Task Force on the Arizona Rules of Family Law Procedure

State Courts Building, Phoenix

Meeting Minutes: November 13, 2017

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

Absent: Helen Davis, Kiilu Davis

Guests: None

Administrative Office of the Courts Staff: Mark Meltzer, Sabrina Nash, Theresa Barrett, Eva Carranza, Geraldine Tacdol-Tiokasin

1. Call to order; remarks by the Chair; approval of meeting minutes. The Chair called the tenth Task Force meeting to order at 10:00 a.m. All four workgroups have meetings set for later this month, and the Chair appreciates their progress. As noted at the October 30 Task Force meeting, the Chairs and staff have begun the process of informally editing and wordsmithing the rules. A.O. 2016-131 established a January 10, 2018 deadline for the Task Force to file its rule petition, but considering the magnitude of this restyling project, the Chairs will ask the Court for an extension until March 2018. Judge Armstrong added that a March filing date would permit the Task Force to vet the draft rules and request prefiling comments from interested groups. Judge Armstrong will present the draft rules to the Family Law Institute in mid-January, so it is still important that the Task Force complete its initial draft by the end of December.

The Chair asked members to review the draft October 30, 2017 meeting minutes, and a member made this motion:

> **Motion:** To approve the draft minutes. Seconded, and the motion passed unanimously. **FLR: 010**

The Chair then requested workgroup reports, beginning with Workgroup 1.

2. Workgroup 1. Mr. Woodnick, Ms. Henderson, and Ms. Burns presented on behalf of Workgroup 1.

Rule 3 ("definitions"): Mr. Woodnick explained that some of the definitions in current Rule 3 were deleted in the restyling because those words are defined in the rules to which they pertain. See, for examples, the relocation of definitions of "pleading," which will be in Rule 24 on pleadings; and "motion," which is now in Rule 35 on motions. The workgroup removed the definition of a Title 14 guardian because the restyled family rules, including proposed Rules 10 through 13, don't refer to that person. They also

removed a comment to current Rule 3 that refers to that guardian. However, members will revisit the definition and the comment if they subsequently find references to guardians elsewhere in the restyled rules. One member suggested that there be no rule for definitions, and that all definitions be within the pertinent rules. A member responded that it is useful to have certain definitions in Rule 3, for example, "in camera," which comes up in multiple rules, but is specific to none. After discussion, the members agreed to retain a limited number of definitions in Rule 3, and they approved the revised rule.

Rule 4 ("computing and extending time"): Ms. Henderson noted that a section in the current rule regarding orders to appear was relocated to Rule 35; see the discussion of Rule 35 below. The provisions in restyled Rule 4(a) regarding computing time are derived from the restyled civil rules. The process for extending time, contained in section (b), is derived from the existing family rule, but the restyled provisions are modeled on the civil rules and modified for applicability to family law cases. The workgroup proposed reciprocal mechanisms for relief, which would be available for moving parties who may have missed a deadline to file a Rule 83 or 85 motion as well as for adverse parties who are responding to these motions. The Task Force will consider this subject further when Workgroup 4 presents Rules 83 and 84 later today. It will also consider whether the provision should clarify that a party can obtain an extension before as well as after the deadline, the grounds and process for obtaining an extension, and if the provision should remain in Rule 4 or be relocated in the post-trial section of the rules. The members approved Rule 4 pending that discussion.

Rule 21 (formerly, "reserved," and as proposed, "sealing, redacting, and unsealing court records"): Ms. Burns advised that following directions from the Task Force, the workgroup used this formerly reserved rule as the location for importing Maricopa Local Rules 2.19 and 2.20. These provisions will replace current Family Rule 71(B), which was deleted. One member suggested that court staff, and not just judicial officers, have access to sealed documents, but after discussion of security and other considerations, members retained the provision as-is. Members shortened the definition of "sealing" in Rule 3, and they eliminated "paper or electronic" and substituted the word "record." They also included in Rule 3 a cross-reference to Rule 21. Members then approved the new Rule 21.

Rule 35 ("family law motion practice"): Ms. Burns noted that draft reflects the workgroup's efforts to simplify the current rule. The workgroup eliminated the word "memoranda" and instead used "motion," "response," or "reply." Rule 35(d) includes a new procedure, adopted with modifications from the civil rules, which permits the parties to agree to extensions of time without the necessity of a court order. The workgroup's draft removed a provision in current Rule 35(C)(3) that begins, "to expedite its business," because it was unaware of any county that utilized that procedure. Language concerning orders to appear was initially relocated from Rule 4 to Rule 35, but on reconsideration, the workgroup removed that language as not being appropriate in Rule 35. Page limits under this rule are based on the limits in the restyled civil rules.

