Probate Rules Task Force

State Courts Building, Phoenix

Meeting Minutes: October 26, 2018

Members attending: Hon. Patricia Norris (Acting Chair), Marlene Appel, John Barron III (by telephone), Hon. Julia Connors, Hon. Andrew Klein, Hon. David Mackey, Aaron Nash by his proxy Maridel Soileau, Hon. Robert Carter Olson, Hon. John Paul Plante, Hon. Jay Polk, Lisa Price (by telephone), Catherine Robbins, Denice Shepherd, Hon. Wayne Yehling (by telephone)

Absent: Hon. Rebecca Berch, Colleen Cacy, Robert Fleming, T.J. Ryan,

Guests: Jessica Fotinos

AOC Staff: Mark Meltzer, Angela Pennington

1. Call to order; preliminary remarks; approval of meeting minutes. Judge Norris, designated by Justice Berch to act as Chair in her absence, called the seventh meeting of the Task Force to order at 10:04 a.m. Judge Norris informed members that workgroups met five times after the September 28 Task Force meeting, and that additional workgroup meetings are scheduled in November. The Chair then asked members to review draft minutes of the September 28 Task Force meeting. Judge Olson noted that although he had presented rules during the September 28 meeting, the first page of the draft minutes showed he was absent. Staff will correct this error.

Motion: A member then moved to approve the September 28, 2018 meeting minutes with the above correction. The motion received a second and it passed unanimously. **PRTF: 006**

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

Rule 15.2 ("administrative dismissals"): Judge Polk noted that the workgroup added clarifying text that distinguished a probate case from a probate proceeding. Members had no questions concerning the additions and the rule was approved as modified.

Rule 15.3 ("administrative closure of a decedent's estate and termination of appointment"): At the previous meeting, members discussed the impacts of filing a closing statement in a decedent's estate; they returned this rule to the workgroup to adjust for those impacts. Judge Polk explained how the workgroup revised the draft thereafter to account for the filing of a closing statement. Members agreed with the revisions and approved the rule as modified.

Rule 17 ("petitions in probate proceedings"): Judge Olson noted that Workgroup 2's revisions to section (e) now uniformly refer to a "response," which includes an

"objection" or "opposition" without using those terms. The workgroup's recent edits also restated the time provisions in section (e), in one instance by adding the word "calendar" before "days," and in another by changing 10 days to 14 days to avoid application of Civil Rule 6(a)(2), which excludes intermediate Saturdays, Sundays, and holidays if the period is less than 11 days. Judge Plante reaffirmed his earlier objections to section (e) concerning the limited time for filing a response, but a majority of members approved these revisions. Finally, Judge Olson agreed with a recommendation from Workgroup 1 to add to Rule 2.1 brief "index" definitions of "application," "petition," "month," and "motion", e.g., "a petition has the meaning defined in Rule 17." Members concurred with this recommendation and staff will add these definitions to Rule 2.1.

Rule 28 ("management of contested probate proceedings"): Previous draft subparts (a)(1) and (2) both referred to a "scheduling order," but the process of entering the order was different for each. Workgroup 2's revised draft clarified this by referring to the (a)(1) order as simply "an order setting litigation deadlines." Subpart (a)(2) and other sections of the rule continue to refer to the document as a scheduling order. Members concurred with these revisions. Judge Polk observed that section (d) refers to "Rule 26.1." He suggested clarifying this by adding the word "Civil" before "Rule," and by adding a provision in Rule 2.1 to explain that "Civil Rule" refers to the "Arizona Rules of Civil Procedure." Members agreed with his suggestions. The members approved Rule 28 with these clarifications.

Rule 28.1 ("disclosure and discovery"): Judge Olson reminded members that their previous discussion of this rule focused on section (e) concerning "fiduciary subpoena authority." The current rules do not have a similar provision, and he noted that this new provision should provide fiduciaries with the authority they need to fulfill their duties after the court has approved the underlying petition.

To address potential abuse of that authority, the workgroup added a new subpart (a)(2) that permits a party to seek discovery from any source, including nonparties, only when a petition is pending, or when otherwise authorized by statute, court order, or section (e). The workgroup's revisions to section (e) specified that fiduciaries, in furtherance of their duties, may request subpoenas if (1) the fiduciary was licensed and appointed by the court as a guardian, conservator, or personal representative; (2) the licensed fiduciary's request was through counsel; or (3) the court authorized an unlicensed fiduciary to make the request. Members agreed that counsel for an unlicensed fiduciary also should be authorized to make a request, and they suggested revisions in this regard, but some concerns remained. For example, if the court authorized the fiduciary to submit a request, would the fiduciary be required to present the order to the clerk before the clerk could issue the subpoena? Some members believed that the clerk should not be required to assure that every request was properly authorized; if a fiduciary abuses his or her authority, judges utilizing their ongoing supervisory capacity should take appropriate action. Another member expressed concern that licensed and

unlicensed fiduciaries would have different authority under the draft rule; this member believes the authority should not be different because one is licensed and the other is unlicensed. Judge Polk then proposed the following revision:

