Task Force on the Arizona Rules of Family Law Procedure

State Courts Building, Phoenix

Meeting Minutes: July 14, 2017

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

Absent: Hon. Peter Swann

Guests: Lindsay Cohen, Nick Brown, Julie Coleman, Ed Pizarro Sr.

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

1. <u>Call to order; preliminary remarks by the Chairs; approval of meeting minutes.</u> The Chair called the fifth Task Force meeting to order at 10:01 a.m. She welcomed the members and introduced a new member, Mr. Horowitz. Workgroups have met 26 times to-date, including 6 occasions since the June 12 Task Force meeting. The Chair discussed the Task Force's progress and commended the members' dedication to this project. The August 4 Task Force meeting represents the "halfway" point, and the Chair will determine at the conclusion of that meeting whether to add one more plenary meeting to the Task Force schedule. Judge Armstrong requested the workgroups to prepare explanations of changes the Task Force is making to each rule, and to note in those explanations whether changes are substantive or are restyling only. The Task Force rule petition will include an appendix with those rule-by-rule explanations, similar to appendices filed by the Civil and Criminal Rules Task Force with their rule petitions. Judge Armstrong emphasized that it's easier for members to keep track of those changes as the work progress, rather than compiling them retrospectively. Judge Armstrong also noted that if the Task Force proposes a new comment, it should be titled, "Comment to the 2019 Amendment."

The Chair then asked members to review the draft June 12, 2017 meeting minutes, and a member made this motion:

> **<u>Motion:</u>** To approve the draft minutes. Seconded, and the motion passed unanimously. **FLR: 005**

2. <u>Workgroup 4.</u> The Chair asked Workgroup 4 to begin today's presentations.

Rule 91 ("modification or enforcement of a judgment"): Judge McMurdie and Ms. Davis made an initial presentation of Rule 91 at the June 12 meeting. Ms. Davis today continued the presentation of Rule 91 and new ancillary Rules 91.1 through 91.6. She observed that current Rule 91 is unnecessarily repetitive and cumulative, that its provisions made compliance difficult for attorneys as well as self-represented litigants, and as a result, portions of the current rule were commonly ignored. To address these issues, the workgroup reduced the size of the rule, and made it more practical and accessible for attorneys and self-represented litigants. The workgroup also reorganized the rule by placing provisions applicable to any post-judgment petition in Rule 91, and by adding separate Rules 91.1 through 91.6 that contain provisions applicable to specific types of modification or enforcement actions. Ms. Davis said that the increased clarity of these draft rules remove "hurdles to the courthouse." She gave these examples:

- An applicant does not need to file an Affidavit of Financial Information ("AFI") with a petition, a practice that now results in a considerable amount of blank answers and "unknowns." Instead, the AFI completion date would be keyed to the return hearing date.
- Petitions for unreimbursed medical expenses would not require the considerable information specified by the current rule, but would instead require a meaningful amount of supporting detail.
- Parties may now be required to engage in pre-petition mediation for legal decision-making disputes, which can be counter-productive and may delay resolution. The workgroup's draft would require mediation at a later time, i.e., before an evidentiary hearing on the petition.

The Chair opened the draft rule for member comments.

- A member asked how the rule would treat parenting plans that require mediation before filing a petition. Ms. Davis suggested that a new comment to the rule could further explain the mediation requirement.
- Another member raised a concern with a requirement in draft Rule 91(b) that the petition include a copy of the judgment the applicant seeks to modify or enforce. If the judgment is already in the court's file, the judge should be able to locate it when the applicant provides the filing date. On the other hand, the court will need an attachment when the petition involves a judgment from another venue or jurisdiction.
    - Members agreed to carve out a "IV-D" exception to this requirement in Rule 91(b)(3), and the workgroup will prepare revised language. Meanwhile,

members discussed and inserted in Rule 91(b)(4) text that would require a reference to the page number and section of the underlying judgment.

