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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of:	Supreme Court No. R-17-0054
PETITION TO AMEND RULES OF FAMILY LAW PROCEDURE AND ARCAP 9	**COMMENT OF THE STATE BAR OF ARIZONA**

Pursuant to Rule 28(D) of the Arizona Rules of Supreme Court, the State Bar of Arizona (the "State Bar") hereby submits the following as its Comment to the above-captioned Petition. With only a handful of exceptions, the State Bar supports the Petition of the Task Force on the Arizona Rules of Family Law Procedure ("Task Force") to amend the Arizona Rules of Family Law Procedure ("family law rules") and related rules:

a. Most of the proposed amendments do not change the rules substantively, but merely incorporate, where appropriate, stylistic revisions. They are also consistent with stylistic revisions of the other Arizona Rules that have occurred in recent years. The State Bar believes that the proposed stylistic changes

should be adopted because they would make the family law rules easier to understand and more accessible to the general public.

b. Apart from the comments below, the State Bar also agrees with the proposed substantive changes to the family law rules. Many of the proposed changes are minor, and would resolve minor issues and inconsistencies that have arisen since the family rules were originally adopted in 2006. The State Bar also agrees with the deletion of many comments to individual rules, and with the Prefatory Comment proposed by the Task Force.

Background of Proposed Amendments

Establishment and Purpose of the Task Force

As the Petition notes, the Task Force was established in December, 2016, and was directed "to review the current family law rules and to 'identify possible changes to conform to modern usage and to clarify and simplify language.'" The Task Force invested more than two thousand hours of time in preparing the Petition that was filed on March 22, 2018.

The Task Force consists of twenty three members, four of whom are also on the State Bar's Family Law Practice and Procedure Committee ("Committee"). In its monthly meetings leading up to the filing of the Petition, the Committee provided

input to the Task Force, including noting its agreement with or suggested revisions to drafts submitted by the Task Force.

General Principles Followed by the Task Force

The Petition explains the general principles adopted by the Task Force per the direction it was given when it was formed. They are:

1. The rules should be clearly written and not present traps for the unwary.

2. If comments to a rule are necessary to understand the rule, then the rule is incomplete or unclear. Substantive matters belong in the rules, not in the comments.

3. If existing case law clarifies or interprets an ambiguity in a current rule, an effort should be made to remove the ambiguity and, if possible, to incorporate interpretative case law.

4. The rules should accommodate electronic filing and document management.

5. The rules should recognize best practices statewide.

6. Substantive changes should be made cautiously, and only if a consensus exists in favor of it. If substantial disagreement exists over a proposed substantive change, it should be presented in a separate rule petition to permit a full airing of views focused just on that change.

7. To avoid unnecessary confusion, rule renumbering should be minimized. Often cited rules should retain the existing rule number, if possible.

8. The family rules should be freestanding and generally should not incorporate by reference other rules of procedure. However, the rules in Appendix A reflect some exceptions (e.g., family Rule 33 cross-references civil rules regarding counterclaims, third-party claims, joinder, and intervention, and Rule 41(n) references the civil rules if there are special circumstances for service of process).

The State Bar fully supports these principles. The proposed revisions below in which the State Bar disagrees with proposed language involve a belief that different language will better effectuate those principles.

Proposed Restyling

The State Bar Supports the Proposed Restyling.

As the Task Force observes, the family law rules include 101 rules. As explained by the Task Force, the proposed amendments include stylistic revisions that make the rules more comprehensible and user-friendly. The elements of restyling include:

1. using informative headings and subheadings;

2. breaking up long sentences, or making them shorter;

3. converting a lengthy rule into shorter subparts, which makes it easier to find provisions;

4. using lists;

5. avoiding repetition;

6. using "plain English" and the active voice;

7. stating things in a positive form; and

8. avoiding legal jargon and ambiguous terminology, including the word "shall" ("shall" is replaced in the proposed amendments with "must," "may," "should," or "will," depending on the context).

The State Bar supports all non-substantive restyling proposed by the Task Force. The State Bar also agrees with the deletion of many comments and, where appropriate, their incorporation into the Rules themselves, and further supports the proposed Prefatory Comment.

Substantive Amendments

The State Bar supports the proposed substantive revisions with the following exceptions:

(1) Proposed Rule 2 eliminates the automatic admissibility of the Affidavits of Financial Information or expert's reports, even if the report was prepared pursuant to Court order. The State Bar understands the concerns related to expert reports. However, the State Bar believes that Affidavits of Financial Information should continue to be automatically admissible. Both the current Rules and Proposed Rules require parties to file Affidavits

of Financial Information in certain circumstances. Proposed Rule 2 may create confusion or misunderstanding for unrepresented litigants.

