Probate Rules Task Force

State Courts Building, Phoenix

Meeting Minutes: September 28, 2018

Members attending: Hon. Rebecca Berch (Chair), John Barron III, Colleen Cacy, Hon. Julia Connors, Robert Fleming, Hon. David Mackey, Aaron Nash, Hon. Robert Carter Olson, Hon. John Paul Plante, Hon. Jay Polk, Lisa Price, Catherine Robbins, T.J. Ryan, Denice Shepherd

Absent: Marlene Appel, Hon. Andrew Klein, Hon. Patricia Norris, 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 sixth Task Force meeting to order at 10:00 a.m. She informed members that workgroups had met seven times after the August 24 Task Force, and she thanked members for their diligence. The Chair then asked members to review draft minutes of the August 24 Task Force meeting. Mr. Nash had advised staff earlier in the week of an error on page 1 regarding Rule 11; the minutes correctly say that the Task Force eliminated option 2, but they should further say that the members retained option 1, not 2. Also, on page 1, regarding Rule 16, Judge Polk requested that the word "registrar" be changed to "application" in the sentence, "but the registrar does not grant relief." Members agreed with these changes.

> **Motion:** A member then moved to approve the August 24, 2018 meeting minutes with the above corrections. The motion received a second and it passed unanimously. **PRTF: 005**

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

Rule 17 ("petitions in probate proceedings"): Judge Polk observed at the August 24 meeting that Rule 17(e) variously uses the terms "response," "objection," or "opposition." The Task Force returned the rule to Workgroup 2 to harmonize this diverse terminology. The workgroup revised the rule thereafter, and now it uniformly refers to a "response." Mr. Barron noted that a "response" includes an "objection." Members agreed with the revisions.

Judge Polk raised two new issues under Rule 17(e). Under the time computation provisions of Civil Rule 6(a)(2), intermediate Saturdays, Sundays, and legal holidays are excluded if the period is less than 11 days. By statute, a petition must be served at least 14 days before a hearing. The draft rule requires the filing of a written response 7 days

before the hearing. The 14-day requirement is based on calendar days, but the 7-day rule requirement would exclude intermediate weekends and holidays, so it could be 10 or 11 calendar days. This narrows the opportunity to respond to as few as 3 days. Another provision in Rule 17 has a 10-day requirement, but this would also exclude intermediate weekends and holidays under Civil Rule 6(a)(2). Members discussed ways of addressing this issue. One way would specify in Rule 17 —and in every other rule that mentions a time requirement — whether the reference is to calendar days or court days. Another would address the issue by instructions in court forms. Mr. Barron proposed that Rule 17(e) specify 7 calendar days for the response, and that the 10-day requirement be changed to 14 days, thereby eliminating the application of Civil Rule 6(a)(2). Members agreed with this proposal and directed staff to modify the draft accordingly.

Judge Polk's second issue asked whether a counter petition or cross-petition requires a new hearing date; he thought draft Rule 17 did not answer this. Members agreed that whether another hearing date is needed probably depends on the timing of the counter petition or cross-petition. If either are filed sufficiently early, they could be considered at the initial hearing along with the original petition. Otherwise, it's the filer's responsibility to assure there is a hearing date. Members saw no need to address this in the rule.

Rule 3 ("applicability of other rules"): Draft Rule 3(a)(2) concerns the applicability of the Arizona Rules of Evidence ("ARE"). Judge Thumma, Judge Agne, and Mikel Steinfeld submitted a memo (the "Thumma memo") to the Task Force with proposed changes to Rule 3(a)(2). To be consistent with the ARE, they suggested that Rule 3(a)(2) refer to "a danger of" such things as unfair prejudice or confusing the jury. They also proposed organizational changes and a new subpart concerning the admissibility of evidence when the ARE do not apply.

Members favored adding to the Probate Rules a provision from the Family Law Rules that requires a party who wants to invoke the ARE to do so in advance of a proceeding. One member suggested that whether a party will invoke the rules should be on the list of items discussed at the initial hearing. But regardless and as a practical matter, doesn't the court admit most of what is offered by a self-represented litigant? Members also agreed that the Probate Rules should address, like a family law rule, whether reports prepared at the court's direction, such as a physician's or investigator's report, should be admitted automatically. The Chair asked Workgroup 2 to further review the Thumma memo and its suggested changes, and to report back to the Task Force at a future meeting.

