

Honorable Dean M. Fink
Probate and Mental Health Department Presiding Judge
Honorable Jay M. Polk
Former Probate and Mental Health Department Presiding Judge
Superior Court in Maricopa County
101 W. Jefferson Street
Phoenix, Arizona, 85003
(602) 372-0879

IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of	}	Supreme Court No. R-23-0039
PETITION TO AMEND RULES 16	}	COMMENT TO PROPOSED
AND 17 OF THE ARIZONA RULES	}	AMENDMENTS OF RULES 16
OF PROBATE PROCEDURE	}	AND 17, ARIZONA RULES OF
		PROBATE PROCEDURE

Pursuant to Rule 28, Rules of the Supreme Court of Arizona, the Presiding Judge of the Probate and Mental Health Department of the Superior Court in Maricopa County and the former Presiding Judge of the Probate and Mental Health Department of the Superior Court in Maricopa County submit the following comment regarding the Petition to Amend Rules 16 and 17 of the Arizona Rules of Probate Procedure (the “Petition”) that David K. Byers, Administrative Director of the Administrative Office of the Courts, filed on July 5, 2023.

I. Introduction

The Petition requests amendment of Rules 16 and 17, Arizona Rules of Probate Procedure (“Probate Rule”), to implement the enactment of Senate Bill (SB) 1291 from the First Regular Session of the Fifty-sixth Legislature. The undersigned whole-heartedly support amending the Probate Rules to implement SB1291; however, as explained below, some of the proposed amendments are

inconsistent with the plain language of SB1291. Consequently, the undersigned propose some different amendments to Probate Rule 16 and 17.

II. Petition's Proposed Amendment to Probate Rule 16(a)

The amendments proposed in the Petition attempt to address two distinct aspects of SB1291. The first of those aspects is notice of the right to a jury trial. Specifically, SB1291 amends A.R.S. §§ 14-5309 and -5405 by adding new subsections C to each statute that require a notice of an initial hearing on a petition for the appointment of a guardian or conservator to include “notice of the right to a trial by jury under section 14-1306, subsection A.” 2023 Ariz. Sess. Laws Ch. 195 §§ 7 and 11. The Petition addresses this issue by proposing that a new subpart (6) be added to Probate Rule 16(a), which prescribes the required content of a notice of initial hearing on a petition filed in a probate proceeding. That new subpart would add to the list of required content, “any notice regarding the right to a jury trial required under A.R.S. §§ 14-5309(C) or 14-5405(C).” The undersigned agree with this proposed addition to Probate Rule 16(a) and urge the Court to adopt the amendment to Probate Rule 16(a) as proposed in the Petition.

III. Petition's Proposed Amendments to Probate Rules 16(b) and 17(a)

The second aspect of SB1291 that the Petition attempts to address is the addition of a new subsection D to A.R.S. § 14-5401. *See* 2023 Ariz. Sess. Laws Ch. 195 § 9. As the Petition correctly states, this new subsection D “prohibits the court from appointing a conservator or entering a protective order under A.R.S. § 14-5401(A)(2) if the person allegedly in need of protection has not appeared before the court either in person or by virtual means” unless certain limited conditions exist.¹ (Pet. at 2.). However, rather than focusing on the

¹When it becomes effective on October 30, 2023, A.R.S. § 14-5401(D) will read as follows:

D. Unless the alleged basis for the appointment of a conservator or entry of a protective order is that the person allegedly in need of protection is confined, detained by a foreign power or

1 court's authority to appoint a conservator or make other protective orders, most
2 of the amendments proposed in the Petition mistakenly are directed at the person
3 allegedly in need of protection.

