

**NOTICE OF MEETING FOR THE PROBATE TRIAL AND PROCEDURE
COMMITTEE OF THE TRUST AND ESTATE SECTION AND ELDER LAW SECTION
OF THE COLORADO BAR ASSOCIATION**

December 2, 2020 at 10 a.m.

<https://cba-cle.zoom.us/j/91827848116?pwd=VEFQRms3VHYyaFpXSDJmN1ROcVp0UT09>

Meeting ID: 918 2784 8116

Passcode: 620136

Call-in: 1 (312) 626 6799

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AGENDA

1. Welcome and Introductions
2. Review of Minutes from November 4, 2020/Approval
3. Chair's Report
 - a. Probate Bench Book – Kathy Seidel
4. New Business or Requests
5. Updates/Reports
 - a. CRPP Rule 40(d). Submitted to Supreme Court for approval? Marcie McMinimee
 - b. Cost Recovery and Compensation Act; C.R.S. § 15-10-604 re procedure and process. Marc Darling/Marcie McMinimee
 - c. Due process concerns re “substantiated perpetrator” list maintained by Departments of Human Services. Kathy Seidel/Norv Brasch
 - d. C.R.S. §§15-14-708(2) and 421(6)(a) Powers of Attorney when fiduciary appointed. Marcie McMinimee
 - e. Conservator's Annual Report - Tabled.
6. Adjournment

NEXT MEETING: January 6, 2021 @ 10 a.m.

REMINDER: Join the Committee through CBA Membership Department – email membership@coabar.org

Probate Trial and Procedure Committee

Minutes of the November 4, 2020 Meeting

The Probate Trial and Procedure Committee met virtually on November 4, 2020. The meeting was called to order at approximately 10:00am.

The following members were present or participated by phone:

Lindsay Andrew – Landrew@steenrodllaw.com

Lori Barkus

Norv Brasch – norv@tealaw.com

Lynne Bruzzese – lynne@lbdurangolaw.com

Gary Clexton – gcllexton@m-s-lawyers.com

Janessa Eberle

Gunther Goetz – gunther@goetzlawoffice.com

Keith Lapuyade – keith.lapuyade@overtonlawfirm.com

Marcie McMinimee – mmcinimee@steenrodllaw.com

Kayla Nelson – kayla@siglerlawco.com

Sal Quintana – s.quintana@qlegalservices.com

Patricia Rankin – prankin99@gmail.com

Colleen Scarola

Catherine Seal – cas@kirtlandseal.com

Sandra Sigler - sandra@siglerlawco.com

Ernest Staggs – estaggs@staggsморris.com

1 Approval of Minutes of Prior Meeting

The minutes of the October 7, 2020 meeting were approved.

2 Chair's Report

- a. Probate Bench Book – Project is stalled. Need completed sections to submit to Judge Leith.

3 New Business or Requests

- a. The Colorado Supreme Court issued its opinion in Freirich v. Rabin (In re Estate of Rabin) 2020 CO 77. The Supreme Court held that a decedent's complete legal files are not the decedent's "property" under C.R.S. section 15-12-709. Legal files belong to the lawyer, except for documents having intrinsic value or directly affecting

valuable rights. A lawyer's duty to surrender certain papers to former clients flows from professional ethics, not property law. The Court further held that the decedent holds the attorney-client privilege after death, not the personal representative, but that the act of appointing a personal representative impliedly waives both the attorney-client privilege and Colorado Rule of Professional Conduct 1.6's duty of confidentiality as necessary for the administration of the estate.

4 Updates/Reports

- a. CRPP Rule 40(d) – No Update. Marcie McMinimee reported that it is still under review with the Supreme Court Rules Committee and Judge Leith.

- b. Cost Recovery and Compensation Act. Marcie McMinimee reported that although there was no meeting last month, some members discussed the project and have decided to pause the subcommittee until meetings can be held in person. Judge Leith is still of the opinion that the current statute is working well but will check with other judges.

- c. DHS/APS “substantiated perpetrator” list. Kathy Seidel reported that a meeting with DHS and CBA members was held on 10/20/2020 among representatives from Colorado Bar Association (CBA) and Colorado Department of Human Services (DHS) regarding the Colorado Adult Protective Services (CAPS) system and the CAMDRS unit. The CBA representatives were Andrew White, Norv Brasch, Kris Zumalt, Lindsay Andrew and Kathy Seidel. The DHS representatives were Kevin Neimond – Manager, Legislative Affairs; Marc Macket – Director, Administrative Review Division and Sheanette Worden-O’Dell – Manager, Administrative Review Division.

