Task Force on the Arizona Rules of Family Law Procedure

State Courts Building, Phoenix

Meeting Minutes: August 4, 2017

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

Absent: Hon. John Assini, Keith Berkshire, Hon. Dean Christoffel, Joi Hollis

Guests: Martin Lynch

Administrative Office of the Courts Staff: Mark Meltzer, Julie Graber, Sabrina Nash, Theresa Barrett

1. Call to order; preliminary remarks by the Chairs; approval of meeting minutes. The Chair called the sixth Task Force meeting to order at 9:30 a.m. She congratulated Judge Eppich on his appointment to the Court of Appeals, Division Two. She reintroduced Julie Graber, who made a presentation about OneDrive at the first Task Force meeting and will be making revisions on OneDrive during today's meeting. The Chair again commended the members for their progress. The Task Force to-date has approved 35 rules. The Task Force reviewed 9 other rules that it returned to workgroups with recommended edits, and two rules are on today's agenda, for a total of 46 rules considered by the Task Force. There are 53 rules remaining, and the Chair believed it would be appropriate to schedule an additional meeting. Most members indicated they were available for another meeting on Monday, November 13, and the Chair requested any members having a conflict with this date to send an email to staff. Adding this meeting date would permit members to utilize the December 15 meeting primarily for a discussion of their rule petition.

The Chair asked members to review the draft July 14, 2017 meeting minutes, and a member made this motion:

> **Motion:** To approve the draft minutes. Seconded, and the motion passed unanimously. **FLR: 006**

2. Workgroup 2. The Chair then asked Workgroup 2 to present Rule 40.

Rule 40 ("summons"): Ms. Clark began the presentation by noting the workgroup's intent to keep Rule 40 focused on the summons, including when a summons is required, the contents of a summons, and service and acceptance of a summons.

Rule 40(a) includes a provision on when a summons is required. The workgroup's draft required a summons for "petitions for dissolution, legal separation, annulment, or for paternity or maternity." A judge member noted that petitions to establish legal

decision-making or parenting time also should be served with a summons, and those petitions were added to the text of Rule 40(a). Such a petition might be filed, for example, where the father acknowledged paternity, but legal decision-making or parenting time issues were unresolved. After discussion, the words "by a parent" were included with the additional text. But the implication is that an "in loco parentis" petition for legal decision-making or parenting time under A.R.S. § 25-409, or a petition for third-party visitation under that statute, would require an order to appear ("OTA") rather than a summons. The Chair asked the members to consider at a future time whether an explanatory comment on this distinction might be appropriate. Judge Armstrong added that the 2006 rule revisions changed the term "order to show cause" to "order to appear" because self-represented litigants better understood "order to appear."

Members were unfamiliar with private counsel filing initial petitions solely for the purpose of establishing child support, but they contemplated whether such petitions should be initiated with a summons. Ms. Sell said that in IV-D cases, respondents rarely file a responsive pleading, and an OTA sufficiently instructs respondents in those cases to appear in court and what documents to bring. She also said that a summons in a child support action may impair federal mandates for expedited processing of those petitions. Another member noted that proceedings under Rule 91, which members discussed at the July 14 meeting, are initiated with an OTA. Members briefly discussed the State using an OTA for its child support petitions and private counsel utilizing a summons for theirs, but members concurred that this was not a useful distinction. Another member observed that the overwhelming majority of petitions regarding child support are in the IV-D context, that the OTAs appear to be functioning well in those proceedings, and there was no need to change that. Members then concluded that the restyled rules should allow the use of an OTA rather than a summons for petitions to establish child support. Members preferred to describe petitions that require a summons using narrative text, as the workgroup had done in draft Rule 40(a), rather than in a columnar list. Members also discussed whether Rule 40(a) should include a reference to the preliminary injunction, which also must be served, but they agreed that this requirement was adequately covered by Rules 26 and 27.

