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Judge Mark W. Armstrong (ret.), Co-Chair
Task Force on the Arizona Rules of Family Law Procedure, Petitioner
1501 W. Washington St.
Phoenix, AZ 85007

SUPREME COURT OF ARIZONA

PETITION TO AMEND THE) Supreme Court No. R-17-0054
ARIZONA RULES OF FAMILY)
LAW PROCEDURE and ARCAP 9) Reply
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As provided by Rule 28 of the Rules of the Arizona Supreme Court and the Court’s scheduling order in this matter, the Task Force on the Arizona Rules of Family Law Procedure (“Task Force”) submits this Reply. The Appendix to this Reply contains the proposed rules, including Petitioner’s newly suggested changes.

I. Introduction. Unlike the Civil and Criminal Rules Task Forces, the Family Law Rules Task Force requested a single comment period on its rule petition. This Task Force did so because it had the opportunity to solicit pre-filing comments. The Task Force received almost twenty thoughtful comments before filing its petition, some of them raising multiple issues, which the Task Force considered at a meeting on February 16, 2018. This effort allowed the rules appended to the original petition to be a better work product, and probably minimized the number of formal

comments submitted during the subsequent public comment period. Five comments were posted on the Rules Forum during the R-17-0054 public comment period, and an equal number of informal comments were transmitted to Task Force staff. The Rules Forum postings included comments from the State Bar of Arizona and from Pima County's family law bench.¹ The latter comment addressed 33 rule provisions, some by noting typographical errors or making syntactical suggestions, and others by raising substantive issues. The Task Force met on June 11, 2018 to discuss the formal and informal comments.²

II. Discussion of Predominant Issues. The comments posed three predominant issues. First, do the proposed rules clearly and accurately distinguish the uses of a summons and an order to appear? Second, does proposed Rule 41(m), which allows a judicial officer to include provisions such as child support and spousal maintenance in a default decree entered after service by publication, meet due process requirements? And third, should the rules mandate resolution

¹ This comment was a compilation of comments by individual members of Pima County's family law bench. The comment noted that it did not represent the views of that entire bench or the superior court in Pima County. This Reply will refer to it as "the Pima bench comment."

² Another comment was posted on the Rules Forum on July 1, 2018, a month past the comment due date. The Court might consider this comment, but it was submitted too late for discussion by the full Task Force.

management conferences? This Reply will begin with a discussion of these three issues.

(a) Use of a summons versus an order to appear. The Task Force spent considerable time clarifying when to serve a petition with a summons, and when to serve a petition with an order to appear. Lisa Boddington, an attorney who serves at Maricopa County's Law Library Resource Center, provided a pre-petition comment regarding the distinction. She submitted an informal follow-up note after the petition was filed on March 22 questioning whether the proposed rules were correct and complete on this point. The Pima bench comment noted a similar concern.

Proposed Rule 23(a) (the analog of current Rule 24(B)) enumerates petitions seeking 11 different types of relief, including petitions for annulment, dissolution, separation, paternity, third-party rights, enforcing or modifying legal decision-making or parenting time, and enforcing or modifying support. Subsequent sections of Rule 23 deal with the filing of a foreign judgment and other types of relief. Some petitions begin a case, and others are filed in post-decree or post-judgment circumstances.

Petitions that initiate an action are generally served with a summons. A summons requires a written response, and the absence of a response may result in the entry of default. A party may file a written response to a petition served with an order to appear, but a written response is not required, and the lack of a written

response will not prompt a default. An order to appear, however, requires a party to show up, and if the party fails to do so, the party's non-appearance may result in the court granting the relief requested by the petition. So, for example, a dissolution petition is served with a summons, and following a failure to file a timely written response, the petitioner may apply for default and a default decree. On the other hand, a petition that seeks to modify child support is served with an order to appear, which requires the responding party to appear at a return hearing. A petition to establish legal decision-making must be served with a summons, whereas a petition to modify legal decision-making must be served with an order to appear.

The current family rules are not completely clear on which petitions require one or the other. But the Task Force recognized, after filing its petition, that its intended clarification also fell short. The proposed rules in the Appendix therefore include a new Rule 23(b) titled "Summons and Order to Appear." Subpart 23(b)(1) refers to specific subparts of Rule 23(a) and identifies petitions that must be served with a summons. Subpart 23(b)(2) does the same to identify petitions that must be served with an order to appear. The Task Force further removed from its proposed rules potentially conflicting provisions in other rules, and renumbered subsequent sections, subparts, and cross-references accordingly. The proposed rules therefore include a single provision, Rule 23(b), which distinguishes what must be served—a summons or an order to appear—with each type of petition.

