Probate Rules Task Force

State Courts Building, Phoenix

Meeting Minutes: November 30, 2018

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

Absent: Hon. Julia Connors, Hon. Wayne Yehling

Guests: None

AOC Staff: Mark Meltzer, Angela Pennington, Stacy Reinstein, Theresa Barrett

1. Call to order; preliminary remarks; approval of meeting minutes. The Chair called the ninth meeting of the Task Force to order at 10:01 a.m. She noted that each workgroup met after the November 16 Task Force meeting and she thanked them for their continuing work. The Chair announced that the Arizona Center for Disability Law will serve as a partner in a pilot project for supported decision-making, and members with interest in this project should see her for contact information. The Chair noted that that today's meeting packet included Supreme Court Rule 42, ER 1.14, and *Rasmussen v. Fleming*, 154 Ariz. 207 (1987). The Chair then asked members to review the November 16 meeting minutes. There were no corrections.

Motion: A member moved to approve the November 16, 2018 meeting minutes. The motion received a second and it passed unanimously. **PRTF: 008**

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

Rule 2.1 ("definitions"): Workgroup 2 recently annotated Rule 2.1 with its recommendations for each definition. However, Judge Olson thought there would be more value in reviewing these annotations after the Task Force had a complete draft of the rules. The Chair accordingly deferred a discussion of Rule 2.1 to the next meeting.

Rule 7.1 ("sealing and unsealing of court documents"): Because the civil rules govern probate proceedings, the workgroup revised Probate Rule 7.1(a) ("procedure") to simply incorporate Civil Rule 5.4 ("sealing and unsealing court records") by reference. Rule 7.1(b) ("access to sealed documents") contains a provision specifically for probate that allows a fiduciary to obtain letters and appointment orders in a sealed file without the need for a court order unsealing the case. Judge Polk added that Judge Sara Agne is currently leading a stakeholder group that's reviewing Rule 5.4. Rule 7.1(a)'s incorporation of the Civil Rule will have the added benefit of not requiring an amendment to Rule 7.1 if that group proposes any changes to Rule 5.4.

Members discussed other sealing issues. One member has had difficulty obtaining a court order approving an accounting in a sealed case that the member submits to a bonding company. The member suggested adding this order to the list in section (b). Instead, members agreed that a party requesting such an order include language allowing its release in the form of order. Such language would avoid the necessity of including a list of exceptions in section (b). Members also discussed a perception that too many conservatorship files in personal injury cases are unnecessarily sealed. Although sealing is sometimes a condition of settlement, given the findings a court must make under Rule 5.4 before entering an order sealing a case, orders sealing conservatorship files should be less prevalent in the future. Judge Polk added that fewer than 300 probate cases in Maricopa County, out of a total of 9000 cases, are currently sealed. Members then approved Rule 7.1 as modified.

3. **Workgroup 1**. The Chair asked Judge Polk to present Workgroup 1's new rules.

Rule 4 ("initiation and termination of probate cases") and Rule 4.1 ("termination of probate proceedings initiated by petition"): Rule 4 is a current Probate Rule. It concerns how a probate case begins and concludes. The current rule uses the words "commencement and duration," whereas the draft rule uses "initiation and termination." Section (a) ("generally") provides that "a probate case is initiated by filing a probate proceeding as described in this rule. The termination of that probate proceeding does not necessarily terminate the probate case." Section (b) deals with the initiation and termination of a decedent's estate case. Sections (c), (d), and (e) respectively address cases concerning guardianships, conservatorships, and trusts. Section (f) addresses cases that challenge or enforce decisions of health care surrogates, but the draft section is not complete. Rule 4.1, which is newly proposed, has the title, "termination of probate proceedings initiated by petition." The draft rule proposes alternative language. The Chair asked for members' comments.

A judge member asked if section (a) alone would suffice as the entire rule. The member observed that the remaining sections are essentially statutory cross-references that add little value to the rule. Another member noted that the list of proceedings in Rule 4 was incomplete; for example, it did not include adult adoptions, matters concerning the disposition of remains, or other actions arising under Title 14. Judge Polk responded that the workgroup did not intend to create an exhaustive list, but members interpreted the rule as doing so. Another judge member had no opposition to the content of the rule but would add a catchall provision to address miscellaneous matters. On a straw vote, 4 members preferred reducing Rule 4 to only section (a), and 8 members supported adding a new catchall provision to section (a).

