

Task Force on the Arizona Rules of Family Law Procedure

State Courts Building, Phoenix

Meeting Minutes: September 29, 2017

Members attending: Hon. Rebecca Berch (Chair), Hon. Mark Armstrong (Co-Chair), Michael Aaron, Hon. John Assini, Keith Berkshire, Annette Burns by her proxy Barry Brody, Cheri Clark, Hon. Suzanne Cohen by her proxy Hon. Katherine Cooper, 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, Hon. Peter Swann, Steven Wolfson, Gregg Woodnick

Absent: Helen Davis

Guests: Chief Justice Scott Bales, Ed Pizarro Sr., Martin Lynch

Administrative Office of the Courts Staff: Mark Meltzer, Eva Carranza, Karla Williams, Jennifer Albright, Kay Radwanski, Julie Graber

1. Call to order; remarks by the Chief Justice and the Chair; approval of meeting minutes. The Chair called the eighth Task Force meeting to order at 10:03 a.m. She welcomed the proxies and the Chief Justice, who briefly addressed the Task Force. The Chief Justice commended the members' diligent work on this project. He is looking forward to their forthcoming rule petition, which will be the next in a series of significant rule restyling petitions. The Chair thanked the Chief Justice for his remarks. She then advised members that workgroups have met 40 times to-date. If all the rules on today's agenda are presented, the Task Force will have considered about two-thirds of the family law rules. She expressed her appreciation for the work of support staff, especially Ms. Williams and Ms. Nash. The Chair asked members to review the draft August 25, 2017 meeting minutes, and a member made this motion:

Motion: To approve the draft minutes. Seconded, and the motion passed unanimously. **FLR: 008**

2. New rules adopted at the August rules agenda. Judge Armstrong summarized two new family law rules the Court adopted at its August rules agenda. The first rule, Rule 23.1, was proposed by Judge Cohen. It concerns family law petitions that are filed in an improper venue. The other new rule, Rule 67.2, is lengthier. It is a uniform rule on arbitration proceedings in family law actions. Both rules have a January 1, 2018 effective date. Members will not need to make changes to these rules, but staff will need to revise the section and paragraph designations of these two rules so they are consistent with the Task Force restyling conventions.

Judge Armstrong also noted the Court of Appeals opinion in *DiPasquale v DiPasquale* (1-CA-CV 16-0356 FC, filed 09.07.2017). The opinion deals with third-party practice in family-related actions, and it relied on Family Law Rule 33, which the Task Force discussed at the August 25 meeting. Although the case presented an unlikely

scenario, the fact that it occurred is justification for a rule that addresses the situation. Judge Armstrong accordingly suggested that the civil rules cross-referenced in Family Law Rule 33 now include Civil Rule 14, which concerns third-party practice. Members agreed with his suggestion.

Judge Armstrong again reminded members that they need to annotate substantive changes to each rule. This is important because the Task Force will need to compile these annotations in an appendix to its rule petition.

The Chair then requested reports from the workgroups.

3. Workgroup 2. Commissioners Christoffel and Assini presented Rules 40, 41, and 42. Mr. Nash presented Rule 46.

Rule 40 ("summons"): Commissioner Christoffel noted that following a suggestion from the Task Force at the last meeting, the workgroup made a single change to Rule 40(f). The Task Force requested an additional provision concerning acceptance of service of a post-decree petition. The workgroup accordingly added the words, "or Rule 91" to Rule 40(f), so it begins, "A party subject to service under this rule, Rule 41, Rule 42, or Rule 91, may accept service...." Members were satisfied that this addition adequately addressed the issue.

Rule 41 (formerly, "service of process within Arizona," and as proposed, "service within and outside Arizona;" and Rule 42, formerly, "service of process outside Arizona," and as proposed, "reserved"): Commissioner Christoffel recalled that the Task Force reviewed the majority of Rule 41 at the last meeting, but a couple issues remained pending. One of those issues concerned the effect of publication on the court's jurisdiction, and the other dealt with the feasibility of merging Rules 41 and 42 into a single rule.

