Task Force on the Arizona Rules of Family Law Procedure

State Courts Building, Phoenix

Meeting Minutes: December 15, 2017

Members attending: Hon. Rebecca Berch (Chair), Hon. Mark Armstrong (Co-Chair), Michael Aaron, Hon. John Assini, Annette Burns, Hon. Dean Christoffel, Cheri Clark, Hon. Suzanne Cohen, Helen Davis, Kiilu Davis, Hon. Karl Eppich, Mary Boyte Henderson, Joi Hollis, David Horowitz, Aaron Nash, Jeffrey Pollitt by his proxy Jennifer Raczkowski, Janet Sell, Hon. Peter Swann, Steven Wolfson, Gregg Woodnick

Absent: Keith Berkshire, Hon. Paul McMurdie

Guests: Ed Pizarro, Sr., Terry Decker

Administrative Office of the Courts Staff: Mark Meltzer, Sabrina Nash, Angela Pennington, Jodi Jerich

1. Call to order; remarks by the Chair; approval of meeting minutes. The Chair called the twelfth Task Force meeting to order at 10:03 a.m. She reported that workgroups have met 59 times this year, including 4 meetings after the December 1 Task Force meeting. Staff calculated that since February, members have invested more than 1,500 hours of their time attending Task Force and workgroup meetings, and this figure does not include their additional time preparing for, and traveling to, these meetings. The Chair commended the members' investment of time and effort in this project, which she expects will benefit the legal community and the public in years to come.

Judge Armstrong announced that the Chief Justice has entered an Order allowing the Task Force until March 31, 2018 to file its rule petition. However, the Task Force should have a draft set of rules ready in early January for pre-filing vetting. Before proceeding with today's rules, Ms. Clark followed-up on an item at the December 1 meeting by advising that she had further researched the issue of expiration dates for civil arrest warrants. She concluded that although Maricopa's civil arrest warrant form has a one-year expiration, no statutes or rules require such a date, and she believes that no further revisions to Rule 94 are necessary in this regard. The Chair then asked members to review the draft December 1, 2017 meeting minutes, and a member made this motion:

> **Motion:** To approve the draft minutes. Seconded, and the motion passed unanimously. **FLR: 012**

The Chair requested workgroup reports, beginning with Workgroup 4. Members approved all the rules presented at today's meeting, with the caveats noted below.

2. Workgroup 4. The Task Force returned Rule 76.1 to the workgroup at the December 1 meeting, and Ms. Davis presented the workgroup's revisions to that rule.

Rule 76.1 ("pretrial statement; scheduling conference; scheduling conference statement"): The workgroup intended its recent changes to promote more thoughtful pretrial

management of family court litigation. Following the discussion on December 1, the workgroup changed "pretrial conference" to "scheduling conference." It modified section (b) ("joint and separate statements") to require the parties to file separate statements if there are concerns with domestic violence. The workgroup's most significant changes were in Rule 76.1(c) ("contents"). The workgroup bifurcated the provisions of section (c) into (1) statements filed for a scheduling conference; and (2) statements filed for trial. The revised rule requires parties to include their positions on disputed issues, as well as other items that apply only at trial, such as designating deposition testimony, only to statements filed for trial. By comparison, a scheduling statement has a shorter list of required items. The workgroup raised an issue in section (g) ("scheduling conference") about whether the court would "hold" or "conduct" a conference. After a brief discussion, the members preferred "hold." Section (g) also provides that a conference is set only on the court's initiative or on a party's request, rather than automatically in every case. The workgroup envisioned that parties would utilize a simplified affidavit of financial information in conjunction with this rule, but the workgroup has not yet drafted the form.

3. **Workgroup 3.** Mr. Wolfson presented several rules that had been returned to the workgroup, and one new rule.

Rule 52 ("subpoena"): Revised subpart (a)(1)(D) now includes language taken from the current family rule about the manner of and time for making an objection to a subpoena. The revised rule does not require objections to a subpoena in a family case to be made by motion, as they are made in civil cases. The rule also specifies that a copy of a subpoena must be served on other parties in the case; Mr. Wolfson explained that service should be accomplished like service of other documents under Rule 43.

