P.2d at 742; *Eichner,* 73 A.D.2d at 460, 426 N.Y.S.2d at 540.

C. State Constitutional Right

Some state courts have held that the right to refuse medical treatment is also a state constitutional right.[10] We hold that the Arizona Constitution also provides for a right to refuse medical treatment.

[10] States which have held that the right to refuse medical treatment is both a federal and state constitutional right include California (*Bouvia,* 179 Cal.App.3d at 1137, 225 Cal.Rptr. at 301), Florida (*In re Guardianship of Barry,* 445 So.2d 365 (Fla.Dist.Ct.App.1984) (noting state constitution was amended after *Satz* to recognize that right to privacy encompassed decisions affecting medical treatment)), New Jersey (*Quinlan,* 70 N.J. at 39, 355 A.2d at 663), and Washington (*Colyer,* 99 Wash.2d at 120, 660 P.2d at 742).

[7] Unlike the federal constitution, the Arizona Constitution expressly provides for a right to privacy. Article 2 of the Arizona Constitution provides:

§ 8. Right to privacy

Section 8. No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

Although Arizona Constitution article 2, § 8 has been invoked most often in a Fourth Amendment context, we see no reason not to interpret "privacy" or "private affairs" as encompassing an individual's right to refuse medical treatment. An individual's right to chart his or her own plan of medical treatment deserves as much, if not more, constitutionally-protected privacy than does an individual's home or automobile.

D. Common-Law Right

[8] The common law has long recognized an individual's right to be free from bodily invasion. Nearly a century ago the Supreme Court noted:

> No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of ****683 *216** others, unless by clear and unquestionable authority of law.

Union Pacific Railway Co. v. Botsford, 141 U.S. 250, 251, 11 S.Ct. 1000, 1001, 35 L.Ed. 734 (1891). Judge Cardozo, during his tenure as a member of New York's highest tribunal, succinctly captured the spirit of the Supreme Court's language when he wrote:

> Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages.

Schloendorff v. Society of New York Hospital, 211 N.Y. 125, 129–30, 105 N.E. 92, 93 (1914).

Protection of this common-law right to be free from nonconsensual bodily invasions is at the heart of what is known today as the doctrine of informed consent. Under this doctrine,

> the patient must have the capacity to reason and make judgments, the decision must be made voluntarily and without coercion, and the patient must have a clear understanding of the risks and benefits of the proposed treatment alternatives or nontreatment, along with a full understanding of the nature of the disease and the prognosis.

Wanzer, *et al., The Physician's Responsibility Toward Hopelessly Ill Patients,* 310 New Eng.J.Med. 955, 957 (1984). *Cf. Conroy,* 98 N.J. at 346, 486 A.2d at 1222; *Colyer,* 99 Wash.2d at 121, 660 P.2d at 743.

The purpose underlying the doctrine of informed consent is defeated somewhat if, after receiving all information necessary to make an informed decision, the patient is forced to choose only from alternative methods of treatment and precluded from foregoing all treatment whatsoever. We hold that the doctrine of informed consent—a doctrine borne of the common-law right to be free from nonconsensual physical invasions—permits an individual to refuse medical treatment.[11]

[11] Other courts also have held that the right to refuse medical treatment is both a constitutional right and a common-law right. *See, e.g., Brophy,* 398 Mass. at 430, 497 N.E.2d at 633; *Farrell,* 212 N.J.Super. at 298, 514 A.2d at 1344; *Foody,* 40 Conn.Sup. at 130–34, 482 A.2d at 717–18; *Colyer,* 99 Wash.2d at 119–22, 660 P.2d at 741–43. *Cf. Conroy,* 98 N.J. at 321, 486 A.2d at 1209 (court recognized constitutional right but limited its holding to application of common-law right); *Matter of Conservatorship of Torres,* 357 N.W.2d 332, 339–40 (Minn.1984) (court recognized constitutional and common-law right but premised its holding on constitutional and statutory right); *Storar,* 52 N.Y.2d at 376, 420 N.E.2d at 70 (whether right to refuse medical treatment is guaranteed by the Constitution is a "disputed question"; court premised its holding on "common-law principles").

STATE INTERESTS

Whether emanating from constitutional penumbras or premised on common-law doctrine, the right to refuse medical treatment is not absolute. Courts have held that the right may be limited by the state's interest in preserving life, safeguarding the integrity of the medical profession, preventing suicide, and protecting innocent third parties.[12]

[12] *See, e.g., Conroy,* 98 N.J. at 348, 486 A.2d at 1223; *Foody,* 40 Conn.Sup. at 132–34, 482 A.2d at 718; *Bartling,* 163 Cal.App.3d at 195, 209 Cal.Rptr. at 225; *Colyer,* 99 Wash.2d at 122, 660 P.2d at 743; *Leach,* 68 Ohio Misc. at 8, 426 N.E.2d at 814; *Satz,* 362 So.2d at 162; *Saikewicz,* 373 Mass. at 740, 370 N.E.2d at 425.

A. Preserving life

[9] The state's interest in preserving life is the most significant interest asserted by the state. *Conroy,* 98 N.J. at 348, 486 A.2d at 1223; *Colyer,* 99 Wash.2d at 121, 660 P.2d at 743; *Saikewicz,* 373 Mass. at 740, 370 N.E.2d at 425. It embraces the separate but related concerns of preserving the life of a particular individual as well as preserving the sanctity of all life. *Conroy,* 98 N.J. at 348, 486 A.2d at 1223.

[10] Although the state's interest in preserving life is justifiably strong, we believe this interest necessarily weakens and must yield to the patient's interest where treatment at issue "serves only to prolong a life inflicted with an incurable condition." ****684 *217** *Colyer,* 99 Wash.2d at 122, 660 P.2d at 743.[13] Such is the case here. The chance that any medical treatment would have brought Rasmussen out of her chronic vegetative state and returned her to a cognitive state was minimal, if not nonexistent. Hospitalization or resuscitation would have only postponed Rasmussen's death rather than have improved her life.

[13] *See Saikewicz,* 373 Mass. at 740–43, 370 N.E.2d at 425–26 ("There is a substantial distinction in the State's insistence that human life be saved where the affliction is curable, as opposed to the State interest where, as here, the issue is not whether, but when, for how long, and at what cost to the individual that life may be briefly extended."); *Quinlan,* 70 N.J. at 41, 355 A.2d at 664 ("We think that the State's interest [in preserving life] weakens and the individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims.").

Based on these observations, we decline to hold that the state's interest in preserving life outweighed Rasmussen's right to refuse medical treatment.

B. Safeguarding integrity of medical profession

[11] The state's interest in preserving the ethical integrity of the medical profession is not readily apparent here. No member of the medical community opposed the medical treatment decisions in this case. In fact, it was Rasmussen's physician who placed the DNR and DNH orders on her chart. Thus, no real conflict existed between the patient and the medical profession that would impugn the latter's ethical integrity. *See Farrell,* 212 N.J.Super. at 300, 514 A.2d at 1345.

[12] Even if a conflict had existed, however, we would have hesitated to find that Rasmussen's interest must yield to the state's interest. The medical profession itself now recognizes that it is no longer obligated to provide medical treatment in all situations. The American Medical Association, through its Council on Ethical and Judicial Affairs, issued the following statement dated March 15, 1986:

> Withholding or Withdrawing Life Prolonging Medical Treatment
>
> The social commitment of the physician is to sustain life and relieve suffering. Where the performance of one duty conflicts with the other, the choice of the patient, or his family or legal representative if the patient is incompetent to act in his own behalf, should prevail. In the absence of the patient's choice or an authorized proxy, the physician must act in the best interest of the patient.
>
> For humane reasons, with informed consent, a physician may do what is medically necessary to alleviate severe pain, or cease or omit treatment to permit a terminally ill patient whose death is imminent to die. However, he should not intentionally cause death. In deciding whether the administration of potentially life-prolonging medical treatment is in the best interest of the patient who is incompetent to act in his own behalf, the physician should determine what the possibility is for extending life under humane and comfortable conditions and what are the prior expressed wishes of the patient and attitudes of the family or those who have responsibility for the custody of the patient.
>
> *Even if death is not imminent but a patient's coma is beyond doubt irreversible and there are adequate safeguards to confirm the accuracy of the diagnosis and with the concurrence of those who have responsibility for the care of the patient, it is not unethical to discontinue all means of life prolonging medical treatment.*
>
> Life prolonging medical treatment includes medication and artificially or technologically supplied respiration, nutrition or hydration. In treating a terminally ill or irreversibly comatose patient, the physician should determine whether the benefits of treatment outweigh its burdens. At all times, the dignity of the patient should be maintained. (Emphasis added).[14]

[14] *See also Saikewicz,* 373 Mass. at 742–45, 370 N.E.2d at 426–27; *Bartling,* 163 Cal.App.3d at 196, 209 Cal.Rptr. at 225; *Storar,* 52 N.Y.2d at 373 n. 3, 420 N.E.2d at 75–76 n. 3 (Jones, J., dissenting in part) (recent surveys suggest that majority of practicing physicians now approve of passive euthanasia and believe that it is being practiced by members of the profession); *Quinlan,* 70 N.J. at 46, 355 A.2d at 667.

****685 *218** The emphasized language suggests that medical ethics would not be questioned if a DNR or DNH order were placed on the chart of a patient suffering from an irreversible coma. Rasmussen was not in a coma, but she was in an irreversible chronic vegetative state. We fail to see any material significance between the two physical conditions.[15] Therefore, the above statement issued by the AMA leads us to believe that this case does not bring into disrepute the ethical integrity of the medical profession.

[15] "A coma, I think, and a chronic vegetative state differentiate only by the fact that in a coma a person appears to be asleep all the time. In chronic vegetative state, there may be cycles of asleep and wakeness, although in neither state does the patient really communicate with the environment." Testimony of Dr. Stephen Cox, Trial Transcript of September 17, 1985, at 80.

C. Preventing suicide

[13] Asserting the right to refuse medical treatment is not tantamount to committing suicide. "Refusing medical intervention merely allows the disease to take its natural course; if death were eventually to occur, it would be the result, primarily, of the underlying disease, and not the result of a self-inflicted injury." *Conroy,* 98 N.J. at 351,

486 A.2d at 1224. *See also Foody,* 40 Conn.Sup. at 137, 482 A.2d at 720; *Colyer,* 99 Wash.2d at 121, 660 P.2d at 743; *Saikewicz,* 373 Mass. at 743 n. 11, 370 N.E.2d at 426 n. 11.

[14] [15] Furthermore, Arizona's legislature has recognized that "[t]he withholding or withdrawal of life-sustaining procedures from a qualified patient in accordance with [the MTDA] does not, for any purpose, constitute a suicide." A.R.S. § 36–3208. Although we have held that the MTDA is inapplicable in this case, it would be illogical indeed to suggest that the state's interest in preventing suicide magically disappears only when an individual becomes terminally ill and completes certain paperwork. Perhaps in some cases the state's interest in preventing suicide will limit an individual's ability to assert his or her right to refuse medical treatment. *See, e.g., In re Caulk,* 125 N.H. 226, 480 A.2d 93 (1984) (state could force-feed prisoner who was starving himself to death because he preferred death to life imprisonment). This is not such a case.[16]

16 Although Arizona makes no provision for criminal punishment of suicide, A.R.S. § 13–1103(A) provides that a person commits manslaughter by intentionally aiding another to commit suicide. Because we hold that the medical treatment decisions made in this case were not decisions to commit suicide, neither the physicians, nurses, health care facility, guardian, guardian ad litem, nor any similarly situated individual or entity can be charged with manslaughter.

D. Protecting innocent third parties

[16] Rasmussen's decision to forego medical treatment will not adversely or directly affect the health, safety, or security of others. Rasmussen had no children, and her only immediate family, three siblings, resided in another state and had agreed to abide by the decision of the physician and guardian to terminate treatment. We find no interests of third parties in this case.[17]

17 *Cf. Jacobson v. Massachusetts,* 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643 (1905) (compulsory smallpox vaccination law enforced); *Application of President & Directors of Georgetown College, Inc.,* 331 F.2d 1000, *cert. denied,* 377 U.S. 978, 84 S.Ct. 1883, 12 L.Ed.2d 746 (1964) (mother of seven-month-old infant compelled to submit to blood transfusion over her religious objections); *Commissioner of Correction v. Myers,* 379 Mass. 255, 399 N.E.2d 452 (1979) (to prevent serious risk to prison security, prisoner with kidney disease compelled to undergo dialysis over his protest that treatment rendered him unable to defend himself); *John F. Kennedy Memorial Hospital v. Heston,* 58 N.J. 576, 279 A.2d 670 (1971) (young unmarried pregnant woman compelled to submit to blood transfusion that would save her life and likely permit her to live normal healthy life).

INCOMPETENCY AND THE RIGHT TO REFUSE MEDICAL TREATMENT

[17] Ordinarily, only the person whose common-law or constitutional rights are at issue may assert them. A competent person clearly has the ability to exercise the right to refuse medical treatment. So, too, ****686 *219** does an incompetent individual who has made his or her medical desires known prior to becoming incompetent. *See, e.g.,* §§ 36–3201 *et seq.* (MTDA). Unfortunately, this case involved an individual who was incompetent at the time medical treatment became an issue and who had not expressed her medical treatment desires prior to becoming incompetent.

We are not the first tribunal to confront this problem. Other jurisdictions have unanimously concluded that the right to refuse medical treatment is not lost merely because the individual has become incompetent and has failed to preserve that right.[18] Reasons for this conclusion have been best articulated by the New York Supreme Court:

18 *See Conroy,* 98 N.J. at 359, 486 A.2d at 1229; *Foody,* 40 Conn.Sup. at ——, 482 A.2d at 718; *John F. Kennedy Memorial Hospital,* 452 So.2d at 923; *Barry,* 445 So.2d at 370 (footnote omitted) ("[T]he constitutional right of privacy would be an empty right if one who is incompetent were not granted the right of a competent counterpart to exercise his rights."); *Colyer,* 99 Wash.2d at 123, 660 P.2d at 744; *Severns,* 421 A.2d at 1347 ("[T]o deny the exercise because the patient is unconscious would be to deny the right."); *Saikewicz,* 373 Mass. at 736, 744, 370 N.E.2d at 423, 427; *Quinlan,* 70 N.J. at 41, 355 A.2d at 664 ("If a putative decision by Karen to permit this non-cognitive, vegetative existence to terminate by natural forces is regarded as a valuable incident of her right to privacy ... then it should not be discarded solely on the basis that her condition prevents her conscious exercise of the choice.").

> We ... conclude that by standards of logic, morality and medicine the terminally ill should be treated equally, whether competent or incompetent. Can it be doubted that the "value of human dignity extends to both"? What possible societal policy objective is vindicated or furthered by treating the two groups of terminally ill *differently?* What is gained by granting such a fundamental right only to those who, though terminally ill, have not suffered brain damage and coma in the last stages of the dying process? The very notion raises the spectre of constitutional infirmity when measured against the Supreme Court's recognition that incompetents must be afforded all their due process rights; indeed any State scheme which irrationally denies to the terminally ill competent patient is plainly subject to constitutional attack.
>
> *Eichner,* 73 A.D.2d at 464–465, 426 N.Y.S.2d at 542–43 (emphasis in original; citations omitted).

We conclude that Rasmussen's right to refuse medical treatment still existed despite her incompetency and her failure to articulate her medical treatment desires prior to becoming incompetent. Because she was incapable of exercising that right, however, we must determine who could exercise that right for her.

WHO CAN EXERCISE AN INCOMPETENT'S RIGHT TO REFUSE MEDICAL TREATMENT

[18] The court of appeals held that either a family member or a guardian could exercise Rasmussen's right to refuse medical treatment. 154 Ariz. at 205, 741 P.2d at 672.[19] Its decision was based on United States Supreme Court cases holding that a third party has standing to assert the constitutional rights of others if a substantial relationship exists between the claimant and the third party, assertion of the constitutional right by the claimant is impossible, and the claimant's constitutional right will be diluted if the third party is not allowed to assert it. *See Eisenstadt v. Baird,* 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); *Griswold v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958).

[19] The court of appeals also developed a "priority list" of surrogate decisionmakers to minimize the amount of judicial intervention in future similar cases. 154 Ariz. at 206–207, 741 P.2d at 673–674 (judicially appointed guardian, person(s) designated by patient, spouse, adult child or majority of adult children, parents, nearest living relative, attending physician). We acknowledge that not all surrogate decisionmakers will be court-appointed guardians. We decline, however, to develop a "priority list" in this case of first impression and vacate this portion of the court of appeals' opinion.

****687 *220** We need not decide today whether a family member could or could not exercise Rasmussen's right to refuse medical treatment because no family member ever attempted to do so in this case. The facts of this case limit our review to a determination only of whether the Public Fiduciary as guardian could vicariously exercise Rasmussen's right to refuse medical treatment.

[19] Although the above-cited caselaw gives the Public Fiduciary standing to assert Rasmussen's right to refuse medical treatment, we disagree with the court of appeals that it permits the Public Fiduciary to exercise that right. As the guardian ad litem noted:

> The logical extension of the Court of Appeals[']reasoning is that the person with standing to assert a constitutional right in court could also make the decision for the third person as to whether they could or should receive contraceptives or become a member of the NAACP. Obviously, this is not the reasoning of the Supreme Court of the United States....

Petition for Review, Appendix B at 1.

Instead of relying on Supreme Court caselaw, our analysis begins with an examination of relevant Arizona statutes. The superior court has subject matter jurisdiction to adjudicate all issues relating to the protection of incapacitated persons. A.R.S. § 14–1302(A)(2). Contained within the court's jurisdiction is the authority to appoint a guardian. A.R.S. §§ 14–5303, –5304. The general powers and duties of a guardian are set forth in A.R.S. § 14–5312, which provides in relevant part: "A guardian may give any consents or approvals that may be necessary to enable the ward to receive medical or other professional care, counsel, treatment or service." A.R.S. § 14–5312(A)(3).

The guardian ad litem argues that a guardian's right to consent to or approve medical treatment does not include the right to refuse medical treatment. Similar arguments were made in *Matter of Guardianship of Hamlin,* 102 Wash.2d 810, 689 P.2d 1372 (1984), and *Matter of Conservatorship of Torres,* 357 N.W.2d 332 (Minn.1984).

In *Hamlin,* the guardian had the statutory authority "to care for and maintain the incompetent or disabled person, assert his or her rights and best interests, and provide timely, informed consent to necessary medical procedures." At issue was whether the guardian, as part of his duty "to care for and maintain" Hamlin, could terminate a life support system. The Washington Supreme Court admitted that "a literal dictionary definition would seem to exclude authority to consent to termination. A decision to terminate life support systems, however, transcends dictionary definitions." 102 Wash.2d at 815, 689 P.2d at 1375. The court then observed that the guardian had the statutory authority to assert Hamlin's "rights and best interests" and concluded: "Just as medical intervention is, in the majority of cases, clearly in the best interests of the ward, nonintervention in some cases may be appropriate and, therefore, in the ward's best interest." *Id.* The court then examined the medical evidence, concluded that it was in Hamlin's best interest to terminate the life support system, and thus held that the guardian had the statutory authority to consent to the termination.

In *Torres,* the conservator's duties and powers "include[d], but [were] not limited to ... [t]he power to give any necessary consent to enable the ward or conservatee to receive necessary medical or other professional care...." The court-appointed attorney representing Torres argued that a conservator's order to remove a conservatee's life support system was not a consent to receive necessary medical care. The conservator argued that his consent would be meaningless if it did not include the power to refuse medical treatment. The Minnesota Supreme Court, focusing on the statutory language of "but are not limited to", concluded that the conservator had the implied, if not express, authority to order the removal of life support systems "if the conservatee's best interests are no longer served by the maintenance of life supports...." 357 N.W.2d at 337.

****688 *221** [20] Unlike the statute in *Hamlin,* A.R.S. § 14–5312(A)(3) does not give a guardian the right to assert Rasmussen's "best interests." Nevertheless, Arizona caselaw holds:

> The cardinal consideration governing the court in its appointment of a guardian for the person and estate of a ward is how to serve most effectively the best interests and temporal, moral and mental welfare of a living person.

Countryman v. Henderson, 17 Ariz.App. 218, 220, 496 P.2d 861, 863 (1972). And although A.R.S. § 14–5312(A) contains introductory language suggesting, as in *Torres,* that a guardian's duties are broader than those specifically enumerated, such introductory language is inapplicable here.[20] We note, however, that A.R.S. § 14–1102 requires us to liberally construe the guardianship statutes.

[20] The preface to A.R.S. § 14–5312(A)(3) provides: "A guardian of an incapacitated person has the same powers, rights and duties respecting his ward that a parent has respecting his unemancipated minor child.... In particular, and *without qualifying the foregoing,* a guardian has the following powers and duties...." (emphasis added). We decline to hold that the emphasized language permits us to conclude that a guardian can assert an incapacitated person's right to refuse medical treatment even though such authority is not specifically enumerated in § 14–5312(A)(3). Such a holding would require us first to conclude that a parent has the right to assert his unemancipated minor child's right to refuse medical treatment. We have never addressed that factual situation before, nor are we faced with it today. Because of the significant import of today's case, we hesitate to reach any conclusions via a bootstrapping process that would call for resolving issues never previously nor currently before us.

[21] In our opinion, the right to consent to or approve the delivery of medical care must necessarily include the right to consent to or approve the delivery of *no* medical care. To hold otherwise would, as the Washington and Minnesota supreme courts observed, ignore the fact that oftentimes a patient's interests are best served when medical treatment is withheld or withdrawn. To hold otherwise would also reduce the guardian's control over medical treatment to little more than a mechanistic rubberstamp for the wishes of the medical treatment team. This we decline to do. We follow the conclusions reached in *Hamlin* and *Torres* and hold that the Public Fiduciary as Rasmussen's guardian had the implied, if not express, statutory authority to exercise Rasmussen's right to refuse medical treatment.

LIMITS ON GUARDIAN'S DISCRETION

The guardian ad litem contends that the guardian should not have unbridled discretion to decide whether to refuse any or all medical treatment. We agree.

[22] Courts have developed two standards to guide

surrogate decisionmaking: "substituted judgment" and "best interests." Under the substituted judgment standard, the guardian "attempt[s] to reach the decision that the incapacitated person would make if he or she were able to choose." President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Deciding to Forego Life-Sustaining Treatment,* 1, 132 (1983) (hereinafter *Commission Report*). This standard best guides a guardian's decisionmaking when a patient has manifested his or her intent while competent.[21] Unfortunately, the record in this ****689 *222** case is barren of any evidence that Rasmussen expressed her medical desires in any form prior to becoming incompetent. Where no reliable evidence of a patient's intent exists, as here, the substituted judgment standard provides little, if any, guidance to the surrogate decisionmaker and should be abandoned in favor of the "best interests" standard.[22]

21 Such an intent might be embodied in a written document, or 'living will,' stating the person's desire not to have certain types of life-sustaining treatment administered under certain circumstances. It might also be evidenced in an oral directive that the patient gave to a family member, friend, or health care provider. It might consist of a durable power of attorney or appointment of a proxy authorizing a particular person to make the decisions on the patient's behalf if he is no longer capable of making them for himself. It might take the form of reactions that the patient voiced regarding medical treatment administered to others. It might also be deduced from a person's religious beliefs and the tenets of that religion, or from the patient's consistent pattern of conduct with respect to prior decisions about his own medical care.

Conroy, 98 N.J. at 361, 486 A.2d at 1229–30 (footnotes and citations omitted).

The substituted judgment standard has been criticized for permitting past preferences to govern subsequent treatment decisions even though a person's interests can change radically over time. *See* Dresser, *Life, Death and Incompetent Patients: Conceptual Infirmities and Hidden Values in the Law,* 28 Ariz.L.Rev. 373, 379–82 (1986).

