Probate Rules Task Force

State Courts Building, Phoenix

Meeting Minutes: May 8, 2018

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

Absent: Hon. Wayne Yehling

Guests: None

AOC Staff: Theresa Barrett, Jodi Jerich, Mark Meltzer, Angela Pennington, Lou Ponesse, Jacob Oubre

1. Call to order; preliminary remarks; approval of meeting minutes. The Chair called the second Task Force meeting to order at 10:00 a.m. She welcomed the members and introduced a proxy. She advised that workgroups met seven times after the first Task Force meeting and prepared ten rules for presentation at today's meeting. She then asked members to review draft minutes of the first meeting. There were no corrections to the draft.

Motion: A member moved to approve the April 6, 2018 meeting minutes, the motion received a second, and it passed unanimously. **PRTF: 001**

2. OneDrive. The Chair had announced at the first meeting that members would utilize Microsoft's OneDrive, a cloud-based document storage application, to facilitate the members' collaboration on restyling the probate rules. OneDrive has been effectively used for other recent rules restyling projects, but some Task Force members have had difficulty using OneDrive's editing features. The Chair invited Lou Ponesse, manager of the AOC's Support Center, and Jacob Oubre, an AOC SharePoint administrator, to address this issue. Mr. Ponesse acknowledged the problem and informed members that it probably was the result of Microsoft's recent changes to OneDrive. Consequently, Task Force members who are not on the Court's intranet have limitations editing Word documents. Notwithstanding Microsoft's recent changes, members should be able to track their changes in online versions of the rules, but Microsoft has not yet fully implemented that function and it may take a couple more weeks for Microsoft to do so. Mr. Ponesse assured members that the origin of their problems is with Microsoft rather than the AOC, and he encouraged members to contact the Support Center for assistance, including a temporary workaround, as needed.

3. **Workgroup 2.** The Chair then requested reports from the workgroups on their assigned rules, beginning with Workgroup 2. She asked that members defer motions to approve rules because as the Task Force progresses, it might need to make subsequent modifications to rules it previously considered. But the Chair encouraged members to reach informal consensus today as they reviewed and discussed each rule.

Judge Olson presented four rules on behalf of Workgroup 2. Judge Olson first made observations concerning the intended audience for the restyled rules. If the Task Force believed that its intended audience is self-represented litigants, the rules could be written as a how-to user manual. But the information self-represented litigants rely upon is typically provided in printed forms and the instructions that accompany those forms. Workgroup 1 concluded that the real audience for the restyled rules is professionals, and it approached restyling with a view toward the needs of attorneys and licensed fiduciaries. Workgroup 2 was cautious about including exhaustive lists and statutory citations in its rules to avoid the unintended omission of any necessary details or provisions. Comments to Workgroup 2's rules are labeled "current comments" because the workgroup did not anticipate keeping any of them. Finally, Judge Olson noted that Rules 1, 2, and 3 are complementary and he requested members to consider them collectively.

Rule 1 ("Scope, Applicability, and Construction"): The workgroup spent hours on this rule over the course of two sessions. The workgroup's draft differs from the current rule because it has three sections (scope, applicability, and construction) rather than one. Section (a) concerning scope is brief and it defers to Rule 2 an enumeration of the types of probate proceedings. Section (b) regarding applicability informs users that the rules apply to parties who are self-represented as well as to those represented by counsel. The workgroup presented section (c) concerning construction in three versions, all of which included principles of construing the rules to effect "consistent, predictable, prompt, efficient, and just" resolution of probate proceedings. (Current Rule 1 does not include the principles of "consistent" or "predictable.") But the three section (c) versions had nuanced differences regarding the emphasis each placed on court enforcement of the rules.

Members had concerns that infrequent judicial enforcement of court rules resulted in increased costs and reduced consistency and predictability. But members also tried to balance the court's need to enforce rules without unduly limiting the court's necessary discretion in a myriad of circumstances. One member noted that few cases are contested. Most cases are uncontested and typically involve self-represented litigants or attorneys who "dabble" in probate, and judges should have considerable flexibility in fashioning a just process in those cases. In contested cases, by contrast, members believed the rules should be more than mere guidelines and should instead ensure that cases are litigated as the rules and statutes direct. Members had an extensive discussion of these concepts. They rejected suggestions to reverse the order of the verbs "construe" and "enforce," or

to substitute "interpret" for "construe." Members then agreed to the following version of Rule 1(c):

> The court must enforce and construe these rules in a manner that ensures a consistent, predictable, prompt, efficient, and just resolution of probate cases.