The Chair then requested reports from the workgroups.

3. **<u>Workgroup 1.</u>** Judge Polk presented rules on behalf of Workgroup 1.

Rule 14 (currently, "consents, waivers, renunciations, and nominations," and as proposed, "acknowledgment of a consent, waiver, renunciation, or nomination"): Judge Polk observed that this rule intends to permit either a notary or a person such as a notary to verify the identity of the signer of specified documents. A brief new comment to this rule refers to A.R.S. § 33-511, which details who in Arizona may take acknowledgments. One member noted that it is often difficult to locate a notary, and even if one of the specified documents is notarized, a party may still object to its authenticity. Another member responded that the rule is designed to reduce instances of fraud, and is some states, the notary process may be digitized. Most members approved the rule and its requirement that a person such as a notary verify the identity of the signer.

Rule 15 (currently, "proposed orders," and as presented, "proposed orders, decrees, and judgments"): Judge Polk believes that certain provisions in Civil Rule 5.1 ("filing pleadings and other documents"), including a section on proposed orders, are not applicable in probate because probate does not yet have electronic filing. Workgroup 1's proposed Rule 15 tailors the submission of orders for probate cases. A new section (a) clarifies that the word "order" includes a decree or a judgment. Section (b) would require the filer to include in the order's caption the hearing date to which the order pertains. The workgroup removed a provision in current Rule 15(B) that allows the court to continue a hearing if the petitioner fails to comply with the rule.

The members' discussion focused on two aspects of the draft. Section (b) would require submission of a proposed order at least 5 days before the hearing. Pima County members did not believe their local practice required such a rigid lodging deadline. One member thought it would not be necessary to continue a hearing simply because an order was untimely submitted; and if needed, the court could conduct the hearing and take the matter under advisement to provide parties sufficient time to file objections to the form of order. Members also posed questions about the process for a party to submit a proposed order during, or after, a hearing, which wasn't covered by the draft. The other aspect of the draft that caused members concern was section (e)'s requirement that the party submitting the proposed order provide the court with copies to be conformed and postage-paid addressed envelopes. Although Maricopa County's probate division utilizes the copies-and-envelopes process, Pima and Yuma counties do not. Members began to revise section (e) to provide an alternative that would place on the party submitting the order a duty to distribute the signed order to other parties within a specified time after entry of the order. However, the members were unable to effectively resolve the timing and process for submission of proposed orders, and distribution of signed orders. The Chair returned the rule to the workgroup for further consideration.

Rule 15.1 ("appointment of a guardian ad litem"): Judge Polk introduced this rule but recognized that it required further study. The rule originated several years ago in Justice Timmer's committee. Workgroup 1 was divided on what the revised rule should say, and Judge Polk acknowledged that he disagreed with the draft included in today's meeting materials. (A recent memo decision, *Kennedy v. Wybenga*, 1-CA-CV 17-0559 FC,

9-11-2018, also was included in the materials. The decision discussed the propriety of appointing a guardian ad litem ("GAL") in a family case.) Judge Polk outlined the distinctions for appointing a GAL in various case types (family, civil, probate), and he distinguished cases in which capacity was not an issue and those in which it was. The workgroup concluded that a GAL was a best interests attorney ("BIA"), and it expressed this conclusion in its draft rule; but it used both terms rather than just the latter one because GAL was embedded in local nomenclature. Judge Polk believed that GALs were overused in Maricopa County probate proceedings because they overlap with information already provided to the court by a physician and a court investigator. Judge Mackey noted that the Task Force has already referred to a GAL in Rule 37. Judge Plante and other members noted that a BIA is not defined by statute or a current rule, that appointment of a BIA in a probate proceeding might be questionable on constitutional grounds, and that a judicial officer rather than a BIA should determine what is in the person's best interests. Mr. Ryan cited A.R.S. § 14-1408, which provides for a statutory representative and replaces a former statutory provision concerning GALs.