Regarding the first issue, Commissioner Christoffel noted that under current Rules 41(N) and 42(E), service by publication does not confer jurisdiction for matters such as paternity, child support, spousal maintenance, division of marital property, "or any other issue requiring personal jurisdiction over a party." Comments to the current rules expressly say that the rules do not follow the holding in *Master Financial v Woodburn*, 208 Ariz. 70 (2004), a civil case dealing with the court's jurisdiction when the defendant was served by publication. Workgroup 2 now proposed (1) a deletion of those comments, (2) a revision to Rule 41 that strikes the jurisdiction provision in the section on service by publication, and (3) adding a new comment stating the rule now follows the holding in *Master Financial*, particularly paragraphs 15 through 22 of that opinion. Commissioner Christoffel reasoned that service, whether personal or by publication, provides notice of a suit, but it does not confer jurisdiction, and that for either type of service, the served party can challenge jurisdiction. The rule as revised would emphasize the need for the court to consider, when service was made by publication, whether the defendant had the requisite minimum contacts with Arizona to exercise personal jurisdiction; and it would allow the party served by publication to later challenge a jurisdictional finding. When a party is served by publication, a subsequent entry of judgment would require an on-the-

record hearing, which the served party could later review to support a challenge to the jurisdictional finding.

One member was concerned that alternative service requires court authorization, but a party needs no such authorization to serve by publication, which seemed incongruous. Commissioner Christoffel responded that a petitioner obtains authorization for alternative service by an *ex parte* motion, a one-sided proceeding without input from the respondent, whereas the respondent could directly challenge service by publication, which a fairer, two-sided proceeding. Other members noted that if a judgment for child support was entered after service by publication, it could result in a failure to pay warrant and the respondent's arrest, which they considered problematic. But Commissioner Christoffel suggested that when the respondent has been served by publication, a fact that should be noted in the court's file, the court should not issue a warrant without a showing that the respondent had actual notice of the judgment. Judge Armstrong added that current Rule 94(b) and A.R.S. § 25-681 require actual notice of an order before the court can issue a warrant. One member suggested that the Task Force consider adding a sentence to the proposed rule stating that it must not be utilized as a method to obtain the respondent's arrest, but members declined that suggestion.

In response to members' concerns that it would be disruptive if respondents served by publication had their bank accounts garnished, another member noted that civil judgment debtors who were served by publication also have their accounts garnished, sometimes for substantial sums. Civil defendants and family court respondents may both seek relief from garnishment or execution by timely challenging the court's jurisdiction to enter the underlying judgment. Another member observed that petitioners may serve by publication even when they know respondents' whereabouts, simply to avoid direct service. The Task Force has not yet considered Rule 44 on default judgments, but when it does, it should assure that the rule includes a provision that a petitioner who has obtained service by publication must show at the default hearing the rationale for using that method of service. After this discussion, the Chair observed that most members favored the revisions proposed by Commissioner Christoffel, but there were concerns as summarized above, and the rule petition should invite comments on those concerns.

Commissioner Assini addressed the second issue concerning the merger of Rules 41 and 42 into a single Rule 41. He noted that the current rules contain several duplicate provisions, and the merged version reduces duplication. The merged version proposes a change to the title of Rule 41 so it encompasses service within and outside Arizona. Commissioner Assini reviewed the changes in Rule 41(a) ("generally"), which includes provisions on jurisdiction, out-of-state service, and authority to serve a summons, which are currently contained in Rules 42(A) and (B). Proposed Rule 41(d) regarding "service by mail or national courier service" now applies to both in-state and out-of-state service. A new provision in Rules 41(d) and 41(g) ("serving an incarcerated person") requires an avowal in petitioner's affidavit that in addition to service by restricted mail or a national

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courier service, the petitioner also sent copies of the documents being served to the inmate by first class mail. In Rule 41(m) (“service by publication”), the words “within or outside of Arizona” were added to clarify that it has application to in-state as well as out-of-state respondents. A new Rule 41(n) (“service in other circumstances”) was added that contains cross-references to Civil Rules 4.1 and 4.2 for situations not covered by restyled Rule 41, for example, serving a corporation outside the United States. Members then raised the following questions:

