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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of SECOND AND
FINAL PETITION TO AMEND
ARIZONA RULES OF FAMILY LAW
PROCEDURE AND REQUEST TO
CONSIDER RULE CHANGE
PETITION ON AN EXPEDITED
BASIS

Comment of Arizona Attorney
General's Office on
Supreme Court No. R-07-0010

The Office of the Attorney General submits this comment regarding
Petition R-07-0010. This Comment specifically addresses the proposed
changes to Arizona Rules of Family Law Procedure 44(B)(3), 44(B)(4),
27(C), and 35(D). The information in this Comment is based on the
Attorney General's Office's expertise as a representative of the Arizona
Department of Economic Security (DES) in Title IV-D child support
matters.

Rule 44(B)(3) Should Not Be Amended to Require a Petition to Include a Specific Amount of Past Support.

The proposed amendment to Ariz. R. Fam. Law P. 44(B)(3) requires the Petitioner to plead an exact amount of past support. This Office recommends that, instead, this Court amend the rule to require that the petition give notice to the non-custodial parent of the time period for which past support is requested and that past support will be calculated by a retroactive application of the child support guidelines. This alternative language is included in Exhibit A. This alternative is recommended because it is consistent with the statutory requirements, and it avoids the legal and practical problems that the language in the Petition would create.

A. Attorneys May Not Have Access to the Information Necessary to Include a Specific Amount in the Petition.

In addition to Mothers and Fathers, DES is a third interested party in Title IV-D child support cases. The proposed rule would require the State's attorney to make allegations in a Petition regarding information that only the other parties may possess. Where a non-custodial parent works as a contractor or is self-employed, the State is unlikely to have information on the non-custodial parent's income. Even where historical data is available to the State's attorney before filing a petition, it may be out of date. According to Arizona Health Status and Vital Statistics compiled by the Arizona Office of Vital Records for 2006, 43.9% of children born in Arizona are born out of wedlock, and many of these parents have never lived together. Therefore,

custodial parents frequently may not have much information about the income and earning ability of the non-custodial parent.

Even if the custodial parent can provide information, the State may not be able to verify its reliability before filing the petition, if at all. Information and testimony presented by a party under oath in a court hearing with the opportunity for cross-examination is more likely to be reliable. The reality of practice in many child support cases in Arizona is that the State's attorney often does not have updated and complete information on the individual parties' income in advance of the court hearing.

Arizona's Title IV-D child support agency has approximately 225,000 cases. At any given time 8,000 to 10,000 of those cases are in active litigation in the Attorney General's Child Support Enforcement Section. More than ninety percent (90%) of the parties who appear in IV-D matters are unrepresented by counsel and often do not understand the responsibility to provide information in advance of hearing. The reality is that little pretrial discovery is done or would be productive in these cases, many stipulations are entered on the day of the hearing, and the primary fact gathering in contested cases is done at court. Any new requirements as to what must be plead in advance must be reasonably practicable within the framework of the family law practice.

The proposed rule would put the State's attorney in the position of making an uninformed estimate before filing a petition in order to complete the guidelines work sheet and calculate past support. The attorney often

simply cannot include a specific amount of past support in the Petition without violating Ariz. R. Fam. Law P. 31, which provides that the attorney's signature on a petition constitutes a certification that the petition is well-grounded in fact. The evidence necessary to determine the specific sum is best determined at the hearing when the parties are most likely to provide it in the first instance, and where credibility can be assessed. This is precisely why a hearing is conducted rather than having a judgment entered by motion without hearing pursuant to Ariz. R. Fam. Law P. 44(B)(1).

The practical effect of the proposal to require a specific amount of past support in the Petition would be to make it more difficult to obtain a judgment for past support and this would, in many instances, reduce the recovery available to the custodial parent or the State. This is contrary to the directives in statute (A.R.S. §§ 25-320, -809), which establish the court's obligation to consider relief in the form of past support determined by a retroactive application of the guidelines.

The application of the proposed rule change in a case in which the non-custodial parent has defaulted illustrates some additional practical problems. In a default situation, the Court could not enter a past support judgment in an amount higher than that requested in the petition, even if the evidence at hearing supported a higher amount under the child support guidelines. For example, a judicial officer might determine, based on the testimony of the custodial parent, that the State has underestimated the non-custodial parent's income. Requiring the Petition to include a specific

amount as a ceiling for the relief that can be obtained effectively limits a judicial officer's discretion to enter a higher amount based on the evidence presented at hearing and consistent with the guidelines, an unintended consequence that should be avoided.