Members further agreed that it was not necessary to include in the restyling a comment to the current rule.

Rule 2 ("Probate Case and Proceedings"): Restyled Rule 2 was derived from current Rules 2(O) and 2(P). The restyled rule distinguishes a probate case from a probate proceeding and provides the meaning of the term "non-probate proceeding." A probate case is the basic container. It includes a probate case number and probate proceedings, and it may include non-probate proceedings. A probate case will include one or more probate proceedings arising under Title 14 or specified provisions of Title 12 or Title 36. A non-probate proceeding is one that could be filed as a separate case, that is, other than as a probate case, but it might also be appropriately filed within, or consolidated with, a probate case. A member suggested revising the text of Rule 2(a) to read, "These definitions distinguish between a probate case and the various proceedings that may occur within the case." Task Force members concurred with this suggestion and agreed that this sentence was clearer and more direct than the workgroup's draft.

In conjunction with Rule 2, members discussed surcharge actions. Can a third party be brought into a probate case in these actions without a summons? If they do not appear, can the court enter a default? Members distinguished situations where a person was already participating in a probate case from those where a new entity such as a bonding company was brought into the action. The latter could probably be sued in a civil action, the clerk would accordingly issue a summons, and a default procedure could occur if the defendant failed to respond. On the other hand, a fiduciary who has appeared in the probate proceeding is under the court's authority and need not be served with a summons, and members declined to incorporate a summons provision in the probate rules. However, one member recommended that even in this circumstance, a private process server should serve the fiduciary to confirm the fact of service. The court might also require personal service under A.R.S. § 14-1401, and the Chair suggested Workgroup 1 propose language for a rule if it believed one was necessary to address this issue.

Rule 2.1 ("Definitions"): Judge Olson described Rule 2.1 as the receptacle of definitions in the probate rules. The workgroup already deleted some definitions in current Rule 2 that it believed unnecessary, and members can add other definitions to Rule 2.1 as this project progresses. He suggested that if a definition is specific to a single rule, the rule should include the definition, but if the defined term appears in multiple rules, it should probably be defined in Rule 2.1. The Chair encouraged members to provide definitions that are meaningful for self-represented litigants. The Task Force will revisit this rule in the future.

Rule 3 ("Applicability of Other Rules"): Judge Olson coupled his discussion of Rule 2 with Rule 3. He noted the workgroup's simple provision, set forth in Rule 3(b), for applying other rule sets in non-probate proceedings. This provision says, "In non-probate proceedings, the same procedure and evidence rules apply as if the matter had been litigated as a separate action." Judge Olson believes this is a straightforward navigation provision that will direct users to the appropriate rule set in a non-probate proceeding. The appropriate rules could be civil or family, as current Rule 3 indicates, but they might also be eviction rules, protective order rules, or other rules. Judge Olson suggested changing the last word of Rule 3(b), "action," to the word "case." A member noted that in its draft, the workgroup had removed a specific reference in current Rule 3 to the juvenile rules, and that at least in Maricopa County, proceedings concerning guardians for minors occur in juvenile court rather than in the probate department. Judge Olson suggested addressing this by inserting the word "qualifying" before the word "civil" in Rule 2(d), which concerns the meaning of a non-probate proceeding, but members declined this suggestion pending further information about the statewide process for handling guardianships of minors. In this regard, members noted the last sentence of the current comment to Rule 3, which describes consolidation of a probate proceeding and a juvenile case. This led to a discussion of the entire comment. One member suggested retaining the comment and observed that the concept of a "case within a case" described in the comment is useful and illustrative. But after further review of the comment, members could not find enough justification to retain it and the comment will be removed for now. Generally, the Task Force will presumptively delete any current comment unless there is an articulated reason to keep it.

4. <u>Workgroup 1.</u> Judge Polk presented Rules 6 and 11 on behalf of the workgroup.

Rule 6 ("Probate Information Form"): The workgroup made stylistic changes to the draft. Substantive changes included the addition in section (c) ("required information") of the fiduciary's work and cell phone numbers, and an email address. Judge Polk explained that this is a confidential form the court uses to track fiduciaries, and the fiduciary's information might be used for issuing a fiduciary arrest warrant. Mr. Nash explained the clerk's process for keeping the information confidential. For unknown reasons, Pima County required the decedent's date of birth, and this data field was included in current Rule 6(c).