4 To address new subsection D of A.R.S. § 14-5401, the Petition proposes
5 two amendments to Probate Rule 16(b), which prescribes the required warning
6 language that must appear in every notice of initial hearing on a petition, and one
7 amendment to Probate Rule 17(a)(2), which specifies when an interested person
8 other than the petitioner must attend an initial hearing on a petition. The first
9 proposed amendment to Probate Rule 16(b) would have the first sentence of the
10 second paragraph read, "You are not required to attend this hearing except as
11 provided in A.R.S. § 14-5401(D)." (Proposed new language shown in
12 underlining). The problem with the proposed new language is that nothing in
13 new A.R.S. § 14-5401(D) requires any person to attend a hearing; as already
14 explained, the statute only prohibits the court from appointing a conservator (or
15 entering another protective order) unless the person allegedly in need of
16 protection has appeared before the court either in person or by virtual means.
17 Consequently, the undersigned recommend that the Court not adopt the
18 amendment to the second paragraph of Probate Rule 16(b) (i.e., the proposed
19 addition of the phrase "except as provided in A.R.S. § 14-5401(D)).

20 The second proposed amendment to Probate Rule 16(b) would add
21 language to paragraph (1) to clarify that if an interested person who receives the
22 notice of an initial hearing does not file a timely response or attend the initial
23

24 missing, *the court shall not appoint a conservator or enter a protective order* for a person under
25 subsection a, paragraph 2 of this section unless the person allegedly in need of protection has
26 appeared before the court either in person or by virtual means. If that person is unable or
27 unwilling to appear in person or by virtual means, evidence of the person's inability or
28 unwillingness to attend shall be presented to the court. If the person does not wish to attend in
person or by virtual means, a declaration signed by that person shall be filed with the court to
prove the person's inability or unwillingness to attend. The court shall weigh the evidence,
request additional evidence if necessary and document all evidence in the court record.

(Emphasis added.)

1 hearing, the court may grant the relief requested in the petition unless doing so is
2 “otherwise prohibited by law.” The undersigned agree with this clarification;
3 however, the undersigned believe that, grammatically and stylistically, the
4 “unless otherwise prohibited by law” language is better placed at the beginning
5 of paragraph (1) rather than in the middle of that paragraph. Read in its full
6 context, *as proposed in the Petition*, the full sentence would read as follows:

7 If you do not file a timely response or attend the hearing: (1) the
8 court may grant the relief requested in the petition unless
9 otherwise prohibited by law and without further proceedings

10 Read in its full context, *as proposed by the undersigned*, the full sentence would
11 read as follows:

12 If you do not file a timely response or attend the hearing:
13 (1) unless otherwise prohibited by law, the court may grant the
14 relief requested in the petition without further proceedings

15 Also in furtherance of new subsection D to A.R.S. § 14-5401, the Petition
16 proposes amending Probate Rule 17(a)(2), by adding the phrase “and except as
17 provided in A.R.S. § 14-5401(D).” Probate Rule 17(a)(2) addresses only one
18 issue, namely when an interested person other than the petitioner is required to
19 attend an initial hearing on a petition. New subsection D to A.R.S. § 14-5401
20 does not require anyone to attend an initial hearing on a petition; instead, it
21 limits the court’s ability to grant a petition for the appointment of a conservator
22 (or for entry of another protective order) for an adult. Phrased differently,
23 SB1291 creates a limitation on the court’s authority; it does not create an
24 obligation on any interested person or party. However, the Petition’s proposed
25 amendment of Probate Rule 17(a) mistakenly suggests that A.R.S. § 14-5401(D)
26 does impose a duty of attendance.² For this reason, the undersigned urge the
27 Court to not adopt the amendment to Rule 17(a)(2) proposed in the Petition.

28 ²Page 2 of the Petition explains the reason for the proposed amendment to Probate Rule 17(a)(2) as follows: “Petitioner proposes amending Probate Rule 17(a), which currently does not require an interested person

1 The undersigned believe a better way of implementing new A.R.S. § 14-
2 5401(D) is to amend Probate Rule 17(b)(1), which addresses what action the
3 court may take at an initial hearing if no interested person has filed a timely
4 written response (objection) to the petition and if no interested person has
5 appeared at the initial hearing and made an oral response (objection).³ To
6 promote compliance with A.R.S. § 14-5401(D), the undersigned propose
7 amending Probate Rule 17(b)(1) to read as follows (new language shown in
8 underlining):

9 **(b) Procedure at Initial Hearing**

10 (1) ***No Opposition.*** Except as provided in A.R.S. § 14-5401(D), ~~If~~ no
11 interested person has opposed the relief requested in the petition
12 as provided in Rule 15, the court may decide the issues raised in
13 the petition at the initial hearing without setting additional court
14 events.