Members continued to discuss Rule 4(a). Some thought it duplicated the provisions of Rule 2, especially because Rule 4(a)'s use of "probate case" and "probate proceeding" could require readers to return to Rule 2 for clarification. Furthermore, Rule

4.1 appeared to duplicate or confound Rule 4(a). Judge Polk offered to combine some of the provisions of Rules 2, 4, and 4.1 into a single rule, which he will present later.

Rule 4.2 ("related non-probate actions"): Judge Polk advised that this newly proposed rule would apply to civil claims brought by a fiduciary, such as wrongful death or elder abuse cases, and family law cases involving a protected person. Judge Polk noted that because these cases are now filed in the probate case, they elude civil time standards, they are difficult to calendar, they are not administered efficiently, they lose the practical benefit of electronic filing (which is not available in probate court), and they complicate entitlement to notices of change of judge. To address these issues, new Rule 4.2(b) ("filing of non-probate action in probate case prohibited") would provide, "A non-probate action may not be filed in a probate case." Rule 4.2(c) ("assignment and consolidation of non-probate action") would allow partial or complete consolidation of those cases with the probate case. Rule 4.2(d) ("procedural requirements") specifies procedural requisites for consolidation, including notice to the parties and a requirement that the judges assigned to the probate and non-probate actions must confer. Rule 4.2(e) ("separate hearings") derives from Civil Rule 42(b).

Members had split views on this proposed rule. Some contended it was contrary to A.R.S. 14-1302(b)(3), which gives the court general jurisdiction to "hear and determine related claims by or against fiduciaries, protected persons or incapacitated persons by or against third parties, including claims for malpractice, breach of contract, personal injury, wrongful death, quiet title and breach of fiduciary duty." They also believed it was contrary to case law. These members suggested that proposed Rule 4.2 would increase administrative burdens rather than reduce them, because the rule would require the filing of motions to consolidate. Moreover, they believe that probate judges would want to know about, and be involved in the disposition of, related civil and family law proceedings as a matter of course, and this rule would frustrate that purpose. These members also were concerned about non-probate judges making decisions affecting the assets of a probate estate. One member gave an example of a rental property in a conservatorship estate, which could give rise to actions for unpaid rent, eviction, remediation, and quiet title and that could be addressed more effectively by a single probate judge rather than multiple civil judges. Another member suggested that if fiduciaries were required to file complaints at the civil counter, counterclaims would inevitably arise that would need to be heard in probate court. These members thought the most productive solution to the issues raised by Judge Polk would be to simply assign separate cases numbers to the civil filings but track the civil and probate cases together in probate court. One member predicted a "firestorm of opposition" to Judge Polk's proposal if it was included in the rule petition.

Other members supported the proposal for the reasons cited by Judge Polk. They also supported it because judicial officers in probate court cannot always conduct certain civil proceedings such as defaults with the same routine and efficiency as non-probate

judges. They also believe that the reference to "court" in A.R.S. § 14-1302 refers to the superior court generally, rather than to a distinct probate court.

The Chair called for a straw vote. Seven members supported Judge Polk's proposal for the separate filing of non-probate claims, while eight members favored the current practice that allows the filing of non-probate claims in the probate case. One member observed that most of the judges on the Task Force supported Judge Polk's proposed Rule 4.2, and most practitioners opposed it, demonstrating a clear divide in their respective perspectives. The rule petition will mention this split. Regardless, Rule 4.2 as proposed will not appear in the final draft.

Rule 5 ("document captions"): Judge Polk noted that the workgroup simplified this rule by incorporating within section (a) ("generally") by reference the captioning requirements of Civil Rule 5.2(a) ("caption"). Section (b) ("title of the case") adds two other requirements for probate cases. Section (c) ("continuation of a conservatorships or other protective order") is like current Rule 5(c), but the words, "beyond the minor's eighteenth birthday" were added for clarity. Section (c) does not apply to guardianships of minors because those proceedings originate in juvenile court rather than in probate. Members approved the draft as presented.

