Probate Rules Task Force

State Courts Building, Phoenix

Meeting Minutes: August 24, 2018

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

Absent: Hon. David Mackey, Hon. Robert Carter Olson, Lisa Price, Hon. Wayne Yehling

Guests: None

AOC Staff: Jodi Jerich, Mark Meltzer, Angela Pennington

1. Call to order; preliminary remarks; approval of meeting minutes. The Chair called the fifth Task Force meeting to order at 10:01 a.m. She noted that each workgroup has met at least once since the July 27 meeting, and each workgroup has scheduled another meeting after today. The Chair then asked members to review draft minutes of the fourth Task Force meeting.

Motion: A member moved to approve the July 27, 2018 meeting minutes, the motion received a second, and it passed unanimously. **PRTF: 004**

2. Consent agenda. Five rules that the Task Force previously discussed were returned to their respective workgroups for further modifications and then placed on today's consent agenda for abbreviated discussion.

Rule 11 ("Telephonic and video attendance and testimony"): Judge Polk advised that Workgroup 1 eliminated option 2 (containing a 30-day deadline for making a request) and retained option 1 (permitting a person to make the request in a timely manner considering the specified circumstances). As directed by the Task Force at the July 27 meeting, Workgroup 1 added the introductory words "unless otherwise provided by local rule" at the start of Rule 11(d) ("time for making request"). Members had no further changes to this rule.

Rule 16 ("applications in probate proceedings"): Mr. Barron noted that following input from the Maricopa Probate Registrar at the July 27 meeting, the workgroup deleted a draft phrase in Rule 16(c)(2) that would have required the registrar to act on an application within two business hours. Members concurred with the deletion. Judge Polk had one additional suggestion regarding Rule 16(e). The draft refers to "relief requested or granted in an application." But the application does not grant relief. That is done by

court order. Judge Polk requested removal of the words "or granted," and members agreed with his request.

Rule 17 ("petitions in probate proceedings"): Mr. Barron noted that in Rule 17(a) ("meaning of petition"), the workgroup added a new sentence to clarify that a petition "includes a counter petition, cross-petition, and third-party petition." The workgroup also added the word "initial" before the word "hearing" in the title and body of section (c).

Section (e) ("response to a petition") requires anyone who opposes the relief requested in a petition to file a response no later than 7 days before the hearing. By statute, a petition can be served just 14 days before the hearing, and Judge Plante observed that the schedule in section (e) allows only 7 days to file a response. The interested person might be out-of-state, but even if in-state, this schedule requires a person who wishes to use an attorney to locate, meet with, and retain the attorney, and have the attorney file a response, within one week. Judge Plante proposed modifying the rule to permit the filing of a response up to and including the hearing date. The current rule requires the filing of a response 3 days before the hearing. A member suggested changing the proposed 7 days to two days. Another member explained that the Task Force's rationale for changing the 3-day rule to 7 days was to allow timely processing of a paper response and to assure it would be in the court file on the day of the hearing because the probate court still does not have the benefit of more expeditious electronic filing. Notwithstanding, anyone can still appear on the hearing date, even telephonically, to verbally object and then file a response thereafter. On a straw vote, all but two members preferred to leave the time at 7 days.

Judge Polk added that if the Task Force adopts Workgroup 1's proposed revisions to Rule 12, Rules 17(c) ("initial hearing date") and 17(d) ("notice of hearing on the petition") would be redundant and could be deleted. He also noted that Rule 17 variously uses the terms "response," "objection," or "opposition." Members discussed this and concluded that the usages were appropriate when considered in their context. Mr. Barron observed that a response also could be a joinder, and he advised that Workgroup 2 would review the rule further to assure these terms are used correctly.

Rule 22 ("order appointing guardian, etc."): Mr. Fleming noted that although Workgroup 3 had not yet incorporated revisions recommended by the Task Force, he was able to address them, specifically:

- In Rule 22(b)(1) ("generally"), he would delete the words "authority to manage the estate's assets," and would substitute the word "powers."
- He would transfer the remainder of subpart (b)(1), including subparts (b)(1)(A), (b)(1)(B), and (b)(1)(C) as a comment to Rule 22.