Judge Polk's workgroup will consider today's comments and review the rule further.

Rule 15.2 (currently, involuntary termination of appointment; other remedies for non-compliance; dismissal; sanctions," and as proposed, "involuntary [administrative] dismissals"): Judge Polk noted that proposed Rules 15.2 through 15.5 all derived from portions of current Rule 15.2. Rule 15.2 also originated in Justice Timmer's committee and arose from concerns that some probate files were never closed. Restyled Rule 15.2 retained the substance of current Rule 15.2(D). Under the restyled rule, the case is subject to dismissal if the petitioner does not obtain a hearing date within 3 months after filing a petition. Rule 15.2(b) distinguishes the dismissal order in a case where only a single petition was filed, from a dismissal order in a case when more than one petition was filed. Judge Olson requested that the workgroup revise this section to differentiate the dismissal of probate and non-probate cases, and the workgroup will do so. Members preferred "administrative dismissal" as the title of this rule, rather than "involuntary dismissal."

Rule 15.3 ("Administrative Closure of a Decedent's Estate and Termination of Appointment"): The draft rule, which derives from current Rule 15.2(A), includes a new provision that explains the meaning of a closed estate. Subsequent sections provide for the court's issuance and distribution of a notice regarding pending administrative closure. Judge Polk explained that if the required action is not taken, the case is not dismissed. Rather, the estate is administratively closed, and the personal representative's appointment is terminated.

Members questioned a provision that "a decedent's estate is closed when a closing statement has been filed." The filing of a closing statement does not close the estate; it is closed a year thereafter. Members had other suggestions to improve the accuracy of the

rule's provisions and its terminology. They also preferred the structure of current Rule 15.2(A). The workgroup will make changes to its draft and present the rule again at a future meeting.

Rule 15.4 ("involuntary termination of a minor guardianship or closure or a minor conservatorship case"): The workgroup's draft was based on current Rule 15.2(B), which concerns termination of a minor guardianship; but it added new provisions concerning the closure of a minor conservatorship. Some members thought the new provisions were unnecessary for closure of a minor conservatorship. They also expressed concerns about closure of a conservatorship if funds remained in a restricted account, whether the restrictions on the account would continue to be effective if the conservatorship was closed, and the undesirability of escheating the account.

Most members declined a suggestion to delete the conservatorship portion of this rule. Members shared anecdotal information about banks releasing funds without an order before the minor turned 18 or releasing funds to an 18-year-old but without a court order. Members nonetheless requested certain modifications to the draft. The provision originally required administrative closure six months after the minor became 18; they changed this to two years. They also added that administrative closure of a conservatorship did not release the depository from restrictions, authorize the release of funds, or exonerate the bond. Finally, members asked the workgroup to revise Form 10. They wanted the form to include language that by opening the account, the financial institution agrees to submit to the court's jurisdiction, and that the court may require it to provide account information and confirm that funds remain on deposit.

Rule 15.5 ("remedies for non-compliance by a guardian or conservator"): This draft rule corresponds with current Rule 15.2(C). The list of orders in the draft mirrors the list in the current rule, except terminating the guardian/conservator's authority has been moved up in the list of options, and the list now includes "an order under Civil Rule 70," which concerns enforcing a judgment for a specific act. With regard to terminating the guardian or conservator's authority, the draft specified that the court may enter "an order terminating the guardianship or conservatorship proceeding if the court determines that dismissal is appropriate, but the court must not terminate a guardianship or conservatorship if the court has reason to believe the ward remains incapacitated or the protected person remains in need of protection, and that person continues to reside in Arizona." Members discussed this provision and agreed that in real life, circumstances can arise that warrant terminating a guardianship or conservatorship, even when the ward remains incapacitated. Members then agreed to truncate this provision by ending it with the word "appropriate."