> In furtherance of the fiduciary's duties, any of the following may request the court clerk to issue subpoenas to produce materials or permit inspections: (1) a guardian, conservator, or personal representative who is a licensed fiduciary; (2) an attorney representing a guardian, conservator, or personal representative; or (3) any fiduciary expressly authorized by the court.

Most members supported Judge Polk's revision. However, one member asked if this revision would provide authority to the attorney for any fiduciary. Judge Olson then suggested that the attorney should be listed third rather than second in this sequence. Another member asked the workgroup to clarify that the clerk would not be required to verify the requesting party's role before issuing a subpoena. The Chair requested Workgroup 2 to address these issues and present its revisions on the consent agenda of the next Task Force meeting.

The Chair then requested reports from the workgroups.

3. <u>Workgroup 3.</u> Judge Mackey presented rules on behalf of Workgroup 3.

Rule 19 ("appointment of attorney, investigator, and medical professional"): Workgroup 3 initially presented this rule at the June 15 Task Force meeting. Members had multiple concerns with the previous draft, particularly the provisions regarding appointment of counsel, and returned it to the workgroup. Today's meeting packet included three versions of Rule 19: the earlier version, and Commissioner Connors' new A and B versions. The workgroup preferred version B, the shortest of these three versions, because version B reduced redundancy with statutory requirements. Version B contained sections for the time and method of appointment, a proposed order, and notifying individuals of their appointment. Version A contained more detailed provisions, including sections (b) ("nomination of attorney"), (c) (nomination of a medical professional), and (d) ("prohibited attorney appointments").

Ms. Soileau noted that the proposed order provision in version B requires submission of the order to "the assigned judicial division." Ms. Soileau has authority to sign these orders in her dual capacity as probate registrar and special commissioner, and she requested changing this phrase to "the assigned judicial officer." Members agreed with her request. A member asked why version B no longer includes provisions concerning the appointment of independent counsel and the avoidance of conflicts of interest. Judge Mackey responded that judges recognize and deal with these conflicts when they occur but acknowledged that version B does not include these provisions, although version A does. The previous version of Rule 19 also included a provision that gave preference to a medical professional who previously treated the subject person.

Following comments by several members, Judge Mackey proposed adding to version B certain provisions concerning attorney conflicts contained in section (d) of version A. One member thought this was inappropriate because the existence of a prior attorney-client relationship does not always give rise to a conflict. A judge member noted that attorneys will be bound by ethical rules regardless of whether this provision is added to Rule 19, that the ethical principle in that provision might be overly simplified, and that members should not attempt to summarize a large body of ethical rules in a single provision of the probate rules. The member also noted that relationships, practices, and circumstances concerning attorneys and clients might differ in large and small counties and in the latter, a judge might be more inclined to make the appointment notwithstanding a prior relationship. But the judge member also cautioned against a rule that would allow the petitioner to select opposing counsel. Another member noted that some counties have appointment lists that mitigate this dilemma, but other counties do not maintain these lists. What happens when the petitioner cannot nominate an attorney and the county has no appointment list?

Judge Mackey then proposed adding to version B the nomination provision in section (b) of version A; he also suggested that adding section (c) of version A, regarding the appointment of a medical professional, would be helpful. But the members were unable to reach consensus on whether version B should include section (d) of version A concerning prohibited attorney appointments. Some members preferred keeping version B as shown in the meeting materials, without further modifications. The Chair returned the rule to the workgroup for continued discussion of the members' comments. Judge Mackey said the workgroup also would consider allowing a judicial officer to independently make appointments under this rule. He added that the workgroup recommended abrogating the current comment.

Rule 23 ("appointment of a temporary guardian or temporary conservator"): Judge Mackey noted that the workgroup reorganized this rule but did not intend any substantive changes. The draft has three sections. Section (a) requires the petition to include a request for a permanent guardian or conservator or explain why one is unnecessary. Section (b) requires the petitioner to provide copies of the filed petition and affidavits to the assigned judicial officer. The workgroup believed this provision would be feasible statewide. Section (c) would require the court to determine whether the petition for a temporary appointment should proceed without notice or without a hearing. Several members thought section (c) was unnecessary because the content is replicated in statute. After discussion, members agreed to delete section (c). The workgroup recommended deletion of the comment to the current rule. Members approved Rule 23 in accordance with their discussion.