15 The proposed new introductory clause, “Except as provided in A.R.S. § 14-
16 5401(D),” clarifies that, in a proceeding for the appointment of a conservator (or
17 entry of another protective order) for an adult, the court may not grant the relief
18 requested in the petition unless the conditions of A.R.S. § 14-5401(D) have been
19 satisfied.

20 **IV. Petition’s Proposed Amendments to Probate Rules 16(b) and**
21 **17(a)**

22 For the foregoing reasons, the undersigned respectfully request that this
23 Court do the following:
24

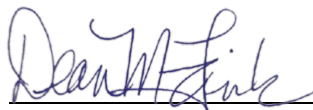
25 to attend the initial hearing if they do not oppose the relief requested, *to add verbiage requiring attendance by an*
26 *interested person* ‘as provided by A.R.S. § 14-5401(D).’” (Emphasis added.). Respectfully, this misconstrues new
27 A.R.S. § 14-5401(D), which does not require any interested person to attend an initial hearing and, instead, only
28 limits the court’s authority to appoint a conservator or make another protective order for an adult.

³Probate Rule 15(e), which addresses how an interested person may oppose a petition, uses the term
response rather than *objection*.

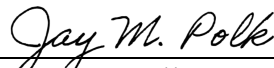
- Adopt the Petition's proposed amendment to Probate Rule 16(a), i.e., the addition of a new subpart (6) as proposed in the Petition;
- Deny the Petition's proposed amendments to Probate Rule 16(b);
- Deny the Petition's proposed amendment to Probate Rule 17(a)(2);
- Adopt the undersigned's proposed amendments to Probate Rule 16(b); and
- Adopt the undersigned's proposed amendments to Probate Rule 17(b)(1).

Attached as exhibits to this petition are two redline versions. One shows the undersigned's proposed changes relative to the changes proposed in the petition. The other reflects the undersigned's proposed changes relative to existing Probate Rules 16 and 17 (prior to the amendments this Court has adopted on an emergency basis effective October 30, 2023).

RESPECTFULLY SUBMITTED this 2nd day of October 2023.



Hon. Dean M. Fink, Presiding Judge
Probate and Mental Health Department
Superior Court in Maricopa County



Hon. Jay M. Polk, Former Presiding Judge
Probate and Mental Health Department
Superior Court in Maricopa County

Electronic copy filed with
the Clerk of the Arizona Supreme Court
this 2nd day of October, 2023

David K. Byers, Director
Administrative Office of the Courts
1501 W. Washington St.
Phoenix, Arizona 85007

(Exhibit “A”)

Arizona Rules of Probate Procedure

(Comparison to Rules 16 and 17 as amended by 8/24/23 *Order Amending on an Emergency Basis Rule 16 and 17 of the Arizona Rules of Probate Procedure*: Deletions from temporary amendments shown with ~~double-strikethrough~~, new language is shown with ALL CAPS.)

Rule 16. Notice of Initial Hearing on Petition

(a) Required Content. The notice of an initial hearing on a petition required by Rule 15(d) must state:

(1) through (3) [No change]

(4) if the court has authorized virtual attendance at the initial hearing,

(A) a statement that specifies whether the court has permitted, or required, virtual attendance, and

(B) instructions for virtually attending the initial hearing; ~~and~~

(5) if the court has not authorized virtual attendance at the initial hearing, the following statement: “If you wish to attend this hearing virtually, you must request permission from the court as described in Rule 12(c), Arizona Rules of Probate Procedure.”; and

(6) if required by A.R.S. §§ 14-5309 and 14-5405, the right to a jury trial as provided by A.R.S. § 14-1306(A).

(b) Required Warning. The notice must include the following warning:

This is a legal notice; your rights may be affected. [Éste es un aviso legal. Sus derechos podrían ser afectados.]

