

Probate Practice Book Advisory Committee

Meeting Minutes

Thursday, September 15, 2011
3:00 p.m.

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

The meeting was convened at 3:07 p.m. by Judge Paul J. 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, Attorney Tom Gaffey, Attorney Karen Gano, Attorney Paul Hudon, Attorney Patricia Kaplan, Attorney Gabriella Kiniry, Attorney Andrew Knott, Judge Brian Mahon, Judge John McGrath, Mr. Stephen Pednault, Attorney Carmine Perri, Attorney Greta Solomon, Judge Beverly Streit-Kefalas, Mr. Arthur Teal, Judge Claire Twerdy, Ms. Sondra Waterman, Judge Steven Zelman.

Members absent: Ms. Suzette Farrar, Judge Gerald Fox, Attorney Christopher Hug, Judge Robert Killian.

Also in attendance: Attorney David Biklen, Committee Reporter

Remarks of the Chair

Judge Knierim thanked the committee members for their work at the subcommittee level during the summer months. The project is progressing very well to date and promises to be of great value to the users of the probate system.

Judge Knierim reported that Chief Justice Chase Rogers has asked Justice Peter Zarella to act as the Supreme Court's liaison to the committee. Judge Knierim will be keeping Justice Zarella apprised of the committee's progress.

Approval of the minutes of June 15, 2011

The minutes of the June 15, 2011 meeting were unanimously approved.

Committee Reports and discussion of proposed concepts

Subcommittee I – General Provisions and Procedures Applicable to all Case Types

Judge Zelman, Chair of Subcommittee I, presented proposed concepts for rules on the following topics: Scope of Rules, Definitions, Clerks and Records, Parties, Appearances, Probate Fees and Filing Requirements.

The full committee offered feedback on the following topics:

Topic and item number references are to the subcommittee meeting minutes (and also to the concepts lists sent in advance of the full committee meeting).

Clerks and Records, Item No. 8

A rule should require that all court orders and decrees be in writing but should not make the requirement a condition to enforceability.

Parties, Item No. 3

The committee suggested that the rule make it clear that providing notice to an individual upon the individual's request does not automatically make the recipient a party to the matter.

Appearance of counsel, Item No. 8(b).

There was considerable discussion regarding a proposal that an attorney must file a withdrawal of appearance no later than 5 days prior to the date of any scheduled hearing in a matter. While some expressed concern that last minute withdrawals could cause delay and adversely affect the rights of parties, others argued that counsel should not be required to continue representation when the attorney-client relationship has broken down.

Probate fees, Item No. 8

While there was general consensus that a court should have the authority to delay the approval of an account until payment of probate fees, opinions were divided on whether a court should be able to withhold other decrees or documents to ensure payment. Certificates releasing estate tax liens were raised as a matter of particular concern. Some members argued that releases should be issued as a matter of right in circumstances in which there is no estate tax expected, while others suggested that releases could perhaps be issued on the condition that the fiduciary hold funds in escrow for payment of probate fees and other expenses. The issue was referred to Subcommittee III for further discussion.

Filing requirements, Item 8

The rules should incorporate broad language to provide flexibility in dealing with any form of electronic communications, rather than identifying current communication methods that may become obsolete.

Filing requirements, Item No.11

The committee discussed whether to require petitioners – whether represented by counsel or not -- to provide copies of their petitions and the attachments to all parties. While members expressed support for the concept in theory, concerns were expressed about the burden of such a requirement on self-represented parties, and in particular those who are indigent. Similar concern was expressed about a requirement that court staff make and send copies of filings for parties. It was suggested that CMS-generated notices could be modified to make it clear that parties may review the court's file prior to the hearing or request a copy of a petition from the petitioner (and include the petitioner's contact information) or from the court (in which case copy charges would apply). Implementation of an e-filing system or online access to documents in court files would ultimately provide a solution but is not expected to be available in the near term.

Other issues to be considered:

- Could a new form of waiver permit a party to indicate that he or she does not want copies of filings?
- Should state agencies be entitled to copies provided by court staff without charge?

Subcommittee III has proposed a rule that the proponent must provide a copy of the purported will and the fiduciary must provide a copy of the inventory and final account to all parties in decedents' estates.

Subcommittee III will continue to discuss the issue with respect to various petitions and filings in specific types of cases and will forward its conclusions to Subcommittee I.

See also discussion of *Probate Bonds*, Item No. 6, under Subcommittee III below, regarding a requirement that a fiduciary must use the official form to establish a restricted account.

Subcommittee II – Procedures for Hearings

Judge Mahon, Chair of Subcommittee II, presented proposed concepts for rules on discovery and evidence. He emphasized that the subcommittee's proposals are intended to advance the dual objectives of maintaining a probate court system that is user friendly for self-represented parties while promoting uniformity in the conduct of contested hearings.