22 *See Foody,* 40 Conn.Sup. at 139–40, 482 A.2d at 721; *Conroy,* 98 N.J. at 361, 486 A.2d at 1231 ("[I]n the absence of adequate proof of the patient's wishes, it is naive to pretend that the right to self-determination serves as a basis for substituted decision-making."); *Barber v. Superior Court,* 147 Cal.App.3d 1006, 1021, 195 Cal.Rptr. 484, 493; *Commission Report* at 5 ("The decisions of surrogates should, when possible, attempt to replicate the ones that the patient would make if capable of doing so. When lack of evidence about the patient's wishes precludes this, decisions by surrogates should seek to protect the patient's best interests.") (footnote omitted); *id.* at 133 ("The substituted judgment standard can be used only if a patient was once capable of developing views relevant to the matter at hand; further, there must be reliable evidence of those views."); *id.* at 136 (Commission recommends using best interests approach where patient's likely decision is unknown); Note, *Equality for the Elderly Incompetent: A Proposal for Dignified Death,* 39 Stan.L.Rev. 689, 714 (1987) (substituted judgment standard is deficient when patient's intent is unknown); Note, *Live or Let Die; Who Decides an Incompetent's Fate? In re Storar and In re Eichner,* 1982 B.Y.U.L.Rev. 387, 392–93 (criticism of application of substituted judgment standard when no evidence of patient's intent exists). *But see Spring,* 380 Mass. at 635–40, 405 N.E.2d at 120–22 (patient expressed no intent while competent; court relied upon opinion of patient's wife and son and applied substituted judgment); *Saikewicz,* 373 Mass. at 749–53, 370 N.E.2d at 430–31 (court applied substituted judgment standard even though patient was incompetent from birth).

Under the best interests standard, the surrogate decisionmaker assesses what medical treatment would be in the patient's best interests as determined by such objective criteria as relief from suffering, preservation or restoration of functioning, and quality[23] and extent of sustained life. *Commission Report* at 135. "An accurate assessment will encompass consideration of the satisfaction of present desires, the opportunities for future satisfactions, and the possibility of developing or regaining the capacity for self-determination." *Id.*[24]

23 By "quality of life" we refer to "the value that the continuation of life has for the patient," and not "the value that others find in the continuation of the patient's life...." *Commission Report* at 135 n. 43.

24 We reject any suggestion that a patient's best interests can be determined merely by distinguishing active treatment from passive treatment, withholding treatment from withdrawing treatment, ordinary treatment from extraordinary treatment, and mechanical breathing devices from mechanical feeding devices. Such distinctions have been widely criticized. *See, e.g., Conroy,* 98 N.J. at 367–74, 486 A.2d at 1233–36; *Barber,* 147 Cal.App.3d at 1016, 195 Cal.Rptr. at 490; *Commission Report* at 61–77, 82–89.

[23] When the Public Fiduciary was appointed as guardian, Rasmussen was completely unable to interact with her environment, and the medical probability that she would ever return to a cognitive sapient state, as distinguished

from a chronic vegetative existence, was virtually non-existent. Thus, any medical treatment administered in the absence of the DNH and DNR orders would have provided minimal, if any, benefits and would have only postponed Rasmussen's death rather than improved her life. We believe that the trial court properly concluded that Rasmussen's best interests would be served by the placement and retention of the DNR and DNH orders on her medical chart.

ROLE OF GUARDIAN AD LITEM

We turn now to briefly address the guardian ad litem's request for a definition of his role in this type of proceeding. Although our comments come too late to offer guidance to the guardian ad litem in this case, they hopefully will assist him and other guardians ad litem in similar future cases.

A guardian ad litem is appointed during guardianship proceedings to represent an incapacitated person if such person has no counsel. A.R.S. § 14–5303. The guardian ad litem's function is to "represent the interest[s]" of the incapacitated person. A.R.S. § 14–1403(4). In representing the **690 *223 interests of his ward, the guardian ad litem will perform both procedural and substantive duties.

[24] A guardian ad litem's procedural duties will include drafting and mailing to all interested parties any legal documents affecting the incapacitated person. In addition, he will be responsible for receiving and responding to all legal documents mailed to the incapacitated person. Procedurally, however, the guardian ad litem's duty is not necessarily to act as the guardian's adversary.

[25] [26] The guardian ad litem's principal substantive duty will be to discover all facts relevant to medical treatment of the patient and report such facts to the court. Such facts will include, but are not limited to:

> (a) facts about the incompetent: *i.e.,* age, cause of incompetency, relationship with family members and other close friends, attitude and prior statements concerning life sustaining treatment; (b) medical facts: *i.e.,* prognosis for recovery, intrusiveness of treatment, medical history; (c) facts concerning the state's interest in preserving life: *i.e.,* the existence of dependents, other third party interests; and (d) facts about the guardian, the family, other people close to the incompetent, and the petitioner: *i.e.,* their familiarity with the incompetent, their perceptions of the incompetent's wishes, any potential for ill motives.

Colyer, 99 Wash.2d at 133, 660 P.2d at 748–49. If from his factual findings the guardian ad litem concludes that the ward's best interests will not be served by the guardian's proposed actions, the guardian ad litem as "counsel" for the ward can challenge the guardian's conduct during appointment proceedings and throughout the appellate process. Such was the case here.

ROLE OF THE COURT

Last, but certainly not least, we address the degree to which judicial involvement is required in this type of case. On this issue, opinions of other jurisdictions diverge. The two leading cases are *Quinlan* and *Saikewicz.*

In *Quinlan,* the New Jersey Supreme Court permitted the withdrawal of life support systems only after Quinlan's guardian-father, other family members, attending physicians, and a hospital ethics committee concurred in such action. The court then wrote:

> We consider that a practice of applying to a court to confirm such decisions would generally be inappropriate, not only because that would be a gratuitous encroachment upon the medical profession's field of competence, but because it would be impossibly cumbersome. Such a requirement is distinguishable from the judicial overview traditionally required in other matters such as the adjudication and commitment of mental incompetents. This is not to say that in the case of an otherwise justiciable controversy access to the courts would be foreclosed; we

> speak rather of a general practice and procedure.

70 N.J. at 50, 355 A.2d at 669.[25]

25 *See also Farrell,* 108 N.J. at 356–358, 529 A.2d at 415; *Matter of Peter,* 108 N.J. 365, 380, 529 A.2d 419, 427 (N.J.1987) ("[J]udicial review of a surrogate's decision to give effect to the patient's preference is unnecessary unless a conflict arises among the surrogate decisionmaker, the family, the physician and the Ombudsman."); *Barry,* 445 So.2d at 372; *In re L.H.R.,* 253 Ga. 439, 439–47, 321 S.E.2d 716, 718–23 (1984); *Hamlin,* 102 Wash.2d at 820, 689 P.2d at 1378 ("[I]f the treating physicians, the prognosis committee, and the guardian are all in agreement that the incompetent patient's best interests are served by termination of life sustaining treatment, absent legislation to the contrary, there is no need for judicial involvement in this decision."); *Colyer,* 99 Wash.2d at 127, 660 P.2d at 746 ("In cases where physicians agree on the prognosis and a close family member uses his best judgment as a guardian to exercise the rights of the incompetent, intervention by the courts would be little more than a formality."); *Barber,* 147 Cal.App.3d at 1022, 195 Cal.Rptr. at 493.

A different point of view was articulated by the Supreme Judicial Court of Massachusetts in *Saikewicz.* Although the court noted that a probate judge should consider the advice or knowledge of physicians, medical experts, and hospital ethics committees, it concluded:

> ****691 *224** We take a dim view of any attempt to shift the ultimate decision-making responsibility away from the duly established courts of proper jurisdiction to any committee, panel or group, ad hoc or permanent....
>
> We do not view the judicial resolution of this most difficult and awesome question—whether potentially life-prolonging treatment should be withheld from a person incapable of making his own decision—as constituting a "gratuitous encroachment" on the domain of medical expertise. Rather, such questions of life and death seem to us to require the process of detached but passionate investigation and decision that forms the ideal on which the judicial branch of government was created. Achieving this ideal is our responsibility and that of the lower court, and is not to be entrusted to any other group purporting to represent the "morality and conscience of our society," no matter how highly motivated or impressively constituted.

373 Mass. at 758–59, 370 N.E.2d at 434–35.[26]

26 This portion of *Saikewicz* has been the subject of much commentary and criticism. *See, e.g., L.H.R.,* 253 Ga. at 442–45, 321 S.E.2d at 720–21 (summary of selected articles).

[27] [28] One need only look to the plethora of cases cited *ante* at 214, n. 4 741 P.2d at 681 n. 4, where arguments were heard or opinions were issued long after the patient had died, to conclude that judicial intervention in decisions of this nature can indeed be unduly cumbersome. A minimal amount of judicial involvement in an incompetent's affairs is unavoidable in cases such as this one, though, where guardianship is sought and an incompetency hearing is required. *See* A.R.S. § 14–5303. Once the court resolves the matters of guardianship and incompetency, however, its encroachment into the substantive decisions concerning medical treatment should be limited to resolving disputes among the patient's family, the attending physicians, an independent physician, the health care facility, the guardian, and the guardian ad litem. Here the guardian ad litem opposed the plan of medical treatment agreed upon by all other interested parties, and the court properly made itself available to resolve the dispute. Where, however, all affected parties concur in the proposed plan of medical treatment, court approval of the proposed plan of medical treatment is neither necessary nor required.

[29] If the court is requested to resolve disputes among interested parties, particularly disputes questioning the "substituted judgment" or the "best interests" of the incompetent patient, then evidence necessary to resolve the dispute must be "clear and convincing." Although the typical evidentiary standard in civil cases is "by a preponderance of the evidence," we have recognized the need for a higher standard in exceptional civil matters. *See, e.g., Linthicum v. Nationwide Life Insurance Co.,* 150 Ariz. 326, 723 P.2d 675 (1986) (punitive damages awarded only upon clear and convincing evidence). We deal here with matters that in at least some instances raise life-or-death issues and in all instances involve personal interests more important than those found in the typical civil dispute where private litigants squabble over a sum of money. We hold that court-resolved disputes in cases of this nature must be resolved by clear and convincing evidence. *See also Storar,* 52 N.Y.S.2d at 378, 420 N.E.2d at 72; *Leach,* 68 Ohio Misc. at 10, 426 N.E.2d at 815.

[30] The consequences of a decision to terminate medical treatment will often be irreversible. Therefore, the court in any dispute will assume that the patient wishes to continue receiving medical treatment, and the burden to prove otherwise will rest on the party or parties desiring to terminate the treatment.

CONCLUSION

The case under immediate consideration concerns only Mildred Rasmussen. Yet, the principles and procedures articulated herein undoubtedly will govern future similar cases. Even after today's opinion, however, issues in this area remain unan ****692** swered ***225** —some by choice, others by oversight. issuEs that we have confronted today, as well as those remaining unresolved, are fraught with moral, ethical, social, medical, and legal considerations. Such issues are not well-suited for resolution in adversarial judicial proceedings. Rather, the Legislature is best suited to address these matters in a comprehensive matter. Only the Legislature has the resources necessary to gather and synthesize the vast quantities of information needed to formulate guidelines that will best accommodate the rights and interests of the many individuals and institutions involved in these tragic situations. Many other courts have reached this same conclusion. *See, e.g., Conroy,* 98 N.J. at 343–46, 486 A.2d at 1220–21; *Hamlin,* 102 Wash.2d at 822, 689 P.2d at 1379; *Satz,* 379 So.2d at 360. Like them, we urge our Legislature to respond to these matters within permissible constitutional limits.

The judgment of the trial court is affirmed. The opinion of the court of appeals is affirmed in part and reversed in part.

CAMERON and HOLOHAN, JJ., concur.

MOELLER, J., did not participate in the determination of this matter.

FELDMAN, Vice Chief Justice, concurring.

I join in the court's opinion, except that portion (154 Ariz. at 223–24, 741 P.2d at 690–91) which holds that the final determination to refuse or discontinue medical treatment may be made by the guardian without court supervision or approval. On this question, the court has followed the lead of *Quinlan* and held that the decision in a best-interest case may be made by the guardian in consultation with the family and the physicians. No court order is necessary before implementation of the decision. *See In re Quinlan,* 70 N.J. 10, 355 A.2d 647, *cert. denied,* 429 U.S. 922, 97 S.Ct. 319, 50 L.Ed.2d 289 (1976).

Although one may argue either side of the question, I believe that it would be better policy—even where there is unanimity of opinion between the guardian, the family, and the doctors—that "substituted judgment" and "best interest" decisions be validated by court order. The question of whether to refuse or discontinue treatment is not simply a medical issue to be left to the doctors; although the medical evidence is in many ways determinative, the final decision incorporates a range of ethical, moral, and societal values which should not be left solely to doctors, family members, or representatives of the court, no matter how well informed and well meaning they might be. *See* Annas, *Reconciling Quinlan and Saikewicz: Decision Making for the Terminally Ill Incompetent,* 4 AM.J. LAW & MEDICINE 367 (1979). Such decision making requires the final validation—not necessarily by adversarial hearing—and the detached and neutral inspection of a judicial officer, accountable to the law, and therefore to the public. *See Superintendent of Belchertown State School v. Saikewicz,* 373 Mass. 728, 370 N.E.2d 417 (1977).

If the question were whether to commit a patient for psychiatric treatment for a period of thirty days, no group of doctors, no group of family members, and no guardian appointed by the court could be given the final authority to accomplish such a result, even though they all agreed it was "for her own good." *See* A.R.S. §§ 36–520 *et seq.* In my view, the decision to end whatever life remains in the patient should be given no less care and attention before it becomes irrevocable. Surely, if the system guarantees the patient a hearing before commitment, it must require some hearing before refusal or termination of treatment necessary for life support.

All Citations

154 Ariz. 207, 741 P.2d 674, 56 USLW 2090

Rule 2.1. - Definitions.

WG2 recommends inserting provisions concerning STAT REP and court-appointed counsel, and their respective roles and duties ~~recommends inserting, possibly in Rule 2.1,~~ provisions concerning in Rule 10 ~~GALs~~ or a new rule. ~~WG-1 suggests putting these in Rule 10 or a new rule.~~

~~(a)~~ ~~(a)~~ ~~**"Application"**~~ ~~means~~ is ~~a written request to the probate registrar~~ ~~that complies with~~ under ~~Rule 16~~ ~~of these rules.~~

(x) **"Application"** has the meaning described in Rule 16.

(x) **"Attend"** means to be present, either personally or by counsel, at a court event {WG2 REC. ADOPT AS AMENDED} ~~When these rules require a person to attend a court event, the person may satisfy that requirement by the attendance of that person's attorney. A person may attend a court event through that person's attorney unless these rules, a statute, or a court order provide otherwise.~~

~~B. **"Licensed fiduciary"** means a person or entity that is certified by the Supreme Court of Arizona pursuant to A.R.S. § 14-5651.~~

(b) "Civil action" ~~means~~ is a lawsuit brought to enforce, redress, or protect private rights and includes suits in equity and actions at law. For purposes of these probate rules, the term "civil action" excludes any family law or probate proceeding. {WG2 REC. KEEP AS WRITTEN IF STILL IN USE}

(x) **"Civil Rules"** means the Arizona Rules of Civil Procedure. A **"Civil Rule"** is a rule in the Arizona Rules of Civil Procedure. {WG2 REC. KEEP AS WRITTEN}

(x) **"Contested hearing"** has the meaning described in Rule 3.1(a). {WG2 REC. KEEP AS WRITTEN}

~~D. "Commissioner" means a judicial officer who has the powers and duties set forth in Rule 96, Rules of the Supreme Court. Commissioners may be appointed as judges pro tempore and, as such, may act as judges in matters assigned to them.~~

(x). **"Court"** includes a judicial officer, clerk, or court administrator. {WG2 REC. KEEP AS WRITTEN}

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(xx) "**Demand for notice"** means a written request filed with the court by an interested person to be notified of any filings made in the probate proceeding.

(c) "Evidence" means testimony, writing, material objects, or other things offered to prove the existence or nonexistence of a fact.

~~**(d) "Evidentiary hearing"** or "hearing" means a proceeding held before a judicial officer or a jury during which evidence is presented.~~

(e) "Family law proceeding" ~~means~~ is a proceeding brought under A.R.S. Title 25. {WG2 REC. KEEP AS WRITTEN IF STILL IN USE}

(f) **"Financial institution"** has the same meaning as defined in Arizona Revised Statutes § 14-5651. {WG2 REC. KEEP AS WRITTEN }

(f) "Guardian ad litem" ~~means~~ is a ~~representative~~ person appointed by the court ~~pursuant to~~under A.R.S. § 14-1408, or ~~a person appointed pursuant to~~ under Rule 17(f), Arizona Rules of Civil Procedure, ~~by the court~~ to represent the interests of a minor, unborn, or unascertained person; a person whose identity or address is unknown; or an incapacitated person in a particular case before the court. "Guardian ad litem" does not include an attorney appointed ~~pursuant to~~ under A.R.S. §§ 14-5207(D), -5303(C), or -5407(B). {WG2 SUGGESTION TO DELETE THIS DEF. - EDIT RULE 33 to remove GAL, etc.}

(x) **"Interested person"** INCLUDES ANY PARTY, AND ANY PERSON A~~i~~s defined by Arizona Revised Statutes § 14-1201 ~~and as used in these rules, "interested person" includes a party~~. {WG2 REC. KEEP AS AMENDED }

(g) "Judicial officer" includes a commissioner, judge pro tempore, and judge. {WG2 REC. KEEP AS WRITTEN }

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B. **"Licensed fiduciary"** means a person or entity that is licensed by the Supreme Court of Arizona under A.R.S. § 14-5651. {WG2 REC. KEEP AS WRITTEN }

h) "Medical professional" includes a physician, psychologist, and registered nurse, or others authorized by law~~,~~ for guardian and conservator proceedings under A.R.S. §§ 14-5303(C) and -5407(B), and a psychologist or psychiatrist for a guardian requesting inpatient treatment authority under A.R.S. § 14-5312.01. {WG2 REC. DELETE - ALREADY DEFINED IN STATUTE }

(x) **"Motion"** has the meaning described in Rule 18. {WG2 REC. KEEP AS AMENDED}

~~**(h) "Motion"** means is an oral or written request made to the court that complies with under Rule 18 of these rules.~~

~~**(i) "Non-appearance hearing"** means means a setting on the court's calendar where the attendance of interested persons is not required, but where any interested person who wants to make an objection may appear and do so before the court makes a ruling on the issue to be decided.a hearing scheduled pursuant to Rule 12 of these rules.~~

(j) "Oral argument" ~~means~~ is a proceeding before a judicial officer ~~during which~~ when parties or their lawyers ~~-~~state their positions in support of or in opposition to a motion. Evidence is not presented at an oral argument. {WG2 REC. DELETE – SEEMS UNNECESSARY}

(k) "Party" ~~means~~ is a person who has filed a notice of appearance, an application, a petition, or an objection in a probate proceeding. An interested person who has filed a demand for notice, but

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has not filed a notice of appearance, a petition, or an objection, is not a party. A party includes the party's attorney, except when a rule provides otherwise. {WG2 REC. KEEP AS WRITTEN }

(l) **"Person"** means an individual or an organization. {WG2 REC. KEEP AS WRITTEN }

~~(lm) **"Petition"** means is a written request to the court under Rule 17 for substantive relief that complies with Rule 17 of these rules.~~

(x) **"Petition"** has the meaning described in Rule 17. {WG2 REC. KEEP AS WRITTEN }

(~~m~~n) **"Protected adult"** ~~means~~ is an adult who qualifies for the appointment of a conservator under Arizona statutes regardless of whether a conservator has been appointed. {WG2 REC. DELETE THIS – RULE 34 IS NOW RULE 37 AND THE PRHASE PROTECTED ADULT IS NO LONGER USED. }

(~~n~~o) **"Subject person"** ~~means~~ is the decedent, alleged incapacitated person, ward, person allegedly in need of protection, or protected person. [**Staff Note:** Should this rule include definitions for each of these terms?] {WG2 REC. DELETE – SUPERFLUOUS. DEFINITION IS DERRIVED FROM CONTEXT, DUH!}

(x) **"Uncontested hearing"** has the meaning described in Rule 3.1(b). {WG2 REC. KEEP AS WRITTEN}

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Rule 2.1. Definitions.

WG2 recommends inserting provisions concerning STAT REP and court-appointed counsel, and their respective roles and duties in Rule 10 or a new rule.

~~**(a) "Application"** is a written request to the probate registrar under Rule 16.~~

(x) **"Application"** has the meaning described in Rule 16.

(x) "Attend" means to be present, either personally or by counsel, at a court event {WG2 REC. ADOPT AS AMENDED}~~When these rules require a person to attend a court event, the person may satisfy that requirement by the attendance of that person's attorney. A person may attend a court event through that person's attorney unless these rules, a statute, or a court order provide otherwise.~~

(b) "Civil action" is a lawsuit brought to enforce, redress, or protect private rights and includes suits in equity and actions at law. For purposes of these probate rules, the term "civil action" excludes any family law or probate proceeding. {WG2 REC. KEEP AS WRITTEN IF STILL IN USE}

(x) **"Civil Rules"** means the Arizona Rules of Civil Procedure. A **"Civil Rule"** is a rule in the Arizona Rules of Civil Procedure. {WG2 REC. KEEP AS WRITTEN}

(x) **"Contested hearing"** has the meaning described in Rule 3.1(a).{WG2 REC. KEEP AS WRITTEN}

~~D. "Commissioner" means a judicial officer who has the powers and duties set forth in Rule 96, Rules of the Supreme Court. Commissioners may be appointed as judges pro tempore and, as such, may act as judges in matters assigned to them.~~

(x). **"Court"** includes a judicial officer, clerk, or court administrator.{WG2 REC. KEEP AS WRITTEN}

(xx) "**Demand for notice"** means a written request filed with the court by an interested person to be notified of any filings made in the probate proceeding.

(c) "Evidence" means testimony, writing, material objects, or other things offered to prove the existence or nonexistence of a fact.

(e) "Family law proceeding" is a proceeding brought under A.R.S. Title 25. {WG2 REC. KEEP AS WRITTEN IF STILL IN USE}

(f) **"Financial institution"** has the same meaning as defined in Arizona Revised Statutes § 14-5651. {WG2 REC. KEEP AS WRITTEN }

(f) "Guardian ad litem" is a person appointed by the court under A.R.S. § 14-1408, or under Rule 17(f), Arizona Rules of Civil Procedure, to represent the interests of a minor, unborn, or unascertained person; a person whose identity or address is unknown; or an incapacitated person in a particular case before the court. "Guardian ad litem" does not include an attorney appointed under A.R.S. §§ 14-5207(D), -5303(C), or -5407(B). {WG2 SUGGESTION TO DELETE THIS DEF. - EDIT RULE 33 to remove GAL, etc.}

(x) **"Interested person"** INCLUDES ANY PARTY, AND ANY PERSON As defined by Arizona Revised Statutes § 14-1201. {WG2 REC. KEEP AS AMENDED }

(g) "Judicial officer" includes a commissioner, judge pro tempore, and judge. {WG2 REC. KEEP AS WRITTEN }

B. **"Licensed fiduciary"** means a person or entity that is licensed by the Supreme Court of Arizona under A.R.S. § 14-5651. {WG2 REC. KEEP AS WRITTEN }

h) "Medical professional" includes a physician, psychologist, and registered nurse, or others authorized by law for guardian and conservator proceedings under A.R.S. §§ 14-5303(C) and -5407(B), and a psychologist or psychiatrist for a guardian requesting inpatient treatment authority under A.R.S. § 14-5312.01.{WG2 REC. DELETE - ALREADY DEFINED IN STATUTE }

(x) **"Motion"** has the meaning described in Rule 18.{WG2 REC. KEEP AS AMENDED}

~~**(h) "Motion"** is an oral or written request to the court under Rule 18.~~

~~**(i) "Non-appearance hearing"** means a setting on the court's calendar where the attendance of interested persons is not required, but where any interested person who wants to make an objection may appear and do so before the court makes a ruling on the issue to be decided.~~

(j) "Oral argument" is a proceeding before a judicial officer when parties or their lawyers state their positions in support of or in opposition to a motion. Evidence is not presented at an oral argument. {WG2 REC. DELETE – SEEMS UNNECESSARY}

(k) "Party" is a person who has filed a notice of appearance, an application, a petition, or an objection in a probate proceeding. An interested person who has filed a demand for notice, but has not filed a notice of appearance, a petition, or an objection, is not a party. A party includes the party's attorney, except when a rule provides otherwise.{WG2 REC. KEEP AS WRITTEN }

(l) **"Person"** means an individual or an organization. {WG2 REC. KEEP AS WRITTEN }

~~**(m) "Petition"** is a written request to the court under Rule 17 for substantive relief .~~

(x) **"Petition**" has the meaning described in Rule 17. {WG2 REC. KEEP AS WRITTEN }

(n) "Protected adult" is an adult who qualifies for the appointment of a conservator under Arizona statutes regardless of whether a conservator has been appointed. {WG2 REC. DELETE THIS – RULE 34 IS NOW RULE 37 AND THE PRHASE PROTECTED ADULT IS NO LONGER USED. }

(o) "Subject person" is the decedent, alleged incapacitated person, ward, person allegedly in need of protection, or protected person. [**Staff Note:** Should this rule include definitions for each of these terms?] {WG2 REC. DELETE – SUPERFLUOUS. DEFINITION IS DERRIVED FROM CONTEXT, DUH!}

(x) "Uncontested hearing" has the meaning described in Rule 3.1(b). {WG2 REC. KEEP AS WRITTEN}

Rule 7.1. Sealing and Unsealing Court Documents.