- A member asked whether the rule should require the attachment of a child support worksheet when the petition concerns child support. Members deferred this inquiry to their discussion of Rule 91.1; see page 4 of these minutes.
- In Rule 91(d) ("mediation"), a member suggested changing the phrase "schedule an evidentiary hearing" to "hold an evidentiary hearing." Members agreed with the suggestion.
- Members also commented on the last sentence of Rule 91(d) ("the court may not order private mediation absent an agreement of the parties.") They discussed the interaction of this provision with Rule 66, which concerns alternative dispute resolution, and the availability of mediation services in particular counties. Members agreed to remove this sentence pending their discussion of Rule 66.

Rule 91.1 ("post-judgment petition to modify spousal maintenance or child support") and the issue of return hearings: Members proceeded to an extensive discussion of the "return hearing," which is a term used throughout Rule 91; see, for example, Rule 91(i)(1) ("setting a return hearing or rejecting a petition"). The issue was precipitated by a member's observation that Rule 91.1(c) ("affidavit of financial information") bases the time for the parties to exchange this document on the date of the return hearing, but there is no return hearing in a IV-D case. In other counties, notably Yuma and Pima, courts set orders to appear ("OTA") for an evidentiary hearing rather than a return hearing because they may have insufficient resources to conduct both hearings. A member also suggested that a single hearing is practical because self-represented litigants are less likely to appear if the court sets more than one hearing on a petition. If mediation is required before an evidentiary hearing, the court would be reluctant to set a return hearing solely to order mediation, because the court could do that by a written order sent to the parties. But other members had different points of view and expressed a preference that courts set OTAs for return hearings. They observed that return hearings facilitate due process by permitting responses and disclosures before an evidentiary hearing. These members emphasized that brief return hearings are useful for confirming service on the respondent and for resolving cases, and they help avoid the need for a longer evidentiary hearing. A "return hearing" simply means the parties will "return to court," and the term does not imply an evidentiary proceeding.

Regardless, members agreed that the OTA should specify whether the court will consider evidence at the hearing. But there was a split among the members about whether the hearing must be non-evidentiary. About half the members agreed with the proposed text of Rule 91(i) ("initial review of petitions and return hearing") that states, "If the court

issues the Order to Appear, it must set a return hearing where, excepting emergent circumstances, no evidence will be taken." But the other half of the members preferred a rule that allows the court to set either a non-evidentiary return hearing or an evidentiary hearing according to local practice. The Chair advised that the Task Force's rule petition would note the split of opinion and solicit comments from stakeholders on this subject. Members agreed that if the rule ultimately provides for a non-evidentiary return hearing (absent exigent circumstances), judicial education would be necessary to assure its implementation as a uniform statewide procedure. They also agreed that a rule that eventually permits an OTA for an evidentiary hearing would require several additional changes to Rule 91.

Members also discussed a new provision in Rule 91(j) ("manner and timing of service"). The version introduced at the June 12 meeting required service of the petition "at least 10 days before the scheduled conference or hearing." The workgroup's revised version would require service "no later than 10 days after receipt of the issued Order to Appear…." A member suggested that in IV-D cases, respondents may move frequently and it may be difficult to serve the respondent this quickly as proposed; the member suggested "20 days before the hearing" as a compromise. Members disfavored an exception in this rule for IV-D cases that would allow a state agency more time to effect service than a private litigant. After a further discussion of alternatives, members concurred with bracketing the service time in Rule 91(j) as follows: "The applicant must make good faith efforts to complete service promptly and within 10 days after the receipt of the issued order to appear, but must complete service in no event later than 20 days before the hearing." In proposing this language, members expressed concern about making the rule more complicated rather than simpler. They discussed whether different times for completing service should apply if the OTA was for an evidentiary hearing rather than a return hearing. During the course of the discussion they reconsidered the Rule 91(i) issue discussed above, but they again concluded they would identify that issue in their petition and request comments. Although a member proposed language that the applicant must complete service 20 days before a return hearing and 30 days before an evidentiary hearing, members declined to adopt this proposed change at today's meeting.

While on the subject of Rule 91.1(b)(1), which concerns a petition for child support in a "standard procedure" case, members resumed their discussion on appending to the petition a copy of a child support worksheet. Members acknowledged that the worksheet might not always be available, but the worksheet would be useful for showing how the existing number was derived and what the applicant was asking the court to modify. Members agreed to this addition, and to describe the appropriate worksheet, they used this language: that the applicant must "attach a copy of the most recent child support worksheet that supports the existing child support order, if available." They agreed that

it was not necessary to include a worksheet for a "simplified procedure" case (Rule 91.1(b)(2)), which is governed by the Arizona Child Support Guidelines.