Members considered moving those limits to Rule 20, which deals with the form of documents, but concluded these limits should remain in Rule 35. A member asked about the meaning of "sur-reply" in section (a)(3). Members revised the pertinent sentence of section (a)(3) to state instead, "a party may not respond to a reply unless authorized by the court." The member also asked if the requirement in section (a)(1), that "an application for a court order in a pending action must be by motion," was necessary, and if it was, whether it should be restated. Members discussed revising this provision to restate the definition of "motion" they had previously eliminated in Rule 4. Rather than using that definition, however, they revised (a)(1) to state, "a party must request a court order in a pending action by motion, unless otherwise provided by these rules." With these modification, members approved Rule 35.

3. **Workgroup 2.** Commissioner Christoffel presented Rule 44.1.

Rule 44.1 ("Default Decree or Judgment"): Commissioner Christoffel explained that Rule 44.1 is the result of separating current Rule 44 into two rules, Rule 44 on "default," which Ms. Clark presented at the previous meeting, and a new Rule 44.1. Rule 44.1(a) begins by describing circumstances when a party can obtain a decree or judgment by motion without a hearing. Commissioner Christoffel recommended during his presentation, and without objection from the members, that subpart (a)(1)(C) be retitled, from "default" to "appearance." In section (b), he also recommended removing the word "damages" after the word "money" in the title, so the title now simply says, "judgment by motion for money other than child support."

Draft Rule 44.1(b) would not allow a party to obtain by motion a money judgment for spousal maintenance. Members discussed whether the rule should provide otherwise. If a self-represented litigant has properly prepared the required paperwork, why should that person need to take time off work to appear for a hearing that adduces no additional pertinent information? A judge member contended that these rules should not impose such barriers. Court personnel check the sufficiency of the party's default paperwork, and the court can set the matter for hearing if the paperwork is deficient; but otherwise, a hearing should be unnecessary. Another member felt that the record produced at a hearing lends an element of legitimacy to the proceeding, which is absent if there is no hearing. The member was particularly concerned about the absence of a hearing for parties whose documents were prepared by a document preparation service, when parties may not be fully aware of the contents. The judge member reiterated that the court may order a hearing, or a party may request one, but a hearing should not always be mandatory. Commissioner Christoffel raised the possibility of combining the provisions of a default decree without a hearing with the provisions for entry of a consent decree under Rule 45, which also does not require a hearing.

Yet another judge member expressed that obtaining a divorce is a major event in a person's life, and it is not unreasonable or burdensome for the rules to require the person's attendance in court for that event. A court hearing serves to provide the requisite level of due process. Failure to pay maintenance or support are jailable

obligations, and decrees that order these obligations deserve commensurate judicial attention. Unlike a consent decree, where these obligations can be established without a personal appearance if both parties consent, a default decree is usually entered without the consent of both parties. Another member noted the benefit of having a transcript of a default proceeding for review in subsequent modification proceedings, but there is no transcript for a decree entered by motion. The issue was characterized as one of expediency versus due process. A straw poll on whether the proposed rule should allow the court to award spousal maintenance by motion without a hearing showed the members were fairly divided on the issue.

The first judge-member then proposed that rather than attending a hearing, a party could submit a new form with a default application that would contain the information the party would testify to at a hearing. If a party does not provide all the necessary information in the form, the court could set the matter for hearing. The form could include information that might not be in the party's verified petition. The form could also provide specific information that A.R.S. § 25-319(B) requires for an award of spousal maintenance. Detailed information in a form might allow judges to make better, more informed decisions than if a party had personally appeared at a hearing. On the other hand, self-represented litigants might find it difficult to complete a form, or to complete it correctly. The form would need to be accompanied by educational tools that would facilitate a party's ability to complete the form fully and accurately, and the party would be required to provide a copy of the form to the party in default. After the discussion, a strong majority of members were interested in the form alternative, and the Chair directed Workgroup 2 to draft and propose such a form. Pending that, members agreed to delete from draft Rule 44.1(b) the provision that would not allow the court to award spousal maintenance by motion without a hearing. Members also discussed whether child support should be awarded by motion without a hearing if a form fully provided the necessary information. Members agreed that might be workable, but asked the workgroup to consider the issue first.

Members proceeded to discuss another section of Rule 44.1 regarding child support. Commissioner Christoffel suggested that the rule should address past child support, and that another draft paragraph concerning previously owed support, i.e., arrearages, is unnecessary and could be eliminated. One member proposed eliminating this entire section because it duplicates statutory directives, but Commissioner Christoffel believes the rule reinforces the need for, and the manner of making, a proper calculation. The members then modified the draft section, including the section title, which is now "past child support judgment." Members also discussed whether the rule allows the calculation to be made at a hearing as well as before a hearing; members agreed that it does ("will be calculated"), but in either event the rule requires notice of the calculation.

In section (f), members changed a requirement that the clerk maintain a verbatim record of a default proceeding when service was made by publication to a requirement

that the court maintain the record. The members also agreed that the words "attorney's fees" should be in the singular possessive throughout the rules, to make the term consistent with the civil rules restyling.

4. **Workgroup 4.** Mr. Berkshire presented Rules 83 and 84.