Ms. Worden-O’Dell began the dialogue with a high-level overview of the appellate process. After APS county office conducts investigation, they should send notification letter to the alleged perpetrator (“AP”) with instructions on how to appeal the finding. The AP has 90 days from the date of the letter to appeal. If the appeal is timely, CAMDRS will accept the appeal. It is then assigned to a reviewer who has 120 days to resolve. The 120 day period can be held in abeyance under certain circumstances, such as a pending civil matter (e.g. conservatorship or guardianship proceeding) or criminal procedure. This abeyance cannot extend past 180 days. See 12 CCR 2518-1-30.920.G The 120 day period can also be held in abeyance if the AP and CAMDRS are close to settlement and the AP agrees to an extension. CAMDRS

will take into consideration the best interests of the adult and possible rehabilitation of the AP. If CAMDRS finds enough evidence to uphold the APS finding, it is upheld; if not, CAMDRS will look at settlement options. If an incident is found to be very severe CAMDRS may send it directly to hearing with the Office of Administrative Courts (OAC) and an Administrative Law Judge (ALJ).

Mr. Mackert added that each case is individualized and that standards are applied uniquely to each appeal. An appeal can go straight to OAC/ALJ if CAMDRS doesn't hear from the AP within 120 days of assignment to a reviewer (assumption is that appeal has been abandoned).

The first step in the CAMDRS review process is to look at the county's evidence and apply a "preponderance of evidence" standard to what was substantiated. If this initial review of the county's evidence is upheld, the next step is to determine whether settlement is appropriate. Factors to be considered into whether to settle include the nature of the incident; severity; impact on adult; AP's response (no response or uncooperative) and actions taken since the event of alleged mistreatment.

When the decision is made to advance the case to OAC/ALJ, it is then out of CAMDRS hands and handled exclusively by the OAC.

Mr. Mackert addressed the issue of reportability status during the appeals process. The alleged mistreatment remains reportable. Even if CAMDRS overturns the county's finding, they cannot change the finding in the CAPS system; that remains up to the county. When the AP is given notice of the county finding, the notice should reference specific finding (at a high level). The AP can request the county file, but confidential information will be redacted as required by law. The "discovery" process can be expanded if the matter goes to OAC/ALJ hearing.

CAMDRS only gets request for appeal from the AP, who once has received notice from county is now a substantiated perpetrator ("SP"). The county's investigative process should include interviews with the AP, the victim, collateral contacts, etc. The county has a choice of findings: unsubstantiated, inconclusive, or substantiated. The name of an AP/SP is only released if a background check is requested. For a name to be taken off a county list, the AP/SP must appeal and then depends on findings and terms of settlement. There is no requirement that an AP/SP has to deal with CAMDRS; they can appeal directly to OAC/ALJ.

There is no public listing or website that can be accessed by general public as to names on the counties' lists. An AP/SP name is only revealed if a facility is doing a

background check. And a potential employee must give the facility permission to do the background check. The information released is “high level” as in “minor or severe caretaker neglect.” Names remain reportable until final findings, so can remain on county list for extended period until expunged. CAMDRS can overturn a county finding if there is not a preponderance of evidence to sustain. Colorado statutes do not say that if a facility gets a reportable finding on a prospective employee, that the facility cannot employ said person, but gives the facility the right to consider reportable findings in making decision whether to employ that person. There may be legislative changes contemplated to prohibit employment of person if there is a reported finding of mistreatment.

Key points from meeting: DHS divisions clearly have good intent but these may not translate into practice. Attorneys voiced concern over handling of “community” cases where it is evident that there may be inadequate training and lack of knowledge in substantive areas.

Next steps: Collect war stories and request another meeting to submit concerns.

- d. C.R.S. §§ 15-14-708(2) and 15-14-421(6)(a) re Powers of Attorney. Marcie McMinimee submitted a draft of proposed changes to the statutes which would make them consistent with each other. The draft added the following language to § 15-14-421(6)(a): “Pursuant to C.R.S. 15-14-708(2), except as set forth herein, the power of attorney is not otherwise affected unless limited, suspended or terminated by the court.” Section 15-14-708(2) was changed to state “If, after a principal executes a power of attorney, a court appoints a conservator of the principal’s estate or other fiduciary charged with the management of some or all of the principal’s property, the agent’s authority is subject to the provisions of C.R.S.15-14-421(6)(a), the power of attorney is not otherwise affected, unless limited, suspended, or terminated by the court.” Discussion ensued as to whether it would be better to just terminate the POA when a conservator is appointed. Marcie pointed out that if a conservator is appointed, the court will give notice to the agent as to whether the POA is revoked, but that it cannot be reinstated if the conservatorship terminates. As some conservatorships may be limited to specific actions, the POA may need to stay in effect for other matters. Cate Seal opined that the court should consider the existing POA and make a decision based on what the conservator may need. It was agreed to let the proposed changes stand.

Next steps Kathy Seidel to run by Elder Law, SRC and T&E section next month.

e. Conservator's Annual Report – Tabled.

5 Adjournment

The meeting adjourned at approximately 11:00 am.