Rule 91.2 ("post-judgment petition to enforce spousal maintenance or child support"): The workgroup draft of this rule required "a current summary calculation of the arrears derived from the Clearinghouse records of the Department of Child Support Enforcement…." Members discussed the practice of obtaining an arrearage calculation and the distinction between that calculation and a "payment history," which may not show the amount due. One member also noted that in Maricopa County, the court does an independent calculation of the arrearage. Because an applicant may need to submit a clearinghouse calculation from out-of-state, the members agreed to use lower case letters, which are more generic, rather than capital letters, and they made other modifications to this provision. Their agreed-upon language for this portion of Rule 91.2(a) is, "The petition also must include a current summary calculation of arrears derived from support payment clearinghouse records…."

Rule 91.3 ("Post-Judgment Petition to Modify Legal Decision Making or Parenting Time"), Rule 91.4 ("Post-Judgment Petition to Relocate or Prevent Relocation"), and Rule 91.5 ("Post-Judgment Petition for Enforcement of Legal Decision-Making or Parenting Time; Warrant to Take Physical Custody"): Members discussed these rules but they had no significant revisions to the workgroup's drafts.

*Rule 91.6 ("other post-judgment petition*s"): The workgroup's draft of this rule required the petition to state "the specific legal authority that confers subject matter jurisdiction on the family court, or authorizes it to grant the relief requested." One member observed that the "family" court is actually the "superior court," so members deleted the word "family." The also removed the words "subject matter jurisdiction" from the remaining part of this provision and revised it to say, "the specific legal authority that permits the court to grant the relief requested."

Rule 89 ("enforcing a judgment for a specific act"): Judge Eppich presented this rule. He advised that it was modeled on restyled Civil Rule 70. Members approved the rule without any changes to the draft.

3. **<u>Workgroup 1.</u>** Workgroup 1 then presented several of its rules.

Rule 6 ("change of judge as a matter of right") and Rule 6.1 ("change of judge for cause"): Ms. Henderson advised that these rules are based on restyled civil rules, but the workgroup made appropriate modifications for family law proceedings. She reminded the members that they had reviewed these rules at a previous Task Force meeting. One issue then was who was a "judge" under these rules. The workgroup added a definition of "judge" in Rule 6(a) ("definitions") that defined this word, as used in Rule 6 and Rule 6.1, as "any judge, judge pro tem, or court commissioner." Rule 6 clarified that there is

only one change as a matter of right. On the "time limits" in Rule 6(d), members discussed a 60-day requirement for holding a temporary orders hearing and concluded that no change to the draft of Rule 6 was warranted. But in Rule 6(f) ("actions remanded from an appellate court"), the members concurred that a remand for a "new trial" did not encompass a remand of a "contested hearing," and they added "contested hearing" to this provision.

Rule 8 ("telephonic appearance and testimony"): Mr. Woodnick noted that the workgroup took a pragmatic approach to this rule but it had concerns with the manner of supplying exhibits to a witness who testified telephonically. If a party provided only a limited number of exhibits to the witness, the party could signal a cross-examination strategy; but producing for the witness all of the exhibits in the case could be burdensome. The members agreed that it's difficult for the rule to anticipate a myriad of scenarios, yet section (c) permits the court to use its discretion as these scenarios arise. Members discussed A.R.S. § 25-1256(F) and made minor modifications to section (c) to accommodate the statute. They revised the titles of Rule 8 and sections (a) and (d) for more consistent and clearer meaning, and made other conforming changes to the text of the rule. The members then approved the draft of Rule 8.

Rule 9 ("duties of parties or counsel"): Ms. Henderson observed that the workgroup consolidated various provisions, such as the second and third sentences of current Rule 23 regarding a mailing address, into its draft of Rule 9. However, members took issue with the phrasing of draft Rule 9(b) ("responsibility to the court") that requires parties to keep the court "informed of material changes in the status of their cases." "Material changes" is too vague, and the workgroup will prepare revised language. Ms. Henderson reviewed the substitution provisions of section (d), including subpart (2)(C) that continues to require a signed order approving a substitution of counsel.

