Task Force on the Arizona Rules of Family Law Procedure

State Courts Building, Phoenix

Meeting Minutes: April 28, 2017

Members attending: Hon. Rebecca Berch (Chair), Hon. Mark Armstrong (Co-Chair), Michael Aaron (by telephone), Hon. John Assini (by telephone), Keith Berkshire, Annette Burns, Cheri Clark, Hon. Suzanne Cohen, Helen Davis by her proxy Therese McElwee, Hon. Karl Eppich, Joi Hollis, Hon. Paul McMurdie, Aaron Nash, Jeffery Pollitt, Janet Sell by her proxy Holly Wan, Gregg Woodnick

Absent: Hon. Dean Christoffel, Mary Boyte Henderson, Kiilu Davis, Steven Serrano, Hon. Peter Swann, Steven Wolfson

Guests: None

Administrative Office of the Courts Staff: Mark Meltzer, Karla Williams, Sabrina Nash

1. <u>Call to order; introductory remarks; approval of meeting minutes.</u> The Chair called the third Task Force meeting to order at 10:01 a.m. She welcomed the members and introduced the proxies. The Chair advised that workgroups have met 7 times since the March 20 Task Force meeting, and she thanked the members for their diligence. But she observed that even if the Task Force completed all of the rules on today's agenda, it then would be less than a quarter of the way through the rules. Moreover, the rules completed so far are easier compared to the remaining ones. She requested that workgroups strive to prepare more rules for Task Force review. Because there are 99 rules, the Task Force needs to review, on average, more than a dozen rules at each meeting.

Judge Armstrong reminded (a) Workgroup 1 to consider pending rule petition R-17-0019 concerning proposed Rule 23.1; and (b) Workgroup 3 to consider pending petition R-17-0017 regarding proposed Rule 67.2.

During the call to the public at the March 20 Task Force meeting, a public member suggested that proposed Rule 22 concerning the conduct of proceedings should say that parents cannot expose their children to conflict and are prohibited from making disparaging remarks to their children about the other parent. Staff thereafter located documents used in three different counties that bear on this subject, which were posted on the Task Force meeting information webpage.

The first document was a notice from the Pima County Superior Court that says in part, "You are required to complete a course in Domestic Relations Education on Children's Issues (Parent Education)…if you have natural or adopted minor children

with the other party….You must attend the course within 45 days of filing a petition [or] being served with a petition….” Attendance is required under A.R.S. § 25-352.

The second document, from the Maricopa County Superior Court, was entiled “Order and Notice to Attend Parent Information Class.” It contained information similar to the Pima notice, but it explicitly says, “This is an official court order. If you fail to obey this order, the court may find you in contempt of court.” The notice portion of this document says that “the purpose of the program is to give parents information about how children are affected by matters that involve family courts.”

The third document was a standard form parenting plan used in Maricopa County. It requires the signatures of both parties. Section I of the plan (“additional arrangements and comments” at page 8) includes agreements to “praise the other parent” (“encourage love and respect between the minor children and the other parent, and [not] do anything that may hurt the other parent’s relationship with the minor children”); and to “cooperate and work together…consistent with the best interests of the minor children, and to amicably resolve such disputes as may arise.”

The fourth document, a single page, is from the Yavapai County Superior Court. The document lists the goals of parent education, including “helpful and harmful parent behaviors” and “parent conflict and what it does to children.”

The Chair accordingly noted that after considering the public comment, the subject addressed by that comment seems to be adequately covered elsewhere, and a rule of procedure on the subject does not appear necessary.

The Chair asked members to review the draft March 20, 2017 meeting minutes, and a member then made this motion:

Motion: To approve the draft minutes. Seconded, and the motion passed unanimously. **FLR: 003**

2. Discussion of style and substance. The Chair then discussed boundaries of rules restyling, and when it might be appropriate for workgroups to cross the threshold of a substantive rule revision. She referred to Administrative Order 2016-131, which established this Task Force. The Order directed that the Task Force recommend rule revisions “to conform to modern usage and to clarify and simplify language.” Judge Armstrong observed that changing the way a rule applies in a court proceeding to conform to modern usage might require a substantive revision. But he noted there may be circumstances when these substantive changes are appropriate and desirable. In those instances, the Task Force should “flag” the change in a comment or prefatory comment, explain how the proposed rule differs from the current one, and provide reasons for the change. The Chair added that it might not be easy to draw a “bright line” on when a substantive change may be necessary, and that members might determine on a rule-by-rule basis when these changes are appropriate. The Civil Rules Task Force drafted rules

that were more comprehensible for self-represented litigants by clarifying and simplifying language, and family rules revisions also should further that objective.

