

Probate Practice Book Advisory Committee

Meeting Minutes

Thursday, June 21, 2012
3:00 p.m.

Office of the Probate Court Administrator
186 Newington Road
West Hartford, CT

The meeting was convened at 3:10 p.m. by Judge Paul Knierim, Probate Court Administrator and Chair.

Other members in attendance: Attorney Molly Ackerly, Judge Michael Albis, Attorney Bonnie Bennet, Attorney Douglas Brown, Professor Jeffrey Cooper, Ms. Suzette Farrar, Attorney Thomas Gaffey, Attorney Karen Gano, Attorney Paul Hudon, Attorney Christopher Hug, Judge Robert Killian, Attorney Gabriella Kiniry, Attorney Andrew Knott, Judge Brian Mahon, Judge John McGrath, Mr. Stephen Pednault, CPA, Attorney Carmine Perri, Attorney Greta Solomon, Judge Beverly Streit-Kefalas, Mr. Arthur Teal, Judge Claire Twerdy, Ms. Sondra Waterman, and Judge Steven Zelman.

Also in attendance: Attorney David Biklen, Committee Reporter.

Members not in attendance: Judge Gerald Fox and Attorney Patricia Kaplan.

Remarks of the Chair

Judge Knierim thanked the members for their enormous contributions to the development of a new probate practice book. He noted that committee members had dedicated more than 1,100 person hours to meetings of the committee and its subcommittees, not counting time spent researching, analyzing, drafting and editing. The project is on target for the new edition of the practice book to be effective July 1, 2013.

Judge Knierim described the timeline for approval of the new practice book. Over the summer months, he and Attorneys Bennet, Biklen and Gaffey (referred to in these minutes as the drafting committee) will edit the current drafts to ensure style consistency and resolve any remaining open issues. The committee will meet to review a revised draft on September 13, 2012. The proposed rules will then be submitted to the Supreme Court. The Supreme Court will publish the rules in the Connecticut Law Journal, establish a period for written comment and conduct a public hearing. After making any edits in response to comments, a final

revision will be submitted to the Supreme Court for approval. Judge Knierim hopes to complete the process by mid-November.

Judge Knierim indicated that all draft rules are posted on the website. A joint seminar sponsored by the Probate Assembly and the Connecticut Bar Association at the end of November will focus on the new rules.

Approval of the minutes of December 15, 2011 and March 15, 2012

The minutes of the December 15, 2011 and March 15, 2012 meetings were unanimously approved.

Discussion of drafts of proposed rules.

Subcommittee I – General Provisions and Procedures Applicable for All Case Types

Judge Zelman, Chair of Subcommittee I, highlighted the changes Subcommittee I made to draft rules in response to feedback from judges, court staff and the full advisory committee. He then reviewed drafts of Rules 8 through 18, 49 and 50. The following draft rules generated discussion:

Rule 8 Notice

It was suggested that the Attorney General be included in the definition of party for matters involving a charitable interest or beneficiary. This would obviate specific references to the Attorney General in section 8.4 and other provisions in which notice to the Attorney General is currently specified.

Section 8.8 should be amended to specify the procedure to be followed when a party's address is unknown.

Rule 9 Counting Time Periods

The rule should be revised to clarify that time periods are calculated using calendar days, rather than business days, unless a statute specifies otherwise. The rule should also address what happens when a time period ends on a Saturday, Sunday or holiday and should state the applicable rules for a time period that is measured in hours rather than days.

Rule 12 Court-appointed Attorney

Rule 12.5 should be revised to clarify that an attorney's appointment continues for the duration of a matter *in the probate court*, and does not automatically continue if the case proceeds after a transfer or appeal to the Superior Court. Two exceptions were noted:

- Connecticut Practice Book Rule 35a-19(c) provides that an attorney's appearance continues upon the transfer of a removal or termination of

parental rights matter to Superior Court until a withdrawal is filed and granted by the Probate Court or Superior Court.

- Section 45a-649a requires an attorney for a respondent in a conservatorship proceeding, on the client's request, to assist in filing an appeal in Superior Court.

Rule 13 Court-appointed Guardian ad Litem

The phrase "the person whom the GAL represents" may cause confusion about the role of the GAL and should be replaced with a phrase such as "the person for whom the GAL is acting."

Rule 15 Disqualification of Judge

Attorney Hug raised a concern with section 15.3(b), which permits a judge to waive the requirement that a motion for disqualification be submitted in writing not later than three days before the hearing. While recognizing that the provision is intended to permit consideration of an issue that arises after the deadline for filing a disqualification motion, Attorney Hug believes that a clear record of the basis for the motion is essential. Attorney Hug will prepare substitute language for the drafting committee's consideration.

