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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of: ARIZONA RULES OF PROBATE PROCEDURE, RULES 30.3, 30.4 AND 33	Supreme Court No. R-11-0023 COMMENT OF THE SUPERIOR COURT OF ARIZONA, MARICOPA COUNTY TO PETITION TO AMEND VARIOUS RULES OF PROBATE PROCEDURE

The Presiding Judge and the Presiding Probate/Mental Health Judge of the Superior Court in Maricopa County file the following comment pursuant to Rule 28, Arizona Rules of the Supreme Court, regarding the petition to amend various rules of the Rules of Probate Procedure. The Superior Court in Maricopa County (Superior Court) supports the efforts of the Committee on Improving Judicial Oversight and Processing of Probate Matters, and appreciates all the hard work the committee has expended on the recent legislation and this rule petition. However, the Superior Court in Maricopa County respectfully request the Committee and the Supreme Court consider modifications or alternatives to some of the proposed rules.

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1. Proposed Modification to Rule 30.3 Proposal.

The Superior Court agrees that sustainability of conservatorship funds is an important part of the probate process and the court should strongly consider this when making orders in conservatorship cases. However, the Superior Court is concerned with how the conservator can or will obtain the "projected lifespan" of a protected person.

Proposed Rule 30.3 requires the conservator to obtain or provide his or her own estimate as to the "projected lifespan" of the incapacitated person. Although the rule and the instructions with corresponding proposed form clearly provide it shall be a "good faith estimate," the Superior Court believes this information will be both difficult, if not impossible, to obtain, and extremely subjective to the point of being meaningless. Doctors are reluctant to estimate when a person will die because there is no hard science to determine lifespan beyond statistical actuarial tables for large populations, estimating life expectancy on a personal level may contradict a treatment plan or create depression or false hopes for the protected person, and such estimates create unrealistic expectations and extreme emotional reactions for family members. Time of death is simply not an event that can be calculated with any medical certainty. News reports are full of stories of people given months to live who are still alive decades later, as well as individuals who are given a clean bill of health at a physical and doctors expect them to live for years who pass away days later.

Requiring unreliable estimates of when a parent or family member will die also collides with family expectations or hopes, and strain family relationships when family members accuse conservators of planning for the death of the protected person at times they are not willing to accept.

The real issue is an accurate calculation of the time to depletion of estate assets in context of how much longer the estate will need to be available to support the protected person. The Superior Court suggests that Rule 30.3 be

revised to require the conservator to disclose the time to depletion of the estate at the current rate of expenditure, the age of the protected person, and a brief statement of the known medical and physical condition of the protected person. With these more objective and known variables, the court and the family can better assess what, if any, adjustments are needed or possible to the care plan to ensure estate assets are available to care for the protected person for as long as possible. Alternatively, the Superior Court suggests the Supreme Court consider using an actuarial table or life table similar to those used by the Social Security Administration.[1]

The Superior Court further suggests the Supreme Court consider making Rule 30.3 discretionary with the judicial officer. The proposed version of Rule 30.3 would require an analysis in each case of whether the expenses exceed the income. This additional process will substantially increase the costs in some cases, without any benefit to the estate and without any need in some cases. The large estate where time to depletion is important to manage and preserve estate assets is the exception, and most conservator estates are of modest means with few or no assets to manage beyond current income. In such cases, requiring the conservator to obtain a lifespan estimate, and make an equally meaningless time to depletion estimate creates unnecessary expense to the estate and provides no benefit to the protected person or his/her estate. The probate court judge is in the best position to determine whether such an analysis is necessary in a given case. As a result, the Superior Court proposes the following change:

> Rule 30.3. Sustainability of conservatorship
> A. UNLESS OTHERWISE EXCUSED BY THE COURT, The conservator shall disclose whether the annual expenses of the conservatorship exceed income and, if so, THE EXPECTED TIME

[1] The Social Security Administration tables are available at http://www.ssa.gov/oact/NOTES/as120/LOT.html. Life expectancy, at least as of 2007, is available at http://www.ssa.gov/oact/STATS/table4c6.html.

