Task Force on the Arizona Rules of Family Law Procedure

State Courts Building, Phoenix

Meeting Minutes: June 12, 2017

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

Absent: Hon. Dean Christoffel

Guests: Hon. Scott Bales, Terry Decker, Tanya Henson, Martin Lynch, Ed Pizarro Sr., Claudia Arrunategui

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

1. Call to order; remarks by the Chief Justice. The Chair called the fourth Task Force meeting to order at 10:01 a.m. She welcomed Chief Justice Scott Bales and invited him to address the Committee. The Chief Justice noted that the work of this Task Force is very demanding, but it's also critically important because rules of procedure affect every family law case. The restyling of the family law rules is a culmination of rules projects that began during his tenure as Chief Justice, which included restyling of the evidence, civil appellate, protective order, civil, and criminal rules. These projects furthered major goals of his strategic agenda, such as promoting access to justice and improving judicial procedures. Clear and simple rules help cases progress through the court system. He anticipated that the restyled family law rules will greatly improve the usability of the rules, especially for self-represented litigants. He recognized that the timetable for the Task Force to complete its work is challenging, yet he commended the capability of the Task Force members and he looked forward to seeing their rule petition next year. He concluded by expressing the justices' appreciation for the work and commitment of Task Force members.

2. Remarks by the Chair; approval of meeting minutes. The Chair advised that workgroups had met 20 times to-date, including 8 meetings since the April 28 Task Force meeting; and that each workgroup has a pending meeting date. Based on the number of rules now completed, she said the Task Force was on track to meet the Court's timetable, but many of the completed rules were "easy" and she encouraged the workgroups to remain diligent. She acknowledged that workgroups are time-consuming, and she and Judge Armstrong thanked the members for their excellent effort.

Judge Armstrong also reminded the workgroups to consistently use terminology by referring to rules, sections, and subparts. The Chair then asked members to review the draft April 28, 2017 meeting minutes, and a member then made this motion:

> **Motion:** To approve the draft minutes. Seconded, and the motion passed unanimously. **FLR: 004**

The Chair then asked for rule presentations by the workgroups.

3. Workgroup 2. Workgroup 2 presented Rules 39 and 43.

Rule 39 (currently "proof of authority by attorney for respondent not personally served," and proposed, "reserved"): Mr. Pollitt noted that in 2008, the Court deleted corresponding Civil Rule 80(f), which is referenced in the comment to the current family rule. What thereafter remained in the family rule concerns the notice of appearance, and this topic will be covered in restyled Rule 9(d)(1)(A). Mr. Pollitt accordingly recommended that the content of current Rule 39 be deleted, and that Rule 39 instead be "reserved." Task Force members concurred with his recommendation.

Rule 43 (now, "service and filing of pleadings and other papers; sensitive data form," and proposed, "serving pleadings and other documents"): Ms. Clark advised that the workgroup utilized the corresponding civil rule, Rule 5.1, as a starting point, but it removed text that had no application to family cases, for example, a provision about "seizing property." The workgroup also attempted to eliminate redundancies. Task Force members then offered comments. In (a)(1), a member suggested deleting as unnecessary the words "other parties" from the phrase "service on other parties," and changing "Rule 43" to "this rule." In that same sentence, another member suggested changing "summons, petition, and response" to "summons, petition, or order to appear." Members agreed to these changes. They also agreed to delete the entirety of subpart (a)(3) ("if a party fails to respond to the petition"), because there are circumstances, especially in cases involving children, where a failure to respond should not impair a party's rights. They further noted that in some situations involving an order to appear or a post-judgment proceeding, a response to a petition is not required and a failure to respond does not result in a party's default. Members also agreed to delete an inappropriate draft provision concerning "serving numerous defendants." (The Chair directed staff to do a global search for the word "defendant," and to replace it with the correct family law term, "respondent.")

The word "service" is a term of art. It sometimes refers to the original service of a summons and petition, and at other times it refers to "delivery" in the course of litigation. One member suggested that the rules should refer to the latter as "mail," because that is how service is typically done since it does not require "personal delivery." Another

member suggested that there were three levels of service: one, service in the course of litigation; two, quasi-personal service (i.e., on an agent or a person of suitable age and discretion); and three, actual service on the person (i.e, what is necessary for a contempt petition.) Many self-represented litigants misunderstand these distinctions. One member observed that Rule 41 and 42 service establishes jurisdiction, whereas Rule 43 service provides notice. Members discussed the possibility of using a distinct word for each level of service (even "levels 1, 2, and 3"), and describing these levels in Rule 40. Members agreed that self-represented litigants in family court should have a simple and clear explanation of service.