- He would change the introductory phrase of the comment by adding the words shown with underline: "examples of restrictions might include but are not limited to the following."

Members agreed to the foregoing modifications. Judge Polk suggested an additional revision to subpart (b)(2) ("proof of restricted account"). The current draft requires that proof be filed within 30 days, but occasionally filing a proof takes more time, or can be accomplished more quickly. Accordingly, Judge Polk proposed adding the following sentence: "For good cause, the court may shorten or enlarge this deadline." Members agreed to this addition and they approved Rule 22 as modified.

Rule 29 ("alternative dispute resolution"): Mr. Barron explained the workgroup's recent modification to this rule. The three sections of the previous draft have become two sections. Furthermore, the rule now provides that unless the parties agree, they are not subject to the compulsory arbitration provisions of the civil rules. Finally, the duties to confer and participate are now in separate sentences in the rule. Members had no questions or objections concerning these modifications.

3. Workgroup 1. The Chair then invited Judge Polk to present Workgroup 1 rules.

Rules 12.1 to 12.5 ("Conference; oral argument; settlement conference; evidentiary hearing; compliance and order to show cause hearings"): Without presenting a draft, Judge Polk introduced this series of rules concerning court events at the July 27 Task Force meeting. This is his first presentation of the workgroup's draft. The series as originally envisioned included two court events, "other hearings" and "divisional review," which the workgroup eliminated in the draft. Judge Polk asked members to consider these rules as a group. He added that if the Task Force approves this series of rules, they probably should precede Rule 9.

Judge Polk reviewed each of these rules. In Rule 12.1 on conferences, he noted sections containing a definition, how a conference is set, notice of a conference, attendance at a conference, and evidence ("evidence may not be presented.") Rule 12.2 provides that evidence may not be presented at oral argument. Although evidence is defined in Rule 2.1, members did not want Rule 12.2 to be misconstrued and result in exclusion of exhibits at oral argument that are appended to a motion. Accordingly, members agreed to change this to say that testimony may not be presented at oral argument. Rule 12.4 pertains to an evidentiary hearing, which includes a bench or jury trial. On a straw vote, 8 members favored including Rules 12.1-12.5 in their recommended draft, and 3 opposed inclusion.

Rule 12 ("Initial hearing on a petition") and Rule 9 ("Notice of initial hearing on petition"): Judge Polk first noted that the revised version of Rule 12 includes short and

simple explanations of setting the hearing, notice, attendance, the procedure, and when evidence may be presented. Unlike the previous draft of this rule, the revised version eliminated the nomenclature of appearance and non-appearance hearings. Instead, and unless the court specifies otherwise, the petitioner must attend; likewise, interested persons who do not object to the requested relief need not attend. But anyone who opposes the requested relief and who has not filed a written objection at least 7 days before the hearing must attend and object. The hearing is denominated the "initial" hearing to recognize that there may be subsequent court events.

Judge Polk proceeded to an explanation of Rule 9 and noted that members should consider Rules 9 and 12 as a package because they interact. Rule 9, like Rule 12, refers to the "initial" hearing. The workgroup eliminated the Spanish translation of the required warning in the Rule 9 notice ("this is a legal notice; your rights may be affected") because it was only translated a portion of the warning. In the English version of the warning, the workgroup added the new sentence, "you are not required to attend this hearing," with the additional caveat that attendance is required if the person opposes the relief requested by the petition. To lengthen the permitted time for responding to a petition, one member would remove the word "not" in draft Rule 9(e) ("the provisions of [Civil] Rule 6(c) [that provide additional time for service by mail] do not apply to notices of hearings in probate proceedings…." However, other members disagreed and left the word "not" in the draft.

A member asked whether a party could attend an initial hearing through their attorney, or whether personal attendance was required. Members reviewed the definition of "attend" in Rule 2.1 and concluded that attendance by counsel was sufficient. However, Rule 12(c)(1) specifically refers to the attendance by "petitioner and petitioner's attorney." To avoid confusion, members thought the notice of hearing should say whether the petitioner is required to attend, and in addition, the rule should have a provision advising that the notice must include this information. Members instead addressed this by removing the words "and petitioner's attorney" from the title and body of subpart (c)(1).

