

APPROVED

**VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES FOR FAMILY PROCEEDINGS**

**Minutes of Meeting
September 13, 2019**

The meeting was called to order at 1:35 p.m. in the Hoff Lounge, Oakes Hall, Vermont Law School, by Hon. Michael Kainen, chair. Present were Committee members Penny Benelli, Laura Bierley (by telephone), Hon. Thomas Carlson (by telephone), Anne Damone, Hon. Gregory Glennon (by telephone), Sarah Haselton (by telephone), Hon. Christine Hoyt, Jody Racht, Marshall Pahl, Karen Reynolds, Alycia Sanders, and Caryn Waxman (by telephone). Also present were Hon. Beth Robinson, Supreme Court liaison; and Professor Emeritus L. Kinvin Wroth, Reporter.

1. Minutes. The draft minutes of the meeting of Jun 21, 2019, were unanimously approved as previously distributed.

2. Status of proposed and recommended amendments.

Proposed amendment to V.R.F.P. 18(d)(1) clarifying process of appointing mediator, recommended to the Court on January 11, promulgated on February 4, effective April 8, 2019. The Legislative Committee on Judicial Rules (LCJR), at its meeting on June 6, 2019, had requested a response from the Family Rules Committee on its concern that the language of the amendment appeared to require a mediator designated by the court who is not on the Family Division Mediation Program's approved list of mediators to have domestic violence training regardless of whether the matter involved domestic violence.

At its June 21 meeting, the Family Rules Committee had asked Chairman Kainen to report to LCJR its view that the purpose of the rule was to assure that all mediators had had adequate domestic violence training. That training was a specific component of the credentials required for inclusion on the Mediation Program's list. The possibility of domestic violence must always be considered at the outset of any mediation, especially if there is substantial disagreement among the parties about mediation, or one or more of them is self-represented. Accordingly, although the final sentence of Rule 18(d)(1)(B) gives the judge some measure of discretion in assessing the credentials of a mediator not on the Mediation Program approved list, that assessment must include consideration of the appropriateness of the non-list mediator's domestic violence training and experience in the circumstances of the particular case. Chairman Kainen stated that LCJR had not met since June, but that he would report the Committee's views on the purpose of the language to LCJR before its next meeting.

3. Proposed V.R.F.P. 6.2 (mental health proceedings). The Committee considered Professor Wroth's September 10, 2019, revised draft of proposed V.R.F.P. 6.2 reflecting that Act 77 of 2018 changed "Criminal" to "Family" Division in 18 V.S.A., ch. 206, subch. 3, § 8840, providing for original jurisdiction of commitment proceedings, but that § 8845 providing for

annual judicial review of those proceedings in the Criminal Division was not amended. On motion duly made and seconded, it was voted unanimously to recommend to the Supreme Court that the September 10, 2019, draft of the proposed rule be sent out for comment.

4. Consideration of *In re K.F.*, 2013 VT 39, note 2 (6/7/13) (request to develop procedure for addressing ineffective assistance of counsel claims by parents in TPR proceedings). The Committee considered Ms. Racht's September 11, 2019, report for the subcommittee (Ms. Racht, Judge Kainen, Ms. Reynolds, and Mr. Pahl, chair) and the subcommittee memoranda of August 29, 2014, February 2, 2018, and March 27, 2019, that accompanied it. Ms. Racht summarized the history of the subcommittee's work on the matter and stated that two basic issues were involved in addressing ineffective assistance claims—what standard should a court apply in considering such claims and whether a claim should be raised in the Supreme Court only as part of the direct appeal of a TPR order or should be addressed by motion under V.R.C.P. 60(b) (applicable in TPR cases by virtue of V.R.F.P. 3(a), which incorporates V.R.F.P. 2(a)).

As to the standard question, after discussion of both criminal cases and civil TPR cases and rules, it seemed that despite different phrasing, different constitutional sources, and different weighing of the factors, the tests came down to a showing of the inadequacy of representation and a showing that the party was significantly prejudiced by the inadequate representation. On the procedural issue, Committee views were divided between the relative finality of direct appeal with specific time deadlines and the flexibility and efficiency of the Rule 60(b) option, which trial judges could adapt to the circumstances of particular cases. After further discussion, it was agreed that the subcommittee would present at the next meeting a draft report to the Supreme Court summarizing its research and laying out the options, including the formalization of Rule 60(b) and the details of a direct appeal rule. In making this report, the Committee would ask the Court for further direction.

