Task Force on the Arizona Rules of Family Law Procedure

State Courts Building, Phoenix

Meeting Minutes: August 25, 2017

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

Absent: Helen Davis, Hon. Peter Swann

Guests: Ed Pizarro Sr.

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

1. Call to order; preliminary remarks by the Chair; approval of meeting minutes. The Chair called the seventh Task Force meeting to order at 10:00 a.m. She acknowledged the members' commitment to this project and their ongoing work, which includes 5 workgroup meetings since the August 4 Task Force meeting; 33 workgroup meetings since February; and totals to-date of more than 63 hours spent in workgroup meetings and 26 hours spent at Task Force meetings. The Chair reminded members to keep notes of revisions to their assigned rules, and requested the workgroup chairs to assure these notes are taken and maintained.

The Chair asked members to review the draft August 4, 2017 meeting minutes, and a member made this motion:

> **Motion:** To approve the draft minutes. Seconded, and the motion passed unanimously. **FLR: 007**

2. Workgroup 1. The Chair then asked Workgroup 1 to present its rules.

Rule 5 ("consolidation"): Mr. Woodnick advised that the workgroup did not alter the rule substantially, however, it deleted the word "only" and added the word "not" in (a)(4), as follows: "The court may not consolidate a case involving ~~only~~ an order of protection with the substantive family law case." Members agreed that consolidating the order of protection case with a family case might result in impermissible protective order information appearing in the court's online records, and this could impair federal funding. Nonetheless, the rule should allow the court to conduct a hearing that involves both cases. Members agreed that an explanatory comment to the rule might explain this nuance. But after additional discussion, members instead revised the rule to simply provide, "the court may not consolidate a case involving an order of protection with a family law case, but may conduct a joint hearing." (During that discussion, members agreed to delete the word "substantive" in (a)(4) ("the substantive family law case") as

unnecessary.) In draft rule (a)(2) ("assigned judge"), members substituted "first-filed case" for "earliest-filed case" because the latter term ("earliest") implies there are more than two cases. The draft rule randomly used the words "actions" and "cases," and members concurred that the rule should use the word "cases" throughout.

Members made syntax changes to section (b) and eliminated unnecessary words, including the word "specifically" in the phrase, "unless the court specifically orders otherwise." Members agreed the phrase "not only for the purpose" in that section was a better choice than "not merely for the purpose." They also added the word "hearing" so it is now "hearing or trial." In section (c), members struck the word "previously" as an incorrect modifier in the phrase "previously filed a petition," and substituted "will be treated as a response" for the phrase "will constitute that party's response." Ms. Sell raised the issue of consolidating multiple child support enforcement actions that are pending in different counties, and she proposed a new subpart (a)(5) to address this. Members responded that this is a venue rather than a consolidation issue, and the Chair directed Workgroup 1 to consider this when it reviews Rule 23 and pending rule petition number R-17-0019, which concerns a proposed new venue Rule 23.1. A member suggested that if the workgroup prepares a new rule, it also should consider a mechanism to assure that the record of proceedings is provided to each county when proceedings from various counties are joined.

Rule 5.1 ("simultaneous dependency and legal decision-making/parenting time proceedings"): Mr. Woodnick also presented Rule 5.1, which concerns the interplay between proceedings under Title 8 and Title 25. The workgroup recommended the deletion of portions of the current family rule that direct the juvenile court rather than the family court. The members discussed each of the workgroup's three proposed sections of Rule 5.1. In each section, including section titles, members changed juvenile or family court to juvenile or family division. In section (a) ("transfer to juvenile court"), members agreed that the word "may" transfer rather than "must" transfer was appropriate because the family court may keep aspects of the case that do not involve children, such as dissolution of the marriage or division of property. The children's issues are transferred to, rather than consolidated with the juvenile action, and both actions continue under their respective case numbers. Although the word "transfer" might not be legally precise, it fairly describes for self-represented litigants what is happening with their cases. Consistently with these concepts, members revised section (a) to simply state, "if pending family law and dependency proceedings concern the same parties, the juvenile division has jurisdiction over the children." But the rule does not specify the actions that a juvenile judge may take; that should be addressed by a juvenile rule.

Members discussed how the family court would be informed of a pending dependency proceeding. Often the family court is informed of the dependency fortuitously. Accordingly, members added a new subpart (a)(1) regarding "notice." This provision provides, "the parties must notify the family division of a pending dependency

proceeding." Under this provision, a party can provide the notice by a filed document, in open court, or by other means.

