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Family Law Rules Review Committee
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IN THE SUPREME COURT
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	)	Supreme Court No. R-07-0010 Reply to Comments of: 1) Attorney General's Office 2) Arizona Association of Superior Court Clerks (AASCC) 3) Clerk of the Superior Court for Maricopa County

REPLY TO COMMENTS

The Family Law Rules Review Committee, by and through its chair, the Honorable Norman J. Davis, Associate Presiding Judge of the Maricopa County Superior Court, hereby replies to Comments filed by the Office of the Attorney General, the Arizona Association of Superior Court Clerks (AASCC), and the Clerk of the Superior Court for Maricopa County with respect to changes to Rules 27(C), 35(D), 41(G), 44(B)(3) and 44(B)((4), *Arizona Rules of Family Law Procedure* proposed in the Committee's Second and Final Petition to Amend *Arizona Rules of Family Law Procedure*.

I. REPLY TO COMMENT TO RULE 27(C).

The Comment from the Attorney General requests that the time for a responding party to be served in cases initiated with a Petition and Order to Appear under Rule 27(C) be reduced

from twenty (20) days to ten (10) days as is the standard for post-decree and post-judgment petitions under Rule 91(L). The Comment expresses concern that requiring service upon adverse parties at least twenty (20) days prior to the scheduled hearing in child support establishment cases may require some hearings to be rescheduled and cause some delay.

The Committee recommends that the time limit for service remain at twenty (20) days prior to the scheduled hearing. Rule 27 prescribes procedures for serving of initial family court actions. Actions for annulments, dissolutions, legal separations, paternity, maternity and child custody filed by a parent are all initiated by the filing of an initial petition and the issuance of a summons as directed by statute and Rule 27(A) and (B). In these matters, the responding party is provided twenty (20) days to file a written response if served in Arizona, and thirty (30) days if served outside of Arizona. Significant additional time is allowed for these parties to provide disclosure, conduct discovery, and prepare for hearing before an evidentiary hearing is even scheduled.

Under Rule 27(C) initial actions seeking grandparent or great-grandparent visitation, custody or visitation by a nonparent, or the establishment of an initial child support order proceed with the filing of the initial petition and the issuance of an order to appear. The rule as written is intended to provide the responding party a minimal twenty (20)-day time period to respond and prepare for the initial hearing. Because of the nature of the proceeding, this initial hearing in child support establishment cases is normally the final hearing at which evidence is presented and a final judgment entered. Significant legal rights are adjudicated at these hearings, with the non-custodial parent normally being assessed a monthly child support amount, and a significant past support judgment covering a prior period of time of up to three (3) years or longer. Reducing the time period to prepare to ten (10) days would significantly impact the due

process rights of the responding party to obtain counsel, if desired, conduct discovery, if needed, and meaningfully prepare for the evidentiary hearing scheduled in the order to appear.

These initial petitions are also significantly different than post-decree and post-judgment petitions under Rule 91(L) because the latter petitions are filed to modify or enforce an existing decree or judgment. They are more predictable and are filed in an existing case where the parties are more likely better informed of the process, issues and evidence required to resolve a narrow issue as a result of prior participation in the initial action. These post-decree and post-judgment proceedings also do not establish large past support judgments, and the consequences of inadequate preparation are ameliorated to some degree because inaccurate monthly child support awards can often be revisited and modified further if substantial changes have occurred.

The vast majority of child support establishment cases filed by the Office of the Attorney General are served upon self-represented, non-custodial parents who are generally unfamiliar with the legal processes, but are expected to understand the complexities of Arizona child support law and calculation, and match the expertise of the Attorney General's office in presenting evidence and argument at this initial hearing. Given these circumstances it is not surprising that the majority of child support establishment cases proceed by default when the self-represented non-custodians fail to appear or defend. Shortening the time period to prepare could only exacerbate this imbalance, and create both the impression and reality of inadequate due process for these self-represented litigants.

II. REPLY TO COMMENT TO RULE 35(D).

The Attorney General recommends eliminating or at least extending the time period that a motion for reconsideration may be filed from the proposed fifteen (15) days to a longer period of thirty (30) days after entry of the judgment or order.

The principal of finality of judgment is critical in family law cases that are too often characterized by the endless filing of motions and petitions to modify or reconsider prior rulings. To allow a motion for reconsideration to be filed without time limitation would invite every ruling and decision previously made by the court in every case to be challenged at any time in the future, even after the time for appeal has long expired, and provide no finality to litigation. Motions for reconsideration are often filed indiscriminately in family law cases and commonly address topics that are covered by other rules. Rule 35(D) was originally adopted without significant change from Rule 7.1, *Arizona Rules of Civil Procedure*. Neither rule contained a time limitation for filing a motion for reconsideration. The Committee proposed the addition of a time limitation provision to Rule 35(D) to provide some guidance and appropriate limitation in this area.

