Task Force on the Arizona Rules of Family Law Procedure

State Courts Building, Phoenix

Meeting Minutes: March 20, 2017

Members attending: Hon. Rebecca Berch (Chair), Hon. Mark Armstrong (Co-Chair), Michael Aaron (by telephone), Keith Berkshire by his proxy Erica Gadberry, Mary Boyte Henderson, Annette Burns, Cheri Clark, Hon. Suzanne Cohen, Helen Davis, Kiilu Davis, Hon. Karl Eppich, Joi Hollis, Hon. Paul McMurdie, Aaron Nash, Jeffery Pollitt, Janet Sell, Steven Serrano (by telephone), Hon. Peter Swann, Steven Wolfson, Gregg Woodnick

Absent: Hon. John Assini, Hon. Dean Christoffel

Guests: Martin Lynch, Cynthia Oxman, Julie Coleman, Ed Pizarro Sr.

Administrative Office of the Courts Staff: Mark Meltzer, Karla Williams, Julie Graber, Theresa Barrett, Amy Love

1. Call to order; introductory remarks; approval of meeting minutes. The Chair called the second Task Force meeting to order at 10:01 a.m. She noted that workgroups have met 5 times since the first Task Force meeting. She encouraged workgroups to set future meetings at the conclusion of each meeting so they always have their "next meeting" scheduled. She reminded members that Ms. Williams is available to assist with connecting to or using OneDrive.

Judge Armstrong introduced a pair of issues that members might contemplate at subsequent meetings. The first issue involves procedural requirements for motions. Civil Rules 5.2 and 7.1 contain pertinent provisions, but there are no corresponding Family Law Rules ("FLR") on this subject and he suggested that the Task Force consider adding them. He also asked whether the FLR should include an analog to Civil Rule 68 concerning offers of judgment. The previous family law rules committee decided that offers of judgment in family cases would be contrary to public policy; he asked whether this Task Force supports that view. (Judge Swann added that a State Bar committee is considering a proposal to abrogate or modify Civil Rule 68.) Finally, Judge Armstrong brought to the members' attention *Bobrow versus Bobrow* (Division One, 3/9/17), and particularly its discussion on the enforceability of an attorneys' fee provision in a premarital agreement.

The Chair asked members if they had corrections to the draft February 17, 2017 meeting minutes. There were none, and a member then made this motion:

Motion: To approve the draft minutes. Seconded, and the motion passed unanimously. **FLR: 002**

2. Discussion of jury trials and civil issues in family law actions. Judge Armstrong explained that the previous family law rules committee included provisions in the family rules concerning civil issues and jury trials, which occur, although rarely, in family law actions. He gave as an example a person's claim against a spouse for breach of fiduciary duty. One member observed that jury trials are permitted in declaratory actions. However, because there are few declaratory actions in family court, the possibility of a jury trial in a family court declaratory action is more theoretical than actual. Members discussed options for dealing with civil issues. One option is to handle the civil matter in family court, but without a jury trial, which might provide a speedier resolution. Another approach would be to transfer the civil component to a civil division, which could conduct a jury trial when appropriate. (However in smaller counties, there may not be a civil division to which a family case could be transferred.)

Because most parties in family court proceedings are not represented by counsel, a member encouraged the Task Force to make the FLR simpler, and not propose rules for circumstances that are unlikely to occur in the overwhelming majority of family cases. Accordingly, the most effective solution to the jury-trial issue might have the FLR refer parties to civil rules if the parties have a civil issue. Members discussed a new family law rule that would codify this approach. The essence of the rule would state that if there is a civil component in the case, the court and the parties should apply the rules of civil procedure.

- Workgroup 1, which was assigned the introductory portions of the FLR where this rule would be located, will discuss drafting such a rule.

The Task Force could utilize this approach to eliminate current FLR that address inherently civil subjects. Rules concerning crossclaims and similar pleadings, and rules for service of process, such as service on a corporation, might be removable. Deleting such rules could simplify the FLR for pleading and service, and make the FLR generally more comprehensible for self-represented litigants. Judge Armstrong observed that one of the goals of the civil rules restyling was making those rules more understandable for self-represented litigants, but perhaps this Task Force can further advance that goal.

The Chairs then requested the workgroups to report their recommendations concerning individual FLR.