Rule 32 (currently Rule 31, "decedents' estates—specific procedures," and Rule 32, "trusts—specific procedures," and as proposed, "personal representative's inventory and account; trustee's account"): The workgroup's draft of Rule 32 incorporates current

Rules 31 and 32. Judge Mackey explained that this draft adopts some of the features of Rule 30 ("conservator's inventory, budget, and account"). For example, it similarly clarifies the timing requirement, which begins when letters are first issued. However, unlike Rule 30, Rule 32 includes a provision based in statute for filing a supplementary inventory. The trust-specific procedures in section (c) of the draft are generally derived from the current rule. Subpart (c)(2) includes a modified provision derived from a comment to the current rule that does not require, in counties with a court accountant, submission of a trustee's accounting to that accountant unless the court orders otherwise.

A judge member inquired why the workgroup consolidated current Rules 31 and 32. Judge Mackey explained that the workgroup wanted to assure that Rule 33, which is commonly cited, maintained its current number. An alternative would be bifurcating Rule 32 into 32.1 for estates and 32.2 for trusts, but there was no support for that. Another member asked the rule to clarify that conservatorship accounting forms are not used for accountings in decedents' estates or trusts. A judge member agreed but asked that any clarification include the phrase, "unless the court orders otherwise," because there are occasionally circumstances where the conservatorship forms are warranted. Another judge member proposed adding the clarification to Rule 38 ("forms") rather than to Rule 32. By a straw vote, a slight majority favored adding the clarification to Rule 32. Judge Mackey proposed a new section (d) in Rule 32 that would be titled "forms" and would say, "unless the court orders otherwise, a personal representative's account or a trustee's account need not be presented on the standard forms for conservator accounts." Judge Mackey would be agreeable to relocating this provision to Rule 38 if the members after reconsideration favor doing so.

Because current Rules 31 and 32 were consolidated, a judge member proposed that the title of the draft rule more prominently feature the trust aspect. But there were no suggested changes to the title. Another judge member suggested (1) that subpart (a)(1)(C) concerning "notice of delivery" should say to whom notice was sent, rather than who received it, because the filer may not know the actual recipient when filing the notice; and (2) that subpart (c)(1) expressly permit a trust beneficiary to file a petition to compel the trustee to submit an accounting. Members agreed with both suggestions, and the draft was modified accordingly. Finally, a member proposed deleting provisions in section (a), which provide options for what to do with the inventory, because they are redundant to statute. But a majority favored keeping the provisions because some parties, especially those that are self-represented, don't realize they have a choice of filing or mailing.

Members approved Rule 32 with the revisions noted above.

4. **<u>Workgroup 1.</u>** Judge Polk presented the proposed changes.

Rule 7 ("confidential documents and information"): Rule 7 concerns confidentiality, and Judge Polk said that at a future meeting, the workgroup will present

a new and related Rule 7.1 concerning sealing. Draft Rule 7 includes most of the substance of current Rule 7, but portions have been reorganized. To the definition of "financial account" in draft Rule 7(a)(3), the workgroup added, "pensions, profit-sharing, or retirement and similar benefit plans." The workgroup recommended the deletion of current section (B), which requires the clerk to comply with court rules and the Arizona Code of Judicial Administration, because it is self-evident. The title of draft section (b) changed the gist of the corresponding current section from "maintaining" confidential records to "access to" confidential documents, which more accurately distinguishes the nature of the section and conforms more closely to restyled Family Law Rule 17. In summary, parties, attorneys, and court staff have access to confidential documents without the necessity of a court order. In the interests of brevity, draft subpart (b)(3) ("other confidential documents") incorporates by reference the provisions of subpart (b)(2) ("probate information form"). Judge Polk noted the addition of a short sanctions provision in section (g) to codify the court's inherent authority.

The probate court currently utilizes paper filing, and Rule 7(c) describes the process for filing paper confidential documents in envelopes. A sentence in section (c) provides that the clerk is not required to review a document filed under this section to determine whether it's a confidential document. The court could sanction a party who habitually files documents in envelopes that are not confidential. A judge member observed that an implied premise to this rule is that a guardian or conservator should take actions that an ordinarily prudent person would take on their own behalf. The member suggested that there is a "treasure trove" of confidential information in archived files and current cases that continues to be available to the public. The member proposed treating all files in these case types as confidential, rather than denominating selected documents or information as confidential, with the person on whose behalf the case was filed having a choice of making specific documents or information public. He questioned whether Rule 7 as proposed would fulfill its intended purpose. The judge's concern was limited to guardianships and conservatorships and did not apply to decedents' estates.