Rule 57 ("depositions by oral examination"): Although members had previously discussed a provision about the attendance of nonparties at a deposition, the workgroup declined to include such a provision. Instead, it concluded that counsel and the court should address this circumstance on a case-by-case basis. The workgroup modified the amount of time allowed for a deposition. The revised rule specifies that the deposition "should be of reasonable length, is presumptively limited to 4 hours, and must be completed in a single day," unless the parties agree or the court orders otherwise. A new provision in subpart (b)(3) ("method of recording") allows a party to designate another method of recording, in addition to the certified reporter; that other recorder need not be a formal videographer, and a party could even record the deposition with a cell phone. The revised rule omits a provision contained in the corresponding civil rule concerning placement of a video recording device. Mr. Wolfson noted another newly added provision in subpart (d)(3) ("motion to terminate or limit"). This provision requires the party who limits or terminates a deposition to file a motion within 10 days thereafter. If the party who limited or terminated the deposition does not timely file such a motion, the other party may move to compel the continuation of the deposition or seek sanctions under Rule 65.

Rule 60 ("interrogatories to parties"): Mr. Wolfson reported that an *ad hoc* Task Force group of members from multiple workgroups contemplated revisions to the uniform interrogatories, but those have not yet been completed.

Rule 63 ("physical, mental, and vocation evaluations of persons"): Members previously discussed who may be present at, or record, an examination under this rule. The workgroup further reviewed section (c) ("attendance of representative; recording) in light of that discussion and considered the effect a representative or a recording may have on a mental exam compared to a physical or vocational exam. Following Mr. Wolfson's presentation, members agreed to the following changes. First, in subpart (c)(1) concerning a physical or vocational exam, the sentence will begin with the words, "the person to be examined…has the rights…," and it will conclude with the words, "unless the court determines it may adversely affect the examination's outcome." Second, in subpart (c)(2) regarding a mental health exam, the sentence will begin with the words, "Unless the examiner agrees or the court orders otherwise, the person to be examined may not…." Finally, in the title of this rule and elsewhere in the body of the rule, members agreed to use the phrase "mental health exam" rather than "mental exam."

Rule 64 ("requests for admission"): Mr. Wolfson noted the addition of a standard in the second sentence of section (b) ("effect of an admission") for the withdrawal of an admission, which is derived from the current Arizona civil rule. Members discussed whether an admission is "for purposes of the pending action only," or whether the admission might be allowed in other actions. Members had concerns with conducting discovery in a family case with the intent to use those responses in another case. They concurred that these rules should not encourage that practice. The workgroup had omitted the phrase "for purposes of the pending action only," but Task Force members agreed to add it back to Rule 64. They also agreed, for the time being, to add it back to other rules, or even to add it as a global provision in Rule 51. Parenthetically, members noted the use of "he or she" in subpart (a)(5); the Chairs will do a comprehensive search for these pronouns and replace them with words that are gender neutral.

Rule 68 ("conciliation court"): The title of draft Rule 68(d) is "assessment or evaluation," and those words are used elsewhere in the section. Members briefly discussed whether there is a meaningful distinction between an "assessment" and an "evaluation," and whether they should use a single word rather than both. They believed that an assessment is briefer and an evaluation is fuller, and accordingly, they retained both words and made no changes to the draft.

Rule 73 ("family law conference officer"): Mr. Wolfson advised that the December 15 meeting was the workgroup's initial presentation of this rule to the Task Force. The workgroup believed that the use of family law conference officers ("FLCO") varied by county. But generally, the workgroup's proposed revisions to this rule would curtail a FLCO's ability to serve a quasi-judicial function. The workgroup believed that a FLCO should assist parties, but should not forward recommendations to the assigned judicial officer. Accordingly, the workgroup removed provisions found in the current rule that

permit a FLCO to make such recommendations. However, section (d) ("failure to comply with an order to bring information") allows a FLCO to report to the court a party's failure to cooperate. Because the FLCO would not serve a judicial function, the workgroup also removed the immunity provision. (Members also hypothesized that if this rule contained an immunity provision for a FLCO, then shouldn't the rules require analogous immunity provisions for everyone? And in any event, immunity is as provided by law.) As one workgroup member observed, these revisions eliminate the FLCO's role as a special master, and restore the FLCO's role as a mediator.