Rule 83 (formerly, "motion for new trial or amended judgment," and as proposed, "altering or amending a judgment; supplemental hearings") and Rule 84 ("motion for reconsideration or clarification"): Mr. Berkshire observed that current Rule 83's reference to a new trial is inappropriate because in family cases, the granting of a motion does not result in a new trial. Rather, a party will request the judge, based on evidence presented at the concluded trial, to alter or amend its ruling and, if appropriate, to conduct a supplemental hearing at which the court could receive additional evidence. The workgroup also intended that its draft deal with the circumstance of self-represented litigants filing post-trial motions using the titles of new trial (in current Rule 83) and reconsideration (in current Rule 84) without meaningful differentiation. Mr. Berkshire believes the draft will synthesize Rules 83 and 84 into a single, Rule 83 post-trial motion to alter or amend the judgment, which will be time-extending. The proposed rule would give the court a gate-keeping function and permit it to weed out meritless motions by allowing it to deny a motion without requiring a response. The draft rule would add a new (a)(1)(A) (that the court "did not properly consider or weigh all of the admitted evidence"), which was derived from Rule 84. Misconduct of the prevailing party was modified to misconduct of the other party. Draft section (a) added a new ground concerning mathematical errors.

Members discussed whether to include in the proposed rule an element of the current rule that provides a limit of granting no more than two new trials to either party. One member suggested that the rule provide that all motions, by all parties, must be filed within a specified time. The member's concern was that if the court grants a motion, the aggrieved party may need to file a subsequent motion. For example, if the court grants a motion regarding a business valuation, it might prompt another motion to also alter or amend an award of spousal maintenance, which in turn may lead to successive motions. At some point, the number of time extending motions should end and the judgment should be final. One member suggested a one-and-done approach to post-trial motions in the superior court, but a judge member observed that he rarely sees more than a single Rule 84 motion in a case anyway. On the other hand, remedies by appeal are costly and time-consuming. Judge Armstrong noted a case pending Supreme Court review that concerns a post-trial motion regarding a QDRO entered a decade earlier. Judge Armstrong also noted the need to amend ARCAP 9 because of Task Force action on the post-judgment motions section of the family rules. One member suggested that the appellate rule be amended by referring to the rule's title rather than its number, although other members disagreed and the Chairs will determine this later.

As the discussion progressed, members expressed the desirability of retaining a rule on motions for clarification, notwithstanding the proposed elimination of Rule 84. One member proposed adding such a motion to the provisions of Rule 85. But the

response to a motion to alter or amend should not be another motion to alter or amend, and if the granting of a Rule 84 motion would precipitate another issue, the non-moving party should raise that issue in the response. Members discussed various methods and language to deal with this situation. Members partially addressed the issue of multiple motions by a new Rule 83(d), which provides, "no party may file a motion to alter or amend an order granting or denying a motion under this rule." The workgroup will work on a rule regarding clarification, including an appropriate location for that rule, after the conclusion of today's meeting.

Members also returned to the Rule 4 issue raised earlier today. Under proposed Rule 83(c)(2), the court must set a deadline for a response if the motion is not summarily denied. Members discussed extensions of time to file the motion and to file a response, and questioned why parties cannot agree to extend time, for example, because a transcript is unavailable. But Judge Armstrong recommended that the rule provide specific outside time limits for filing the motion and response. Members then agreed that the motion must be filed within 25 days after entry of judgment (compared to 15 days under the current rule), and that if the court orders a response, the other party should have 30 days to file one. The proposed rule would also provide that the deadline for filing the motion may not be extended by stipulation or court order. Members agreed that the moving party should have 15 days after the filing of a response to file a reply.

5. **Call to the public; roadmap; adjourn.** There was no response to a call to the public.

The Chairs and staff will continue their editing and review process of approved rules. About two dozen rules are pending workgroup review. The next two Task Force meetings are set for Friday, December 1, and Friday, December 15. At the December 1 meeting, the Task Force will review the remaining rules of Workgroups 2 and 4, and half of the remaining rules of Workgroup 3. A judge member asked Workgroup 2 to consider whether Rule 47 needs clarification about whether those hearings are evidentiary. The Task Force will consider the balance of Workgroup 3's rules, and the remaining rules of Workgroup 1, at the December 15 meeting. Because of the short intervals between meetings, members will again need to access materials in an electronic format. The Task Force should set a meeting in early January to review a draft petition; staff will poll the members whether they prefer Friday, January 5, or Monday, January 8, 2018.

The Task Force's rule petition will mention outreach to stakeholder groups, and members should consider a list of stakeholders to whom they may present the draft and from whom they will invite pre-filing comments. The Chairs again reminded the members of the importance of preparing rule-by-rule summaries. Staff explained that the petition will not include a redline version of the proposed rules, and these summaries, which will be included in an appendix to the petition, will explain how and why a rule was modified, and particularly whether there are any proposed substantive changes.

The meeting adjourned a**t** 2:07 p.m.