

**Family Law Review Committee
Judicial Education Center
1541 E. Van Buren, Suite B4
Silver/Turquoise Room
November 17, 2006**

In Attendance:

- Honorable Norman Davis, Chair
- Honorable Mark Armstrong
- Annette Burns
- Honorable Bruce Cohen
- Honorable Steve Desens
- Annette Everlove
- Elaine Fridlund Horne
- Bridget Humphrey
- Honorable Michael Jeanes
- Honorable Jan Kearney
- Commissioner Carolyn Passamonte
- Commissioner Julie Roth

Staff:

- Konnie K. Young, Court Specialist, Administrative Office of the Courts
- Lorraine Nevarez, Administrative Office of the Courts

Guest:

- Vincent Frey, Esq., Unit Chief for Pima County Attorney General's Office
- Rick Underwood, Esq.

I. CALL TO ORDER

Judge Norman Davis called the meeting to order at 10:10 a.m. with a quorum present.

II. APPROVAL OF MINUTES

The August 25, 2006 meeting minutes were presented for approval.

MOTION: Motion was made and seconded to approve the August 25, 2006 meeting minutes as presented. Motion passed unanimously. FLRR-06-010

III. Discuss Phase 2 Strategic Plan

The Phase 2 Strategic Plan was developed to inform the court and public of the Committee's proposed plan to proceed through the Rules in an organized manner for the monthly Committee meetings. The Committee will allow for time at the end of the phase for review of final draft.

IV. Reports From Workgroups:

A. Qualified Domestic Relations Orders (QDROs)

Rick Underwood, Esq. gave a presentation on supplemental enforcement orders (QDRO's) to answer the following questions that were raised: (1) What is the status of the attorneys who prepare them? (2) Who do they represent? (3) What is their legal duty to submit the QDRO's to the court? (4) Should they be treated as special masters? Rick presented on the role of the QDRO attorney as a facilitator and asserted that a QDRO attorney's duties are more in line of a special master, who receives cases dealing with ongoing disputes about retirement benefits and assets. It is difficult as a facilitator to enforce parties to agree or provide the necessary information to resolve the case. Rick shared his concerns about the following rules:

Rule 9

This rule governs appearance as attorney of record and limited scope representation. Short of appointments as special masters, practitioners hired to prepare domestic relations orders dividing retirement benefits act as neutral facilitators, not representing either party but merely carrying out the terms of the settlement. Of course, settlements frequently do not settle the issues but leave a lot of the terms of division unanswered. Thus, the facilitator finds himself or herself trying to resolve differences after the divorce when there is no leverage that can be brought to bear to bring finality and closure to the retirement benefit division. Rick suggested the following two issues may be properly addressed under this rule:

1. Should withdrawal of divorce counsel be permitted before the orders dividing retirement benefits are final? Because the practitioner is acting as a facilitator not representing either party, he or she is not in a position to bring any type of enforcement actions. Once a matter becomes contested, the facilitator, while he or she may try to persuade a reasonable solution, needs to return the matter to the parties or their divorce counsel for further negotiation and litigation. However, it was noted that divorce lawyers frequently withdraw before the matter has even come to the facilitator. Therefore, resolution of the unsettled issues becomes difficult and sometimes nearly impossible. It was suggested that perhaps withdrawal should not be permitted until the division, which requires further court order, is complete.

2. In what status can and should a facilitator appear in a post-decree divorce case? Rule 9 only addresses appearances of counsel in some adversary role. How can a facilitator even appear, if not acting under the Special Master rules? Should all facilitator appearances be made under the Special Master provisions? One problem with that limitation is that the court very often does not appoint any attorney to handle retirement benefit division or in some cases does not address the division at all. As a

practitioner who handles these matters Rick stated that parties should not be required to also agree to a Special Master Order after the divorce; it is difficult enough to get the parties to agree to go forward and pay a retainer to carry out the settlement.

Rule 43 Service

Rule 43(C) sets forth the rules for service after an appearance in a divorce case. Essentially, 43(C) indicates a party (or his or her attorney if so represented) can be served by mail. However, once the time for appeal of the divorce judgment has passed, service should be made in the same manner as a summons. Since the division of retirement benefits unfortunately is put off until after the divorce is over and frequently quite a while after the divorce is final, the inability to serve a party by mail pursuant to this rule can complicate the process. Extending the period in which service by mail can be made to at least 6 months and perhaps one year would help alleviate the problem with getting retirement plan benefit division completed post-divorce.