3. Workgroup 1. Workgroup 1 began with Rule 6.

Rule 6 ("change of judge"): Judge Armstrong said the previous FLR committee included Rule 6 to confirm that the civil rules' right to a change of judge also applies in family cases. Ms. Henderson began Workgroup 1's presentation of Rule 6 by noting that the current rule contains a cross-reference to former Civil Rule 42(f) ("change of judge"). However, the restyled civil rules separated Rule 42(f) into two new rules: Rule 42.1

("change of judge as a matter of right") and Rule 42.2 ("change of judge for cause"). Under Rule 42.1, a party waives the right to a change of judge if it is not exercised within 60 days after an appearance. The workgroup found this problematic because counsel may not appear in a family case until after the 60-day period had run. Therefore, rather than incorporating restyled Civil Rule 42.1 by reference, the workgroup drafted a new Rule 6 concerning a change of judge as a matter of right. Under this rule, the right is preserved until 60 days before the trial date, similar to the timing provision of the former civil rule. A new Rule 6.1 would govern a change of judge for cause. Rule 6.1 mirrors Civil Rule 42.2.

Task Force members discussed how reassignment of a case would be treated under proposed Rule 6(c), and whether there is a distinction between reassignment of a particular case by minute entry and reassignment of a judge's entire calendar by rotation. To address this issue, members used language in the restyled civil rule, i.e., that a notice is timely if it is filed within 10 days "after the party receives notice of the new assignment, or within 10 days after the new judge is assigned, whichever is later." The Task Force's use of language that parallels the civil rule will facilitate the applicability in family cases of appellate opinions interpreting the civil rule, and members agreed with this change.

The members discussed a second issue arising under proposed Rule 6(a): whether the right should apply to one judicial officer, to a judge and a judge pro tem, to a commissioner or a commissioner pro tem, or to a combination of the foregoing? Some members favored limiting the right to a change of only one judicial officer. This would serve the public interest and mitigate the delay caused by multiple changes of judge. Other members observed that different issues in a single case might be heard by more than one judicial officer, and believed the right should be extended to accommodate that circumstance. The members considered, for example, whether a IV-D case, which might be heard by a judicial officer other than the assigned judge, should include a separate right to a change of judge. Members further discussed the time limits provisions in Rule 6(c), and they agreed to revisions in subparts (3) and (4).

- However, because the Task Force did not have consensus on the entirety of Rule 6.1, the Chair returned the draft to Workgroup 1 for further consideration.

Members made other observations for the workgroup's consideration. Is there a distinction in proposed Rules 6(d)(4) ("a scheduled contested hearing begins") and 6(d)(5) ("trial begins")? Is there a distinction throughout the FLR between a "trial" and a "hearing," or are the words used interchangeably? One member suggested that a judge receives evidence at a trial, but does not do so at a hearing. However, another member noted occasions when the court may receive evidence at a hearing. A judge member suggested that a trial is a "final evidentiary hearing." Members should determine if there

is a meaningful difference between a "hearing" and a "trial," and if so, they should use the correct term in the appropriate context; otherwise, they should use one of these terms throughout the rules but not both. Another member asked the workgroup to reconsider proposed Rule 6(d)(3); the member suggested that a party's appearance at a conference where nothing is contested should not operate as a waiver. The Chair indicated the Task Force will revisit these issues after Workgroup 1's further review.

Rule 11 ("exclusion of minors"): Mr. Davis presented an overview of the revisions the workgroup made to this rule. A member suggested, and the Task Force agreed, to delete gender references ("his or her"). Another member noted inconsistent use of the term "minor child." The member suggested using the term once at the beginning of each subpart, and thereafter the term "child." Other members suggested modifications to the section titles, and to the rule's title.

- In light of the number of suggested changes, the Chair returned this rule to Workgroup 1 for further edits.

Rule 15 ("affirmation instead of oath"): Mr. Davis also presented this rule. One member suggested changing the word "suffices" to "is sufficient." Another member asked whether the word "solemn" was necessary. But because the language of this proposed rule is identical to restyled Civil Rule 43(b), the members agreed the rule was acceptable without any additional changes.

Rule 16 ("interpreters"): Ms. Burns presented Rule 16. The rule is modeled on restyled Civil Rule 43(c). A judge member criticized draft language that would allow the court to require a party to pay the cost of an interpreter; the member submitted this might impinge on the right of access to the court by a party with limited English proficiency. Members agreed to remove that language. They removed the words "from funds" in the same sentence and agreed to insert the word "as," so the provision now says, "to be paid ~~from funds~~ as provided by law."

