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IN THE SUPREME COURT
STATE OF ARIZONA

PETITION TO AMEND RULES 7, 8, 10, 10.1, 10.2, 15.1, 15.2, 18, 19, 22, 26, 26.1, 27.1, 28, 29, 29.2, 30(B), 30(D), 30.1, 30.2, 30.3, 30.4, 33	Supreme Court No. R-110023 Comments of Louis F. Comus, Jr. Regarding Petition To Amend Rules 7, 8, 10, 10.1, 10.2, 15.1, 15.2, 18, 19, 22, 26, 26.1, 27.1, 28, 29, 29.2, 30(B), 30(D), 30.1, 30.2, 30.3, 30.4, 33

Louis F. Comus, Jr., a member of the State Bar of Arizona, submits the following comments to changes to the Arizona Rules of Probate Procedure (collectively "Rules", and specifically, "Rule __") proposed in the referenced petition:

Rule 7. Confidential Documents and Information

This proposal adds three types of documents to those treated and considered as confidential under Rule 7. In existing Rule 7, inventories and accountings are also listed as confidential documents; however a Comment for Rule 7 indicates that while inventories and accountings (containing amounts and account numbers)

are to be considered as confidential documents, the inventory cover sheets and petitions for approval of accountings are said not to be confidential documents. These covering documents would therefore presumably not be included in the closed envelopes for those specific filings, but would rather be filed in the main, open court file. When this Comment is revised to reflect the newly included confidential document forms, consideration should be given to whether the covering sheets for these new forms are also not to be included as part of the confidential documents, although the indicated attachments clearly should be considered as confidential documents.

Rule 8. Service of Court Papers

Note that paragraph A of Rule 8 relates only to cases in which Title 14 requires that notice of a hearing or other document be served personally. The only such requirements in Title 14 are in Sections 14-5309.B. and 14-5405.B., each of which requires personal service of the hearing notice only upon the ward or the alleged incapacitated person, and that person's spouse and parents if they can be found within the state. Although the indicated statutes do not require service of a copy of the petition personally upon the ward and others, current Rule 9.A does require that the notice be accompanied by a copy of the petition or motion.

This proposal would add a new paragraph B to Rule 8, attempting to deal with dismissal of a proceeding in which service of notice has not been achieved

within 120 days after the filing of the initial petition or application in a probate case. There are several problems with this proposal. First, a probate case is not commenced by service of a notice and petition or application; it is commenced by filing of a petition or application, with notice thereafter given, generally by mailing, and not by personal service.

There is currently no requirement in Title 14 that a copy of an application (the filing of which relates only to informal probate and appointment proceedings in connection with a decedent's estate) ever be given to anyone, let alone served upon anyone personally.

Current statutes and court rules, as well as the Order to Personal Representative and Acknowledgment and Information to Heirs/Devisees, (provided as Form 1 appended to the Rules), require the giving of various notices and copies of pleadings to interested persons within specified time periods after commencement of probate proceedings for decedents' estates. The same Order further requires the filing of proof of giving such notices with the court, again within specified time periods.

For the reasons set forth above with respect to this proposed rule change, it is suggested that any such change be restricted to guardianship/conservatorship proceedings, and without any reference to "application". Further, rather than even referring to "service of notice" in a proceeding, the emphasis should be placed

upon holding of a hearing on the petition in a guardianship or conservatorship, which, if it has not occurred within a specific time period (possibly even within the 120 days included in the current proposal in the petition), probably should result in dismissal of the petition, unless the petitioner can justify further delay to the court.

Rule 10. Duty Owed BY COUNSEL, FIDUCIARIES, UNREPRESENTED PARTIES, AND INVESTIGATORS

In proposed new sub-paragraph 4 of paragraph C, dealing with duties regarding a minor's death, adoption, marriage or emancipation, possible confusion about the meaning of "emancipation" in this context could be avoided by use of the actual words of Section 14-5210, dealing with termination of appointment of a guardian, which happens on the "minor's death, adoption, marriage or attainment of majority", if, indeed, that is what was intended in this proposal.

