

APPROVED

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

**Minutes of Meeting
April 24, 2019**

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 Michael Gawne, Brian Hesselbach, Hon. Kathryn Kennedy, Katherine Mosenthal, David Otterman, and Hon. Justine Scanlon (by telephone). Also present was Professor Emeritus L. Kinvin Wroth, Reporter.

The Committee welcomed newly appointed Hon. Kathryn Kennedy, Probate Judge for Orange County, to the Committee.

1. **Approval of draft minutes of the meeting of December 12, 2018.** The minutes of the meeting of December 12, 2018, were approved as previously circulated.

2. Status of proposed and recommended amendments.

A. Amendments made necessary to conform Probate Rules to new Rules on Electronic Filing. Professor Wroth reported that the Special Committee on Electronic Filing expected to circulate on May 10, 2019, a proposed order amending those rules and making amendments in other rules, including V.R.P.P. 5, necessary for the roll-out of the electronic filing system (Odyssey e-file Vermont) in the fall. Committee members could comment informally before that date to the Special Committee Reporter, Hon. Walter Morris, on the working drafts circulated for this meeting, or could comment formally after May 10. Chairman Kilgore, Mr. Gawne, and Mr. Hesselbach, agreed to serve as a subcommittee to compile a list of Probate Court documents that should, or should not, be e-filed for submission to the Special Committee [see also item 10 below]. Professor Wroth agreed to send a Powerpoint on Odyssey prepared by the Court Administrator's Office to the Committee.

B. Review of revised proposed V.R.C.P. 79.2, incorporated in revised proposed V.R.P.P. 79.2, sent out for comment by the Supreme Court on September 6, with comments due November 5, 2018. Comment period extended to January 31, 2019. Professor Wroth reported that the order and all comments received were considered by the Court on April 1, and would be acted on by the Court at its May 1, 2019 meeting.

C. Consideration of proposed V.R.C.P. 43(a), et al. (including V.R.P.P. 43(b)), video and audio appearance, and proposed AO 47, Technical Standards, proposed by Special Committee on Video and Cameras in the Court, sent out for comment on January 24, with comments due on March 23, 2018. Professor Wroth reported that he had sent to

both the Special Committee and the Court the proposed draft of amendments to V.R.P.P. 43(a) and (b) and a new V.R.P.P.43.1 adapting proposed V.R.C.P. 43.1 to probate practice that the Committee had approved at its December 12 meeting. The Special Committee had incorporated the Committee's draft in its January 28, 2019, promulgation recommendation to the Court. The order was considered by the Court on April 1, and would be acted on by the Court at its May 1, 2019 meeting.

D. Proposed new V.R.P.P. 39, expedited hearings, sent out for comment on January 9, with comments due on March 11, 2019. Chairman Kilgore reported that no comments had been received. On motion duly made and seconded, there being no further discussion, it was voted unanimously to recommend to the Court that the rule be promulgated as circulated.

E. Proposed amendments of V.R.P.P. 77(e)(1), (2). concerning confidentiality of index of wills, sent out for comment on November 8, 2018, with comments due on January 7, 2019. Chairman Kilgore reported that one comment supporting the amendments had been received. On motion duly made and seconded, after further discussion, it was voted unanimously to recommend to the Court that the amendments be promulgated as circulated, with the phrase "During the life of the testator" placed at the beginning of paragraph (e)(1) for clarity.

Professor Wroth advised the Committee that the proposed order revising and replacing the Vermont Rules for Public Access to Court Records, circulated to the bar for comment on February 11, with comments due on March 11, 2019, contained provisions abrogating V.R.P.P. 77(e) and listing some of the statutory provisions that Rule 77(e) implemented in appendices to proposed V.R.P.A.C.R. 5 and 6. The appendices are incorporated in those rules by virtue of V.R.P.A.C.R. 5(h) and 6(b)(1). Committee members expressed concerns that Rule 77(e) covered matters not fully embraced in the statutes and had the benefit of providing uniform standards of practice in the probate courts with accompanying guidance in the Reporter's Notes. Chairman Kilgore agreed to send a memorandum to the Reporter to the Public Access Rules Committee, Hon. Walter Morris, expressing these concerns

