

Judge Greg Sakall
Family Court Presiding Judge¹
Pima County Superior Court
110 West Congress Street
Tucson, AZ 85701

Judge Michael Peterson
Presiding Judge
Graham County Superior Court
800 W Main St
Safford, AZ 85546

Judge Bruce Cohen
Family Department Presiding Judge
Superior Court in Maricopa County
125 West Washington, Ste 101
Phoenix, AZ 85003

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:)
) Supreme Court
) No.
PETITION TO AMEND RULE 77)
AND ADOPT RULE 77.1 OF)
ARIZONA RULES OF FAMILY)
LAW PROCEDURE)

BACKGROUND

This is a proposal for Arizona to adopt an informal family law trial (IFLT) program that would allow parties to opt into a more efficient and fair process to manage many family law cases.

Several states have already adopted informal domestic relations trials (IDRTs)² a tool to increase access to justice and improve efficiency in family law matters. [Alaska](#), [Idaho](#), [Oregon](#),

¹ The courts are listed for identification purposes only. The opinions expressed in this Petition are those of the individual undersigned judges and do not necessarily reflect the views of the courts.

² In Arizona, the term “family law” is more often used than “domestic relations.” Thus, this proposal will use the more common term and “IFLT” acronym, rather than IDRT.

and [Utah](#) have implemented IFLT in various forms. The Montana Supreme Court recently [adopted](#) a pilot program. The Washington Supreme Court has a [rule change proposal](#) for an IFLT under advisement. Other jurisdictions, including the [Sixth Judicial District of Iowa](#), [Thurston County \(WA\) Superior Court](#), and [King County \(WA\) Superior Court](#), have implemented local programs. Indiana's Family Law Taskforce [recommended](#) a statewide IFLT program in its March 2021 report.

As explained further below, the Arizona Supreme Court should follow these jurisdictions and adopt an IFLT program.

GOALS & ESSENTIAL ELEMENTS OF AN IFLT PROGRAM

Many family law cases involve self-represented litigants. In Maricopa and Pima Counties, up to 80% of family law cases involve at least one self-represented litigant. Further, one study has highlighted “a very real justice gap within the United States:” and the need to create “client-centric family law courts and processes.” [Cases Without Counsel: Research on Experiences of Self-Representation in U.S. Family Court](#), Institute for Advancement of American Legal System (2016), 2. IFLTs are one tool that make the court processes more client-centric. [Informal trials speed up family law cases in Iowa](#), *The Gazette*, July 7, 2021.

Idaho was the first state to experiment with the IFLT program and based it upon an Australian model. William J. Howe III & Jeffrey E. Hall, [Oregon's Informal Domestic Relations Trial: A New Tool To Efficiently and Fairly Manage Family Court Trials](#), 55 Fam. Ct. Rev., 70, 79 (2017).

The goal of the IFLT is to provide judges and litigants with a potentially less contentious alternative trial process. Essential elements of all programs include the following:

- Opt-in process. Both parties must agree.

- Parties provide pretrial documents (pretrial statement, financial affidavits, parenting plan) just like a regular trial case.
- Parties participate in an ADR process before trial.
- Parties consent to the process and waive the right to trial under the standard rules.
- Each party gets an opportunity to testify to the Court. The Court, not the parties, has the right to question the testifying party. The other party may suggest issues or questions that the Court should inquire of the testifying party. There is no cross-examination.
- Additional witnesses are in the judicial officer's discretion.
- Rules of evidence are relaxed; the Court considers any relevant evidence.
- Expert reports can be admitted without testimony so long as each party had the opportunity to review the report at a time sufficiently in advance of the proceeding.
- Judicial officers typically announce a decision before leaving the courtroom
- Parties retain appeal rights.

VARIATIONS IN IFLT PROGRAMS

Some states limit the types of issues (e.g., parenting time, child support) that can be resolved via an IFLT, while other states allow all family law issues to be decided by an IFLT.

The different IFLT programs have varying rules for the role of attorneys. Most allow the attorney to make opening and closing statements and propose questions to the Court. Some allow an attorney to question an expert witness.

Most IFLT programs allow a party to withdraw from the IFLT process with varying deadlines to do so, and varying showings that must be made.