Rule 49 Disclosure

Section D(3) of this Rule provides for the provision of copies of various documents related to retirement plan benefits and other employment related benefits. However, this disclosure is not required if the parties enter a written agreement disposing of all property issues. Rick's experience is that even where such an agreement is entered, there is not sufficient benefit information available to determine the benefits, the parties' interests or how to proceed. Accordingly, it would help if parties are required to provide this information even if a written settlement agreement is entered to ensure this information is collected contemporaneously with the divorce.

Rule 60 Interrogatories and Rule 62 Production of Documents

Rick would like to expand these rules to grant the right to a facilitator to require either party to respond to Interrogatories or a Request to Produce Documents. Additionally, a facilitator should be able to apply for an order to compel against either party under Rule 65.

Rule 72 Family Law Master

The most common view among those practitioners assisting in the division of benefits is that any appointment of a practitioner to assist in the division of benefits should be under Rule 72. That approach would alleviate a number of the problems discussed above for facilitators.

Community Property Determinations

Although not currently part of the Rules it was suggested that perhaps a provision could be included in the Rules to require any necessary community property determinations regarding benefits be determined as part of the divorce proceeding and not be left to be determined in a post-

Decree process or proceeding involving a facilitator. The number of unsettled retirement benefit issues (as well as other similar issues such as stock option division) after the divorce create protracted disputes and litigation.

The Committee agreed with the concerns regarding these issues.

ACTION: The workgroup will draft language for clarification to Rules 49 and 72 and bring it back to the next meeting for further discussion.

B. Prior/Single Notice on Arrearage Statement

Vincent Frey, Esq. Unit Chief for Pima County Attorney General's Office gave a presentation on the proposed amendment to the rule and the effect of this amendment. Vincent shared the following concerns:

- The choice of the proposed terminology refers to “arrears and arrears judgments that grew from periods of time from filing a petition.” The term “Arrears” in the child support world is used to refer to money that is owed after a child support order has been issued. This proposed amendment would make it difficult for custodial parents and the state to obtain judgments for past due child support. Interpretation of this rule is inconsistent with public policy. In accordance with state law ARS § 25-809, there are judgments of past support up to 36 months that are retroactive to the commencement of the proceedings.
- To be able to obtain past support judgments the proposed rule amendment would:
 - (1) Force a party or attorney to violate Rule 11 (*ARCP*) and its counterpart Rule 31 (*ARFLP*). The proposed rule would require the attorney to state the specific amount of money the party is seeking for past support which would usually be an estimate. Under Rule 11 and 31, a signature is required by the attorney to certify the petition is well-rounded in fact. Attorneys do not have the information of the parties' income during the proceedings.
 - (2) This proposed rule amendment is a disincentive to the non-custodial parent's participation in the case if the attorney makes an uneducated estimate on the past support judgment than the custodial parent is at risk of losing the judgment money that is rightfully owed to them or the state. Also it will have a negative impact on litigants in private dissolutions cases and private paternity actions. Sometimes information about the non-custodial parents' income is not known. It comes through the discovery that takes place after the petition and the application for the affidavit is filed.
 - (3) The proposed amendment is intended to be a procedural change, but it changes substantive rights and makes judgments for past support problematic. The notice requirement applies to past support

but not to current support or spousal maintenance. This type of rule should be addressed as a possible statutory change by the legislature.

- (4) Arizona has been a law pleading state, and this rule is going to change that without justification. As a notice pleading jurisdiction, parties in Arizona should not be required to plead the specific amount of past support they are seeking. The current practice is the non-custodial parent is put on notice when he/she receives the initial petition which states that the petitioner is seeking past support. No greater notice is required under ARS § 25-809. When the non-custodial parent is summoned to appear he/she is advised that failure to appear will result in a judgment.
- (5) The proposed rule amendment will invade the discretion of judges in some cases. It will not allow them to enter the appropriate amount.
- (6) The amendment does not remedy any known problems in Pima County and if the goal is to encourage non-custodial parents to participate in the proceedings this proposed rule amendment may have the opposite effect. It could be better accomplished with a rule that requires greater notice to the non-custodial parent that the past support judgment can be entered for period of 36 months.
- (7) Vincent urged the committee to not amend the rule requiring parties to state the specific amount of past support.

