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COMMENTS TO PROPOSED AMENDMENTS TO THE ARIZONA RULES OF PROBATE PROCEDURE

Rule 10, Arizona Rules of Probate Procedure

Concern: Rule 10(C)(1)(b) states that the fiduciary shall refrain from charging to attend court proceedings, including depositions, unless such attendance is required by law, court order or other circumstances such that the fiduciary's attendance is necessary. I am the legal voice of my ward if I am serving in a guardianship capacity, and therefore need to be there to act on his or her behalf and in his or her best interests. In attempting to find the reason I would not be required or necessary in one of these events, it would only be if it were an action outside of the realm of my responsibility, i.e. it is a conservatorship matter and I'm the guardian. However, there have been instances where as the guardian, I can shed light on the proceedings even if they involved the conservator. I have attended criminal proceedings for clients where I'm just the conservator, but had more information to supply the attorney for the ward which assisted him in his representation of the ward. I am afraid that whatever the proceeding, if the participants in the ward's life are not there, there will either be rulings made on misinformation, or the hearing will need to be reset.

Recommendation: Strike this section.

Rule 10.2, Arizona Rules of Probate Procedure

Concern: Rule 10.2(C), in the last line, appears to open up a bidding process for anything from nursing home care to fiduciary and attorney fees. Unless our standards have been changed without my knowledge or understanding, fiduciaries have a duty to preserve the lifestyle of their wards. This often means that we place them in a more expensive but socially more active home than in a less expensive but more rural environment. Obviously, if the costs outweigh the benefits, we need to adjust this responsibility and engage in less expensive services. However, I am concerned about the statement, that "at any stage in the proceedings the Court may order that competitive bids for goods or services be obtained". I assume that as the fiduciary, I would be allowed to explain why we chose nursing home A over nursing home B, but shopping for fiduciary and attorney fees can also be misleading and ultimately more expensive. I have been appointed to cases where the prior fiduciary's fees were considerably more than mine, so I believe the Court already has the power to change fiduciaries or attorneys. My concern would be the ability of the Court to limit my ability to get the appropriate care for my wards.

Recommendation: Strike this last sentence.

Rule 19, Arizona Rules of Probate Procedures

Concern: Rule 19(B) states that, "Absent good cause, a party who seeks the appointment of a guardian or conservator shall not nominate a specific attorney to represent the subject person unless the attorney has an existing or prior attorney-client relationship with the subject person." On the face of it,

I understand where this may have been abused in the past. However, I am from Coconino County, and at the last count, we had 3 attorneys who would act as "court appointed" attorneys at the fees paid by the County. I typically "nominate" one of several attorneys in the area based upon their fees (sole practitioners charge less than large law firms), their knowledge of this area of law (there are a lot of dabblers out there who can really increase the fees with their lack of knowledge), and based upon their reputations as honest attorneys who care about their wards and don't "churn" their fees. Because I am responsible for paying their fees from the ward's estate, and therefore am responsible for the reasonableness of their fees, I believe I should have some input into who gets appointed to these cases.

Recommendation: Change this wording to say, "If a prospective ward does not have an existing or prior attorney-client relationship with an attorney, a party who seeks the appointment of a guardian or conservator may only nominate a specific attorney to represent the subject person if they do not have a conflict of interest with said attorney, and if they believe said attorney can represent the subject person, adequately, at a reasonable attorney fee, and without prejudice."

Rule 22, Rules of Probate Procedure

Concern: Rule 22(C)(2) states that restricted "funds shall be deposited into an interest bearing, federally insured restricted account at a financial institution engaged in business in Arizona." This directly violates the Prudent Investor's Standard in that it literally mandates that we place these funds in accounts making about point nothing in interest. Fiduciaries are managers of professionals. I am not a financial expert, but I do know that investing $500,000.00 in a money market at .025% is not prudent, and it is certainly not going to increase my ward's assets. I always utilize financial experts and stress the need to protect the assets to the best of their expertise, given the client's wealth, income, expenses and age, but to certainly not place them in a low to no interest account.

Recommendation: Strike the following language: "Funds shall be deposited in an interest bearing, federally insured restricted account at a financial institution engaged in business in Arizona". Replace that sentence with, "Funds shall be deposited in a restricted financial institution or brokerage account. The Fiduciary shall consider the needs of the beneficiaries, the provision of regular income, the preservation of assets and should avoid excessively risky investments pursuant to the Prudent Investor Rule".

Rule 30.1(A)(B)(C). Rules of Probate Procedure

Concern: Rule 30.1(A)(B)(C) requires the Petitioner (in my case, I am usually the Petitioner) to come up with a good faith estimate of all projected monthly and annual costs that shall be incurred by conservator...As it currently stands, I am hard pressed to ascertain how much money the prospective ward even has, let alone what the fees and expenses will be monthly or annually. If the prospective ward is so inclined, and 90% of the time, they are not, I may have a copy of a couple of bank statements. If a family member is involved, and they actually feel like cooperating with me, I might know more. I do know that I will expend more in fees initially trying to marshal assets and get on existing accounts. I do know that the banks won't and should not give me any information until I am appointed, and even then we have to deal with Legal Departments in other states who have no idea what we do. I would suggest

that the "to the extent the information can be reasonably known or projected at the time the petition is filed" is, not very much and not very likely. We are going to be filing a budget with annual expenses and income with our inventory 90 days after the appointment. Even then we won't know the full picture but can at least make a "good faith estimate". This is a case of attempting to reduce loss and risk by increasing senseless and useless administrative efforts. My comment on most of my Petitions will be that due to a lack of authority, I could not get an estimate of anything. Even assuming this matter is laid out perfectly at my feet, I'm able to come up with the good faith estimates, I know the expenses and the fees, I guarantee you it will change by the time the inventory and budget are done, and we'll have to either amend the good faith estimate, or ask for permission to change it all on the budget we submit in 90 days.