(b) Service by publication under proposed Rule 41(m). Formal comments from the State Bar and the Department of Economic Security, as well as the Pima bench comment, took issue with proposed Rule 41(m), titled “Service by Publication.” The issue has its genesis in current Rule 41(N) (“service by publication; return”), which expressly states that service by publication is not sufficient to confer jurisdiction upon the court to determine issues of paternity, child support, spousal maintenance, division of marital property, or any other issue requiring personal jurisdiction over a party. A committee comment to current Rule 41 notes that this rule does not follow the holding in *Master Financial, Inc. v. Woodburn*, 208 Ariz. 70, 90 P.3d 1236 (App. 2004), which is applicable to Civil Rule 4.1.

The Task Force’s proposed revisions to what is now Rule 41(m) remove language about publication being insufficient to confer jurisdiction for certain determinations in a family law case. The Task Force also proposes to abrogate the current comment and substitute a new comment to the 2019 amendment, as follows:

Former Rules 41 and 42 imposed limitations on the court’s personal jurisdiction over a party when the party was served by publication. Revised Rule 41 deletes those limitations, and this rule now follows the holding in *Master Financial, Inc. v. Woodburn*, 208 Ariz. 70, 74, 90 P.3d 1236 (App. 2004), paragraphs 15-22. Nevertheless, service by publication is subject to subsequent challenge if it does not satisfy due process standards of being reasonably calculated to give notice to the party being served and providing the best practicable notice under the circumstances. See Rules 83 and 85.

Accordingly, in appropriate circumstances and even when service is made by publication under proposed Rule 41(m), the court would have jurisdiction to enter orders concerning paternity, child support, division of marital property, and other issues.

The State Bar's comment noted, among other things, that the Bar was "concerned about the due process implications of this change," and the Pima bench's comment joined in the Bar's position. The formal comment from the Department of Economic Security/Division of Child Support Services said, "because service by publication is not expected to provide actual notice to the party, it is DCSS's position that it is a better practice to avoid publication. For support proceedings, it is preferable to consider various types of alternative service that would provide actual notice.... DCSS will certainly be called upon to enforce orders obtained in this way and will have difficulty assessing the legitimacy of the service." DCSS urged the Court to reject this change or, if service by publication is allowed, that it require the court's pre-authorization and a judicial determination that service by publication is the best means practicable for providing notice under the circumstances.

The Task Force is mindful of the concerns expressed in these comments. But under proposed Rule 41(m), a petitioning spouse who served an unlocatable respondent by publication would no longer be left in limbo about, for example,

ownership of property or the paternity of a child. And the proposed rules provide the following safeguards for a defaulted respondent who was served by publication.

First, if the serving party knows the last known address of the person being served, proposed Rule 41(m)(3) requires the serving party to mail the summons and a copy of the pleading to that person on or before the date of the first publication. Proposed Rule 41(m)(4) also requires the serving party to file an affidavit that specifies the circumstances necessitating service by publication.

Second, in the appended version of the proposed rules, the Task Force recently added a new Rule 44.1(a)(3) that says, “the court may not enter a default judgment without a hearing if the party in default was served by publication.” Another recent amendment to Rule 44.2(g) expressly requires the court to “inquire of the steps taken by petitioner to satisfy the due process standards for publication of being reasonably calculated to give notice to the respondent and providing the best practicable notice under the circumstances.” A judicial officer will therefore have an opportunity during a hearing at which the petitioner must appear to consider whether petitioner’s service by publication was appropriate.

Third, an order entered after service by publication, including a child support order, would be subject to subsequent challenge by the defaulted party. A defaulted party who was served by publication would have an opportunity within one year after entry of judgment under Rule 83(e), or under the reasonable time allowed by

Rule 85(b)(6), to appear and contest whether service by publication fulfilled due process requirements.

Although the method of alternative service preferred by the comments requires judicial approval, the approval is based on an *ex parte* request. (See proposed Rule 41(l), which allows a request for alternative service “on motion and without notice to the person to be served.”) After a party is served by an alternative method, the rules allow the entry of default judgment without the need for petitioner to appear in court. By comparison, under the proposed rules for service by publication, a petitioner is required to appear at default hearing and personally explain the steps that were taken to satisfy due process.

Whether the Task Force’s proposed Rule 41(m) is consistent with due process and improves current rule provisions concerning service by publication are policy questions for the Court’s determination.

(c) Resolution management conferences. Rule 76 concerns resolution management conferences (“RMC”). Rule 76(a) provides that “the court may, and on a party’s request must, set an RMC.” The State Bar’s comment suggested that setting an RMC on a party’s request could be burdensome to the court and used by a party for delay or other inappropriate purposes. The Pima County bench joined in this view. Task Force members, however, disagreed. Under Civil Rule 16(d), the court must set a scheduling conference on a party’s request, and the proposed family

rule follows that principle. Task Force members agreed that an RMC, when done right, can be productive and reduce the parties' burdens. Litigants who ask for an RMC have an issue they want to present to a judge, and although RMCs might not be popular in every county, members agreed to retain this provision.