Another member questioned whether the revised version of Rule 12 addressed the underlying need to explain the meaning of a non-appearance hearing. Although it often is not a hearing, people still show up. The member proposed modifying current Rule 12 to simply explain that people don't always need to appear at a non-appearance hearing. In response, a judge member observed that the concept of a non-appearance hearing is troublesome for judicial officers as well as others because a hearing implies a court event. The Chair commented that the proposed rules demystify the process, while also recognizing that the concept of a non-appearance hearing has utility. Commissioner Connors noted that about two-thirds of her docket consists of non-appearance hearings, primarily accountings and guardians' reports. Does the Task Force need to define the term, or can it, as Workgroup 1 proposed, refer to it as a hearing that people don't need

to attend? Should a hearing notice explicitly identify a certain hearing as one where attendance isn't necessary? Should the draft rule include a comment advising that a hearing where attendance isn't required was formerly known as a non-appearance hearing?

A judge member observed that regardless of which terms are in the final draft, self-represented persons should understand those terms. Another judge member thought that when a petition is filed, the notice should simply say who needs to attend, and that defining a confusing term will not eliminate confusion. A straw vote on the question showed 4 members would incorporate the term "non-appearance hearing" in the Task Force draft with a definition of the term, and 6 members favored not using that term. The Chair stated that the rule petition would note the split of opinion, but it was unnecessary to include a comment in the rule. A member proposed consolidating draft Rules 9 and 12 into a single rule, but the proposal garnered no support. Members also discussed removal of the Spanish translation in Rule 9. Although only a portion of the warning was translated, members thought this would put the reader on notice to find someone who could translate the remainder; and it was important to leave this language in the notice because it is served by mail, which might not put the recipient on notice of its importance as personal service by a process server would do. By a margin of 2:1, members favored retaining the Spanish translation. Members also supported Rule 9 as revised, but two members opposed the revised draft. Rules 9 and 12 are accordingly approved.

4. **Workgroup 2.** Mr. Barron led the presentations.

Rule 28 ("Pretrial procedures"): Mr. Barron advised that the workgroup has not yet completed its draft of this rule, and it may modify certain provisions to conform to the recently drafted Rules 12.1-12.5. He read to members a proposed provision (Rule 28.1) on disclosure and discovery that says, "Unless the parties agree or the court orders otherwise, the tiering requirements in Civil Rule 26.2 do not apply to discovery in a probate case. Unless inconsistent with these rules, Rules 26 through 37 of the Arizona Rules of Civil Procedure apply to discovery and disclosure in contested probate proceedings." However, this is only a preliminary draft.

Mr. Barron proceeded to a question recently posed by a Maricopa County probate commissioner about whether the Task Force is going to recommend a probate rule that corresponds with new Civil Rule 26(f). Civil Rule 26(f) ("timing and sequence of discovery") provides that "a party may not seek discovery from any source, including nonparties, before that party serves its initial disclosure statement under Rule 26.1." The commissioner was concerned that a corresponding probate rule could impair the gathering of information that assists in promptly marshalling estate assets. The commissioner also thought the probate rules should expressly allow immediate use of subpoenas by a court-appointed fiduciary to obtain necessary information in furtherance

of the fiduciary's duties. Mr. Barron did not believe the workgroup's proposal would follow the civil rule in this regard, but he requested the members' input.

Members discussed probate case scenarios where subpoenas would be useful early in a case, including cases that were not contested. Most agreed that Civil Rule 26(f) wouldn't work well in probate. A judge member concurred with the commissioner's belief that appointed fiduciaries should be able to subpoena information to perform their duties. But members also recognized that some pre-disclosure discovery is undertaken by aggressive litigators, and that should be curtailed. One member thought the assigned judge should control discovery. Another thought that an early and reasonable request to use discovery could be approved by a judicial officer, but the Chair did not believe judicial approval should be necessary for a routine discovery request. After further discussion, members concluded that the probate rules should not include an analog to Civil Rule 26(f), and Mr. Barron advised that the workgroup would proceed with its draft accordingly.

