

APPROVED

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

**Minutes of Meeting
October 9, 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 Brian Hesselbach, Hon. Kathryn Kennedy, Mark Langan, Katherine Mosenthal, David Otterman, Hon. Justine Scanlon, Justin Sheng, and Norman Smith. Also present was Professor Emeritus L. Kinvin Wroth, Reporter.

1. **Approval of draft minutes of the meeting of April 24, 2019.** The minutes of the meeting of April 24, 2019, were approved as previously circulated with one abstention.

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, on June 19, 2019, had circulated proposed orders amending those rules and making amendments in other rules, including V.R.P.P. 4, 5, 79, and 79.1 necessary for the roll-out of the electronic filing system (Odyssey e-file Vermont). Comments on the proposed orders were due on August 19, 2019. Chairman Kilgore, Judge Kennedy, Mr. Langan, and Judge Scanlan agreed to review a list of comments and questions in Judge Kilgore's e-mail to the Committee of October 6, 2019, and report on any action to be proposed on them and on issues raised under item 8 of this agenda as soon as possible.

B. Review of revised V.R.P.P. 79.2, incorporated in order with revised V.R.C.P. 79.2, promulgated May 1, effective September 3, 2019, with the Civil and Probate Rules Committees to advise the Court on them by September 7, 2021. Reviewed on June 6, 2019, by Legislative Committee on Judicial Rules (LCJR) without comment. Professor Wroth reported that emergency amendments to V.R.C.P. 79.2(c) (which would be incorporated in V.R.P.P. 79.2) and V.R.A.P. 35(c), adding restrictions on the use of devices in a courthouse, had been promulgated September 4, 2019, effective immediately. Comments on the emergency amendments, though the amendments were effective immediately, could be submitted until November 8, 2019.

It was agreed that this item should be removed from the agenda, because no action on it was appropriate now, but that the item should be restored if issues concerning the application of the rule arose in Probate courts.

C. Consideration of V.R.C.P. 43(a), et al. (including V.R.P.P. 43(b)), video and audio appearance, and AO 47, Technical Standards, promulgated May 1, effective August 3, 2019. Professor Wroth reported that the amendments were held for further consideration by LCJR on June 6, 2019. That consideration had not yet occurred, because LCJR had not met since that date.

D. New V.R.P.P. 39, expedited hearings. Professor Wroth reported that the rule had been recommended to the Supreme Court on May 22, 2019, for promulgation and had been promulgated on June 13, effective August 15, 2019.

E. Proposed amendments of V.R.P.P. 77(e)(1), (2). concerning confidentiality of index of wills, recommended on April 26, 2019, for promulgation. Professor Wroth advised the Committee that the provision of 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, 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, had been withdrawn at this Committee's request and its agreement to consider appropriate amendments to V.R.P.P. 77(e). Judge Kilgore agreed to confer with Judge Morris, Reporter to the Public Access Rules Committee, about the status of the revised Public Access Rules. Professor Wroth agreed to prepare a draft amendment to V.R.P.P. 77(e) for the next meeting.

In a discussion of the related question of the disposition of old wills, Mr. Langan suggested that the Probate Division Oversight Committee might consider the question. It was noted that Uniform Electronic Wills Act (UEWA), to be considered by the Legislature, might address the matter. See item 11.A of this agenda.

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. Chairman Kilgore reviewed his October 7 email containing proposed revisions to Professor Wroth's revised draft of proposed V.R.P.P. 80.9-80.12, dated 6/26/18. After discussion, it was agreed that Committee members should send comments on the drafts to him and Professor Wroth by November 15, 2019, and that they would prepare a further revised draft for the next meeting.

4. 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. Smith stated that he had not prepared a memorandum, but discussion followed on questions that he raised about lack of clarity in the Rules concerning service. V.R.P.P. 17(a) provides that all interested persons, broadly defined by subparagraph (a)(1)(A) (cf. 14 V.S.A. § 204), are to be served under Rule 4 at the commencement of a proceeding, which, per V.R.P.P. 3(b)(1), is on the filing of the petition and a list of interested persons. Per V.R.P.P. 3(b)(3), however, if the petitioner obtains the consents of all interested persons within a reasonable time, the court may proceed without further notice or hearing. This provision is inconsistent with 14 V.S.A § 107(a), which permits allowance of the will without notice and hearing if the heirs at law and surviving spouse have filed consents. Furthermore, provisions about the timing and obligation of notice that would affect the time to appeal or move to reconsider the allowance of the will are unclear or nonexistent. See also V.R.P.P. 39, promulgated effective August 15, 2019, item 2.D of this agenda. After discussion the Committee agreed to defer further consideration of this item pending a report at the next meeting by the Committee's judicial members after discussion of these questions at the November Probate judges meeting.

5. 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). This item was deferred until the next meeting in view of Mr. Gawne's unavoidable absence.

6. V.R.P.P. 3.1, In Forma Pauperis. There was no report on this item because of a mistaken reporting assignment in the agenda.

7. 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 draft of proposed V.R.P.P.73 intended to implement 14 V.S.A. §118. In discussion it was agreed to substitute "within 14 days" for "immediately," defining the period in which the Civil Division judge should reply to the request of the Probate Court. Professor Wroth agreed to prepare a revised draft with Reporter's Notes for the next meeting.

8. V.R.P.P. 11(a), Signing of Papers. Acceptability of document with electronic signature. Consideration of this issue is to be undertaken by the subcommittee established under item 2.A of this agenda.

9. Rules to implement !4 V.S.A. § 1852 (motion to waive administration of final accounting). The Committee considered Chairman Kilgore's draft of a proposed rule to provide for a motion to waive administration of the final accounting. He noted that subdivision (f) of the draft might be controversial in light of the statute. Professor Wroth agreed to prepare a draft proposed rule for the next meeting that would condense the language drawn from the statute and would include subdivision (f).

10. Need for parent coordination rule. The Committee consider Mr. Hesselbach's question whether a Probate rule on parent coordination should be adopted in view of the developing use of parent coordination in Probate court. Chairman Kilgore agreed to obtain specific information about the current status of the practice at the November Probate judges meeting.

11. Other business.

A. After further discussion of the UEWA (see item 2.E above), Chairman Kilgore agreed to work with Professor Stephanie Willbanks, a Vermont member of the Uniform Laws Commission, on a Vermont draft, and Mr. Langan agreed to pursue the question of getting the Act on the legislative agenda for 2020.

B. Chairman Kilgore asked that his proposed amendments of V.R.P.P. 66 be laced on the agenda for the next meeting.

12. Dates of next meetings. Professor Wroth will circulate possible dates for meetings in December and February.

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

Respectfully submitted,

L. Kinvin Wroth, Reporter