Members discussed other issues under draft Rule 73. First, the draft rule would permit a FLCO to record a session with the parties. However, if the FLCO is not performing a judicial function, members questioned whether a recording was necessary. After discussion, members agreed to keep this provision. First, a recording might be helpful in preparing written documentation of an agreement the parties reach during a session. Second, a FLCO might be subject to attack for something the FLCO allegedly said at a session, and a recording might provide a clear record for the FLCO's protection. The rule provides that recording is optional. Members recognized that parties could request a recording after a session, but members did not consider that a significant factor during their discussion. Members considered whether the FLCO's report to the court under Rule 73(b) should also be provided to the parties. Members believe that although the rule is silent on this question, in Maricopa County the current practice is to provide the FLCO's report to the parties. The FLCO's report is particularly helpful for self-represented parties who do not reach agreements because it informs them of the issues that will be tried. Finally, members also discussed whether the rule should allow a FLCO to interview children. Because the FLCO would not make recommendations, members thought it was unlikely that a FLCO would conduct interviews. Regardless, interviews are governed by Rule 12.

4. **Workgroup 2:** Members then considered Workgroup 2's revisions to Rules 47 and 48 and its recent revisions to the default form for spousal maintenance.

Rule 44.1 ("default decree or judgment by motion and without a hearing;" and a form ("default information for spousal maintenance"): Commissioner Christoffel explained at the outset that he prepared most of the recent revisions to the form, but he inadvertently omitted a paragraph that said, "I am requesting spousal maintenance in the amount of X dollars per month for X years." Staff then added this new paragraph 10 to the OneDrive version of the form. Members had previously discussed the checkboxes on the first page of the form, which are derived from A.R.S. § 25-319, and Commissioner Christoffel proceeded with a review of the questions below the checkboxes.

Question 2 as proposed by the workgroup asked, "Do you have a physical or emotional condition that would require spousal maintenance to meet your needs? Describe: ___." The workgroup thought this language reflected the statute, but after discussion, members agreed that the question should relate to employability. They accordingly revised the question to ask, "Do you have a physical or emotional condition

that limits your ability to work? Describe: ____." In question 4 regarding educational expenses, members added the words, "be able to contribute…." After the question, they added the word "describe." Question 8 concerns the spouse's monthly income. Revised question 8 asks, if there is no documentation of that income, how the moving party estimated the income. Members made syntactical edits to other questions, but continued to use the phrases "the other party" and "your spouse" as suitable in the context. Commissioner Christoffel also reviewed a newly added page of the form that requests information concerning expenses, debt payments, and income. He reminded members that the form is designed for use in a default proceeding without a hearing, and represents an effort to get sufficient information on which to base a financial decision.

Rule 47 ("motions for temporary orders"), Rule 47.1 ("simplified child support orders") and Rule 47.2 ("motions for post-decree temporary legal decision-making orders"): Commissioner Christoffel noted that Mr. Pollitt, who was not present at today's meeting, was instrumental in revising these rules. He also noted that the workgroup proposed dividing current Rule 47 into three separate rules to simplify the process and to assist users in locating appropriate provisions.

Stylistically, the workgroup referred to a temporary order throughout the rule in the plural, i.e., "temporary orders." Commissioner Christoffel explained that the workgroup removed several statutory references found in current Rule 47(A) and instead used descriptive language in the restyled rule. An exception appears in subpart (a)(1), which includes a reference to A.R.S. § 25-402 and requires specification of the court's authority to enter temporary orders concerning legal decision-making and parenting time. Although the moving party should include a jurisdictional reference in a pleading, it would be helpful for the court to also have this in the Rule 47 motion. Members also believed Rule 47 should expressly provide that the court does not have jurisdiction if the moving party did not previously or concurrently file a petition; members therefore added a new sentence in section (a) that states, "The motion must be filed either after or concurrently with the initial petition." In what is now section (b) ("order to appear" ["OTA"]), the workgroup removed requirements concerning the number of copies that are currently in Rule 47(C): the workgroup thought this matter should be addressed by local rules.