The workgroup proposed that it might be simpler and more effective to include the data fields specified in section (c) within a statewide form. The rule could direct fiduciaries to complete the form rather than detailing those fields in the rule. If the Task Force adopted this alternative, members inquired where fiduciaries would be able to find the form. Self-represented litigants might not readily look for the form in the Arizona Code of Judicial Administration, and the company that publishes court rules might not include forms in its products. Members also discussed whether a rule petition would be necessary whenever the form required amendment, which could be onerous. Staff noted

Rule 148(a) of the Justice Court Rules of Civil Procedure, which provides an expedient process for the AOC's administrative director to modify forms in response to changes in state laws or procedures, or to make administrative amendments or technical corrections, without the need to file a rule petition.

Regardless of whether a form is adopted, a judge member recommended that the rule should require sufficient information to locate fiduciaries. The member noted that courts cannot just close their files when fiduciaries fail to appear, and that courts spend considerable time and resources attempting to locate these individuals. Members discussed a range of new fields, including third party-contact information, which the members rejected; and prior addresses, maiden names, aliases, and photographs, or a copy of a driver's license or statewide identification card, which might be useful. One member was concerned that if the rule or form required more personal information, fiduciaries would submit incomplete forms. Another factor is that guardianships and conservatorships can last for decades, but fiduciaries rarely update the current information forms when their demographic information changes. It would be helpful to bolster the provision requiring updated information. To assess the need for fiduciaries' information, one member requested data on the number of fiduciary arrest warrants the court issues. Members were generally supportive of a statewide probate information form, and Workgroup 1 will create a form and return it to the Task Force for further discussion.

Rule 11 ("Telephonic Attendance and Testimony"): The Family Law Rules Task Force recently restyled its corresponding rule concerning telephonic appearances and testimony. Although the workgroup used that restyling as a model, Judge Polk noted that the workgroup modified that rule to meet the needs of a probate court. In doing so, the workgroup changed "telephonic appearance" to "telephonic attendance" to accommodate those who want to attend and listen without making a formal appearance. Judge Polk further explained distinctions in the draft rule between attending and testifying. Although the last paragraph of the current comment is advisory, he suggested retaining that paragraph in the restyling.

Judges from non-urban counties took exception to a provision in the draft rule that would require filing a motion to allow telephonic attendance or testimony no later than 30 days before the hearing. Those judges thought this time requirement was unrealistic and advised that many requests are filed at the last minute. One judge described last-minute requests as routine, and thought that in uncontested matters, the requests should be presumptively granted. Another judge observed that some minute entries advise parties that they may attend telephonically without the necessity of a request. One judge noted a preference for allowing requests filed on the day of a hearing because that would be consistent with the principles enumerated in Rule 1.

Members considered adding a "good cause" requirement that would permit a judge to waive the 30-day limit, but other members disagreed with that addition. Some

believed a provision in the draft could allow a judge to authorize a shorter time, but this would necessitate two filings, first to allow filing a request within 30 days of a hearing, and second, filing the actual request after the court grants the first. But other members thought the rule should require some notice, particularly for a request to allow a witness' telephonic testimony or for any evidentiary hearing. As a compromise, a member suggested filing a notice rather than a motion, because a party could choose not to object to the former. Another member noted that telephonic appearances reduce the parties' expenses, and the request process should be accordingly simple. A judge member cautioned against a one-size-fits-all rule. For example, a status conference should be amenable to telephonic attendance, but the number of parties might make that impractical. If everyone on a long calendar of uncontested hearings wanted to attend by telephone, it might create logistical issues for the court. The judge suggested that the rule provide for considerable judicial discretion in allowing telephonic attendance.

The Chair concluded the discussion by directing Workgroup 1 to prepare an alternative version with some notice provision and with consideration of the members' comments at today's meeting.

