

APPROVED

**VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF PROBATE PROCEDURE
Minutes of Meeting
September 16, 2021**

The meeting was called to order at 2:05 p.m. on Teams by Hon. Jeffrey Kilgore, chair. Present virtually were Committee members Michael Gawne, Matthew Getty, Brian Hesselbach, Daniel Kimbell, 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 June 17, 2021. The minutes of the meeting of June 17, 2021, were unanimously approved as previously circulated.

2. Status of proposed and recommended amendments.

A. Effect on Probate Rules of draft amendments to the 2020 Vermont Rules on Electronic Filing. Chairman Kilgore distributed copies of e-mail correspondence among himself, Professor Wroth, Judge Morris, and Justice Dooley concerning the establishment of a subcommittee of the Electronic Filing Rules Committee. The subcommittee will propose amendments dealing with the filing of original documents such as wills and vital records certificates and the destruction of such records, and will consider whether the proposed rules should be included in the Electronic Filing or Probate Rules. The subcommittee will include a member of the: Probate Rules Committee and, if possible, Judge Glover, chair of the Probate Division Oversight Committee. Chairman Kilgore agreed to serve on behalf of the Committee.

B. Effect on Probate Rules of emergency amendments to Appellate Rules and E-filing Rules concerning electronic appeals to Supreme Court. Professor Wroth reported that the amendments were promulgated on July 13, effective August 17, 2021, V.R.A.P.13(a), governing the record on direct appeals from the Probate Division was amended for consistency with other provisions of the amendments applicable generally to appeals to the Supreme Court by substituting a provision that the record consists of the items listed in V.R.A.P. 10(a) as amended for the requirement that the record consist of a certified copy of the Probate proceedings, which was deemed no longer necessary because of electronic file access. The sentence requiring inclusion of the eCabinet registration number is also deleted as unnecessary. Other Appellate Rules concerns will be considered by the subcommittee described in item 2.A above.

C. Issues concerning AO 49 as amended through September 1, 2021. Chairman Kilgore noted that the Probate Division Oversight Committee had recommended a division of Probate matters between those appropriate for remote hearing (*e.g.*, status conferences, name-change proceedings, discovery requests, uncontested or temporary guardianships, certain hearings of less than one hour) and those appropriate for in-person hearings (*e.g.*, will contests, certain matters requiring more than one hour, and certain contested matters). All recommendations depended on the availability of court rooms approved for in-person use by the Court Administrator and other discretionary factors such as the needs of self-represented litigants and witnesses and access to video options for parties and witnesses. He will circulate a copy of the recommendations to the Committee following the meeting.

Professor Wroth reported that on September 1, the effective date of AO 49 had been extended to November 1, 2021, and that the order had been amended to authorize the Court Administrator to identify “limited entry” court houses. All evidentiary and non-evidentiary hearings scheduled for such court houses must be remote except those that could be held in a court room identified by the Court Administrator as capable of safely accommodating the small number of persons involved or as approved by the Chief Superior Judge in consultation with the Court Administrator pursuant to AO 49, §16, concerning venue. Remote hearings are to be encouraged in all court houses. In all cases not required to be filed electronically by the E-filing Rules, filing and service by email is allowed.

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. See also *Id. II*, 2017 VT 15. Chairman Kilgore reported that the subcommittee (himself, Judge Kennedy, Judge Scanlon, Mr. Langan, Mr. Gawne, Mr. Getty, and Ms. Rowell) had not met but that he would schedule a meeting in the near future.

4. **Elections, 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)**. Deferred at the June 17 meeting. Mr. Gawne reported that it was inappropriate to address the merits presently because oral argument was to be held on September 28 in a case involving the issues. Professor Wroth noted that V.R.P.P. 13(b) provided that the election and homestead right provided by V.R.P.P. 13(a)(1) and (2) were to be asserted within 8 months of the date that the will is proved or administration granted. The statute, 14 V.S.A. § 319(e)(2), however, currently provides that the election is to be made within 4 months of the later of service of notice of the rights of the surviving spouse or of the inventory. Mr. Gawne noted that he had sought to address these issues in his February 2020 draft of amendments to V.R.P.P. 13, consideration of which had been deferred most recently in light of the pending case. In further discussion, Committee members noted concerns with the responsibility and time frame provided in V.R.P.P. 13(a) for sending the notices of the spousal rights provided in clauses (a)(1)-(4), especially in cases involving unrepresented litigants. It was agreed that the matter should be on the Rules Committee’s next agenda. Chairman Kilgore said that he would ask the Oversight Committee to consider the statutory issues.

5. **Review and possible comment on policy re destruction of paper filings after entering into Odyssey, 4/7/20**. Deferred at the June 17 meeting. Chairman Kilgore noted that these questions would be considered by the subcommittee to be established pursuant to item 2.A above.

6. **Proposed amendments of V.R.P.P. 66. Accountings**. The Committee considered Chairman Kilgore’s September 16 proposed revisions to proposed new V.R.P.P. 66(i) set out in Draft 2 (June 16, 2021), discussed at the June 17 meeting. Chairman Kilgore said his revision was in response to comments that lawyers and other licensed practitioners might have more understanding of inventory and accounting issues than Vermont-licensed CPAs. Discussion centered on the need for consent, the scope of judicial waiver, and the need for detail in paragraph (b)(1)(A)-(E) in complicated estates and in the practice of fiduciary institutions and in the inventory form. On motion duly made and seconded, there being no further discussion, it was voted unanimously to recommend that the proposed rule as revised by Chairman Kilgore be sent out for comment.