This led to a discussion about the timing of an OTA and service of a Rule 47 motion. Because of the immediacy of a Rule 47 motion, some members believed Rule 43 service of the motion should be required on the date of filing, even if a concurrently filed petition had not yet been served under Rules 40 or 41. Other members observed that there may be strategic reasons not to serve a Rule 47 motion so quickly. After discussion, members approved section (d) ("service"), which requires "good faith efforts to complete service promptly, and, absent good cause, [the moving party] must complete service within 5 days after receipt of the issued order to appear and no later than 14 days before the date set in the order."

Members then discussed whether the hearing set by the OTA could be an evidentiary hearing. The return on an OTA is often a resolution management conference, but case law precludes the taking of evidence at a resolution conference. However, the objective of the hearing is to enter orders, which typically require the taking of evidence. This is a quandary in Maricopa County, where some OTAs say evidence may be taken at the return hearing, and other OTAs are silent on the issue. These OTAs require attorneys to prepare for evidentiary hearings even though the court may not receive evidence at the return. On the other hand, judges may be able to encourage parties to reach agreements if the return is set for a resolution management conference, and this would be an effective use of time for both the court and the parties. If the parties don't agree on temporary orders, and since they are already present in the courtroom, an evidentiary hearing may be necessary as a practical matter. On the other hand, some judges set the return for an evidentiary hearing and omit a resolution conference altogether. After further discussion, members agreed that a resolution conference should presumptively be the first step of a temporary orders hearing. Judge Swann then proposed the following new language for section (c) ("scheduling"):

> Upon receiving a motion for temporary orders and the required supporting documents, the court must schedule a resolution management conference. No evidence shall be taken at a resolution management conference, unless the parties agree. The purpose of a resolution management conference is to engage the court in an effort to facilitate agreements between the parties that permit the entry of temporary orders at the conclusion of the conference. If, at the conclusion of the resolution management conference, issues remain that require an evidentiary hearing concerning temporary orders, the court must schedule an evidentiary hearing on those issues. If the court finds that the circumstances of a specific case demonstrate that a resolution management conference would not serve the interests of efficiency, it may schedule an evidentiary hearing on temporary orders instead of a resolution management conference.

Members appreciated the flexibility of this language, which allows the court to set an evidentiary hearing concerning temporary orders on a case-by-case basis when it determines that a resolution conference would not be efficient. But otherwise, a resolution conference would be the presumptive first step on the return of an OTA. The Chair would welcome stakeholder comments on the new provision, but members agreed to incorporate the provision in their draft rule. Members retained other portions of the draft rule that deal with when the court must set a conference or hearing, disputed issues of fact, and extensions of time. Commissioner Christoffel added that under subpart (c)(3), a judge who enters temporary parenting time orders must determine an amount of child support under A.R.S. § 25-320, as required by A.R.S. § 25-403.09.

Members also discussed draft section (f) ("requirements before a conference or hearing"). In the domestic violence exception to the meet and confer requirement, they deleted the word "significant" before the word "history." They also rearranged the order of the subparts so the domestic violence exception applied to the exchange of witness lists and exhibits, as well as to the general meet and confer conference. In section (h), members changed the captioning requirement in current Rule 47(K) from "expedited hearing required" to "expedited hearing requested." Members also modified subpart (j)(1) to provide that temporary orders "are enforceable as final orders but terminate and are unenforceable upon dismissal of the action, [etc.]."

Commissioner Christoffel reviewed draft Rules 47.1 and 47.2. The workgroup intended its restyled versions to clarify and simplify these provisions, and members had no questions or comments.

Rule 48 ("temporary orders without notice"): Commissioner Christoffel proposed adding "serious or life-threatening" to the elements of this rule, but members disagreed because they are not included in statute. Otherwise, the workgroup made no substantive changes. Members added "evidentiary" before the word "hearing" in section (d) ("hearing"). A member inquired whether the rule applied when the other party could not be located, but after discussion, the question was unresolved.