Staff based the initial restyling of Rule 9 on restyled Civil Rule 5.3. Task Force members noted the omission in staff's restyling of a provision that is in the current family rule, but which has no Civil Rule 5.3 counterpart. That current provision, in Family Rule 9(A)(1), provides that counsel of record is deemed responsible "until the time for appeal from a judgment has expired or a judgment has become final after appeal…." Members agreed to reinsert this. Then they discussed whether, after the time for appeal has expired or a judgment has become final after appeal, the court should automatically remove counsel from the record as representing the party, or whether the rule should require counsel to file a motion to formally disengage from the client in the court record. Judge Armstrong noted that Maricopa County Local Rule 6.2(e) contains a procedure where, in these circumstances, counsel may file a "notice of withdrawal of attorney of record." The current Family Rule is silent on whether a notice is required, but members concurred that

this local "notice" procedure would be useful. Ms. Henderson will draft additional language for Rule 9(d) regarding a notice of withdrawal.

Members discussed a provision added by staff to Rule 9(d), also prompted by a recent change to Civil Rule 5.3, concerning change of counsel within the same firm or office. This provision also applies to governmental entities, but given the volume of family cases in the Attorney General's office and the absence of difficulties in locating the assigned assistant attorney general, members agreed to delete "governmental law office" from the draft rule.

Rule 10 ("representation of children") and Rule 10.1 ("court-appointed advisor"): Ms. Burns noted that the workgroup divided current Rule 10 into two draft rules, one for the child's attorney and best interests attorney; and a new Rule 10.1 for a court-appointed advisor. Current Rule 10(A) contains a list of reasons for appointing an attorney for the child, which includes "any other reason deemed appropriate by the court." Draft Rule 10(b) ("grounds") shortens the list by simply saying, "any reason the court deems appropriate." The body of draft Rule 10(c) ("qualifications") contains a reference to American Bar Association standards, which are referenced in a comment to current Rule 10. Provisions in section (F) of the current rule, which concern fees and expenses, were relocated to section (d) ("appointment order") of the draft rule. The workgroup did not include in its Rule 10 draft any provisions that correspond to current Rules 10(H) and 10(I) ("minors and incompetent persons" and "appointment of guardian") because it believed Rule 37 ("substitution of parties") is a more appropriate place for those provisions, and that rule is assigned to Workgroup 2.

Judge Cohen reviewed Rule 10.1. The draft rule reflects text and organizational changes similar to changes the workgroup made to Rule 10. The body of Rule 10.1(b) includes a reference to a relevant act of the Uniform Law Commission concerning child abuse, neglect, and custody. The draft rule includes a provision, similar to current Rule 10(E), which distinguishes permissible actions a court-appointed advisor may take from actions that an attorney may take. A member suggested that a court-appointed advisor's report should include a discussion of A.R.S. § 25-403 factors. Members declined to include a specific reference to this statute, but they agreed to add to section (d) ("participation"), subpart (5), that the report should discuss "applicable statutory factors." Members had no other comments and approved draft Rules 10 and 10.1.

Rule 12 ("court interviews of children"): Judge Cohen and Mr. Woodnick jointly presented this rule. They noted that the workgroup deleted current Rule 10(B) ("special precautions") because this section appeared to be more in the nature of a "how-to-do" provision than a court rule. However, Judge Armstrong advised that this provision was prepared after a lengthy study by a State Bar workgroup, and that workgroup expressly recognized that its proposed rule did not contain "typical rule language." Judge

Armstrong also advised that the Court adopted these "special precautions" relatively recently (2015). Accordingly, he recommended reinserting this provision, and the members agreed with his recommendation.