The proposed rule change is designed to give more specific information to non-custodial parents about the potential past support obligation to encourage them to participate in the litigation rather than default. However, it may result in actually reducing such participation. A non-custodial parent who is served with a petition that underestimates his or her income and support obligation is less likely to appear in court when that might result in a higher, but more accurate, order. This actually creates a disincentive for the non-custodial parent to appear in court and provide current information. The rule could operate to deprive the custodial parent or the State of the past support to which they are legally entitled. These consequences are contrary to Arizona law and public policy.¹

B. Proposed Alternative Amendment to Rule 44(B)(3)

This Office proposes that the Rule be amended to provide that the Petitioner must include in the Petition the specific period of time for which support is sought and that the amount of support will be calculated by retroactive application of the Arizona Child Support Guidelines. *See* Exhibit

¹ The legislature has expressed Arizona public policy regarding the parental duty of support. Parents have the duty to provide all reasonable support to their children. A.R.S. §25-501(A). [I]t is the public policy of this state that parents shall be responsible for the support of their dependent children in order to relieve or avoid the burden often borne by the general citizenry through public assistance programs. A.R.S. § 46-401. The obligation to pay child support is primary, and other financial obligations are secondary. A.R.S. § 25-501(C).

“A”. This change will address the concerns described above, and it is also consistent with the notice pleading requirements in Ariz. R. Fam. Law P. 29(A).

The proposed rule in the Petition also uses some terminology that is inconsistent with related Arizona statutes. The rule refers to “child support arrears accruing for periods of time prior to the date of filing of the petition to establish the first order for child support” for cases initiated by Petition and Order to Appear. But, the term “arrears” is generally used to refer to money that is unpaid *after* a child support order has been issued. When child support is being ordered retroactive to the date the parties separated, it is generally referred to as “past care and support” or “past support”, which is the terminology used in A.R.S. §§ 25-320 and 25-809.

The proposed alternative included in Exhibit “A” modifies the language of the rule accordingly.

II. Rule 44(B)(4) Should Be Amended to Require Mailing within Three Judicial Days Rather than Within 24 Hours.

The proposed rule requires mailing a copy of the decree or judgment to a defaulted party within 24 hours of receipt. While this requirement may not be a problem in a case where a party walks away from a default hearing with a signed decree, it can be a problem if the decree or judgment is received later by mail or runner. The State often receives decrees/judgments in a mass delivery several days or weeks after the hearing. Because of high volume and delays in receipt of documents, it would be difficult for the State

and many other practitioners to comply with this one-day requirement in all cases. If an attorney happens to be out of the office on the single day that mailing is required, he would be in violation of the proposed rule. As an alternative, this Office proposes a requirement for mailing within three judicial days. *See* Exhibit “A”. Such a rule should not be detrimental to the defaulted party, and is far more practicable than requiring mailing within 24 hours.

III. Rule 27 (C) Should Be Amended to Require Ten (10) Days Rather than Twenty (20) Days Notice.

The proposed amendment to Rule 27(C) appears to impact establishment actions filed by the State almost exclusively because most other family court actions are initially commenced by Petition and Summons. The goal of the proposal to require twenty (20) days notice of a hearing was to make the time period for service consistent with the time period for responding to a Petition and Summons. Because this proposal applies only to child support establishment actions, however, it would be more appropriate to make the time period consistent with Ariz. R. Fam. Law P. 91(L) which requires service ten days prior to the hearing. The actions in question address only child support, and it usually does not require twenty days to prepare a Child Support Calculation. In the rare, complicated case where more time is needed, the court may continue the hearing. Although this may be the first court action, the parties have already established paternity, or else paternity is not an issue. Thus, there is not the same level

of surprise or complexity found when initiating a petition in paternity, custody, or dissolution. Requiring service of process twenty (20) days prior to hearing, when the hearing is usually set out only thirty (30) to forty-five (45) days from filing, often does not allow the State enough time to effectuate service of process. This will result in an increase in requests to quash scheduled court hearings, more inefficiency in the use of court resources, and will delay final resolution of cases, as well as delivery of support to children.

As an alternative, this Office proposes that in all actions other than those listed in sub-paragraphs 27(A) and (B), the petitioner shall serve upon all parties entitled to service of process a copy of the petition, order to appear issued by the court and any notices, forms, and orders required under Rule 26(D), at least ten (10) days prior to the scheduled hearing, unless otherwise ordered by the court. Service shall be pursuant to Ariz. R. Fam. Law P. 40, 41 or 42, as applicable. *See* Exhibit “B”.