- The members also agreed to remove the last sentence of the proposed rule, which said, "The interpreter's compensation may be taxed as cost." Workgroup 4 will examine the issue of costs when it considers Rule 78.

Rule 18 ("preserving a record of a court proceeding"): Mr. Woodnick, who presented this rule, advised that the workgroup made no changes to staff's proposed restyling. A member inquired if the rule could include a provision that would allow the unsealing of records to prepare transcripts for an appeal. However, members believed this would exceed the scope of this rule, and they declined to expand it.

Rule 19 ("lost or destroyed records"): Mr. Woodnick noted this proposed rule is based on restyled Civil Rule 80(d). Members had no changes to it.

Rule 21 ("reserved"): Rule 21 previously dealt with local rules of the superior court, but Ms. Henderson noted that the Court abrogated Rule 21 by its Order in rule petition number R-16-0033. Supreme Court Rule 28.1 now governs the promulgation of local rules. Rule 21 will continue to be "reserved."

Rule 22 ("conduct of proceedings"): Ms. Burns explained that the restyled rule includes two new section headings, "time limits" and "decorum." Members deleted some of the proposed language in the "time limits" section. As a result, the section provides that the court may impose reasonable time limits that are "appropriate to the proceedings," and a party "may request additional time." The "request" could include an oral request in the course of a hearing, as well as a written motion. Members also modified the "decorum" section to emphasize that rather than the court conducting the proceeding in an "orderly, courteous, and dignified manner," it is the parties who must conduct themselves that way.

Rule 25 ("family law cover sheet"): Ms. Burns noted that the workgroup did not make changes to staff's draft. However, Task Force members revised and shortened that draft so it now simply states, "A family law cover sheet must be presented as required by administrative order or local rule." In the course of the discussion, members noted that not all counties utilize a family law cover sheet, and those that do may not use uniform versions. The cover sheet primarily serves administrative rather than judicial purposes. A member also noted the cover sheet may duplicate information on the confidential sensitive data sheet. Members agreed that it might be useful to have a Supreme Court-approved family law cover sheet form in Rule 97. The Chair suggested that members consider such a form at a future point in this project, after obtaining input from superior court clerks.

Rule 28 ("required response"): Mr. Woodnick advised that the workgroup approved staff's restyled draft without additional changes, but Task Force members believed the draft was deficient. First, they note that while Rule 28(a) referred to a party "who is served with a petition," the draft omitted the words "and summons." After discussion, those two words were added to the draft. This led to a conversation about the distinction between a "summons" and an "order to appear." Members agreed that this restyling project should clarify which proceedings are initiated with a summons, and which require an order to appear. Pertinent provisions currently are spread throughout a number of rules, but they should be reorganized in a more user-friendly way so litigants can readily understand which document is required for a particular proceeding. Whether a summons or an order to appear is used can affect the need to file a response to a petition, and circumstances allowing the petitioner to obtain a default.

A member observed that "legal decision-making" in section (a) should be followed by the words "by a parent" because under current Rule 91, some legal decision-

making petitions do not require a summons. Another member suggested, and other members agreed, to add to section (a) the words, "and provide a copy to the assigned judicial officer and other parties." Members also changed the last sentence of draft section (a), which stated that the response must include a "verification," to instead require the response to include "a declaration under Rule 14(b)."

4. Workgroup 3. Mr. Wolfson presented Rules 54, 55, and 56 on behalf of the workgroup.

Rule 54 ("discovery before an action is filed on pending an appeal"): The workgroup considered adding to draft Rule 54(a)(3) ("notice and service") a cross-reference to FLR 37(b) concerning incompetent persons. After further discussion, the workgroup instead recommended adding a reference to FLR 10(h), which would encompass minors as well as incompetent persons. One member concurred with this recommendation because in Pima County, minors occasionally are parties in paternity actions. Another member suggested using a form of the verb "preserve" in this rule rather than "perpetuate" or "perpetuating." However, a member noted that the civil rules task force spent considerable time on corresponding Civil Rule 27, and conformity to that rule, which uses "perpetuate," would be appropriate. This member added that Rule 54 is rarely used by self-represented litigants, and an effort is underway that would provide even more simplified FLR for those litigants. Members concluded this discussion with an agreement to incorporate the Rule 10(h) concept, but possibly not the verbatim text of Rule 10(h).