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

3. Workgroup 2. Mr. Pollitt presented three rules on behalf of Workgroup 2.

Rule 36 ("real party in interest"): Mr. Pollitt reviewed the workgroup's draft. He observed that the workgroup deleted a portion of staff's proposed provisions, particularly provisions that would conform the FLR to Civil Rule 17. The workgroup believed these provisions, covering topics such as bailees or executors as parties, had minimal application in family law cases. The Assistant Attorney General who was present at the meeting confirmed that the workgroup's proposed Rule 36(d) ("action in the name of the State for another's use") would be applicable in Title IV-D cases. Members agreed with the workgroup's changes.

Rule 37 ("death, incompetency, and transfer of interest"): Proposed Rule 37(a)(2) includes a provision that says, "if a party dies while a petition for paternity or maternity is pending, the action does not necessarily abate." Members believed this was appropriate. For example, after a respondent in a paternity action dies, a family court judge still might need to order DNA testing of the respondent, although the case thereafter could become a probate proceeding against the respondent's estate. However, members also believed that the proposed rule's recitation that the case "does not necessarily abate" did not adequately address what should happen after the petitioner's death. The members discussed whether Rule 37(a)(2) should include a reference to a pertinent statute, A.R.S. § 25-805. The statute provides guidance for the court in the event of the "death, absence, or insanity" of the petitioner in a paternity or maternity action. Members agreed these events were not common, but they were not rare either, and accordingly, the court rule should include a reference to this statute. They further agreed that the reference should be located in a comment to Rule 37 rather than in the body of Rule 37.

- Workgroup 2 will prepare a comment for Rule 37 that incorporates the statutory reference.

Rule 38 ("reserved"): Mr. Pollitt noted that the current rule has no text and members agreed that Rule 38 will remain as a "reserved" rule number.

4. Workgroup 4. Mr. Berkshire presented Rules 79 and 82, and Judge Eppich presented Rule 88.

Rule 79 ("summary judgment"): Mr. Berkshire advised that the restyled family rule mirrors newly restyled Civil Rule 56 in most respects, but the workgroup revised a few

items to conform the rule to family law proceedings. Draft Rule 79(b)(3) requires the filing of a summary judgment motion 90 days before "the date set for trial." The Task Force had previously discussed using the term "hearing" rather than "trial." One member suggested that "hearing" would be appropriate in Rule 79, but Judge Armstrong suggested dealing with this issue globally, later in the project, rather that on a piecemeal basis now. The draft of Rule 79(c)(4) ("objections to evidence") initially included language derived from Civil Rule 7.1(f), a rule for which there currently is no FLR analog. However, the workgroup did not believe Civil Rule 7.1(f) language was necessary in Rule 79, and it substantially pared Rule 79(c)(4) to simply say that a party objecting to the admissibility of evidence must raise the objection in a response, reply, or opposing statement of facts.

Members discussed the proposed requirement of a good faith consultation certificate in draft Rule 79(d)(1)(B). The workgroup proposed a provision that corresponds to Civil Rule 7.1(h). Mr. Berkshire suggested that in lieu of locating this provision in Rule 79, members should consider adding an analog to Civil Rule 7.1(h) in the general provisions of the FLR. Relocating the provision would allow its application to multiple family law rules, including rules on motions, discovery, and disclosure. One member supported adopting language in the FLR from Civil Rule 7.1(h), which requires a consultation "in person or by telephone, and not merely by letter or email." Counsel in family law cases occasionally will contend that a letter or email is sufficient "consultation," and adding language from the civil rule will clarify that these methods do not suffice. Members agreed it would be beneficial to insert the "good faith" provision in one of the "general" rules at the beginning of the FLR. Judge Armstrong suggested the workgroup might locate this provision within a new Rule 35.1, following Rule 35 on motion practice.

- The Chairs requested Workgroup 1 to draft language for a proposed rule on "good faith consultation."

However, Judge Armstrong cautioned about applying such a rule to self-represented litigants who might have orders of protection. The rule should apply in cases where both parties are represented, but this cohort constitutes only about ten percent of family cases. Workgroup 1 should also consider how the good faith consultation rule would apply where one party in a case, the party who has the order of protection, is represented, and the opposing party has no counsel.

Rule 82 ("findings and conclusions by the court; judgment on partial findings"): Mr. Berkshire noted that the workgroup removed verbiage in the current rule that makes the draft simpler and clearer. It eliminated in section (a) a sentence that said, "Requests for findings are not necessary for purposes of review." It also deleted from section (a) specific references to "motions under Rules 32 and 79" because these motions

are subsumed under the phrase "any other motion," which section (a) retains. Members agreed that the draft was more readable than the current rule and they had no other comments or revisions.