BENEFITS OF AN IFLT PROGRAM

Evaluation studies have shown that litigants have generally found the IFLT beneficial and believe that the judicial officer has heard them. Howe, 55 Fam. Ct. Rev., 70, 77; Idaho's Informal Custody Trial Evaluation Report, [Evaluation 2010](#) (Idaho), 1.³ Judicial officers have found the IFLT has distinct advantages over the traditional trial process, including savings of judicial time and parties' resources, and the potential for reduced conflict and for parties to feel heard through openly sharing their side of the story. Howe at 77-79; Idaho at 1. Judicial officers do not recommend the IFLT for all cases. They have some criticisms, including the potential for relying on improper evidence and judges feeling rushed to make decisions. Idaho, 1, 8, 13. As a result, they do not recommend IFLT for complicated cases with expert witnesses. *Id.*

IFLTs also offer some unique advantages for attorneys to provide unbundled services to clients, such as pretrial consultation, assistance with trial preparation such as organizing exhibits, and participating in an IFLT. Washington State Bar Association's Low Bono Section [supports](#) the rule change proposal. The IFLT may also offer opportunities for legal paraprofessionals and licensed legal advocates in the future to make justice more accessible for parties in family law cases. *See, e.g.,* [Comment](#) of Miryam Gordon. Limited License Legal Technician, in support of IDRT GR 40, Washington; [Comment](#) of Tamara Garrison.

One report advocated for IFLT as a process that may make the courtroom more accessible for victims of domestic violence. [Assisting Self-Represented Litigants in Domestic Violence Cases: Recommended Strategies](#), Center for Court Innovation (2018), 22-24.

A presentation from Oregon noted that many judicial officers already conduct family law trials like the above. Still, it is important to have rule(s) that authorize this manner of conducting

a trial. An IFLT program reduces judicial anxiety over violating ethical cannons when employing these informal procedures. Howe, Fam. Ct. Rev. at 79.

In December 2020, a rule change [petition](#) was filed in Washington State seeking to implement a statewide IFLT program. Washington’s [three largest counties](#) already have some form of IFLT. While the Washington Supreme Court has not yet acted on the Petition, the below summarizes some [comments](#) in support of adopting an IFLT process:

- “[t]he proposed rule would give much-needed guidance to judicial officers trying to navigate their obligation to remain neutral alongside their ability to work with unrepresented parties to ensure equal access to justice.” Access to Justice Board.
- The local programs have been “extremely successful” and have “reflected the practical realities of how some family law trials have been conducted in the past, especially in matters where both parties are self-represented.” Superior Court Judges’ Association Family and Juvenile Law Committee.

RULE CHANGE PROPOSALS

This IFLT concept was discussed by the [Family Court Improvement Committee](#) (FCIC) at its November 18, 2021 meeting. The FCIC voted to approve supporting the concept of an IFLT program in Arizona. Because of the Court’s rule petition cycle, the following rule change proposals are solely those of the undersigned and not the FCIC. The undersigned welcomes input from FCIC and other interested stakeholders.

For these reasons, Rule 77, ARFLP, should be amended with the recommended changes noted below:

³ Further information is available at the National Center for State Court’s
5

Rule 77. Trials

(a) **Setting Cases for Trial.** Unless the court has already set a trial on its own or at a resolution management conference or a scheduling conference, any party may file a motion to set a case for trial. The motion must state:

- (1) the date by which the case will be ready for trial;
- (2) the names, addresses, and telephone numbers of the parties or their attorneys who are responsible for the conduct of the litigation;
- (3) whether the case is entitled to a preference for trial because legal decision-making or parenting time is at issue; ~~and~~
- (4) the estimated time for trial; and
- (5) whether the party agrees to proceed with an informal family law trial under Rule 77.1.

(b) **Continuances and Scheduling Conflicts.** Rule 34 addresses trial continuances and scheduling conflicts.

Rule 77.1. Informal Family Law Trials

(a) **Applicability.** Upon consent of all parties and the court, an Informal Family Law Trial (IFLT) may be held to resolve all actions brought under Title 25 of the Arizona Revised Statutes. This rule applies to both pre-decree and post-judgment actions.

(b) **General.** An IFLT is an alternative trial procedure to which the parties, their attorneys, and the court voluntarily agree. Under this model, the court may admit any relevant and material evidence, even though such evidence might be

inadmissible under formal rules of evidence, and the traditional format used to question witnesses at trial does not apply. In most cases, the only witnesses will be the parties. At the discretion of the court, other relevant witnesses may be called.

(c) Election. All parties must elect an IFLT and waive a traditional trial.