PERIOD WHEN THE ESTATE OF THE PROTECTED PERSON WILL BE TOTALLY DEPLETED BASED UPON THE CURRENT RATE OF EXPENDITURE, THE CURRENT AGE OF THE PROTECTED PERSON, A BRIEF SUMMARY OF THE PROTECTED PERSON'S CURRENT PHYSICAL AND MEDICAL CONDITION, AND THE MANAGEMENT PLAN FOR THE NON-SUSTAINABLE CONSERVATORSHIP. ~~whether the assets available to the conservator less liabilities are sufficient to sustain the conservatorship during the projected lifespan of the protected person. If the assets are not sufficient, the conservator shall also disclose the management plan for the non-sustainable conservatorship. Unless otherwise~~ IF ordered by the court, the conservator shall disclose the information required by this rule, including the conservator's assumptions and calculation, when filing an inventory, any conservator's account, and following any material change of circumstances.

…

The purpose of the disclosure required by this rule is to provide the court and parties with a general idea as to whether the assets and income of the conservatorship estate are sufficient to pay for the protected person's expenses during that person's projected life expectancy. It should be up to the court whether this is necessary based on the circumstances of the particular case. When required by the court, information about the estimated time to depletion, the protected person's current age, and relevant current information on the physical and medical health of the protected person will provide sufficient and appropriate information to manage the remaining assets of the estate without subjecting the family and treating physicians to a guessing game on when the protected person will die. Alternatively, additional information from consistent actuarial tables on life expectancies will provide some predictive information to make these decisions.

The disclosure required by this rule is intended to serve solely as a management tool; the court does not intend that a good faith projection will form the basis for a claim of liability against the conservator.

The following example describes how the required disclosure is calculated: assume a protected person's estate consists of $20,000 in bank accounts and a residence with a fair market value of $120,000 and a $65,000 mortgage. Further

assume that same protected person has an annual income of $20,000 and annual expenses (including fiduciary and attorney fees) of $45,000. The conservatorship's sustainability is calculated as follows:

> 3 years until assets are depleted thus, if the conservator estimates that the protected person's lifespan is three years or less, the conservatorship is sustainable. On the other hand, if the conservator estimates that the protected person's lifespan is more than three years, the conservatorship is not sustainable and the conservator must explain how the protected person's expenses will be managed after three years.

2. Proposed Modification to Rule 30.4 Proposal.

The Superior Court agrees pre-approved budgets are critical to the probate process. Budgets are meant to prevent so called "sticker shock" for the parties and can be a mechanism to prevent conservators from expending excessive funds on items such as fees charged to the estate. However, proposed Rule 30.4 fails to provide the oversight that it could.

The proposed rule presumes that the budget and any amendments submitted by the conservator are reasonable if no one objects. This is problematic. If no objection is filed, the budget is presumed reasonable. Simply because no objection is filed does not make the budget reasonable and does not dictate that the budget should be automatically approved when no objection is filed.

The Superior Court is further concerned that proposed Rule 30.4 fails to sufficiently protect estates in terms of fees requested by attorneys and fiduciaries. Attorney's fees and fiduciary fees are among the most unpredictable and variable to a conservator estate, have proven to be the subject of the most controversy and abuse, and should be subject to a higher level of scrutiny than medical bills, taxes and similar expenses. Accordingly, the Superior Court proposes Rule 30.4 be further revised to eliminate any presumptions of reasonableness for these fees and

to require that no fees requested by attorneys and fiduciaries above a certain maximum amount be paid from the estate until the court has an opportunity to review and approve the fee requests at the end of each accounting period after considering all of the circumstances including estate value, total income received and disbursements made during the accounting period. To this end, the Superior Court proposes the following amendments:

Rule 30.4. Conservatorship estate budget

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E. An interested person may file a written objection to the budget or amendment within fourteen days after the filing date of the budget or amendment. On the filing of a written objection, the court may overrule all or part of the objection, order a reply by the conservator or set a hearing on the objection. The court may also set a hearing in the absence of an objection. At a hearing, the conservator has the burden to prove that a contested budget item is reasonable, necessary and in the best interest of the protected person. ~~If an interested person fails to object to a budget item within fourteen days after the filing date of the budget or amendment, however, the budget item shall be deemed presumptively reasonable at the time of the conservator's account.~~

a. NO FEES REQUESTED BY ATTORNEYS AND FIDUCIARIES ABOVE A COMBINED PRESET MAXIMUM LEVEL MAY BE PAID FROM THE ESTATE UNTIL THE COURT HAS REVIEWED AND APPROVED THE FEE REQUESTS AT THE END OF ACCOUNTING PERIOD IN QUESTION, EVEN IF THE BUDGETED AMOUNTS FOR ATTORNEY'S FEES AND FIDUCIARY FEES IS GREATER THAN THE PRESET MAXIMUM LEVEL.

