

**VERMONT SUPREME COURT**  
**ADVISORY COMMITTEE ON RULES OF PROBATE PROCEDURE**  
**Minutes of Meeting**  
**April 7, 2014**

The meeting was called to order at 1:40 p.m. in Room 216 Debevoise Hall, Vermont Law School, by Hon. Joanne M. Ertel, Chair. Present were Committee members Molly Bucci (by phone), Mark Langan, Hon. James Mahoney (by phone), Hon. John Monette, Kay Mosenthal, John Newman, David Otterman, Dianne Pallmerine, Catherine Richmond, and Professor L. Kinvin Wroth, Reporter.

The Committee welcomed new member Kay Mosenthal to her first meeting.

1. **Approval of draft minutes of the meeting of January 28, 2014.** On motion duly made and seconded, it was voted unanimously to approve the draft minutes of the meeting of January 28, 2014.

2. **Status of proposed and recommended amendments.** Professor Wroth reported that the Committee's proposed amendment of V.R.P.P. 17(a)(3) had been sent out for comment on December 4, 2013, with comments due on February 3, 2014, and the proposed amendment of V.R.P.P. 80.1 had been sent out for comment on October 14, with comments due by December 13, 2013. As previously reported, the Legislative Committee on Judicial Rules had considered the proposed amendments on December 13, 2013, and had no comments on either proposal. No other comments were received on either one. Accordingly, it was agreed to recommend the amendments to the Supreme Court for promulgation as previously circulated.

3. **Consideration of comments on proposed amendments to V.R.P.P. 67.** The Committee considered reports on the following assignments made at the January 28 meeting:

A. **Draft questionnaire to obtain information from the probate judges and registers about their experience with the issues involved in the proposed amendments.** The Committee considered Judge Ertel's draft. It was agreed that section 2 of the questionnaire should be expanded to ask as to each category of fiduciary how severe the harm was, whether criminal prosecution had resulted, whether the fiduciary was an attorney, whether the fiduciary was represented by an attorney, whether the misappropriation involved self-dealing or other benefit to the fiduciary, and whether a bond would have provided relief or might have deterred the misconduct. Judge Ertel agreed to make appropriate revisions and send out the questionnaire to the judges and registers.

B. **Information about the availability and costs of bonding in different situations and locations.** Judge Monette reported that, in general, his key finding was that the person to be bonded had to establish creditworthiness. In some jurisdictions, where liquid assets or investments are involved an institution may be required to have an attorney cosigner on a withdrawal or the fiduciary must obtain judicial approval for disbursements. Premiums ranging from \$289 for a \$50,000 estate to \$2,346 for a \$1,000,000 estate were in the range that Committee members had anticipated.

C. **Research on bonding practice in other states.** Professor Wroth reported that a brief review of bonding provisions in other states revealed that 16 states have adopted the bonding provisions of the

Uniform Probate Code, §§ 3-603—3-606, under which the court in a formal probate proceeding has significant discretion regarding bonding. The judge may order a bond or equivalent collateral unless the will relieves the fiduciary of the requirement, may override a relief provision in a will on the request of an interested person, must require a bond or collateral if an interested person or creditor requests it in writing, and may dispense with a bond even if the will requires it. In other states, there is wide variety in the scope and specificity of standards and terms. The great majority require a bond unless exempted by statute or waived by the judge on grounds such as waiver in the will, waiver by consent of all beneficiaries, that the fiduciary is a corporation or resident of the state, or that a bond is otherwise unnecessary. In these cases, many states permit a judge to order a bond even when exempted or waived if circumstances require or an interested person requests it.

In discussion, it was agreed that guardianships presented a special problem that might require legislation and that the provision of the proposed rule for special administrators should be reviewed in consideration of relevant statutory provisions. Other provisions of the draft should be considered in light of responses received from the questionnaire.

**4. Expanded provisions for motions and contested cases.** The Committee reviewed Mr. Newman's October 8, 2-13, draft amendment incorporating provisions similar to those of V.R.C.P. 7 and 78 as proposed V.R.P.P. 7(b)(3)-(5). Mr. Newman noted that the amendments were intended to avoid trial by ambush by providing time periods and requiring a responsive pleading. On motion duly made and seconded, there being no further discussion, it was voted unanimously to recommend that the proposed rule be sent out for comment.