A comment from a private practitioner in Pima County addressed the appropriateness of mandatory RMCs on motions for temporary orders under Rule 47. The comment contended that this requirement would "impose multiple burdens on clients" and observed that Pima County generally did not utilize RMCs. After considering the comment, the Task Force declined to change this provision of Rule 47. However, the Task Force anticipated the issue raised by this comment when it drafted proposed Rule 47(i). This provision would permit counties by local rules or administrative orders to establish alternative processes, including alternatives to an RMC under this rule.

III. Other Issues Raised by the Comments. In addition to the predominant issues, the comments raised other issues that resulted in rule revisions, including the following.

(a) ***Rule 2: Applicability of the Arizona Rules of Evidence.*** The State Bar disagreed with the Task Force's treatment of Affidavits of Financial Information under proposed Rule 2, and after discussion, the Task Force concluded the State Bar's comment was well-taken. The Task Force then modified Rule 2 by adding a

new section (d) that the Task Force believed was consistent with current Rule 2(B)(3)(b). New section (d) provides, “Any Affidavit of Financial Information required to be filed or served may be considered as evidence if offered as evidence by a party and admitted into evidence by the court.”

(b) Rule 13: Public Access to Proceedings and Records. Rule 13(c) requires the filing of a motion to close the courtroom at least two days before a hearing. The Pima bench comment observed that information requiring closure might not be known in advance of the hearing. Members agreed with this observation and added a sentence to this rule allowing the court on a party’s motion or on its own to close the courtroom “if unforeseen circumstances arise that require closure.”

(c) Rule 20: Form of Documents. The A.O.C.’s Information Technology team, which is continuing to develop e-filing applications, expressed concern with a provision in Rule 20(b) regarding document format. Rule 20(b)(9) says, “Printed court forms may deviate from the requirements of this rule, but they must be single-sided. Forms provided by the superior court or the Supreme Court meet the requirements of this rule.” The team’s concern was that with e-filing, many forms that are ultimately filed with the court are, or will be, provided by e-filing vendors rather than the court. The Task Force acknowledged the team’s concern by including references to “a court-authorized vendor” in both sentences of subpart (b)(9).

(d) **Rules 45: Consent Decree, Judgment, or Order.** The Task Force’s March petition proposed the abrogation of provisions regarding waiver of service. The Task Force felt these waiver provisions were too complex for self-represented litigants, involved unduly long response times, and were inferior to the process of accepting service. Unfortunately, some references to waiver, including a reference in Rule 45, remained in the March 22 draft. These references have now been corrected.

(e) **Rule 57: Depositions by Oral Examination.** The State Bar had concerns with a provision in Rule 57(a)(1) (“when a deposition may be taken: depositions permitted”) that precluded taking a person’s deposition when the person had already been deposed. The State Bar observed that this might cause confusion about whether depositions are precluded in post-decree proceedings. Members agreed with this observation, and they added after the words “had already been deposed” the words “under the current petition.”

(f) **Rule 59: Using Depositions in Court Proceedings.** The State Bar also had concerns with a provision in Rule 59(d)(3)(A) that would require a party who objected to a deponent’s competence, or to the competence, relevance, or materiality of the deponent’s testimony, to make the objection before or during the deposition. Task Force members noted that this provision parallels Civil Rule 32(d)(3)(A), but after discussion, they believed the Civil Rule was incorrect.

Accordingly, they reverted to the former Family Law rule so that objections on these grounds are “not waived” by failure to make them before or during the deposition.

(g) **Rule 70: Notice of Settlement:** The proposed rule required that notice of settlement be given to the assigned judge or commissioner, the clerk, and the court administrator. The Pima bench comment though this was unnecessarily burdensome. Task Force members agreed and deleted the requirement of providing notice to the clerk and court administrator.

(h) **Rule 72: Family Law Master:** The proposed rule repeatedly used the term “order of reference.” Members agreed with a suggestion in the Pima bench comment to change this to “appointment order” or, in a subpart title, to “order of appointment.” They also agreed with the Pima bench’s suggestion that a copy of a master’s report be provided to “any self-represented party,” in addition to represented parties’ counsel.