b. IF THE ATTORNEY OR FIDUCIARY REQUESTS THAT FEES OVER THE COMBINED PRESET MAXIMUM LEVEL BE PAID EARLIER THAN AT THE END OF THE ACCOUNTING PERIOD IN QUESTION, THE ATTORNEY OR FIDUCIARY SHALL FILE A WRITTEN PETITION REQUESTING PAYMENT AND STATING THE REASON(S) WHY EARLIER COURT APPROVAL IS NECESSARY.

c. THE COMBINED PRESET MAXIMUM LEVEL FOR PAYMENT OF ATTORNEY'S FEES AND FIDUCIARY FEES IS BASED ON THE TOTAL ESTATE VALUE AT

THE BEGINNING OF THE ACCOUNTING PERIOD IN QUESTION, AS FOLLOWS:

4% ON THE FIRST $100,000;
3% ON THE NEXT $100,000;
2% ON THE NEXT $800,000;
1% ON THE NEXT $9,000,000;
0.5% ON THE NEXT $15,000,000; AND
FOR ALL AMOUNTS ABOVE $25,000,000, A REASONABLE AMOUNT TO BE DETERMINED BY THE COURT.[2]

F. The court may order that a budget is accepted in the absence of an objection. On the court's own motion or upon the filing of a written objection, the court shall approve, disapprove or modify the budget to further the protected person's best interest.

The Superior Court believes the above recommendations will go farther than the proposed rule to protect estates and provide the Court the tools necessary to protect the estate.

3. Proposed Modification to Rule 33 Proposal.

Currently, fee petitions are submitted in many formats. The information provided in the petitions varies greatly. The petitions do not contain the same information and often fail to contain the necessary information to enable the court decide whether the requested fees are reasonable. The use of non-standard formats makes it more difficult to assess the information and increases the time for review of each petition. The Superior Court suggests that the proposed Rule 33 be further revised to include the requirement of a standard executive summary to assist the court in assessing the reasonableness of requested fees. The summary should provide a brief narrative describing the ward's needs, services provided, and the resulting benefit to the ward. The summary should also provide a description of the attorneys' and other professionals' relevant experience and hourly rate.

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[2] *See* California Probate Code §§ 10810-10814.

The Superior Court proposes the following:

Rule 33. Compensation for Fiduciaries and Attorney's Fees Attorneys; STATEWIDE FEE GUIDELINES

A. A GUARDIAN, CONSERVATOR, ATTORNEY OR GUARDIAN AD LITEM WHO INTENDS TO BE COMPENSATED BY THE ESTATE OF A WARD OR PROTECTED PERSON SHALL GIVE WRITTEN NOTICE OF THE BASIS OF ANY COMPENSATION AS REQUIRED BY ARIZONA REVISED STATUTES SECTION 14-5109.

B.~~A.~~ Unless otherwise ordered by the court, a petition that requests approval of compensation for a personal representative, trustee, guardian, conservator, guardian ad litem, attorney representing such fiduciary, or an attorney representing the subject person in a guardianship or conservatorship proceeding for services rendered in proceedings under A.R.S. Title 14 shall be accompanied by a statement that includes the following information:

1. AN EXECUTIVE SUMMARY CONTAINING THE FOLLOWING INFORMATION:

a. THE SERVICES PROVIDED OR WORK PERFORMED WITH A COST-BENEFIT ANALYSIS OF THE SERVICES PROVIDED OR WORK PERFORMED.

b. THE VALUE OF THE ESTATE AT THE INCEPTION OF THE GUARDIANSHIP AND/OR CONSERVATORSHIP, AS WELL AS THE BEGINNING AND END OF THE ACCOUNTING PERIOD.

c. TOTAL AMOUNT OF FEES REQUESTED BY THE PERSON FILING THE PETITION, AND THE TOTAL AMOUNT OF FEES APPROVED BY THE COURT SINCE THE INCEPTION OF THE GUARDIANSHIP AND/OR CONSERVATORSHIP FOR THE PERSON FILING THE PETITION.

d. THE EXPERIENCE AND HOURLY RATE OF EVERY PERSON REQUESTING FEES.

e. OTHER RELEVANT FACTORS SUCH AS THE AMOUNT OF SERVICES PROVIDED OR WORK PERFORMED ON BEHALF OF THE WARD OR PROTECTED PERSON WHICH WERE NOT CHARGED TO THE ESTATE.