5. V.R.F.P. 6. Amendments made necessary by Act 170 of 2013 (Adj. Sess.) concerning minor guardianships. Professor Wroth reported that the Probate Rules Committee expects to have a final draft of proposed amendments incorporating the applicable Family Rules guardianship provisions in the Probate Rules at its meeting scheduled for October 9.

6. Vermont Rules for Public Access To Court Records, adopted by Supreme Court order of May 1, effective July 1, 2019, and considered by LCJR without objection on June 6, 2019. The Committee considered Ms. Benelli's report for the subcommittee (herself, Ms. Olvera, and Ms. Sanders) to determine, (1) what can be done by rule and (2) what changes in or additions to provisions of the new Public Access Rules applying to family cases should be considered. The subcommittee, noting that its charge applied to paper records and did not address additional questions related to electronic filing, concluded that the Family Rules Committee had the power to propose rules governing access to Family Division records and that the Committee could propose them to the Public Access Rules Committee for inclusion in the Public Access Rules. The subcommittee was still in the process of developing specific amendment proposals that it would present at the next meeting.

7. Applicability in Family Division of amendments to V.R.C.P. 5, 79(a). proposed by Special Committee on Electronic Filing to conform to proposed new V.R.E.F. 11,

Professor Wroth reported that proposed Civil Rules amendments to conform to proposed new V.R.E.F. 11, drafted by the Special Committee on Electronic Filing, sent out for comment on June 19, with comments due by August 19, 2019, had not yet been acted on by the Special Committee. Committee members were encouraged to send any comments to the Special Committee as soon as possible.

8. Act 72 of 2017. An Act Relating to Juvenile Jurisdiction. (Section 7 directs the Supreme Court to consider adoption of appropriate rules by July 1, 2018.) Consideration of youthful offender rules in light of Act 45 of 2019 (5/30/19). Mr. Pahl reported that the subcommittee would present a rules proposal to implement the statute at the next meeting.

9. Enforcement of money judgments. Professor Wroth reported that the Civil Rules Committee had taken no action on the pending amendments to V.R.C.P. 69 and related rules at its June 21 meeting but would consider them at a meeting scheduled for October 4, 2019. The Committee then considered Judge Carlson's June 24, 2019, draft of a new V.R.F.P. 43(f) providing for enforcement of money judgments in the Family Division by incorporation of V.R.C.P. 4.1 and 4.2. On motion duly made and seconded, after discussion, it was voted unanimously to recommend to the Supreme Court that this draft of the proposed rule be sent out for comment. Professor Wroth agreed to prepare Reporter's Notes before sending the rule to the Court.

11. V.R.F.P.43(b)(1). Conformity to Vermont Parentage Act, 15 V.S.A. 115A(d)(2). Item 11 was taken up out of order. Magistrate Hoyt had forwarded to the Committee Magistrate Humbert's e-mail of August 6, 2019, suggesting that V.R.F.P. 4.3(b)(1) should be amended or eliminated in view of the enactment of 15A V.S.A. §115(d)(2). After consideration of the question whether the rule would continue to apply to cases filed before the Vermont Parentage Act became effective, it was agreed to table the item until the next meeting pending research on that question.

Justice Robinson then excused herself from the meeting.

10. Live-streaming in Family Court hearings. The Committee considered Magistrate Hoyt's e-mail of August 7, 2019, concerning the application of present and new V.R.C.P. 79.2 to live-streaming of Family Court proceedings. After brief discussion, it was agreed to table the item until the next meeting and to consider it and other issues raised by new V.R.C.P. 79.2 in light of proposed V.R.F.P. 19 based on Judge Corsones' concerns and sent to the Court on November 3, 2018, but not acted upon. Professor Wroth noted that the Committee should include in its consideration emergency amendments to V.R.C.P. 79.2 promulgated on September 3, with comments due on November 8, 2019.

12. Dates of next meetings. The next meeting is scheduled for November 8, 2019. Professor Wroth will circulate suggested dates for further meetings.

. There being no further business, the meeting was adjourned at 4:00 p.m.

Respectfully submitted,

L. Kinvin Wroth
Reporter