Recommendation: Strike rule 30.1 entirely.

Rule 30.3, Arizona Rules of Probate Procedure

Concern: I think this rule oversimplifies the duties and responsibilities of a fiduciary. Yes, when we take cases, we determine whether or not there are sufficient assets for a private fiduciary to be involved. This process includes the age (not estimate of how long they will live because I have no idea), their existing income and assets vs. how difficult this case will be and therefore, how much will be expended in fiduciary and attorney fees. We have no set formula, but if the client is seriously mentally ill, has an income of $600.00 per month, lives in a trailer and is probably going to need to be in an institution someday, we won't take that case. If the individual has a home worth $300,000.00, and income of $3,000.00 per month, we try to assess their health and the longevity of their funds: Are they going to need to be in a home someday, are we able to get them on Arizona Long Term Care and allow them to stay in their home, what condition is the home in and are we going to be able to sell it if we need to? If we determine they can't live alone, and their income precludes Arizona Long Term Care but is insufficient for a nursing home, we might look at that $300,000.00 home and decide that the proceeds from the sale will sustain them for the next 5 to 6 years. If we come up short, we qualify the ward for ALTCS when the time comes, and we keep them at no charge. The truth of the matter is that the ward with the $3,000.00 income and the house, if healthy, is going to outlive their funds no matter who takes them. I appreciate the "out" we are given which is to come up with an alternate management plan, which in many cases includes the fact that we will assist them in retaining their quality of life, and "give back" to them by keeping them if they run out of resources. While not all fiduciaries will do that, I would hope that it would be a sufficient enough management plan to allow us to keep them. The budgets alone should let you know if a private fiduciary can handle the case, and if the Court has questions concerning that, the fiduciary can commit to keeping a case which runs out of funds, or give it to the Public Fiduciary in the first place.

Recommendation: Strike rule 30.3 in its entirety. **Rule 30.4, Arizona Rules of Probate Procedure**

Concern: Rule 30.4(D) requires that the conservator shall file an amendment to the budget if we exceed the budget by 10% or $2,000.00 within 30 days of reasonable assumption of that increase. There go the administrative costs again. So, every time a ward needs more dental work than anticipated, or is moved

to Skilled Nursing from Assisted Nursing or needs temporary or permanent additional care, or any of a hundred real life unanticipated expenditures, I will charge an hour or so to amend the budget, my attorney will charge to review it and finalize it, we'll mail it out, hope we have no objections, and we have added even more fees to our already anticipated overage. If a ward needs more care, it is easily explained in the next account, and it isn't something that the court or the interested parties would want to prevent. If my ward's washing machine broke, and they need a new one, do we really want to add administrative costs to the mix so that I can explain that in 30 days? It seems to me that the subjective part of the budget are the administrative fees. That is the part that we should have to explain and that is the part the Court could actually do something about. Limit the amendment to the budget to cover increased or unexpectedly high fiduciary and attorney fees.

Recommendation: Change the word "expenditures" in paragraph D to administrative, fiduciary and attorney fees. Strike "for any specific category".

Proposed Statewide Fee Guidelines IX

Concerns: I do not think that it is appropriate to dictate how often a fiduciary should visit a ward, but perhaps how efficient and how effective the visits or visit is. I have Wards who live in facilities where they are thriving and need a visit from me once a month just to remind them who I am, see what their current shopping or personal needs may be and to just get an overall feel for their welfare. These visits typically take about ½ hour. I have wards who need to see me weekly or at least every other week. They are upset, confused, forget who I am, forget that we can help them, and need more attention. These mini visits take perhaps twenty minutes to a half hour. The emphasis should not be on the quantity of the visits but the quality.

Recommendation: Strike IX and replace it with: "On a case by case basis, the Fiduciary should visit with the ward or protected person as often as necessary to ensure that they are safe and that their quality of life is maintained. These visits should be minimalized as used as information gathering visits . As the Ward or protected person becomes more adjusted to their surroundings, and the confidence of the Fiduciary increases, the visits should be shortened routine monthly visits.

Proposed Statewide Fee Guideines X

Concern: The Statewide Fee Guidelines X allows five hours per year per account. Each account includes probably two to 8 financial institutions and brokerages which also have to be itemized in each of the accounts. An account is like a giant checkbook which captures all of the receipts, disbursements, gains and losses. Each separate account in an account can take up to 2 or 3 hours just to get them input and balanced for the entire year.

Recommendations: Change the language in X to say, "Preparation of Conservator's account and Budget: Two hours per individual account or brokerage per year.