~~**JMP note: Should we include a specific provision to address the problem that frequently arises in minor conservatorships (approval of settlements that are confidential)?**~~

(a) Procedure. The procedure for sealing and unsealing documents in a probate case is provided in Civil Rule 5.4.

(b) Access to Sealed Documents. Court documents that are sealed in a probate case may be examined only by judicial officers. Access to sealed documents by court staff or clerk staff will be determined by local administrative orders or as allowed by Rule 7(b)(2)(E). Access to sealed documents by parties and the public will be allowed only after entry of a court order ~~in accordance with this rule~~, except that the following persons may obtain certified copies of any sealed order appointing the fiduciary and the fiduciary's sealed letters of appointment without a court order unsealing those documents:

(1) a court-appointed fiduciary,

(2) that fiduciary's attorney, or

~~**(a)**~~**(3)** a person authorized by the fiduciary or the fiduciary's attorney ~~may~~ upon presentation of a completed form substantially similar to Form X. ~~obtain a certified copy of the fiduciary's sealed letters of appointment without a court order unsealing the letters~~.

~~**JMP note:** What about other parties? And what about clerks (including deputy clerks), judicial officers' staff, and court administration? I think this needs to be broader.~~

NOTE: Inasmuch as there is a another group of judges, clerks, State Bar members, and stakeholders that is currently evaluating the operation of Civil Rule 5.4, WG-1 recommends relying on Rule 5.4 and allowing that group to take the lead on revisions to Rule 5.4. ~~**Motion or Stipulation to Seal Court Documents; Service.**~~

~~**Generally.** Any interested person or the court on its own may move to seal a court document, or, in exceptional circumstances, an entire case.~~

~~**Contents.** A written The title of the motion or stipulation to seal must disclose that the motion or stipulation seeks sealing of a court record and must describe why the sealing is justified with reference to the factors listed in (c).~~

~~**Filing and Service of Motion or Stipulation to Seal Document.**~~

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Commented [JP1]: Civil Rule 5.4(d)(2) states: "Any motion or stipulation to file a document under seal must set forth a clear statement of the facts and legal authority justifying the filing of the document under seal, including, if applicable, why the request satisfies the requirements of Rule 5.4(c)(2).
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Filing of Motion or Stipulation and Submission of Documents; Service. A party who submits a written motion or stipulation to seal one or more documents, but not the entire case, must file the motion or stipulation with the clerk and, unless the court orders otherwise, serve a copy of the motion or stipulation on all parties in accordance with the applicable rules of service. In addition, that party must separately submit to judicial officer assigned to the case a copy of the motion or stipulation, along with the documents that are the subject of the motion or stipulation. The documents must be in a secured envelope, affixed to which must be a cover sheet that displays the notation "DOCUMENT(S) PROPOSED FOR FILING UNDER SEAL" and that identifies the case number and title and each document contained in the envelope with sufficient detail so the court can readily identify it and the number of pages in each document. Unless the court orders otherwise, the submitting party is not required to provide the parties or the clerk with a copy of the documents that are the subject of the motion or stipulation.

Request to Seal Case Initiation Documents. If the motion or stipulation requests the sealing of one or more documents used to commence a probate case, the clerk must file the motion or stipulation, treating it as the case-initiating document, and assign a number to the case.

Public Access to Documents Pending Ruling. Until the judicial officer has decided whether to permit the documents to be filed under seal, the documents do not constitute part of the public record in the case.

Judicial Action on Motion or Stipulation. If the judicial officer denies the request to seal the documents, the judicial officer shall direct the clerk to file the documents as part of the public record. If the judicial officer grants the request to seal the documents, the judicial officer shall direct the clerk to file the documents under seal.

(1)

Filing and Service of Motion or Stipulation to Seal Entire Case.

Prior to Commencement of the Case. A party who seeks sealing of an entire case before the case has been commenced must submit a written motion or stipulation to the presiding judge of the county or another judicial officer designated by the presiding judge to rule on such requests. The motion or stipulation must not be filed with the clerk until the judicial officer has ruled on the motion or stipulation.

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Commented [JP3]: I don't think this is necessary, but I'm adding it because it is easier to remove it later than to have to draft it in the future.
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(b) After Commencement of the Case. A party who submits a written motion or stipulation to seal an entire case after the case has been commenced must file the motion or stipulation with the clerk and, unless the court orders otherwise, serve a copy of the motion or stipulation on all parties in accordance with the applicable rules of evidence. The motion must be served on all parties in accordance with the applicable rules of service.

(c) Written Findings Required. The court may order documents, or any part thereof, or a case, to be sealed, provided the court enters written findings that the specific sealing is justified. The findings must include the following:

(1) there exists an overriding interest that overcomes the right of public access to the document;

(2) the overriding interest supports sealing the document;

(3) a substantial probability exists that the overriding interest will be prejudiced if the document is not sealed;

(4) the proposed sealing is narrowly tailored; and

(5) no less restrictive means exist to achieve the overriding interest.

(d) Motion to Unseal; Service. A sealed court document or case may be unsealed only by stipulation of all parties, on the court's own motion, or on a motion filed by a party or other interested person. A motion to unseal a court document or case must be served on all parties in accordance with the applicable rules of service. If the movant cannot locate a party for service after making a good faith effort to do so, the movant may file an affidavit setting forth the efforts to locate the party and requesting that the court waive the service requirements of this rule. The court may waive the service requirement if it finds that further good faith efforts to locate the party are not likely to be successful.

(e) Objection to Unsealing. Any party opposing a motion to unseal must demonstrate why the motion should not be granted. The opposing party must show that overriding circumstances continue to exist or that other grounds provide a sufficient basis for keeping the document sealed.

COMMENT

This rule uses the adjective "overriding interest" to conform to the court's use in *State v. Tucker*, 231 Ariz. 125 (App. 2012), and Rule 5.4 of the Arizona Rules of Civil Procedure.

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Rule 7.1. Sealing and Unsealing Court Documents.

(a) Procedure. The procedure for sealing and unsealing documents in a probate case is provided in Civil Rule 5.4.

(b) Access to Sealed Documents. Court documents that are sealed in a probate case may be examined only by judicial officers. Access to sealed documents by court staff or clerk staff will be determined by local administrative orders or as allowed by Rule 7(b)(2)(E). Access to sealed documents by parties and the public will be allowed only after entry of a court order, except that the following persons may obtain certified copies of any sealed order appointing the fiduciary and the fiduciary's sealed letters of appointment without a court order unsealing those documents:

(1) a court-appointed fiduciary,

(2) that fiduciary's attorney, or

(3) a person authorized by the fiduciary or the fiduciary's attorney upon presentation of a completed form substantially similar to Form X.

NOTE: Inasmuch as there is a another group of judges, clerks, State Bar members, and stakeholders that is currently evaluating the operation of Civil Rule 5.4, WG-1 recommends relying on Rule 5.4 and allowing that group to take the lead on revisions to Rule 5.4.

Rule 4. ~~Commencement~~Initiation ~~ing~~ and ~~Duration~~Termination of ~~a~~ Probate Cases ~~and Proceedings~~Case; ~~Duration of Proceedings.~~

(a) Generally. A probate case is initiated by filing a probate proceeding as described in this rule. The termination of that probate proceeding does not necessarily terminate the probate case.

~~**Staff Note:** The current rule does not mention juvenile cases (although the comment does).~~

~~**Generally~~~~Probate Proceedings Generally.**~~

~~**(a) Commencement.** A probate proceeding is commenced by filing:~~

~~**(1)** filing a petition; or~~

~~filing an application for an informal probate of a will or the an informal appointment of a personal representative.~~

~~**Duration.** A probate proceeding ends when:~~

~~a judicial officer has resolved all the issues raised in the petition and has entered a final order or judgment in accordance with Civil Rule 54(c); or~~

~~**(2)** the probate registrar has approved or denied the application as described in Rule 16.~~

(b) ~~Commencement~~Initiation and Termination of ~~Proceedings Regarding~~ a Decedent's Estate Case.

~~**(b)**~~**(1)** *Initiation.* A ~~probate case relating to a~~ decedent's estate case is ~~commenced~~ initiated by filing any of the following documents:

~~**(1)**~~ **(A)** an application for:

~~**(A)**~~ **(i)** informal appointment of a personal representative or for informal probate of a will under A.R.S. §§ 14-3301 to -3311; or

~~**(B)**~~**(ii)** informal appointment of a special administrator under A.R.S. § 14-3614;

~~**(2)**~~**(B)** a petition for:

~~**(A)**~~**(i)** formal appointment of a personal representative or for formal probate of will or for determination of intestacy under A.R.S. §§ 14-3401 to -3415;

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Commented [JMP2]: The current rule uses "Decedent's Estate Case." Staff changed it to "Proceedings Regarding a Decedent's Estate Case." This change confuses the definitions of "proceeding" and case. This part of the rule really does talk about how a case is started.

Commented [JMP3]: I made this change to be consistent with the rest of the rule.

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~~(B)~~(ii) formal appointment of a special administrator under A.R.S. § 14-3614;

~~(3)~~(C) certified copies of a domiciliary foreign personal representative's appointment and any official bond under A.R.S. § 14-4204; or

~~(4)~~(D) an affidavit of succession to real property under A.R.S. § 14-3971(E).

~~(c)~~(2) ~~*Duration*~~*Termination* ~~*of Proceedings Regarding a Decedent's Estate Case*~~. A probate case initiated by filing one of the documents listed in subparts (b)(1)(A)(i), (b)(~~2~~1)(~~A~~B)(i), or (b)(~~2~~1)(B)(ii) ~~continues until~~terminates when:

~~(1)~~(A) ~~until~~ the court has entered an order ~~closing the estate~~under A.R.S. §§ 14-3931 or 14-3932~~,~~; or

~~(2)~~(B) under A.R.S. § 14 -3933, or under A.R.S. §§ 14-3973 and 14-3974, ~~until~~ one year after the personal representative has filed a closing statement if no proceeding is then pending in the case~~statement under A.R.S. §§ 14-3931 to -3938 or -3973 to -3974~~.

~~(d)~~(c) ~~Commencement~~Initiation and ~~Duration~~Termination of a Guardianship Case.

(1) ***~~Commencement~~Initiation.*** A guardianship case is ~~commenced~~ initiated by filing a petition requesting the appointment of a guardian under A.R.S. §§ 14-5303 or 14-5310 ~~under Title 14, A.R.S. §§ 14-5303 or -5310~~.

(2) ***~~Duration~~Termination.*** A guardianship case ~~continues until~~terminates when:

(A) ~~until~~ the court has entered an order terminating the guardianship; ~~or~~

(B) in the case of a guardianship of an adult, by operation of law under A.R.S. § 14~~until the ward has died~~-5306; or

(C) in the case of a guardianship ~~for~~of a minor, ~~the ward has reached 18 years of age~~by operation of law under A.R.S. § 14-5210~~, guardianship is terminated by operation of law; or under A.R.S. § 14-5306~~.

~~**(B)** the juvenile court makes a finding of dependency, enters a final order granting a Title 8 guardianship, enters a final order of adoption, or enters another permanent placement order.~~

~~(e)~~(d) ~~Commencement~~Initiation and ~~Duration~~Termination of a Conservatorship Case.

(1) ***~~Commencement~~Initiation.*** A conservatorship case is ~~commenced~~ initiated by filing a petition requesting the appointment of a conservator or other protective

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Commented [JMP4]: I find it odd that decedent's estates are broken into two subparts but guardianships are dealt with in one subpart. Can we follow the existing probate rules and have decedent's estates covered in one subpart?

Commented [JMP5]: We need to be consistent. In the section dealing with decedents' estates, the statutory citations were stricken and not replaced with any reference to Title 14.

Commented [JMP6]: The probate rules do not apply to title 8 guardianships.

relief authorized under A.R.S. ~~article 4, chapter 5, t~~Title 14, Chapter 5, Article 4. ~~A.R.S. under A.R.S. §§ 14-5401.01 or 5404~~.

(2) ***~~Duration~~Termination*.** A conservatorship case ~~continues~~terminates when:

(A) ~~until~~ the court has entered an order terminating the conservatorship ~~under A.R.S. §§ 14-5419(I) or 5430~~; or

(B) after the protected person's death, and if the conservator is granted the powers of a personal representative, termination occurs under subparts (b)(2)(A) or (b)(2)(B) of this rule~~after the protected person's death, until the court has entered an order closing the estate, or one year after the conservator has filed a closing statement if no proceeding is then pending in the case under A.R.S. §§ 14-3931 to 3938~~.

~~(f)~~(e) ~~Commencement~~Initiation and ~~Duration~~Termination of a Trust Case.

(1) ***~~Commencement~~Initiation*.** A case relating to the administration ~~internal affairs~~ of a trust is ~~commenced~~ initiated by filing:

(A) a petition under A.R.S. § 14-10201; or

(B) a petition for declaratory judgment under A.R.S. §§ 12-~~1801~~1831 to ~~1867~~1846.

(2) ***~~Duration~~Termination*.** A case relating to the ~~internal affairs~~administration of a trust ~~continues until~~terminates when ~~the court takes either of the following actions~~:

(A) ~~in the case of a trust subject to the continuing supervision of the court,~~ the court enters an order terminating ~~court~~ its continuing supervision of the trust,

~~(A)~~(B) ~~or~~the court enters an order terminating the trust, ~~; or~~or

(C) in all other ~~cases~~instances, the court enters a final, appealable order granting or denying the petition.

(f) Initiation and Termination of Case Challenging or Enforcing Decision of Health Care Surrogate.

~~(B)~~(1) **

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Rule 4. Initiation and Termination of Probate Cases

(a) Generally. A probate case is initiated by filing a probate proceeding as described in this rule. The termination of that probate proceeding does not necessarily terminate the probate case.

(b) Initiation and Termination of a Decedent's Estate Case.

(1) *Initiation.* A decedent's estate case is initiated by filing any of the following documents:

(A) an application for:

(i) informal appointment of a personal representative or for informal probate of a will under A.R.S. §§ 14-3301 to -3311; or

(ii) informal appointment of a special administrator under A.R.S. § 14-3614;

(B) a petition for:

(i) formal appointment of a personal representative or for formal probate of will or for determination of intestacy under A.R.S. §§ 14-3401 to -3415;

(ii) formal appointment of a special administrator under A.R.S. § 14-3614;

(C) certified copies of a domiciliary foreign personal representative's appointment and any official bond under A.R.S. § 14-4204; or

(D) an affidavit of succession to real property under A.R.S. § 14-3971(E).

(2) *Termination.* A probate case initiated by filing one of the documents listed in subparts (b)(1)(A)(i), (b)(1)(B)(i), or (b)(1)(B)(ii) terminates when:

(A) the court has entered an order under A.R.S. §§ 14-3931 or 14-3932; or

(B) under A.R.S. § 14 -3933, or under A.R.S. §§ 14-3973 and 14-3974, one year after the personal representative has filed a closing statement if no proceeding is then pending in the case.

(c) Initiation and Termination of a Guardianship Case.

(1) ***Initiation.*** A guardianship case is initiated by filing a petition requesting the appointment of a guardian under A.R.S. §§ 14-5303 or 14-5310.

(2) ***Termination.*** A guardianship case terminates when:

(A) the court has entered an order terminating the guardianship;

(B) in the case of a guardianship of an adult, by operation of law under A.R.S. § 14-5306; or

(C) in the case of a guardianship of a minor, by operation of law under A.R.S. § 14-5210.

(d) Initiation and Termination of a Conservatorship Case.

(1) ***Initiation.*** A conservatorship case is initiated by filing a petition requesting the appointment of a conservator or other protective relief authorized under A.R.S. Title 14, Chapter 5, Article 4.

(2) ***Termination.*** A conservatorship case terminates when:

(A) the court has entered an order terminating the conservatorship; or

(B) after the protected person's death, and if the conservator is granted the powers of a personal representative, termination occurs under subparts (b)(2)(A) or (b)(2)(B) of this rule.

(e) Initiation and Termination of a Trust Case.

(1) ***Initiation.*** A case relating to the administration of a trust is initiated by filing:

(A) a petition under A.R.S. § 14-10201; or

(B) a petition for declaratory judgment under A.R.S. §§ 12-1831 to -1846.

(2) ***Termination.*** A case relating to the administration of a trust terminates when:

(A) the court enters an order terminating its continuing supervision of the trust,

(B) the court enters an order terminating the trust, or

(C) in all other instances, the court enters a final, appealable order granting or denying the petition.

(f) Initiation and Termination of Case Challenging or Enforcing Decision of Health Care Surrogate.

(1) **

Rule 4.1. ~~**Commencement, Consolidation, and Transfer of Non-Probate Proceedings**~~**Civil Actions Filed Within or Consolidated with a Probate Case.**~~**Termination of Probate Proceedings Initiated by Petition**

A probate proceeding that was initiated by the filing of a petition terminates when: (1) a judicial officer has resolved all the issues raised in the petition ~~and has entered a final order or judgment in accordance with Civil Rule 54(c)~~, or (2) the petition has been dismissed under Civil Rule 41.

For Rule 2: A probate proceeding is initiated by filing a petition or, in the case of a decedent's estate, filing any one of the documents described in Rule 4(x).

Rule 4.1 Initiation and Termination of Probate Proceedings.

(a) A probate proceeding is initiated by filing a petition or, in the case of a decedent's estate, filing any one of the documents described in Rule 4(x).

(b) Termination.

a. A probate proceeding initiated by application terminates when the registrar has approved or denied the application as described in Rule 16.

b. A judicial officer has resolved all the issues raised in the petition and has entered a final order or judgment in accordance with Civil Rule 54(c).

NOTE: Considering sequencing Rules 2, 4, and 4.1 so they are together.

~~**Staff Note:** This rule is derived from current Rule 4(B).~~

~~**JMP Note:** "Non-probate proceeding" is defined in Rule 2. That definition will need to be modified because, as currently drafted, it implies consolidation of case types is allowed.~~

~~*~~

~~**(a) Requirements.** A civil action may be filed within or consolidated with a probate case, under the case number assigned to the probate case, only under one of the following conditions:~~

~~**(a)** if the probate case involves a decedent's estate, parties to the civil case must include the decedent's estate or the personal representative of the decedent's estate, or both;~~

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(b) if the probate case involves a guardianship or conservatorship, the ward or protected person, or the guardian or conservator for the ward or protected person, must be a party to the civil case; or

(c) if the probate case involves the internal affairs of a trust, the trust or the trustee of the trust must be a party to the civil action.

(b) Commencement. A civil action filed within a probate case is commenced according to the Arizona Rules of Civil Procedure.

(c) Definition of Party. As used in Rule 4.1(a) only, the word "party" means plaintiff, defendant, counterclaimant, counter-defendant, cross-claimant, cross-defendant, third-party plaintiff, or third-party defendant in the case filed within or consolidated with a probate case. [**Staff Note:** Is this definition necessary? Note that "party" is defined in current Probate Rule 2, and the definition in this rule differs from that one.]

Rule 4.1. Termination of Probate Proceedings Initiated by Petition

A probate proceeding that was initiated by the filing of a petition terminates when: (1) a judicial officer has resolved all the issues raised in the petition ~~and has entered a final order or judgment in accordance with Civil Rule 54(c)~~, or (2) the petition has been dismissed under Civil Rule 41.

For Rule 2: A probate proceeding is initiated by filing a petition or, in the case of a decedent's estate, filing any one of the documents described in Rule 4(x).

Rule 4.1 Initiation and Termination of Probate Proceedings.

(a) A probate proceeding is initiated by filing a petition or, in the case of a decedent's estate, filing any one of the documents described in Rule 4(x).

(b) Termination.

a. A probate proceeding initiated by application terminates when the registrar has approved or denied the application as described in Rule 16.

b. A judicial officer has resolved all the issues raised in the petition and has entered a final order or judgment in accordance with Civil Rule 54(c).

NOTE: Considering sequencing Rules 2, 4, and 4.1 so they are together.

Rule 4.2. ~~**Family Law Action Filed Within or Consolidated with a Probate Case**~~**Related Non-Probate Actions.**

~~**Staff Note: This rule is derived from current Rule 4(C).**~~

(a) Definition. For purposes of this rule, "fiduciary" means a guardian, conservator, personal representative, or trustee.

(b) Filing of Non-Probate Action in~~, and Consolidation of Non-Probate Action with,~~ Probate Case Prohibited. A non-probate action may not be filed in ~~, or consolidated with,~~ a probate case.

(c) Assignment and Consolidation of Non-Probate Action~~Action to Judicial Officer Assigned to Probate Case~~. If a fiduciary in a probate case is a party to a non-probate case, the judicial officer assigned to the probate case, ~~O~~on motion of a party or on its own, ~~the court~~ may do any of the following, upon finding that such action would be serve the interests of judicial economy:

(1) Order that any portion, or all, of the non-probate action be heard by the judicial officer assigned to the probate case;

(2) Join for hearing or other court proceeding any or all matters at issue in the non-probate action and the probate case;

(3) Consolidate the non-probate action into the probate case; or

(4) Enter any other orders to avoid unnecessary cost or delay.

(d) Procedural Requirements. ~~order that a non-probate action be assigned to the judicial officer to whom an open probate case is assigned if a fiduciary in the probate case is a party to the non-probate action and if the court finds that such assignment would serve the interests of judicial economy.~~ Before ~~making~~entering such an order:

(1) the parties to both the non-probate action and the probate case must be given notice of the motion and an opportunity to respond, and

(2) the judicial officer to whom the probate case is assigned must confer with the judicial officer to whom the non-probate action is assigned.

(e) ~~Reassignment of Non-Probate Action to Judicial Officer Assigned to Non-Probate Action~~Separate Hearings. If a non-probate action has been consolidated with a probate case, the court may order a separate hearing on one or more issues. When ordering a separate hearing, the court must preserve any right to a jury trial.

NOTE: If adopted, this Rule requires modification of Rule 2(d) as follows:

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Meaning of "Non-Probate Action." A non-probate action is a claim that does not arise under any of the following:

(1) A.R.S. Title 14,

(2) A.R.S. § 36-3206, or

(3) A.R.S. Title 12, Chapter 10, Article 2.

~~**(a) Requirement.** A family law action may be filed within or consolidated with a probate case relating to a guardianship or conservatorship, under the case number assigned to a probate case, only if the ward or protected person is either the petitioner or the respondent in the family law action.~~

~~**(b) Commencement.** A family law action filed within or consolidated with a probate proceeding is commenced according to the Arizona Rules of Family Law Procedure.~~

~~**COMMENT**~~

~~In *Marvin Johnson, P.C. v. Myers*, 184 Ariz. 98, 907 P.2d 67 (1995), the Arizona Supreme Court held that a civil action against a former personal representative and others for fraud, breach of fiduciary duty, and racketeering in connection with the administration of an estate could be consolidated with the probate proceeding relating to the administration of the estate. Thus, the court has recognized that a probate proceeding may involve a case within a case. This rule sets forth the circumstances under which a civil action, family law proceeding, or juvenile proceeding may be filed within or consolidated with a probate case.~~

~~Regarding Rule 4(A)(1). Pursuant to A.R.S. § 14-1201(38), the term "personal representative" includes a special administrator.~~

~~Regarding Rule 4(A)(3). Pursuant to A.R.S. § 14-10201, a proceeding commenced to address a specific issue relating to the internal affairs of a trust does not result in continuing court supervision of the trust's administration after the court has resolved the specific issue for which the proceeding was initiated.~~

~~Regarding Rule 4(B)(3). This definition of "party" applies only to a civil case filed within or consolidated with a probate case. The definition of "party" in Rule 2(M) applies to the rest of the probate rules.~~

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Rule 4.2. Related Non-Probate Actions.

(a) Definition. For purposes of this rule, "fiduciary" means a guardian, conservator, personal representative, or trustee.

(b) Filing of Non-Probate Action in Probate Case Prohibited. A non-probate action may not be filed in a probate case.