The full committee offered feedback on the following topics:

Discovery, Item 1

The committee supports the concept that probate courts should serve a gatekeeper role in the management of discovery, with an emphasis on promoting agreement among the parties. The subcommittee should provide more detail on how the proposal to permit discovery only upon order of the court squares with C.G.S. §§ 52-148a et seq., which authorize parties in probate proceedings to conduct depositions.

Discovery, Item 3

The committee intends to recommend a form to memorialize discovery and scheduling orders resulting from case management conferences.

The committee should evaluate whether it is appropriate for the judge handling the pre-hearing case management issues to then hear the case itself or whether another judge, or possibly a probate magistrate, should handle the discovery and scheduling issues.

Evidence, Item 1

The subcommittee's proposal that the rules of evidence be mandatory in all matters in which facts are in dispute generated considerable discussion. While there was broad support for the concept, the subcommittee is asked to provide further guidance on the scope of judges' discretion in applying the rules, particularly in cases involving both represented and self-represented parties. In addition, the subcommittee should consider a provision to direct how a judge will signal that the matter is considered contested for purposes of applying the rules of evidence.

Committee members agreed that additional training regarding the rules of evidence would be appropriate for both judges and attorneys.

Subcommittee III – Rules for specific types of matters.

Judge Albis, Chair of Subcommittee III, presented proposed concepts for rules on probate bonds, fiduciary accounting and decedents' estates.

The full committee offered feedback on the following topics:

Probate Bonds, Item No. 4

The subcommittee should review the proposed requirement that fiduciaries report changes in the value of assets that exceed 10% of the value of the probate bond in light of market fluctuations.

Probate Bonds, Item No. 6

The proposed rule would require that a fiduciary and financial institution execute the official form to establish a restricted account. This will necessitate an explicit

exception to the filing requirements provision proposed by Subcommittee I, which currently indicates that official probate forms are not required.

The subcommittee should consider an annual recertification to verify that a restricted account remains in force.

Probate Bonds, Item No. 7

The subcommittee should consider a provision to authorize a reduction in the bond amount when some or all of the assets in the estate are subject to a structured settlement. The rule might also address whether modification of structured settlements should require prior probate court approval.

Fiduciary Accounting, Item 3(c)

The committee should review the definition of fiduciary acquisition value regarding the following issues:

- Is there any conflict between adjustments related to income tax cost basis and the obligation of a fiduciary to track the value of an asset at the commencement of the estate?
- Should charitable trusts be excluded from adjustments related to income tax basis?

Financial Accounting, Item 4(d)

The subcommittee should review whether a financial report (the simplified form of account) should include a reconciliation of assets.

Financial Accounting, Item 5(a)

The subcommittee should determine whether separate accounting for principal and income (and hence a full account rather than a financial report) is required for some or all charitable trusts.

Financial Accounting, Item 6

The subcommittee should determine whether any of the requirements of rule 6 can be relaxed for full accounts. For example, the rule could permit transactions to be grouped into categories, rather than itemized.

Financial Accounting, Item 7

There was a difference of opinion among committee members whether the rules should permit a court to dispense with an account that is otherwise required when all the beneficiaries have executed a receipt and release. It was suggested that the committee consider a hybrid approach with a summary report that is not as detailed as a financial report or account.

Financial Accounting, Item 9

The subcommittee should consider a rule requiring notice to all interested parties before waiving the requirement of a final conservatorship account when the conserved person has been determined to be eligible for Title 19.

Financial Accounting, Item 11(a)

While noting that keeping time records is good practice for both attorneys and fiduciaries, the consensus of the committee is that the rules should not compel time records because time expended is only one of several factors in determining the reasonableness of fees.

The language listing the factors to be addressed in the task statement should be modified to indicate that the attorney or fiduciary need only address those factors that are relevant in the particular case.

The subcommittee should add a reference to the engagement letter as a factor to consider in reviewing attorney's fees.

The subcommittee should consider whether the rules should offer guidance on the fees of accountants or other professionals.

Decedents' Estates, Item 17(c)

The subcommittee should replace the phrase "if so directed in the will" with the words "if the will permits."

Decedents' Estates, Item 19(c)

The committee discussed but did not resolve the subcommittee's proposal that notice of a hearing to admit a will should be sent to beneficiaries of prior wills in the custody of the court, in addition to heirs. The subcommittee should consider the following issues in reviewing the proposal:

- Is the petitioner responsible for determining the addresses of beneficiaries under prior wills?
- Would a GAL be necessary for missing beneficiaries under prior wills?
- What if one of the beneficiaries under a prior will is a trustee?

Decedents' Estates, Item 19(e)

The committee should determine if creditors who are known to have been paid can be removed from the list of interested parties.

Next Meeting

The next quarterly meeting of the full committee is December 15, 2011 at the Office of the Probate Court Administrator, 186 Newington Road, West Hartford, CT from 3:00 to 6:00 p.m.

Adjournment

The meeting was adjourned at 6:30 p.m.

Approved December 15, 2011