5. Workgroup 1. Judge Cohen introduced the rules on "pleadings and motions" in Part II of the family rules by noting that the current rules are not in a sensible sequence. As part of its reorganization of these rules, the workgroup proposed relocating what had become Rule 21 on "sealing, redacting, and unsealing court records" to Rule 17, which was previously reserved. The workgroup then renumbered Rule 23.1 concerning "improper venue," which the Court adopted earlier this year, as Rule 21. Both renumbered rules would fall within the rules on general administration. Most of the "reserved" rules in Part II would be located toward the end of the rules on pleadings and motions. The rule on motions would retain its current number, Rule 35. In summary, Part II of the family rules would be reorganized as follows:

Part II	**As proposed: Pleadings and Motions**	**Part II**	**Currently: Pleadings and Motions**
Proposed #	**Proposed Title**	**Current #**	**Current Title**
23 FKA R. 24	Pleadings; Petition and Response	23	Commencement of Action
24 FKA R. 29	Contents of Pleadings	24	Pleadings Allowed
25 FKA R. 26	Additional Filings	25	Family Law Cover Sheet
26 FKA R. 31	Signing Pleadings, Motions, and Other Documents; Representations to the Court; Sanctions	26	Additional Filings

27	Service of the Petition	27	Service on the Opposing Party or Additional Parties
28 FKA R. 34	Amended and Supplemental Pleadings	28	Mandatory Responsive Filings
29 FKA R. 32	Defenses and Objections; Motion for Judgment on the Pleadings; Joining Motions; Waiving Defenses; Pretrial Hearing	29	General Rules of Pleading
30	Reserved	30	Form of Pleading
31	Reserved	31	Signing of Pleadings
32	Reserved	32	Defenses and Objections; When and How Presented; By Pleading or Motion; Motion for Judgment on Pleadings
33	Third-Party Rights and Other Claims in an Existing Action	33	Counterclaims; Third Party Practice
34	Reserved	34	Amended and Supplemental Pleadings
35	Family Law Motion Practice	35	Family Law Motion Practice

Proposed Rule 23 ("pleadings; petition and response"): Ms. Henderson explained that this proposed rule merges content from current Rule 23 ("commencement of action") with content from current Rule 24 ("contents of pleadings"). The proposed rule also includes a definition of "petition" derived from current Rule 3. In section (a) ("petition"), and in contemplation of whatever future legislation might be passed, the workgroup added a provision that permits a party to begin an action by filing a petition seeking "relief otherwise authorized by statute." Section (e) ("response") has provisions that differentiate whether a response to a petition is required or permissive.

Proposed Rule 24 ("contents of pleadings"): Ms. Henderson also explained that current Rule 29 ("general rules of pleading"), which is the source of this proposed rule, requires pleadings to contain "short and plain" statements. The workgroup changed this to "simple, concise, and direct," but after discussion, members further modified this to require "simple" statements in a petition (section (a)) and in a response (section (b).) In subpart (a)(1), members added two words as follows: "unless the court already has exercised its jurisdiction…." In section (b), members agreed to delete as unnecessary the word "fairly" in the phrase, "a denial must fairly respond to the substance of an allegation."

Proposed Rule 25 ("additional filings"): Ms. Burns noted that this proposed rule incorporates content from current Rule 26 ("additional filings") as well as a single sentence that composed current Rule 25 ("family law cover sheet"), which has become Rule 25(d). Members added a statutory reference in the second sentence of section (b) ("petition for legal decision-making or parenting time, paternity, or maternity") to clarify

that a preliminary injunction is issued when a party files a petition to establish legal decision-making or parenting time for a child whose paternity has been established. Section (e) ("order to appear") requires a party in certain proceedings to provide the court with two copies of an order to appear.

Proposed Rule 26 ("Signing Pleadings, Motions, and Other Documents; Representations to the Court; Sanctions"): Mr. Woodnick briefly reviewed proposed Rule 26, and members corrected cross-references in the draft.

Rule 27 ("service of the petition"): This rule number corresponds with current Rule 27, but Mr. Davis explained the differences. The proposed rule removes references in the title and body of section (a) ("annulment, dissolution of marriage, or legal separation") to dissolution of a covenant marriage or legal separation in a covenant marriage. He raised the issue whether the title and body of section (b) should refer to legal-decision making or parenting time "by a parent," and after discussion, members agreed that it should. In section (c) ("order to appear and petition"), members again considered the issue of how many days before a court hearing a petitioner must serve the respondent. Members discussed 20 days and 10 days, and concluded by adding the following new sentence: "Petitioner must complete service not later than 20 days before the scheduled hearing, or not later than 10 days if the only issue is child support, unless the court orders otherwise." The Chair welcomes public comment on this proposed provision.