- Why does the rule require direct service on a minor? As a collateral issue, is in-state service by mail an appropriate method of service, or should it instead be a variant of alternative service? In-state service by mail is not permitted under the civil rules, but it is allowed under current Family Rule 41, and the revised rule conforms to that. Otherwise, the requirements for service on a minor in draft Rule 41 conform to what is required under the corresponding civil rule.
- Under Rule 41(m), should service by publication also require petitioner to mail documents to respondent’s last address, or to respondent’s last-known address? After discussion, members agreed the rule should say, last-known address.
- In Rule 41(b), what is the meaning of the sentence, “Service is complete when made.” Although the same sentence is contained in Civil Rule 4.1(b), and notwithstanding that eliminating the sentence would deviate from the civil rule, members thought the sentence was a tautology (i.e., service is complete when service is complete), and they deleted the sentence.

With the above changes and with due regard for the concerns noted above, members approved revised Rule 41, as well as Rule 42 as a reserved rule.

Rule 46 (“dismissal”): Mr. Nash explained that the restyled rule was largely adopted from Civil Rule 41, but it also includes elements from current Family Rule 46. Members changed the pronoun “their” in the draft to “its.” One member suggested that if a hearing is pending on an order to appear, a notice of dismissal would not be sufficient to vacate the pending hearing, and the party should instead file a motion to dismiss. To the contrary, most members believed that a notice of dismissal could appropriately include a request to vacate the pending court date. Another member observed that a motion to dismiss should be directed at a pending petition, rather than an entire case; and that the rule should provide for dismissal of post-decree as well as pre-decree petitions. The member also suggested that Rule 46 should use the term “filing party,” or “applicant,” as the Task Force used in Rule 91. Members agreed to these changes. Members suggested revising language in the current rule about a failure to prosecute, but they disfavored the workgroup’s alternative of “moving the case forward.” However, members agreed to use the phrase, “take the steps required by these rules to resolve the case or petition.” With these changes, members approved Rule 46.

4. Workgroup 1. Workgroup 1 presented Rules 20, 28, 30, and 31.

Rule 20 ("form of documents"): Mr. Woodnick highlighted the workgroup's changes. The workgroup eliminated a draft provision containing detailed requirements for a caption by tying those requirements to a Rule 97 form. The workgroup simplified Rule 20(b)(6) on handwritten documents to a single requirement: the document must be legible. Members agreed to remove a provision in draft Rule 20(b)(1) regarding line numbers along the left side of each page. One member suggested deleting a requirement in Rule 20(b)(4) for 13-point font. After discussion, members retained that requirement, and reinserted text the workgroup had deleted concerning preferred font styles. Mr. Nash had no suggested changes to Rule 20(c) concerning electronically filed documents. Members approved Rule 20 with these modifications.

Rule 28 ("required response"): Members previously reviewed this rule and returned it to the workgroup with its concerns. Mr. Woodnick presented a revised rule that the members approved with two caveats. First, Mr. Nash will inquire whether it's necessary for a party responding to a petition to provide a copy to the assigned judicial officer. Members were concerned that this step might have no benefit to the judicial officer, and in certain counties, a judge might not have even been assigned at this early stage. The other caveat dealt with whether petitions for legal decision-making are served with a summons or with an order to appear. Members requested Workgroup 1 to consider this issue when it reviews Rule 27, which concerns service on the opposing party. Rule 27 has not yet been presented to the Task Force.

Rule 30 (currently, "form of pleading," and as proposed, "reserved"): This rule was also previously reviewed by the Task Force and returned to the workgroup. Mr. Woodnick advised that after further review, the workgroup relocated portions of the rule either to Rule 20 ("form of documents") or to pending Rule 29 ("general rules of pleading"). There were no remaining provisions in the rule and the workgroup recommended that it be reserved. Members agreed with these changes.