IV. Motions to Reconsider Should be Due within Thirty (30) Days.

Currently, the family law rules of procedure establish no deadline for filing motions to reconsider. The proposal establishes a new, fifteen (15) day deadline. The proposed deadline causes a problem for the State in two (2) ways. First, problematic orders are frequently the result of hearings for which the State did not receive prior notice, and which the court conducted without realizing that it was a Title IV-D case. Second, because of the high

volume of the Title IV-D practice, orders are not always received in a manner timely enough to permit the State to file a motion to reconsider within fifteen (15) days. Other litigants may experience similar problems.

As an alternative to the proposed, new fifteen (15) day deadline, this Office proposes that the time period be expanded from the current proposal of fifteen (15) days to thirty (30) days. This compromise will still impose a new time limit on motions to reconsider that does not now exist, while maintaining a reasonable period of time for the court's order to be received, analyzed and assessed by counsel and client, and then responded to, if appropriate.² See Exhibit "C".

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² The Petition to Amend Rule 35(D) states that the change is consistent with Ariz. R. Civ. P. 7.1, the parallel provision in the Arizona Civil Rules of Procedure. This office notes that the civil rule does not contain a time limit for filing a Motion for Reconsideration, nor has anyone filed a proposal to change that rule to bring it in conformity with the proposed family court rule.

Conclusion

This Office supports the rule change with the amendments suggested in this Comment.

Dated this 20th day of May, 2008.

TERRY GODDARD
Attorney General

by Stanley R. O'Dell
Mary O'Grady
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Section Chief Counsel –
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A copy of this comment has been mailed or
Delivered this 20th day of May, 2008, to:

Hon. Norman J. Davis, Chair
Family Law Rules Review Committee
Maricopa County Superior Court
125 W. Washington, Suite 002
Phoenix, AZ 85003
Petitioner

EXHIBIT “A”

FONT LEGEND for Attached Rules

RED – Changes Effective January 1, 2008 (R-06-0022)

BLUE – Changes recommended in current rules petition

GREEN – Changes recommended by the Office of the Attorney General in
Comment

Rule 44. Default Decree

A. Application and Entry. When a party against whom a judgment for affirmative relief is sought has failed to respond or otherwise defend as provided by these rules, the clerk shall enter that party's default in accordance with the procedures set forth below. All requests for entry of default shall be by written application to the clerk of the court in which the matter is pending.

1. *Notice.*

a. *To the Party.* When the whereabouts of the party claimed to be in default are known by the party requesting the entry of default, a copy of the application for entry of default shall be mailed to the party claimed to be in default.

b. *Represented Party.* When a party claimed to be in default is known by the party requesting the entry of default to be represented by an attorney, whether or not that attorney has formally appeared, a copy of the application shall also be sent to the attorney for the party claimed to be in default. Nothing herein shall be construed to create any obligation to undertake any affirmative effort to determine the existence or identity of counsel representing the party claimed to be in default.

c. *Whereabouts of Unrepresented Party Unknown.* If the whereabouts of a party claimed to be in default are unknown to the party requesting the entry of default and the identity of counsel for that party is also not known to the requesting party, the application for entry of default shall so state and shall be mailed to the unrepresented party's last known address.

2. *Effective Date of Default.* A default entered by the clerk shall be effective ten (10) days after the filing of the application for entry of default.

3. *Effect of Responsive Pleading.* A default shall not become effective if the party claimed to be in default pleads or otherwise defends as provided by these rules prior to the expiration of ten (10) days from the filing of the application for entry of default.

4. *Applicability.* The provisions of this rule requiring notice prior to the entry of default shall apply only to a default sought and entered pursuant to this rule.

B. Judgment by Default. Judgment by default may be entered as follows:

1. *By Motion without Hearing.*

a. When the petitioner's claim against a respondent is for a sum certain or for a sum that can by computation be made certain, the court upon motion of the petitioner and upon affidavit of the amount due shall enter

judgment for that amount and costs against the respondent, if the respondent has been defaulted for failure to appear and is not a minor or incompetent person. If the claim states a specific sum of attorneys' fees that will be sought in the event judgment is rendered by default, and if such award is allowed by law and is supported by the affidavit, the judgment may include an award of reasonable attorneys' fees not to exceed the amount of the demand therefore. If the claim requests an award of attorneys' fees, but fails to specify the amount of such fees that will be sought in the event judgment is rendered by default, the judgment may include an award of attorneys' fees, if such an award is allowed by law and the reasonable amount therefore is established by affidavit, where the respondent has not entered an appearance in the action.

b. When a petition for legal separation, dissolution, or annulment of marriage has been filed, a decree may be entered upon motion supported by the affidavit of either or both parties to the marriage, provided that:

1) there are no minor children of the relationship of the parties born before or during the marriage or adopted by the parties during the marriage, and the wife, to affiant's knowledge, is not pregnant; and

2) ~~the parties waive any right to spousal maintenance.~~
neither party requests spousal maintenance.

