Task Force on the Arizona Rules of Family Law Procedure

State Courts Building, Phoenix

Meeting Minutes: February 16, 2018

Members attending: Hon. Rebecca Berch (Chair), Hon. Mark Armstrong (Co-Chair), Michael Aaron, Hon. John Assini, Keith Berkshire, Cheri Clark by her proxy Tracy McElroy (by telephone), Hon. Suzanne Cohen, Helen Davis, Kiilu Davis, Hon. Karl Eppich, Mary Boyte Henderson, Joi Hollis (by telephone), David Horowitz, Hon. Paul McMurdie, Aaron Nash, Jeffrey Pollitt, Janet Sell, Hon. Peter Swann, Steven Wolfson, Gregg Woodnick

Absent: Annette Burns, Hon. Dean Christoffel

Guests: None

Administrative Office of the Courts Staff: Mark Meltzer, Angela Pennington, Jodi Jerich, Theresa Barrett

1. Call to order; remarks by the Chair; approval of meeting minutes. The Chair called the thirteenth Task Force meeting to order at 10:03 a.m. She advised that today's meeting would begin with a review and discussion of comments concerning the draft family law rules (version 01.04.2018). But she asked members to first consider the draft December 15, 2017 meeting minutes, and a member made this motion:

> **Motion:** To approve the draft minutes. Seconded, and the motion passed unanimously. **FLR: 013**

Judge Armstrong added that the Court recently accepted review of a case concerning the "special weight" (the phrase used in A.R.S. § 25-409) given to a fit parent's preferences in a conflict with the child's grandparents. The case is *Friedman v Roels,* 242 Ariz. 463 (App. 2017), review granted in Arizona Supreme Court No. CV-17-0225-PR.

2. Disposition of comments concerning the 01.04.2018 draft rules. Staff assembled all the comments submitted prior to the February 12 deadline in a table. Each comment had an assigned number and members discussed these comments sequentially. An additional comment submitted by Ms. Madsen earlier this week was separately included in the meeting materials. If these minutes do not discuss a specific comment, it is because members previously discussed the issue raised by the comment and believed their earlier discussion resolved the issue, or because the comment concerned such things as typographical or formatting errors.

1. *Mr. Smith's comment regarding Rule 72.* This comment was addressed by the 01.04.2018 draft.

2. *Mr. Rogers' comment regarding Rule 17.* Rule 17, which concerns sealing, parallels new Civil Rule 5.4 on sealing. Mr. Rogers suggested substituting the word "overriding" for the word "compelling" in Rule 17, which would conform the civil and family rules. One member favored retaining the word "compelling" because it relates to an issue of constitutional dimension, but most members agreed to adopt Mr. Rogers suggestion if Rule 17 includes an explanatory comment. The Chairs will draft a comment.

3. *Ms. Piccarreta's comment regarding Rule 67.3*
considered in conjunction with
10. *Judge Bryson's comment regarding Rule 67.2.*

Rule 67.3(e) ("court-selected private mediator") refers to the court's selection of a private mediator, including choosing "from the court's own list of private mediators." Members agreed that the public might give greater weight to a court's list than it would to mediator lists from other sources. Moreover, those courts that maintain a list don't vet the individuals on it, and may not even set qualifications for inclusion on their list. One member had no objection to parties reviewing a list of names on a court's list, but objected to the court selecting an individual's name from the list to serve as the parties' mediator. Another member asked whether Rule 67.3(g) ("judges pro tempore as mediators") suggested a rent-a-judge philosophy, because the member believed there should not be a charge for a pro tempore's service. But another member believed that the express purpose of Rule 67.3(g) was to allow parties to compensate a pro tempore's service as a private mediator, and contended that merely removing the word "private" from Rule 67.3(g)(1) would not fulfill the rule's intended purpose. One member proposed deleting Rule 67.3(g)(4) ("payment for a judge pro tempore's services") in its entirety. But another member stated that deleting Rule 67.3(g)(4) would gut the entire section. One member recalled an ethics opinion on whether a judge pro tempore could receive compensation for services as a mediator under the circumstances posed by the rule, and members agreed to look for and review the opinion. Other members suggested retaining these rules as currently drafted and requesting formal comments.