Rule 31 ("signing pleadings, motions, and other documents; representations to the court; sanctions"): Mr. Davis presented this rule and noted changes to the title of the rule that were occasioned by eliminating two sections. The workgroup recommended the deletion of current Rule 31(d) ("assisting filing by self-represented person") because it did not believe it was necessary; the attorney is ghost-writing and is not appearing as counsel of record. The workgroup also recommended the deletion of Rule 41(d) ("verification") because the subject of the rule is covered by Rule 14 ("Written Verifications and Unsworn Declarations Under Penalty of Perjury"), which the Task Force previously approved. The workgroup made a change to the title of subpart (a)(3), from "filing by multiple parties" to "signing for another party." Members discussed alternative phrases in Rule 31(b) ("representations to the court"). Subpart (b)(2) had the options of "good faith argument" or "nonfrivolous argument," while (b)(3) had choices of factual contentions being "well-grounded in fact" or factual contentions that "have evidentiary support." After

discussion, members decided that the rule should conform to restyled Civil Rule 11(b), and they will use in Rule 31(b) the phrases “nonfrivolous argument” and factual contentions “that have evidentiary support.” Members approved Rule 31 with these revisions.

5. **Workgroup 3.** Mr. Wolfson, Judge Swann, and Mr. Horowitz presented Rules 65, 69, 72, 74, and 75.

Rule 65 (“failure to make disclosures or to cooperate in discovery; sanctions”): Members discussed this rule at the August 25 meeting, but there were questions about whether the workgroup intended to delete certain provisions. Mr. Wolfson advised the workgroup reviewed the rule further and its members agreed that the sections it intended to delete were titled “failure to timely disclose; inaccurate or incomplete disclosure; disclosure after deadline or during trial;” “failure to timely disclose unfavorable information;” “expenses on failure to admit;” and “party’s failure to attend its own deposition or to respond to interrogatories or requests for production.” Mr. Wolfson reiterated that these deleted sections duplicated the broader provisions of Rule 65(b) (“failure to comply with court order, discovery or disclosure rule; sanctions”). The workgroup retained a previously presented section on “failure to preserve electronically stored information.”

A member asked about a potential overlap of proposed Rules 65(a)(4) and 65(b)(2), both titled “payment of expenses.” Mr. Wolfson replied that (a)(4) concerns expenses connected with a motion, whereas (b)(2) is broader and contemplates expenses related to discovery violations. Mr. Wolfson again reviewed Rule 65(b), which allows sanctions for a failure to comply with a disclosure or discovery rule as well as the failure to obey a court order regarding discovery. Another member inquired whether the sanctions in Rule 65(b) apply to entities as well as persons. Mr. Wolfson responded that the workgroup intended that the rule apply to both, and if necessary, the workgroup could clarify that in the future. A member noted that the section numbering was still incorrect and the word “jury” was inadvertently included in the remedies provisions of the section on electronically stored information. Staff will correct the numbering, and members agreed to remove the phrase in which the word “jury” appears. Otherwise, members approved Rule 65.

Rule 69 (currently, “binding agreements; presumption of validity,” and as proposed, “binding agreements”): Mr. Horowitz noted that the workgroup made few changes to this rule, but it spent considerable time discussing the underlying issues, such as the required elements for an agreement, and when an agreement becomes binding. The current rule does not include a signature requirement, but Mr. Horowitz explained that under draft Rule 69(a) (“validity”), to bind themselves the parties must have a signed agreement. They also can bind themselves by memorializing the agreement before a court reporter, which is as reliable as a writing provided the parties confirm their assent on the record. A member inquired whether the proposed rule precludes agreements on substantive

issues between counsel for the parties. A couple workgroup members believed it was preferable to err on the side of caution and preclude that under this rule, especially on issues involving children. But others held the view that an attorney has authority to bind the client, in a record made in open court or by a signed writing, without the client's expressed assent. On a straw vote, most members would permit agreements by counsel, either written or on the record; but a significant minority favored a requirement that the client sign or consent. The petition will note this division, but for now, the rule will say, "signed by the parties personally or signed by counsel on a party's behalf." An agreement entered under this draft rule is valid. A new Rule 69(b) ("court approval") provides that an agreement is not binding on the court until it is submitted to and approved by the court. Members agreed to delete a section of the proposed rule concerning separation agreements because that provision is subsumed under other portions of the rule. Members approved the rule as modified.

Rule 70 ("notice of settlement"): Mr. Horowitz observed that the workgroup made few changes to the draft restyling. In Rule 70(a) ("notice of settlement"), it deleted the words "to ensure future compliance with this rule" because it appears that judges do not impose sanctions for the stated purpose. In Rule 70(b) ("settlement without final judgment"), the workgroup deleted the words "and entered in the record" because the provision also requires filing, and a filed document axiomatically becomes part of the record. Members approved Rule 70. In Rule 70 and in other rules, members agreed to use the term "self-represented party" rather than "unrepresented party" or "party not represented by counsel."

