

APPROVED

**VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF PROBATE PROCEDURE**

**Minutes of Meeting
March 25, 2021**

The meeting was called to order at 1:05 p.m. on Teams by Hon. Jeffrey Kilgore, chair. Present virtually were Committee members Michael Gawne, Matthew Getty, Brian Hesselbach, Hon. Kathryn Kennedy, Mark Langan, Hon. Justine Scanlon, and Norman Smith. Also present virtually were Hon. William Cohen, Supreme Court liaison, and Professor Emeritus L. Kinvin Wroth, Reporter.

1. **Approval of draft minutes of the meeting of December 3, 2020.** The minutes of the meeting of December 3, 2020, were unanimously approved as previously circulated.

2. **Status of proposed and recommended amendments.**

A. Amendments made necessary to conform Probate Rules to the 2020 Vermont Rules on Electronic Filing, Judge Kilgore called the Committee's attention to his e-mail of March 24, 2021, attaching the Electronic Filing Committee's draft amendments to incorporate exceptions for probate documents that had to be physically retained, as well as a list of such documents. He asked that Committee members send him comments on the drafts and list by April 14. It was agreed that consideration of final action by the Electronic Filing Committee should be on the agenda of the next meeting.

B. Issues concerning AO 49 as amended through March 8, 2021. Professor Wroth reported that AO 49 had been amended on December 22, 2020, effective that date, to limit civil proceedings (including probate proceedings) to remote participation by all parties and witnesses, unless the court found good cause, or granted a party's motion under V.R.P.P. 43.1, to proceed with partial or full in-person participation. He further reported that the Administrative Order was amended on March 8, effective March 15, 2021, to extend the judicial emergency declared in AO 48 until May 31, 2021; to delete the suspension of civil jury trials until January 1, 2021, leaving in place provisions for determining when such trials should be held; to make clear that the 2020 Electronic Filing Rules applied to filing and service; to authorize offering the July 2021 bar examination; and to incorporate, as a new § 24, the Civil Rules Committee's proposed emergency amendment of V.R.C.P. 68.

C. Effect of Court's Long Term Planning Committee: Ramp-up Report, May 13, 2020, Justice Cohen reported that Justice Carroll was heading a Supreme Court work group that was taking a broad look at virtual trial possibilities, including whether virtual trials might continue after the expiration of AO 49.

3. **V.R.P.P. 17(a). Need for service on interested persons in light of *In re Holbrook's Estate I*, 2016 VT 13 and *Id. II*, 2017 VT 15.** Mr. Langan reported for the subcommittee (Judge Kilgore, Judge

Kennedy, Judge Scanlon, and himself), reviewing the issues concerning notice under V.R.P.P. 17(a). In sum, 14 V.S.A. § 107 originally did not require notice. V.R.P.P. 17(a) required notice under Rule 4 to any “interested person” broadly defined. The practice had been to obtain consents so that a will could be allowed without hearing. *Holbrook* essentially said that the statutes and rules required a hearing before allowance with notice to all interested persons as defined in the rule, and that consents only obviated the need for testimony, not hearing. Section 107 was then amended to permit allowance of the will without hearing if consents of the heirs at law and surviving spouse were obtained. However, V.R.P.P. 3(a)-(b), 4(a), and 17(a)(1) still require consents of all “interested persons,” defined in Rule 17(a)(1) as “heirs, devisees, legatees, children, spouses, and such other persons as the court directs,” as well as the trustees of any trust through which estate assets may be distributed.

In subsequent discussion, questions were raised concerning how objections to allowance could be made by appeal or under Rule 60(b) and whether, despite the statute, notice could be given to others under Rule 17(a) or 14 V.S.A. § 111. Other inconsistencies were noted—*e.g.*, 14 V.S.A. § 204, V.R.P.P. 5.1. Reference was made to the more efficient practice in other states, including New Hampshire, New York, and Maine, which had been considered by the Pratt Committee in its statutory review and revision process. After further discussion, it was agreed that the subcommittee would consider establishment of a consistent and simpler process in two steps: (1) Develop a plan for such a process. (2) Recommend appropriate Vermont statutory and rule provisions to implement the plan in a coherent and consistent way.

4. Elections, V.R.P.P. 13, Form 49, and 14 V.S.A. § 305 and 27 V.S.A. § 105 in light of Act 195 (S.29). Judge Scanlon noted that a case was pending before her involving some of these issues and that she had turned her sound off for discussion of this item. After discussion, it was agreed to defer action on this item until she had decided that case.

5. Proposed new V.R.P.P. 73 to implement 14 V.S.A. § 118 providing for direct reference to the Civil Division of matters involving wills. Sent out for comment on January 5, with comments due on March 8, 2021. Chairman Kilgore reported that no comments had been received and that the Civil Rules committee had decided that no action was necessary on its part. It was agreed to recommend to the Court that the rule be promulgated as previously circulated.

6. Review and comment on policy regarding destruction of paper filings under Odyssey. Chairman Kilgore reported that he and Ms. Ferris would address this issue in connection with their continuing work under item 2.A above.

7. Proposed New V.R.P.P. 66.1 Accountings. The Committee gave further consideration to Professor Wroth’s November 30, 2020, draft intended to incorporate the provisions of Chairman Kilgore’s draft of September 20, 2020, in light of discussion at the meeting of December 3, 2020. It was agreed that he and Professor Wroth would prepare a new draft for the next meeting that would incorporate the elements of that discussion.

8. Applicability of V.R.P.A.C.R. 7(a)(1)(B) in Probate Division. Mr. Gawne reported that his firm has not used the certificate of compliance required by V.R.P.A.C.R. 7(a)(1)(B), that none of the Franklin

County courts require it, and the Franklin County Bar has not discussed the issue. He stated that his firm will start completing the certificate. Judge Scanlon stated that she would call the issue to the attention of the Probate Division Oversight Committee. In discussion, Committee members agreed that there was still confusion and lack of knowledge about the operation of Odyssey and that additional education about the process should be undertaken, at the state and county levels.

9. **Need for Rules to implement Act 167 of 2020, § 15 (amending 14 V.S.A. § 107) and §§ 28-29 (adding 4 V.S.A. § 35 (27)).** Chairman Kilgore, Judge Kennedy, and Professor Wroth agreed to prepare a draft to present at the next meeting.

10. **Other business.** There was no other business.

11. **Date of next meeting.** It was agreed that the next meeting would be held at 1:30 p.m. on June 17, 2021.

There being no further business, the meeting was adjourned at 3:15 p.m.

Respectfully submitted,

L. Kinvin Wroth, Reporter