RULE 10.1. FIDUCIARY'S AUTHORITY TO FILE DOCUMENTS AND APPEAR IN COURT PROCEEDINGS WHEN REPRESENTED BY COUNSEL.

The proposal contained in paragraph A probably can be restricted to guardianships and conservatorships – it is difficult to understand why this rule should apply in a decedent's estate at all. First, an attorney will almost never have appeared in court in a decedent's estate case prior to the filing of an application, which only happens at the commencement of an informal probate and/or appointment proceeding. Further, there seems to be no particularly good reason that a fiduciary should be precluded from filing an application or a closing

statement directly with the court, without the attorney's interference, in any event. Thus, if reference to "application" or "closing statement" is removed from this proposal, keeping in mind that there is no requirement in Title 14 that either an inventory or an accounting be filed in court for a decedent's estate (except in cases of supervised administration) this new Rule would presumably only apply to inventories and accountings in conservatorships, as well as the new risk assessments, good faith estimates and budgets added as confidential documents in Rule 7, discussed above.

Since, as noted above with respect to Rule 8, the concept of "serving a copy" is virtually unused in the probate code, except for personal service of copies of the petition and notice of hearing in a guardianship and/or conservatorship proceeding (which, by the way, under paragraph A above can only be done by the attorney in any event), this paragraph could make the fiduciary responsible for "providing" copies of such documents to necessary persons.

RULE 10.2. PRUDENT MANAGEMENT OF COSTS

Given the thrust of paragraph B of this proposal, rather than restricting the disclosure requirement to "costs of complying with a court order", should not this disclosure requirement be extended to "the projected costs of complying with the requirements of any court order, court rule, or statute"? The next sentence could

then be adjusted to direct (or even authorize) the court to enter orders to modify any such requirements.

With respect to the proposal in paragraph C, since costs for goods and services are not part of any presentation or disclosure in connection with court appointment of personal representatives or special administrators, and since the concepts of "budget" or "budget objection" are relevant only in conservatorships, and since attorneys become court-appointed only in connection with guardianships and conservatorships and not with decedents' estates (except in extremely rare instances where, once again, rates for goods and services are not a part of the considerations by the court), the word "fiduciary" in this paragraph can and should be changed to apply only to "guardians" and "conservators".

RULE 15.1 APPOINTMENT OF GUARDIAN AD LITEM

The last sentence of paragraph C of this proposal purports to require the custodian of any relevant record to provide the guardian ad litem with access to such record. Since there is no requirement that any such custodian be given notice and an opportunity to be heard upon a motion for appointment of a guardian ad litem, might not a banker or stockbroker resist providing such records which, under the privacy rules of the bank or brokerage house, are not to be disclosed to outside parties?

Rule 19. Appointment of Attorney, Medical Professional and Investigator.

In order to avoid concern that even a long-standing attorney-client relationship between the "subject person" and his attorney (who may not even be in the case) is not automatically terminated by this rule, it is suggested that the first two lines of paragraph C of this proposal be changed to read:

> UNLESS OTHERWISE ORDERED BY THE COURT, AN ATTORNEY SHALL NOT BE APPOINTED BY THE COURT, ACCEPT AN APPOINTMENT BY THE COURT, OR REMAIN APPOINTED BY THE COURT AS THE ATTORNEY OR GUARDIAN AD LITEM . . . .

Rule 22. ORDERS APPOINTING CONSERVATORS, GUARDIANS AND PERSONAL REPRESENTATIVES; Bonds and Bond Company, RESTRICTED ASSETS

Subparagraph 1 of paragraph C, dealing with restricted accounts, purports to require certain orders to plainly state any restrictions on the fiduciary's authority to manage monetary assets of the estate. Paragraph D of this proposal then deals with restrictions on a fiduciary's authority with respect to real property. There is no provision dealing with restrictions on a fiduciary's authority to manage tangible personal property of any sort. This could be a problem for estates of persons possessing valuable art, antiques, jewelry, baseball cards, rare books, and the like. This oversight could be corrected by changing the designation of paragraph C to "RESTRICTED ASSETS", and removing the word "monetary" from subparagraph 1 under paragraph C.