Rule 88 ("judge's inability to proceed"): Judge Eppich advised that Ms. Sell's alternative draft of this rule was stylistically different than staff's, but it was substantively the same. Members concurred with using Ms. Sell's version. Members agreed that the rule should refer to the successor judge as "the replacement" rather than "the new" judge. The second sentence of the draft begins with the words, "If an adequate electronic record is unavailable," and members discussed whether the word "electronic" was necessary. It appeared that not all counties have video recordings of proceedings, some have only audio; and in some cases, a replacement judge may not need to review any electronic record. Accordingly, members agreed to delete the word "electronic" from this phrase, and they otherwise agreed with the rule as modified.

5. **Workgroup 1.** Workgroup 1 presented Rules 11, 14, 23, and 30.

Rule 11("attendance of minors"): Mr. Woodnick recalled that at the March meeting, members had requested Workgroup 1 to make additional revisions to this rule. Thereafter, the workgroup modified its use of the words "minor child" and "child" in this rule, and it reorganized section (b). A member said that some practitioners contend the current rule operates to exclude children from testifying as witnesses, and asked the draft rule to address this contention. The members rejected adding to the draft rule the phrase, "unless the child is testifying as a witness," but they agreed to change the word "present" in sections (a) and (b) to "attending" or "attendance," which harmonizes the phrasing of the rule with its title. They also agreed to reverse the order of sections (a) and (b), so "exclusion of minors generally" is now the first section, and "attendance of a minor child affected by the proceeding" is the second. Finally, in new section (b), members added the words "affected by the proceeding" after the words "minor child." Members concurred with this rule as modified.

Rule 14 ("written verifications and unsworn declarations under penalty of perjury"): Mr. Woodnick advised that the workgroup made changes to this rule to make it more readable. In section (a) ("written verification"), the workgroup clarified language and added user-friendly descriptions to cross-referenced rule numbers. In section (b) ("unsworn declarations under penalty of perjury"), the workgroup paid particular attention to making the rule easier for self-represented litigants to understand by removing unnecessary words. Task Force members further streamlined the form of the subscription contained in draft section (b), and eliminated the words "executed on." Members agreed to the rule's text after these modifications.

Rule 23 ("beginning an action"): Judge Cohen explained that Rule 23 is the analog of Civil Rule 3. The workgroup removed language in current FLR 23 about a requirement that parties advise the court of their current address, because this requirement should be in a separate general rule concerning duties and conduct of parties. (The requirement to notify the court of an address change also is frequently mentioned in minute entries.) The members considered locating this general rule regarding duties of a party as Rule 21, which currently is "reserved." (Note that Rule 9 is a separate rule that concerns "duties of counsel.") Members discussed whether the remaining language of draft Rule 23 ("a family law action begins when a person files a petition with the court") is redundant to Rule 24; that rule provides in part, "A family law action is commenced by filing a petition with the clerk of the court."

- The Task Force returned Rule 23 to the workgroup to consider consolidating it with other rules, and for inclusion of a general provision concerning duties and conduct of parties.

Rule 30 ("form of pleading"): Mr. Woodnick noted the workgroup's suggestion that section (a) ("caption, names of parties") say that the petition "should" name all the parties, but after discussion, Task Force members changed this to "must" name all the parties. The workgroup removed from its draft version a Latin phrase ("et. al.") that is in current section (a). Although the workgroup deleted the entire provision of the current rule where this Latin phrase was used, one member suggested it would be beneficial to retain the portion that says it is unnecessary to include the names of all parties in the caption of subsequent filings. In section (b) ("paragraphs, separate statements"), members requested to reinsert the word "numbered" between "separate" and "paragraphs."

The discussion evolved to whether rules should have different requirements for filings by attorneys and filings by self-represented parties, many of whom file handwritten documents that are marginally compliant with the rules' formal mandates. Some members contended the rules should not have one standard for counsel, and another standard for pro per filers. Other members believed the rules should not contain pleading requirements that self-represented litigants do not follow, and that judges don't enforce. And others suggested that there are certain basic requirements, for example, that filers use only one side of the paper, which all filers are obligated to observe. A few members were reticent to adopt in FLR 30 the relatively rigid requirements of corresponding Civil Rule 5.2 ("form of documents").

- Workgroup 1, which is assigned Rules 24, 30, and related rules, should consider and propose practical responses to the above issues regarding the requirements of court filings.

6. **Roadmap.** The Chair confirmed June 12, July 14, and August 25 as Task Force meeting dates. Because of the number of rules remaining for Task Force review, the Chair also set an additional Task Force meeting for August 4, 2017. If the Task Force makes substantial progress at the next two meetings, the Chair might vacate the August 4 date; but it appears that meeting will be necessary for adequate progress toward the January deadline for filing a rule petition. She encouraged workgroups to review their rules as soon as practicable so the Task Force has a reasonable time to consider each rule.

By a show of hands, the Task Force should have a quorum for the June 12 meeting.

7. **Call to the public; adjourn.** There was no response to the Chair's call to the public.

The meeting adjourned at 1:38 p.m.