

APPROVED

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

**Minutes of Meeting
February 21, 2018**

The meeting was called to order at 1:35 p.m. in the Hoff Lounge, Oakes Hall, Vermont Law School, by Hon. Jeffrey Kilgore, chair. Present were Committee members Hon. Ernest T. Balivet, Michael Gawne, Brian Hesselbach, Mark Langan, Katherine Mosenthal, David Otterman, Diane Pallmerine (by telephone), Hon. Justine Scanlon, Justin Sheng (by telephone), and Norman Smith. Also present by telephone was Professor L. Kinvin Wroth, Reporter.

New Member of the Committee Attorney Michael Gawne, Esquire, of St. Albans was introduced to the Committee.

1. Approval of minutes. After a correction that Hon. Justine Scanlon was not present at the meeting of November 29, 2017, on motion duly made and seconded, it was voted, with Mr. Gawne abstaining, to approve the draft minutes of the meeting of November 29, 2017, as previously distributed.

2. Status of proposed and recommended amendments.

A. The Committee agreed to defer action on V.R.P.P. 79.2 until the Supreme Court has had the opportunity to review V.R.C.P. 79.2 as recommended by the Special Committee on Video and Cameras in the Court.

B. Professor Wroth reported that Proposed V.R.C.P. 43(a) and V.R.P.P.43(b), video and audio appearance, and Proposed AO47, Technical Standards, proposed by the Special Committee on Video and Cameras in the Court were sent out for comment on January 24, with comments due on March 23, 2018. Judge Kilgore will report back on potential comments sent to him by Committee members within two weeks and will send any comments agreed on to the Special Committee for consideration in making its recommendation to the Court.

3. Expanded provisions for motions and contested cases. It was moved and seconded to discontinue discussion of expanding provisions for motions and contested cases in V.R.P.P. 39. While the motion passed, the committee agreed to discuss the New Hampshire model at the next meeting. It was moved and seconded to discontinue discussion of expanding provisions for motions and contested cases in V.R.P.P. 72. The motion passed.

4. Effect of recommended amendment of V.R.F.P. 7 and addition of V.R.F.P. 7.1 on probate jurisdiction under V.R.F.P. 6, 6.1. Further consideration of Professor Wroth's June 15 drafts of proposed V.R.P.P. 80.9-80.12.

V.R.P.P. 80.9 – The Committee agreed to change the words “ward” or “proposed ward or person in need of guardianship” to “minor.”

V.R.P.P. 80.10 - Paragraph (c)(1) was amended to read as follows:

(1) *Appointment.* In all proceedings to which this rule applies, the respondent, or an attorney who has been appointed or retained to represent a respondent, or any other attorney or party, may file and serve a motion, supported by affidavit, requesting the appointment of a guardian ad litem. The court may raise the issue on its own motion. In all cases other than where the respondent has personally filed the motion or consents in open court, the motion and affidavit shall be served upon the respondent. The motion shall not be granted except after opportunity for hearing. No hearing is required when the respondent does not object and the court in its discretion finds that the affidavit provides sufficient support for the motion.

V.R.P.P. 80.11 – Subdivision (c) was amended to read as follows:

(c) Appointment of Attorney. If the issues related to the child are contested and the guardian ad litem recommends the appointment of an attorney for the child pursuant to Rule 80.11(e)(6), the court may appoint an attorney for the child. In appropriate circumstances, the court may appoint an attorney for the child without a request from the guardian. The court may order either or both parties to pay a reasonable fee for the attorney’s service.

Subdivision (d) was amended to read as follows:

(d) Child as Witness.

(1) In any proceeding in which a party seeks to call as a witness a minor child who is a subject of the proceeding, the court shall hold a hearing to determine whether to allow the child to testify. If a guardian ad litem and an attorney for the child have not previously been appointed under (b) or (c), then, to assist the court in that determination, the court may appoint a guardian ad litem and shall appoint an attorney for the child.

(2) If the court finds after hearing that the testimony of the child is necessary to assist the court in determining the issue before it, that the evidence sought is not reasonably available by any other means, and that the probative value of the testimony outweighs the potential detriment to the child from being called as a witness, the court may allow the testimony, shall then continue the appointment of the attorney and the guardian ad litem, if any, and may impose any further conditions that it deems appropriate to protect the child.

Subparagraph (f)(1)(B) was amended to read as follows:

(B) the guardian ad litem, if requested by the court, shall submit to the court and the parties a list of all of the guardian ad litem’s activities carried out pursuant to the court’s order issued under (e);

V.R.P.P. 80.12 - Paragraph (d)(1) was amended to read as follows:

(1) *In Pretrial Proceedings*. At any conference or pretrial proceeding if a guardian ad litem has been appointed, the guardian ad litem, if requested by the court, shall submit to the court and the parties a list of all of the guardian ad litem's activities carried out pursuant to the court's order issued under (c) and, if requested by the court, may make a brief oral statement on the record as to matters that will help the court formulate issues for further pretrial procedure and trial. The guardian ad litem's oral statement will not be considered evidence.

With respect to the four proposed rules, V.R.P.P. 80.9 – 80.12, as the same are amended as set forth in these minutes, the Committee approved the rules for submission for comment. Professor Wroth will draft a proposed promulgation order in final form with Reporter's Notes and present it to the Committee for approval at the next meeting.

5. Suggested amendment of V.R.P.P 77(e)(2), concerning the confidentiality of index of records. No action was taken pending the legislature's action on the "Pratt bill" (S.29). Mr. Gawne updated the Committee as to the status of the bill. The bill has passed the Senate. It may be amended as recommended by the Franklin-Grand Isle Counties Bar Association once hearings are scheduled in the House Judiciary Committee.

6. V.R.P.P. 45(b) – document subpoena. The Committee deferred action pending action by the Supreme Court on amendments recommended by the Civil Rules Committee.

7. V.R.A.P. 4(f) – "prisoner's mailbox" rule. The Committee deferred action pending action by the Supreme Court on amendments to V.R.C.P. 3 and 5 proposed by the Civil Rules Committee.

8. V.R.P.P. 17(a). Need for service on interested persons in light of *In re Holbrook's Estate I*, 2016 VT 13. See also *Id. II*, 2017 VT 15. No action was taken pending the legislature's action on the "Pratt bill" (S.29). Mr. Langan pointed out that if S.29 passes, the *Holbrook* issue will become moot.

9. Consideration of Mark Langan's email of January 31, 2018 to the Committee. Mr. Langan pointed out an error in Form 49. The Form would lead one to believe that the homestead election applies only in intestate estates. Judge Scanlon, who chairs the Probate Oversight Committee, which adopts new and revised forms, will bring this matter to the attention of that committee.

10. Form 49 and 14 V.S.A. §305 and 27 V.S.A. §105 in light of S. 29. No action was taken pending the legislature's action on the "Pratt bill" (S.29).

11. Other business. None.

12. Date of next meeting. Mark your calendars: it is scheduled for May 16, 2018, 1:30 p.m. at Vermont Law School.

There being no further business, the meeting was adjourned at approximately 4:30 p.m.

Respectfully submitted,

Jeffrey P. Kilgore for
L. Kinvin Wroth, Reporter