Proposed Rule 28 ("amended and supplemental pleadings"): This proposed rule corresponds to current Rule 34, and the rule's title remains the same as it is currently. Ms. Burns noted that the rule provides for amendments before a response is filed, as well as thereafter. The current provision concerning the relation back of amendments was substantially shortened in the draft because families know the identity of their members, and amendments changing the identity of a putative father, rather than just correcting the putative father's name, should not proceed simply by an amendment to the pleadings under this rule. Members removed a provision in the draft rule concerning service of an amended pleading on a government entity.

Proposed Rule 29 ("Defenses and Objections; Motion for Judgment on the Pleadings; Joining Motions; Waiving Defenses; Pretrial Hearing"): Mr. Woodnick advised that this rule corresponds to current Rule 32. Section (c), which concerns the time to assert defenses under this rule, has been revised and clarified. The workgroup's draft of section (d) ("motion for judgment on the pleadings") proposed a filing deadline of not later than 90 days before trial, but after discussion, members changed that to "within such time as not to delay trial." In section (f) ("motions to strike"), members added a reference to the limitations on such motions that is specified in Civil Rule 7.1(f). Members reviewed section (g) ("waiving and preserving certain defenses") to assure the provision, including the defense of lack of subject matter jurisdiction, was legally correct. They revised the subpart titles of section (g) to say "(1) waiver of certain defenses," and "(2) how to preserve other defenses." The title of current section (D) ("preliminary hearings") was

changed in draft section (h) to "hearing on Rule 29 motions." Under the draft provision, a party may request to have the motion heard and decided before trial.

6. Other rules issues. Judge Armstrong raised an issue regarding Rule 49 ("disclosure"), which members had discussed extensively at the August 4 meeting. Judge Armstrong said that during a review session, the Chairs and staff believed that the meet and confer requirement for electronically stored information ("ESI") was burdensome, unnecessary, and omitted a provision concerning self-represented litigants with protective orders. Judge Armstrong inquired if members objected to removing this meet and confer requirement. There were no objections. Judge Armstrong also advised that draft Rule 49 includes a provision that requires parties to file a joint motion in the event of a dispute regarding ESI. However, the Family Law Rules do not provide for joint motions, and he also requested the members' consent to remove that provision. After discussion, members believed it would be useful to have an expedited process for resolving ESI disputes, and the Chairs and staff will refashion the provision.

Justice Berch also noted an issue raised by AOC-Legal that touches on Rules 13(e) ("access to records"), 17 ("sealing, etc."), and 43.1(f) ("sensitive data"). The issue is whether the draft rules should include a provision that makes psychological evaluations in family cases presumptively confidential. These evaluations are not usually filed over the counter, but sometimes they are. When that occurs, the assigned judge may seal the document. But on some occasions, evaluations are attached as exhibits to motions and become publicly accessible. Members expressed concerns with other reports and filings regarding children's issues and other matters that may raise issues of confidentiality. Justice Berch suggested adding a confidentiality provision to the rule on protected addresses, and she'll consider that provision with Judge Armstrong and staff.

7. Call to the public; roadmap; adjourn. There was no response to a call to the public.

The Chairs and staff are continuing to meet and review the draft rules. Their goal is to have a complete draft set of rules ready for submission to the State Bar by January 8. Once the draft set is complete, staff also will circulate it to the members. The Chair requested members to review the draft from top to bottom, and to pay special attention to rules prepared by their respective workgroups. She asked that members send any comments and corrections to staff. She also asked that they continue to work on their rule summaries. But in doing this work, the Chair stressed the importance of members not making edits or revisions on OneDrive. She requested that as of the close of today's meeting, members refrain from making changes to the rules on OneDrive. This is necessary to assure that the version of the rules on OneDrive is stable and final.

The draft set of rules will be available for public review next month on the Task Force webpage. There will also be an Outlook mailbox on the webpage to facilitate the submission of comments concerning the draft. Staff will compile comments and distribute them to Task Force members. The Task Force will not meet in January, but it

probably should meet in early to mid-February to discuss comments. Staff will poll the members for an available date. At the next meeting, members should also consider any necessary revisions to forms and interrogatories.

The Chair again expressed her appreciation for the members' work and diligence. The meeting adjourned a**t** 3:34 p.m.