Members also discussed the extent of the juvenile court's jurisdiction over child support issues. Workgroup members noted that they preserved current Rule 5.1(E) (now proposed Rule 5.1(c) entitled "support orders") to clarify the juvenile judge's authority to enter support orders in a dependency or guardianship proceeding. Members discussed the interplay between Rule 5.1(c) and A.R.S. § 25-403.09. Under the rule and statute, the court must calculate child support when entering orders concerning parenting time or legal decision-making. In practice, some counties prefer to make the calculation in the juvenile court during the dependency proceeding. In other counties, and to assure the accuracy of arrearage calculations and ensure that the court makes all the required findings under A.R.S. § 25-403, the child support aspect of the case is referred to the family court.

Either the family or the juvenile court may enter a support order; that is discretionary and section (c) uses the word "may." But to assure that one of the courts enters an order and that both courts are aware of it, members added to section (c) the sentence, "any order regarding child support must be filed in both the family division and the juvenile division." This also assures that the order is publicly accessible, because it would not be if it was only filed in the juvenile division. If there is no pending family case, judicial education rather than another rule provision should address how to proceed. Educational literature might describe whether a family court proceeding should be initiated in that circumstance, as well as how the court should modify support orders if one party's parental rights are severed. Rule 5.1 does not specify what happens in every one of a multiplicity of scenarios the members contemplated; rather, members agreed that the rule is intended to provide the courts with authority to do what is necessary, and to utilize their discretion in accomplishing those objectives. Finally, members agreed to add the word "establish" in the first sentence of section (c) ("the juvenile division may establish, suspend, modify, or terminate a child support order"), and to change "wage assignment" to "income withholding order." With these changes, members completed and approved their revisions to Rule 5.1.

Rule 7 ("protected and unpublished addresses"): Ms. Burns, who presented Rule 7, advised that although the workgroup made few substantive changes to this rule, the current rule is not easy to follow and the workgroup reorganized it. Ms. Burns noted recent changes she had made to the draft of Rule 7(d)(3)(B): "…after a hearing and ~~up~~on a finding that ~~the party with the protected address does not reasonably believe that~~ there is no reasonable belief that…." Members concurred with these changes and made further organizational changes to the rule. They deleted section (a) ("generally") and merged provisions of sections (b) and (c) ("on request" and "request procedure"). As revised, these provisions require the court to protect the requesting party's address if the other party does not know that address, and there is either a reasonable belief of harm without a protected address, or there is a valid order of protection. In addition, the court must

(not may) protect the address if the party shows the requisite elements; and the party must show a reasonable belief that the party may (not will) suffer harm. Also, as revised, the party's address would be automatically protected upon filing a request and pending a court determination within 5 days after the filing.

Members reversed the order of references to the companion form (in the draft rule it is now, "Form 15, Rule 97," rather than vice versa), and made other changes that align the text of Rule 7 with Form 15. Members preferred the term "protected address" rather than "unpublished address" throughout the rule, and they made conforming changes to the title and body of the rule. Mr. Nash informed members of certain practices in Maricopa's Superior Court regarding protected addresses. He said that the clerk charges for mailing, as provided by statute; when mail is undeliverable to the protected address, the clerk will scan the returned envelop, but not necessarily the contents, and put the scan in the court's file; that in that circumstance, the filing party is generally not notified of non-delivery; and the procedure of the protected person providing an address on a separate sheet of paper, as the rule provides, works well. The workgroup recommended deletion of language that the clerk's duty to protect an address ended upon entry of a final appealable order; the workgroup believed that a party should not lose the protection just because the case has concluded. However, at Mr. Nash's suggestion, and given his familiarity with the rule's operation, members agreed to delete this provision, thereby simplifying when the clerk's duty terminates. (The clerk's duty would now end "when the person whose address is protected files a notice of published address that sets forth the person's current mailing address for future service.") There were no additional comments and members approved this rule.

Rule 17 (currently, "limits on examining a witness," and as proposed, "reserved") and Rule 22 ("conduct of proceedings"): Judge Cohen reported the workgroup's recommendation that the single sentence of Rule 17 be relocated as Rule 22(c). Rule 17 would then be reserved. Members agreed that these were sensible changes and approved them.

Rule 23 (currently, "beginning an action," and as proposed, "reserved"): Mr. Davis noted that Rule 23 currently is composed of three sentences. The Task Force previously approved moving the second and third sentences of Rule 23 to Rule 9 ("duties of parties and counsel"). Mr. Davis advised that the workgroup now recommended transferring the remaining sentence of Rule 23 ("a family law action is commenced by filing a petition with the clerk of the court") to Rule 24 ("pleadings"), although the workgroup has not yet restyled Rule 24. Rule 23 would be "reserved." Members approved these changes.

