Task Force on the Arizona Rules of Family Law Procedure

State Courts Building, Phoenix

Meeting Minutes: December 1, 2017

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

Absent: Hon. Peter Swann

Guests: None

Administrative Office of the Courts Staff: Mark Meltzer, Sabrina Nash, Angela Pennington, Jodi Jerich

1. Call to order; remarks by the Chair; approval of meeting minutes. The Chair called the eleventh Task Force meeting to order at 10:01 a.m. She commended the members of Workgroup 4 for completing a review of their assigned rules. The Chair was optimistic that the Task Force could conclude its initial review of the rules at the December 15 meeting. Her goal is to have a complete preliminary draft by the beginning of January and to start vetting the rules before filing a rule petition. Judge Armstrong filed a motion yesterday to extend the petition filing deadline until the end of March. The chairs and staff are continuing to meet and edit rules.

The Chair asked members to review the draft November 13, 2017 meeting minutes, and a member made this motion:

> **Motion:** To approve the draft minutes. Seconded, and the motion passed unanimously. **FLR: 011**

The Chair then requested workgroup reports, beginning with Workgroup 2.

2. Workgroup 2. Workgroup 2 continued its discussion of the default rules, and it presented Rule 45 on consent decrees.

Rule 44.1 ("default decree or judgment by motion and without a hearing;" Rule 44.2 ("default decree or judgment by hearing;" and a form ("default information for spousal maintenance"): Commissioner Christoffel explained at the November 13 meeting that Rule 44.1 is the result of separating current Rule 44 into two rules, Rule 44 on "default," which Ms. Clark presented at an October meeting, and a new Rule 44.1 on default decrees and judgments. After the discussion at the November 13 meeting, Workgroup 2 further divided Rule 44.1 into a rule on default decrees or judgments by motion without a hearing, and a new Rule 44.2 that provides for default decrees or judgments following a hearing. The workgroup's most recent revisions to Rule 44.1 would permit the court to enter a decree by motion for spousal maintenance and on children's issues. With these

revisions, a petitioner would not be required to attend court for a perfunctory default hearing, but could instead complete a required spousal maintenance form or provide specified documents that provide a basis for orders concerning legal decision-making and parenting time. If the form or documents are incomplete or deficient, the court would set the matter for a default *hearing*. Some of the information required by the revised default rule is modeled on what is required for a consent decree, which also is entered without a hearing. The default form and supporting filings could also document the basis of those orders in the event they are the subject of a subsequent modification proceeding.

None of the members had objections to proceeding with these concepts. However, Commissioner Christoffel said that a Pima County hearing officer was concerned that self-represented litigants could not accurately complete the spousal maintenance form. On the other hand, Pima County's law library holds clinics for self-represented litigants, and those clinics could provide information and guidance on completing the form. If self-represented litigants have clinics and other tools available, then in a significant number of cases, they should be able to properly complete the form. In response to a question, Commissioner Christoffel confirmed that under the revised rules, cases where a respondent was served by publication still would require petitioner to appear at a default hearing. However, under the revised rule for service, the court could enter a decree concerning children's issues and spousal maintenance notwithstanding service by publication. Members suggested that Rule 44.2 should include a cross-reference to Rule 41 to clarify this point.

Commissioner Christoffel then reviewed the workgroup's proposed default information for spousal maintenance form. He noted that the form requires a verification, and that petitioner would be required to send the form to respondent. The form begins with a series of checkboxes that are based on A.R.S. § 25-319(B). It then poses 7 questions, and members had comments concerning those questions. For example, the questions did not ask about the respondent's income. The form did not show what amount petitioner requested, and the duration of petitioner's requested spousal maintenance award. Question 1, "Were you employed during the marriage? How?" does not include relevant questions about when and where the petitioner was employed. Question 2, which asked for a description of physical or emotional limitations, raised concerns under the Americans with Disabilities Act, and it did not relate any limitation to the petitioner's earnings capacity. Some members also thought Question 3, "describe any contributions you've made to your spouse's earning ability and how you have reduced your income or career opportunities to benefit your spouse" might be difficult for some people to understand. But members noted the challenge of drafting a form that applies to a myriad of individual situations. In addition, the form is not designed for high net-worth individuals, who would probably have attorney representation. Moreover, the form would provide judicial officers with more information to base a ruling on than they might obtain from in-court testimony. The form might even assist judicial officers in obtaining useful information when they conduct in-person hearings. One member proposed that the form focus on an explanation of what amount the petitioner is asking for, and for how

long, and why petitioner thinks the respondent spouse can afford to make those payments. Another member suggested that all the necessary information be in a single, self-contained form. Commissioner Christoffel advised that the workgroup will revise the form based on members' comments during today's meeting. The form will be included in the draft rules that will be circulated for public comments in January.