(c) Assignment and Consolidation of Non-Probate Action. If a fiduciary in a probate case is a party to a non-probate case, the judicial officer assigned to the probate case, on motion of a party or on its own, may do any of the following, upon finding that such action would be serve the interests of judicial economy:

(1) Order that any portion, or all, of the non-probate action be heard by the judicial officer assigned to the probate case;

(2) Join for hearing or other court proceeding any or all matters at issue in the non-probate action and the probate case;

(3) Consolidate the non-probate action into the probate case; or

(4) Enter any other orders to avoid unnecessary cost or delay.

(d) Procedural Requirements. Before entering such an order:

(1) the parties to both the non-probate action and the probate case must be given notice of the motion and an opportunity to respond, and

(2) the judicial officer to whom the probate case is assigned must confer with the judicial officer to whom the non-probate action is assigned.

(e) Separate Hearings. If a non-probate action has been consolidated with a probate case, the court may order a separate hearing on one or more issues. When ordering a separate hearing, the court must preserve any right to a jury trial.

NOTE: If adopted, this Rule requires modification of Rule 2(d) as follows:

Meaning of "Non-Probate Action." A non-probate action is a claim that does not arise under any of the following:

(1) A.R.S. Title 14,

(2) A.R.S. § 36-3206, or

(3) A.R.S. Title 12, Chapter 10, Article 2.

Rule 5. Document Captions.

(a) **Generally.** The first page of every document filed with the court must contain a caption that complies with Civil Rule 5.2(a). ~~A caption must contain the name of the court, the title of the case, the case number, and a title briefly describing the type of document being filed.~~

(b) Title of the Case. The title of the case must include the following information:

(1) The name of the subject person or trust; and

(2) Immediately below the subject person's name, the subject person's status as an adult, a minor, or deceased.

~~**(a)** , and, if the subject person is a minor, the title must note such minority.~~

~~**(b) Consolidated Cases.** If a civil, family law, [or juvenile proceeding?] has been filed within, or consolidated with, a probate case, the filing must contain the caption required by (a), followed by a caption that complies with Rule 10(a) of the Arizona Rules of Civil Procedure or Rule 20(a) of the Arizona Rules of Family Law Procedure, as applicable.~~

(c) Continuation of a Conservatorship or Other Protective Order. A petition to continue the conservatorship of a minor or other protective order beyond the minor's eighteenth birthday under A.R.S. § 14-5401(B) must be filed in the existing case. If the court grants the petition, the case number will remain the same, but the caption must be amended to reflect that the conservatorship or protective order is for an adult.

~~**Staff Note:** Proposed Family Rule 20 provides:~~

~~**(a) Caption.** The first page of every document filed with the court must contain a caption. A caption details the county, state, parties, and title of the document. Fictitious names are allowed if a party's name is unknown. When the party's true name is discovered, the pleading must be amended accordingly.~~

Commented [JP1]: The primary purpose of this rule, as originally drafted, was to deal with consolidated cases. Repeating what is in Civil Rule 5.2(a) is unnecessary. Thus, I just refer the reader to Civil Rule 5.2(a), which also might be unnecessary. The real gist is what is the "title" of a probate case. This is addressed in the next section. An alternative approach would be to merge (a) and (b) of this rule to read, "For purposes of Civil Rule 5.2(a), the title of a probate case must include . . . ."

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Commented [JP2]: The plan is to revise Probate Rule 4 to prohibit the consolidation of different case types into a probate case; thus, this subpart is unnecessary.

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Rule 5. Document Captions.

(a) Generally. The first page of every document filed with the court must contain a caption that complies with Civil Rule 5.2(a).

(b) Title of the Case. The title of the case must include the following information:

(1) The name of the subject person or trust; and

(2) Immediately below the subject person's name, the subject person's status as an adult, a minor, or deceased.

(c) Continuation of a Conservatorship or Other Protective Order. A petition to continue the conservatorship of a minor or other protective order beyond the minor's eighteenth birthday under A.R.S. § 14-5401(B) must be filed in the existing case. If the court grants the petition, the case number will remain the same, but the caption must be amended to reflect that the conservatorship or protective order is for an adult.

Rule 8. Personal Service of Certain Documents.

(a) Personal Service on Subject Person of Guardianship or Protective Proceeding. Whenever A.R.S. Title 14 requires personal service of a document on the subject person of a guardianship or protective proceeding, service must be made by a person authorized in Civil Rule 4(d) and the subject person may waive service only in accordance with A.R.S. §§ 14-5309(B) and -5405(B).

(b) Personal Service on Other Persons. Whenever A.R.S. Title 14 requires personal service of a ~~notice of hearing or other~~ document on any other person, service must be ~~accomplished [made?]~~made under Civil Rules 4, ~~4(d),~~ 4.1~~,~~ and 4.2 ~~of the Arizona Rules of Civil Procedure~~.

~~(a)~~**(c) Personal Service When Money Judgment Requested.** If a petition requests that the court enter a money judgment against a person, service of a copy of the petition and a copy of the notice of the initial hearing on that petition must be made on that person under Civil Rules 4, 4.1, and 4.2. ~~**[Staff Note; Consider not limiting the application of Rule 4 to only Rule 4(d). For example, 4(f) concerns accepting or waiving service, and 4(g) concerns a proof of service.]**~~

~~**(b) Time to Complete Service. [JWR Note:** Trying to track the language of ARCP 4(*l*).] If a required person is not served, in the manner provided in A.R.S. Title 14, with a notice and petition commencing a probate case within 120 days after the petition is filed, the court—on motion, or on its own after notice to the petitioner—may dismiss the petition without prejudice or order that service be made within a specified time. But if the petitioner shows good cause for the failure, t~~The court, ~~in its discretion, may~~ must extend the time for service. an appropriate period. ~~[**Staff Note:** The 120-day period deviates from Civil Rule 4(i), which requires service within 90 days after the filing of a complaint.]~~

~~**COMMENT**~~

~~A.R.S. Title 14 generally authorizes service of notices of hearings by mail in lieu of personal delivery. See, e.g., A.R.S. § 14-1401(A)(1). In some circumstances, however, A.R.S. Title 14 expressly requires that the notice of hearing be personally served. See, e.g., A.R.S. §§ 14-5309(B) and -5405(B). Thus, a party who is required to give notice of a hearing should carefully review the applicable statutes. The purpose of this rule is to clarify that, if personal service is required by the court or by any provision of A.R.S. Title 14, service must comply with Rules 4(d), 4.1, and 4.2 of the Arizona Rules of Civil Procedure.~~

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Commented [JP1]: The problem with Staff's comment about acceptance or waiver of service is that 14-5309(B) states: "Waiver of notice by the ward or the alleged incapacitated person is not effective unless that person attends the hearing." Similar language appears in 14-5405(B), which deals with conservatorships. Thus, I've tried to address this (because I think Staff makes a valid point when talking about all others who might be entitled to notice) by breaking up the rule a bit.

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Commented [JP2]: I am deleting this because I don't believe it is necessary. In fact, I don't think this rule makes sense when one considers that a party first obtains a hearing date and then serves interested persons with a copy of the petition and notice of the hearing. If service hasn't been properly made by the date of the hearing, the court will reset the hearing (or dismiss if the petition if the petitioner fails to appear). Rule 15.2 already authorizes administrative dismissals when not initial hearing date has been obtained two months after filing the petition.

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Rule 8. Personal Service of Certain Documents.

(a) Personal Service on Subject Person of Guardianship or Protective Proceeding. Whenever A.R.S. Title 14 requires personal service of a document on the subject person of a guardianship or protective proceeding, service must be made by a person authorized in Civil Rule 4(d) and the subject person may waive service only in accordance with A.R.S. §§ 14-5309(B) and -5405(B).

(b) Personal Service on Other Persons. Whenever A.R.S. Title 14 requires personal service of a document on any other person, service must be made under Civil Rules 4, 4.1, and 4.2.

(c) Personal Service When Money Judgment Requested. If a petition requests that the court enter a money judgment against a person, service of a copy of the petition and a copy of the notice of the initial hearing on that petition must be made on that person under Civil Rules 4, 4.1, and 4.2.

Rule 10. Duties of ~~Counsel and~~ Self-Represented Parties.

~~**Note: this rule is unnecessary**~~

~~**(a) Duties of Counsel.**~~

~~**(1) *Contact Information.*** An attorney must advise the clerk or court administrator in each of the counties in which that attorney ha pending probate cases of the attorney's current office address, email address, and telephone number, and promptly notify each such clerk or court administrator of any change in office address, email address, or telephone number. [**Staff Note:** The draft adds email address.]~~

~~**(2) *Limited Scope Representation.***~~

~~**(A)** *Notice of Limited Scope Appearance.* Subject to the limitations in ER 1.2(c) of the Rules of Professional Conduct, an attorney may make a limited appearance by filing a notice stating that the attorney and the party have a written agreement for the attorney to provide limited scope representation to the party, and specifying the matter or issues with regard to which the attorney will represent the party.~~

~~**(B)** *Service of Documents.* Service of documents on an attorney who has made a limited appearance is valid service on the party, to the extent permitted by statute and Rule 4(f), Arizona Rules of Civil Procedure, in all matters in the case. But service on the attorney does not extend the attorney's responsibility to represent the client beyond the specific matter for which the attorney and client have agreed.~~

~~**(C)** *Services Without an Appearance.* This rule does not limit an attorney's ability to provide limited services to a client without appearing as counsel of record.~~

~~**(b) Duties of Self-Represented Parties.**~~

~~**(1)**~~ **(a) Contact Information.** Self-represented parties must inform the court of their current mailing address, email address, and telephone number, and of any change in their address or telephone number.

(b) Representation of Parties. Only an active member of the State Bar of Arizona or an attorney who has been admitted *pro hac vice* under the Rules of the Arizona Supreme Court may represent a party in a probate court proceeding.

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~~(2)~~ **(c) Fiduciaries.** A non-lawyer serving as a fiduciary may represent himself or herself in that capacity in the probate case.

~~(3) **Preparation of Court Filings.** Only an active member of the State Bar of Arizona, an attorney admitted *pro hac vice* under the Rules of the Arizona Supreme Court, or a person certified as a legal document preparer by the Arizona Supreme Court may prepare court filings.~~

~~**Staff Note:** Should (b)(2) and (3) be relocated to section (a)? These provisions don't describe duties of self-represented parties. Also, consider the comment to Rule 10.5 on this topic.] [**JWR Note:** I would put them in their own subsection (c). They really don't pertain to counsel's duties. Then I would put the text of (1) right after the title for (b).]~~

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Rule 10. Duties of Self-Represented Parties.

(a) Contact Information. Self-represented parties must inform the court of their current mailing address, email address, and telephone number, and of any change in their address or telephone number.

(b) Representation of Parties. Only an active member of the State Bar of Arizona or an attorney who has been admitted *pro hac vice* under the Rules of the Arizona Supreme Court may represent a party in a probate court proceeding.

(c) Fiduciaries. A non-lawyer serving as a fiduciary may represent himself or herself in that capacity in the probate case.

Rule 10.1. Duties of Court-Appointed Fiduciaries.

Staff Note: This rule derives from current Rule 10(C).

(a) Generally. A court-appointed fiduciary must:

(1) review all court filings prepared on the fiduciary's behalf;

(2) if the fiduciary is a licensed fiduciary who is not also an active member of the State Bar of Arizona, place the fiduciary's license number on all documents signed by the fiduciary and ~~[or?]~~ filed with the court~~; [**Staff Note:** Note sure if these are two types of documents (signed or filed) or a single type (i.e., signed and filed.) Also, why isn't a licensed fiduciary required to place a license number on documents, regardless of whether the fiduciary is a member of the bar?]~~

~~**(3)** file an updated Rule 6 information form no later than 10 days after any changes in such information; and [**Staff Note:** relocate the following clause to the guardian's duties: except that if the ward's physical address changes, the ward's guardian shall file the updated probate information form within three days of learning of the change in address]~~

~~**(4)** if the updated information form contains a change of a subject person's address or telephone number, or a change of the fiduciary's address or telephone number, mail or deliver a copy of the form to the subject person's court-appointed attorney, the subject person's guardian ad litem, and all parties to the probate case in which the updated form was filed.~~

(b) Duties Following Death of a Ward or Protected Person. Upon the death of a fiduciary's ward or protected person:

(1) a guardian or conservator appointed under A.R.S. Title 14 must give the court, no later than 10 days after learning that the ward or protected person has died, written notice of the ward or protected person's death; and

(2) except as provided in A.R.S. § 14-5419(F) or as the court orders otherwise, a conservator must file a final accounting of the protected person's estate no later than 90 days after the protected person's death. The accounting must reflect all activity between the ending date of the most recently approved accounting and the date of the protected person's death. The court may extend the date for filing the accounting or relieve the conservator from filing an annual or final accounting.

(c) Termination of Appointment. Before resigning from a case or having the court terminate the guardian's responsibilities, a court-appointed guardian must comply with statutory requirements for withdrawal, including the filing of final reports and accountings.

(d) Duties upon a Minor's Death, Adoption, Marriage or Emancipation. If a minor ward dies, is adopted, marries, or attains majority, a court-appointed guardian must give the court written notice no later than 10 days after the event. If a minor does not have a conservator when a guardianship terminates, the guardian must provide the court and former minor ward with a written list of any known assets or monies, beyond personal effects, the guardian believes are owned by the former minor ward.

Rule 10.1. Duties of Court-Appointed Fiduciaries.

Staff Note: This rule derives from current Rule 10(C).

(a) Generally. A court-appointed fiduciary must:

(1) review all court filings prepared on the fiduciary's behalf;

(2) if the fiduciary is a licensed fiduciary who is not also an active member of the State Bar of Arizona, place the fiduciary's license number on all documents signed by the fiduciary and filed with the court

(b) Duties Following Death of a Ward or Protected Person. Upon the death of a fiduciary's ward or protected person:

(1) a guardian or conservator appointed under A.R.S. Title 14 must give the court, no later than 10 days after learning that the ward or protected person has died, written notice of the ward or protected person's death; and

(2) except as provided in A.R.S. § 14-5419(F) or as the court orders otherwise, a conservator must file a final accounting of the protected person's estate no later than 90 days after the protected person's death. The accounting must reflect all activity between the ending date of the most recently approved accounting and the date of the protected person's death. The court may extend the date for filing the accounting or relieve the conservator from filing an annual or final accounting.

(c) Termination of Appointment. Before resigning from a case or having the court terminate the guardian's responsibilities, a court-appointed guardian must comply with statutory requirements for withdrawal, including the filing of final reports and accountings.

(d) Duties upon a Minor's Death, Adoption, Marriage or Emancipation. If a minor ward dies, is adopted, marries, or attains majority, a court-appointed guardian must give the court written notice no later than 10 days after the event. If a minor does not have a conservator when a guardianship terminates, the guardian must provide the court and former minor ward with a written list of any known assets or monies, beyond personal effects, the guardian believes are owned by the former minor ward.

Rule 10.2. Duties of Counsel for Fiduciaries.

Staff Note: This rule derives from current Rule 10(D).

(a) Duty to Minimize Legal Expenses. To minimize legal expenses, a fiduciary's attorney should ~~[**JWR Note:** I'm worried about using the word "must" here. Is an attorney subject to Bar discipline or court sanction if he/she fails to do so?]~~ encourage the fiduciary to take actions the fiduciary is authorized to perform and can perform competently rather than have the attorney perform them. ~~[**Staff Note:** The current provision seems wordy.]~~

(b) Duty upon Withdrawal. An attorney who has appeared in a probate case as counsel of record for a guardian, conservator, personal representative, or trustee ~~[**Staff Note:** Consider substituting "fiduciary" for the preceding list]~~ must include with a motion to withdraw, in addition to the requirements set forth in Civil Rule 5.3~~, Arizona Rules of Civil Procedure~~:

(1) a status report that advises the court and parties of any issues pending in the probate case; and

(2) a statement that informs the court and parties whether, to the best of the attorney's knowledge, all required guardian reports, inventories, accountings, and other similar required reports have been filed.

Rule 10.2. Duties of Counsel for Fiduciaries.

Staff Note: This rule derives from current Rule 10(D).

(a) Duty to Minimize Legal Expenses. To minimize legal expenses, a fiduciary's attorney should encourage the fiduciary to take actions the fiduciary is authorized to perform and can perform competently rather than have the attorney perform them.

(b) Duty upon Withdrawal. An attorney who has appeared in a probate case as counsel of record for a guardian, conservator, personal representative, or trustee must include with a motion to withdraw, in addition to the requirements set forth in Civil Rule 5.3:

(1) a status report that advises the court and parties of any issues pending in the probate case; and

(2) a statement that informs the court and parties whether, to the best of the attorney's knowledge, all required guardian reports, inventories, accountings, and other similar required reports have been filed.

Rule 10.3. Duties of Counsel for the Subject Person of a Guardianship or Conservatorship Proceeding.

Staff Note: This rule derives from current Rule 10(E).

(a) Initial Training. Any attorney who serves as a court-appointed attorney or ~~guardian ad litem~~statutory representative for a proposed adult ward or adult protected person must first complete a training course prescribed by the Supreme Court. The Supreme Court will issue a certificate of completion and the attorney must file a copy of the certificate ~~with the court making the appointment~~in the probate case in which the attorney was appointed. ~~[**Staff Note:** Is the following sentence still necessary, or can it be deleted?] Any attorney who, at the time this rule becomes effective, is serving as a court-appointed attorney or guardian ad litem for an adult ward or protected person must complete a training course prescribed by the Supreme Court as soon as practicable and thereafter must file a certificate of completion with the court making the appointment.~~

(b) Later Required Training. An attorney who continues to serve as a court-appointed attorney or ~~guardian ad litem~~ statutory representative for an adult ward or protected person must complete an additional training course prescribed by the Supreme Court every 5 ~~years, and~~years and must file a copy of a certificate of completion in the probate case in which the attorney was appointed.~~with the court making the appointment.~~

(c) Termination of Appointment.

(1) ***Generally.*** The ~~participation~~ appointment~~[**Staff Note:** Does participation mean the appointment?]~~ of an attorney representing the subject person in a guardianship or conservatorship proceeding terminates upon the subject person's death.

(2) ***Exception.*** In extraordinary situations, the court for good cause may authorize the limited participation of the subject person's attorney after the subject person's death, if the court's order authorizing the attorney's continued participation sets forth the basis and scope of the attorney's continued participation.

Rule 10.3. Duties of Counsel for the Subject Person of a Guardianship or Conservatorship Proceeding.

Staff Note: This rule derives from current Rule 10(E).

(a) Initial Training. Any attorney who serves as a court-appointed attorney or statutory representative for a proposed adult ward or adult protected person must first complete a training course prescribed by the Supreme Court. The Supreme Court will issue a certificate of completion and the attorney must file a copy of the certificate in the probate case in which the attorney was appointed.

(b) Later Required Training. An attorney who continues to serve as a court-appointed attorney or statutory representative for an adult ward or protected person must complete an additional training course prescribed by the Supreme Court every 5 years and must file a copy of a certificate of completion in the probate case in which the attorney was appointed.

(c) Termination of Appointment.

(1) ***Generally.*** The appointment of an attorney representing the subject person in a guardianship or conservatorship proceeding terminates upon the subject person's death.

(2) ***Exception.*** In extraordinary situations, the court for good cause may authorize the limited participation of the subject person's attorney after the subject person's death, if the court's order authorizing the attorney's continued participation sets forth the basis and scope of the attorney's continued participation.

Rule 10.4. Duties of Investigators.

Staff Note: This rule derives from current Rule 10(F).

(a) Initial Training. Before being appointed as an investigator under A.R.S. §§ 14-5303(c), 14-5407(b), or 36-540(g), a person must first complete a training course prescribed by the Supreme Court. The Supreme Court will issue a certificate of completion and the investigator must file a copy of the certificate ~~with the court making the appointment~~in the probate case in which the investigator was appointed.

(b) Later Required Training. Any person who continues to serve as a court-appointed investigator must complete an additional training course prescribed by the Supreme Court every 5 years and must file a copy certificate of completion in the probate case in which the investigator was appointed.~~with the court making the appointment.~~

Rule 10.4. Duties of Investigators.

Staff Note: This rule derives from current Rule 10(F).

(a) Initial Training. Before being appointed as an investigator under A.R.S. §§ 14-5303(c), 14-5407(b), or 36-540(g), a person must first complete a training course prescribed by the Supreme Court. The Supreme Court will issue a certificate of completion and the investigator must file a copy of the certificate in the probate case in which the investigator was appointed.

(b) Later Required Training. Any person who continues to serve as a court-appointed investigator must complete an additional training course prescribed by the Supreme Court every 5 years and must file a copy certificate of completion in the probate case in which the investigator was appointed.

Rule 10.5. Repetitive Filings; Vexatious Conduct; Remedies.

Staff Note: This rule derives from current Rules 10(G) and 18(C).

(a) Definitions. For purposes of this rule:

(1) "Court-appointed attorney" means an attorney appointed pursuant to A.R.S. §§ 14-5303(C), 14-5310(C), 14-5401.01(C), or 14-5407(B). [**Staff Note:** Consider moving this definition to Rule 2.]

(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 litemstatutory representative, or a special conservator appointed under A.R.S. § 14-5409. [**Staff Note:** Consider moving this definition to Rule 2.]

(3) "Vexatious conduct" means habitual, repetitive conduct undertaken solely or primarily to harass or maliciously injure another party or that party's representative, cause unreasonable delay in proceedings, cause undue harm to the ward or protected person, or cause unnecessary expense. It does not include conduct undertaken in good faith.

(b) Notice of Repetitive Filings.

(1) ***Grounds.*** A party may file a notice of repetitive filings if:

(A) the party has a good faith belief that an interested person has filed a motion or petition that requests the same or substantially similar relief to the relief requested in an earlier motion or petition filed within the preceding 12 months by the same interested person; and

(B) the later-filed motion or petition does not describe in detail a change in fact or circumstance that supports the requested relief.

(2) ***Timing and Identification of the Earlier Filing.*** A party must file a notice of repetitive filing no later than the response or objection deadline for the allegedly repetitive filing. A notice of repetitive filing must include the title and date of the alleged repetitive filing, the title and date of the earlier filing, and the date of the court's ruling on the earlier filing.

(3) ***Effect of Notice.*** A notice of repetitive filing stays the deadline to respond or object to the alleged repetitive filing until further court order.

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(4) ***Court's Authority.*** The court may summarily strike a repetitive motion on its own or after receiving a notice of repetitive filing.

~~(3)~~

~~(b)~~(c) **Remedies.** If the court finds that a person has engaged in repetitive filings or vexatious conduct in a probate case, the court may do any combination of ~~either or both of~~ the following:

(1) ~~require~~ Require the person to obtain the court's permission to file future pleadings and other papers in the probate case or in other cases, and, if the court enters such an order, no party is required to respond to the person's future filings until ordered to do so;

(2) ~~order~~ Order that a fiduciary, fiduciary's attorney, court-appointed attorney, guardian ad litem, trustee, or personal representative not be required to respond to future requests for information made by the person that are related to the probate case, unless a later order requires it; ~~.~~

~~(2)~~

~~(c)~~(3) ~~**Other Remedies.** This rule's remedies are in addition to~~Order any other civil remedy or ~~provision of~~remedy provided by law.