Rule 72 ("family law master"): Judge Swann noted that in recent years, revisions to this rule, as well as to Rule 74 concerning the parenting coordinator, have been substantive and controversial. However, with one exception concerning Rule 72, the workgroup's proposed changes to these rules are not substantive, but are simply intended to conform these rules to the restyling conventions. The exception is a proposed new Rule 72.1 entitled "retirement benefits, stock options, and other employment related compensation." The substance of this new rule is currently included in Rule 72(L). The workgroup believed that the person identified in this provision does not perform a judicial function and does not decide anything, but rather performs a ministerial function and acts within the scope of what the court has previously decided to implement the court's decision. In that sense, the person is not a Rule 72 master. The proposed new rule provides that if an issue assigned to the person requires the use of discretion, the person must refer the issue to the court for determination. Members deferred adding a provision that would allow the parties in that circumstance to refer the issue to an arbitrator for determination. Members then discussed three other items.

- The draft rule refers to the person as a "master with special expertise," but the person is not a master as contemplated by Rule 72. Members considered alternative names, such as "court-appointed expert" (which does not fit well with Evidence Rule 706 because the person does not testify), "administrator"

(which also isn't suitable because the person has no discretionary authority), and "drafter" (which was closer but still inadequate.) Members decided to use the term "professional with special expertise," and the draft rule will be modified accordingly.

- Does the substance of Rule 72.1 belong in Rule 95 ("other family law services and resources")? Members discussed both alternatives and for the time being, they agreed to leave it as a new standalone rule.
- Members declined to revisit the issue of appointment of a master on motion, and they agreed to strike the current comment and its reference to Civil Rule 53. They reviewed and agreed to retain the workgroup's proposed comment, but they requested the workgroup to modify the comment so it would allow the court to allocate or shift costs.

With the caveats noted above, members approved Rules 72 and 72.1.

Rule 74 ("parenting coordinator"): The meeting materials included a version comparing the restyled version of Rule 74 with the current rule, and Judge Swann again noted that no substantive changes were intended in the proposed restyled version. A member raised a recurring issue about not appointing a coordinator unless the parties agreed, but Judge Swann reminded members that the substance of the current rule was previously approved after extensive study by stakeholders, and Task Force members declined to revisit the substance of this rule. Ms. Clark noted that the restyled draft removed the word "services" after the words "conciliation court," and the Chair directed staff to reinserted "services" in those instances. Pending that edit, members approved draft Rule 74.

Rule 75 (currently, "plan for expedited process," and as proposed, "reserved"): The workgroup recommended deletion of this rule because it is redundant to the referenced statutes, and members agreed. Rule 75 will be reserved.

6. Workgroup 4. The workgroup presented Rules 78, 92, 95, and 97.

Rule 78 ("judgment; attorney fees, costs, and expenses"): Mr. Berkshire advised that the workgroup's revisions to Rule 78 took into consideration the Court's 2014 opinion in *Bollermann v Nowliss*, and the subsequent, pending petition by the State Bar to amend this rule (R-16-0020). He then reviewed the workgroup's proposed revisions. Rule 78(a) ("definitions, form") generally follows the corresponding civil rule. Rule 78(b) ("judgment upon multiple claims or involving multiple parties") includes the "express determination" language used in Civil Rule 54, but adds the phrase that "a claim for attorney fees is considered a separate claim from the related judgment...." It appears that far too many partial judgments in family court have unnecessary Rule 78(b) language, which is both risky and problematic for the parties; but this may be an issue that a rule revision cannot adequately address. Rule 78(c) ("entry of judgment after death of a party") was unremarkable.