The Committee asserts that the establishment of a time period of filing motions for reconsideration is necessary in family law procedure, but agrees that the time limit to submit such motions should be extended to thirty (30) days after filing of the ruling sought to be reconsidered. Accordingly, the Committee requests that the proposed amendment set forth in the last full sentence of Rule 35(D) be amended to read:

> A motion for reconsideration shall be filed not later than thirty (30) days after the filing of the ruling sought to be reconsidered.

III. REPLY TO COMMENT TO RULE 41(G).

The Comment from the Arizona Association of Superior Court Clerks (AASC) addresses Rule 41(G) to indicate that technology is not yet present to fully implement this rule. The Comment concludes, however, by supporting this rule change because “electronic service can be

implemented when the technology allows". The Committee agrees, and Rule 41(G) will allow the courts to improve efficiency and service to the public when existing technology is in place.

IV. REPLY TO COMMENT TO RULE 44(B)(3).

The Comment from the Attorney General objects to the requirement in Rule 44(B)(3) that child support establishment petitions must specifically state the amount of past support sought for periods prior to the date of the filing the petition because: 1) the State's attorney may not have access to sufficient reliable information to complete the calculations sufficient to certify their accuracy prior to the scheduled hearing; 2) the practical effect of the proposal could reduce child support recovery; 3) the prayer for a specific amount of past support in the petition may preclude the court from entering a higher amount at a default hearing if supported by the evidence; and 4) specific prayers for past support judgments may encourage non-custodial parents to fail to appear at hearings where a larger amount could be assessed.

The Committee continues to support the proposed change to Rule 44(B)(3) because of the substantial consequences that attach to past support judgments, the potential for significant error in such judgments entered by default, a demonstrated need to encourage greater participation by parents in the process, and the fundamental fairness of notifying predominately uninformed, self-represented respondents of the specific consequences of their failure to appear.

The State already enjoys a significant tactical advantage in child support establishment cases brought against young, self-represented respondents who have little legal knowledge and limited resources to hire counsel and oppose the State's attorneys trained in the nuances of child support law. An extremely large percentage of respondents in these cases historically do not appear and the cases proceed by default. Child support judgments have no absolute statute of limitations, are nondischargeable in bankruptcy, can result in incarceration of the obligor if not

paid, and are entitled to many preferences in collection procedures. Many of these judgments are never fully collected as respondents struggle to pay the current monthly child support obligation, let alone a past support judgment covering at times more than a three-year period. It is important that the amount of these judgments be determined fairly, reasonably and in accordance with legal requirements. It is hoped that notifying non-custodial parents of the specific amount of past support sought by the State will encourage more respondents to appear and participate in the process. This will allow the court to not only determine more accurate child support orders, but provide an opportunity for absent parents to reconnect with their children by the entry of appropriate visitation and custody orders.

This change to Rule 44(B)(3) applies only to past support judgments obtained by default when the non-custodial parent, by definition, does not appear as ordered and the court proceeds by default. In these situations the only possible information that can be presented into evidence is that information already known and available to the State. The State knows or is able to know all of this information at the time of filing its original petition in almost every case. Much information is obtained administratively by the State and the balance is obtainable from the custodial parent who has made an assignment of child support benefits to satisfy the State's interest and is legally required to cooperate with and provide needed information to the State. At some point prior to the default hearing, the State will be required to use this information and perform the calculations in support of a request for a past support judgment, and such information can just as easily be provided in the initial petition. In those rare cases where additional information is discovered in the several week time period between filing the petition and the default hearing, the petition can be easily amended and served by mail on the respondent.

The intent of the proposed change is not to reduce or increase child support recovery to the State or any party. It is to encourage meaningful participation in the process by all parties in the hopes that fair and reasonable past support judgments can be calculated and entered after hearing all of the facts from both parents. Past support judgments and monthly child support awards may be increased, decreased, or remain the same as compared to the current default system, but judgments and awards entered with evidence obtained from all parties are inherently more equitable.