5. Workgroup 3. Judge Mackey presented four rules on behalf of Workgroup 3.

Rule 20 ("Affidavit of Proposed Guardian or Conservator"): Current Rule 20 is a single sentence followed by an exception contained in a longer comment. Both the rule and the comment include a statutory reference. Workgroup 3 reorganized Rule 20 into two sections; the first section is based on the current rule, and the second section is taken from the comment. Notwithstanding, the workgroup questioned whether it was necessary to retain the rule, because its substance also is in the referenced statute. The Chair noted that when a substantive requirement is in a statute, we should not repeat it in a rule, unless the intent is to assist self-represented litigants, in which event we should repeat it. Members agreed that incorporating some statutory requirements in rules while omitting others was an irrational approach. Moreover, if a rule repeats the content of a statute, the rule would require amendment for any statutory change. After discussion, the members' consensus was to recommend abrogation of Rule 20.

Rule 21 ("Background Check Requirements"): A similar discussion ensued regarding Rule 21: what is the reason for this rule if its requirements are specified by statute? If self-represented litigants need to know about it, members agreed they should instead have access to a handbook that sets out the statutory requirements. One member proposed striking every probate rule that incorporates statutory provisions. Although the members did not go that far, they did agree to recommend the abrogation of Rule 21.

Rule 26.1 ("Request for Findings on Appointment"): The substantive content of this rule is also covered by statute. Although the workgroup considered whether to retain this rule to address the priority for appointment of a guardian of a minor, it concluded that this alone was not a sufficient basis for keeping the rule. Accordingly, the workgroup recommended abrogating Rule 26.1, and the Task Force concurred.

Rule 27.1 ("Training for Non-Licensed Fiduciaries"): The workgroup noted that this rule does not fit well in its current location within Part V ("contested probate proceedings"), and it recommended relocating these provisions to Part IV, which concerns the appointment of fiduciaries. Task Force members agreed. Ms. Appel also explained other proposed restyling modifications to the draft. A member asked whether the Certificate of Completion referenced in section (a) was filed with the court, as specified in the rule. Mr. Nash noted that the clerk requires the certificate or other proof of training, such as a finding in a minute entry. Accordingly, section (a) includes the phrase, "unless the court orders otherwise." One member advised that the training appears to consist of simply a dozen PowerPoint slides, with the last slide constituting the Certificate of Completion. Members agreed that the Task Force should recommend to the AOC's Education Services Division that the training be sufficiently robust and topically specific; and if it is presented as a PowerPoint presentation, that there be some means to authenticate that the fiduciary in fact read the presentation.

Because the title of Rule 27.1 refers to non-licensed fiduciaries, a member inquired why section (b), which excepts licensed fiduciaries and financial institutions from the section (a) training requirement, was necessary. One member responded that the rule title is not part of the rule's substance, so the exceptions need to be specified in the body of the rule. A judge member supported retaining section (b), which includes statutory references that contain the definition of a financial institution. The member was concerned that this term would be undefined if section (b) was deleted. Another member observed that although financial institutions are exempt from the licensing requirement for fiduciaries under A.R.S. § 14-5651, they are only exempt from the non-licensed fiduciary training requirement because of the language of Rule 27.1(b). The member noted that removing section (b) would require financial institutions to have the specified training, so the abrogation of section (b) might have untoward consequences. Members considered two alternatives to address this issue. One alternative would add language in section (a) containing an exception for financial institutions; the other alternative was to retain section (b). Although a majority initially favored the first alternative, Mr. Nash favored the second option because the rule is more directive if the exceptions are explicitly specified. Another member favored retaining section (b) to not rile financial institutions. Also, removal of section (b) would necessitate a definition of financial institutions and licensed fiduciaries elsewhere, probably in Rule 2.1. One member suggested new language in section (a) to address fiduciaries licensed by the AOC and financial institutions as defined under pertinent statutes. Workgroup 1 volunteered to work on this issue further and to obtain input from Workgroup 3.

6. <u>Roadmap.</u> The previously proposed meeting date of Friday, June 8 is no longer available. Based on members' indicated availability, the Chair confirmed a new date for the third Task Force meeting: Friday, June 15, beginning at 10 a.m. in Conference Room 119. She also suggested either Friday, July 13, or Friday, July 27, for the fourth Task Force meeting. She directed staff to poll the members after today's meeting for their availability on these two dates. In response to a question from a member, the Chair and

staff confirmed that meeting materials were available to the public on the Task Force webpage.

The Chair commended the workgroups for their progress and the members for the quality of today's discussions.

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

8. **Adjourn.** The meeting adjourned at 2:19 p.m.