~~**COMMENT**~~

~~Rule 10 is designed to help the court oversee and supervise probate cases. Courts are required by other rules to exercise administrative supervision over cases. *See, e.g.*, Ariz. R. Sup. Ct. 92 (describing duties of presiding and associate presiding judges). As part of that supervision, courts should periodically review cases and may, after notice, dismiss or administratively close cases that have not been efficiently prosecuted.~~

~~Only an attorney who is a member in good standing with the State Bar of Arizona may represent a party, fiduciary, or other party in a probate proceeding. A family member who is appointed as the fiduciary may represent him or herself in court, but may not speak for or on behalf of other family members. *Cf. Byers Watts v. Parker*, 199 Ariz. 466, 467, 18 P.3d 1265, 1266 (App. 2001) (holding that the non lawyer mother appointed as guardian *ad litem* for her minor son, could not represent her son in a civil lawsuit without the services of an attorney).~~

~~Rule 10(B)(3) is intended to apply to the drafting of documents such as applications, petitions, motions, objections to petitions, responses to motions, notices of hearing, status reports, and similar documents. It is not intended to preclude a physician, psychologist, or nurse from preparing a report to the court nor is it intended to preclude an accountant or bookkeeper from preparing an accounting to be submitted to the court, nor is the rule~~

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~~intended to prohibit such a document from being used as an exhibit.~~

~~Probate proceedings require reporting, accounting, and other statutorily mandated action. These requirements are important because they allow the court and interested persons to see whether the probate matter is being effectively administered and help ensure oversight of probate cases. Attorneys and fiduciaries are in the best position to advise the court regarding compliance with statutory and rule based requirements and to set forth in their motions to withdraw how those requirements have been or will be met. In addition to considering the basis for an attorney's withdrawal, courts are encouraged to consider whether statutory or court imposed requirements must be met before or after the withdrawal of counsel.~~

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~~Section (C)(2) of this rule is based on former Rules 127 and 128, Rules of the Supreme Court. The section is included in these rules for the convenience of those who serve as fiduciaries in probate proceedings. In accordance with A.R.S. § 14-5419(F), a conservator may be allowed to file a closing statement in lieu of a final accounting, unless otherwise ordered by the court, as now reflected in Rule (10)(C)(2)(b).~~

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~~Rule 10(E) applies not only to attorneys appointed by the court pursuant to A.R.S. §§ 14-5303(C) and -5407(B), but also to counsel of the subject person's own choosing, as well as counsel nominated pursuant to Rule 19(B). The purpose of a court-appointed attorney in guardianship and conservatorship proceedings is to represent the interests of the subject person and to protect the subject person's civil liberties. Upon the death of the subject person, the subject person no longer has an interest in his or her estate. Therefore, the subject person's attorney's role in the case is no longer necessary. Moreover, a client's death ordinarily terminates the lawyer's representation of the client. *See* The American College of Trust and Estate Counsel Foundation, *Commentaries on the Model Rules of Professional Conduct* MRPC 1.16 (4th ed. 2006). Accordingly, the subject person's death terminates the representation of that person's attorney. Nothing in the rule, however, is intended to preclude the subject person's attorney from participating in the case as a creditor of the subject person's estate.~~

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Rule 10.5. Repetitive Filings; Vexatious Conduct; Remedies

Staff Note: This rule derives from current Rules 10(G) and 18(C).

(a)Definitions. For purposes of this rule:

(1) "Court-appointed attorney" means an attorney appointed pursuant to A.R.S. §§ 14-5303(C), 14-5310(C), 14-5401.01(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 statutory representative, or a special conservator appointed under A.R.S. § 14-5409.

(3) "Vexatious conduct" means habitual, repetitive conduct undertaken solely or primarily to harass or maliciously injure another party or that party's representative, cause unreasonable delay in proceedings, cause undue harm to the ward or protected person, or cause unnecessary expense. It does not include conduct undertaken in good faith.

(b) Notice of Repetitive Filings.

(1) ***Grounds.*** A party may file a notice of repetitive filings if:

(A) the party has a good faith belief that an interested person has filed a motion or petition that requests the same or substantially similar relief to the relief requested in an earlier motion or petition filed within the preceding 12 months by the same interested person; and

(B) the later-filed motion or petition does not describe in detail a change in fact or circumstance that supports the requested relief.

(2) ***Timing and Identification of the Earlier Filing.*** A party must file a notice of repetitive filing no later than the response or objection deadline for the allegedly repetitive filing. A notice of repetitive filing must include the title and date of the alleged repetitive filing, the title and date of the earlier filing, and the date of the court's ruling on the earlier filing.

(3) ***Effect of Notice.*** A notice of repetitive filing stays the deadline to respond or object to the alleged repetitive filing until further court order.

(4) ***Court's Authority.*** The court may summarily strike a repetitive motion on its own or after receiving a notice of repetitive filing.

(c) Remedies. If the court finds that a person has engaged in repetitive filings or vexatious conduct in a probate case, the court may do any combination of the following:

(1) Require the person to obtain the court's permission to file future pleadings and other papers in the probate case or in other cases, and, if the court enters such an order, no party is required to respond to the person's future filings until ordered to do so;

(2) Order that a fiduciary, fiduciary's attorney, court-appointed attorney, guardian ad litem, trustee, or personal representative not be required to respond to future requests for information made by the person that are related to the probate case, unless a later order requires it;

(3) Order any other civil remedy or remedy provided by law.

Rule 10.6. Prudent Management of Costs.

~~**(a) Fiduciary Duties.** A fiduciary must prudently manage costs and preserve the assets of the ward or protected person for his or her benefit. Unless a governing instrument or a court order directs otherwise, a fiduciary also must avoid incurring any cost for a good or service if the cost exceeds the likely [**JWR Note:** "Probable" sounds like a $50 word for "likely."] benefit of the good or service to the ward, protected person, decedent's estate or trust. [**Staff Note:** In the preceding section, the first sentence does not mention a personal representative, or an estate or trust, but the second does refer to an estate or trust. Was this an intended omission, or should the first sentence include additional references?]~~

~~**(b) Duty to Notify the Court and Court Orders.** A guardian ad litem, guardian or conservator, guardian or conservator's attorney, or an attorney for a ward or protected person [**Staff Note:** Consider replacing the preceding phrase with "a fiduciary or the fiduciary's attorney"] must timely disclose to the court any reasonable belief that the projected cost of complying with a court order may exceed the likely benefit to the ward, protected person, decedent's estate, or trust. This notice also must be given to all persons entitled to notice. [**Staff Note:** The preceding sentence was added because the first sentence made multiple references to "person" with different meanings.] If appropriate and if consistent with due process, the court may enter or modify orders to protect [**JWR Note:** Do we need the clause? It makes the sentence really wordy. Its substance also follows from the first sentence of the rule.] or further the best interest of the ward, protected person, decedent's estate, or trust. [**Staff Note:** Similar comment to the note above. Also, the beginning of the first sentence seems to include redundant positions. Is there a shorter way of saying the same thing?]~~

~~**Market Rates.** Market rates for goods and services are a proper, ongoing consideration for the fiduciary and the court during the initial court appointment of a fiduciary or attorney, at a hearing on a budget objection, and on a request to substitute a court-appointed fiduciary or attorney. [**JWR Note:** I'm not sure what this sentence means. I took a stab at it in the next sentence, but I'm not sure I captured the intent. What does it mean to "consider" market rates?] In appointing a fiduciary or attorney, in ruling or considering on a budget objection, and in ruling on a request to substitute a court-appointed fiduciary or attorney, the court and fiduciary should not agree to pay more than market rates for a good or service. At any stage of the proceedings, the court may require competitive bids for goods or services.~~

~~**(c)** **WG Note:** WG-1 was divided about whether this rule should be entirely deleted because it is redundant to ARS 14-1104 and ACJA 3-303, whether section (b) or certain other portions should be retained, or whether to leave the restyled version~~

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intact. The WG requests direction from the Task Force. The WG also proposed the alternative of incorporating the provisions of this rule into the order to fiduciary and acknowledgement, which would help to assure that the fiduciary has read and has knowledge of these provisions.

Rule 10.6. Prudent Management of Costs.

WG Note: WG-1 was divided about whether this rule should be entirely deleted because it is redundant to ARS 14-1104 and ACJA 3-303, whether section (b) or certain other portions should be retained, or whether to leave the restyled version intact. The WG requests direction from the Task Force. The WG also proposed the alternative of incorporating the provisions of this rule into the order to fiduciary and acknowledgement, which would help to assure that the fiduciary has read and has knowledge of these provisions.

Rule 13. Accelerated Hearings and Rulings; Emergency Appointments; Ex Parte Motions and Petitions.

(a) Accelerated Hearings on Petitions. Except as provided in section (c), a party requesting an accelerated hearing on a petition must file a separate motion that states the legal authority and factual circumstances supporting the request. The motion may incorporate by reference relevant allegations in the petition. The petitioner must provide the assigned judicial officer a copy of the motion, a copy of the petition, and a proposed order accelerating the hearing. The court may summarily grant or deny the motion requesting an accelerated hearing.

(b) Accelerated Rulings on Motions. A motion that ~~party~~ request~~sing~~ an accelerated ruling ~~on a motion~~ must contain the words "Accelerated Ruling Requested" below its title.~~state the request in the motion's caption.~~ The movant ~~party~~ must state in the body of the motion—and not in a separate motion—the legal authority and factual circumstances supporting the request. The court may summarily grant or deny the request for an accelerated ruling.

(c) Emergency Appointment of a Guardian or Conservator. A petition that requests the emergency appointment of a temporary guardian, a temporary conservator, or other relief authorized by A.R.S. §§ 14-5310 or -5401.01 must contain the word "Emergency"~~state~~ in its title. ~~the request for emergency relief in the petition's caption.~~ The petitioner must state in the body of the petition—and not in a separate motion—the legal authority and factual circumstances supporting the request for emergency or immediate action.

(d) *Ex Parte* Motions and Petitions. Any motion or petition that seeks ~~*ex parte*~~ relief without prior notice to interested persons must ~~state~~contain the words "~~E~~ex ~~P~~parte" in its title ~~the request in the caption~~. The movant or petitioner must state in the body of the motion or petition—and not in a separate motion—the legal authority and factual circumstances supporting the request.

~~**Staff Note:** This draft reversed the order of current rule sections (a) and (b) because section (a) was the only filing that required a separate motion. The Task Force might consider combining draft sections (b), (c), and (d) into a single section.~~

~~**COMMENT**~~

~~Regarding Rule 13(A). The Rules of Civil Procedure provide time frames for filing response and reply memoranda to motions. If a party desires a ruling on a motion before that time expires, the party may request that the court accelerate its ruling on the motion. Such requests, however, may unfairly affect the opposing party by~~

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~~reducing the amount of time the opposing party has to respond to the motion. Such requests also create a challenge for judicial officers since they must choose whether the matter presented requires more prompt attention than other matters pending before the court. Consequently, in order for the judicial officer to evaluate a request to accelerate a ruling on a motion, the request must demonstrate good cause why the normal response times relating to motions should not apply.~~

~~With respect to the requirement that the caption of the motion indicate that an accelerated ruling is requested, it is sufficient for the words "accelerated ruling requested" to appear immediately below the title of the motion. The body of the motion, however, must provide the court with sufficient information so the court can fully and fairly evaluate whether an accelerated ruling will unfairly prejudice the other parties or other persons having business before the courts.~~

~~Regarding Rule 13(B). A.R.S. Title 14 generally provides that at least fourteen calendar days' notice must be given of a hearing on a petition. For good cause shown, however, the court may provide for a shorter notice time for any hearing. *See* A.R.S. § 14-1401(B). Thus, if a party desires that fewer than fourteen days' notice be required or if a party desires that a hearing be moved to a date sooner than that originally scheduled, the party should file a motion requesting that the court accelerate the hearing. Any such motion must demonstrate good cause why the hearing should be accelerated.~~

~~Regarding Rule 13(C). A.R.S. §§ 14-5310 and -5401.01 address petitions for the appointment of a temporary guardian and temporary conservator, respectively, and specifically authorize the court to conduct the hearing on such petitions on fewer than fourteen days' notice. Therefore, a separate motion requesting an accelerated hearing is not required; however, pursuant to those statutes, the petition must set forth facts that demonstrate the existence of an emergency requiring immediate action.~~

~~With respect to the requirement that the caption of the motion indicate that emergency or immediate relief is being requested, it is sufficient for the word "emergency" to appear at the beginning of the title to the petition (e.g., "Emergency Petition for Appointment of Guardian") or that the words "immediate relief requested" or "emergency relief requested" appear below the title of the petition. The body of the petition must provide the court with sufficient information from which the court can fully and fairly evaluate whether emergency or immediate relief is appropriate.~~

~~Regarding Rule 13(D). Ex parte requests seek relief from the court without providing notice to other parties. In such a case, the other parties do not have an opportunity to respond before the court considers the request. Ex parte proceedings may substantially impair the rights of parties who are not given notice of the~~

~~proceedings. Consequently, ex parte relief should be requested only in extraordinary circumstances. For example, A.R.S. §§ 14-5310 and 5401.01 describe when the appointment of a temporary guardian or temporary conservator may be requested without giving advance notice to the alleged incapacitated person or person alleged to be in need of protection.~~

~~With respect to the requirement that the caption of the motion or petition indicate that ex parte relief is being requested, it is sufficient for the words "ex parte" to appear at the beginning of the title of the motion or petition (e.g., "Ex Parte Emergency Petition for Appointment of Conservator") or immediately below the title of the motion or petition. The body of the motion or petition must provide the court with sufficient information from which the court can fully and fairly evaluate whether ex parte relief is appropriate.~~

Rule 13. Accelerated Hearings and Rulings; Emergency Appointments; Ex Parte Motions and Petitions.

(a) Accelerated Hearings on Petitions. Except as provided in section (c), a party requesting an accelerated hearing on a petition must file a separate motion that states the legal authority and factual circumstances supporting the request. The motion may incorporate by reference relevant allegations in the petition. The petitioner must provide the assigned judicial officer a copy of the motion, a copy of the petition, and a proposed order accelerating the hearing. The court may summarily grant or deny the motion requesting an accelerated hearing.

(b) Accelerated Rulings on Motions. A motion that requests an accelerated ruling must contain the words "Accelerated Ruling Requested" below its title. The movant must state in the body of the motion—and not in a separate motion—the legal authority and factual circumstances supporting the request. The court may summarily grant or deny the request for an accelerated ruling.

(c) Emergency Appointment of a Guardian or Conservator. A petition that requests the emergency appointment of a temporary guardian, a temporary conservator, or other relief authorized by A.R.S. §§ 14-5310 or -5401.01 must contain the word "Emergency" in its title. The petitioner must state in the body of the petition—and not in a separate motion—the legal authority and factual circumstances supporting the request for emergency or immediate action.

(d) *Ex Parte* Motions and Petitions. Any motion or petition that seeks relief without prior notice to interested persons must contain the words "ex parte" in its title. The movant or petitioner must state in the body of the motion or petition—and not in a separate motion—the legal authority and factual circumstances supporting the request.

Workgroup 3 Judge David Mackey assigned

NOTE: This is a proposed new Part VII of the Probate Rules. The rules in this new part are derived from current Rules 24 and 36.

PART VII. GUARDIANS WITH INPATIENT MENTAL HEALTH AUTHORITY

Rule 24##. Appointment ofOrder Appointing a Guardian with Inpatient Mental Health Authority.

If a(a) Generally, The court on clear and convincing evidence may enterauthorize as an order appointing a guardian and granting the guardian authority to give the ward's consent for the ward to receive for inpatient mental health care and treatment, including placement in an inpatient psychiatric a level one behavioral health facility licensed by the Arizona Department of Health Services..

(b) Time Limit. [The order must specifically state that the guardian's authority terminates no more than one year from the order's filing date, or . The order may specify upon clear and convincing evidence a longer period of time specified longer than one year, however, only upon a showing ofby the court extraordinary cause as specified in the order.. If the order specifies a period longer than one year, the reporting requirements of section (c) will still apply.

(c) Report and Review. The guardian must file an annual report, including an evaluation report, as required by A.R.S. § 14-5312.01(P). The court must promptly review the report of every guardian with inpatient mental health authority, and either approve it, set the report for hearing, or modify the prior order by terminating the guardian's authority to consent for the ward to receive inpatient mental health care and treatment. The court must terminate the guardian's inpatient mental health authority for failure to timely file an annual report, unless the guardian has requested an extension of time to file it.

The court mayunless the court extends the authority by a further subsequent written order.

(d) Other Provisions. The court may order may that the guardian's authority terminates sooner than one year from the order's filing dateinclude other ordersprovisions concerning the guardian's authority that the court determines are necessary to protect the ward's best interests. TBut the court shall must limit the guardian's authority to what is reasonably necessary in the least restrictive treatment alternative.alternative. [**Comment from Lisa:** Should the LOA also include language regarding the guardian's mental health authority?]

(e) Acknowledgement. Letters will not issue to the appointed guardian until the guardian has signed an acknowledgment of the guardian's powerduty to consent for the ward to receive inpatient mental health care and treatment and the court has entered an order substantially similar to Form **.

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(f) Renewal of Authority. The court may order a renewal of the guardian's authority by a subsequent written order as provided in Rule ###.

(g) Temporary Order. The court may temporarily authorize the guardian to consent for the ward to receive inpatient mental health care and treatment as provided by A.R.S. § 14-5310.

Strike the Comment

COMMENT

This rule is intended to aid in the administration of cases where in which a guardian has been granted the general duties of a guardian pursuant to A.R.S. § 14-5312 and the additional authority to consent for the ward to receive inpatient mental health care and treatment in a level one behavioral health facility licensed by the Department of Health Services. The guardian's authority to act for the ward in the underlying guardianship of general duties is not affected by the additional authority to consent to inpatient mental health treatment. By statute, a guardian's authority to consent to inpatient treatment ends if the guardian does not file an evaluation report at the one-year anniversary. The, but the guardian's other statutory duties do not end after one year. The requirement of the guardian with inpatient mental health authority is required to file a report every year to state that the ward needs ongoing inpatient treatment. The purpose of this report is to provides due process for the ward, and helps to ensure that the ward is not held in a locked treatment facility if the ward does not require such confinement. See Rule 36 of these rules for the process for renewal of the authority to consent to inpatient treatment.

Pursuant toUnder A.R.S. § 14-5312.01(C), the court may limit the duration of a guardian's authority to consent to inpatient mental health care and treatment. Pursuant toUnder A.R.S. § 14-5312.01(P), the guardian's authority to consent for the ward to receive inpatient mental health care and treatment in a level one behavioral health facility licensed by the Department of Health Services terminates if the guardian does not file the statutorily required annual report of guardian, pursuant to A.R.S. § 14-5315, and an evaluation report. The guardian's authority to consent to the ward's inpatient treatment also terminates if the evaluation report indicates that the ward does not need inpatient mental health care and treatment.

Rule ###. Renewal of a Guardian's Inpatient Mental Health Authority

(a) Required Filings. A guardian who has been authorized to consent for the ward to receive inpatient mental health care and treatment in an inpatient psychiatric facility

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licensed by the Arizona Department of Health Services, and who wants to renew that authority before it expires, must file:

(1) the guardian's annual report required under A.R.S. § 14-5312.01(P);

(2) a psychiatrist's or psychologist's evaluation report required under A.R.S. § 14-5312. 01(P); and

(3) a motion asking the court to renew the guardian's authority to consent to inpatient mental health care and treatment.

(b) Timing. The guardian must file the motion and the other documents no later than 30 days before expiration of the order that grants the guardian the authority to consent for the ward to receive inpatient mental health care and treatment in an inpatient psychiatric facility. If the guardian does not file a motion for renewal before expiration of the order, the guardian must file a petition under Rule XX.

(c) Proposed Order. When the motion, the guardian also must lodge a proposed order that would grant the motion and renew the guardian's authority.

(d) Delivery. The guardian must promptly mail, deliver, or otherwise provide to both the ward and the ward's court-appointed attorney copies of the guardian's annual report, the physician's or psychologist's evaluation report, the motion, and the proposed order.

(e) Objection to Motion for Renewal or Request for Hearing. The ward may file an objection to a motion for renewal or may file a request for a hearing under A.R.S. § 14-5312.01(P). If the ward files either an objection or a request for a hearing, the court must enter an order that extends the guardian's authority to consent for the ward to receive inpatient mental health care and treatment in a behavioral health facility licensed by the Arizona Department of Health Services until the court has ruled on the ward's objection, or conducted a hearing on whether the guardian's authority should be renewed.

(1) complying with Rule 58(a)(2) of the Arizona Rules of Civil Procedure [Staff Note: Is this the correct cite?] [JWR Note: Good question. After looking at the cited rule, I have I have no idea what is being required here]

(c) Renewal Order. Renewal orders are subject to the requirements of Rule XX(a).

Rule ####. Renewal of a Guardian's Inpatient Mental Health Authority by Petition

If a guardian's authority to consent for the ward to receive inpatient mental health care and treatment in an inpatient psychiatric facility licensed by the Arizona Department of Health Services has expired, the guardian must file a petition requesting authority under

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~~Rule ##. [Staff Note: And what happens if the guardian doesn't file a petition to renew after the authority has expired?]~~

~~[Staff Note: Even though the guardian's authority to consent for MH treatment has expired under section (c), because the guardianship is still in place, it's not clear why a motion suffices under section (a) but a petition is required under section (c). It's also not clear what effect the expiration of authority has on the ward, who may still be an in-patient.]~~

~~[Staff Note: Rule 24 concerns appointment of a guardian with inpatient mental health authority. Consider consolidating Rules 24 and 36 or relocating one of the rules so they are adjacent.]~~

~~COMMENT~~

~~A.R.S. § 14-5312.01(P) requires a guardian who has been granted the authority to consent for the ward to receive inpatient mental health care and treatment in a level one behavioral health facility to file not only an annual report of guardian that complies with A.R.S. § 14-5315, but also a physician's or psychologist's evaluation report that indicates whether the ward continues to need inpatient mental health care and treatment. If the guardian does not file the evaluation report or if the evaluation report indicates that the ward does not need inpatient mental health care and treatment, the guardian's authority to consent to such treatment automatically ceases. A.R.S. § 14-5312.01(P).~~

~~Consolidated Rule~~

~~Rule ####. Order Granting and Renewing the Guardian's Inpatient Mental Health Authority.~~

~~(Aa) Order Granting Guardian Inpatient Mental Health Authority.~~ ~~Upon filing a petition for authority and complianceying with A.R.S. § 14-5312.01 including the submission of a psychiatrist's or psychologist's evaluation report required under A.R.S. § 14-5312. 01(P) the court can issue an order authorizing the guardian to consent to the placement, placementcare, and treatment of a ward in an inpatient treatment facility.~~

~~(1) (1) Time Limit.~~ ~~The order authorizing a guardian to place a ward in an inpatient treatment facility pursuant to A.R.S. § 14-5312.01, and the letters of appointment, must specifically state~~

~~**(A)** that the authority that is granted, and~~

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(B) a specified date that the guardian's authority to consent to inpatient mental health care and treatment terminates on a specified date no more than one year from the issuance of the order.

(2) Report and Review. The guardian must file an annual report and an evaluation report, as required by A.R.S. § 14-5312.01(P), at least one month prior to the termination date of the order inpatient authority and include an evaluation report, as required by A.R.S. § 14-5312.01(P). The court must promptly review the reports of every guardian with inpatient mental health authority, and either approve it, set the report for hearing, or modify the prior order by terminating the guardian's authority to consent for the ward to receive inpatient mental health care and treatment. The court must terminate the guardian's inpatient mental health authority for failure to timely file an annual report, unless the guardian has requested an extension of time to file it. (Notice to the facility.)

(3) Other Provisions. The order may include other provisions concerning the guardian's authority that the court determines are necessary to protect the ward's best interests. But the court must limit the guardian's authority to what is reasonably necessary in the least restrictive treatment alternative. [**Comment from Lisa:** Should the LOA also include language regarding the guardian's mental health authority? Addressed above in A1]

(4) Acknowledgement. Letters will not issue for the appointed guardian until the guardian has signed an acknowledgment of the guardian's power to consent for the ward to receive inpatient mental health care and treatment and the court has entered an order substantially similar to Form **.

(f) Renewal of Authority. The court may order a renewal of the guardian's authority by a subsequent written order as provided in Rule ###.

(5) Temporary Order. The court may temporarily authorize the guardian to consent for the ward to receive inpatient mental health care and treatment as provided by A.R.S. § 14-5310.

(Bb) Renewal of a Guardian's Inpatient Mental Health Authority.

(1) Renewal of Authority. The court can order a renewal of the guardians' authority to consent to inpatient treatment pursuant to A.R.S. §14-5312.01.

(2) Required Filings. A guardian who has been authorized to place a ward in an inpatient treatment facility pursuant to A.R.S. §14-5312.01 has been authorized to consent for the ward to receive inpatient mental health care and treatment in an inpatient psychiatric facility licensed by the Arizona Department of Health Services, and who wants to renew that authority before it expires, must file:

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(1) a**A)** a motion asking the court to renew the guardian's authority to consent to inpatient mental health care and treatment;

(2B) a psychiatrist's or psychologist's evaluation report required under A.R.S. § 14-5312.01(P); and

(3C) the guardian's annual report if due within one month of the renewal of inpatient mental health authority or a reference to the last annual report and an update on any changes in the information set forth in the last annual report.

(3) Timing. The guardian must file the motion and the other documents no later than 30 days before expiration of the order that grants the guardian the authority to consent for the ward to receive inpatient mental health care and treatment in an inpatient psychiatric facility. If the guardian does not file a motion for renewal before expiration of the order, the guardian must file a petition under A above.