Members also discussed when the petitioner should file the form and provide a copy to the respondent. Members generally believed that the form should be sent early enough that respondent has an opportunity to review it before the court acts on it. Although Rule 44 only requires petitioner to mail a copy of the default application to respondent, Commissioner Christoffel proposed adding to that rule, or to Rule 44.1, a requirement that petitioner mail the form with the application. Commissioner Christoffel also proposed that the form include an abbreviated affidavit of financial information, in lieu of a full, multi-page financial affidavit.

As a result of other changes to Rule 44.1, members revised Rule 44.1(c)(1) ("judgment of maternity or paternity: generally") to remove references to legal decision-making and parenting time, and to improve the provision's syntax. They also discussed whether a reference in subpart (c)(2) to A.R.S. § 25-813 was correct or complete. They agreed that this statutory reference is a federal requirement for a default order in a paternity or maternity action that did not need to be changed, and that other jurisdictional authorities could be alleged in a petition.

Rule 45 ("consent decree"): Mr. Nash presented this rule. A member expressed a preliminary concern that the title of the draft rule inappropriately removed the words "order or judgment," and after discussion, members agreed to add these words to the title and elsewhere in the rule. The workgroup proposed that subpart (b)(1) state, "whether the wife is pregnant with the husband's child," but after discussing recent case law and issues that arise with surrogates, members changed this to "whether one party is pregnant with a child common to the parties." A similar revision was made in section (c). Members discussed whether subpart (b)(4) should require a recitation that the division of property was "fair and equitable" or "fair and reasonable." A.R.S. § 25-318 refers to "not unfair," and one member proposed removing the word "fair" from this rule. However, judges typically rely on the parties' representation that the division is "fair and equitable" and they retained that phrase. Subpart (b)(5) requires parties to sign a consent decree, order, or judgment before a notary public. Although some members believed that Rule 45 consent orders should be notarized, in practice, they may not be. However, proposed Rule 14(a) requires a notarized verification for a consent decree.

The workgroup relocated a provision concerning TANF from section (b) to section (c), and added "or county attorney" after "written approval of the Attorney General." They also deleted the word "benefits under" before TANF and added "services from" before the Title IV-D program. A Task Force member requested in subpart (c)(4) that "parent information program" be capitalized. Members discussed whether a party would file a certificate of completion of the program, or if the program provider filed them with

the court. The rule does not need to differentiate who files the certificate if it winds up in the court record, but members nonetheless added to the provision, "if not previously filed with the court." There is no requirement in Rule 45 concerning conciliation; however, there is a reference in subpart (a)(2) to Form 8, which does mention the conciliation provision. The workgroup deleted a subpart in section (c) that required a completed judgment data sheet because that form is no longer in use. Members declined to require an income withholding order for spousal maintenance in proposed Rule 45 because an order is optional in that circumstance. With these changes, members approved Rule 45.

3. **Workgroup 3.** Mr. Wolfson presented 5 rules on behalf of the workgroup.

Rule 50 ("complex case designation"): Mr. Wolfson noted that complex cases require specific and detailed attention by the assigned judge. Although under the current rule a party simply files a notice of complex designation, the proposed rule would require the filing of a motion for complex designation. The proposal provides factors for the court to consider when deciding if it should designate a case as complex. If the court grants the request, it must set a scheduling conference and provide additional time for trial. The proposed rule eliminates the current rule's requirement for disclosure under Civil Rule 26.1 because it does not apply to every case. The workgroup believed it was preferable for the court to conduct a conference where the parties could discuss specific disclosure needs that are appropriate to an individual case.

One of the factors for the court to consider in determining complexity is "numerous difficult or novel legal issues." A member suggested eliminating "difficult" because it is ambiguous, and members then agreed on "issues that would take time to resolve." After discussion, they also agreed to retain the word "significant" before "expert testimony." Members had concerns that the rule's requirement for 12 hours of trial time might lead to 12 hours becoming a default limit rather than a floor, and that it might be contrary to current Rule 77 standards and Evidence Rule 611's text to "avoid wasting time," but members nonetheless retained the 12-hour provision. Members also discussed the time for requesting complex designation. Staff's draft said, "no later than 20 days after receipt of the opposing party's initial disclosure under Rule 49." Because initial disclosures may be incomplete or cursory, members changed this to 60 days after the filing of a responsive pleading, or later for good cause. Members approved Rule 50 as modified, but they would like to have public comment on the proposed rule.