If subparagraph 2 is intended to cover only cash assets, the current wording may be appropriate. However, the last sentence of this subparagraph, dealing with reinvestment of funds, is curious unless it is made clearer that this paragraph does, in fact, deal only with cash accounts and investments.

However, if paragraph 2 is intended to cover only cash assets, there would appear to be no similar provision covering investment accounts containing non-cash assets, such as securities, including brokerage accounts, IRAs, annuities, and similar accounts. In addition, many of these types of accounts are normally not federally insured, so inclusion of that requirement for such accounts simply would not work. And, of course, any restrictions on such accounts should clearly also include the permission for reinvestment within the account without further order of the court.

The language of subparagraph 2 of paragraph D of this proposal is probably too restrictive for a small number of estates that could be affected, including those that may have significant holdings of real estate, particularly real estate that is being managed for purposes of lease or sale. For such cases, the court should be permitted to modify the required language where appropriate. This could be accomplished by adding the following parenthetical prior to the colon, so as to provide "SHALL CONTAIN THE FOLLOWING LANGUAGE (OR SIMILAR APPROPRIATE LANGUAGE APPROVED BY THE COURT):"

Rule 26. Issuance AND RECORDING of Letters

Noting that Rule 26 currently deals generally with "fiduciaries", as well as specifically with guardians, conservators, personal representatives, and special administrators, there seems to be no reason to restrict the proposal in paragraph E to "conservators, pursuant to A.R.S. § 14.5421". If the letters are to be restricted with respect to real property, it seems reasonable to require that a certified copy of the letters be recorded wherever the estate owns real property, whether or not the fiduciary in a particular case is a conservator or other type of fiduciary under Title 14.

Rule 27.1 Training for Non-Licensed Fiduciaries

It is suggested that this proposal be restricted to guardians and conservators, and that it not be applied to personal representatives or special administrators of decedents' estates. While guidance is certainly appropriate, it is already amply provided in Form 1, "Order to Personal Representative and Acknowledgement and Information to Heirs/Devisees", attached to the Rules. This commenter has personally found that otherwise untrained new personal representatives customarily pay considerable attention to the prescribed order, which often results in a barrage of procedural questions. It is doubtful that a "training program approved by the Supreme Court", that involves more than merely signing the order set forth in Form 1, would be more effective than use of Form 1 itself. In addition,

if the "training program" is intended to be case specific, it could likely not be completed before a decedent's estate proceeding is commenced. If a "training program" is to be required, it should be available to anyone, at any time prior to the commencement of a decedent's estate probate proceeding, or otherwise this procedure could result in significant delays in probate of a will and appointment of a personal representative. Finally, if the "training program" is to be available only online, many family fiduciaries might find the training program at least daunting and possibly even unavailable to them if they don't use computers, as sometimes happens with older family members. All of this could be avoided by merely removing application of new Rule 27.1 from fiduciaries of decedents' estates, while continuing to require use of Form 1.

Rule 29. ALTERNATIVE DISPUTE RESOLUTION

Excellent proposal.

RULE 30.1. GOOD FAITH ESTIMATE

This proposed rule should not be adopted. In virtually all conservatorships, the requirements of this Rule will result in delay in filing the initial pleadings. In the case of emergency considerations, which are not unusual in conservatorships, the probable delay could be dangerous. In addition, the requirements of this proposal will clearly cause additional expense to the estate, by requiring attempts to obtain detailed information, at a time when such information may not be

available, particularly to the petitioner. Further, this proposal would appear to encourage a petitioner to provide guesses, based upon little or no relevant information. The futility of such a process, added to the probable costs and delays involved, seem to suggest a different course of action to reach the hoped-for result of this proposal.

RULE 30.2. FINANCIAL ORDER

For clarity in paragraph b of this proposal, the word "attorney" in each sentence should be preceded by "court-appointed".