Another provision in the draft rule permits the entry of an order "appointing a court investigator to investigate the reasons for…noncompliance…." A member asked whether the term "investigator" has a generic meaning, or whether the court must

appoint its in-house investigator. To permit the court to appoint someone other than a court investigator, and while recognizing the definition of "investigator" in A.R.S. § 14-5307, members agreed to change this term to "person." Finally, Judge Polk suggested that this rule should be relocated in Part VII of the rules ("post-appointment procedures") but he added that doing so can be deferred until the Task Force has a complete draft of the probate rules.

4. **Workgroup 3.** Judge Mackey led the presentations.

Rule 30 ("Conservator's Inventory, Budget, and Account"): Judge Mackey reviewed the organization and content of the draft restyling. Workgroup members agreed that the consumer credit report required in section (a) has marginal value, but they left this requirement in the rule pending a legislative change. The workgroup recommended abolishing the requirement for an amended inventory upon late discovery of an asset, reasoning that the inventory is a snapshot of what is initially in the estate, and later-discovered assets will be adequately reflected in a subsequent accounting. Furthermore, the workgroup found the terms "erroneous and misleading," which are in the current rule, to be vague and uncertain. A Task Force member suggested that rather than focus on a new asset, or whether the asset makes a significant difference in the value of the estate, the rule should require the conservator to notify the court if the conservator discovers that the initial bond amount is inadequate. A member responded that "inadequate" is also a vague term. The Chair asked the workgroup to consider ways to address this issue.

Judge Mackey proceeded to discuss section (b) of the rule concerning a budget. He noted that the section on budgets does not require a request for approval, and if there is no objection, a budget may be presumed reasonable. Judge Olson would like the rule to add that the court could consider the lack of an objection in determining reasonableness. Another member thought that budgets served no purpose in many cases, and he would like to abrogate the requirement. Judge Mackey noted proposed Rule 30(d) ("court authority"), which would permit the court for good cause to order a variation of Rule 30's requirements if doing so would be consistent with prudent management and oversight of the case. A member suggested relocating this provision to the beginning of the rule, rather than keeping it at the end. Judge Plante suggested that the rule provide that a budget is not required unless the court orders otherwise. Another member recommended adding a preface to section (b) stating, "if the court requires a budget…" A budget is not required for a simple estate, but the default for most cases is the complex set of forms, which does have this requirement. The workgroup will reexamine these suggestions, with the recognition that revisions to Rule 30 will probably require revisions to Rule 38 forms.

Judge Mackey turned to Rule 30(c) on the conservator's account. The workgroup preferred doing away with the current requirement for filing the first account for a period

covering only nine months; as proposed, the rule would require the first accounting to cover the period from the conservator's appointment (defined as the date the court first issued letters) through and including the anniversary date of the conservator's letters, which would be a full year. Later accountings would reflect activity from the end date of the previous account through the anniversary date of the letters. The rule allows the court flexibility in selecting shorter or different dates, and members added the phrase, "unless the court orders otherwise" at the beginning of Rule 30(c)(1)(A) ("timing").

Rule 30.1 (currently, "financial order"): This rule's provisions are duplicated in other rules or statutes, and the workgroup recommended its abrogation. Members agreed.

Rule 30.2 (currently, "sustainability of conservatorship"): Judge Olson observed that adding the concept of sustainability to the rules on conservatorships was a significant achievement of Justice Timmer's committee. It requires an analysis of the resources of a conservatorship estate and determining what the protected person would do if the person had full rational capacity. Judge Olson observed that this is a discipline every prudent person should follow in their private lives and especially should be required for those who make decisions on behalf of a protected person. Members noted other reasons why a sustainability calculation was useful, including calculating a "burn rate" in anticipation of an application for long-term care, and advising heirs of what their potential inheritance might be. (Another member suggested adding language in the budget provisions of Role 30(b) about spending down assets.) The workgroup noted that sustainability is incorporated within the forms, and the calculation would be completed if the court orders use of the forms, although the workgroup recommended abrogating Rule 30.2 concerning sustainability. After further discussion, members recommended that if Rule 30.2 is abrogated, the workgroup should consider adding a sustainability provision for conservatorships in Rule 30.

Rule 30.3 ("conservatorship estate budget"): Judge Mackey noted that the substance of this rule was incorporated in the draft of Rule 30 and the workgroup accordingly recommended its abrogation.

