Comments to
Proposed Probate Rule Amendments filed 1/30/19
Rules 32 and 47 and Form 2-S

Proposed Rule 32:

For many years the Probate Court has had the benefit of being able to appoint a Guardian Ad Litem (GAL) to assist the court in obtaining an independent unbiased opinion about the best interests of a proposed ward or protected person in regard to issues pending before the court. This practice was codified by adding Rule 15.1 to the Probate Rules by an amendment effective February of 2012.

In Maricopa County this is done by filing a Motion with the court explaining why the appointment of a GAL is necessary or advisable. If granted the court appoints an attorney who has received appropriate training to act as GAL off the list of attorneys maintained by the Office of Court Appointed Counsel. The Motion is often filed simultaneously with the filing of a Petition for Guardianship or Conservatorship before any hearing adjudicating the incapacity issue is held. The benefit to the court is that often the GAL is the voice of reason that bears no allegiance to the agenda or emotional views of warring family members in equal statutory priority vying for the authority to control the life or financial decisions of the person who is the subject of the proceeding. Sometimes the war is between the Petitioner and the proposed ward or protected person who remains articulate but whose judgement and reason is impaired by some mental deficiency, condition, illness or disease. Although not always granted, when the voice of a GAL is added to the mix to address solely the best interest of the person to be affected, the court and the person who is the subject of the proceeding are the ones who benefit.

Rule 15.1 coexisted with the provisions of ARS 14-1408 which permits the court to appoint a "Representative". As the comment to the proposed rule points out, this person was originally referred to as a "Guardian ad Litem" until it was changed to "Representative" by amendment in 2009. The original version of ARS 14-1408 was derived from the Uniform Trust Code.

Apparently, the drafters of this proposed rule want to avoid confusion and have chosen to do so by defaulting to the appointment of a "representative" under 14-14-1408 and deleting old Rule 15.1 authorizing the court to appoint a GAL. As pointed out in the comment, a Representative may have even broader powers than that of a GAL with a much more limited scope than a Representative. It appears that the drafters believe that what could have been accomplished previously under rule 15.1 may now be accomplished under ARS 14-1408. On close inspection, I do not believe that is true.

First, 14-1408 states that the court may appoint a representative where it determines that an "interest" is not represented or where "available representation may be inadequate". The attorney for the proposed ward is obligated to represent the legal interests of his client and so the "best interest" of a client may not be represented or may not be adequately represented. Therefore, this sounds like a perfect fit for the appointment of a limited scope Representative (GAL) to advise the court about the best interest of the person. However, 14-1408 goes on to state that the court may appoint a representative "to receive notice, give consent **and otherwise represent, bind and act on behalf of a …incapacitated person**….", none of which powers would be appropriate to grant to a GAL in a Guardianship or Conservatorship proceeding.

It is important to remember that 14-1408 was derived from the Uniform **Trust** Code which in turn derived the language from the Uniform **Probate** Code, which uses the term Guardian ad Litem and is the provision from which our original Section 14-1408 was taken. I suggest that ARS 14-1408 is drafted to meet the needs and interests of parties and litigants in Probate and Trust proceedings and is not a good fit for parties or litigants in Guardianship, Conservatorship and Protective arrangement proceedings.

Compare the Uniform Trust and Probate Code provisions with the following from the Uniform Guardianship, Conservatorship and Other Protective Arrangements Act:

SECTION 115. GUARDIAN AD LITEM. *The court at any time may appoint a guardian ad litem for an individual if the court determines the individual's interest otherwise would not be adequately represented. If no conflict of interest exists, a guardian ad litem may be appointed to represent multiple individuals or interests. The guardian ad litem may not be the same individual as the attorney representing the respondent. The court shall state the duties of the guardian ad litem and the reasons for the appointment.*

Comment

This section authorizes the court to appoint a guardian ad litem for an individual whose interests would not otherwise be adequately represented or adequately known to the court. Such an appointment is distinct from the appointment of an attorney for a respondent (see Sections 204, 305, 406, and 507) and the appointment of a visitor in a proceeding for an adult respondent (see Sections 304, 405, and 506). The appointment of a guardian ad litem for an adult respondent is therefore not typical and is not required for any proceeding under the act.

It is important that the court, when appointing a guardian ad litem, advise the guardian ad litem of his or her role. This section encourages such advice by requiring the court to state the duties of the guardian ad litem and its reasons for the appointment.

The section adds language not present in Section 115 of the 1997 act and the counterpart provision of even earlier versions of the act clarifying that the guardian ad litem may not be the same individual as the attorney representing a respondent. A similar statement was included in the comments to, but not text of Section 115 of the 1997 act. The role of the guardian ad litem is distinct from that of the attorney for a respondent, and the two often may be in conflict. The guardian ad litem typically is tasked with identifying and representing an individual's best interest. By contrast, an attorney for a respondent is tasked with advocating for the individual's wishes to the extent ascertainable (see Sections 204, 305, 406, and 507). Appointing the same person to take on both roles is thus incompatible with due process and does not advance the court's interest in fact-finding.