The Committee then reviewed Mr. Newman's January 19, 2012, draft of proposed V.R.P.P. 2.1 providing special provisions for contested cases. Suggestions in discussion included the need for a definition of "contested case" or a trigger to set the procedure in motion, the possibility of a menu of procedural options from which the parties could choose, the need for clarity to protect the simpler case from unnecessary use of complex procedural provisions, and the possibility of an agreement that there would be no trial de novo in appeal from a contested case. It was agreed that the subcommittee (Mr. Newman, Ms. Pallmerine, and Judge Mahoney) would develop a new draft and seek comments on it from Professor Wroth before the next meeting. Professor Wroth agreed to send the full Committee a copy of the current VBA proposal of an expedited actions rule for civil actions as an example of creating separate tracks for actions on the basis of their complexity.

**5. 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.** It was agreed to consider at the next meeting the decoupling of V.R.F.P. 6 and 6.1 from the Family Rules for use in probate court in light of the recent promulgation of V.R.F.P. 7, 7.1, concerning guardians and attorneys for minors in Family Division proceedings. Professor Wroth agreed to prepare a draft proposal for consideration by a subcommittee consisting of Judges Ertel, Mahoney, and Monette before the next meeting.

**6. Clarification of procedure for opening an estate.** The Committee considered Professor Wroth's April 3 further revised draft of amendments to V.R.P.P. 3 and 4. On motion duly made and seconded, after discussion, it was voted unanimously to recommend that the proposed amendments of V.R.P.P. 3 be sent out for comment with an addition to Rule 3(d), implementing agenda item 10

below, that would make clear that the requirement of a birth certificate or other proof of parentage applied only to petitions for minor guardianships. With regard to the proposed amendments to V.R.P.P. 4, Professor Wroth agreed to prepare a draft amendment to V.R.P.P. 5 containing provision similar to those of V.R.C.P. 5(b) concerning methods of delivery. Professor Wroth will prepare further drafts for the next meeting.

**7. Proposed Amendment of V.R.P.P. 43(e)—Appointment of Interpreters—to Conform to Current Policy.** Professor Wroth reported that the Civil Rules Committee will consider a further draft of a proposed amendment of V.R.C.P. 43(e) at a meeting in May. It was agreed to await the outcome of that Committee's deliberations.

**8. Interaction of 14A V.S.A. § 201(b) and V.R.P.P. 60.1.** On motion duly made and seconded, after discussion, it was voted unanimously to table this question pending a report from the probate judges on whether a trust proceeding should remain open as provided in V.R.P.P. 60.1(b) even though no supervision had been ordered by the court pursuant to 14A V.S.A. § 201(b).

**9. Appointment of executor in estate with no assets.** The Committee considered Professor Wroth's draft of proposed V.R.P.P. 80.9(a) based on Mr. Newman's draft of proposed V.R.P.P. 80.4 concerning asset-less estates and possession of a will by the court. After discussion it was agreed that Professor Wroth's draft and Mr. Newman's proposed Rule 80.4(c) were unnecessary in light of existing statutory provisions and that Professor Wroth should prepare a draft of Mr. Newman's proposed V.R.P.P. 80.4(a) concerning delivery of a will by its custodian as a rule applicable to all estates.

**10. Require death certificate with petition to open estate and birth certificate with petition for minor guardianship—V.R.P.P. 3.** See item 6 above.

**10. Other business:** At Mr. Langan's suggestion, Professor Wroth agreed to provide the Committee with a copy of the pending proposed amendment of V.R.F.P. 18 concerning mediation in the Family Division if approved by the Family Rules Committee at its next meeting.

**11. Date of next meeting.** It was agreed that the Committee would meet at 1:30 p.m. on Thursday, June 12, 2014, at Vermont Law School.

There being no other business, the meeting was adjourned at 4:50 p.m.

Respectfully submitted,

L. Kinvin Wroth, Reporter