- The Chair returned Rule 43 to Workgroup 2 to fashion definitions and explanations, and to determine where these should be located. When the Workgroup next presents Rule 43, it should also present Rules 40, 41, and 42 sequentially.

4. <u>Workgroup 3.</u> The Chair then asked Workgroup 3 to present its rules.

Rule 57 ("depositions by oral examination"): Mr. Wolfson first advised that the workgroup intends to add a provision about the need for parties to confer and cooperate on deposition scheduling. The workgroup deleted provisions found in Civil Rule 30(b)(5) concerning the "officer's duties" because it believed those provisions were either antiquated or redundant. However, Task Force members noted the need to include in Rule 57 a provision that the officer administers an oath. (Members agreed that an unsworn audio recording is not a "permitted method" under draft Rule 57(b)(3)(A).) The workgroup discussed whether parties should have equal amounts of time at a deposition, but Task Force members were comfortable with the approach taken by the civil rules, which is reflected in draft Rule 57(c). In draft Rule 57(e), the workgroup did not determine a time limit for a deponent's review of a transcript when the deposition occurred less than 30 days before trial. And it changed this provision to make submission of the transcript to the deponent optional rather than mandatory.

Members discussed draft Rule 57(g), which allows for sanctions against the noticing party under specified circumstances. The current provision does not provide for sanctions against a non-appearing deponent, and the members considered but did not decide whether to provide for that circumstance in this rule or in Rule 65. Members also discussed draft Rule 57(a)(2), which requires a petitioner to obtain court permission to take a deposition sooner than 30 days after service of a petition. One member suggested changing "petitioner" to "party" so the provision applied to both parties, but other members offered reasons for applying this 30 day requirement solely to petitioners. However, a judge member observed that a "petitioner" in a post-decree proceeding may have been the "respondent" during pre-judgment proceedings, with resulting name confusion. The judge suggested addressing this confusion by treating both sides equally.

The members agreed with the judge and revised (a)(2) to provide that "a party" must obtain the court's permission unless both parties otherwise agree in writing, or if the deponent may leave Arizona within the 30 day period. Members made a conforming change to the title of (a)(2). They also made a conforming change to the title of section (c) by removing the words, "written questions."

Section (d) includes provisions for a motion to terminate or limit a deposition. The draft rule is comparable to restyled Civil Rule 30(d)(3). Members discussed how the rule works in practice, and whether or how the parties could contact a judge. Can a party terminate a deposition unilaterally? If a party terminates a deposition without judicial input, should the party be required to file a subsequent motion, and if so, what should be the filing deadline? (Members agreed that within 10 days was an appropriate time.) Should a provision allow sanctions for a frivolous motion, one interposed solely for delay, or one that is not granted? Should the opportunity to terminate or limit be available to either side (the deponent and the deposing party)? Should there be a good faith requirement?

- The Chair asked the workgroup to consider these issues.

Section (d) also includes a 4-hour deposition limit. Members discussed whether time spent during breaks, or when the parties were "off-the-record," should be excluded from that limit. Would it matter whether it was the deponent or the examiner who requested a break? Members concluded that the family rule is modeled on the corresponding civil rule, which does not go into this level of detail, and they accordingly made no changes to the family rule. One member proposed relocating (c)(3) ("conferences between deponent and counsel") to section (d), but after discussion, the Task Force declined this suggestion. Members agreed to retain (a)(4), which specifies that a subpoena is not necessary to require a party's attendance at a deposition; this provision is particularly for the benefit of self-represented litigants.

Members made stylistic changes elsewhere in the rule, such as using the word "party" rather than "it," adding the words "or affirmation" after the word "oath," and in places, changing the word "officer" to "certified court reporter." A member asked whether Rule 57 should specify who may be present at a deposition. The member proposed limiting those present, absent a court order, to the parties and their counsel. But other members noted that an expert may want to attend, as may a parent of a minor in a paternity case. On the other hand, and without the parties' agreement, the attendance of friends and significant others could be problematic.