Revised Rule 78(d) (“attorney fees, costs, and expenses”) includes provisions for asserting and establishing a claim, and when the claim must be established. These new provisions represent the workgroup’s response to *Bollermann* and R-16-0020. One member suggested that the provisions should be more consistent with corresponding Civil Rule 54. Mr. Berkshire noted that Civil Rule 54 provisions may not be ideally adaptable to family law proceedings. First, A.R.S. § 25-324 allows an award of expenses, which civil cases do not, so the components and calculations in family cases are different than civil cases. In addition, and unlike most civil cases, fees and expenses may be issues that are raised during the trial of a family case. That is why, Mr. Berkshire explained, proposed Rule 78(d) provides that a claim for fees, costs, and expenses “must” be included in any required pretrial statement. Judge McMurdie added that under proposed Rule 78(d)(3), if a party has properly and timely asserted a claim for fees, costs, or expenses, but the claim is omitted in a subsequent judgment, the claimant must file a Rule 83 motion within 15 days after entry of the judgment, or the claim is deemed denied. This new provision therefore provides a time limit for the court’s determination of these claims. Members also discussed including in the family law rules a correlate to Civil Rule 54(c), which serves as a useful finish line and avoids a time-consuming need for appellate courts to determine whether they have jurisdiction to review a civil judgment. Workgroup members are open to the possibility of including an analog to Civil Rule 54(c) in Family Rule 81 (“entry of judgment”), which is assigned to Workgroup 4, but that rule has not yet come before the Task Force.

Rule 78(e) (“offers of judgment not applicable”) is consistent with the current rule. Ms. Davis, who was not present but who has written articles on this provision, may want to offer her opinions concerning offers of judgment in family cases. But Judge Armstrong said the provision was adopted in 2006 after considerable deliberation. Another member noted a study’s conclusion that offers of judgment do not necessarily encourage case resolutions. Members made no changes to proposed Rule 78(e) and they approved Rule 78 as presented.

Rule 92 (“civil contempt and sanctions for non-compliance with a court order”): Judge Eppich noted that current Rule 92(c) refers to “orders to show cause or orders to appear.” The workgroup eliminated the outdated reference to orders to show cause in its revised rule. The workgroup also eliminated in proposed Rule 92(d) a finding of a “willful” failure to comply with a court order. Judge Eppich advised that willfulness is not an element of contempt, but the absence of willfulness is a defense to contempt. Members agreed to add to Rule 92(e) (“order and sanctions”) a new sentence that states, “The contemnor may show that the failure to comply with the court order was not willful.” This language is consistent with A.R.S. § 12-864, although members did not see a need to refer to the statute in the rule. Ms. Sell requested, and members agreed, to add “employment services” to the list of appropriate sanctions in proposed Rule 92(d)(2). Rule 92 was approved with these changes.

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Rule 95 (“other family law services and resources”): Judge McMurdie advised that the workgroup added a sentence in section (a) (“generally”) that the court must determine on the record whether parties could pay for private services and the allocation of costs. The workgroup proposed substituting a general reference for specific references in Rule 95(b), and substituting “behavioral health” for “mental health.” It deleted language in Rule 95(e) (“supervised exchanges”) and elsewhere that was informative but not substantive. The workgroup also deleted current Rule 95(F) (“batterer intervention and prevention programs”) because it combined those provisions with draft Rule 95(f) (“domestic violence services”). Members agreed with these changes, and with Judge Armstrong’s additional suggestion to add to section (f) the words “licensed by the Arizona Department of Health Services.” Members declined to add immunity provisions in Rule 95 because that is a statutory subject and members did not want to inadvertently expand the scope of immunity. Members approved Rule 95 as modified.

Rule 97 (“family law forms”): Judge McMurdie briefly reviewed Rule 97 and noted that the workgroup proposed no substantive revisions to the rule. Members approved the rule as presented.

7. **Call to the public.** Mr. Martin Lynch and Mr. Ed Pizarro Sr. responded to a call to the public and presented remarks to members of the Task Force.

8. **Roadmap; adjourn.** The Chair commended the members for reviewing 18 rules during today’s meeting. She emphasized that the Task Force will need to review about 15 rules during each of its next three sessions to file a petition in January. She encouraged workgroups to review a sufficient number of rule to meet this goal. Due to member conflicts, the Chair reset the October 20 meeting to **Monday, October 30.** Subsequent meetings are set for Monday, November 13, Friday, December 1, and Friday, December 15. The Chair reminded workgroups to keep notes of substantive changes to their respective rules.

The meeting adjourned at 3:25 p.m.