Rule 67.2(g), which is a uniform rule, includes a provision about the court's selection of an arbitrator if the parties' selection of an arbitrator in their agreement fails (for example, the arbitrator is no longer available to serve). A member thought that if there was a question about who the parties chose as their arbitrator, then the parties might not have an agreement. The parties could ask the court to interpret the agreement, but they shouldn't ask the court to pick an arbitrator for them.

After further discussion, members agreed to the following changes to Rules 67.2 and 67.3:

> In Rule 67.2(g), to remove subpart (3), which provided, "If an arbitrator is unable or unwilling to act or if the agreed-on method of selecting an arbitrator fails, on motion of a party, the court will select an arbitrator."
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> In Rule 67.3(e), to remove only the last clause [shown by strikethrough as follows]: "**Court-Selected Private Mediator.** The parties may ask the court to select a mediator for them from a list of private mediators they provide to the court~~, or from the court's own list of private mediators~~."

Members made no changes to Rule 67.3(g)(4), but they agreed that the rule petition should request comments on issues raised by that provision.

4. *Ms. Kane's comment regarding Rule 10 and attorney's fees.* Members discussed the question this comment raised about Rule 10 (whether BIA and GAL were interchangeable terms), but they concluded that clarifying changes to the draft were unnecessary. The Chair and staff will discuss uniformity in the punctuation and spelling of attorney's fees after today's meeting.

5. *Mr. Evans' comment regarding Rule 77.* Members discussed whether Rule 77 ("trials") includes an implicit requirement that a party confer with other parties before requesting a continuance from the court. After this discussion, they agreed that any provision on continuances should be broad enough to apply to other proceedings and not just trials, and that this provision is inappropriately located in Rule 77. They further agreed that the Chairs and staff should draft a comparable provision that would apply to any proceeding, and locate this new provision in a rule that is currently reserved (a member suggested Rule 34). Members requested that the new provision address the need to confer when there are domestic violence issues; and that it address reasonable but unsuccessful attempts to confer.

6. *Ms. Burns' comment regarding Rules 12, 29, 37, and 40.* The current draft has already corrected the misspellings and erroneous rule cross-references noted in this comment. In response to the perceived ambiguity in Rule 40(g) concerning the word "return," a member suggested expanding the term to "return of service," and the Chairs will take this suggestion under consideration.

7. *Ms. Hill's comment regarding Rule 47.* The Chair acknowledged Ms. Hill's concerns regarding the resolution management conference, but noted that the Task Force previously had a lengthy discussion on the issue and that the issue also was presented in the rule petition. Members took no further action to modify the draft rule.

8. *Ms. Greene's comment regarding Form 2.* Mr. Nash and other members agreed that it would be helpful, especially for self-represented litigants, to have further

directions on Form 2, the AFI, about not filing sensitive information. Mr. Nash suggested that the directions use the word "redact," and that the form define "redact." Members offered "blank out" or "black out" as possible substitute terms. Mr. Nash will check whether the clerk already has standard language on this point.

9. *Professor Atwood's comment regarding Rules 67.1 and 67.2.* At the Chairs' direction, references to "must/may" in the 01.04.2018 version of Rule 67.2 were corrected in the 02.12.2018 version to say "must." Staff has not yet made the necessary numbering and lettering changes, but these will be done before filing the petition.

10. See number 3 above.

11. *Judge Swann's comment regarding Rule 95.* Judge Swann discussed a possible conflict between Rules 72/74, which require the parties' consent for services under those rules, and Rule 95(b), behavioral or mental health services, which does not require consent. His concern was that the court might, for example, appoint a private custody evaluator under Rule 95(b), and require the parties to pay the evaluator without their consent to the appointment. Members acknowledged that substance abuse services under section (c) or other services under the rule would not require a party's consent. After discussing the issue, members made changes to the second sentence of Rule 94(a), which then read: "The court must determine on the record whether the parties have the ability to pay for services as well as allocate the costs of those services." To minimize the possibility of conflict with Rules 72/74, members also agreed to delete from the first sentence of Rule 95(a) the words, "in addition to services described in other rules."

12. *Ms. Clairmont's comment regarding various rules.* Ms. Clairmont proposed adding to Rule 2(d) the words, "as required by Rule 49 or by court order." After considering *Hays v Gama*, members discussed an alternative modification: adding the words "except as otherwise provided by law." But after further discussion, members agreed that the concept is adequately covered by other rules, e.g., Rules 49 and 65, and that section (d) was unnecessary. They accordingly deleted Rule 2(d). While still on Rule 2, Judge Armstrong advised that the Court adopted Evidence Rule 807, a rule on the residual hearsay exception, and members modified Rule 2(b) to include a reference to the rule.