Rule 51 ("general provisions governing discovery"): These revisions are based on restyled Civil Rule 26, with modifications. The draft rule provides that a party may not request discovery of information that an opposing party is required to disclose under Rule 49. The purpose of this provision is not to limit discovery, but rather, to assure that the opposing party complies with his or her Rule 49 disclosure duties. The workgroup removed a provision that would have provided for a limit of one expert per issue per side, which is the civil rule. After discussion, members agreed with this deletion because two experts on a complex family issue may be appropriate. Another provision in draft

Rule 51 requires a party to present disclosure and discovery issues under Rule 65. Members approved the rule as modified.

Rule 52 ("subpoena"): Mr. Wolfson noted that the workgroup added a new provision, Rule 52(a)(3) ("interstate depositions and discovery"), which incorporates Civil Rule 45.1. He then raised two policy issues presented by Rule 52. The first issue is whether the family rule should mirror Civil Rule 45 on subpoenas. Among the reasons for doing so is the availability of a civil subpoena form; the family rules do not include a form of subpoena. The second and related issue dealt with objections to a subpoena. Under the civil rule, an objecting party is required to file an objection, whereas the current family rule permits the subpoenaed person to object in writing, without a court filing; it then becomes the burden of the subpoenaing party to file a motion to compel enforcement. The workgroup recommended that the family subpoena rule be modeled on the current family rule rather than the civil rule. Members overwhelmingly preferred the current family rule process, and the workgroup will need to modify the draft to reflect that preference. Finally, Mr. Wolfson noted that the draft civil rule requires the subpoenaing party to give other parties two days' notice of a document subpoena before it's served, and the family rule simply requires prior notice. Members agreed that a revised family rule should instead require the subpoenaing party to give notice concurrently with service of the subpoena. Members also recommended that the rule include a minimum, presumptive response time for the subpoenaed records custodian to respond to a documents subpoena of either 10 or 14 days.

Rule 53 ("protective orders regarding discovery requests"): Mr. Wolfson reviewed the proposed rule and advised that it is modeled on Civil Rule 26(c), without substantive modifications. Members had no comments or questions and approved the rule as proposed.

Rule 59 ("using depositions in court proceedings"): This rule is patterned on Civil Rule 32, and it includes in subpart (a)(6) a provision that is not in the civil rule but is in the current family rule: "A deposition may also be used as permitted by Rule 2(a) of these rules." Mr. Wolfson's review of this rule noted a provision in subpart (c)(2) that requires a person intending to offer deposition testimony at a hearing to designate the appropriate portions, except for deposition testimony offered for impeachment. Members approved this provision, but they first discussed concerns with a practice whereby a party does not purchase a deposition transcript but expects to receive a copy without charge if the other party designates it for trial. Members had different views on whether the designating party is required to provide a copy, but the discussion did not result in any modifications to the rule. Members did delete subpart (d)(3)(C), relating to objections to a written question at a deposition under Rule 58, because they had previously abrogated Rule 58. Otherwise, members approved Rule 59.

4. **<u>Workgroup 4.</u>** Workgroup members presented several rules including rules the Task Force had previously considered.

Rule 76 ("resolution management conference"), Rule 76.1 ("pretrial statement; pretrial conference"), and Rule 76.2 ("sanctions for failure to participate in a court proceeding"): Ms. Davis observed that the workgroup divided current Rule 76 ("pretrial procedures") into three new rules. Proposed Rule 76 deals solely with the resolution management conference ("RMC"). The proposed rule, like the current rule, requires the court to set an RMC no later than 60 days after a party files a request for one, unless the court extends the time for good cause. Members discussed whether 60 days was too long an interval, but they agreed to retain that time pending the receipt of comments on this matter. In subpart (b)(1)(A), members agreed to delete "significant" as an adjective before the words "history of domestic violence." The workgroup's draft of subpart (b)(1)(B) refers to compliance with applicable disclosure requirements under Rules 49 and 50, but after further discussion, members deleted (b)(1)(B) because disclosure may be incomplete at the time of the conference. Otherwise, members approved the draft rule.

On Rule 76.1, members discussed the timing of the pretrial conference and pretrial statements. The draft rule followed the current rule and provided for the filing of a pretrial statement 20 days before either a trial date or the date set for a pretrial conference. However, the workgroup preferred a process that would allow the parties to interact with the court sooner than immediately before trial; this would allow a discussion with the court of what was at issue in an individual case, and for scheduling an appropriate trial date and other pretrial proceedings. Members discussed the possibility of having an initial pretrial statement and supplemental and final pretrial statements, or only one. A judge member suggested calling one filing a preconference statement, to distinguish it from a pretrial statement, and to possibly include a provision in Rule 50 for these statements in complex cases. Members did not resolve these issues and they returned the rule to the workgroup for further consideration. Before the discussion concluded, members agreed that in section (b), if the parties are unrepresented and there are allegations of domestic violence, the parties must file separate statements under this rule.