Mr. Barron then turned to a partial draft concerning pretrial procedures that the workgroup prepared after a discussion at the previous Task Force meeting: proposed Rule 28.2, "Tiered Limits to Discovery Based on Attributes of Cases." Mr. Barron referred to this draft as the workgroup's "thought experiment" on this subject. It generally parallels new Civil Rule 26.2, but its details are tailored for probate proceedings. Furthermore, unlike the 3 tiers in Civil Rule 26.2, draft Probate Rule 28.2 has 4 tiers. Mr. Barron explained that the probate draft contemplates that no previous discovery was undertaken in the case. He explained the characteristics of Tier 1 cases, which have a minimal number of witnesses and could probably be tried in one day; and Tier 3 cases, which are truly complex probate matters requiring 5 or more days of trial. Tier 2 would have cases that did not easily fit into Tiers 1 or 3. The fourth tier was denominated "Tier X." Cases in this tier, such as many guardianship proceedings, would require *de minimis* discovery. Mr. Barron also suggested that the members consider a rule with no discovery tiers or presumptions, and which instead would provide that discovery would be governed by an individualized scheduling order. The Chair opened these proposals for comment.

The first member to comment proposed a third alternative, a generic rule providing that discovery must be proportional to specified factors. The member thought there were too many variables in probate cases for assigning them to tiers and supported the proposal for a scheduling conference. Mr. Barron thought the term "proportional" was amorphous and poorly defined, and that a structured, tiered system of discovery, with discretion to deviate, might work better. Another member proposed a two-tiered system: one tier like XX (but possibly called "Tier P") for simple cases that could be quickly tried, and another tier for all other cases. More than one member observed that probate cases are not well-suited for tiering based on monetary amounts at issue. A judge member observed that guardianships are more analogous to criminal than civil cases because liberty interests are at stake in guardianships, and there should be no discovery

limits for those cases. A member proposed a preface to the probate discovery rule stating that attorneys have a duty to act responsibly in undertaking discovery. A couple members supported the concept of allowing parties to conduct discovery until someone objected, and at that point, the parties would need to speak with the judge, who would make a proportionality determination before allowing further discovery. Similarly, another member proposed initially assigning every case to Tier 2, and the parties would only need to see the judge if that tier was inappropriate. A member noted that there are fee-shifting provisions in Title 14 statutes that might be pertinent. Another member returned to Mr. Barron's proposal about individualized scheduling orders and suggested that there should be no presumptive limits on discovery before the court enters a scheduling order. Finally, a member mentioned that tiering in civil cases became effective on July 1, and it would be helpful if we could wait to see how it's working before finalizing a probate discovery rule. Mr. Barron thanked the members for their comments, which Workgroup 2 will consider further when it reconvenes.

5. **Workgroup 3.** Mr. Fleming presented on the workgroup's behalf.

Rule 37 (now, "Settlements involving minors or adults in need of protection"): Mr. Fleming reviewed changes the workgroup made to this rule after the previous Task Force meeting. He first noted that in subpart (a)(1) ("settlement of a minor's claim for less than $10,000"), the workgroup added words allowing the court to "authorize the recipient to execute appropriate releases of liability as may be required to conclude a settlement." Executing a release is usually a necessary adjunct of settlement. He then noted a new subpart (a)(3) ("payment of money or delivery of property in other situations"). In circumstances other than a personal injury or wrongful death claim, this new provision allows a judicial officer who is assigned to hear matters under Title 14 to authorize the establishment of a trust or other arrangement, if doing so would be in the best interests of the minor or adult person in need of protection and to avoid the necessity of continuing court supervision. In section (d) ("orders"), newly added language gives the court additional options after a settlement, including appointing a conservator, establishing a special needs trust, or approving a structured settlement. The members removed subpart (d)(7), which would permit approval of a deposit in a restricted account under A.R.S. § 14-5411(A), because that option is already provided by statute. Members supported all these additions.