2. If compensation is requested based on hourly rates, a detailed statement of the services provided, including the tasks performed, the date each task was performed, the time expended in performing each task, the name and position of the person who performed each task, and the hourly rate charged for such services;

3. An itemization of costs for which reimbursement is sought that identifies the cost item, the date the cost was incurred, the purpose for which the expenditure was made, and the amount of

reimbursement requested, or, if reimbursement of costs is based on some other method, an explanation of the method being used for reimbursement of costs; and

4. If compensation is not based on hourly rates, an explanation of the fee arrangement and computation of the fee for which approval is sought.

C.~~B.~~ Copies of all petitions for compensation and fee statements shall be provided to or served on each party and person who has appeared or requested notice in the case. Proof of such service shall be filed with the court.

D.~~C.~~ If a petition for compensation or fees is contested, the objecting party shall set forth all specific objections in writing, and a copy of such written objections shall be given to or served on each party and person who has appeared or requested notice in the case. Proof of service or delivery of such notice shall be filed with the court.

E.~~D~~. When an attorney or fiduciary fee statement accompanies an annual accounting, the fee statement shall match the charges reported in the annual accounting or a reconciliation of the fee statement to the accounting shall be provided by the fiduciary

F.~~E.~~ WHEN DETERMINING REASONABLE COMPENSATION, ~~T~~the superior court SHALL FOLLOW THE STATEWIDE FEE GUIDELINES SET FORTH IN APPENDIX B TO THESE RULES ~~may adopt fee guidelines designating compensation rates that may be used in determining the reasonableness of fees payable to licensed fiduciaries in cases under A.R.S. Title14.~~

G.~~F.~~ Unless ordered by the court, neither a personal representative nor a personal representative's attorney is required to file a petition for approval of such person's fees.

H. COMPENSATION PAYABLE TO ATTORNEYS OR GUARDIANS AD LITEM FROM THE ESTATE OF A WARD OR PROTECTED PERSON IS WAIVED IF NOT SUBMITTED IN COMPLIANCE WITH ARIZONA REVISED STATUTES, SECTION 14-5110.

The Superior Court believes a standard executive summary as provided above will significantly improve the Superior Court's ability to accurately assess the reasonableness of attorney's fees in a given case.

Moreover, the Superior Court requests the Supreme Court consider adopting a fixed hourly rate or fee structure for attorneys and/or fiduciaries. Several jurisdictions have modified how attorney's fees are calculated in probate cases. Some jurisdictions have moved to a fixed rate in recent years. For

example, Travis County in Texas[3] recently set attorney's fees for probate cases as follows:

Years Practicing Probate and Guardianship Law	Court-Approved Rate
0 – 2 years	up to $165/hour
3 – 5 years	$165 – 195/hour
6 – 10 years	$195 – 250/hour
11+ years	$250 – 350/hour

If an attorney believes he or she should be paid at a higher rate, the attorney may submit a request to the court to approve an increase in the hourly rate. Likewise, the 13th Judicial Circuit in Florida in 2010 set hourly fees for guardians. Other jurisdictions have modified fee structures in probate to be a maximum amount or cap based on the value of the estate. *See, e.g.*, West's Ann. Cal. Prob. Code §§ 10810 – 10814; Nev. Rev. Stat. §§ 150.060-150.067. A set fee schedule or a cap on fees charged by attorneys and fiduciaries would provide all interested parties with sufficient information beforehand about possible charges to the estate and can provide a presumption of reasonableness. The Superior Court requests the Supreme Court consider this when adopting a rule regarding compensation for fiduciaries and attorneys.

4. Conclusion.

The Superior Court strongly supports the commendable work done by the Committee on Improving Judicial Oversight and Processing of Probate Matters. The proposed rules will significantly improve the oversight of estates in probate court. However, the Superior Court believes the alternatives proposed in this comment will further improve the oversight of estates and the ability of the court to protect estates.

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[3] Information from http://www.co.travis.tx.us/probate/pdfs/attorneyfees.pdf.

For the foregoing reasons, the Superior Court proposes alterative language for Rules 30.3, 30.4, and 33 of the Rules of Probate Procedure.

Respectfully submitted this 22nd day of September, 2011.

Honorable Norman Davis
Presiding Judge
Superior Court of Arizona, Maricopa County

Honorable Rosa Mroz
Presiding Probate/Mental Health Judge
Superior Court of Arizona, Maricopa County

Original and six (6) copies delivered this
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