Ms. Davis explained that Rule 76.2 made no substantive changes to the current rule. But in subpart (b)(5), members added after "unless dismissal would be contrary to the best interests of a child" the words, "or the complying party." In response to a question, Ms. Davis confirmed that the contempt referenced in subpart (b)(7) is civil and not criminal contempt. Members then approved this rule.

Rule 80 ("declaratory judgments"): Under the agenda item entitled "other rules issues," Ms. Davis noted that the Task Force had previously abrogated Rule 80, which concerned declaratory judgments. Thereafter, she has seen family cases utilizing declaratory actions, and she requested that the rule be reinstated. Judge Armstrong noted that it is a short rule that can be readily reinserted into the set, and he suggested doing this if declaratory actions are used. No one objected, and the rule will be added back.

Rule 83 (formerly, "motion for new trial or amended judgment," and as proposed, "altering or amending a judgment; supplemental hearings") and Rule 84 (currently, "motion for reconsideration or clarification" and as proposed, "motion for clarification"): Mr. Berkshire

explained that the workgroup revised these two rules following their presentation during the November 13 meeting. Although the workgroup initially proposed the abrogation of Rule 84, it now proposed a Rule 84 that is only for clarification, and not for reconsideration. The revised rule expressly provides that it does not extend the time for filing a notice of appeal, that it may not be combined with a Rule 83 motion, and that under Rule 84, the court may not open the judgment or accept additional evidence as it can under Rule 83. Members discussed and approved this version of Rule 84. Mr. Berkshire further noted that the members had concerns at the last meeting with successive motions under Rule 83. He observed that Rule 83(d) expressly precludes the filing of a motion to alter or amend an order granting or denying a motion under the rule, which should curtail successive motions. Moreover, the workgroup added a new sentence to subpart (c)(3) ("contents of response") that expressly requires a party's response to address any issue that might arise if the court grants the moving party's Rule 83 motion. Mr. Berkshire noted that under subpart (c)(1), the deadline for filing a motion is 25 days, and under subpart (c)(2) the court has up to 15 days to deny the motion before setting a deadline for a response, so the responding party may have up to 40 days to review the motion before the response deadline begins to run, which should be adequate. With these revisions, members approved Rule 83.

Rule 87 ("stay of proceedings to enforce a judgment"): Judge Eppich advised that the workgroup made stylistic but not substantive changes to staff's draft. However, in section (g) ("stay of a judgment in rem"), it expanded the specified time from 15 days to 25 days, which is more consistent with changes to the provisions on post-trial motions. In section (e), subpart (1) is titled "money judgments," and members agreed to change the title of subpart (2) from "nonmoney judgements" to "other judgments." With these modifications, members approved Rule 87.

Rule 94 ("civil and child support arrest warrants"): Ms. Sell observed that this rule provides more substance on civil arrest warrants than child support arrest warrants because the latter are primarily governed by statute. In subpart (b)(1), the standard for issuing a civil warrant for failure to appear for a subpoena is the same as a failure to appear on an order to appear. A member questioned a provision in subpart (c)(3) ("effectiveness") that indicated a civil arrest warrant is in effect until it is executed or extinguished by the court. The member thought there might be a one-year time limit for execution, but no one located any statutory authority for that proposition. In section (d) ("time and manner of execution"), members disfavored the phrase "twenty-four judicial business hours" and, after discussion of applicable law, changed the time to 48 hours. Section (f) ("forfeiture of a bond on a civil arrest warrant") refers generally to the procedure for forfeiture of bonds in criminal cases, and members agreed that the provision should refer to a specific criminal rule or statute. Members conditionally approved the rule pending these changes.

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

The Chair noted there are about 13 rules remaining for review, all of which will be on the December 15 meeting agenda. If those rules are completed on December 15, a January Task Force meeting should not be necessary. She encouraged members to complete their rule-by-rule summaries and provide them to staff. A summary should note any substantive changes, or if the rule was merely restyled; should cross-reference any corresponding civil rule; and should mention any changes to a form necessitated by the rule revisions. Members should consider preparing a reference table that correlates civil and family rules. Ms. Davis and Mr. Pollitt are working on a new uniform request for production. A member suggested that the Task Force consider Pima County's simplified affidavit of financial information, which is a single page. A simplified set of procedures for self-represented litigants will abide adoption of the restyled family rules.

A complete set of draft family rules will be posted on the Task Force webpage. There will be a link on the webpage to an Outlook mailbox allowing anyone to submit comments to the Task Force concerning the draft. Judge Armstrong noted that his deadline for submitting a draft set of rules, which he will use for his presentation to the Family Law Institute next month, is January 5, 2018. Because of the limited length of his presentation, he cannot discuss each rule, but he will highlight significant changes, such as the Task Force revisions to Rules 2, 6, and 10.

The meeting adjourned a**t** 2:43 p.m.