Rule 8 ("personal service of certain documents"): Judge Polk explained that section (a) of the draft rule ("personal service on subject person of guardianship or protective proceeding") reflects a statutory provision applicable to guardianships and conservatorships whereby the subject person can waive service only by appearing in court. Section (c) ("personal service when money judgment requested") is new; it would require service of petitions making such a request under Civil Rules 4, 4.1, and 4.2 Some members thought section (c) was unnecessary in light of section (b) ("personal service on other persons"), which requires service under the Civil Rules when required by Title 14. Judge Polk responded that service in probate proceedings is customarily made by mail, and the court accepts an unsworn proof of mailing. He believes that personal service should be required when a party requests a monetary judgment. One member thought this was illogical because once the court has jurisdiction over a party, the court can award significant nonmonetary relief after service by mailing. Another member believed section (c) would require personal service of a petition for attorney fees, or any petition that included a request for fees.

Most members initially favored abrogating Rule 8, and particularly Rule 8(c). They believed that Title 14 included the necessary service provisions, that experienced attorneys would use personal service when they wanted to verify service, that Civil Rules 4, 4.1, and 4.2 applied in the absence of a probate rule on service, and that the court could order a higher level of service in an individual case if appropriate, for example, before proceeding with a default. But Judge Polk observed that Rule 8 was adopted recently, in 2007, and abrogating the rule and references to the Civil Rules might result in litigants lacking the directions they need. A member then suggested including as Rule 8 only the

following language, which is taken from the last sentence of the comment to the current rule:

> If personal service is required by the court or by any provision of A.R.S. Title 14, service must comply with Rules 4 [not 4(d), as in the comment], 4.1, and 4.2 of the Arizona Rules of Civil Procedure.

Members agreed with this alternative. They will consider later relocating this brief provision to the rule on notice. They declined to include an additional sentence in the provision that would thereafter allow the court to enter default judgment because court inherently has this authority.

Rule 10 ("duties of self-represented parties"): Judge Polk noted that current Rule 10 is quite lengthy, and staff proposed breaking the current sections into Rules 10 and 10.1 through 10.6. The workgroup agreed with this approach. The workgroup proposed the deletion of current Rule 10(A) ("duties of counsel"), because the content is covered by Civil Rule 5.3 ("duties of counsel and parties").

Draft Rule 10 is derived from current Rule 10(B). However, it does not include current Rule 10(B)(3), which concerns document preparation, because that current provision is ambiguous and possibly inaccurate. The workgroup believes that draft Rule 10(b) ("representation of parties"), which provides that only an active State Bar member may represent a party in a probate proceeding, is more a tool for judges to use when instructing lay parties that they may not represent another individual, than it is for lay parties' consumption. One member observed that draft Rule 10(b) is awkwardly worded, and suggested changing it to something simpler, such as, "a non-lawyer may not represent someone else." Draft Rule 10(c) ("fiduciaries") provides that a non-lawyer serving as a fiduciary may represent himself or herself in that capacity in a probate case. Members discussed potential conflicts of interest in that circumstance. Supreme Court Rule 31(d)(30), which details exceptions to the practice of law, is instructive regarding licensed fiduciaries, and members agreed that this provision should serve as a model for redrafting Rule 10(c).

Rule 10.1 ("duties of court appointed fiduciaries"): This draft rule corresponds with current Rule 10(C) ("duties of court-appointed fiduciaries"). It is substantively like the current rule, except it no longer includes current subpart (C)(1)(d) requiring an updated probate information form because that is covered by Rule 6. Members approved Rule 10.1.

Rule 10.2 ("duties of counsel for fiduciaries"): This rule derives from current Rule 10(D) ("duties relating to counsel for fiduciaries"). The draft is substantively the same as the current rule, and it includes a duty to minimize legal expenses. The current rule says that counsel "shall encourage the fiduciary." Members discussed whether to change "shall" to "should" or "must." They agreed that "must encourage" was more directive and yet sufficiently flexible to meet the purpose of this rule. They then approved the draft rule.

Rule 10.3 ("duties of counsel for the subject person of a guardianship or conservatorship proceeding"): This rule is based on current Rule 10(E) ("duties of counsel for subject person of guardianship/conservatorship proceeding; duties of guardian ad litem"). References to "guardian ad litem" in the text of the current rule were changed to "statutory representative" in the draft. The current rule is not clear on where counsel should file the completion certificate. The workgroup's draft would require counsel to file the certificate in each case in which counsel was appointed. However, Judge Polk proposed that the rule allow a local administrative order to specify where it should be filed, so the process could be customized and vary from county to county as local needs dictate. Another judge member observed that the rule addresses professional duties of members of the State Bar, and as professionals, counsel should only be required to retain the certificate and produce it upon request. Members agreed with this idea, and noted that in counties with appointment lists, counsel are probably asked to produce the certificate as a requirement of having their names added to the court's list. Accordingly, members removed from draft Rules 10(a) ("initial training") and 10(b) ("later required training") provisions that required counsel to file their completion certificates. Members approved the rule as modified.