- The Chair asked the workgroup to address this issue, including how notice of a non-party's attendance would be provided, and who would have the burden of obtaining a court order to allow or disallow a non-party to attend. The Chair

would also like the workgroup (1) to consider the sanctions issue noted earlier, including whether to relocate section (g); (2) to further review (c)(2) regarding objections; and (3) to make additional conforming changes consistently with the first sentence of the paragraph above.

Rule 58 (now, "depositions by written questions" and proposed, "reserved"): Judge Swann advised that the procedure provided by this rule had no ongoing relevance. The workgroup recommended, and Task Force members agreed, that the text of this rule be deleted, and that the rule be "reserved."

Rule 60 ("interrogatories to parties"): Mr. Wolfson and Judge Swann jointly presented this rule. The rule, which as drafted includes uniform as well as non-uniform interrogatories, provides for a limit on the number of interrogatories. There are different ways of counting uniform and non-uniform interrogatories; in uniform interrogatories, subparts are not counted, but subparts are counted in non-uniform interrogatories. Also, spousal maintenance is now a subject for non-uniform interrogatories, but the workgroup envisions drafting uniform interrogatories for spousal maintenance. (Mr. Wolfson will advise members when the workgroup will be discussing spousal maintenance interrogatories.) The workgroup also considered whether some uniform interrogatories might be inapt or misplaced and whether those should be deleted. Members discussed the numerical limit for interrogatories, but they did not reach consensus on a particular number. However, they concurred that each uniform interrogatory and its subparts should only count as one interrogatory.

One member suggested that interrogatories were more "affordable" for self-represented litigants than other types of discovery, but said these litigants may not understand the meaning of "interrogatories." The member suggested that the rule include clearer language, and that the word "oath" be added to the definition in Rule 60(a)(1).

- The workgroup will review this rule further.

Rule 61 (now, "uniform and non-uniform interrogatories; limitations; procedures," and proposed, "reserved"): Mr. Wolfson advised that the substance of the current rule is now in proposed Rule 60, and the workgroup recommended that Rule 61 be "reserved." Members concurred.

Rule 62 ("production of documents, etc."): Judge Swann reviewed the restyled rule. He noted additional language modeled on the revised civil rule concerning electronically stored information. Members proceeded to a discussion of the limit provided in draft Rule 62(b)(1) of "10 items or distinct categories of items." Members criticized this phrasing and noted that a category could include multiple subsections of documents. For example, a single category might request "business records" plus numerous sub-

categories under that general item. Judge Swann acknowledged that the word "category" was not particularly specific; he asked members to propose a better term, but none were proposed.

One member suggested that disclosure should be the touchstone of production; that this concept should be built into the rules; and that a party should be able to demand compliance with disclosure without the necessity of serving a request for production. Another member agreed and noted that disclosure, discovery, and mandatory forms may require the production of duplicate information. In addition, parties occasionally ask for information, e.g., records of joint bank accounts, which both parties can access. Members concurred that requests for production could be used abusively, and that courts may not have the resources to effectively manage discovery. Members discussed possible ways to address this problem. Proposed solutions included uniform requests for production; or an enforceable standard of "reasonableness," that is, that the requested information be relevant and reasonable in both scope and quantity. Judge Swann observed that uniform requests for production, like uniform interrogatories, might be overused and be requested in cases where they don't apply. Members also should be mindful of cases in which experts may ask counsel to request particular documents. And there are situations in which there is an imbalance of power between spouses, where notwithstanding the joint nature of an account or asset, one party is in control of information.

- Workgroup 3 will reconsider draft Rule 62 in light of this discussion. Ms. Davis and Mr. Berkshire offered to prepare and present a set of uniform requests for production.