Draft Rules 40(b)(1)(D) and (E) used the phrase "appear and defend." Members disfavored the word "defend" and changed the phrase to "appear and respond." The workgroup's draft of Rule 40(b)(2) ("actions for annulment, dissolution of marriage, or legal separation") restated statutory language regarding conciliation to make that language more meaningful for self-represented litigants. The workgroup presented two alternate versions of the restated language. Members preferred Commissioner Christoffel's version, but they deleted the words "or both spouses" to clarify that either spouse may request the conciliation court's assistance. Members reviewed A.R.S. §§ 25-312(2) and 25-381.09 and concluded that the statutes do not guarantee free marriage counselling, and that the workgroup's draft rule complied with statutory requirements. The workgroup revised draft Rule 40(c) ("replacement summons") to make it clearer. In Rule 40(d) ("who may serve a summons") and elsewhere, the workgroup replaced the

phrase "service of process" with "service of a summons." The workgroup also recommended deletion of a section of Rule 40 entitled "statewide certification of process servers" because that topic is addressed by the Arizona Code of Judicial Administration. In Rule 40(e) ("service of summons in Title IV-D cases"), Ms. Sell advised that the Office of Special Investigations, which is the entity named in the current rule, had become "the Inspector General," and members accordingly deleted the words "Office of Special Investigations."

Workgroup 2 discussed the provisions of "accepting" and "waiving" service under Rule 40(f). The workgroup found that the distinction of these two terms made by restyled Civil Rule 4(f) was not useful for family cases. But Task Force members asked whether Rule 40(f) should provide an incentive, such as additional time to respond, for returning an acceptance. Alternatively, should Rule 40(f) provide a sanction for a refusal to accept service? After discussion, members agreed to use the term "accept," which self-represented litigants would understand better than "waiver," rather than both terms; and they declined to provide incentives for accepting service or additional sanctions for refusing to accept service. In Rule 40(f)(2)(A), members agreed to delete "or authorized agent" in the following sentence: "A party on whom service is required may, in person or by an attorney ~~or authorized agent~~, enter an appearance in open court." Members also agreed that there was no need for the rule to distinguish a special appearance from a general appearance. In Rule 40(f)(3), members deleted the word "waiver" and changed "acceptance and appearance" to "acceptance or appearance." In Rule 40(g)(6) ("validity of service"), members changed "make" proof of service to "file" proof of service. In Rule 40(i) ("time limit for service"), the workgroup maintained the 120-day time limit in current Rule 40(I). Members had no further comments or changes regarding Rule 40.

Ms. Clark then returned to Rule 39 ("meaning of service"), a rule the Task Force discussed at the July 14 meeting. Ms. Clark noted that the workgroup added the words "by Rule 40 and" in Rule 39(b)(1) before the references to Rule 41 and Rule 42. To be consistent with the above-noted changes to Rule 40, the workgroup removed the term "waiver" in Rule 39(c). A member took issue with a portion of Rule 39(a) that required the filing party to serve other parties "promptly after" filing a document; the member believed this would preclude mailing a copy before filing the document. This comment led the members to reorganize Rule 39 by combining prior draft sections (a) and (b). Section (a) as reorganized now begins, "(a) General Rule. When filing a document with the court, a party must provide every other party with an exact copy of the filed document. The method by which that document must be provided depends on the type of document filed, as follows: … [Subparts (1), (2), and (3)] …." Members also removed quotation marks in Rule 39 around the words "service" and "serve." They had no further changes to Rule 39.

3. **Workgroup 3.** Mr. Wolfson and other members of Workgroup 3 then presented Rule 49. Mr. Wolfson prefaced this presentation by requesting members' input on the workgroup's draft in-progress.

Rule 49 ("disclosure"): Mr. Wolfson referred to a provision in draft Rule 49(d) concerning the resolution statement—this provision currently is Rule 49(A)—and said the workgroup looked at the role of resolution statements and when parties should file them. The current rule requires the filing of a resolution statement concurrently with the party's initial disclosure. The workgroup believed this timing was impractical for the parties and made the resolution statement less useful for the court. The workgroup recommended decoupling the disclosure and resolution statements, and changing the time for filing the latter to 30 days after exchanging initial disclosure statements, or 5 days before a court hearing. The workgroup further proposed a requirement that the court set a resolution management conference 30 days after the parties exchange disclosures. The workgroup envisioned that the court would take a more hands-on approach to case management at these conferences, and would encourage the parties to reach agreements on issues that might otherwise require temporary orders hearings. This, in turn, would free-up court time spent on those evidentiary hearings, and allow for earlier trial settings.