(4) Proposed Order. When the motion is filed, the guardian also must lodge a proposed order that would grant the motion and renew the guardian's authority. Renewal orders are subject to the requirements of A above.

(5) Delivery. The guardian must promptly mail, deliver, or otherwise provide to both the ward and the ward's court-appointed attorney copies of the motion, the psychiatrist's or psychologist's evaluation report, the guardian's annual report or updates and the proposed order.

(6) Objection to Motion for Renewal or Request for Hearing. The ward may file an objection to a motion for renewal or may file a request for a hearing under A.R.S. § 14-5312.01(P). If the ward files either an objection or a request for a hearing, the court must (or may?) enter an order that extends the guardian's authority to consent for the ward to receive inpatient mental health care and treatment in a behavioral health facility licensed by the Arizona Department of Health Services until the court has ruled on the ward's objection, or conducted a hearing on whether the guardian's authority should be renewed.

(1) complying with Rule 58(a)(2) of the Arizona Rules of Civil Procedure.[Staff Note: Is this the correct cite?] [JWR Note: Good question. After looking at the cited rule, I have I have no idea what is being required here]

(c) Renewal Order. Renewal orders are subject to the requirements of Rule XX(a).

Rule ####. Renewal of a Guardian's Inpatient Mental Health Authority by Petition

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~~If a guardian's authority to consent for the ward to receive inpatient mental health care and treatment in an inpatient psychiatric facility licensed by the Arizona Department of Health Services has expired, the guardian must file a petition requesting authority under Rule ##. [Staff Note: And what happens if the guardian doesn't file a petition to renew after the authority has expired?]~~

~~[Staff Note: Even though the guardian's authority to consent for MH treatment has expired under section (c), because the guardianship is still in place, it's not clear why a motion suffices under section (a) but a petition is required under section (c). It's also not clear what effect the expiration of authority has on the ward, who may still be an in-patient.]~~

~~[Staff Note: Rule 24 concerns appointment of a guardian with inpatient mental health authority. Consider consolidating Rules 24 and 36 or relocating one of the rules so they are adjacent.]~~

~~**Strike comment**~~

~~COMMENT~~

~~A.R.S. § 14-5312.01(P) requires a guardian who has been granted the authority to consent for the ward to receive inpatient mental health care and treatment in a level one behavioral health facility to file not only an annual report of guardian that complies with A.R.S. § 14-5315, but also a physician's or psychologist's evaluation report that indicates whether the ward continues to need inpatient mental health care and treatment. If the guardian does not file the evaluation report or if the evaluation report indicates that the ward does not need inpatient mental health care and treatment, the guardian's authority to consent to such treatment automatically ceases. A.R.S. § 14-5312.01(P).~~

PART VII. GUARDIANS WITH INPATIENT MENTAL HEALTH AUTHORITY

Consolidated Rule STAFF'S REVISED VERSION 10.17.2018 - UPDATED 11.27.18

Rule X. Guardian's Inpatient Mental Health Authority.

(a) Guardian's Petition Requesting Inpatient Mental Health Authority. If a petition complies with A.R.S. § 14-5312.01 and includes the submission of a psychiatrist's or psychologist's evaluation report required under A.R.S. § 14-5312. 01(P), the court may enter an order that authorizes the guardian to consent to the placement, care, and treatment of the ward in an inpatient psychiatric~~mental health treatment~~ facility.

(1) Order and Letters. The order authorizing a guardian to place the ward in an inpatient psychiatric~~treatment~~ facility under A.R.S. § 14-5312.01, and the letters

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of appointment, must describe the authority granted to the guardian and include a specific date that the guardian's authority terminates. The court for good cause may terminate the authority before the specified date.

(2) Other Provisions. The order granting the guardian inpatient mental health authority may include other provisions that the court determines are necessary to protect the ward's best interests. But the court must limit the guardian's authority to what is reasonably necessary and the least restrictive treatment alternative.

(3) Acknowledgement. The court will not issue letters concerning the guardian's inpatient mental health authority until the guardian has signed an acknowledgment of the guardian's power and the court has entered an order substantially similar to Form **.

(4) E~~Temporary~~mergency Order~~Order~~. The court may temporarily authorize the guardian to consent for the ward to receive inpatient mental health care and treatment, once determination has been made that an emergency exists. ~~as provided by A.R.S. § 14-5310.~~

(5) Reports. The guardian must file an annual guardian's report, as required by A.R.S. § 14-5315. In addition, a guardian who requests to continue the guardian's inpatient mental health authority also must file an evaluation report by a psychiatrist or psychologist, as required by A.R.S. § 14-5312.01(P). The guardian must file the evaluation report no~~at least one month~~ later than 30 days before the termination date of the inpatient authority. The court must promptly review the reports and take appropriate action under A.R.S. § 14-5312.01(P).

(b) Renewal of a Guardian's Inpatient Mental Health Authority.

(1) Renewal of Authority. The court can renew the guardians' authority to consent to inpatient treatment as provided by A.R.S. § 14-5312.01 and this rule.

(2) Timing. The guardian must file a motion and the other documents required by subpart (b)(3) no later than 30 days before expiration of the order that grants the guardian inpatient mental health authority. If the guardian does not file a motion for renewal before the expiration of the order, the guardian must file a new petition requesting inpatient mental health authority under section (a) of this rule.

(3) Required Filings. A guardian who has been authorized to place a ward in an inpatient psychiatric~~treatment~~ facility pursuant to A.R.S. §14-5312.01 may request renewal of that authority before it expires by complying with the time requirement of subpart (b)(2) and by filing:

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(A) a motion that states grounds for renewal and requests the court to renew the guardian's authority;

(B) a psychiatrist's or psychologist's evaluation report required under A.R.S. § 14-5312.01(P);

(C) the guardian's annual report, if due within one month of the renewal of inpatient mental health authority, or otherwise, a reference to the guardian's last annual report and an update on the information contained in the last annual report.

(D) a proposed order that would grant the motion and renew the guardian's authority. Renewal orders are subject to the requirements of section (a) of this rule.

(4) Service. The guardian must promptly mail, deliver, or otherwise provide to both the ward and the ward's court-appointed attorney copies of the motion, the psychiatrist's or psychologist's evaluation report, the guardian's annual report or updates, and the proposed order.

(5) Objection to Motion for Renewal or Request for Hearing. The ward may file an objection to a motion for renewal or may file a request for a hearing under A.R.S. § 14-5312.01(P). The guardian's authority continues pending the court's determination of the motion. If the motion proceeds to a hearing, the guardian has the burden of providing by clear and convincing evidence that the ward is likely to be in need of inpatient mental health care and treatment during the renewal period.

Strike comment

~~COMMENT~~

~~A.R.S. § 14-5312.01(P) requires a guardian who has been granted the authority to consent for the ward to receive inpatient mental health care and treatment in a level one behavioral health facility to file not only an annual report of guardian that complies with A.R.S. § 14-5315, but also a physician's or psychologist's evaluation report that indicates whether the ward continues to need inpatient mental health care and treatment. If the guardian does not file the evaluation report or if the evaluation report indicates that the ward does not need inpatient mental health care and treatment, the guardian's authority to consent to such treatment automatically ceases. A.R.S. § 14-5312.01(P).~~

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NOTE: This is a proposed new Part VII of the Probate Rules. The rules in this new part are derived from current Rules 24 and 36.

PART VII. GUARDIANS WITH INPATIENT MENTAL HEALTH AUTHORITY

Rule ##. Order Appointing a Guardian with Inpatient Mental Health Authority.

(b) Time Limit. The order must specifically state that the guardian's authority terminates no more than one year from the order's filing date

(c) Report and Review. The guardian must file an annual report, including an evaluation report, as required by A.R.S. § 14-5312.01(P). The court must promptly review the report of every guardian with inpatient mental health authority, and either approve it, set the report for hearing, or modify the prior order by terminating the guardian's authority to consent for the ward to receive inpatient mental health care and treatment. The court must terminate the guardian's inpatient mental health authority for failure to timely file an annual report, unless the guardian has requested an extension of time to file it.

(d) Other Provisions. The order may include other provisions concerning the guardian's authority that the court determines are necessary to protect the ward's best interests. But the court must limit the guardian's authority to what is reasonably necessary in the least restrictive treatment alternative. [**Comment from Lisa:** Should the LOA also include language regarding the guardian's mental health authority?]

(e) Acknowledgement. Letters will not issue to the appointed guardian until the guardian has signed an acknowledgment of the guardian's power to consent for the ward to receive inpatient mental health care and treatment and the court has entered an order substantially similar to Form **.

(f) Renewal of Authority. The court may order a renewal of the guardian's authority by a subsequent written order as provided in Rule ###.

(g) Temporary Order. The court may temporarily authorize the guardian to consent for the ward to receive inpatient mental health care and treatment as provided by A.R.S. § 14-5310.

Strike the Comment

COMMENT

This rule is intended to aid in cases where a guardian has been granted the general duties of a guardian pursuant to A.R.S. § 14-5312 and the additional authority to consent for the ward to receive inpatient mental health care and treatment in a behavioral health facility licensed by the Department of Health Services. By statute, a

guardian's authority to consent to inpatient treatment ends if the guardian does not file an evaluation report at the one-year anniversary, but the guardian's other duties do not end after one year. The guardian with inpatient mental health authority is required to file a report every year to state that the ward needs ongoing inpatient treatment. The purpose of this report is to provide due process for the ward, and helps to ensure the ward is not held in a locked treatment facility if the ward does not require confinement.

Under A.R.S. § 14-5312.01(C), the court may limit the duration of a guardian's authority to consent to inpatient mental health care and treatment. Under A.R.S. § 14-5312.01(P), the guardian's authority to consent to the ward's inpatient treatment terminates if the evaluation report indicates that the ward does not need inpatient mental health care and treatment.

Rule ###. Renewal of a Guardian's Inpatient Mental Health Authority

(a) Required Filings. A guardian who has been authorized to consent for the ward to receive inpatient mental health care and treatment in an inpatient psychiatric facility licensed by the Arizona Department of Health Services, and who wants to renew that authority before it expires, must file:

(1) the guardian's annual report required under A.R.S. § 14-5312.01(P);

(2) a psychiatrist's or psychologist's evaluation report required under A.R.S. § 14-5312. 01(P); and

(3) a motion asking the court to renew the guardian's authority to consent to inpatient mental health care and treatment.

(b) Timing. The guardian must file the motion and the other documents no later than 30 days before expiration of the order that grants the guardian the authority to consent for the ward to receive inpatient mental health care and treatment in an inpatient psychiatric facility. If the guardian does not file a motion for renewal before expiration of the order, the guardian must file a petition under Rule XX.

(c) Proposed Order. When the motion, the guardian also must lodge a proposed order that would grant the motion and renew the guardian's authority.

(d) Delivery. The guardian must promptly mail, deliver, or otherwise provide to both the ward and the ward's court-appointed attorney copies of the guardian's annual report, the physician's or psychologist's evaluation report, the motion, and the proposed order.

(c) Objection to Motion for Renewal or Request for Hearing. The ward may file an objection to a motion for renewal or may file a request for a hearing under A.R.S. § 14-5312.01(P). If the ward files either an objection or a request for a hearing, the court must enter an order that extends the guardian's authority to consent for the ward to receive inpatient mental health care and treatment in a behavioral health facility licensed by the Arizona Department of Health Services until the court has ruled on the ward's objection, or conducted a hearing on whether the guardian's authority should be renewed.

(1) complying with Rule 58(a)(2) of the Arizona Rules of Civil Procedure [Staff Note: Is this the correct cite?] [JWR Note: Good question. After looking at the cited rule, I have I have no idea what is being required here]

(c) Renewal Order. Renewal orders are subject to the requirements of Rule XX(a).

Rule ####. Renewal of a Guardian's Inpatient Mental Health Authority by Petition

If a guardian's authority to consent for the ward to receive inpatient mental health care and treatment in an inpatient psychiatric facility licensed by the Arizona Department of Health Services has expired, the guardian must file a petition requesting authority under Rule ##. [Staff Note: And what happens if the guardian doesn't file a petition to renew after the authority has expired?]

[Staff Note: Even though the guardian's authority to consent for MH treatment has expired under section (c), because the guardianship is still in place, it's not clear why a motion suffices under section (a) but a petition is required under section (c). It's also not clear what effect the expiration of authority has on the ward, who may still be an in-patient.]

[Staff Note: Rule 24 concerns appointment of a guardian with inpatient mental health authority. Consider consolidating Rules 24 and 36 or relocating one of the rules so they are adjacent.]

COMMENT

A.R.S. § 14-5312.01(P) requires a guardian who has been granted the authority to consent for the ward to receive inpatient mental health care and treatment in a level one behavioral health facility to file not only an annual report of guardian that complies with A.R.S. § 14-5315, but also a physician's or psychologist's evaluation report that indicates whether the ward continues to need inpatient mental health care and treatment. If the guardian does not file the evaluation report or if the evaluation report indicates that the ward does not need inpatient mental health care and treatment, the guardian's authority to consent to such treatment automatically ceases. A.R.S. § 14-5312.01(P).

Consolidated Rule

Rule ####. Order Granting and Renewing the Guardian's Inpatient Mental Health Authority.

(a) Order Granting Guardian Inpatient Mental Health Authority. Upon filing a petition and complying with A.R.S. § 14-5312.01 including the submission of a psychiatrist's or psychologist's evaluation report required under A.R.S. § 14-5312. 01(P) the court can issue an order authorizing the guardian to consent to the placement, care, and treatment of a ward in an inpatient treatment facility.

(1) Time Limit. The order authorizing a guardian to place a ward in an inpatient treatment facility pursuant to A.R.S. § 14-5312.01, and the letters of appointment, must specifically state

(A) the authority that is granted, and

(B) a specified date that the guardian's authority to consent to inpatient mental health care and treatment terminates.

(2) Report and Review. The guardian must file an annual report and an evaluation report, as required by A.R.S. § 14-5312.01(P), at least one month prior to the termination date of the inpatient authority. The court must promptly review the reports, and either approve it, set the report for hearing, or modify the prior order by terminating the guardian's authority to consent for the ward to receive inpatient mental health care and treatment. (Notice to the facility.)

(3) Other Provisions. The order may include other provisions concerning the guardian's authority that the court determines are necessary to protect the ward's best interests. But the court must limit the guardian's authority to what is reasonably necessary in the least restrictive treatment alternative. [**Comment from Lisa:** Should the LOA also include language regarding the guardian's mental health authority? Addressed above in A1]

(4) Acknowledgement. Letters will not issue for the appointed guardian until the guardian has signed an acknowledgment of the guardian's power to consent for the ward to receive inpatient mental health care and treatment and the court has entered an order substantially similar to Form **.

(f) Renewal of Authority. The court may order a renewal of the guardian's authority by a subsequent written order as provided in Rule ###.

(5) Temporary Order. The court may temporarily authorize the guardian to consent for the ward to receive inpatient mental health care and treatment as provided by A.R.S. § 14-5310.

(b) Renewal of a Guardian's Inpatient Mental Health Authority.

(1) Renewal of Authority. The court can order a renewal of the guardians' authority to consent to inpatient treatment pursuant to A.R.S. §14-5312.01.

(2) Required Filings. A guardian who has been authorized to place a ward in an inpatient treatment facility pursuant to A.R.S. §14-5312.01 has been authorized to consent for the ward to receive inpatient mental health care and treatment in an inpatient psychiatric facility licensed by the Arizona Department of Health Services, and who wants to renew that authority before it expires, must file:

(A) a motion asking the court to renew the guardian's authority to consent to inpatient mental health care and treatment;

(B) a psychiatrist's or psychologist's evaluation report required under A.R.S. § 14-5312.01(P); and

(C) the guardian's annual report if due within one month of the renewal of inpatient mental health authority or a reference to the last annual report and an update on any changes in the information set forth in the last annual report.

(3) Timing. The guardian must file the motion and the other documents no later than 30 days before expiration of the order that grants the guardian the authority to consent for the ward to receive inpatient mental health care and treatment in an inpatient psychiatric facility. If the guardian does not file a motion for renewal before expiration of the order, the guardian must file a petition under A above.

(4) Proposed Order. When the motion is filed, the guardian also must lodge a proposed order that would grant the motion and renew the guardian's authority. Renewal orders are subject to the requirements of A above.

(5) Delivery. The guardian must promptly mail, deliver, or otherwise provide to both the ward and the ward's court-appointed attorney copies of the motion, the psychiatrist's or psychologist's evaluation report, the guardian's annual report or updates and the proposed order.

(6) Objection to Motion for Renewal or Request for Hearing. The ward may file an objection to a motion for renewal or may file a request for a hearing under A.R.S. § 14-5312.01(P). If the ward files either an objection or a request for a hearing, the

court must (or may?) enter an order that extends the guardian's authority to consent for the ward to receive inpatient mental health care and treatment in a behavioral health facility licensed by the Arizona Department of Health Services until the court has ruled on the ward's objection, or conducted a hearing on whether the guardian's authority should be renewed.

(1) complying with Rule 58(a)(2) of the Arizona Rules of Civil Procedure [Staff Note: Is this the correct cite?] [JWR Note: Good question. After looking at the cited rule, I have I have no idea what is being required here]

(c) Renewal Order. Renewal orders are subject to the requirements of Rule XX(a).

Rule ####. Renewal of a Guardian's Inpatient Mental Health Authority by Petition

If a guardian's authority to consent for the ward to receive inpatient mental health care and treatment in an inpatient psychiatric facility licensed by the Arizona Department of Health Services has expired, the guardian must file a petition requesting authority under Rule ##. [Staff Note: And what happens if the guardian doesn't file a petition to renew after the authority has expired?]

[Staff Note: Even though the guardian's authority to consent for MH treatment has expired under section (c), because the guardianship is still in place, it's not clear why a motion suffices under section (a) but a petition is required under section (c). It's also not clear what effect the expiration of authority has on the ward, who may still be an in-patient.]

[Staff Note: Rule 24 concerns appointment of a guardian with inpatient mental health authority. Consider consolidating Rules 24 and 36 or relocating one of the rules so they are adjacent.]

Strike comment

COMMENT

A.R.S. § 14-5312.01(P) requires a guardian who has been granted the authority to consent for the ward to receive inpatient mental health care and treatment in a level one behavioral health facility to file not only an annual report of guardian that complies with A.R.S. § 14-5315, but also a physician's or psychologist's evaluation report that indicates whether the ward continues to need inpatient mental health care and treatment. If the guardian does not file the evaluation report or if the evaluation report indicates that the ward does not need inpatient mental health care and treatment, the guardian's authority to consent to such treatment automatically ceases. A.R.S. § 14-5312.01(P).

PART VII. GUARDIANS WITH INPATIENT MENTAL HEALTH AUTHORITY

Consolidated Rule STAFF'S REVISED VERSION 10.17.2018 - UPDATED 11.27.18

Rule X. Guardian's Inpatient Mental Health Authority.

(a) Guardian's Petition Requesting Inpatient Mental Health Authority. If a petition complies with A.R.S. § 14-5312.01 and includes the submission of a psychiatrist's or psychologist's evaluation report required under A.R.S. § 14-5312. 01(P), the court may enter an order that authorizes the guardian to consent to the placement, care, and treatment of the ward in an inpatient psychiatric facility.

(1) Order and Letters. The order authorizing a guardian to place the ward in an inpatient psychiatric facility under A.R.S. § 14-5312.01, and the letters of appointment, must describe the authority granted to the guardian and include a specific date that the guardian's authority terminates. The court for good cause may terminate the authority before the specified date.

(2) Other Provisions. The order granting the guardian inpatient mental health authority may include other provisions that the court determines are necessary to protect the ward's best interests. But the court must limit the guardian's authority to what is reasonably necessary and the least restrictive treatment alternative.

(3) Acknowledgement. The court will not issue letters concerning the guardian's inpatient mental health authority until the guardian has signed an acknowledgment of the guardian's power and the court has entered an order substantially similar to Form **.

(4) Emergency Order. The court may temporarily authorize the guardian to consent for the ward to receive inpatient mental health care and treatment, once determination has been made that an emergency exists. ~~as provided by A.R.S. § 14-5310.~~

(5) Reports. The guardian must file an annual guardian's report, as required by A.R.S. § 14-5315. In addition, a guardian who requests to continue the guardian's inpatient mental health authority also must file an evaluation report by a psychiatrist or psychologist, as required by A.R.S. § 14-5312.01(P). The guardian must file the evaluation report no later than 30 days before the termination date of the inpatient authority. The court must promptly review the reports and take appropriate action under A.R.S. § 14-5312.01(P).

(b) Renewal of a Guardian's Inpatient Mental Health Authority.

(1) Renewal of Authority. The court can renew the guardians' authority to consent

to inpatient treatment as provided by A.R.S. § 14-5312.01 and this rule.

(2) Timing. The guardian must file a motion and the other documents required by subpart (b)(3) no later than 30 days before expiration of the order that grants the guardian inpatient mental health authority. If the guardian does not file a motion for renewal before the expiration of the order, the guardian must file a new petition requesting inpatient mental health authority under section (a) of this rule.

(3) Required Filings. A guardian who has been authorized to place a ward in an inpatient psychiatric facility pursuant to A.R.S. §14-5312.01 may request renewal of that authority before it expires by complying with the time requirement of subpart (b)(2) and by filing:

(A) a motion that states grounds for renewal and requests the court to renew the guardian's authority;

(B) a psychiatrist's or psychologist's evaluation report required under A.R.S. § 14-5312.01(P);

(C) the guardian's annual report, if due within one month of the renewal of inpatient mental health authority, or otherwise, a reference to the guardian's last annual report and an update on the information contained in the last annual report.

(D) a proposed order that would grant the motion and renew the guardian's authority. Renewal orders are subject to the requirements of section (a) of this rule.

(4) Service. The guardian must promptly mail, deliver, or otherwise provide to both the ward and the ward's court-appointed attorney copies of the motion, the psychiatrist's or psychologist's evaluation report, the guardian's annual report or updates, and the proposed order.

(5) Objection to Motion for Renewal or Request for Hearing. The ward may file an objection to a motion for renewal or may file a request for a hearing under A.R.S. § 14-5312.01(P). The guardian's authority continues pending the court's determination of the motion. If the motion proceeds to a hearing, the guardian has the burden of providing by clear and convincing evidence that the ward is likely to be in need of inpatient mental health care and treatment during the renewal period.

Strike comment

~~COMMENT~~

~~A.R.S. § 14-5312.01(P) requires a guardian who has been granted the authority to consent for the ward to receive inpatient mental health care and treatment in a level one behavioral health facility to file not only an annual report of guardian that complies with A.R.S. § 14-5315, but also a physician's or psychologist's evaluation report that indicates whether the ward continues to need inpatient mental health care and treatment. If the guardian does not file the evaluation report or if the evaluation report indicates that the ward does not need inpatient mental health care and treatment, the guardian's authority to consent to such treatment automatically ceases. A.R.S. § 14-5312.01(P).~~

RRule 30. Conservator's Inventory, Budget, and Accounting; Guardian's Report.

(a) Court Authority. For good cause, in a case the court may order a variation of the requirements of this rule for an inventory, budget, or account, or the form thereof, if the court finds that the variation is consistent with prudent management and oversight of the case.

(a)(b) Conservator's Inventory.

(1) ***Generally.*** For purposes of this rule, the conservator's appointment is the date the court first issued letters.

(A) *Timing.* Unless the court orders otherwise, aA conservator must file the inventory of a protected person's estate, required under A.R.S. § 14-5418(A), no later than 90 days after the date of the conservator's appointment.after the court issues the conservator's temporary or permanent letters.

(B) *Contents.* The inventory must list the value of all property the protected person owned as of the date when the court issued the conservator's letters, and must provide the value of each asset as of the date of the conservator's first appointment.of the conservator's appointment.

(B)(C) *Consumer Credit Report.* The credit report, as required by A.R.S. (Section) § 14-5418(A) , shallmust be filed with the inventory, or the conservator shall provide an explanation as to why it could not be provided. .90 days of the filing date of the inventory, to the inventory at the time of filing.

(2) ***Motion for Additional Time.*** If the conservator is unable to file the inventory within 90 days after the court issued the conservator's letters, the conservator must file a motion requesting additional time to file the inventory. The conservator must file the motion before the deadline, and state why the conservator needs additional time, and how much additional time he or she needs is needed to file the inventory.

(3) ***Amended Inventory.***

(A) *Generally.* After filing the inventory but before filing the conservator's first accounting, the conservator must file an amended inventory if the conservator discovers an additional asset or discovers that the value of an asset on the inventory (whether appraised or not) is erroneous or misleading.