The workgroup's draft of Rule 12 says, in part, that "unless the parties stipulate otherwise, the court must record the interview…." This is different from the current rule, which provides that "the interview must be recorded…." A member proposed reverting to the current language. One judge member suggested that parties should be able to waive a recording, but another expressed caution about not having a record of an interview that a judge may rely upon. Another member noted that even if the parties waive a record, they would nonetheless receive a report of the interview, and that judges customarily rely on the report more than they rely on the actual interview. Another member observed that if the judge does the interview, the judge probably wouldn't prepare a report. Judge Armstrong proposed keeping in the rule the language shown in the first sentence of this paragraph above, but adding to section (c) ("record of the interview") the words, "except that the court must record any interview conducted by the judicial officer." Members agreed with this compromise language. Judge Armstrong further explained that "sealing" as used in this rule means the interview is not available to the public, but it is available to the parties. To clarify this concept, members added in Rule 12(c)(2) ("sealing") three words: "…the court may seal <u>from the public</u> part or all of the record of the interview." They also agreed that draft Rule 10(d)(4) ("admissibility") was redundant to Rule 2, and they removed this provision.

Rule 13 ("public access to proceedings and records"): Judge Cohen reviewed the draft rule and explained that the workgroup made no substantial changes to staff's initial restyling. However, the workgroup deleted the comment to this rule. Members had no questions concerning the draft and they approved the rule as presented.

4. **<u>Workgroup 2.</u>** Workgroup 2 presented Rules 39, 43, and 43.1.

Rule 39 (formerly "reserved," now "meaning of 'service'"): Commissioner Christoffel explained that current Rule 39 is titled, "proof of authority by attorney for respondent not personally served." At a previous Task Force meeting, the workgroup recommended deleting this rule and maintaining it as "reserved." Thereafter, the workgroup decided to utilize Rule 39 to describe the different meanings of "service," a term-of-art that Rules 40, 41, and 42 use. Draft Rule 39(a) (the "general rule"), requires service "promptly after filing." Section (b) ("meaning of service") describes the different meanings of service in three broad circumstances: service of a summons and petition; service of documents filed in the course of a case; and service of contempt petitions. Section (c) introduces the concepts of waiver and acceptance of service. One member noted that section (b)(1) says, in part, that "the petitioner" must serve an OTA with a petition, but that person might be the "respondent" in the case. To avoid confusion, this should refer to "the applicant."

Members concurred, and they will consider at a later time bifurcating this provision for pre- and post-decree situations.

Rule 43 ("service of other documents after service of the summons, petition, and order to appear") and Rule 43.1 ("filing of pleadings and other documents"): Ms. Clark noted that the Task Force returned Rule 43 to the workgroup for reasons noted at page 2 of the June 12, 2017 meeting minutes. The workgroup made the revisions suggested by the Task Force. The workgroup also included, as the Task Force suggested, an explanation regarding the meaning of "service;" see Rule 39 above. A member inquired about the meaning of the term "service is complete" as used in Rule 43(b), but use of this term conforms to its use in the restyled civil rules, and members can consider whether further clarification of the term is appropriate when they review Rule 4 ("time"). Members had no additional comments and approved Rule 43 as presented.

Mr. Nash presented Rule 43.1. He advised that the draft rule is modeled on restyled Civil Rule 5.1. There is a new provision in draft Rule 43.1(b)(4) regarding filing by an incarcerated party. For the sanctions provision of section (d)(4), the workgroup inserted Rule 71(a) as the appropriate cross-reference. Section (e), which concerns proposed orders and judgments, modified provisions of the restyled civil rule so they conform to family law procedures. A new "exception" was added in section (e)(3) that allows the filing of a proposed order or judgment to preserve the record on appeal. Section (f) governs "sensitive data." Ms. Sell discussed recent changes to federally mandated forms, and she agreed to prepare additional conforming language for section (f) that accommodates those forms. Mr. Nash noted that section (f)(3) now refers to "income withholding orders," which is the revised federal term, rather than to "orders of assignment," which current Rule 43(G) uses. The workgroup recommended the deletion of a lengthy comment to current Rule 43. Except as otherwise noted, members approved draft Rules 43 and 43.1.

5. <u>Roadmap; call to the public; adjourn.</u> The Chair reminded members of pending Task Force meeting dates (August 4, August 25, September 29, October 20, December 1, and December 15, all Fridays), which are shown on today's meeting agenda. A show of hands indicated the Task Force would have a quorum of members present for the August 4 meeting.

The Chair made a call to the public. There was no response. The meeting adjourned at 4:04 p.m.