Rule 63 ("physical, mental, and vocational evaluations of persons"): Mr. Wolfson and Judge Swann, who also jointly presented this rule, noted that it raised a variety of evidentiary and logistical issues. An example of an evidentiary issue of concern was the difference in treatment between a report from the conciliation court, which typically is admitted as evidence even when the author does not testify; and a report from, for example, a vocational expert, which may not be admitted as evidence even if the expert has testified. The workgroup was divided on how to treat these differences. Some believed that application of the rules of evidence would keep all of these reports out of evidence; that the mere preparation of a written report does not make it admissible; and that because a report, such as one from the conciliation court, was court-ordered should not render it automatically admissible. One member said that the court's appointment of an expert under Rule 63 should not invariably render the expert "court-appointed," because the expert still may have been selected by a party. Some members believed that expert opinions need to be tested by courtroom cross-examination. Others believed that if an expert witness testified and laid a proper foundation, then the expert's written report should be admitted even when the expert did not testify about the entire contents of the

report. One member made a distinction between a report that simply contains the content of an interview, which would be admissible, and a report that includes conclusions and recommendations, such as a § 25-406 custody evaluation, which should not be admitted. Rule 63 does not address these issues, but Judge Swann proposed that Rule 2 should address them. Judge Armstrong noted that Evidence Rule 702 applied even if the rules are not invoked under Rule 2.

- Following this discussion, members asked Workgroup 1 to consider these issues when they review Rule 2.

Elsewhere in Rule 63, members discussed the meaning in section (d) of "like reports of the same condition." They modified this phrase by saying "all other reports for the same condition, except for a vocational exam protected by the work product privilege." Distinguishing Rule 63 from corresponding Civil Rule 35, members further revised the "waiver of privilege" provision of Rule 63(d) to say that a Rule 63 examination "does not constitute a waiver of any privilege that the examined party is otherwise entitled to assert under law." Members also discussed the provisions of draft Rule 63(c) concerning the attendance of a representative and making an audio or video recording of an examination. They agreed that whether to allow a representative or a recording should depend on the type of examination at issue. They concurred that the examining expert for a physical or vocational exam could determine if a representative or recording would "adversely affect the examination's outcome," but if the examined person insisted on a representative or recording and the court did not order otherwise, the examiner could decline to perform the exam. On the other hand, the workgroup concluded that a representative or recording would presumptively and adversely affect the outcome of a mental examination, and it drafted a provision to this effect. However, the provision still allows the parties and the examiner to agree to the presence of a representative or a recording, or to request the court to permit the representative or recording for good cause.

- The Chair asked the workgroup to further review this draft rule and add other clarifying language where needed.

Rule 64 ("requests for admission"): Mr. Wolfson noted that the workgroup's changes streamlined the rule. One member objected to shortening the response time from 40 days, which is in the current family rule, to 30 days, which is the time for responding in corresponding Civil Rule 36. Another member believed that 30 days would be easier to calculate for practitioners who do both civil and family work, and that 30 days, i.e., one month, is also easier to calculate than 40 days. But other members supported the 40 day period, and noted that while most civil litigants have counsel, most family litigants do not, and they would benefit from the additional time. Another member noted the omission from this draft rule of a 60 day period to respond after service of requests for admission with the summons and petition, and the member asked that this be added

back. After discussion and a straw vote, the members favored the 40/60 day period not only for responding to requests for admissions, but also for responding to requests for production and for answering interrogatories.

Draft Rule 65(b) concerns the effect of an admission, and the withdrawal or amendment of an admission. A member asked whether there should be a time limit for a withdrawal or amendment. For example, if a party files a summary judgment motion based on admissions, would the opposing party's subsequent request to withdraw or amend be untimely? Members discussed the standard and the burden. Judge Armstrong noted that the second sentence of Civil Rule 36(b) contains a standard based on federal case law, and members agreed that this sentence should be incorporated in Rule 65(b). (Members also agreed that the words "requesting party" in the referenced sentence refers to the party who requested the admission rather than the party requesting relief.)

- The Chair requested the workgroup to add the sentence from Civil Rule 36(b). She also asked the workgroup to consider whether Rule 64 should include an equivalent to Justice Court Rule of Civil Procedure 126(b), which among other things requires a notice to the opposing party of a calendar date when responses to requests for admission are due.

5. <u>Workgroup 4.</u> Mr. Berkshire presented Rule 85, and Judge McMurdie and Ms. Davis jointly presented Rule 91.

Rule 85 ("relief from judgment or order"): Mr. Berkshire noted that the language of proposed Rule 85 was almost identical to corresponding Civil Rule 60, and this would facilitate the application in family law matters of case law under the civil rule. Members had no questions and no suggested changes regarding Rule 85.