A member raised the holding in *Gomez v. Maricopa County*, 175 Ariz. 469 (Ariz. App., 1993). In that case, a mother gave a power of attorney to a relative to settle a wrongful death claim on behalf of her and the decedent's children; the relative proceeded to settle the claim. The opinion held that because the court neither appointed a guardian to act on the minors' behalf nor approved the settlement, the settlement agreement did not bar the children's subsequent action. The member's concern was that draft subpart (a)(1), which permits approval of a settlement by a judge who is not assigned to hear Title 14 cases and who therefore might not establish a conservatorship, could conflict with the holding in *Gomez*. The Chair suggested that members note this issue in their rule petition.

A member observed that use of the word "settlement" in this rule is now inappropriate because the addition of subpart (a)(3) would allow the court to approve such things as receipt of an inheritance or a payment under the decedent's life insurance policy. In the title of the rule, and as applicable in the body of the rule, members therefore changed "settlement" to "financial recovery." Finally, Judge Polk reminded members that they had previously agreed to recommend an amendment to the civil rules that would add a provision that corresponded to Probate Rule 37. This will abide further Task Force action.

Rule 24 (currently, "Appointment of a guardian with inpatient mental health authority," and as proposed, "Order appointing a guardian with inpatient mental health authority;" and Rule 36 ("Renewal of guardian's inpatient mental health authority"): Mr. Fleming provided background for these two rules. Years ago, a guardian appointed under Title 36 for a gravely disabled person could not consent for the ward's treatment in a level one mental health facility. To remedy this, the Legislature adopted A.R.S. § 14-5312.01. Thereafter, the Court adopted Probate Rules 24 and 36, which align with the statute and provide for due process. The requirements of due process include the appointment of counsel, opinions of a medical expert, and a court hearing. If these requirements were met, the appointed guardian could consent for the ward's in-patient mental health care.

Rules 24 and 36 were placed apart in the rule book, not proximate to each other, and the workgroup recommended, because of their specialized subject, that they be in their own compartmentalized part of the rules. The workgroup tentatively created a Part VII of the Probate Rules titled "guardians with inpatient mental health authority." Rules 24 and 36 would need to be renumbered, so for the time being, the workgroup designated them as ## and ###. However, Mr. Fleming noted the possibility of consolidating them into a single rule. The draft rules conform the provisions to current practices and nomenclature, including referring to inpatient mental health facilities licensed by the Arizona Department of Health Services rather than level one facilities. These rules address issues of attorney appointments and the guardian's authority. Like the current rule, they also provide that if the guardian does not timely renew its authority, the guardian must file a new petition. Members then discussed the draft.

One member had concerns with what constituted an inpatient mental health facility. For example, would a locked group home fit within the scope of the rule? Ms. Jerich reviewed the statutory definition, and members then concluded that while a group home may be licensed, it is not licensed as an inpatient psychiatric facility. Members also discussed the relationship between facilities licensed by statute and those licensed by the Arizona Administrative Code. Some believe the draft rule should accommodate both.

A member then asked about the renewal process, and how the court would be informed that a court order had expired. It appears that the court does not track the expiration dates of these orders and it does not do internal reviews; the motion to renew

is normally the trigger for review, but if none is filed, the court takes no action. Members discussed circumstances where the order expires but the ward continues to be in an inpatient mental health facility. Although the statute and rules are intended to provide a sensible process that meets due process standards, issues remain. The workgroup's draft contemplated orders for longer than one year, but members construed the statute as creating a one-year cycle. This requires new letters, and therefore formal renewal, every year. Any revised rule should accordingly be premised on a one-year cycle. Members also agreed that the letters should show the date the guardian's authority to consent will expire.

Section (a) requires clear and convincing evidence; a member noted that the rule does not answer the question, clear and convincing evidence of what? In section ##(e) ("acknowledgement"), a member suggested that the "duty to consent" should be changed to "power to consent," and members agreed with this change. Members made other grammatical changes to the draft.