You are not required to attend this hearing ~~except as provided by A.R.S. § 14-5401(D)~~. However, if you oppose any of the relief requested in the petition that accompanies this notice, you must file with the court a written response at least 7 calendar days before the hearing date or you or your attorney must attend the hearing. Any written response must comply with Rule 15(e) of the Arizona Rules of Probate Procedure. If you do not file a timely response or attend the hearing:

(1) UNLESS OTHERWISE PROHIBITED BY LAW, the court may grant the relief requested in the petition ~~unless otherwise prohibited by law and~~ without further proceedings, and

(2) you will not receive additional notices of court proceedings relating to the petition unless you file a demand for notice pursuant to Title 14, Arizona Revised Statutes.

(c) through (e) [No changes]

Rule 17. Initial Hearing on a Petition

(a) Attendance at the Initial Hearing.

(1) *[No change]*

(2) *Other Interested Persons and Their Attorneys.*

(A) No Opposition to Relief Requested in Petition. Unless the court has specified otherwise ~~and except as provided by A.R.S. § 14-~~

~~5401(D)~~, an interested person who does not oppose the relief requested in the petition is not required to attend the initial hearing.

(B) [No change]

(b) ~~and~~ Procedure at Initial Hearing

(1) ***No Opposition.* EXCEPT AS PROVIDED IN A.R.S § 14-5401(D), If no interested person has opposed the relief requested in the petition as provided in Rule 15, the court may decide the issues raised in the petition at the initial hearing without setting additional court events.**

(2) [No change]

(c) [No change]

(Exhibit “B”)

Arizona Rules of Probate Procedure

(Comparison to existing Rules 16 and 17 before amendments effective 10/30/23:
Deletions from temporary amendments shown with ~~striketrough~~, new language is
shown with underlining.)

Rule 16. Notice of Initial Hearing on Petition

(a) Required Content. The notice of an initial hearing on a petition required by Rule 15(d) must state:

(1) through (3) [No change]

(4) if the court has authorized virtual attendance at the initial hearing,

(A) a statement that specifies whether the court has permitted, or required, virtual attendance, and

(B) instructions for virtually attending the initial hearing; ~~and~~

(5) if the court has not authorized virtual attendance at the initial hearing, the following statement: “If you wish to attend this hearing virtually, you must request permission from the court as described in Rule 12(c), Arizona Rules of Probate Procedure.”; and

(6) if required by A.R.S. §§ 14-5309 and 14-5405, the right to a jury trial as provided by A.R.S. § 14-1306(A).

(b) Required Warning. The notice must include the following warning:

This is a legal notice; your rights may be affected. [Éste es un aviso legal. Sus derechos podrían ser afectados.]

You are not required to attend this hearing. However, if you oppose any of the relief requested in the petition that accompanies this notice, you must file with the court a written response at least 7 calendar days before the hearing date or you or your attorney must attend the hearing. Any written response must comply with Rule 15(e) of the Arizona Rules of Probate Procedure. If you do not file a timely response or attend the hearing:

- (1) unless otherwise prohibited by law, the court may grant the relief requested in the petition without further proceedings, and
- (2) you will not receive additional notices of court proceedings relating to the petition unless you file a demand for notice pursuant to Title 14, Arizona Revised Statutes.

(c) through (e) [No changes]

Rule 17. Initial Hearing on a Petition

(a) Attendance at the Initial Hearing.

(1) *[No change]*

(2) *Other Interested Persons and Their Attorneys.*

(A) No Opposition to Relief Requested in Petition. Unless the court has specified otherwise, an interested person who does not oppose the relief requested in the petition is not required to attend the initial hearing.

(B) *[No change]*

(b) Procedure at Initial Hearing

(2) *No Opposition.* Except as provided in A.R.S § 14-5401(D), ~~if~~ no interested person has opposed the relief requested in the petition as provided in Rule 15, the court may decide the issues raised in the petition at the initial hearing without setting additional court events.

(3) [No change]

(c) [No change]