The supporting affidavit shall set forth facts showing that jurisdictional requirements have been met and that the provisions of A.R.S. § 25-381.09 have been met or do not apply. The affidavit shall also set forth factual statements supporting the relief requested in the proceeding, including an award of attorneys' fees, if applicable. A default decree under this rule is not available if the adverse party is a minor or incompetent person, or if the adverse party has otherwise appeared and default has not been entered for failure to appear unless the parties have agreed that the matter may proceed as if by default.

c. When a petition to establish maternity or paternity has been filed and an order of custody or parenting time is not requested, a judgment may be entered upon motion supported by an affidavit or affidavits of the state or the mother or the father. In cases where the default judgment is requested by the state, the factual basis for the finding of paternity shall be established by the affidavit of a parent. The supporting affidavit(s) shall set forth facts showing that jurisdictional requirements have been met and that a default order is appropriate pursuant to A.R.S. § 25-813. If entry of an order for current and past support is requested, the motion shall be accompanied by a child support worksheets to support the amounts requested and the supporting affidavit shall state the basis for the determination(s) of the gross

income of the defaulting parent. The affidavit shall also set forth facts supporting any other relief requested.

2. *By Hearing.* In all other cases the party entitled to a judgment shall apply to the court therefore, but no judgment by default shall be entered against a minor or an incompetent person unless represented in the action by a guardian, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, that party or, if appearing by representative, that party's representative shall be served with written notice of the application for judgment at least three (3) days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the relief to be granted, or to establish the truth of any statement by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper. The defaulted party is in the position of having admitted each and every material allegation of the petition.

Once a defaulted respondent has made a motion under the provisions of this rule, the trial court shall allow respondent to participate in the hearing to determine what, if any, is appropriate relief to be awarded petitioner pursuant to the Petition, or to establish the truth of any statement.

3. *Past Support and Arrearage Judgments.* No judgment by default under this rule shall be entered for any amount of child support accruing for periods of time prior to the date of filing of the petition to establish the first order for child support unless, **in the petition or in the notice required pursuant to paragraph A**, the party seeking support has notified the party from whom support is sought of the specific amount of such past support ~~sought in the petition or in the notice required pursuant to paragraph A.~~ **time period for which such past support is sought and that it will be calculated by retroactive application of the Arizona Child Support Guidelines.** No judgment by default for any amounts of past child support ~~arrears~~ owed for periods of time prior to the filing of a petition for order to appear scheduled pursuant to Rule 26(C) shall be entered for failure to appear at such hearing unless, **in the petition or in a separate written notice filed and served upon the responding party at least 10 judicial days prior to the hearing, the party filing the petition has notified the responding party of the specific amount of such arrears sought in the petition or in a separate written notice filed and served upon the responding party at least 10 judicial days prior to the hearing setting forth the specific amount sought** ~~sought~~ **time period for which such past support is sought and that it will**

be calculated by retroactive application of the Arizona Child Support Guidelines.

4. *Informing Defaulted Party.* When a decree or judgment is entered by default, except in those cases resulting from default after service by publication, the party obtaining the decree or judgment shall certify that, within ~~24 hours~~ 3 judicial days of the that party's receipt of the decree, that party will mail a copy of the decree or judgment to the other party at the other party's last known address, and shall place a record of the mailing on the decree or judgment entered, affect the time to appeal, or relieve a party from any obligations.

C. Setting Aside Default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 85(C).

D. Petitioners, Counterclaimants. The provisions of this rule apply whether the party entitled to the judgment by default is a petitioner, a third-party petitioner, or a party who has pleaded a counterclaim.

E. Judgment against the State. No judgment by default shall be entered against the state or an officer or agency thereof unless the claimant establishes a claim or right to relief by evidence satisfactory to the court.

F. Judgment When Service by Publication; Statement of Evidence. Where service of process has been made by publication and no answer has been filed within the time prescribed by law, judgment shall be rendered as in other cases, but a record of the proceedings, in a form approved by the court, shall be maintained by the clerk of the court unless designated otherwise by the court.