The Committee agreed to have the workgroup make amendments to the language.

ACTION: The workgroup will circulate suggested language and bring a recommendation back to the Committee in January.

C. Rule 76

The workgroup drafted alternative language to answer the question that was raised: Is there any actual purpose to be served by retaining the necessity of joint pretrial statements in every case? The workgroup put together the following two alternatives:

- (1) Eliminate the requirement for joint pretrial statements in every case and let the party choose what they want.
- (2) State that separate statements should be permitted. The reason for joint statements is to try and get the lawyers together before the day of trial to see if there is anything they agree upon or anything that will need more research and work on before trial.

The Committee agreed on the first alternative and added language to the second sentence of Rule 76: "If not specified by the court....except that if..." This alternative language will serve as a function to get lawyers to at least go through the major five issues. It will help find common ground and uncontested issues.

V. Arizona Rules Of Civil Appellate Procedure

Mark Armstrong gave a brief overview of the *sua sponte* Petition Pursuant to Rule 28, *Rules of the Supreme Court*: Emergency Adoption. Mark Armstrong is asking the Committee to endorse an amendment to Rule 28 for emergency adoption. A motion was made to endorse amended Rule 28 with the note of importance of promptness of an effective date.

MOTION: Motion was made and seconded with an amendment to note the importance of effectiveness. Motion passed unanimously. FLRR-06-11

Mark Armstrong also reported on DV Rules Committee. The Committee formed a workgroup in regard to Rule 4 Family Law Cases (*ARPOP*). There was concern about the role of the Title 25 judge. The workgroup will bring recommendations back to the full Committee in regard to clarifying the Title 25 judge's responsibilities.

VI. Comprehensive Review of Rules 1-43 (Sections I, II, III, & IV)

The Maricopa County Local Rules Review Committee met to assess the continuing need for local rules following the adoption of the *Arizona Rules of Family Law Procedure (ARFLP)*. Their goal was to eliminate or narrow local rules to reduce confusion. The Maricopa County Local Rules Review Committee is requesting this Committee address the subjects of those rules within one set of statewide rules to be able to eliminate unnecessary local rules in Maricopa County. The following rules and topics are ones that the Maricopa County Local Rules Review Committee believe to have statewide importance: (1) Copies of Motions and Responses to Trial Judges (2) Motions To Compel Discovery (3) Copies of Orders/Stipulations and Stamped Envelopes (4) Notice of Withdrawal (5) Default Decree Sent To Respondents (6) Pre-Hearing Requirements in Post-Decree Cases (7) Exhibits To Court In Advance of Trial/Hearing (8) Authority of Court Administration To Dismiss Inactive Cases.

The Committee reviewed the list of rules and topics and determined the rules/topics of local concern that this Committee will address are: (1) Copies of Orders/Stipulations and Stamped Envelopes (2) Exhibits to Courts in Advance of Trial/Hearing.

VII. New Workgroups Formed

The Committee will address the rest of the rules in workgroups. The Committee also created the following workgroups:

1. SEALED DOCUMENTS AND FILES/ RULE 123 CONCERNS:
JUDGE KEARNEY/MICHAEL JEANES/ ANNETTE EVERLOVE
2. VERIFICATION:
BRIDGET HUMPHREY/ MICHAEL JEANES/ JUDGE DAVIS

3. SERVICE OF PROCESS RULES:
JUDGE DESENS & JUDGE ROTH
4. PUBLIC COMMENTS:
JUDGE DAVIS, COMM. PASSAMONTE & JUDGE COHEN
5. MOTIONS TO TRIAL JUDGE (Add to Rule 35 or 43):
COMM. PASSAMONTE & ELAINE

ACTION: These workgroups will bring back suggestions to the full Committee in January. Also, the previously assigned QDRO and Prior/Single Notice on Arrearages workgroups will provide updated reports at the next meeting.

VII. Review Public Comment from ARFLP Comment Website

The Committee has reviewed the public comments and has begun to address them. The Committee has established a workgroup to review them and bring back concerns to the full Committee.

VIII. Call to Public/Adjournment

No members of the public were present. Meeting adjourned at 2:15 p.m.

**Next Meeting: Friday, January 26, 2007
State Courts Building
Conference Room 345/B
10:00 AM – 2:00 PM**