3. 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. The Committee considered Professor Wroth's revised draft of proposed V.R.P.P. 80.9-80.12, dated 6/26/18, incorporating revisions made at the meeting of May 16, 2018. In discussion it was suggested that the reference in Rule 80.10(a) to 18 V.S.A should be limited to "§ 9303(b), to the extent that the probate court is involved," and that Rule 80.10(b) should provide for the assignment of counsel pursuant to 14 V.S.A. § 30/65(a) in addition to Administrative Order No. 32. Professor Wroth agreed to explain the meaning of "privileged" in the Reporter's Notes to Rule 80.9(a). It was agreed that at the next meeting, the Committee would review the changes previously made to Rules 80.9 and 80.10 and would go over Rules 80.11 and 80.12 in detail.

4. **V.R.P.P. 45(b)—document subpoena. Consideration of effect on V.R.P.P. 45 of the several amendments to V.R.C.P. 45 promulgated since the original promulgation of the Probate Rule effective July 1, 1985.** The Committee considered Professor Wroth's summary of the development of V.R.C.P. 45 and Chairman Kilgore's side-by-side comparison of V.R.P.P. 45 and V.R.C.P. 45. After discussion, it was agreed that the present Probate Rule was satisfactory in operation and that this item should be removed from the agenda

5. **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.** It was agreed to defer consideration of this item in the absence of Mr. Smith.

6. **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).** The Committee considered Professor Wroth's December 11 revised draft of amendments to V.R.P.P. 13(a) and (b). After discussion, Mr. Gawne agreed to prepare a revised draft at the next meeting

7. **V.R.P.P. 3.1, In Forma Pauperis.** The Committee considered Professor Wroth's January 22 proposed draft of amendments to V.R.P.P. 3.1 in light of pending amendments to V.R.C.P. 3.1 and V.R.A.P. 24. After discussion, Chairman Kilgore agreed to prepare a revised draft for the next meeting with the assistance of Judge Kennedy.

8. **Proposed summary judgment motion rule.** Committee members noted that the proposed new Rule 39 (item 2.D. above) could achieve similar results without the formality of summary judgment practice, which was more appropriate for civil actions. After discussion, it was agreed to remove this item from the agenda

9. **Need for rule to implement newly enacted 14 V.S.A. § 118 providing for direct reference to the Civil Division of matters involving wills.** In discussion, Committee members noted that § 118 was very broad but was in the part of title 14 covering will construction. It might be useful in a case where appeal was certain. Committee members agreed that communication with the Civil Division about the reference need not be on the record. Professor Wroth agreed to prepare a draft rule for the next meeting.

10. **V.R.P.P. 11(a), Signing of Papers. Acceptability of document with electronic signature.** Raised by Mr. Gawne. After discussion, it was agreed to add consideration of this issue to be added to the charge of the subcommittee established under item 2.A. above.

11. **V.R.P.P. 80.3, Small Estates. Amendment to allow direct transfer of small sums owed to deceased to pay small debts of the estate.** Raised by Mr. Gawne. Judge Scanlon noted that her practice in such matters was to appoint a special administrator for a limited time with the limited purpose of paying such bills. Mr. Gawne stated that this practice was a satisfactory way of addressing the issue.

12. **Other business.**

A. Mr. Gawne raised the problem created by amended 14 V.S.A § 1203 barring claims made later than one year after death when an estate had not been opened. After discussion in which it appeared that the language of the statute was clear, no action was taken.

B. Chairman Kilgore proposed that the need for rules to implement 14 V.S.A. §1852, providing for a motion to waive administration of a final accounting, should be placed on the agenda for the next meeting.

13. **Date of next meeting.** Professor Wroth will circulate possible dates for a meeting in late September or October.

There being no further business, the meeting was adjourned at 4:45 p.m.

Respectfully submitted,

L. Kinvin Wroth, Reporter