The Committee does not agree with the State's argument that the court will be precluded from entering higher past support judgments when they are indicated. It is a very common practice for litigants in family law and civil cases to seek the maximum recovery possible in the initial petition or complaint based upon the then known facts and equally rare for a court to exceed the requested maximum at a default hearing. The State certainly can certify under Rule 32 to all of the numbers and arguments that they believe are supportable in good faith under existing law. Thus, it would be rare that a court would want to exceed the maximum possible position presented by the State. In those few cases where such a circumstance occurred, the court could direct the petition to be amended and continue the hearing.

It is also extremely unlikely that the proposed rule change would cause more parties to fail to appear. The problem in this area is not that respondents have too much legal knowledge and will somehow strategically structure their appearance to their legal advantage, but rather that they are unaware of the severe consequence that failing to appear will cause to them. Requiring the petitioner to plead a lump sum of past support sought simply provides critical information to the respondent that will either encourage an appearance at the hearing or allow the court greater confidence that the respondent is not objecting to the assessment. Absent the Committee's

proposed amendment, self-represented litigants likely are unaware that the assessment of a potentially large judgment will occur, and most certainly are unaware of the specific amount of past support being sought. Knowing that the assessment of a large judgment in a specific amount is likely, it is significantly more likely that a respondent will appear to avoid this consequence and allow all parties to have their day in court.

Providing such basic information to respondents does not in any way impugn public policy, but helps insure that the court achieves its statutory and public policy directive to award "reasonable support" based on all the facts and circumstances in the case, and after fair warning to a respondent that a past support judgment for up to three (3) years in a specific amount may be imposed if the respondent fails to appear at the hearing.

The Committee agrees with the Comment that judgments in this rule should be referenced as "past support" judgments and not "arrearage" judgments. Accordingly, Rule 44(B)(3), with these minor adjustments should read as follows:

> 3. *Past Child Support 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 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. No judgment by default for any amounts of past child support 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 the party filing the petition has notified the responding party of the specific amount of such past child support 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.

REPLY TO COMMENTS TO RULE 44(B)(4).

Three Comments have been received on the proposed rule change to Rule 44(B)(4). The Comment from the Arizona Association of Superior Court Clerks (AASCC) asserts that the rule

would require the entry of information on court orders and electronic images after they are filed and alternatively urges adoption of Pinal County Local Rule 3.6 to correct this problem. The Comment from the Clerk of the Maricopa County Superior Court disagrees with AASCC and urges elimination of the rule's applicability to Maricopa County to allow the clerk to mail the decree or judgment to the parties. Finally, the Comment of the Attorney General requests that the time period for mailing the decree or judgment be extended from twenty-four (24) hours to three (3) judicial days. After discussion the Clerk of the Maricopa County Superior Court indicated that he was withdrawing his comment in favor of the Committee resolution proposed herein.

The goal of this proposed rule change is to insure that defaulted parties are informed of court actions affecting their marital status, children and property rights as soon as possible. None of the comments object to this task being accomplished. The question is who should do the mailing, and how long should they have to do it.

The Committee agrees that the primary obligation to notify the defaulted party should be placed on the party obtaining the decree or judgment. At the same time Maricopa County has been successful in obtaining compliance with this requirement by requiring the party seeking the decree or judgment to provide the court at the time of the default hearing with a copy of the decree or judgment and a postage prepaid envelope addressed to the defaulting party's last known address for mailing by the clerk. The Committee also recognizes that some judicial oversight of this function is appropriate because of the emotional nature of family law cases and high percentage of self-represented litigants who may not always satisfy the requirement of the rule. The Committee agrees with the comments of the Arizona Association of Superior Court Clerks and the Attorney General and supports revisions of the proposed rule to address valid

concerns made by both comments. Accordingly, the Committee urges the adoption of the following revised Rule 44(B)(4):

> 4. *Informing Defaulted Party.* When a decree or judgment is entered by default, except in those cases resulting in default after service by publication, the party obtaining the decree or judgment shall certify on the decree or judgment, that, within three (3) judicial days of the party's receipt of the decree or judgment, the party obtaining the decree will mail a copy of the decree or judgment to the party in default at that party's last known address. Failure to comply with this rule shall not affect the validity of the decree or judgment entered or the time to appeal, or relieve a party from any obligations set forth in the decree or judgment.

CONCLUSION

The Committee respectfully requests the Court make the proposed amendments to the previous petition and proposals of the Committee as set forth herein.

Respectfully submitted this 20th day of June, 2008.

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Norman J. Davis, Chair
Family Law Rules Review Committee

Electronic copy filed with the
Clerk of the Supreme Court of Arizona
This 20th day of June, 2008
By: _____

Copy mailed this 20th day of June, 2008, to:

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