G. Request for Judgment. A judgment by default shall not be different in kind from or exceed the amount requested in the pleadings. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, consistent with the best interests of the child(ren), even if the party has not requested such relief in the party's pleadings, except that awards of spousal maintenance and for attorneys' fees must be specifically pled for such relief to be granted through a default judgment.

EXHIBIT "B"

Rule 27. Service on the Opposing Party or Additional Parties

A. Summons, Preliminary Injunction and Petition. In an action for annulment, dissolution, legal separation, dissolution of covenant marriage or legal separation in covenant marriage, the petitioner shall serve upon the opposing party a copy of the petition, a copy of the summons, the preliminary injunction issued pursuant to A.R.S. § 25-315(A); and ~~the~~ any notices, forms; and orders required under Rule 26(D).

B. Summons and Petition. In an action for paternity or maternity, ~~or~~ or child custody by ~~a nonparent, or grandparent or great-grandparent visitation,~~ the petitioner shall serve upon all parties entitled to service a copy of the petition and ~~a copy of~~ the summons; and ~~the~~ any notices, forms; and orders required under Rule 26(D).

C. Order to Appear and Petition. In all actions other than those listed in paragraphs A and B, the petitioner shall serve upon all parties entitled to service a copy of the petition, order to appear issued by the court and any notices, forms and orders required under Rule 26(D), at least 20 10 days prior to the scheduled hearing, unless otherwise ordered by the court. Service shall be pursuant to Rule 40, 41 or 42, as applicable.

EXHIBIT "C"

Rule 35. Family Law Motion Practice

A. Formal Requirements; Time Periods.

1. The grounds for any motion shall be stated with particularity, and shall set forth the relief or order which is sought. All written motions made before or after trial shall be accompanied by a memorandum indicating, at a minimum, the precise legal points, statutes and authorities relied on, upon and citing the specific portions or pages thereof.

2. All motions shall be served on the opposing parties. Unless otherwise ordered by the court, affidavits supporting the motion shall be filed and served together with the motion.

3. Any party opposing the motion shall file any answering memorandum within ten (10) days thereafter. An answering memorandum shall be titled "Response to _____ (name of motion)."

4. Within five (5) days after service of the Response, the moving party may serve and file a memorandum in reply titled "Reply to _____ (name of motion)". The reply shall be directed only to matters raised in the response.

5. Affidavits submitted in support of any response shall be filed and served together with the response unless the court permits them to be filed and served at some other time. In its discretion, the trial court may waive these requirements as to motions made in open court.

6. The time and manner of service of every motion, response and reply shall be noted on all such documents and shall be governed by Rule 43. If the precise manner in which service has actually been made is not noted on any such filing, it will be conclusively presumed that the filing was served by mail, and the provisions of Rule 46 (D) shall apply. This conclusive presumption shall only apply if service in some form has actually been made. The time periods specified in this paragraph shall not apply where specific times for motions, affidavits or memoranda are otherwise provided by statute or order of court.

7. The rules applicable to captions and other matters of form of pleadings apply to all motions and other papers provided for by this rule, and all such motions and other papers shall be signed in accordance with Rule 31.

B. Effect of Non-Compliance. If a motion does not conform in all substantial respects with the requirements of this rule, or if the opposing party does not serve and file the required response or if counsel for any moving or opposing party fails to appear at the time and place assigned for

oral argument, such non-compliance may be deemed a consent to the denial or granting of the motion, and the court may dispose of the motion summarily.

C. Oral Argument.

1. Any party may request or the court may order on its own motion a time and a place for oral argument on any motion. The setting of oral argument is at the discretion of the court.

2. To expedite its business, the court may make provision by order for the submission and determination of motions, without oral hearing, upon brief written statements of reasons in support and opposition.

3. If granted by the court, oral argument may be limited to a prescribed number of minutes; which ~~time~~ shall not be exceeded without special permission in advance.

D. Motions for Reconsideration. A party seeking reconsideration of a ruling of the court may file a motion for reconsideration. All motions for reconsideration, however titled, shall be submitted without oral argument and without response or reply unless the court otherwise directs. No motion for reconsideration shall be granted, however, without the court providing an opportunity for response. A motion authorized by this rule may not be employed as a substitute for a motion pursuant to Rule 82(B), 83 or 86 5(C) and shall not operate to extend the time within which a notice of appeal must be filed. A motion for reconsideration shall be filed not later than ~~fifteen~~ **(15) thirty (30) days** after entry of the judgment or order.