When appointing a guardian ad litem who is an attorney, the court should avoid appointing an attorney who is associated with a firm in which another attorney represents a party to the proceeding (e.g. the respondent or the petitioner). Such appointments can create a conflict of interest and may be proscribed by the jurisdiction's rules of professional responsibility.

This act does not address payment for a guardian ad litem because that topic is ordinarily addressed elsewhere in state law.

It appears that Section 115 of the Uniform Guardianship, Conservatorship and Other Protective Arrangements Act is the sum and substance of our current Rule 15.1 which is now being eliminated. I believe that the substance of Rule 15.1 should be retained in our new Probate rules in the context of a Guardianship or Conservatorship proceeding.

Not only is current Rule 15.1 being eliminated but new Rule 32 contains a provision in subsection (e) which prohibits the court from appointing a "representative" for a person before the court has found, after notice and hearing, that the person is incapacitated or is in need of protection. In family court proceedings (Rule 10.1 RFLAP) and juvenile court proceedings (Rule 40 RPJC) the court is permitted to appoint GALs or Advisors prior to any adjudication to advise the court on the best interest of the individual who is the subject of the proceeding. It is a mistake to eliminate this valuable tool in Guardianship and Conservatorship proceedings in Probate Court. At a minimum the Supreme Court should continue to allow judges to appoint a Representative with the limited powers of a GAL at any time the court deems it advisable.

In addition, the Supreme Court should consider what affect the deletion of Rule 15.1 in favor of new Rule 32 will have on the procedures in ARS 36-540 (G) and the procedures currently being used by some criminal courts in Criminal Rule 11 competency proceedings. ARS 36-540 (G) allows the Mental Health Court to order an investigation into the need for a guardianship or conservatorship for a person in a Title 36 involuntary treatment proceeding who is believed to be an incapacitated person under ARS 14-5101. Currently GALs are appointed through the probate court to investigate the need for a guardian or conservator and, if deemed necessary, to file such an action to protect the person. Rule 32 appears to prevent such an investigative appointment before an adjudication of incapacity is made in a Probate proceeding. A similar investigative appointment of a GAL is often made in Criminal Rule 11 proceedings where the defendant is incompetent and not restorable to determine whether the defendant would benefit form the appointment of a guardian. This practice would appear to be no longer available if Rule 32 is enacted without amendment because the appointment of such a person is not permitted prior to an adjudication of incapacity.

Proposed Rule 47:

Subsection (a) 4 of New rule 47 is somewhat confusing. The wording of the rule states: *"If the court grants the request without notice, the party and the court must follow procedures that are substantially similar to those set forth in A.R.S. § 14-5310(B)."* A court may grant a Temporary order only If it finds that all the "conditions" in A.R.S. § 14-5310(B) have been met, which is what the first sentence of this subsection clearly states. This new rule then goes on to state as quoted above that if a court grants a request for temporary order without notice, the court and the party must follow "procedures" that are substantially t those set forth in A.R.S. § 14-5310(B). Does this mean that a Petitioner must strictly meet all of the conditions set forth in A.R.S. § 14-5310(B) for the court to issue a temporary order, but after the temporary order is granted the court and the party only need to follow procedures that are substantially similar to those set forth in the statute? The only post-order "procedure" in A.R.S. § 14-5310(B) appears to be the procedure set forth in subsection (B) 4 which is a requirement that the Petitioner, as certified in the Petition, personally serve the proposed ward within the time set by the court but not later than 72 hours later, as directed by the court. It should be clear that the Petitioner must comply with the procedure directed by the court and not some substantially similar procedure.

Because it shouldn't be necessary to state in the rule that which is already required by the statute, I would recommend that the last sentence of new proposed Rule 47 be deleted. Admittedly, however, the wording of subsection (B) 4 is not a model of clarity. If the drafters of this new rule wanted to remind the court and the Petitioner of the requirement of post-order notice to the ward , the last sentence should be reworded to make it clear specifically what procedure is being referred to and that the Petitioner must strictly comply with the post-order procedure requirements ordered by the court and not just do something substantially similar.

If the drafters are attempting to remind the courts to comply with the important post-order requirements where a temporary order is granted without notice, perhaps the proposed rule should also remind the courts that they must appoint counsel under subsection (C), set an expiration date for the temporary order under subsection (D) and set a hearing date as set forth in subsection (E).

Probate Form 2-S - Supplemental Order To Guardian With Inpatient Psychiatric Treatment Authority And Acknowledgement:

Subsection E: The third sentence of Subsection E of the proposed new Form 2-S is confusing. It states: "If or if you do not file the evaluation report, the report indicates that your ward will not likely need inpatient mental health care and treatment, your authority to consent to placement in an inpatient psychiatric facility will cease on the date specified in the prior court order." I suspect that it should read as follows: " If ~~**or if**~~ you do not file the evaluation report, **or if** the report **that is filed** indicates that your ward will not likely need inpatient mental health care and treatment, your authority to consent to placement in an inpatient psychiatric facility will cease on the date specified in the prior court order."

I recommend that the third sentence of subsection E of Form 2-S be clarified.

Respectfully submitted,

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