

Comments To Proposed Rule Amendment filed January 30, 2019
Rules 36(b)(2) and Rule 44(e)

A. Comment on Proposed Rule 36(b)(2)

Proposed Rule 36(b)(2) states in part: "... The fiduciary must use Form 10 for the proof of restricted account."

Rule 55 (b) states that the Judicial Branch website will specify whether a form is recommended or required.

Rule 55 (b) (2) states that "Required forms may not be adapted or modified, except by court order."

So, my understanding is that proposed Rule 36(b)(2) instructs that that the Judicial Branch website will state that Form 10 is a required form – allowing no modification except by court order.

Therefore, unless the current Form 10 is substantially changed, Form 10 will only allow restricted accounts which are federally insured by the FDIC or NCUA.

A.R.S. 14-5411 A. provides the statutory basis for restricted investment accounts and states in part:

Unless otherwise directed, the bond shall be in the amount of minus the value of securities deposited under arrangements requiring an order of the court for their removal

At least in Maricopa County, the probate court has been approving investments in a wide range of financial assets within restricted investment accounts as provided under A.R.S. 14-5411 A. In such cases, Form 10 has been modified. The modifications have included removal of the reference to "federally insured". With the adoption of this proposed rule, Form 10 will be a required form and cannot be modified or adapted except by court order.

Conclusion

If my understanding of the proposed rule is correct, Form 10 will be a required form under Rule 55(b)(2) and if so, then whenever a petition requests establishing a restricted investment account which will hold financial assets which are not federally insured and/or requires additional language relative to the required Form 10, , the petitioner will need to request that the court approve modification of Form 10.

B. Proposed Rule 44(e) (1)

Proposed Rule 44 (e)(1) requires that the annual account be filed no later than 60 days after the anniversary date of the issuance of the conservator's permanent letters of appointment.

The current rule provides 90 days.

What is the proposed rule trying to resolve?

The parties and the court all are served by timely filings of true and complete accountings. The parties are also served by making the processing of accountings as efficient for the conservatorship estate as possible in the effort to control costs.

I have been an attorney for conservators for 40 years. I take the 90 day period seriously because extension motions only increase the cost of processing accountings and the 90 day period meets the goal of processing and approving accountings on a timely basis while leaving an adequate time for the conservator, the person preparing the accounting, and counsel to prepare and finalize an complete and true accounting.

From my perspective, the adoption of this proposed rule will result in an increase of poorly prepared accountings, an increase in untimely filed accountings, an increase in motions to extend the time to file accountings, and an increase in costs involved in processing accountings.

Following is a hypothetical 60-day:

Possible schedule to meet 60-day requirement:

By the 10th day of the 60-day period, the conservator receives the ending month financial statements. (Note: *Many bank statements end at different days of the month. So, a bank statement ending on the 21st of a month may not be received by the conservator until the 30th day of the 60-day period*),

By the 20th day of the 60-day period, the conservator gathers up all the statements and provides to person preparing the accounting.

By the 35th day of the 60-day period, the person preparing the accounting prepares the accounting.

By the 45th day of the 60-day period, the attorney and conservator receive and review the report, communicate with the person preparing the accounting as to any questions, corrections, and obtains the final accounting.

By the 52nd day, the attorney drafts all pleadings (Form 7, fee petitions, any supplemental petitions and submits to the conservator).

By the 58th day, the conservator review and signs Form 7 (before a notary which may take days to obtain) and other pleadings (such as fee petitions) if necessary.

By the 60th day, the accounting is filed.

If proposed Rule 44(E) is adopted shortening the period to 60 days, and assuming conservator, attorney, person preparing accounting all strive to try to meet the above timeline, I suggest that on March 1st (the 60th day) many parties, some using their best efforts, some not so best, will not have completed each task required. If so, then the motion to extend will be prepared and hopefully filed on or before March 1st. The extension request will often be for another 60 days. The court will decide whether the extension request is reasonable. Costs will increase because more extensions will be requested. (Note: What is the cost of a motion and order to extend which the Conservator's attorney prepares and the Court appointed counsel reviews? I have seen the cost easily approach \$500 and more.).

Conclusion:

In my mind, a better solution:

- a. Publicizing and enforcing the current 90-day requirement for filing an accounting;
- b. Where a court accountant is involved, court administration working to develop the resources to allow court accountants to complete the initial review in 3 months. In such cases, most accountings would end up being approved within the year following the end of the accounting period. While the committee proposing the rule has no authority on budget, the committee should recognize that, to the extent the court accountant logjam is part of the problem – advancing the deadline from 90 to 60 is not part of the solution.

Submitted by Robert L. Beckett, Attorney, Bar No. 004034
Dyer Bregman & Ferris PLLC
3411 N. 5th Ave. Suite 300
Phoenix, Arizona 85003
rlbeckett@dbfazlaw.com
602-254-6008 ext 2449 office
480-286-1857 cell

Note: Citation clerical issue: Proposed Rule 9(b) refers to Rule 7(b)(2)(E). It appears the correct reference is to Rule 8(b)(2)(E)