Rule 10.4 ("duties of investigators"): Draft Rule 10.4 derives from current Rule 10(F), which has the same title. Members discussed a similar issue about the filing of completion certificates. They noted (1) there is a training program on the Supreme Court's website for investigators; (2) a significant number of investigators are directly employed by public agencies; and (3) the Supreme Court's website includes a list of qualified probate investigators. Given these facts, members no longer saw the need to require the filing of completion certificates in individual cases, and they deleted this requirement from sections (a) ("initial training") and (b) ("later required training"). Members then approved the rule as modified.

Rule 10.5 ("repetitive filings; vexatious conduct; remedies"): Current Rule 18(C), presently untitled, concerns repetitive filings. Workgroup 2 suggested that Workgroup 1 combine that provision with current Rule 10(G) on vexatious conduct, and draft Rule 10.5 shows this combination. Definitions and remedies in Rule 10.5 derive from existing Rule 10(G) and under the combined rule, the definitions and remedies apply to both repetitive filings and vexatious conduct. The term "guardian ad litem" was replaced with "statutory representative." One member suggested that Rule 10.5 was unnecessary because judges have inherent authority to deal with vexatious conduct, but other members disagreed. Members also discussed the provisions of section (c) and determined that they were appropriate and not internally redundant. Members approved the draft rule.

Rule 10.6 ("prudent management of costs"): Although this draft initially reflected the title and text of current Rule 10.1, the workgroup recommended deleting it. Judge Polk explained that the current rule preceded legislation (A.R.S. § 14-1104) and code sections (A.C.J.A. § 3-303) covering the same subject area, and the workgroup believed the rule had become superfluous. If the Task Force deletes this rule, he suggested

including text concerning the prudent management of costs in the acknowledgement forms, which the fiduciaries sign and presumably read. But another judge member urged retention of this rule, noting that it was a major accomplishment of the 2011 committee, and it is broader and more instructive than the statute. Members then discussed whether the rule should only apply to guardianships and conservatorships, or whether it also should apply to fiduciaries in decedents' estates and trusts. They also discussed whether fiduciaries as a practical matter request a court order that the fiduciary not to do something, as the rule requires, because the cost exceeds the benefit. After reviewing the statute and further discussion, members proposed deleting draft Rule 10.6(a) ("fiduciary duties") but retaining section (b) ("duty to notify the court and court orders") with modifications to the introduction of that section so it also encompasses personal representatives and trustees, and to truncate the provisions of (c) ("market rates"). On a straw poll, most members approved this approach. They also agreed to change "guardian ad litem" to "statutory representative." Approval of the rule will abide these modifications.

Rule 13 ("accelerated hearings and rulings; emergency appointments; ex part motions and petitions"): Judge Polk advised that the draft was primarily a restyling of the current rule, with the addition of language in section (a) ("accelerated hearings on petitions") and section (b) ("accelerated rulings on motions") that would allow the court to summarily grant or deny a request under either section. Judge Polk also noted that section (d) ("*ex parte* motions and petitions") included an explanation of the Latin term. Members had no questions or comments and approved the draft rule.

4. **<u>Workgroup 3.</u>** Judge Mackey made presentations on behalf of the workgroup.

Rules 24 + 36 consolidated ("guardian's inpatient mental health authority"): Because Judge James McDougall (ret.) recently suggested edits to the consolidated rule, and because the members' further consideration of the rule might require extended discussion, Rules 24 + 36 will be deferred until the next Task Force meeting.

Rule 30 ("conservator's inventory, budget, and account"): The Task Force previously returned this rule to the workgroup with comments and requests for modification. Accordingly, in the timing provisions of section (c) ("conservator's budget"), the workgroup added the underlined words, "<u>if ordered by a judicial officer</u>, the conservator must file the initial budget…." The sustainability provisions of subpart (d)(2) were modified to add a requirement, if the estate is not sustainable, that the conservator include a discussion in the account of available options. In subparts (d)(3) and (d)(4), the workgroup added the words "or other date set by the court" to accommodate local variations in setting due dates for accountings. Members had no additional comments and approved the rule with these modifications.

