

Judge Bruce R. Cohen  
Family Department Presiding Judge  
Maricopa County Superior Court  
125 West Washington, Suite 101  
Phoenix, Arizona 85003

**IN THE SUPREME COURT OF THE STATE OF ARIZONA**

In the Matter of: ) Supreme Court  
 ) No.  
PETITION TO AMEND RULE 44(A) )  
OF ARIZONA RULES OF FAMILY )  
LAW PROCEDURE )

**BACKGROUND**

This is a proposal to amend Rule 44(a) of the *Arizona Rules of Family Law Procedure* (ARFLP) to clarify the requirements for applications for default in family court cases.

Presently, Rule 44(A)(2)(E) provides that “a copy of the proof or acceptance of service establishing the date and manner of service on the party in default” must be attached to the written application for default. The rule does not provide whether the failure to attach the proof of service renders the application defective and invalid.

This rule equally impacts parties represented by counsel and those who are self-represented. However, the failure to comply disproportionately

arises for self-represented litigants. Further, and more importantly, there has been disparate treatment as to the impact a failure to attach the proof of service may have on the default process. Through informal gathering of information, there have been some judicial officers and counties who have treated the failure to attach the proof of service to be fatal to the default process, thereby vacating the default and requiring that the default application process begin anew. Often, the vacating of the default is decided at the time of the default hearing, thereby vacating the hearing after the party has taken the time to appear at court. There have been other judicial officers and counties who have treated the failure to attach the proof of service to be a non-issue if there is proof of service otherwise accessible to the judicial officer within the court file.

When this inconsistency in approach was first brought to the undersigned's attention, contact was made with members of the committee that recommended the last set of changes to the ARFLP, including this provision. When informed that some courts have treated the failure to attach the proof of service as a defect that rendered the default invalid, certain members of the prior committee noted that Rule 44(A) should be read in concert with Rule 1 (which provides that the rules should be construed "in a manner that ensures just, prompt, and inexpensive determination in every

action and proceeding.”). Based thereon, certain members of the prior rules committee suggested that if there is proof of service within the court record but no such proof of service is attached to the application for default, the default should proceed as that would meet the intent and spirit of Rule 1, ARFLP.

During the informal inquiry, some feedback focused on the unavailability of proof of service. Those professionals who dedicate services to the self-represented population noted that self-represented parties often fail to retain copies of proof of service, whether by filing the original without making copies or never having seen the proof of service because it was filed directly with the court by the process server.

From further inquiry, it was discovered that the reasoning behind Rule 44(A)(2)(E) was two-fold: First, it allowed the assigned judicial officer to determine with ease that service of process had been effectuated. This justification should not be sufficient to vacate an application for default if the only defect was that a party failed to attach the proof of service.

The second reason given is that by attaching the proof of service to the application for default, the defaulted party would have notice of how and when service of process was completed. In circumstances where the defaulted party may challenge the validity of service, this would afford that

party with information as to the means by which service of process was allegedly effectuated.

Given the disparate treatment among courts within Arizona, the concern that rendering the application for default to be invalid places too much weight on something that is “form over substance,” and the lack of clear guidance as to the impact of a failure to comply, it is suggested that the rule be amended. The following proposal will ensure that the spirit and intent of Rule 1 is employed while also protecting the defaulted party.

### **PROPOSAL**

The current Rule 44(A)(2)(E) of the Arizona Rules of Family Law

Procedure should be amended as follows (new language in red):

(E) establishes that service of process has been effectuated either by attaching a copy of the proof or acceptance of service or setting forth in the application (substantially in the form set forth in Form 17, Rule 97) the date and manner of service on the party in default; and

As noted, it is suggested that a new form be created to ensure that applications for default in family law cases comply fully with the rule and to assist those who are seeking entry of a default.

### **CONCLUSION**

This proposed rule change will serve to clarify Rule 44(A), ease compliance and meet the intent behind the provision. It is respectfully requested that the amendment proposed above be adopted.

RESPECTFULLY SUBMITTED, this 15<sup>th</sup> day of January, 2020.

*Bruce R. Cohen*

BRUCE R. COHEN

Family Court Presiding Judge

Superior Court of Arizona

Maricopa County

125 West Washington, Suite 101

Phoenix, AZ 85003