Judge Swann elaborated on the workgroup's concept. He said that a culture change during the past decade has resulted in more temporary orders hearings than previously contemplated. The scheduling of more temporary orders hearings has the dual effects of duplicating the presentation of evidence the parties would ordinarily present only at trial; and it polarizes the parties rather than getting them to consensus. Judge Swann noted that the original concept of the resolution management conference, as developed by Judge Norman Davis, was to have parties reach agreements on their issues early, expediently, and efficiently. Now, however, with the proliferation of temporary orders hearings, a large number of cases proceed through mini-trials in advance of trial. The workgroup's proposal would have judges take an active role in resolving cases or issues as promptly as possible. A member noted that complex cases often are not amenable to early resolution. Judge Swann responded that trial judges actually see few complex cases, and he is agreeable to excluding those cases; but judges do see a vast number of self-represented litigants who would benefit from prompt and practical resolutions. He added that by resolving these non-complex cases more quickly, judges would have more time to spend on the truly complex ones, which would ameliorate criticism that judges have insufficient time for those cases. Judge Armstrong suggested that the workgroup add a new provision or comment that explains the purposes of a resolution management conference rather than changing the terminology.

Judge Swann further mentioned a pending rule petition that included a recommendation for tiering of civil cases, and that such a system, which would differentiate judicial management of cases having varying levels of complexity, might be useful in family cases, too. A judge member asked whether this would be useful when the parties already can opt out of discovery requirements. Judge Swann responded that it might be of use when the parties cannot agree on discovery issues, but members generally believed that the current system allows the court reasonable discretion in controlling discovery, the current system is simple, and retaining this system eliminates the need for new rules concerning tiering.

If a resolution management conference would occur near the inception of a case, a member questioned how a party would fashion a settlement position before discovery had occurred. Workgroup members responded that a resolution statement need not provide extensive detail to be useful. One member noted that the forms referenced in Yuma Local Rule 6 may provide a workable template for a resolution statement, and in Maricopa County, the family law conference officer has a useful form. Moreover, the resolution statement does not necessarily require a party's position regarding settlement. Rather, it should provide the party's statement about what needs to be done (for example, retain a business valuation expert) to get the case resolved, or at least it should say what should happen next to move the case towards resolution. The resolution statement should not be a reiteration of the party's demands, because those were stated in the petition or response. The workgroup's concept presupposes that parties will file a statement of disputed issues before every court conference. But these conferences, unlike a temporary orders hearing, need not be evidentiary or adversarial. Some members of the workgroup are open to changing the name of a resolution management conference to a different name that refocuses its original purpose, as developed by Judge Davis, but a name change is not necessary as long as his original intent for having a resolution management conference remains intact. Judge Swann added that some self-represented litigants don't comprehend the distinction between family and severance proceedings, and it would be useful if the court made these litigants aware of the less draconian outcomes concerning their children in family court.

Members then proceeded to discuss specific text in draft Rule 49. Draft Rule 49(b)(2)(B) ("time for additional or amended disclosures") was taken from Civil Rule 26.1(d)(2). Some members believed this provision is problematic because it requires a party to disclose information that the opposing party should have previously disclosed, it encourages gamesmanship, and it reduces opportunities to get candid reactions during depositions. A majority of members agreed to remove the word "deposition" from the draft, but others wanted to retain this word; the Chair suggested that the rule petition note this divergence of views and request comments. Draft Rule 49(b)(2)(C) ("disclosure by written discovery or deposition") borrowed a provision from the civil rules that allows disclosure during a deposition or by another form of communication. The provision elevates the substance of disclosure over the form in which it is made. Members agreed to keep this provision but added the word "written" before communication. Workgroup 3 added a note to draft Rule 49(b)(3) ("failure to disclose, false or misleading disclosure, untimely disclosure") that would add to Rule 65 ("failure to make disclosure or discovery; sanctions") the sanction of an adverse inference; members generally agreed with this addition, as long as the sanction was permissive rather than mandatory. But they otherwise deferred this proposal to their discussion of Rule 65.

Members proceeded to discuss draft Rule 49(c) ("signature under oath"). This provision was derived verbatim from Civil Rule 26.1(e), but it has no corollary in current Rule 49. Members were critical of this provision. One member raised the distinction

between disclosing statements of fact, which were amenable to verification, and position statements, which were not. In response, members added the underlined words, "each disclosure of fact …" to the draft. Another member presumed that the verification requirement would exempt document disclosures, although this provision did not expressly say that. And one member asked, if Rule 49(b)(2)(C) would allow disclosures by alternate forms of written communication, whether Rule 49(c) would require verification of counsel's letters. Additionally, parties might disagree whether a statement is one of fact or one of position, or whether it could be both. On a straw vote, the great majority of members favored eliminating Rule 49(c) from the draft, and it was deleted. But the Chair suggested that this issue also be noted in the rule petition and that the petition invite comments.