Rule 33 (currently, "counterclaims; third party practice," and as proposed, "third party rights and other claims"): Ms. Burns presented the workgroup's proposed reorganization of Rule 33, which included a reference in section (a) to A.R.S. § 25-409 and the incorporation by reference of several civil rules in section (b). This led to an extensive discussion about claims and joinder.

Following that discussion, members agreed to add a reference in section (b) to Civil Rule 24. Members discussed a change to that portion of draft Rule 33(a) that provided that a person "may intervene in an existing action pursuant to A.R.S. § 25-409." Some members were reluctant to use the term "intervene" because it is not used in the referenced statute. The statute instead says that a person "may petition the superior court…." Members considered conforming the language in section (a) to what is shown in the statute, but they concluded that the person's appearance is in the nature of an intervenor, and that captions of these petitions often identify those persons as intervenors. Members accordingly did not revise the draft of section (a). However, they added to the proposed title of Rule 33 the words, "in an existing action." One member proposed an alternative to the draft rule that would simply provide, "a party who wishes to join in a family action may petition the court to do so." Members declined this proposal. They also declined a suggestion to rewrite section (b) to eliminate cross-references to the civil rules; the cross-references assure that case law developed under the civil rules can be cited on the rare occasions when one of those civil rules is utilized in a family case. Ms. Sell requested a new section in Rule 33 that would codify the State's right to intervene under A.R.S. § 25-509, but the Chair deferred her request pending Workgroup 1's presentation of other rules concerning pleadings and parties. Members had no other changes to Rule 33 and approved the rule in its current form.

3. **Workgroup 3.** Mr. Wolfson presented Rule 65.

Rule 65 (currently, "failure to make disclosure or discovery; sanctions," and as proposed, "failure to make disclosures or to cooperate in discovery, sanctions"): In draft Rule 65(a) ("motion for order compelling disclosure or discovery"), the workgroup condensed several provisions of current Rule 65(A) (such as failing to answer a question at a deposition, answer an interrogatory, produce materials, etc.) into a single provision that simply says a party "has not complied with a discovery rule." The workgroup removed superfluous references to Rule 53 protective orders. It modified the standard for not awarding expenses of a discovery motion; the current rule says the opposing party was "substantially justified," and the revised rule says the opposing party acted "in good faith." In section (b), the workgroup proposed that a sanction of dismissal not be available in circumstances where dismissal "would be contrary to the best interests of a child." It modified the sanction of prohibiting "claims or defenses" to one that prohibited "arguments." It changed the contempt sanction to one that would instead allow the court to schedule a proceeding to treat a violation as contempt of court. The workgroup eliminated proposed section (c) ("failure to timely disclose; inaccurate or incomplete disclosure; disclosure after deadline or during trial") because these violations are subsumed under proposed section (a), the remedies under section (b) apply, and section (c) is therefore duplicative. The Chair then requested the members' comments.

One member inquired whether the sanctions in section (b) should include "any other sanction that the court deems appropriate." Members noted that the draft already used the language, "including the following," and interpretation of similar statutory

language suggests that alternatives are not limited to those listed. Another member asked whether "arguments" includes "claims or defenses," or whether all three terms should be used. For example, is a *Cockrell* claim a variety of argument, or would the term argument fail to preserve a *Cockrell* claim on appeal? Members concluded that arguments probably include claims and defenses, and regardless, a court order that precludes an argument would specify the claim or defense it is precluding. Members agreed to use the word "argument" in Rule 65, although they might take a different approach when they consider Rule 78. A provision on failure to disclose information before trial has a proposed cutoff of less than 30 days before trial. The corresponding civil rule is less than 60 days before trial, and members discussed which time was more appropriate. One member argued in favor of 60 days because expert disclosure is required 60 days before the trial of a family case; and disclosure of a lay witness 31 days before trial is too close to trial. Moreover, the court might not timely decide a motion to preclude that witness if the motion is filed only four weeks before trial, and a ruling on the eve of trial might make the parties' trial preparation difficult. On the other hand, disclosure 30 days before trial appears to be common in family cases, and the discussion concluded with a general agreement to leave the time at 30 days.

- One member observed that multiple references to "after giving an opportunity to be heard" are formatted with different punctuation, and requested the workgroup to modify these for uniformity. The workgroup should recheck cross-references to other rules to assure they are accurate. Mr. Wolfson advised the workgroup also will revisit Rule 65 to confirm the extent of deletions of the remaining portions of the rule.

4. **Workgroup 2.** Commissioner Christoffel presented Rule 41 and the workgroup's further revisions to Rule 40(f).