Another judge member took a contrary view and favored keeping as little as possible confidential; the judge believes that public access is a better public policy. One member raised practical concerns related to the court's case management system. Another member asked whether records are closed based on court rule or by statute; the latter would require statutory changes. See, for example, A.R.S. § 36-509(C). Rule 123 has a general policy presumption in favor of open records, and some members voiced strong support for that policy in guardianship and conservatorship proceedings. The public fiduciary needs access to open probate files to obtain essential information for fulfilling the fiduciary's function, especially in successive proceedings. But the probate registrar receives daily telephone calls from "flippers" asking to review records in multiple cases on fishing expeditions, and confidentiality is necessary to protect against surreptitious activity by flippers.

On a straw vote, only one member favored keeping all documents confidential in guardianship and conservatorship proceedings. To address the public fiduciary's interest in access to information, a member proposed adding the public fiduciary to those allowed to access information as a new subpart (b)(2)(F). Members agreed with this proposal. Members had no other comments or suggested changes to Rule 7, and it was approved as modified.

Rule 15 ("proposed orders, decrees, and judgments"): Judge Polk reminded members that they returned Rule 15(e) to the workgroup to reconsider a provision concerning envelopes and copies. After reconsideration, the workgroup retained the provision that requires a party submitting an order to provide the court with envelopes and copies. However, the workgroup added the prefatory words, "unless the court orders otherwise," which allows a court to dispense with this requirement. Members questioned how this prefatory provision would be implemented. Some thought it doubtful that the court would issue an order providing otherwise. One member proposed a provision that would allow the court to provide otherwise by local rule. Another member suggested that because Maricopa is the only county that requires envelopes and copies, it should adopt a local rule on this subject; but Judge Polk noted that Maricopa has no local rules on probate proceedings. Judge Polk further noted that the revised section (e) includes a new concluding sentence that contemplates the eventual adoption of e-filing in probate court, which would obviate the need for envelopes and copies.

On a straw poll, and by a 2 to 1 margin, members preferred the workgroup's revised version of section (e). Only a single member supported the local rule alternative. But the Chair requested that the Task Force's rule petition note the difference in practices between Maricopa and other counties. Otherwise, the rule was approved as presented.

Rule 15.1 (currently, "appointment of guardian ad litem," and as proposed, "statutory representative"): The workgroup's most recent version of this rule included a detailed comment prepared by Judge Polk. He explained that Arizona no longer has a statute (formerly A.R.S. § 14-1403) for appointment of a guardian ad litem ("GAL"), but it does have a statute now (A.R.S. § 14-1408) for a statutory representative ("SR"). The statutory changes prompted the workgroup to revise the title of Rule 15.1. Judge Polk believed both statutes contain similar criteria for appointments, but the powers of a SR are broader than those of a GAL. Draft Rule 15.1 reinforces due process by requiring the filing of a verified petition for appointment of a SR (section (c)), and a noticed hearing (section (d)). The notice is different for minors and incapacitated individuals. Rule 15(e) precludes the appointment of a SR for the subject person of an adult guardianship unless the court finds the person is incapacitated or in need of protection. Rule 15(g) expressly provides that the SR is a party to the probate case and has the same rights and responsibilities as other parties. Judge Polk thought the changes to Rule 15.1 were

sufficiently important to warrant a new comment to the rule. Several questions and comments followed.

- Does draft Rule 2.1's definition of a GAL as a representative under A.R.S. § 14-1408 need to be modified?
- If the SR is a party, does the SR no longer have the GAL's judicial immunity?
- How does the clerk treat the SR: as an attorney or a party? If the SR is not an attorney, are there issues regarding the unauthorized practice of law? Does the SR pay an appearance fee?
- Is there an issue if Civil Rule 17(f) continues to refer to a GAL?
- What is the impact on Probate Rule 37, which continues to refer to a GAL?
- Does the SR represent the person or the person's best interests? Should this be clarified in the rule?
- GALs continue to exist in other case types, such as family and juvenile. What is the result if one of these cases arises in probate?
- Title 36 allows the appointment of a GAL to file a guardianship or conservatorship. Does the revised rule accommodate this circumstance?
- The 2017 *Bradford Lund* memorandum decision appears to use the terms GAL and SR interchangeably. Does the draft rule adequately clarify the distinction?

Rule 15(f) deals with the appointment order. Mr. Barron proposed that in the interests of due process, the order should include, with specificity, the following findings and terms:

Findings:
What interest is not being adequately represented?
Why is the interest not being adequately represented?
Why is the appointment of a SR the least restrictive alternative?