Rule 49 Guardian of Adult with Intellectual Disability

After a lengthy discussion, it was clear that most committee members are in favor of retaining the proposed rule that authorizes a court to require a criminal background check for a guardian or proposed guardian. Similar provisions are included in the sections governing children's matters, conservatorships and name changes.

Subcommittee II – Procedures for Hearings

Judge Mahon, Chair of Subcommittee II, reviewed draft Rules 19 and 20, which were revised since the March meeting. The following draft rules generated discussion:

Rule 19 Discovery

There was considerable discussion whether the discovery rule should be limited to contested matters and whether a definition of contested matters is needed. The drafting committee will consider the various arguments while editing this proposed rule.

References should be added to the following statutes, which provide additional discovery tools in probate matters:

- Section 45a-98b, obtaining medical records
- Section 45a-129, summons to testify
- Section 52-148e, party may request court to issue subpoena for deposition

Section 19.2 should be revised to make it clear that only an attorney or the court may issue a subpoena.

Following discussion, committee members were generally in agreement that the failure to respond to a request for admission should not automatically result in a deemed admission. The court should have the ability determine an appropriate remedy after considering all the circumstances as provided in proposed section 19.9.

Rule 20 Evidence

There was broad consensus that the language of the rule referring to the liberal application of the rules of evidence is both an accurate restatement of the law and an appropriate description of the manner in which Probate Courts should apply the rules.

Rule 26 When participation by electronic means permitted

The rule should make clear that the court has full discretion to grant or deny a request for participation by electronic means whether or not the parties agree to it. The rule should also require the court to give consideration to the particular needs of state agencies in deciding such a request.

Subcommittee III – Procedures for Specific Case Types

Judge Albis, Chair of Subcommittee III, reviewed draft rules and changes to draft rules made since the March meeting. The following draft rules generated discussion:

Rules 34-36 Fiduciary Accounting

The question was raised whether a trustee would ever be able to submit a financial report instead of an account given the prohibition on using financial reports when principal and income must be accounted separately. Several examples of situations in which separate principal and income accounting would not be necessary for a trust were identified during the discussion.

The committee discussed whether the use of date of death value as the basis for the fiduciary acquisition value of an asset is appropriate for a successor fiduciary. Members agreed that the use of date of death value is appropriate because the proper measure of a fiduciary's investment performance is market value, rather than fiduciary acquisition value.

Income taxes should be added to the list of administration expenses under sections 36.2(c).and 36.3(d).

Rule 38 Decedents' Estates

Rule 38.3(4) as currently written requires the court to give the Attorney General notice of a hearing to admit a will if any of the beneficiaries under the will are charities. This provision might be unnecessary if the Attorney General is included in the definition of a party in matters involving charitable interests as indicated in the discussion about rule 8 above.

Rule 38.4 requires a petitioner seeking admission of a purported will to send a copy of the petition and will to all parties, including persons named in other any other will in the custody of the court. The rule should require the court to notify the petitioner of the existence of any other will filed with the court.

Rule 38.3(6) should clearly state that notice to beneficiaries under any purported in the custody of the court refers only to a will of the same decedent.

Rule 38.13 provides that a fiduciary may not make distribution to an heir or beneficiary who is not legally capable of acting unless a conservatorship or other suitable alternative arrangement has been established. A question was raised whether this places a burden on the fiduciary and whether "legally incapable" is limited to persons who have been adjudicated to be incapacitated. The drafting committee will give further consideration to this language.

Rule 39 Estate Tax

The committee revisited its prior discussion about the practice at some courts of withholding decrees pending the submission of a tax return of other required filing. In light of the strong consensus among judges and clerks that courts need discretion in this area to properly manage cases, no rule is contemplated.

Rule 42 Children's Matter, General Provisions

Proposed section 42.5(b) permits a court to proceed on a temporary custody petition without further notice when a previously consenting parent has withdrawn his or her consent. The committee discussed whether this provision adequately protects the due process rights of the respondent parent. The drafting committee will consider the issue further.

Rule 45 Conservators

Section 45.9(b) lists factors to be considered in determining how the conservator should administer joint assets, including consideration of the conserved person's estate plan. Committee members discussed whether disclosure of the conserved person's will or other estate planning documents might violate attorney-client privilege or other privacy principles. Others noted that the subcommittee has discussed the issue and concluded that a court could, on the motion of the conservator or other party, seal a portion of the file under Rule 16. The subcommittee felt that a case-by-case analysis would be preferable to a provision making estate planning material automatically confidential.

Next meeting

The next meeting of the full committee will be on September 13, 2012 from 3:00 to 6:00 p.m. The location of the meeting is to be determined.

Adjournment

The meeting was adjourned at 6:45 p.m.