7. **Need for Rules to implement Act 167 of 2020, §§ 15,28-29**. These sections provide concurrent jurisdiction with the Family Division of judicial determinations under new 14 V.S.A. ch. 111, subch. 14 regarding the custody and care of children under certain federal Immigration legislation. Chairman Kilgore reported that he had not contacted the Family Rules Committee on these issues but that, in conjunction with his

communication concerning item 10 below, he would ask Judge Davenport, Family Rules Reporter, whether she had had an opportunity to review 14 V.S.A. § 3098, enacted by Acts of 2019, No. 167 (Adj. Sess.), § 29, noting that § 3098(d), apparently enacted in response to Kitoko v. Salomao, 2019 VT 45, 210 Vt. 398 (2019), grants concurrent jurisdiction to the Probate and Family Divisions.

8. **V.R.P.P. 5.1(b)(1). Service on beneficiaries of report on license to sell.** The Committee considered Mr. Getty's email of July 22, 2021, raising the question whether Rule 5.1(b)(1) should require that a report on license to sell be served on beneficiaries?

Referring to case law holding that approval of the license to sell was not a final order and therefore not appealable, he suggested that if the law is supposed to afford beneficiaries an opportunity to complain about the sale after closing, then (a) the statute should require that reports be filed in all cases and (b) that such reports should be served on the beneficiaries. In discussion, it was suggested that if a report is issued it should be served on the parties and that if a non-party beneficiary receives a motion for license to sell under the existing rule, then that person can appear and receive the report or object to the sale. It was also noted that there was a conflict between the present forms as to whether a report is always required or only if the judge requires it. Chairman Kilgore stated that he would suggest to the Oversight Committee that it consider developing a statute that would require a report to be filed and served on all beneficiaries.

9. **Inconsistency between 12 V.S.A. § 557 and 14 V.S.A. § 1203.** The Committee considered the further issue raised in Mr. Getty's email of July 22, 2021, that 12 V.S.A. § 557(a) is inconsistent with 14 V.S.A. § 1203. In discussion, it was noted that 12 V.S.A. § 557(a), as part of the general statute of limitations (12 V.S.A., ch. 23), applies when a potential plaintiff or defendant in an action dies while the limitation period applicable to the action has not yet run or within 30 days after that limitation period has run. In such a case, the limitation period ceases to run at the date of death. "[I]f the cause of action survives," an action may be brought by or against the deceased's executor or administrator within a new limitation period of two years from the date of the executor's or administrator's appointment. It was further noted that 14 V.S.A. § 1203 may be said to define when a cause of action against an estate "survives" and thus becomes subject to the two-year limitation period provided by 12 V.S.A. § 557(a). Under 14 V.S.A. § 1203(a), claims arising before the decedent's death, except those for real estate possession or title and for personal injury or property damage caused by the deceased, are barred unless brought within four months after notice to creditors given under the Probate Rules or one year after death if notice is not given. Under §1203(b), claims against an estate arising "at or after" the death of the decedent are barred if not brought within four months of performance of a contract with the personal representative or four months after any other claim arises. 14 V.S.A. § 1203(c) excludes from the effect of subdivisions (a) and (b) proceedings to enforce liens against the property of the estate, proceedings to establish liability covered by liability insurance to the extent of the coverage, and the enforcement of any tax liability.

Arguably then, reading 12 V.S.A. § 557(a) and 14 V.S.A. § 1203 together, claims for real estate possession or title, for personal injury or property damage caused by the deceased, to enforce liens against the property of the estate, to establish liability covered by liability insurance, and to enforce a tax liability are the only claims that "survive" to be subject to the two-year limitation period of 12 V.S.A. § 557(a). All other claims are subject to the shorter limitations provided by 14 V.S.A. § 1203(a) or (b). It was also noted that, as suggested by Mr. Getty, 12 V.S.A. § 557(b) is obsolete, 14 V.S.A., ch. 65, which it incorporates, having been repealed in its entirety by 1975 Acts (Adj. Sess.), No. 240, § 12, and, in fact, replaced by 14 V.S.A., ch. 66, Settlement of Claims, enacted by 1975 Acts (Adj. Sess.), No. 240, § 7.

Chairman Kilgore stated that he would bring these issues to the attention of the Oversight Committee for possible statutory clarification.

10. **Inconsistencies between V.R.P.P 80.9-80.11 and Family Rules.** The Committee considered Judge Davenport's email of September 9 and 10, 2021, to Chairman Kilgore, noting that V.R.P.P. 18(d) states that V.R.F.P. 6 and 6.1 govern representation in guardianship proceedings under 14 V.S.A., ch. 111 although V.R.P.P. 80.9 and 80.10, adopted in 2020, now govern those proceedings, and that V.R.P.P. 80.9 applies only to appointments of guardians ad litem, while V/R.F.P. 6 covers appointment of both guardians and attorneys. On motion duly made and seconded, it was voted unanimously that Chairman Kilgore should advise Judge Davenport that V.R.F.P. 18(d) should be abrogated and that the omission of an attorney reference in V.R.P.P. 80.9 was deliberate. As a result of the overhaul of the minor guardian statutes arising out of the enactment of Acts of 2013, No. 170 (Adj. Sess.), §1 and in particular 14 V.S.A. § 2925, a rule was deemed not to be necessary.

11. **Other business.** There was no other business.

12. **Date of next meeting.** It was agreed that the next meeting would be held at 1:30 p.m. on Thursday, December 2, 2021.

There being no further business, the meeting was adjourned at 4:05 p.m.

Respectfully submitted,

L. Kinvin Wroth, Reporter