Terms:
What issues must the representative address?
What is the scope of the appointment?
What is the termination date (unless extended)?
What is the trigger for termination? (E.g., if X is done, the appointment terminates.)

Members recommended that the workgroup consider adding these items to the draft rule.

A member observed that § 14-1408 permits the SR to act on behalf of the person with respect to any matter arising under Title 14; how broad is the SR's authority, and does it supersede the fiduciary's authority? A judge member suggested that the draft clarify this to avoid unintended conflicts of authority. The member also supported a comment to this rule but asked the workgroup to reconsider relocating instructive but

non-directive parts of the draft rule into the comment, and the comment would then serve as a detailed primer for the rule. Another judge member proposed that section (f) specifically allow for the traditional role of GAL, i.e., as a representative of the person's best interest.

Another judge member would adopt the draft as written and suggested that the rule not require certain findings because they are dependent on the circumstances of each case. Judge Polk expressed a similar view because draft section (f) already requires the order to state the basis for the appointment, and its scope and duration. He did not believe the criteria of "least restrictive alternative" was pertinent to the appointment of a SR. On the other hand, he explained that a SR needs to be a party because the SR "calls the shots" for the subject person, who is either incapacitated or too young to participate. But another judge member submitted that the term GAL is ingrained in Arizona law and in the common law, and it would be inappropriate if the rule overlooked its longstanding existence and application. This member would still like to have the ability under this rule to appoint a GAL. Another judge member agreed and asked whether the draft rule is clarifying the subject or making it murkier. Another member requested that the workgroup consider that the overuse of GALs is apparently only an issue in Maricopa County.

Judge Polk replied that the role of GAL, i.e., someone who represents the person's interests, is contained within the functions of a SR, but the SR has broader powers. Judge Mackey proposed that the appointment order in section (f) should be required to state whether the SR represents the person or the person's best interests. Most members saw no downside to the proposal and preferred this approach. The Chair observed that the text of draft Rule 15.1(b) ("the court may not appoint a guardian ad litem") seems to foreclose the role of a best interests representative. However, the statute might be flexible enough to allow the SR to assume different roles, one of which could be a best interests representative. She requested the workgroup to clarify this and possibly include that function in an express provision of the rule. However, the Chair noted the absence of a broad consensus on this issue. She asked the workgroup to consider members' comments and to return a revised Rule 15.1 at a future meeting.

5. <u>Workgroup 2.</u> Judge Olson presented Rule 28.2.

Rule 28.2 ("demand for jury trial"): Today's meeting packet included a draft Rule 28.2 for inclusion within the restyled probate rules. The packet also included a "stop gap" rule entitled "waiver of jury trial," which the workgroup proposed to address the January 1, 2019 effective date of revised Civil Rule 38. The revised civil rule would provide a jury trial automatically unless waived. This would create practical issues in probate court. The stop gap rule would provide a process for waiving a jury in a probate proceeding. While draft Rule 28.2, which would require a demand for a jury in a probate proceeding, would not become effective until January 1, 2020, the workgroup proposed the stop gap

rule to govern proceedings during calendar year 2019. If the Court did not adopt the stop gap rule, Civil Rule 38 could have overwhelming administrative consequences for thousands of guardianship cases in probate court.

Judge Olson explained that the stop gap rule would bolster the integrity of jury waivers in probate proceedings. Section (b) of the stop gap would allow the subject person to waive the jury, orally or in writing, in open court or through counsel. Section (c) would allow counsel to waive the jury on the person's behalf, after first attempting to consult with the subject person (the client-in-a-coma scenario) and after consulting with the person's physician and confirming that the person is unable to direct a waiver of jury. Because of practical problems associated with attorney-physician conferences, members (with one opposed) changed this provision to instead require that counsel consider the medical professional's report. The dissenting member also proposed deleting the avowal or certification requirement in section (c), but there was no support for the proposed deletion.

Judge Olson then noted that the Task Force has three options:

1. Request the Court to suspend or delay the application of revised Civil Rule 38 in probate proceedings;
2. Request the Court to adopt Rule 28.2 on an expedited basis, to take effect at the same time as Civil Rule 38; or
3. Request the Court to adopt the stop gap rule on an interim basis.

These options are listed in their preferred order. Members will present these options to Justice Berch.

6. **Roadmap.** The Chair noted that a new meeting date, Friday, November 30, has been proposed. This extra meeting should help to assure the Task Force will timely complete its restyling. Most members present at today's meeting indicated they were available on November 30. Other future meetings will be on Friday, November 16, and Friday, December 14.

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

8. **Adjourn.** The meeting adjourned at 3:46 p.m.