IV. The Task Force’s Revisions. The Task Force on its own initiative made other revisions to the proposed rules.

(a) **Rule 3: Definitions.** The title of Part II is “pleadings and motions,” and the title of Rule 23 is “pleadings: petition and response,” but there was no definition of “pleading” in the rules. Members agreed that a definition was necessary because, for example, Rule 29 concerns motions for judgment on the pleadings, and includes

a provision for considering matters outside the pleadings. The Task Force therefore added a definition of pleadings in Rule 3 as follows: “A ‘pleading’ is a document filed under Rules 23(a), 23(c), 23(f), 28, or 33.”

(b) Rule 24.1: Time to File and Serve a Response to a Petition. Members spent considerable time during their June 11 meeting discussing Rule 29(a), which is titled “Time to File and Serve a Responsive Pleading.” They concluded that this provision was not comprehensive or clear, and that its location should be more proximate to Rule 24 concerning “Contents of Pleadings.” They accordingly deleted Rule 29(a) and relocated its pertinent content to a new Rule 24.1. New Rule 24.1 explains the time for filing and serving a responsive pleading in six sections titled “generally,” “service in Arizona,” “service outside Arizona,” “acceptance of service,” “response after court rulings on Rule 29 motions,” and “default.”

(c) Rule 29: Defenses and Objections; Motion for Judgment on the Pleadings; Joining Motions; Waiving Defenses; Pretrial Hearing. In addition to moving Rule 29(a) as discussed above, the Task Force made other changes to Rule 29, beginning with its title. Because Rule 29 makes no mention of objections, the title of the rule was modified by removing the words “and objections.” Rule 29 now includes a new section (f) concerning a motion for a more definite statement that contains text taken from Civil Rule 12(e). The title of Rule 29(h) was changed to “disposition of Rule 29 motions,” and the text of that section was clarified.

(d) Rule 76.1: Scheduling Conference; Scheduling Statement; Pretrial Statement. The Task Force deleted the words, “Form X, Rule 97 (‘Simplified Affidavit of Financial Information’) or in such other form permitted by local rule,” from proposed Rule 76.1(g)(1)(A) because such a form, although contemplated, does not currently exist.

(e) Correlation Table. Appendix C to the March petition was a separate table correlating the proposed family law rules with the current family law rules and with the civil rules. Members agreed that this table should now be included with the restyled rules, as shown in the Appendix to this Reply.

(f) ARCAP 9. Appendix B to the March petition contained proposed amendments to ARCAP 9 that would conform the civil appellate rule to proposed Family Law rule revisions. There were no comments concerning the proposed amendments to ARCAP 9, and accordingly, this Reply is not resubmitting Appendix B. The Task Force requests, however, that the Court adopt the ARCAP 9 amendments along with the proposed amendments to the Family Law Rules.

(g) Forms. Rule 97 currently identifies Forms 1 through 16, which appear following Rule 97. The Task Force petition requested the abrogation of current Form 6 (“Joint Alternative Dispute Resolution Statement to the Court”) and the adoption of a new Form 6 (“Default Information for Spousal Maintenance”). Task Force members are continuing to discuss revisions to other Rule 97 forms, but they

have no revisions at present that are ready for inclusion in R-17-0054. Under Administrative Order No. 2016-131, which established the Task Force, members' terms continue until December 31, 2018. Members might reconvene later this year to discuss revisions to the other forms and, if there is agreement, they will file a second rule petition requesting the adoption of additional form changes.

V. Implementation Order. Under Rule 28(F)(2), Rules of the Supreme Court, rules adopted by the Court usually become effective on January 1 of the following year. Task Force members agreed that there was no need to request a delayed implementation date. They further agreed that the implementation order should contain language like the text included in the Court's Order in R-16-0010, which adopted the restyled civil rules. Regarding the family rules, this would mean that the rules would apply to all actions filed after January 1, 2019, as well as to actions pending on that date, "except to the extent that the court in an affected action determines that applying the rule or amendment would be infeasible or work an injustice, in which event the former rule or procedure applies." Members recommend that these principles also apply to Rule 91 petitions and other post-decree or post-judgment proceedings.

Task Force members also request that the Court's implementation order expressly (a) abrogate current Form 6; (b) adopt proposed Form 6; and (c) confirm that current Forms 1 through 5 and 7 through 16 continue to be effective.

VI. Conclusion. The Task Force appreciates the comments stakeholders submitted during the comment period and the opportunity to thereafter improve its work product. The Task Force now requests the Court to abrogate the current Family Law Rules, except the forms noted above, to adopt the proposed rules and the form shown in the Appendix to this Reply, and to adopt the proposed amendments to ARCAP 9.

RESPECTFULLY SUBMITTED this 5th day of July 2018.

By /s/ Rebecca White Berch
Justice Rebecca White Berch (ret.), Chair

By /s/ Mark W. Armstrong
Judge Mark W. Armstrong (ret.), Co-Chair