Members considered the suggestion for additional definitions in Rule 3, but they declined to adopt any. They agreed that the explanation of "next day" in Rule 4 was not helpful, and they deleted it. Ms. Clairmont's comment suggested inclusion in Rule 5.1 of a method of communication between the family and juvenile benches, and although members agreed there should be such a method, they did not believe it needed to be based in a court rule. Regarding Rule 8, and what constituted a "reasonable opportunity to respond," members agreed that what is reasonable depends on the context of each case, which the judge will determine. Members previously had lengthy discussions regarding

Rule 9(c) and a good faith consultation certificate. They agreed that the rule's intent was that counsel have a conversation, whether by phone or in-person, and they declined to include consultation via email exchanges. Except for Rule 49, most of the remaining comments concerned spelling and formatting errors, which the next draft will address. The comment on Rule 49 inquired about the authority of different counties to adopt modified forms, and particularly Pima County's adoption of an alternative AFI. Pima County's AFI was included in its local rules, which were approved by the Supreme Court, and members believe the form is accordingly authorized. Members made no changes to Rule 49.

13. *Staff's comment regarding Rules 82 and 83.* Staff proposed removing the words "supplemental hearings" from the title of Rule 83 because taking additional testimony, i.e., holding a supplemental hearing, is just one of several choices permitted under Rule 83(b). Putting those words in the rule's title gave undue emphasis to that option. Staff also believed there was an inconsistency in allowing 15 days for filing a Rule 82(b) motion to amend findings, but allowing 25 days for a motion to amend findings under Rule 83(b). For consistency, staff proposed changing the time in Rule 82(b) to 25 days. The Chairs concurred with these changes, which were shown in the current draft, and members did not object to the changes.

14. *Judge Hancock's comment regarding Rules 5, 5.1, 17, 47, 91, and 92.* The comment questioned why Rule 5 disallowed consolidation of a protective order proceeding with a family law action. Members agreed that this couldn't occur because of a change in a federal law during the pendency of the current rule. (The federal law is the Violence Against Women Act, 42 U.S.C. §§ 13701 through 14040.) Members agreed to note this in the petition. Members declined to adopt the comment concerning Rule 5.1 because when a court has multiple departments, one department should not direct another. Members agreed that court-ordered redactions under Rule 17 could become burdensome, but the comment focused on the AFI and the court's burden of redactions to the AFI should be mitigated by the adding redaction directions on Form 2 and a change to Rule 43.1(g) that would permit the clerk to treat the AFI as a confidential document. Members did not find inconsistencies between Rules 47 and 76 and made no changes. They also agreed that Rule 91(e), which provides that "a petition that requests a contempt remedy must comply with this rule and Rule 92," addressed the issue the comment raised.

15. *Mr. Halterman's comment regarding Rules 6, 10.1, 12, and 84.* Mr. Halterman's 3-page comment included a proposed modification to Rule 6(f) to allow a second notice of change of judge following a remand. Members had previously discussed this circumstance and declined to revisit the issue. Members then discussed the comment's suggestion that Rules 10.1 and 12 should require CAAs to record an interview of a child. Members declined to do so because CAAs don't do forensic interviews, recording could

be cumbersome, and the requirement might discourage CAAs from involvement in a case.

Members then discussed the comment's suggestion that Rule 84 expressly allow the filing of a motion for reconsideration. Some members noted that parties would probably continue to file motions for reconsideration even in the absence of any rule authority, or they would file them under Rule 35. After discussion, members declined to add motions for reconsideration back to Rule 84. However, they acknowledged that judges should have a vehicle to correct mistakes in interim orders and the rules should provide a way for parties to bring these issues to the court's attention. They therefore agreed to add a provision—either as a new section of Rule 35, as a new Rule 35.1, or as one of the reserved rules—permitting motions for reconsideration. Members gave the Chairs discretion about where to locate this provision, and its substance, although they believe it should be modeled on current Civil Rule 7.1(e).

