

Probate Practice Book Advisory Committee

Subcommittee II

Meeting Minutes
Tuesday, October 11, 2011

Law Offices of Mahon, Quinn & Mahon
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Meriden, CT

Judge Brian Mahon, Chair of Subcommittee II, convened the meeting at 3:00 p.m..

Other members in attendance: Attorney Thomas Gaffey, Attorney Christopher Hug, Hon. John McGrath, Attorney Carmine Perri, Mr. Arthur Teal, Hon. Claire Twerdy.

Also in attendance: Committee Reporter David Biklen

Members not in attendance: Professor Jeffrey Cooper.

Approval of Minutes

Approval of the minutes of the meeting of September 7, 2011 was moved and seconded. All members in attendance voted to approve.

Discussion of Concepts for Rules

Ex Parte Communications

The subcommittee agreed that it would be helpful to have rules addressing ex parte communications, in that such rules would bring the issue to the attention of parties, particularly those not represented by counsel.

It was agreed that some definition of the term "ex parte communications" would be required. It was noted that the Code of Probate Judicial Conduct contains such a definition.

Committee Reporter David Biklen observed that the general convention is to define a term which is to be used only once in the rule where used. Where used in multiple locations, the term is defined at the outset in a definitions section. This should be taken up with the full committee.

The members also agreed that the rules prohibiting ex parte communications in contested matters should be directed at the parties, as well as the court.

The subcommittee also agreed that the rules should identify court filings that do not fall within the prohibition on ex parte communications, including such things as applications, inventories, accounts, and memoranda of law.

It was agreed that the rules should establish exceptions for matters that are administrative in nature, and not substantive, such as scheduling.

The members determined not to attempt to direct how courts and court staff should respond to attempted ex parte communications.

Ex Parte Orders

There was consensus that the rules should address the issuance of ex parte orders by the court:

- In those instances specifically authorized by statute, such as immediate temporary custody and temporary conservator matters;
- In matters in which the statutes do not require prior notice and hearing, such as safety deposit box openings, affidavits in lieu of administration and custody of remains matters;
- In other matters, where all necessary parties waive notice of hearing;
- Even when ex parte orders are appropriate, the court should always have the discretion to require notice and hearing if warranted in the particular case.

Case Management Conferences

This concept was addressed previously by the subcommittee in connection with its consideration of discovery. However, the members agreed that some broader consideration, not limited to discovery, was warranted.

A case management conference may, in any contested matter, be requested by any party, or on the court's own motion. There should be flexibility as to the number and timing of such conferences in a given case. The subcommittee was concerned that the case management conference not be used as a tool for delay. Therefore the court should have discretion as to whether to schedule a conference in response to the request of a party.

In addition to discovery related matters, a case management conference may address other issues such as:

- The identification of claims and defenses;
- Need for motions and scheduling;
- Stipulations of fact;
- Identity of witnesses;
- Anticipated length of trial;
- Scheduling of trial.

The members felt that there is a valid distinction to be made between a case management conference, addressing broader issues aimed at getting the contested matter ready for hearing, and trial management conferences, narrowing the issues to the those attendant upon trial. The subcommittee felt that both have valid purposes and should be allowed. It was also agreed that in some cases the two could be combined into one, and that the court should have discretion given the needs of the particular case.

The subcommittee also agreed that the rules should contain a sample form for a case management order. It was agreed that the order used by the Superior Court should be used as a starting point. Chair Brian Mahon also provided a copy of the order has developed for use in his court.

Status Conferences

The subcommittee reached consensus on the following concepts regarding status conferences:

- A status conference may be requested by any party, or by the court on its own motion;
- It may be requested at any time, and for any purpose having sufficient connection with the progress of the matter before the court;
- The status conference should not be available as a tool for delay or harassment, therefore the court should have discretion whether to set a status conference when requested;
- The court may not issue binding orders at a status conference, provided that it may do so with respect to issues on which all necessary parties have waived notice of hearing.

Review of Feedback From Full Committee

Discovery

A question was raised at the full committee meeting concerning depositions as authorized under §52-148a. The issue was whether the availability of depositions could be limited by rule when there is no such limitation in the statute. The subcommittee agreed to recommend a carve-out under which depositions would be available as provided in the statute, and all other discovery would require prior approval of the court.

The members felt that the court could impose appropriate limits on depositions in the same manner as in the Superior Court, such as by scheduling order.

Evidence

Some concern was expressed at the full committee meeting about the application of the rules of evidence in all probate matters in which facts are in issue. In particular, there was concern that this would place the large number of unrepresented parties in probate matters at a disadvantage.

The subcommittee's feeling was that the court would have sufficient discretion to apply the rules in a manner that is fair to all parties. This concept is expressed in the cases cited by Attorney Perri at prior subcommittee meetings and to the full committee at its September meeting. The subcommittee's only concern was how to express this in the absence of commentary to the rules.

Next Meeting

The next meeting is scheduled for November 9, 2011. It was noted that the judges will be attending a Probate Assembly meeting earlier that day in New Britain. To accommodate the judges' attendance at both meetings, it was agreed to change the time and location of the subcommittee meeting. The members agreed to hold the meeting either at the location of the Probate Assembly meeting, or at Probate Administration in West Hartford. It was further agreed to move the time up to shortly after the conclusion of the Probate Assembly meeting, which is scheduled to conclude at 1:00 p.m.

The meeting was adjourned at 4:50 p.m.