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~~**(B)** *If the Asset Is Not Restricted.* If the conservator files an amended inventory because the conservator has discovered an additional asset and if the additional asset is not already subject to a court-ordered restriction, the conservator must file a petition requesting the court to either increase the amount of the conservator's bond or enter an order restricting the additional asset's sale, conveyance, or encumbrance. The conservator must file the petition at the same time he or she files the amended inventory.~~

~~***Later Discovery of an Asset or Change in Value.***~~

~~*Generally.* After filing the inventory, but before filing the conservator's first account, the conservator must file an amended inventory if the conservator discovers an additional asset or discovers the value of an asset on the inventory (whether appraised or not) is erroneous or misleading.~~

~~*Petition to Increase Bond or Restrict Asset.* If the conservator discovers an additional asset or discovers the value of an asset is erroneous or misleading, the conservator must file a petition requesting the court either increase the amount of the conservator's bond, or enter an order restricting the additional asset's sale, conveyance, or encumbrance. The conservator must file the petition at the same time the amended inventory is filed.~~

~~**(4)** *Assets Discovered After Filing the First AccountLater Discovered Assets or Change in Value.* After a conservator has filed the first accounting, the conservator may not amend the inventory without the court's permission.Unless the court orders otherwise, a conservator may not amend the inventory after filing the first aUnless the court orders otherwise, a conservator may not amend the inventory after the filing of the first account. If the conservator discovers any assets after the filing of the first accounting, or if the conservator discovers that the value of an asset listed on the inventory is erroneous or misleading, the conservator must make appropriate adjustments in the conservator's later accountings.~~

(c) Conservator's Budget.

(1) *Generally.*

(A) *Timing.* ~~Unless the court orders otherwise, t~~If ordered by a judicial officer, t~~T~~he conservator must file the initial budget of a protected person's estate no later than the date the conservator's inventory is due~~temporary or permanent letters~~. All subsequent budgets will be included on the annual account form.

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(B) *Contents.* The budget ~~shall~~must include a reasonable estimate of all anticipated income and expenditures related to the protected person's estate. The budget ~~shall~~ must cover the same time frame as the conservator's annual~~first~~ account.

(2) ***Amendments.*** The conservator must file an amended budget no later than 30 days after reasonably projecting the expenditures for any specific category will exceed the budget by a threshold stated ~~as set forth~~ in the instructions for the conservator's budget ~~provided~~contained in the Arizona Code of Judicial Administration.

(3) ***Filing a Budget, Objections, and Court Action.***

(A) ~~*Filing and Presumption*~~*Presumption; Objection.* A timely filed budget is presumed reasonable unless there is an objection. An interested person may file an objection ~~to a budget, or an amendment, but must do so~~ no later than 14 days after the budget's or amendment's was filed. ~~filing date. If an interested person fails to object to a budget item within 14 days after the filing date, the budget is deemed presumptively reasonable.~~ The court may ~~also~~ set a hearing in the absence of an objection.

(B) *Hearings and Resolving Objections.* The court may ~~overrule all or part of an objection~~summarily overrule the objection, order the conservator to file a response, or set a hearing on the objection. ~~The court may also set a hearing in the absence of an objection. At a hearing, t~~The conservator has the burden of proving a contested budget item is reasonable, necessary, and in the best interest of the protected person.

(C) *Court Action.* ~~On its own or on the filing of an objection, t~~If the court reviews the budget, i~~the court must~~ may approve, disapprove, or modify the budget to further the best interest~~s~~ of the protected person. ~~The court may order a budget accepted if no one has filed an objection.~~ ~~*I need some help with this paragraph. There is nothing that requires a conservator to seek approval of the initial budget. Most professionals seek approval to have additional protection, but I suspect many pro pers do not.*~~

~~(b)~~(d) Conservator's Account~~ing~~.

(1) ***Generally.*** ~~***First Accounting.***~~

~~**(A)** *Contents.* Unless the court orders otherwise, the conservator's first accounting must reflect all activity relating to the conservatorship estate through and~~

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~~including the last day of the ninth month after the date when the court issued the conservator's permanent letters.~~

——*Timing.* *T*~~Unless the court otherwise orders, t~~The conservator must file the annual~~first~~ account~~ing with the court~~ no later than ~~sixty (60)~~60 days from~~on~~ the anniversary date when the court issued the conservator's ~~permanent~~ ~~[permanent]~~ letters. ~~[**JWR Note:** How does this jive with (6)? No deadline if only a temporary appointment has been made?]~~

~~(B)~~(A)

~~(C)~~(B) *Format.* ~~Unless the court orders otherwise, t~~The conservator's account must conform to the format set forth in the Arizona Code of Judicial Administration.

(C) *Required Attachments.* For each bank or securities account listed on the ending balance schedule, the conservator must attach ~~to the accounting a copy of~~ the monthly statement that corresponds to the ending balance of such account ~~as reflected in the accounting~~.

(2) ***Sustainability.*** T~~t~~he annual account must include:

(A) whether the conservatorship's recurring annual expenses exceed its recurring annual income;

——and

(B) if so, whether the assets available to the conservator less the estate's liabilities are sufficient to sustain the conservatorship ~~during the time the protected person needs care or fiduciary services~~for the protected person's foreseeable needs; and~~.~~

(C) if the estate~~if~~ is ~~the assets are~~ not sustainable, the conservator must include a discussion of the available options.

~~(D)~~

(3) ***First Account.*** ~~Unless the court orders otherwise, t~~The conservator's first account must reflect all activity relating to the conservatorship estate from the date of first appointment through, and including, the ~~last d~~ anniversary date of the conservator's ~~permanent~~ permanentletters, or other date set by the court.

~~(2)~~ ***Later Account~~ing~~s.*** ~~Unless the court orders otherwise, a~~All later accounts must reflect all activity relating to the conservatorship estate from the ending date of

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the most recently filed account through, and including, the anniversary date of the conservator's ~~permanent~~ letters, or other date set by the court.

~~**(A)** *Contents*. Unless the court orders otherwise, all later accountings must reflect all activity relating to the conservatorship estate from the ending date of the most recently filed accounting through and including the last day of the twelfth month after that accounting's ending date.~~

~~**(B)** *Timing*. The conservator must file each later accounting with the court no later than on the anniversary date when the court issued the conservator's permanent letters. **[JWR Note:** How does this jive with (6)?]~~

~~**(C)** *Required Attachments*. For each bank or securities account listed on the ending balance schedule of the account, the conservator must attach to the accounting a copy of the monthly statement that corresponds to the ending balance of such account as reflected in the accounting.~~

~~**(3)** ***Format.*** Unless the court orders otherwise, the conservator's accounting must conform to the format set forth in the Arizona Code of Judicial Administration.~~

(4)

(5) ***Final Account~~ing~~.*** ~~Unless the court orders otherwise, and e~~Except as provided in A.R.S. § 14-5419(F), a conservator must file a final account~~ing~~ for a deceased protected person no later than 90 days after the date of the protected person's death.

(6) ***Motion for Additional Time.*** If the conservator is unable to file an account ~~ing~~ within the time set forth in this rule, the conservator must file a motion requesting additional time to file the account~~ing~~. The conservator must file the motion before the deadline, ~~and~~ state why the conservator needs additional time, and how much additional time ~~he or she needs~~ is needed to file the account~~ing~~.

~~**(7) *Date When Letters Were Issued.*** For this rule's purposes, if the conservator's initial appointment was temporary, "the date when the court issued the conservator's letters" means the date when the court first issued the conservator's temporary letters, whether temporary or permanent. Otherwise, "the date when the court issued the conservator's letters" means the date when the court issued the conservator's permanent letters.~~

~~**(c) Annual Guardian Reports.**~~

~~**(1)** *First Report.*~~

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(A) Contents. Unless the court orders otherwise, the guardian's first annual report must reflect all activity relating to the guardianship through and including the last day of the ninth month after the date when the court issued the guardian's permanent letters. [JWR Note: Deleted permanent because of subpart (4), which seems to say that the report's deadline can be triggered by the issuance of a temporary letter.

(B) *Timing*. The guardian must file the first annual report with the court no later than on the anniversary date when the court issued the guardian's permanent letters.

(2) *Later Reports*.

(A) *Contents*. Unless the court orders otherwise, each of a guardian's later annual reports must reflect all activity relating to the guardianship from the ending date of the most recently filed report through and including the last day of the twelfth month after that report's ending date.

(B) *Timing*. The guardian must file each later report with the court no later than on the anniversary date when the court issued the guardian's permanent letters. [JWR Note: Deleted for the same reason. Otherwise (4) makes no sense.]

(3) *Motion for Additional Time*. If the guardian is unable to file an annual report within the time set forth in this rule, the guardian must file a motion requesting additional time to file the report. The guardian must file the motion before the deadline, and state why the guardian needs additional time and how much additional time he or she needs to file the report.

(4) *Date When Letters Were Issued*. For this rule's purposes, if the guardian's initial appointment was temporary, "the date when the court issued the guardian's letters" means the date when the court issued the guardian's temporary letters. Otherwise, "the date when the court issued the guardian's letters" means the date when the court issued the guardian's permanent letters.

Staff Note: Would it be more straightforward, and easier to calendar, if the rule provided that the first accounting or report covered a 12-month period after the letters were issued?

COMMENT

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~~The statutes provide the substantive reporting requirements relating to inventories, accountings, and annual guardianship reports. *See* A.R.S. §§ 14-5315, -5418, and -5419. The purpose of this rule is to clarify the time periods to be covered by accountings and guardian reports and when such documents must be filed with the court.~~

~~Although the inventory itself is a confidential document, *see* Rule 7(A)(1)(e), the inventory and appraisement cover sheet is not a confidential document. Similarly, the accounting, and supporting financial statements,~~ are ~~is a confidential documents, *see* Rule 7(A)(1)(d), while the petition requesting approval and any fee statements are not confidential documents. LMP NOTE: Do we need this comment? Rule 7 outlines what is and is not a confidential document.~~

~~If a guardian who has been granted the power to consent for the ward to receive inpatient mental health care and treatment in a level one behavioral health facility licensed by the Arizona Department of Health Services wishes to renew such authority before it expires, the time frame set forth in Rule 36(a) of these rules governs the filing of the annual guardian report.~~

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Rule 30. Conservator's Inventory, Budget, and Account.

(a) Court Authority. For good cause, in a case the court may order a variation of the requirements of this rule for an inventory, budget, or account, or the form thereof, if the court finds that the variation is consistent with prudent management and oversight of the case.

(b) Conservator's Inventory.

(1) ***Generally.*** For purposes of this rule, the conservator's appointment is the date the court first issued letters.

(A) *Timing.* A conservator must file the inventory of a protected person's estate no later than 90 days after the date of the conservator's appointment.

(B) *Contents.* The inventory must list the value of all property the protected person owned as of the date of the conservator's appointment.

(C) *Consumer Credit Report.* The credit report required by A.R.S. § 14-5418(A) must be filed with the inventory.

(2) ***Motion for Additional Time.*** If the conservator is unable to file the inventory within 90 days, the conservator must file a motion requesting additional time. The conservator must file the motion before the deadline, state why the conservator needs additional time, and how much additional time is needed to file the inventory.

(c) Conservator's Budget.

(1) ***Generally.***

(A) *Timing.* If ordered by a judicial officer, the conservator must file the initial budget of a protected person's estate no later than the date the conservator's inventory is due. All subsequent budgets will be included on the annual account form.

(B) *Contents.* The budget must include a reasonable estimate of all anticipated income and expenditures related to the protected person's estate. The budget must cover the same time frame as the conservator's annual account.

(2) ***Amendments.*** The conservator must file an amended budget no later than 30 days after reasonably projecting the expenditures for any specific category will exceed the budget by a threshold stated in the instructions for the conservator's budget contained in the Arizona Code of Judicial Administration.

(3) ***Filing a Budget, Objections, and Court Action.***

(A) *Presumption; Objection.* A timely filed budget is presumed reasonable unless there is an objection. An interested person may file an objection no later than 14 days after the budget or amendment was filed. The court may set a hearing in the absence of an objection.

(B) *Hearings and Resolving Objections.* The court may summarily overrule the objection, order the conservator to file a response, or set a hearing on the objection. The conservator has the burden of proving a contested budget item is reasonable, necessary, and in the best interest of the protected person.

(C) *Court Action.* If the court reviews the budget, it may approve, disapprove, or modify the budget to further the best interest of the protected person.

(d) Conservator's Account.

(1) ***Generally.***

(A) *Timing. T*he conservator must file the annual account no later than 60 days from the anniversary date when the court issued the conservator's letters.

(B) *Format.* The conservator's account must conform to the format set forth in the Arizona Code of Judicial Administration.

(C) *Required Attachments.* For each bank or securities account listed on the ending balance schedule, the conservator must attach the monthly statement that corresponds to the ending balance of such account.

(2) ***Sustainability.*** The annual account must include:

(A) whether the conservatorship's recurring annual expenses exceed its recurring annual income;

(B) and if so, whether the assets available to the conservator less the estate's liabilities are sufficient to sustain the conservatorship for the protected person's foreseeable needs; and

(C) if the estate is not sustainable, the conservator must include a discussion of the available options.

(3) ***First Account.*** The conservator's first account must reflect all activity relating to the conservatorship estate from the date of first appointment through, and including, the anniversary date of the conservator's letters, or other date set by the court.

(4) ***Later Accounts.*** All later accounts must reflect all activity relating to the conservatorship estate from the ending date of the most recently filed account through, and including, the anniversary date of the conservator's letters, or other date set by the court.

(5) ***Final Account.*** Except as provided in A.R.S. § 14-5419(F), a conservator must file a final account for a deceased protected person no later than 90 days after the date of the protected person's death.

(6) ***Motion for Additional Time.*** If the conservator is unable to file an account within the time set forth in this rule, the conservator must file a motion requesting additional time to file the account. The conservator must file the motion before the deadline, state why the conservator needs additional time, and how much additional time is needed to file the account.

~~Workgroup 3 Catherine Robbins assigned~~

Rule 33. Compensation for Fiduciaries ~~and~~, Attorneys, and Statutory Representatives.

~~*Generally.*~~

~~First Appearance. Unless the court orders otherwise, a newly appointed guardian and/or conservator first appears in said capacity, with the filing of their first annual Report of Guardian or filing of Arizona Form 5 (inventory and sustainability).~~

~~Third Party Compensation. The Petitioner in a new guardianship and/or conservatorship matter, and their attorney and fiduciary shall disclose all compensation and services procured intended to have a benefit or derivative benefit to the ward or protected person.~~

~~Motion for Additional Time. If the attorney or guardian ad litem seeking compensation from the estate is unable to present their claim within the time limits of A.R.S. § 14-5110, the attorney or guardian ad litem must file a motion requesting additional time to present the claim, stating why and how much additional time is needed and must file the motion before the end of the original statutory time limit.~~

~~statutory representative~~**(a) Approval in an Account.** When an account requests approval of fees paid to a fiduciary, an attorney, or a statutory representative, any fee statements submitted must cover the period for which fees have actually been paid.

~~**(b)**~~ **(b) Approval by Separate Petition.** If a request for approval of fees was not included in the fiduciary's account, ~~**Notice.** When a guardian, conservator, attorney, or guardian ad litem who intends to request compensation from the estate of a ward or protected person first appears in the proceeding, that person must provide written notice of the basis for any compensation, as well as the other information required under A.R.S. § 14-5109. The notice must be filed with the court and delivered to all persons entitled to receive notice under A.R.S. §§ 14-5309 and -5405. [**Staff Note:** The draft includes a time for the notice [on their first appearance], as required by the statute.]~~

~~**Petition for Approval.**~~ a fiduciary, an attorney, or a statutory representative may file a separate petition for approval of compensation. A copy of every petition for approval of compensation and fee statements must be mailed or provided to any person who has appeared or requested notice in the case. A proof of notice must be filed that identifies each person to whom the petition was provided and how notice was provided.

(c) Personal Representatives and Trustees. Unless the court orders otherwise, a personal representative or a trustee, or their attorney, is not required to file a petition for approval of their fees.

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(d) Content of Request for Approval. ~~If filed separately, the~~Any request or petition for approval of compensation must be accompanied by a statement that includes the following information:

~~(c) If approval of compensation is being sought, unless otherwise ordered by the court~~Unless the court orders otherwise, ~~a petition that requests approval of compensation for a personal representative, trustee, guardian, conservator, guardian ad litem, attorney representing the fiduciary, or an attorney representing the subject person in a Title 14 guardianship or conservatorship must be accompanied by a statement that includes the following information:~~

~~(1)~~ (1) if the requested compensation is based on hourly rates, a detailed statement of the services provided, including the tasks performed, the date each task was performed, the time expended in performing each task, the name and position of the person who performed each task, and the hourly rate charged for such services;

~~(2)~~ (2) if the requested compensation is not based on hourly rates, an explanation of the fee arrangement and computation of the fee for which approval is sought; and

(3) if the request includes reimbursement of costs, an identification of each cost, the date the cost was incurred, the expenditure's purpose, and the amount of reimbursement requested or, if reimbursement of costs is based on some other method, an explanation of the method being used.

(e) Waiver. An attorney or statutory representative waives compensation from the estate of a ward or protected person if a request is not timely submitted under A.R.S. §14-5110.

~~(3)~~ ~~(f)~~

~~**(d) Personal Representatives and Counsel.** Neither a personal representative nor a personal representative's attorney is required to file a petition for approval of their fees, unless the court orders otherwise. [**Staff Note:** This is derived from section (g) of the current rule. But this exception appears to conflict with section (b).] [**JWR Note:** Not sure that it is conflict. (b) doesn't require anybody to file a petition; all it says is that if you are going to file a petition, it has to have the listed information. [See the first paragraph of the comment below.] But it does highlight that this rule does not say who has to file a petition, although (c) seems to say quite clearly that PR and the PR's attorney does not.]~~

~~**(e) Waiver.** An attorney or guardian ad litem waives compensation from the estate of a ward or protected person if requests are not submitted in compliance with A.R.S. § 14-~~

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~~5110, unless a Motion for Additional Time has been granted by the court.~~ ~~[**Staff Note:** This is derived from section (h) of the current rule.]~~

~~**(f) Fee Statements in an Accounting. If an annual accounting includes an attorney or fiduciary fee statement, the annual accounting and fee statement date range period must match. the charges reported in the annual accounting, or the fiduciary must reconcile the fee statement with the accounting.**~~

~~**Delivery.** A copy of every petition for compensation and fee statements must be mailed or otherwise delivered to any person who has appeared or requested notice in the case. The petitioner must file a notice of delivery with the court identifying each person to whom the petition was delivered and the method~~

~~**(g)** of delivery to that person.~~

Objections. A person objecting to a ~~petition~~ request for compensation in the account or in a separate petition must provide a specific basis for each objection. The objecting person must mail or ~~otherwise deliver~~provide a copy of ~~an~~ the objection to every person who has appeared or requested notice in the case. The person also must file a ~~notice of delivery~~proof of notice ~~with the court~~ that identifies each person to whom the objection was provided and how notice was provided.

~~**(h)** identifying each person to whom the objection was delivered and the method of delivery to that person.~~

(g) ~~Reasonable Compensation~~Fee Guidelines. When determining reasonable compensation, the court must follow statewide fee guidelines contained in § 3-303 of the Arizona Code of Judicial Administration.

~~**(i)**~~

~~**COMMENT**~~

~~This rule is not intended to require court approval of fiduciary fees or attorneys' fees in all circumstances. Instead, this rule clarifies that if approval of fees is requested, the court may require that certain information be provided to assist the court in determining the reasonableness of the fees. In many circumstances, especially with respect to decedents' estates and trusts, court approval of fiduciary fees and attorneys' fees is not required unless an interested person specifically requests that the court review the reasonableness or propriety of compensation paid to a fiduciary or attorney. *See, e.g.*, A.R.S. § 14-3721.~~

~~When a fiduciary asks the court to approve an accounting, the fiduciary necessarily is asking the court to approve, among other things, all the disbursements made by the fiduciary during the accounting period, including any fiduciary or attorney fees~~

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paid during the accounting period. Consequently, when a fiduciary files a petition requesting approval of the fiduciary's accounting, the burden is on the fiduciary to supply the information required by Rule 33(A), not just with respect to the fiduciary's fees but also with respect to all fiduciary and attorney fees paid during the accounting period. Pursuant to Rule 33(D), in such cases, the fiduciary should supply fee statements that match the disbursements reported in the accounting. The fee statements may take the form of the invoices paid during the accounting period so long as those invoices contain the information required by Rule 33(A).

A.R.S. § 14-5651 limits the classes of persons or entities who are entitled to receive compensation for acting as a guardian, a conservator, or a personal representative.

This rule is not intended to apply when a party has requested that the court award the party attorneys' fees against another party, such as an award of sanctions or an award of attorneys' fees in a matter arising out of contract. Instead, this rule applies only to those circumstances in which a fiduciary or an attorney seeks compensation from the estate of a ward or protected person, a decedent's estate, or a trust.

Pursuant to Rule 7(A), fee statements are not confidential documents or information.

In assessing whether compensation paid to or requested by a fiduciary or an attorney is reasonable, the court should consider a variety of factors, not just the amount of time spent on a particular task. *See Schwartz v. Schwerin*, 85 Ariz. 242, 245-46, 336 P.2d 144, 146 (1959) (holding that in determining the reasonableness of attorneys' fees, the court should not give undue weight to any one factor). For example, when reviewing the fiduciary's compensation, the court also should consider the amount of principal and income received and disbursed by the fiduciary, the fees customarily paid to agents or employees for performing like work in the community, the success or failure of the administration of the fiduciary, any unusual skill or experience that the particular fiduciary may have brought to the work, the fidelity or disloyalty displayed by the fiduciary, the degree of risk and responsibility assumed by the fiduciary, the custom in the community as to allowances to trustees by settlers or courts and as to fees charged by trust companies and banks, the nature of the services performed in the course of administration (whether routine or involving skill and judgment), and any estimate that the fiduciary has given of the value of the services. *See* Mary F. Radford, George G. Bogert & George T. Bogert, *The Law of Trusts & Trustees* § 977 (3d ed. 2006). Similarly, when reviewing the attorney's compensation, the court should consider, among other factors, the attorney's ability, training, education, experience, professional standing, and skill; the character of the work performed by the attorney (its difficulty, intricacy, and importance, time and skill required, and the responsibility imposed); the work actually performed by the attorney (the skill,

time, and attention given to the work by the attorney); and the success of the attorney's efforts and the benefits that were derived as a result of the attorney's services. *See Schwartz*, 85 Ariz. at 245-46, 336 P.2d at 146.

The purpose of requiring a detailed statement of services that describes each task performed, the date each task was performed, the amount of time spent on each task, and the person performing each task is to assist the court in determining whether the amount of time spent on a particular task was reasonable. Such requirement is intended to prevent "block billing," which occurs when a timekeeper provides only a daily total amount of time spent working on the case rather than an itemization of the time expended on specific tasks. *See, e.g., Hawaii Ventures, LLC, v. Otaka, Inc.*, 173 P.3d 1122, 1132 (Haw. 2007). "Block billing" makes it difficult, if not impossible, for the court to determine the reasonableness of the time spent on a particular task because all the tasks are lumped together in a single entry that provides only a total amount of time spent. *Id.* That is not to say, however, that the combining of related tasks in a single time entry is prohibited, especially if the time involved for each such task is minimal. For example, if reading an e-mail takes one minute and drafting the response to that e-mail takes four minutes, a single time entry of one tenth of an hour for both tasks is more appropriate than two time entries of one tenth of an hour each. Thus, lawyers and fiduciaries should exercise "billing judgment" when writing time entries to ensure that the court can determine whether the time expended was reasonable.

Rule 33. Compensation for Fiduciaries, Attorneys, and Statutory Representatives.

(a) Approval in an Account. When an account requests approval of fees paid to a fiduciary, an attorney, or a statutory representative, any fee statements submitted must cover the period for which fees have actually been paid.

(b) Approval by Separate Petition. If a request for approval of fees was not included in the fiduciary's account, a fiduciary, an attorney, or a statutory representative may file a separate petition for approval of compensation. A copy of every petition for approval of compensation and fee statements must be mailed or provided to any person who has appeared or requested notice in the case. A proof of notice must be filed that identifies each person to whom the petition was provided and how notice was provided.

(c) Personal Representatives and Trustees. Unless the court orders otherwise, a personal representative or a trustee, or their attorney, is not required to file a petition for approval of their fees.