- Members further agreed that Rule 54 might be one of those rules that could be excluded from the FLR, as the members discussed earlier during today's meeting. The workgroup will accordingly reconsider this rule.

Rule 55 ("persons before whom depositions may be taken, etc."): Mr. Wolfson advised that the workgroup made no changes to staff's restyling. However, in the future the Task Force should consider whether this rule or another FLR should provide an equivalent to Civil Rule 45.1 ("interstate depositions and discovery"). The current FLR do not include provisions that correspond to Rule 45.1.

Rule 56 ("modifying discovery and disclosure procedures and deadlines"): Mr. Wolfson noted the workgroup's consensus to add a reference in Rule 56(b) to a proposed amended FLR 51(f). The amendment to Rule 51(f), modeled on Civil Rule 7.1(h), would elaborate on the meaning of a "good faith consultation." It would specifically provide, as the civil rule does, that the consultation "must be in person or by telephone, and not merely by letter or email." Task Force members supported this concept. They also corrected an erroneous cross-reference in (a)(2) of the draft.

5. Workgroup 4. Workgroup 4 presented Rules 80, 86, 90, and 93.

Rule 80 ("declaratory judgments"): Ms. Sell, who presented this rule, asked whether it was necessary to include this rule in the FLR. She believes the rule is rarely used. She added that the second sentence of the draft, which allows the court to order a speedy hearing, is unnecessary because this is an inherent judicial power. One member responded that when a party seeks the remedy of declaratory relief, it is probably post-decree and often called by a name other than "declaratory relief." Eliminating Rule 80 won't change the practice of seeking this type of relief. Another member noted that Rule 80 contains no substance concerning "how-to" proceed with a declaratory action. In the rare instances when a party to a family law action needs declaratory relief, the party should refer to the civil rules. After discussion, the members agreed to eliminate Rule 80.

Rule 86 ("harmless error"): Judge McMurdie presented this rule. Although the rule is modeled on Civil Rule 61, verdicts are atypical in family law cases and the workgroup accordingly removed a reference in the draft to "setting aside a verdict." Another member questioned whether the rule's first four words, "unless justice requires otherwise," modified the legal standard of "prejudice to a substantial right." Nonetheless, because this rule parallels the civil rule, the members agreed to retain it as proposed.

Rule 90 ("enforcing relief for or against a nonparty"): Ms. Davis noted that this rule is consistent with its Civil Rule 71 counterpart. But she asked whether the rule is instructive, or if it adds anything to the court's existing authority. For example, if the court enters an order against a non-party, isn't the order enforceable in its own right? One member thought that the rule might have use if the court awarded attorneys' fees to counsel, who is not a party to the action. In any event, the rule has a civil rule equivalent, and members agreed to retain it in the FLR.

Rule 93 ("seizing a person or property"): Ms. Davis also presented this rule, which is the analog of Civil Rule 64. Ms. Davis noted that although the rule applies only to a "potential judgment," i.e., prejudgment, it is misleadingly located in Part XII of the FLR, following the part on post-judgment proceedings. Ms. Davis proposed that the remedies specified in this rule (arrest, attachment, garnishment, replevin, and sequestration) are civil in nature and therefore more appropriately governed by civil rules. Another member suggested that provisional remedies, which are creatures of statute, have only marginal application in family actions. Furthermore, a self-represented litigant who reads Rule 93 might incorrectly conclude that a provisional remedy of arrest is available in a family case. Ms. Davis added that the FLR has no equivalent of Civil Rule 69 concerning "execution" of judgments. Does a judgment creditor in a family action therefore apply to a civil court rather than a family court for a writ of execution? Members agreed that Rule 93 is unclear, that there is no utility in having duplicate civil and family rules on this subject, and that for now, the Task Force should delete and "reserve" Rule 93.

- Workgroup 1 should include the applicability of corresponding civil rules in this subject area when it prepares the rule discussed in item 2 above.

6. **Roadmap.** The Chair confirmed April 28 as the next Task Force meeting date. She also confirmed the subsequent meeting date of June 12. These dates are conditioned on the availability of quorums, and she encouraged the use of proxies to assure quorums.

7. **Call to the public; adjourn.** The Chair made a call to the public, and in response the following individuals addressed the Task Force: Mr. Martin Lynch, Ms. Cynthia Oxman.

The meeting adjourned at 3:04 p.m.