The workgroup will work on these rules and return with a revised draft. Members had no objection to the workgroup consolidating both rules into one, if possible.

6. <u>Non-Title 14 cases in probate court.</u> The Chair invited Judge Polk to provide new information on non-Title 14 filings in probate court. Judge Polk confirmed that he is seeing an increase in non-probate civil filings under the probate case number. He acknowledged that these filings are authorized by law, and he does not know if the increase is limited to Maricopa County. Nonetheless, he described issues that are consequences of the increase, including the following:

- Probate court administrators are unable to adequately track the civil filings; for example, their case management system does not establish deadlines for service of a summons.
- Parties who file a new civil case under the probate number aren't required to pay a filing fee as they would if filing at the civil filing counter.
- Different cases aren't differentiated in the probate file by distinct case numbers.
- The probate court is unable to determine whether the civil cases are meeting the Supreme Court's time standards; for data purposes, only the main probate case is tracked.
- The proper procedure for family cases filed in probate is occasionally not followed because filing a separate family court case triggers family-related processes; he provided an example where a respondent to a dissolution petition was served with a notice of hearing rather than a summons and wasn't served with a mandatory preliminary injunction.
- When there are civil cases within a probate case, it complicates who gets notice; sometimes everyone gets notice, which results in parties showing up in court when they don't need to attend, causing expense, and sometimes delay and confusion as well.

- The case-within-a-case complicates who can file a notice of change of judge.
- If a civil case is concluded in probate court, the probate court does not get statistical credit for the adjudication.

Conceptually, Judge Polk would revise Probate Rules 2 and 3 so that filing non-probate actions would be filed in the department in which they ordinarily would be filed. He recognized an exception for civil exploitation cases. Mr. Nash concurred; from the Clerk's perspective, and especially when considering the payment of filing fees and judicial assignments, it's cleaner to file civil cases in the civil department. The Chair asked members to comment.

One member proposed a bankruptcy-type case numbering system, which has a number for the main action and sub-numbers for ancillary actions. But without more sophisticated case management systems, even that would be problematic for tracking cases and computing compliance with time standards. Judge Polk noted that unlike the civil and family law departments, the probate department does not have electronic filing, and this technology offers efficiencies that the probate court lacks. He reiterated that the problem cannot be fully resolved simply by having suffixes on case numbers or different color file folders. Another member recalled that the purpose of allowing civil and family actions in probate court is to have a judge who can see the big picture and maintain a watchful eye. Having such a judge benefits protected persons and estates. Judge Polk responded that it's one thing for a fiduciary to file certain types of claims against a third-party in probate court, and another when the third-party files a garden-variety claim against the fiduciary. Routine collections cases should be handled as civil cases. A member expressed concern with clients having to pay a civil filing fee in addition to a probate filing fee. One member noted the differences between courts in large Arizona counties, which might have specialized departments, and a small county with a single judge or few judges. The member noted that each county might adopt local rules on the issue under discussion. A member asked whether the focus be on how a case is administered, or what the case concerns.

To conclude, Judge Polk noted that some probate cases have become complex because of non-probate litigation within those cases. He emphasized the importance of determining with more specificity the types of cases that are in probate court, and how data should demonstrate what is being accomplished in those cases. The Chair agreed; consideration should be given to the logistical details and ensuring that cases are appropriately monitored and processed. Workgroup 1 may take a further look at this issue and how it might be addressed in Part I of the Probate Rules ("scope of rules, definitions, applicability of other rules").

7. **Roadmap.** The Chair confirmed the next Task Force meeting date of Friday, September 28. Judge Norris will chair the meeting on Friday, October 26. Subsequent meetings are on Friday, November 16, and Friday, December 14.

The Chair encouraged members to use their best efforts at workgroup meetings to review the remaining rules. She reminded members of our goal of requesting feedback on the completed draft set of rules from stakeholders before filing a rule petition in January 2019. She added that the Task Force also will need time before January to prepare the rule petition and appendices. She encouraged workgroups to meet as often as necessary to meet these objectives.

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

9. **Adjourn.** The meeting adjourned at 3:10 p.m.