

APPROVED

**VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF PROBATE PROCEDURE
Minutes of Meeting
December 8, 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 Mark Langan, Hon. James Mahoney, Hon. John Monette, Katherine Mosenthal, John Newman, David Otterman, and Dianne Pallmerine (by phone). Also present was Professor L. Kinvin Wroth, Reporter.

1. **Approval of draft minutes of the meeting of September 23, 2014.** On motion duly made and seconded, it was voted unanimously to approve the draft minutes of the meeting of September 23, 2014, with the correction of an error in the caption of item 1.

2. **Status of proposed and recommended amendments.** The Committee considered Professor Wroth's December 5 draft of the Committee's proposed amendments of V.R.P.P. 3, 4, and 5, sent out for comment on July 19, with comments due on September 19, 2014. No comments were received from the bar on the substance of the amendments. Professor Wroth noted that comments made by the Legislative Committee on Judicial Rules, at a meeting on December 2, 2014, suggesting clarifications of some of the language in the proposed amendments to V.R.P.P. 3, were reflected in additions to the Reporter's Notes, but that the text of the amendments was unchanged. On motion duly made and seconded, there being no further discussion, it was voted unanimously to recommend that the Supreme Court promulgate the amendments as originally sent out for comment, with those changes in the Reporter's Notes.

3. **Expanded provisions for motions and contested cases.** The Committee considered Professor Wroth's revised drafts of proposed amendments to V.R.P.P. 7 and proposed new V.R.P.P. 39, both dated December 1, 2014, and his new draft of proposed amendments to V.R.C.P. 72, dated December 8, 2014. The Committee also considered agenda item 9, Mr. Otterman's e-mail of November 17, 2014, proposing clarification of the procedures for interlocutory appeals from the Probate Division to the Civil Division.

In discussion of the proposed amendments incorporating portions of V.R.C.P. 7(b) and 78(b) in V.R.P. 7(b)(3)-5 and (c), concerning motion practice, it was agreed to change the filing deadline of a motion or other paper from five to three days before the hearing as more consistent with current probate practice. On motion duly made and seconded, there being no further discussion, it was voted unanimously to recommend that the proposed amendments of V.R.P.P. 7 be sent out for comment as drafted with the agreed change.

In discussion of the new draft of proposed V.R.P.P. 39 and the related draft of proposed amendments to V.R.C.P. 72, Professor Wroth noted that at its last meeting, the Committee had looked favorably upon draft V.R.P.P. 39(b) providing for final judgment on a joint stipulation of facts and that

he had retained for further consideration draft Rule 39(c) providing for an expedited hearing on contested facts. He further noted that this draft had originally been based on proposed V.R.C.P. 80.11 providing for expedited hearing in a civil action, and that the Civil Rules Committee after consideration of numerous comments on that proposal had asked the Vermont Bar Association, its original proponent, to consider the comments and advise the Committee on possible revisions of the proposal. As to the proposed amendments to V.R.C.P. 72, Professor Wroth noted that he had tried both to preserve the option of trial de novo of a probate appeal in the Civil Division if requested by either party and to simplify the process for hearing and appeal. As alternatives to trial de novo, subdivisions (f) and (g) of the draft respectively adapted V.R.A.P. 5 to provide for appeal on report by agreement and V.R.A.P. 10(e) for appeal on an agreed statement in lieu of the record. Subdivision (h), modelled to some extent on V.R.E.C.P. 5(h), provided for appeal on the record, either on stipulated facts prepared pursuant to draft V.R.P.P. 39(b) or after hearing under draft V.R.P.P. 39(c) [note typo in December 8 draft], unless a party moved for trial de novo. After discussion, it was agreed that the drafts of proposed V.R.P.P. 39 and amendments to V.R.C.P. 72, as well as Mr. Otterman's suggestion about interlocutory appeals should be referred to the contested cases subcommittee (Judge Mahoney, Mr. Newman, and Ms. Pallmerine) to consider the issues and options and report at a subsequent meeting.

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. Professor Wroth reported that the Family Rules Committee had agreed with the proposal for a joint subcommittee to address Act 170 of 2013 (Adj. Sess.) and common issues pertaining to V.R.F.P. 6, 6.1, 7, and 7.1. Judge Ertel agreed to discuss the means of setting up the joint subcommittee with Jody Racht, Family Rules Committee chair.

5. 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's proposed amendment of V.R.C.P. 43(f) to satisfy federal standards for interpreters had raised some questions with the Legislative Committee on Judicial Rules. Professor Wroth agreed to prepare an amendment to the parallel provisions of V.R.P.P. 43(e) for consideration when the Civil Rules amendment was finally adopted.

6. Appointment of executor in estate with no assets. The Committee considered Professor Wroth's revised December 7 drafts of a proposed amendment to V.R.P.P. 3(b)(2) providing for estates without assets and of a new V.R.P.P. 80.4 providing for delivery of a will by a custodian and obtaining a copy of a will left with the probate court for safekeeping pursuant to 14 V.S.A. § 2.

In discussion of Rule 3(b)(2), Professor Wroth noted that the draft assumed that the Committee's recommended amendment adding Rule 3(b)(2), discussed above under item 2, would be promulgated and would be renumbered as paragraph (3) if the present amendment were adopted. The Committee agreed that the reference to small estate proceedings in the final sentence should be eliminated, with a Reporter's Note explanation, and that the Reporter's Notes would also discuss the question of the fee under 32 V.S.A. § 1434(a)(1). On motion duly made and seconded, there being no further discussion, it was voted unanimously to recommend that the rule be sent out for comment as drafted, with these changes.

In discussion of Professor Wroth's proposed draft of new Rule 80.4(a), it was agreed that language should be added to the Reporter's Notes to the effect that "credible proof of death" in the absence of a death certificate could, in the court's discretion, include evidence such as an affidavit or testimony of a witness to the fact of death, or an authenticated obituary or other notice of death. On motion duly made and seconded, there being no further discussion, it was voted unanimously to recommend that the rule be sent out for comment as drafted, with this addition to the Reporter's Notes.

In discussion of Professor Wroth's proposed draft of new Rule 80.4(b), it was agreed that a two-step process was appropriate. Any individual who could present a death certificate could ask the registrar in any probate district whether a will was filed there pursuant to 14 V.S.A. § 2. For actual delivery of the will or a copy, a more substantial showing should be required. After discussion, it was agreed that, with the possibility of action on this matter in the coming legislative session, the second step should be left to the present statutory provisions for now. On motion duly made and seconded, there being no further discussion, it was voted unanimously to recommend that proposed Rule 80.4(b) should be sent out for comment with everything after the first sentence of the draft deleted and an appropriate explanation in the Reporter's Notes.

7. Status of children as parties under V.R.P.P. 17(a)(1) in light of 14 V.S.A. § 311. Judge Ertel will report on the status of the forms covering this matter at the next meeting.

8. Probate Rules amendment to conform to Act 96 of 2013, "Respectful Language Act." Professor Wroth will report on the status of the statutory revisions required by Act 96 at the next meeting.

9. Interlocutory Appeals from the Probate to the Civil Division . See agenda item 3 above.

10. Other Business. Professor Wroth stated that he would submit the draft annual report with appropriate revisions to reflect actions at the present meeting to the Supreme Court for its consideration at its December 11 meeting if he did not receive any comments from Committee members on it.

11. Date of next meeting. Professor Wroth agreed to circulate dates for a meeting to be held in the second half of February.

There being no other business, the meeting was adjourned at 3:50 p.m.

Respectfully submitted,

L. Kinvin Wroth, Reporter