Rule 31 ("annual guardian reports"): The draft includes a change that mirrors revisions to Rule 30 on when the report is due, but this rule is otherwise straightforward, and the Task Force approved it as presented.

5. **<u>Workgroup 2.</u>** Judge Olson presented Workgroup 2's rules. Judge Olson noted that the foundational concepts of Rule 28 had been presented at previous Task Force meetings and had generated considerable discussion. But today was the initial presentation of draft Rules 28, 28.1, and 28.2.

Rule 28 (currently, "pretrial procedures," and as proposed, "management of contested probate proceedings"): Judge Olson reviewed each of the sections of this draft

rule, including a new section on a meet-and-confer requirement. The draft also includes provisions on the content of the joint report and the content of the proposed scheduling order. Judge Olson noted that section (a) ("generally") contemplates a scheduling order entered by the court at the initial hearing on a petition, or a scheduling order submitted by the parties after a meet-and-confer. The former would be appropriate for most simple cases, but in more complex cases, parties would need to meet and jointly prepare a report and proposed scheduling order. Judge Olson acknowledged that the draft rule should state this more clearly. Judge Polk also suggested adding a provision about whether the parties will invoke the rules of evidence.

Rule 28.1 ("disclosure and discovery"): One of the most significant issues members discussed at previous meetings was whether the Probate Rules should be congruent with the new Civil Rules on tiered discovery. Judge Olson introduced new Rule 28.1 by noting that section (a) expressly provides that Civil Rule 26.2 ("tiered limits to discovery based on attributes of case") would not apply to discovery in a probate proceeding. Section (a) also provides that Civil Rule 26(f), which permits discovery only after exchanging disclosure statements, would not apply in probate proceedings. However, Civil Rules 26 through 37, including Rule 26.1 concerning disclosure, would apply to discovery in contested probate proceedings.

Section (b) of the draft rule also has presumptive discovery limits: 20 interrogatories, 10 requests for admission, 10 requests for production, 10 hours of fact witness deposition, and four hours for an expert's deposition. Section (c) allows the court on its own or on a party's motion to modify these limits. Section (d) provides that the fact that a party took discovery within these limits does not establish a presumption that an attorney's fee claim for the discovery was reasonable or necessary.

Section (e) is titled "fiduciary subpoena authority." It would allow a licensed fiduciary appointed by the court as a guardian, conservator, or personal representative, or their counsel, to request document subpoenas even when there are no other parties to the proceeding or there is no contested matter then-pending. Members had questions concerning this rule. Why is the rule limited to licensed fiduciaries if the fiduciary is court-appointed? Can an unlicensed fiduciary request subpoenas without limitation? If there are no other parties in the proceeding, who serves as a check and balance on the fiduciary's subpoena requests? Who should receive notice of a subpoena request? The workgroup will discuss these concerns and continue its study of the proposed provision.

Rule 28.2 ("demand for jury trial"): The workgroup prepared this rule in response to the Court's recent Order in R-18-0018. The Order amends the Civil Rules and provides an automatic right to a jury, effective January 1, 2019, rather than a jury that under the current rules is only provided on demand. The workgroup wants to revert the restyled Probate Rules to what the civil rules currently provide. A judge member noted that a civil jury has a constitutional basis, whereas the right to a jury in a probate proceeding derives from statute, and this might be a valid basis for the Probate Rules deviating from

the R-18-0018 amendments. Another member suggested modifying the Probate Rules to allow a party to have only an advisory jury. Members will consider this issue further at a future meeting.

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

The Chair again encouraged workgroups to meet as often as possible. There are 12 rules that have not yet been presented to the Task Force, and several rules that were presented at today's meeting were returned to workgroups or not finalized. Even if the Task Force has no time to do prefiling vetting of the rules on a large scale, before filing a rule petition in January the Chair still would like members to seek input from stakeholders who have expressed interest in this restyling project. The Task Force will discuss a draft rule petition at its December meeting.

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

8. **Adjourn.** The meeting adjourned at 4:03 p.m.