Rule 33. Compensation for Fiduciaries and Attorneys; STATEWIDE FEE GUIDELINES

Use of the term "guidelines" usually implies points of reference, often in connection with the exercise of discretion, which these "guidelines" struggle to pursue. If this is intended in paragraph F of this proposal, the word "follow" should not be used at all and certainly not immediately after the mandate "shall". The mandate "shall consider" more appropriately catches the spirit of "guidelines", and is possibly somewhat less likely to be interpreted as requiring or authorizing reduced discretion, regardless of the too-infrequent and unconvincing disclaimers to the contrary in the "guidelines" as presented.

In addition, in order to stop or avoid summary reduction of fees without cause given, the following sentence should be added to paragraph F:

IN THE ABSENCE OF ANY OBJECTION BY AN INTERESTED PERSON, FEES AND COSTS OF PROFESSIONALS AS REQUESTED IN A FEE STATEMENT SHALL NOT BE REDUCED BY THE COURT EXCEPT AFTER A HEARING UPON NOTICE, WITH APPROPRIATE SPECIFICITY, OF ISSUES TO BE DISCUSSED, GIVEN TO ALL INTERESTED PERSONS.

PROPOSED FORMS

FORM 2. Order to Guardian, FORM 3. Order to Conservator, and FORM 4. Order to Guardian and Conservator.

Given the "training programs" required in proposed Rule 27.1, are these forms necessary or even relevant; or more appropriately, given these forms, what benefit does Rule 27.1 add to the program, particularly in light of the probable delay and expense it adds to the proceeding?

FORM 5. Petitioner's Good Faith Estimate

This concept has been justified as requiring petitioners to face the predictable financial realities of entering the conservatorship realm. While reality checks can be valuable and therefore may sometimes be imposed, this form, and Rule 30.1 that mandates it, would add a new procedure and a new accounting (of sorts) to the process, resulting in additional work for fiduciaries and for court personnel (court accountants and judicial officers). Unless this additional procedure also adds value, it imposes more "busy work" on an already complicated process. Unfortunately, the information hoped for in the Form and proposed Rule

will often become available only after appointment of a conservator, and can more competently and clearly be presented in FORM 6 (Conservator's 90-Day Report).

FORM 6. Conservator's 90-Day Report

While this form must be filed at a time when the petitioner/conservator may be able to assemble the required information (see comment on Form 5 above), it clearly adds a new procedure and a new accounting to the process, resulting in additional work for fiduciaries and court personnel. However, the benefits that this form provides at this time in the process may justify these additional costs. But if this additional caution, along with other protective procedures, are well conceived and effective, and since this report is due 90 days into the process, do we need a full annual accounting only 9 months later, or could the first accounting safely be delayed for another 90 days, or even more months? Reduced numbers of required accountings clearly would reduce costs, and pressures on court personnel. And are not potential damages from reduced oversight through less frequent accountings offset by required adherence to budgets required in Rule 30.4? [Editorial Note: The Instructions for Form 6, on page 29 of the Petition commented on herein, refers in heading to "First Conservator's Account", rather than "Conservator's 90-Day Report".]

Form 7. First Conservator's Account, Form 8. Conservator's Account, Form 9, Final Conservator's Account, and Form 10. Simplified Conservator's Account.

These accounting forms require a standardized presentation that is presumably sufficiently simplified for fiduciaries and court personnel. Unfortunately, they perpetuate the need to keep two sets of books for Arizona conservatorships - one to permit financial professionals to track asset performance, and prepare tax returns, and the other for the courts. That this has been true for years for court-approved and court–mandated accounting forms in Maricopa and Pima counties does not excuse continued adherence to the flawed system, and imposition of that system on the courts of other counties. While a fix of this problem would likely require considerable thought administratively, a clean solution, such as the New York model, should eventually benefit fiduciaries and court personnel.

PROPOSED STATEWIDE FEE GUIDELINES

Although there has been lip service denying that these "guidelines" are an attempt to impose a mandatory fee schedule upon the practice of probate law in Arizona, the rules, in places, wind up dangerously close to doing so. And, even though flexibility in application is encouraged in the guidelines in general, "guidelines" as lengthy and detailed as these, in particular, too often provide a haven for avoidance of exercise of discretion, a minimum level for the

inexperienced and incompetent and a maximum limit for the experienced and efficient.