Rule 40 ("summons"): Commissioner Christoffel reminded members that they approved the workgroup's changes to Rule 40 at the August 4 meeting, but thereafter Workgroup 2 made further changes to Rule 40(f) ("accepting service; voluntary appearance"). He said that the acceptance provisions of Rule 40(f) as previously proposed did not include details on the mechanics of accepting service; those details were included in staff's initial versions of Rules 41 and 42. In reviewing Rule 41, workgroup members concurred that instead of splitting the provisions on acceptance into multiple rules, these details should be consolidated in Rule 40(f).

Task Force members believed the workgroup's revised draft inadequately addressed issues of waiving jurisdiction and certain other defenses. Members discussed, reorganized, and revised the text of Rule 40(f)(1) ("accepting service"). The revised text included, among other things, the phrase "if the respondent agrees to sign an acceptance of service." This phrase emphasizes the voluntary nature of an acceptance and allows the respondent to change a decision to accept at any time before signing and returning an acceptance. These changes also would allow the respondent to sign an acceptance

before a court clerk, as the current rule provides. One member noted that a party also should be able to accept service of a post-decree petition.

- The workgroup should consider a separate rule for acceptance of a post-decree petition, or include the post-decree acceptance process in a new Rule 41 provision. Ms. Sell also requested the workgroup to determine whether service of a summons in IV-D cases, as provided in draft Rule 40(e), also should be relocated in Rule 41.

Rule 41 (currently, "service of process within Arizona," and as proposed, "service within Arizona"): Commissioner Christoffel prefaced his review of Rule 41 by advising that the workgroup was considering merging duplicate provisions of Rule 42 into Rule 41. He then noted the workgroup revised the title of Rule 41 by removing a reference to process. He advised that Ms. Clark had determined that the Servicemembers' Civil Relief Act did not impact the service provisions of Rule 41. In draft Rule 41(d) ("service by mail or national courier service"), the workgroup added a requirement that the serving party must request (1) restricted delivery to the party being served, and (2) a receipt signed by the addressee. This should mitigate concerns that someone other than the party being served is the recipient of the mailing, a concern that is amplified when the signature on the return receipt is illegible. The workgroup deleted a section of Rule 41 entitled "serving a minor who has a guardian or conservator" because it is covered by another section entitled "serving a person who has a court-appointed guardian or conservator." In the latter section, the workgroup removed unnecessary references to persons who are "insane, gravely disabled, incapacitated, or mentally incompetent," because the court's order of appointment ordinarily would be based on such a determination. Draft Rule 41(g) concerns service on a governmental entity. Subpart (g)(2) is entitled "alternative procedure for serving the state in a Title IV-D case." Ms. Sell advised that she had not yet seen any use of the alternative procedure, and the rule might precede the availability of technology described in the rule.

Workgroup 2 proposed revisions to section (k) ("service by publication"), and Commissioner Christoffel reviewed those revisions with the Task Force. After the most recent workgroup meeting, Commissioner Christoffel proposed further revisions to subpart (k)(2) ("jurisdiction"), which were projected on-screen. The first sentence of Commissioner Christoffel's version provided, "Service by publication is not sufficient to confer jurisdiction upon the court to determine issues of paternity, child support, spousal maintenance, division of marital property not located in Arizona, or any other issue requiring personal jurisdiction over a party." He added the words "not located in Arizona," which are not included in current Rule 41(N), after "marital property" to indicate that an Arizona court has *in rem* jurisdiction over property that is located in Arizona. A comment following current Rule 41(N) indicates that the court cannot divide property in Arizona when service was made by publication. Although this comment is relatively recent, Commissioner Christoffel advised that he disagrees with it. Other members, however, agreed with it, and suggested that the court only obtains jurisdiction

when there is another level of service, e.g., alternative service, in addition to publication. Alternative service requires court approval, but publication does not.

- The workgroup should review draft Rule 41(k)(2) and the rule on alternative service to clarify what service is required for an Arizona court to have jurisdiction over property in Arizona when a respondent is served by publication. The workgroup also should bring this rule back to the Task Force for further review following the proposed merger of Rule 41 with Rule 42.

5. **Call to the public.** Mr. Ed Pizarro Sr. responded to a call to the public and addressed members of the Task Force.

6. **Roadmap; adjourn.** The Chair reviewed pending Task Force meeting dates (September 29, October 20, December 1, and December 15 (all Fridays) and the newly added meeting date of Monday, November 13. She would like to reserve the December 15 meeting for a discussion of a rule petition, rather than reviewing rules, so the Task Force has 4 meetings currently set to discuss the remaining 46 rules. Several members expressed conflicts with the October 20 date, and the Chair directed staff to determine if an alternative date is available.

The meeting adjourned a**t** 4:09 p.m.