16. *Mr. Norris' comment regarding Rule 12 and the rules generally.* In response to a comment concerning making the FLR more user-friendly for self-represented litigants, the Chairs recognized the members' previous discussions on this issue and their plans for explanatory booklets for those litigants. The comment proposed adding the word "permanency" in the family rules, but members did not support that addition. Finally, regarding interviews of children, members shared the comment's aspiration of having reliable information, but they believed there are multiple factors in achieving this goal and that the comment's proposed change might not produce the hoped-for result.

17. *Staff's comment regarding Rules 43 and 47.* Staff noted that current Rules 43(B) ("service; parties served; continuance") and 47(J) ("summary temporary child support order") were not included in the Task Force draft, and asked whether these were intentionally omitted. Members agreed that although there would not be several respondents in a case, there could be several third parties, and without objection, members agreed to add the substance of Rule 43(B) to the draft. They also agreed that Rule 47(J) was intentionally omitted.

18. *Ms. Madsen's comment regarding various rules.* Members declined to adopt additional changes to Rule 2 following their prior and extensive discussions of this rule. They declined to add a definition of intervenor to Rule 3. Members discussed the issue raised in the comment concerning in-home dependency placement, but draft Rule 5.1(d) already allows the juvenile court to establish child support and the trial court should address the issue when it comes up. Proposed Rule 6.1(d) is like the corresponding civil rule, and the comment pertains to one-judge counties, which are few, and members made no changes to this rule. Members revisited Rule 9(c), but they believed their draft rule required no further changes. However, one member suggested that a standard form for a good faith consultation certificate might address Ms. Madsen's concerns, and this lead to a brief but general discussion on family law forms. Several members have discussed

forms in workgroup settings, but it appears additional forms will not be completed before the Task Force files its rule petition. However, Judge Armstrong observed that the term of this Task Force extends to the end of 2018, and the Task Force therefore will have an opportunity to address forms later. The members who are working on forms will provide an update at the next Task Force meeting.

Members did not believe that Rule 20 required further clarification. However, they added the words, "or in an action for" to Rule 27(b). In Rule 29, they agreed to change "responding defendant" to "responding third-party." A member proposed modifying Rule 29(b) in a way that would permit a party's response to a motion to be in the form of a motion to dismiss that motion. After discussion, members declined to make this modification, but they agreed to note the member's proposal in the rule petition. Finally, members discussed a comment from Ms. Madsen concerning Rule 45 that suggested the adoption of clearer language concerning genders. Members believed that Rule 45's content was appropriate and accurately mirrored statutory language.

The Chairs expressed their appreciation to all those who submitted comments for their prefiling review of the draft rules and for their thoughtful suggestions. These comments improved the proposed rules.

3. Draft rule petition and appendices to the petition. The Chair advised that the draft rule petition, which was included in the meeting materials, will require further revisions based on today's discussions. Members agreed that Appendix C, which contains conforming amendments to ARCAP 9, is straightforward and requires no additional edits. They also agreed that Appendix B—the contemplated appendix containing rule-by-rule summaries of each draft rule—would not be necessary given the depth of explanations concerning substantive changes in the rule petition and in the prefatory comment.

The Chairs requested that members notify staff of any proposed edits to the correlation table. The correlation table will be included with the proposed rules. Judge Armstrong advised that he had already forwarded this table to a subject matter expert for her review.

There are three rule petitions pending in the current cycle concerning family law rules: R-17-0049, concerning Rule 72; R-18-0019, concerning Rule 65(A)(2)(b); and R-18-0023 concerning family law masters and parenting coordinators. The Chairs summarized these petitions, and members agreed that the petitions did not require modifications to the Task Force rules or its rule petition.

The Chair advised that the Task Force would not meet again before the filing of the rule petition in March. She asked the members for their authorization for the Chairs

and staff to edit and finalize the draft rule petition and companion documents. A member then made this motion:

> **Motion:** The Chair and staff, and members working at the Chair's request, have the members' authority to edit and finalize the rule petition, including appendices, and to revise the proposed rules, consistent with the letter and spirit of today's discussion. Seconded and passed unanimously. **FLR: 014**

4. Roadmap; call to the public; adjourn. The Chair informed the members of the need to set another Task Force meeting in June, after the comment period has ended, to discuss comments and to prepare a reply. Staff will poll the members to determine the best meeting date.

There was no response to a call to the public.

The Chair commended the members and staff for their continuing good work and dedication to this project. The meeting adjourned at 2:37 p.m.