Rule 33 ("compensation for fiduciaries, attorneys, and statutory representatives"): The Task Force had also returned this rule to the workgroup with its

suggestions. The workgroup thereafter modified the Rule 33 approval process to apply to all case types. The court may either approve the request for fees when the request is included in a fiduciary's account, or it may approve fees in a separate request. The members' subsequent discussion focused on two issues. First, they questioned whether section (d) ("content of a request for approval") which requires detailed and specific records, is sufficient to preclude block billing. They concluded that it would be helpful if the section contained an express provision disallowing block billing. They also had concerns about the terminology of the draft rule, and whether it clearly delineated the difference between filing a request and filing a petition. They believed a new introductory section should explain the difference. They returned the rule to the workgroup to address these issues. Members also discussed whether section (c) ("personal representatives and trustees") was necessary. They concluded that these fiduciaries are not required to submit fee requests to the court, but they may choose to, or the court may order their submission. Accordingly, they retained section (c). They also discussed whether the proof of notice provision in section (f) ("objections") was necessary because the general rule on notice applies. They agreed it was unnecessary and removed the second sentence of draft section (f).

5. <u>Workgroup 2.</u> Judge Olson presented Rule 38.

Rule 38 ("forms"): Judge Olson explained that the current forms for accountings, by default, are the most complex, i.e., Forms 5 through 8. The workgroup changed the default to form number 9, the simplified form. (The draft rule now says, "Unless otherwise ordered, a conservator should submit simplified accounts using Form 9.") But the rule permits the court to go higher or lower on the continuum of complexity, depending on the circumstances of each case. The revised rule also allows the court to waive an account, as provided in a former comment. Members agreed with this approach and thought it was consistent with their revisions to Rule 30.

Judge Olson also noted that the workgroup added a comment to advise that Rule 38 is not the only form resource. The comment provides:

> In addition to the official forms, additional forms are generally available from the self-help resources at the websites of the Arizona Supreme Court, the Superior Court, and the Clerk of the Superior Court, as well as the State Bar of Arizona Probate Practice Manual.

Judge Olson further suggested that forms be in an appendix to the rules, so stakeholders did not have to search for them. Members took no action on this suggestion.

Members approved Rule 38 as modified.

6. <u>Petition regarding Probate Rule 28.2.</u> The meeting materials included a draft rule petition, which would be submitted by the Task Force, requesting the Court to

adopt Probate Rule 28.2 on an emergency basis. This petition is a response to amendments to Civil Rule 38 included in Order No. R-18-0018, which becomes effective on January 1, 2019 and affords the parties a jury trial automatically, without the necessity of a jury demand. (See the discussion in the September 28, 2018 Task Force meeting minutes at pages 8-9, and in the October 26, 2018 meeting minutes at pages 8-9.) The draft petition requests that effective January 1, 2019, the probate rules revert to the current procedure for guardianships by requiring a demand for a trial by jury. After discussion and a review of pertinent statutes, members agreed to add conservatorships to this request.

> **Motion:** A member then moved to give the Chair authority to finalize the petition and to file it on December 3, 2018. The motion received a second and it passed unanimously. **PRTF: 009**

The Chair advised that the Court would consider the petition on December 12, 2018.

7. **Roadmap.** As directed by the Chair at the November 30 meeting, a small group of Task Force members met to discuss the respective roles of statutory representative, court-appointed attorney, and guardian ad litem. During today's meeting, the Chair asked those members to provide proposed revisions to draft Rule 19 ("appointment of an attorney, medical professional, or investigator") that reflect the group's conclusions. Judge Polk will also circulate his proposal regarding Rules 2, 4, and 4.1 for discussion at the next meeting.

The next Task Force meeting will be on Friday, December 14, 2018. Members will review a draft petition and consider any residual rules issues. The Chair does not anticipate another Task Force meeting between December 14 and January 10, 2019, the petition filing deadline. However, the editorial group (the Chair, Judge Norris, Judge Polk, and staff) will review the petition, rules, and appendices after the December 14 meeting to assure that the drafts are correct. The Court will open the petition for public comment after the filing date, and stakeholders may submit comments until May 1. The Task Force will meet in May, on a date to be determined, to review the comments and prepare a reply. The Court will consider the petition, comments, and reply at its rules agenda in late August or early September 2019.

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

9. **Adjourn.** The meeting adjourned at 4:12 p.m.