Rule 91 ("modification or enforcement of a judgment"): Judge McMurdie and Ms. Davis advised that the workgroup reorganized current Rule 91 into a newly written Rule 91 and new Rules 91.1 through 91.7. Their presentation today concerned the newly written Rule 91 only. The workgroup revised this rule to reflect actual practices in post-judgment proceedings, and to eliminate traps for self-represented litigants. For example, on a post-judgment petition to modify child support under the proposed rule, an affidavit of financial information would not need to accompany the petition, but would be due at a more realistic time set at the return hearing. Moreover, the procedure for the initial filing would be more straightforward; see proposed Rule 91(j)(1), "setting a return hearing or rejecting a petition." A judicial officer would first screen a post-judgment petition under the proposed rule. As in a Civil Rule 12(b)(6) proceeding, the judicial officer would presume that all of the information in the petition was true, and then determine whether that information would be sufficient to state a claim upon which the court could grant relief. If it did, the judicial officer would issue an order to appear; and

if it did not, the judicial officer would reject the petition, and provide the applicant with an explanation of the deficiency and an opportunity to correct it.

The workgroup also considered a requirement that parties submit to mediation before they can file a post-judgment petition. The workgroup concluded that this is counterproductive because it empowers a recalcitrant party to delay judicial proceedings. Judge McMurdie observed that some self-represented litigants who have a decree that requires mediation before seeking judicial intervention believe they are precluded from filing a post-judgment petition if the other party won't first engage in mediation. Proposed Rule 91(l) ("mediation") accordingly provides that "no party may be required to submit to mediation before filing a petition." This provision would allow a judge to require mediation, but after rather than before the filing of a post-judgment petition. (Members noted that a mediation provision in a decree is often "boilerplate" rather than the result of a knowing agreement, and such a provision may even constitute a deprivation of due process.) However, after discussion, members agreed to add to the language of Rule 91(l) quoted above the underlined words "before filing a petition <u>for modification of legal decision-making or parenting time."</u> Members discussed current Rule 66(C) ("initiation of ADR") and further agreed to add a new sentence to section (l) that says, "The court may not order private mediation absent an agreement of the parties."

This led to a discussion about the availability of mediation services through courts in all 15 Arizona counties. Some counties have conciliation courts that offer mediation for a nominal fee or no fee. But other counties don't have that resource. Courts in those counties may have contracts with private providers ("court-annexed mediators"), but members were not sure which counties had those arrangements. And even Maricopa County is not offering free dispute resolution in post-decree proceedings, not as a policy choice, but because of its high volume of cases.

- The Chair requested staff to research arrangements each county has for mediation services.

Ms. Davis observed that the workgroup deleted requirements for exchanging resolution management statements and other disclosure before the return hearing. The workgroup believed that the resolution statements sometimes have marginal application in post-judgment proceedings. Moreover, early disclosure requirements do not make the litigation more productive, and Ms. Davis noted that generally, neither attorneys nor self-represented litigants are disclosing information before the return hearing. Draft rule 91(m) would allow the court to set times to comply with disclosure at the return or other hearing. The workgroup removed a current provision that allows the return hearing to be an evidentiary proceeding. Members also discussed draft Rule 91(d), which would require the petitioner to submit an order to appear with a post-judgment petition. One

member inquired whether a petition that requested modification of legal decision-making should include a summons rather than an order to appear.

- The Chairs noted that Rule 91 is a work-in-progress. The rule will go back to Workgroup 4, which will consider the members' comments today and make further revisions.

6. Roadmap. The Chair confirmed July 14, August 4, August 25, and September 29 as Task Force meeting dates. All of these dates are on Friday. By a show of hands, the Task Force should have a quorum for the July 14 meeting. The Chair encouraged workgroups to schedule future meeting dates. The Chair also advised that Mr. Serrano had resigned from the Task Force, and the Chief Justice has appointed David Horowitz to fill that vacancy. The Chair assigned Mr. Horowitz to Workgroup 3.

7. Call to the public. The Chair made a call to the public. Mr. Terry Decker, Mr. Martin Lynch, and Mr. Ed Pizzaro, Sr., responded and addressed the members.

8. Adjourn. The meeting adjourned a**t** 4:02 p.m.