

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

**Minutes of Meeting
December 3, 2020**

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, Hon. Kathryn Kennedy, Daniel Kimbell, Mark Langan, Laurie Rowell, Hon. Justine Scanlon, Justin Sheng, and Norman Smith. Also present virtually was Professor Emeritus L. Kinvin Wroth, Reporter.

1. Approval of draft minutes of the meeting of September 30, 2020. The minutes of the meeting of September 30, 2020, were approved as previously circulated, with the correction of the spelling of Ms. Rowell's name in the list of those attending, and of Ms. Ferris' name in item 2.A.

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 reported for the subcommittee on e-filing issues (Melinda Ferris and himself) that there was a lack of uniformity among the courts as to what was acceptable for filing, particularly with regard to original probate documents. He suggested that a provision concerning what was acceptable should be in the Rules of Probate Procedure. Professor Wroth noted that the Civil Rules Committee had established a subcommittee to consider how the various provisions concerning electronic filing should be allocated among the Civil Rules, the E-filing Rules, administrative orders and directives, and the procedures governing the Odyssey system.

In discussion, members noted that the newness of the system and the heavy workload imposed on court staff led to the current problems with uniformity among courts. The various training sessions sponsored by the Judiciary were having some effect, but it will take time and experience to get everyone up to speed. It was agreed that the Committee should address issues as far as possible through Probate Rules amendments that could address issues where there were differences among the registers, such as those pertaining to acceptance. Judge Kilgore noted that the Probate judges had developed a list of issues. He undertook to work with Ms. Ferris to develop rules that would address some of the issues discussed and urged patience with the present slow pace of development during this learning period.

B. Issues concerning AO 49 as amended through November 24, 2020, Judge Kilgore noted that AO 49 was now to remain in effect unto January 1, 2021 and will probably be extended. There had been no recent changes affecting Probate practice.

C. Effect of Court's Long Term Planning Committee: Ramp-up Report, May 13, 2020, Judge Kilgore reported that consideration of this report continued to remain a work in progress.

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. Judge Kilgore reported that he and Judge Kennedy were still considering statutory issues involving the list of interested persons in V.R.P.P. 17(a)(1)(A)

and had concluded that V.R.P.P. 3, 5, and 5.1 would also require amendment to address service issues. Judge Scanlon and Mr. Langan agreed to work with them on the issues. .

4. 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).

Mr. Gawne stated that Professor Wroth’s September 28 draft appeared to address the issues that he had sought to raise. Mr. Shen said that he found proposed V.R.P.P. 13(c) unclear as to when an objection to an election could be made and as to how the Rule would work in a case of concurrent jurisdiction among divisions. Judge Kilgore asked Messes. Gawne and Sheng to draft a proposed resolution of these questions and present it at the next meeting.

5. Need for rule to implement newly enacted 14 V.S.A. § 118 providing for direct reference to the Civil Division of matters involving wills.

The Committee considered Professor Wroth’s revised draft dated November 30, 2019, of proposed V.R.P.P.73 intended to implement 14 V.S.A. §118. In discussion, members expressed concerns that the provision would be rarely used because Probate judges were more knowledgeable as to the issues and that delays would result if the Civil Division accepted the reference. Judge Kilgore noted that the statute did not so specify but that the rule applied only to will contests and that he had found it helpful in encouraging parties to resolve differences. It was agreed that the reference should be to the Presiding Judge because the decision involved administrative considerations and that 21 days would be a more realistic deadline for a response. It was agreed that the draft, with that change, should be proposed to the Supreme Court to be sent out for comment.

6. Review and comment on policy regarding destruction of paper filings under Odyssey.

Judge Kilgore reported that he would address this issue in connection with his continuing work with Ms. Ferris under item 2.A.

7. V.R.P.P. 66. Inventory and Accounts.

The Committee considered Professor Wroth’s November 30, 2020, draft intended to incorporate the provisions of Judge Kilgore’s proposal V.R.P.P. 66.1, dated September 30, 2020. Mr. Sheng asked whether the accountant who would prepare an account ordered by the court under proposed V.R.P.P. 66(i)(1) would be an expert witness under V.R.E. 706, or would that be a separate procedural step? In that case, who is the accountant’s client? Mr. Gawne noted that the statutory term for an accountant licensed after 2003 is “public accountant.” See 26 V.S.A. § 13(12). Judge Kilgore noted that he had had a number of recent cases in which an attorney had given bad accounting advice to a client and the judge needed the help in sorting it out that proposed (i)(1) would have provided. The more formal procedure under proposed (i)(2) was for more complicated cases.

In subsequent discussion, in response to a comment that the standard of subparagraph (b)(1)(D) for guns in an inventory seemed unnecessarily complicated, Judge Kilgore noted that it was necessary because highly valuable firearms could be undervalued if not separately identified and described. In response to a question why a deed of real estate was required in subparagraph (b)(1)(A), rather than simply a description, he said that it was to facilitate a pending sale of the property. Judge Scanlon agreed with these conclusions. In response to a question raising the need for “shall” in subparagraphs (b)(1)(A)-(E), he suggested that paragraph (b)(1) could be revised to read, “Estates. Estate inventories may include and, if requested by the court, shall include a description and value of the various assets owned solely by the decedent and the following items and information if applicable:” If that change were adopted, it would be appropriate to delete “shall” in subparagraphs (A)-(E)’

With regard to paragraphs (i)(1) and (2), Judge Kilgore agreed that he would redraft them to add in paragraph (2) “licensed to practice in Vermont” and the language regarding consent from paragraph (1) and would add “Pursuant to V.R.E. 706” at the beginning of paragraph (2) and discuss it in the comment. He would circulate his redraft by e-mail to the Committee, and, if it was approved it would be sent it to the Court to be sent out for comment.

8. Applicability of V.R.P.AC.R. 7(a)(1)(B) in Probate Division. Mr Gawne, on behalf of the Franklin County Bar. raised the issue of the applicability in Probate Court of the requirements of a filer’s certification He would report that the provision applied and should be followed.

9. Change of venue in guardianship cases. This item was deferred to the next meeting.

10. Date of next meeting. Professor Wroth agreed to circulate available March dates for the next meeting,

There being no further business, the meeting was adjourned at 3:30 p.m.

Respectfully submitted,

L. Kinvin Wroth, Reporter