

# **Probate Practice Book Advisory Committee Subcommittee II**

Meeting Minutes  
Wednesday August 17, 2011

Law Offices of Mahon, Quinn & Mahon  
636 Broad Street  
Meriden, CT

Judge Brian Mahon, Chair of Subcommittee II, convened the meeting at 3:05 p.m.

Other members in attendance: Attorney Thomas Gaffey, Attorney Christopher Hug, Attorney Carmine Perri, Judge Claire Twerdy.

Members absent: Professor Jeffrey Cooper, Judge John McGrath, Mr. Arthur Teal

Also in attendance: Attorney David Biklen, Committee Reporter

## **Approval of Minutes**

Approval of the minutes of the July 20, 2011 meeting was moved and seconded. All members present voted to approve.

## **Discussion of concepts for rules**

### **Further Discussion re Discovery**

The subcommittee continued its discussion from the last meeting and the subsequent e-mail exchange. The list of issues for discussion was reviewed and the following conclusions reached:

**1. Informality of probate proceedings.** There was consensus among the members to recommend a “gatekeeper” approach under which discovery would be available only upon court approval. This would occur by means of a preliminary hearing or scheduling conference that could be requested by a party or by the court on its own motion. The court might set such a hearing as soon as it learns that a matter will be contested.

The purpose of this approach is to promote fairness by preventing one party from using excessive discovery against another, and to prevent unduly extended

discovery. It was the sense of the members that judges should be rather liberal in their application of these provisions and not unduly limit reasonable and appropriate discovery. Parties should be encouraged to reach agreement on discovery issues and where they do the courts should give some deference to those agreements.

It was also agreed that the rules should include a standard for allowing discovery. It was suggested that language could be borrowed from Rule 13-2 of the Connecticut Practice Book, to the effect that the information sought appears “reasonably calculated to lead to the discovery of admissible evidence.”

**2. Types of discovery provided by statute.** The subcommittee discussed the four types of discovery that are now provided by statute: depositions, (§52-148a), disclosure of medical information, (§45a-98b), examination of allegedly incapable party, (§45a-132a), and summoning witnesses to give testimony, (§45a-129). The sense of the group was that there should be some cross reference in the rules to these statutes to provide guidance.

**3. Other types of discovery.** It was agreed that the same general types of discovery available in the Superior Court should also be available in the probate courts. The subcommittee discussed incorporating by reference the discovery rules from the Connecticut Practice Book. However, it was felt that some of those rules may be overly burdensome in the probate context and it was suggested that some of them might be considerably simplified for our use. Attorney Hug offered to review them and report back to the group.

**4. Compliance issues.** With respect to discovery disputes, objections, requests for protective order, motions to quash, etc., the subcommittee agreed not to adopt the Superior Court rules governing such matters. Instead they would be addressed using the scheduling order process discussed above. A party seeking to resolve a discovery dispute would simply request another hearing as above at which the court could hear and resolve the matter.

## **Evidence**

The list of issues for discussion was reviewed and the following conclusions reached:

**1. Balancing informality and fundamental judicial principles.** The subcommittee was of the view that the rules of evidence should apply in all contested matters. The members recognized the difficulty in defining what matters are contested in this context. After some discussion it was agreed that the rules should contain language similar to that found in §1-1 of the Connecticut Code of Evidence to the effect that the rules of evidence are applicable in all

matters “in which facts in dispute are found” by the court. This avoids the difficulties of defining what matters are contested, and puts all parties on notice that if they are to introduce evidence of facts that may be disputed, they can expect the rules of evidence to apply.

The subcommittee agreed that the court should have some discretion to apply the rules in a more relaxed manner when dealing with unrepresented parties.

It was also observed that when evidence is offered and no objection is made, the evidence may come in.

The members agreed that this approach would not require application of the rules of evidence in uncontested matter since those matters would not involve “facts in dispute.”

**2, 3. Matters heard on the record.** The subcommittee discussed those matters enumerated in §45a-186 (a), such as involuntary conservatorship and commitment, in which the hearing must be recorded and any appeal is on the record. Under the above approach the rules of evidence would be applied in all matters where there is any dispute as to facts.

**4, 5. Putting parties on notice when rules of evidence to be applied. Contested v. uncontested matters.** The rule as proposed would avoid the need to determine whether a matter is contested, focusing instead on whether there are “facts are in dispute”. In those instances the parties know that the rules of evidence will apply.

**6. Application of rules at request of party.** Under the proposed approach the rules of evidence would apply without the need for a party’s request. On the other hand the parties might elect not to have the rules apply, for example by stipulating to facts or by not objecting to offered evidence.

**7. Reference to UAPA.** The subcommittee concluded that in light of the foregoing there was no need to look to the Uniform Administrative Procedures Act for guidance.

## **Meeting Schedule**

It was agreed that the subcommittee’s meeting schedule for the balance of 2011 will be as follows:

- Wednesday, September 7
- Thursday, October 6
- Wednesday, November 9
- Wednesday, December 7.

All meetings to be at 3:00 p.m. at the offices of Mahon, Quinn and Mahon.

The meeting was adjourned at 4:50.

Minutes approved September 7, 2011