(1) At any time, the court may offer the parties the option of electing an IFLT and must explain the process. If the parties make that election, the court must obtain the parties' consent on the record under oath or in writing on a form in substantial compliance with Form ___, Rule 97.

(2) At any time and by agreement, the parties may request to change from a traditional trial to an IFLT.

(3) The court may refuse to allow the parties to use the IFLT process at any time and may direct that the case proceed traditionally, and may also direct that a case proceed in the traditional manner of trial even after an IFLT has been commenced but before judgment has been entered.

(4) A party who has agreed to proceed with an IFLT may move to opt out of the IFLT provided that the motion is filed at least 21 calendar days before trial. The court may allow a party to withdraw from an IFLT election as long as the withdrawal would not prejudice the other party. The court will not allow a withdrawal of an election that postpones the trial date absent a showing of cause.

(5) The election of a traditional trial or IFLT process does not diminish the court's authority to question witnesses or otherwise manage the proceedings in the interests of justice.

(d) **Pretrial Procedures.** A case proceeding as an IFLT will be subject to the same pretrial procedures and rules, including mandatory disclosure and court orders that apply to a traditional trial case.

(e) **Trial Procedure.** The IFLT will proceed as follows:

(1) At the beginning of the IFLT, the court will ask the parties to affirm that they understand the rules and procedures of the IFLT process, they are consenting to this process freely and voluntarily, and they have not been threatened or promised anything for agreeing to the IFLT.

(2) The court may ask each party or the party's attorney to summarize the issues to be presented.

(3) The moving party will be allowed to testify to the court under oath about all disputes. The party must not be questioned by another party or any lawyers but may be questioned by the court to develop evidence required by any statute or rule necessary to address the matters at issue.

(4) Parties and non-expert witnesses will not be subject to cross-examination; however, the court will ask the nonmoving party or their lawyer whether the party wishes the court to ask about any other areas. The court will inquire into these areas if requested and relevant to an issue that the court will decide.

(5) The process in (e)(3) and (e)(4) will then repeat for each other party.

(6) Lay witnesses (non-experts not named in the case caption) are not allowed to testify unless the court orders otherwise based on a showing good cause. Any testimony from lay witnesses must be submitted in the form of an affidavit or unsworn declaration under the penalty of perjury as provided by Rule 14.

(7) Reports from experts and court-appointed advisors will be admitted as exhibits. Legal decision-making and parenting time evaluation reports will be admitted. An expert or court-appointed advisor may not be called as a witness unless a party has specified the intention to call that witness on that party's Pretrial Statement. Upon the court's request or any party, the witness will be sworn and subjected to questioning by a party or the party's lawyer and the court.

(8) Declarations, letters, or other submissions by the parties' minor children will not be considered, but summaries or transcripts of Rule 12 child interview will be admitted.

(9) The court may admit any other exhibit offered by the parties that can be made a part of the record in the case. The court will then determine the materiality, relevance, and what weight, if any, to give each exhibit. The court may order the record to be supplemented by additional documents or testimony from other witnesses.

(10) A party may not offer an exhibit, affidavit or unsworn declaration under penalty of perjury during an IFLT other than those that have been timely disclosed and specified on a party's Pretrial Statement, unless the court orders otherwise for good cause.

(11) The parties or their lawyers will then be offered the opportunity to respond briefly to the other party's testimony.

(12) The court will offer each party or the party's lawyer the opportunity to make a closing statement.

(13) After the IFLT, the court must render judgment. The court may take the matter under advisement, but best efforts will be made to issue prompt judgments.

(14) The court may put reasonable time limits on any person's testimony or argument.

(15) If an IFLT converts to a traditional trial, the court will allow each party an opportunity to object to any evidence that was offered in the IFLT, and evidence will be admitted consistent with Rule 2.

(16) The court may modify these procedures as justice and fundamental fairness requires.

(f) **Judgment and Appeals.** The court's final judgment will have the same force and effect as if entered after a traditional trial and may be appealed or objected to on any grounds that do not rely on the rules of evidence.

RESPECTFULLY SUBMITTED this 10th day of January, 2022.

Greg Sakall
GREG SAKALL
Family Bench Presiding Judge
Superior Court, Pima County

Michael Peterson
MICHAEL PETERSON
Presiding Judge
Superior Court, Graham County

Bruce Cohen
BRUCE COHEN
Family Department Presiding Judge
Superior Court, Pima County