(d) Content of Request for Approval. Any request or petition for approval of compensation must be accompanied by a statement that includes the following information:

> **(1)** if the requested compensation is based on hourly rates, a detailed statement of the services provided, including the tasks performed, the date each task was performed, the time expended in performing each task, the name and position of the person who performed each task, and the hourly rate charged for such services;
>
> **(2)** if the requested compensation is not based on hourly rates, an explanation of the fee arrangement and computation of the fee for which approval is sought; and
>
> **(3)** if the request includes reimbursement of costs, an identification of each cost, the date the cost was incurred, the expenditure's purpose, and the amount of reimbursement requested or, if reimbursement of costs is based on some other method, an explanation of the method being used.

(e) Waiver. An attorney or statutory representative waives compensation from the estate of a ward or protected person if a request is not timely submitted under A.R.S. §14-5110.

(f) Objections. A person objecting to a request for compensation in the account or in a separate petition must provide a specific basis for each objection. The objecting person must mail or provide a copy of the objection to every person who has appeared or requested notice in the case. The person also must file a proof of notice that identifies each person to whom the objection was provided and how notice was provided.

(g) Fee Guidelines. When determining reasonable compensation, the court must follow statewide fee guidelines contained in § 3-303 of the Arizona Code of Judicial Administration.

~~**COMMENT**~~

~~This rule is not intended to require court approval of fiduciary fees or attorneys' fees in all circumstances. Instead, this rule clarifies that if approval of fees is requested, the court may require that certain information be provided to assist the court in determining the reasonableness of the fees. In many circumstances, especially with respect to decedents' estates and trusts, court approval of fiduciary fees and attorneys' fees is not required unless an interested person specifically requests that the court review the reasonableness or propriety of compensation paid to a fiduciary or attorney. *See, e.g.*, A.R.S. § 14-3721.~~

~~When a fiduciary asks the court to approve an accounting, the fiduciary necessarily is asking the court to approve, among other things, all the disbursements made by the fiduciary during the accounting period, including any fiduciary or attorney fees paid during the accounting period. Consequently, when a fiduciary files a petition requesting approval of the fiduciary's accounting, the burden is on the fiduciary to supply the information required by Rule 33(A), not just with respect to the fiduciary's fees but also with respect to all fiduciary and attorney fees paid during the accounting period. Pursuant to Rule 33(D), in such cases, the fiduciary should supply fee statements that match the disbursements reported in the accounting. The fee statements may take the form of the invoices paid during the accounting period so long as those invoices contain the information required by Rule 33(A).~~

~~A.R.S. § 14-5651 limits the classes of persons or entities who are entitled to receive compensation for acting as a guardian, a conservator, or a personal representative.~~

~~This rule is not intended to apply when a party has requested that the court award the party attorneys' fees against another party, such as an award of sanctions or an award of attorneys' fees in a matter arising out of contract. Instead, this rule applies only to those circumstances in which a fiduciary or an attorney seeks compensation from the estate of a ward or protected person, a decedent's estate, or a trust.~~

~~Pursuant to Rule 7(A), fee statements are not confidential documents or information.~~

~~In assessing whether compensation paid to or requested by a fiduciary or an attorney is reasonable, the court should consider a variety of factors, not just the amount of time spent on a particular task. *See Schwartz v. Schwerin*, 85 Ariz. 242,~~

245-46, 336 P.2d 144, 146 (1959) (holding that in determining the reasonableness of attorneys' fees, the court should not give undue weight to any one factor). For example, when reviewing the fiduciary's compensation, the court also should consider the amount of principal and income received and disbursed by the fiduciary, the fees customarily paid to agents or employees for performing like work in the community, the success or failure of the administration of the fiduciary, any unusual skill or experience that the particular fiduciary may have brought to the work, the fidelity or disloyalty displayed by the fiduciary, the degree of risk and responsibility assumed by the fiduciary, the custom in the community as to allowances to trustees by settlers or courts and as to fees charged by trust companies and banks, the nature of the services performed in the course of administration (whether routine or involving skill and judgment), and any estimate that the fiduciary has given of the value of the services. *See* Mary F. Radford, George G. Bogert & George T. Bogert, *The Law of Trusts & Trustees* § 977 (3d ed. 2006). Similarly, when reviewing the attorney's compensation, the court should consider, among other factors, the attorney's ability, training, education, experience, professional standing, and skill; the character of the work performed by the attorney (its difficulty, intricacy, and importance, time and skill required, and the responsibility imposed); the work actually performed by the attorney (the skill, time, and attention given to the work by the attorney); and the success of the attorney's efforts and the benefits that were derived as a result of the attorney's services. *See Schwartz*, 85 Ariz. at 245-46, 336 P.2d at 146.

The purpose of requiring a detailed statement of services that describes each task performed, the date each task was performed, the amount of time spent on each task, and the person performing each task is to assist the court in determining whether the amount of time spent on a particular task was reasonable. Such requirement is intended to prevent "block billing," which occurs when a timekeeper provides only a daily total amount of time spent working on the case rather than an itemization of the time expended on specific tasks. *See, e.g., Hawaii Ventures, LLC, v. Otaka, Inc.*, 173 P.3d 1122, 1132 (Haw. 2007). "Block billing" makes it difficult, if not impossible, for the court to determine the reasonableness of the time spent on a particular task because all the tasks are lumped together in a single entry that provides only a total amount of time spent. *Id.* That is not to say, however, that the combining of related tasks in a single time entry is prohibited, especially if the time involved for each such task is minimal. For example, if reading an e-mail takes one minute and drafting the response to that e-mail takes four minutes, a single time entry of one-tenth of an hour for both tasks is more appropriate than two time entries of one-tenth of an hour each. Thus, lawyers and fiduciaries should exercise "billing judgment" when writing time entries to ensure that the court can determine whether the time expended was reasonable.

~~Workgroup 3 Robert Fleming assigned~~

Rule 37. Settlements and Financial Recovery Involving Minors or ~~Incapacitated~~ Adults in Need of Protection.

(a) Generally.

~~(a)~~ (1) Settlement of Personal Injury and Wrongful Death Claims. Any settlement of a personal injury or wrongful death claim brought on behalf of a minor or an adult person in need of protection must be submitted for approval by a judicial officer assigned to hear matters arising under A.R.S. Title 14, regardless of whether a court has previously appointed a conservator for the minor or person in need of protection, except that a judicial officer may approve settlements for minors pursuant to Section 2 below.

~~(b)~~ (2) Settlement of a Minor's Claim for Less than $10,000. A settlement of a minor's personal injury or wrongful death claim is not binding on the minor until a judicial officer has approved it. Upon request, any judicial officer may approve the payment of money or delivery of personal property to a parent or conservator of a minor in an amount not exceeding $10,000 and may approve the settlement and authorize the recipient to execute appropriate releases of liability as may be required to conclude a settlement.

~~**Settlement of a Minor's Claim for Less than $10,000.** A settlement of a minor's personal injury claim is not binding on the minor ifuntil a judicial officer has not approved it. Upon request, If requested, any judicial officer may approve the payment of money or delivery of personal property to a parent or conservator of a minor in an amount not exceeding $10,000 and may approve the settlement and authorize the recipient to execute appropriate releases of liability as may be required to conclude a settlement.~~

~~**Settlement of Personal Injury Claims for More than $10,000.** Any settlement of a personal injury or wrongful death claim brought on behalf of a minor or an adult person in need of protection for more than $10,000 must be submitted for approval by a judicial officer assigned to hear matters arising under A.R.S. Title 14, regardless of whether a court has previously appointed a conservator for the minor or person in need of protection.~~

(3) Payment of Money or Delivery of Property in Other Situations. In circumstances not involving a personal injury or wrongful death claim, a judicial officer assigned to hear matters arising under A.R.S. Title 14 may authorize establishment of a suitable trust or other arrangement to avoid the necessity of

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continuing court supervision if the judicial officer finds that the best interests of the minor or adult person in need of protection may be satisfied by the alternative arrangement.

(b) **Petitioner.** A~~ny~~ petition for ~~such~~ approval may be brought by a court-appointed guardian or conservator,~~,~~ a guardian *ad litem*, ~~a next friend~~ or other interested ~~party~~person.~~.~~

(c) ~~**Procedure on hearing**~~**Considerations.** If it is appropriate or necessary to assure fairness and justice for a minor, an adult in need of protection or other litigants, the court may appoint a representative pursuant to ARS §14-1408 or a master pursuant to Rule 53, Arizona Rules of Civil Procedure, with specific instructions to address (as may be applicable):

(1) The reasonableness of the settlement proposal,

(2) The attorney fees to be paid from the minor's or adult's settlement proceeds,

(3) The costs of litigation and apportionment of those costs,

(4) The effect of the settlement on eligibility for public benefits or other resources which might be available, and

(5) The proper apportionment of settlement proceeds among the various litigants.

(d) Orders. The court hearing ~~such~~ the petition may enter any appropriate order under the authority of A.R.S. ~~secs.~~ §§14-5408 and 14-5409, including an order authorizing a single transaction to approve such settlement and establishment of a protective arrangement other than a conservatorship. After considering the size and nature of the proceeds from such settlement, the age and sophistication of the minor or person in need of protection, the living arrangements and ongoing needs, the court may do one or more of the following:

(1) appoint a conservator;

(2) order establishment of an appropriate trust, including a special needs trust, with or without continuing court supervision, as authorized by ARS §14-5409(B),

(3) authorize all or a portion of the proceeds to be placed in an account pursuant to

(A) 26 U.S.C. 529 ("qualified tuition programs") ~~or~~,

(B) 26 U.S.C. 529A ("qualified ABLE programs"), ~~or~~

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(C) 42 U.S.C. 1396p(d)(4)(C) (a pooled special needs trust), ~~or~~

(D) A.R.S 14-5408(C) (a "dignity account")

~~(~~**(4)** in the case of a minor claimant,~~)~~ distribute~~d~~ the proceeds to a custodian ~~pursuant to~~under A.R.S. §~~ec.~~ 14-7656(B) (the Uniform Transfers to Minors Act); ~~or~~

(5) distribute the proceeds to an appropriate person ~~pursuant to~~under A.R.S. § ~~sec.~~ 14-5103 ("~~F~~facility of payment or delivery") or to a guardian under A.R.S. § 14-5312(A)(4)(b)~~.~~;

(6) approve a structured settlement; or

~~(7) approve a deposit in a restricted account under A.R.S § 14-5411(A); or~~

(7) enter any other order authorized by statute.

(e) Duty to Inform. If a fiduciary or other interested person asks the court to approve a distribution from a conservatorship estate, a decedent's estate, or a trust, and if the fiduciary or interested party has knowledge one or more of the distributees is a minor, an incapacitated person, or a protected adult, the fiduciary or interested person must:

(1) notify the court of the distributee's status as a minor, an incapacitated person, or a protected adult; and

(2) if a court has appointed a guardian or conservator for the proposed distributee, or if a court has approved other protective arrangements for the proposed distributee, the fiduciary or interested person must provide the court with a copy of the order appointing the guardian or conservator or the order approving the protective arrangement. [**Note**: Section (e) was derived from current Rule 34.]

~~Note: Robert will add language to accommodate 5103 transactions; and possibly provisions regarding a GAL or special master.~~

~~**(e) Settlement of Claims on Behalf of Minors.** Except as provided in A.R.S. § 14-5103(A), any settlement of a personal injury or wrongful death claim brought on behalf of or against a minor must be submitted for approval by a judicial officer assigned to hear matters arising under A.R.S. Title 14, regardless of whether a court has appointed a conservator for the minor. [**Staff Note:** Why is it necessary for the court to approve a personal injury claim brought against a minor? An insurance company will indemnify the minor in most of those claims, and the minor will have no personal responsibility to pay. Or at least the minor will be released from any further responsibility to pay. And claims against a minor are not mentioned in the statute.]~~

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(d) Settlement of Claims on Behalf of Incapacitated Adults or Protected Person. Any settlement of a personal injury or wrongful death claim brought on behalf of an incapacitated adult or protected person must be submitted for approval by a judicial officer assigned to hear matters arising under A.R.S. Title 14, regardless of whether a court has appointed a conservator for the incapacitated adult.

COMMENT

This rule is intended to clarify the requirement that whenever a settlement is reached in a civil proceeding brought on behalf of or against a minor or incapacitated adult to recover damages for personal injury or wrongful death, the proposed settlement must be submitted for review and approval to a judicial officer assigned to hear probate matters. In most instances, either a conservatorship or trust will need to be established for the minor or incapacitated adult to receive and manage the funds distributed from the settlement. Because of the minority or incapacity of the recipient of the funds, the court should review the terms of the settlement to ensure that its terms and conditions appear to be in the minor's or incapacitated person's best interests. An exception is recognized pursuant to A.R.S. § 14-5103, which provides that payment or delivery of money or personal property to minors in amounts not exceeding $10,000 per annum may be facilitated without the establishment of a conservatorship estate or other protective proceeding.

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Rule 37. Settlements and Financial Recovery Involving Minors or Adults in Need of Protection.

(a) Generally.

(1) Settlement of Personal Injury and Wrongful Death Claims. Any settlement of a personal injury or wrongful death claim brought on behalf of a minor or an adult person in need of protection must be submitted for approval by a judicial officer assigned to hear matters arising under A.R.S. Title 14, regardless of whether a court has previously appointed a conservator for the minor or person in need of protection, except that a judicial officer may approve settlements for minors pursuant to Section 2 below.

(2) Settlement of a Minor's Claim for Less than $10,000. A settlement of a minor's personal injury or wrongful death claim is not binding on the minor until a judicial officer has approved it. Upon request, any judicial officer may approve the payment of money or delivery of personal property to a parent or conservator of a minor in an amount not exceeding $10,000 and may approve the settlement and authorize the recipient to execute appropriate releases of liability as may be required to conclude a settlement.

(3) Payment of Money or Delivery of Property in Other Situations. In circumstances not involving a personal injury or wrongful death claim, a judicial officer assigned to hear matters arising under A.R.S. Title 14 may authorize establishment of a suitable trust or other arrangement to avoid the necessity of continuing court supervision if the judicial officer finds that the best interests of the minor or adult person in need of protection may be satisfied by the alternative arrangement.

(b) Petitioner. A petition for approval may be brought by a court-appointed guardian or conservator, a guardian *ad litem*, or other interested person.

(c) Considerations. If it is appropriate or necessary to assure fairness and justice for a minor, an adult in need of protection or other litigants, the court may appoint a representative pursuant to ARS §14-1408 or a master pursuant to Rule 53, Arizona Rules of Civil Procedure, with specific instructions to address (as may be applicable):

(1) The reasonableness of the settlement proposal,

(2) The attorney fees to be paid from the minor's or adult's settlement proceeds,

(3) The costs of litigation and apportionment of those costs,

(4) The effect of the settlement on eligibility for public benefits or other resources which might be available, and

(5) The proper apportionment of settlement proceeds among the various litigants.

(d) Orders. The court hearing the petition may enter any appropriate order under the authority of A.R.S.§§14-5408 and 14-5409, including an order authorizing a single transaction to approve such settlement and establishment of a protective arrangement other than a conservatorship. After considering the size and nature of the proceeds from such settlement, the age and sophistication of the minor or person in need of protection, the living arrangements and ongoing needs, the court may do one or more of the following:

(1) appoint a conservator;

(2) order establishment of an appropriate trust, including a special needs trust, with or without continuing court supervision, as authorized by ARS §14-5409(B),

(3) authorize all or a portion of the proceeds to be placed in an account pursuant to

(A) 26 U.S.C. 529 ("qualified tuition programs"),

(B) 26 U.S.C. 529A ("qualified ABLE programs"),

(C) 42 U.S.C. 1396p(d)(4)(C) (a pooled special needs trust),

(D) A.R.S 14-5408(C) (a "dignity account")

(4) in the case of a minor claimant, distribute the proceeds to a custodian under A.R.S. §14-7656(B) (the Uniform Transfers to Minors Act);

(5) distribute the proceeds to an appropriate person under A.R.S. § 14-5103 ("facility of payment or delivery") or to a guardian under A.R.S. § 14-5312(A)(4)(b);

(6) approve a structured settlement; or

(7) enter any other order authorized by statute.

(e) Duty to Inform. If a fiduciary or other interested person asks the court to approve a distribution from a conservatorship estate, a decedent's estate, or a trust, and if the fiduciary or interested party has knowledge one or more of the distributees is a minor, an incapacitated person, or a protected adult, the fiduciary or interested person must:

(1) notify the court of the distributee's status as a minor, an incapacitated person, or a protected adult; and

(2) if a court has appointed a guardian or conservator for the proposed distributee, or if a court has approved other protective arrangements for the proposed distributee, the fiduciary or interested person must provide the court with a copy of the order appointing the guardian or conservator or the order approving the protective arrangement. [**Note**: Section (e) was derived from current Rule 34.]

Rebecca White Berch (Justice, ret.), Chair
Task Force on the Arizona Rules of Probate Procedure, Petitioner
1501 W. Washington St.
Phoenix, AZ 85007

SUPREME COURT OF ARIZONA

PETITION TO ADOPT RULE 28.2, ARIZONA RULES OF PROBATE PROCEDURE	)	Supreme Court No. R-18-0037
	)	Emergency Adoption Requested

Rule 28(h), Rules of the Supreme Court, permits expedited consideration of a rule petition and emergency adoption of a court rule. Petitioner requests the Court's expedited consideration of this petition and emergency adoption of Rule 28.2, Arizona Rules of Probate Procedure. The proposed rule is appended to this petition.

1. <u>Background.</u> By the entry of Administrative Order No. 2017-133 on December 20, 2017, the Court established a Task Force on the Arizona Rules of Probate Procedure ("Task Force"). The undersigned was designated as the Task Force Chair.

The Arizona Rules of Probate Procedure ("Probate Rules") govern procedures in all probate proceedings, including guardianships. The Order directed the Task Force to review the current Probate Rules, and then to propose changes that simplify

and clarify these rules and conform them to contemporary practices. The Order set January 10, 2019 as a goal for the Task Force to file a rule petition seeking those changes. The Task Force has met regularly throughout 2018 to meet this goal.

2. <u>Reason for the adoption of Rule 28.2.</u> Current Probate Rule 3(A) provides, "Unless otherwise provided in these rules or inconsistent with these rules, the Arizona Rules of Civil Procedure apply to probate proceedings…." (The Task Force's proposed version of this rule similarly says, "The Arizona Rules of Civil Procedure apply to probate proceedings unless they are inconsistent with these probate rules….") There is no Probate Rule equivalent of Civil Rule 38(b), which concerns a demand for jury trial. Accordingly, this Civil Rule currently applies in probate proceedings. Current Civil Rule 38(b) permits a party to obtain a jury trial by filing and serving a timely demand for a jury.

At its August 2018 Rules Agenda, the Court entered Rules Order No. R-18-0018 and modified Civil Rule 38(b). The modified rule becomes effective on January 1, 2019. The R-18-0018 Order replaces the current title of Rule 38(b), "demand," with the new title of "waiver." The Order strikes all the text of current Rule 38(b) and replaces it with new text. The text of new section (b) provides that parties are deemed to have waived a right to trial by jury "only if they affirmatively waive that right." Put simply, under current Rule 38(b), a party must demand a jury trial; under new Rule 38(b), a jury trial is automatic unless waived.

New Rule 38(b) is impractical in guardianship proceedings in probate court. Under A.R.S. § 14-5303(C), an alleged incapacitated person has a right to trial by jury on a guardianship petition. Current Civil Rule 38(b) was not problematic because alleged incapacitated persons and their counsel rarely filed demands for jury trials. They are almost always satisfied with a bench trial. Under new Rule 38(b), however, these individuals will automatically have a jury trial unless they waive that right. The dilemma is that the great majority of these individuals lack the capacity to knowingly and intelligently waive that right. In the absence of waivers under new Civil Rule 38(b), the trial court will need to provide jury trials in guardianship proceedings beginning January 1, 2019.

The Task Force's rule petition, which it expects to file in January 2019, will include a new Probate Rule, numbered 28.2 and titled "Demand for Jury Trial." Rule 28.2 includes sections (a) ("demand"), (b) ("specifying issues"), and (c) ("waiver; withdrawal") modeled on current Civil Rule 38(b). Rule 28.2 also includes sections (d) ("if a demand is made), (e) ("if no demand is made"), and (f) (advisory jury; jury trial by consent") that are based on current Civil Rule 39. (The R-18-0018 Order also abrogates the text of current Civil Rule 39(a)-(c).)

Rather than waive a jury trial, as new Civil Rule 38(b) would require, Probate Rule 28.2 would require a party to a guardianship petition to affirmatively demand a jury trial. In the absence of a demand, the alleged incapacitated person would have

a trial to the court. Although Rule 28.2 would apply to any probate proceeding, as a practical matter it would apply primarily to guardianships.

3. Reasons for expedited adoption of Rule 28.2. The data book prepared by the Administrative Office of the Courts for calendar year 2017 reported that statewide, there were 205 jury trials in civil cases and 795 trials in criminal cases, or 1000 jury trials throughout Arizona. The data book also reported that during the same year that 4,740 guardianship and conservatorship cases were filed statewide. It did not differentiate how many of these were guardianships. However, Maricopa County data indicates that about 1800 guardianship petitions are filed annually. After adding in the other fourteen counties, there are probably more than 2000 guardianship petitions filed annually statewide.

If every guardianship petition resulted in an automatic jury trial, the number of jury trials statewide in 2019 would likely be triple the current number. If only half of the guardianship petitions resulted in an automatic jury trial, the number of jury trials statewide in 2019 would probably double. These increases would place a substantial strain on existing court resources. It would require the trial court to summon many more jurors to court and pay them for their service. It would increase the length of guardianship hearings and create tremendous backlogs in probate proceedings. It would probably have a ripple effect on other non-probate case types that require trials by jury.

4. <u>Request for expedited adoption.</u> To avoid the need for jury trials in guardianship proceedings beginning on January 1, 2019 — the effective date of new Rule 38 — petitioner requests that the Court adopt Probate Rule 28.2 on an emergency basis, with a concurrent effective date of January 1, 2019. The Court could thereafter

- open this emergency petition for comment, and

- consolidate the emergency petition with the global petition concerning the probate rules that the Task Force will file in January 2019, which will include Rule 28.2.

RESPECTFULLY SUBMITTED this __ day of December 2018.

By _____
Rebecca White Berch (Justice, ret.), Chair, Probate Rules Committee

Rule 28.2. Demand for Jury Trial.

(a) Demand. On any issue triable of right by a jury, a party may obtain a jury trial by filing and serving a written demand at any time after the proceeding is commenced, but no later than 30 days after the initial hearing on the petition. The demand may not be combined with any other motion or pleading filed with the court.

(b) Specifying Issues. In its demand, a party may specify the issues for which it requests a jury; otherwise, the party is deemed to have demanded a jury trial on all issues triable by jury. If a party has demanded a jury trial on only some issues, any other party may — within 10 days after the demand is served or within a shorter time ordered by the court — serve a demand for jury trial on any other or all factual issues triable by jury.

(c) Waiver; Withdrawal. A party waives a jury trial unless its demand is properly filed and served. A proper demand may be withdrawn only if all parties consent.

(d) If a Demand Is Made. If a jury trial is demanded, the action must be tried by jury unless:

> **(1)** all parties file a stipulation to a nonjury trial or so stipulate on the record; or
>
> **(2)** the court, on motion or on its own, finds that there is no right to a jury trial on some or all of those issues. ****See the note below**

(e) If No Demand Is Made. The court must try all issues on which a jury trial is not properly demanded. The court may, on motion, order a jury trial on any issue for which a jury might have been demanded.

(f) Advisory Jury; Jury Trial by Consent. In an action not triable of right by a jury, the court, on motion or on its own:

> **(1)** may try any issue with an advisory jury; or
>
> **(2)** may, with the parties' consent, order a jury trial on any issue, and the verdict will have the same effect as if a jury trial had been held as a matter of right.

**** Staff note regarding subpart (d)(1):** Perhaps a bit difficult to understand, since, if a demand is made under section a for an issue triable of right, it seems that there is then a right. If there is no right, then there is no right. Should we clarify or soften? Issues for which there is no jury trial of right may (must, unless there's a stipulation?) be tried by the Court. Unless the judge finds . . . that a jury trial on some or all of the issues would not be

appropriate? Would not be in a (possibly) protected person's best interests? Seems as though, if one party demands a jury, under the civ pro rules there is a right to it – indeed, under the civ pro rules, there's a presumption that it will happen.