(2) Proposed Rule 41(m) removes the prohibition on obtaining a support order through publication. The State Bar is concerned about the due process implications of this change. The authority of the court to exercise personal jurisdiction over a party has two important components; minimum contacts with the jurisdiction and adequate notice. The Uniform Interstate Family Support Act, A.R.S. § 25-1221, provides important guidance on when the court may exercise long arm jurisdiction over parties to establish support. However, constitutional due process concerns govern the issue of adequate notice. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950)".

There is a split of authority across the country about whether support obligations may be obtained after service by publication. The State Bar believes that prohibiting establishment of support obligations after service by publication is the better public policy because such service is not

calculated to provide actual notice to the party. For support proceedings, it is better practice to consider various other types of alternative service that would provide actual notice e.g. mailing to places of employment, posting on the door of residence wherein a party refuses to answer the door, email, mailing to relatives, and other creative approaches.

"Default orders should be avoided whenever possible. These orders are generally less likely to get support to children because they are often not based on the paying parent's real ability to pay".[1] Permitting support orders to be established after service by publication encourages the entry of default orders. Furthermore, it is important to children that the court establish a realistic and appropriate order based on the paying parent's real ability to pay support so that:

- the parent can make regular child support payments that the children can depend on;
- an uncollectible arrearage does not accrue; and

[1] Office of Child Support Enforcement "Entering Default Orders Bench Card, Child Support and the Judiciary".

- the paying parent is motivated to remain in the formal economy.[2]

A party with no actual notice of the order cannot be expected to pay. In proposing to change this practice, the Taskforce relies on *Master Fin., Inc. v. Woodburn,* 208 Ariz. 70, 73, ¶ 11, 90 P.3d 1236, 1239 (App.2004). The commercial collection issues in that case are fundamentally different than the issues faced by parties in family support proceedings. In *Master Fin.*, and in the proposed comment to ARFLP Rule 41, it is suggested that any irregularities created by using service by publication can be cured by the party who was served by publication filing to set aside the judgment. This is an unrealistic expectation for the majority of self-represented litigants. These parties do not demonstrate the skills necessary to navigate this issue on their own, and the vast majority of them do not have the resources to obtain counsel. As such, this is an access to justice issue. Furthermore, proposed ARFLP Rule 83

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[2] Office of Child Support Enforcement - "Establishing Realistic Support Orders: Child Support and the Judiciary Bench Card." See also **Project to Avoid Increasing Delinquencies: Establishing Realistic Child Support Orders: Engaging Noncustodial Parents, Office of Child Support Enforcement, Administration for Children & Families, U.S. Department of Health and Human Services.**

limits the time period to have such an order set aside to one year from entry of judgment. This limitation bears no relationship to when the party actually learns of the default judgment.

If publication is to be allowed as a method of service in support cases, pre-authorization by the court should be required to determine whether "service by publication is the best means practicable in the circumstances for providing the person with notice of the action's commencement" as required by the rule. Judicial pre-authorization would be consistent with the practice required for other types of alternative service.

(3) Proposed Rule 44.1(e)(5) states a copy of the parent education certificate must be attached to a default decree. This should be revised to state "a copy of the filing parent's certificate of completion of the parent information program, if it has not already been filed with the clerk of court." In Maricopa County, parties have the option of taking the parent information program online and the provider then e-files the certificate of completion. It may be unduly burdensome for self-represented parties to meet this requirement in this situation.

(4) Proposed Rule 44.2(b) would be clearer if it was revised to state "service pursuant to Rule 43" instead of simply stating "service." This would create more clarity for self-represented litigants.

(5) Proposed Rule 57(a) does not define the term "action." This may cause confusion as to whether or not depositions are precluded in post-decree matters. Either the term "action" should be defined, or it should be stated that depositions are not precluded in post-decree matters if a deponent was deposed as part of a previous petition, pre or post decree.

(6) Proposed Rule 59(d)(3) allows a party to object to the relevance of a deponent's testimony. The State Bar is concerned that this may be confusing to attorneys and litigants.

(7) Proposed Rule 76(a) states that "the court may, and on a party's request must, set an RMC." It would be unduly burdensome to require the Court and parties to participate in an RMC in every case where one is requested. For example, an RMC (on one party's request) is unnecessary in some cases, such as establishment or enforcement of child support and the concern is that the RMC request may be used for purposes of delay or to waste the parties' or Court's resources. Statewide, counties utilize RMCs at varying rates, and it may be disruptive to well established practices to make them mandatory upon the request of a party.

CONCLUSION

The State Bar of Arizona respectfully requests that the Petition be granted with the proposed revisions described above.

RESPECTFULLY SUBMITTED this 21st day of May, 2018.

Lisa Panahi

Lisa M. Panahi
General Counsel

Electronic copy filed with the
Clerk of the Supreme Court of Arizona
this 21st day of May, 2018.

by: [signature]