Given these potential problems, the guidelines should be changed as follows:

1. Make clear that they apply only in court proceedings under Title 14, in which the question of reasonable fees and costs has been specifically raised by an interested person or by the court, for court determination, and that they do not otherwise apply to private agreements among professionals and clients.

2. Under paragraph 3, POINTS OF REFERENCE, in subparagraph (a) the use of Exhibit A, purporting to provide any consequential or relevant information on statewide fees, is misplaced. In fact, recent examples using the chart of Exhibit A filled in with information developed and maintained by the Administrative Office of the Courts was long out of date (several years old) and badly flawed (it clearly did not include hourly rates of many very experienced attorneys who regularly practice in this area). For example, although billing rates have long been quoted in [Rule 33] fee statements for conservatorships (and possibly in the relatively few other cases involving fee disputes), it is clear from rates that have been used in discussions of these guidelines that they do not include much, if any, information from these statements. Further, no such fee statements are required or voluntarily filed for most decedents' estates or trusts -- where much of the "higher end" work in this area is done. And rumor has it that rates and fees

generally tend to be higher in Maricopa County and Pima County than elsewhere in the state. These are but a few examples that suggest that a chart as provided in Exhibit A should not even be suggested, at least until the information it contains is accurate and reliable.

3. Similarly, in the POINTS OF REFERENCE under paragraph 3, the suggestion of specific numbers of hours as "reasonable" for specific professional tasks, if stated at all, must also be based on competent data. Further, the specific numbers of hours set forth here are unrealistic (variously either over or under), based on the personal experiences of this commenter and experienced colleagues. They should be deleted, or at least made more realistic.

Conclusion

The proposed Rule additions and changes are intended to add new structure to our probate law systems. "New" can be good if it fixes problems, or it can fail if it falls short, goes too far, or merely creates change that fails to achieve net efficiencies, in this case, of time and expense. "Structure" can also be good, under the same considerations just noted, but all structure requires maintenance: (1) in its creation, to assure that its parts are all necessary and not flawed in their form and implementation; (2) in its operation, to provide support for the parts that are working, judged in individual cases and system-wide, keeping and honing those working parts, but improving those parts that fall short; and (3) in its nurture,

requiring continuing, or at least periodic, review of its ongoing worth and relevance, with willingness to strengthen those parts that are working efficiently and radically change, or even discard, those that are not.

To work well, these changes will require implementation of a system for gathering and processing data to permit evaluations of the effects of these changes. For example: (1) will requirements of good-faith estimates, budgets and these accounting forms have increased the costs to conservatorships to a level that suggests further changes, or not; (2) will the costs for developing, administering, monitoring, enforcing, and improving the training programs approved by the Supreme Court justify their continued use or not; and (3) will the added requirements and pressures imposed on the judicial officers by these new Rules and Forms justify their continued use, or not, assuming the new Rules and Forms don't overwhelm the ability of the courts to function in probate, particularly in the counties that have few judges and no court accountants? It is submitted that if and when the costs in time, effort and dollars of maintaining the new structure represented by the new proposed Rules and Forms become inefficient, unwieldy or unworkable, then it may be necessary to address the perceived problems in smaller bites, within the scope of the ability of the courts to improve the process and still keep functioning effectively.

Based upon the foregoing, Louis F. Comus, Jr. recommends alterations in proposed changes to Rules 7, 8, 10, 10.1, 10.2, 15.1, 19, 22, 26, 27.1, 30.1 and 30.2, and in the Forms and Proposed Statewide Fee Guidelines appended thereto, as set forth in the preceding comments, as well as a commitment to the fashioning of a review program for continuing maintenance and repair of the new system of Rules and Forms.

RESPECTFULLY SUBMITTED THIS 22nd day of September, 2011.

Electronically filed with the Clerk
of the Supreme Court Of Arizona
this 22nd day of September, 2011

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