Returning to draft Rule 49(d), a member questioned the need for a resolution statement if a party requested a temporary orders hearing. The member explained that relevant facts and issues should have been previously noted in the motion for temporary orders, and that a resolution statement would be duplicative. Mr. Wolfson responded that if the temporary orders motion is filed with an initial pleading, the parties would not have had the benefit of disclosure statements that precede preparation of a resolution statement. But he acknowledged the possibility of duplicative filings. He suggested that the rule on resolution statements be a new, stand-alone rule located earlier in the rule sequence, possibly as a new Rule 33. Judge Armstrong observed that the articulation of the parties' positions was fundament to Judge Davis' concept of resolution management, and the draft rule should require parties to present their positions. If the rule requires the filing of a resolution statement at an early stage of the proceedings, a party's statement could simply say such things as the party is not ready to state a position, or the party's position depends on additional discovery. With regard to the organization of Rule 49, a member proposed relocating sections (e) through (k), which are more particular, into a new Rule 49.1, and leaving the general disclosure provisions in Rule 49, but this proposal did not gather support.

Members had suggestions and comments regarding Rule 49(f) ("child support"). In (f)(2)(A), they agreed that the applicable period should be three completed calendar years rather than two. Because the provision refers to completed calendar years, and a tax return or other pertinent tax documents might not be available in January or February, members agreed to add this phrase: "…and year-end information for the most recent calendar year for which tax returns are not yet due." One member inquired whether proof of court-ordered support and maintenance under (f)(3) included arrearages; and whether proof of health insurance premiums under (f)(4) included (a) premiums for stepchildren, and (b) whether health insurance was available, and if so, the cost of coverage. Subparts (f)(5) through (7) also should be reviewed further to assure these provisions are accurate, consistent, and complete.

- Workgroup 3 should clarify these items. The workgroup might find it helpful to review Maricopa's list of what parties should bring to court conferences concerning child support.

The acronym "AFI" was added to refer to the Affidavit of Financial Information following the first reference to the affidavit in Rule 49.

With regard to draft Rule 49(h) ("property"), a member inquired whether it's realistic for a party to disclose the listed documents within 40 days. The member also inquired whether all of the listed information was necessary; for example, whether all of the "escrow documents" are relevant merely to learn a property's purchase price and encumbrances. This member also questioned the need to disclose beneficial interests under (h)(5) and (h)(7), and asked whether the draft would require a party to disclose, for example, wills or trusts in which the party had a contingent and even revocable expectancy. Another member suggested as a starting point deletion of the word "all" in (h)(1), and members agreed to this. In this subpart, the member also recommended that the rule specify information that should be provided, e.g., a legal description or the purchase price, without requiring specific documents that could furnish that information.

- Workgroup 3 should review Rule 49(h) and determine what is necessary, and what could be eliminated. The Chair suggested that the workgroup consider adding language that the listed documents must be produced only when they are relevant to an issue in the case.

Workgroup members explained a change in Rule 49(i) ("debts") that would require disclosure of 11 months of statements rather than 6 months, which the current rule requires. (Online statements are typically available for not more than 12 months; and 6 months would be too brief.) They also explained that draft Rule 49(l) ("disclosure of hard-copy documents and electronically stored information") was taken from restyled Civil Rule 26.1(b). Draft Rule 49(l) includes a provision for resolution of disputes. Draft Rule 49 also includes a new section (o) ("motion to compel disclosure") that corresponds with restyled Civil Rule 26(g). However, this draft section will require integration with other proposed family law rules regarding good faith consultations.

4. **Roadmap; call to the public; adjourn.** The Chair reviewed pending Task Force meeting dates (August 25, September 29, October 20, December 1, and December 15, (all Fridays). The new meeting date is Monday, November 13.

The Chair made a call to the public. Mr. Martin Lynch responded and addressed the Task Force.

The meeting adjourned a**t** 2:09 p.m.