

1 Lisa M. Panahi, Bar No. 023421
2 General Counsel
3 State Bar of Arizona
4 4201 N. 24th Street, Suite 100
5 Phoenix, AZ 85016-6288
6 (602) 340-7236

7 **IN THE SUPREME COURT**
8 **STATE OF ARIZONA**

9 In the Matter of:

Supreme Court No. R-21-

10 **PETITION TO AMEND RULE**
11 **37(b) OF THE ARIZONA RULES**
12 **OF FAMILY LAW PROCEDURE**
13 **AND ADD NEW RULE 37.1**

STATE BAR OF ARIZONA
PETITION

14 Pursuant to Rule 28(a) of the Arizona Rules of Supreme Court, the State Bar
15 of Arizona hereby petitions the Court to amend Rule 37(b), Ariz. R. Fam. L. P. and
16 add new Rule 37.1 The purpose of this Petition is to make the current rule conform
17 to the related Arizona Rules of Criminal Procedure and Probate Procedure, with
18 respect to court proceedings when a party is incompetent or incapacitated. Proposed
19 rule language is provided in Appendices A and B.

20 Rule 37(b), Ariz. R. Fam. L. P., sets procedure in Title 25 actions when a party
21 is deemed incompetent but is silent as to a party's incapacity pursuant to A.R.S. §§
22 14-5401 to 5433. The proposed amendment conforms the rule to procedures in
23 criminal and probate matters, by adding process for a party's incapacity. As there is
24 presently no procedure when a party is deemed incapacitated, this rule change will
25

Appendix A

(Please note: deletions are reflected by ~~striketrough~~ and additions are reflected by underline.)

Rule 37. Substitution of Parties: Death, Incompetency, Incapacity, and Transfer of Interest

(a) [No change in text.]

(b) **Incompetency or Incapacity**. If a party becomes incompetent or incapacitated, the court may—on motion or on stipulation of the parties and the incompetent or incapacitated party’s representative—permit the action to be continued by or against the party’s representative. Anyone filing such a motion must serve the motion on the parties as provided in Rule 43 and on the incompetent or incapacitated party’s representative in the same manner that a summons and pleading are served under Rule 40(f)(1) or 41, as applicable.

(c) [No change in text.]

Appendix B

Rule 37.1 Special Investigator for Alleged Incapacitated Adult

(a) Appointment. If the court has reasonable cause to believe that an adult party is, or may be, an incapacitated person as defined in A.R.S. § 14-5101 or is a person in need of protection pursuant to A.R.S. § 14-5401 and that the party is or may be in need of guardianship or conservatorship, or both, the court may appoint a special investigator to conduct an investigation concerning the need for a guardian, conservator, or both. The court must give notice of the appointment to the special investigator within three days of the appointment.

(b) Stay of Proceedings Upon Appointment. Unless the court orders otherwise, the court's appointment of a special investigator under this rule automatically stays the family court proceedings except that all previously issued orders, including the preliminary injunction, remain in effect. This stay remains in effect until the court issues an order ending the stay.

(c) Role. The role of a special investigator appointed under this rule is limited to investigating whether the adult party for whom the special investigator was appointed may be in need of a guardian, conservator, or other protective proceeding under Title 14, *Arizona Revised Statutes*, and, if so, initiating such proceeding. The special investigator does not represent the adult party for whom the special investigator was appointed and may not be called to testify in any family court proceeding or be asked to advise the adult party or the court on any issue pending in the family court case.

(d) Authority. The order appointing a special investigator pursuant to this section must clearly set forth the scope of the appointment, including the reasons for and duration of the appointment and the rights of access as authorized by this rule. The order appointing a special investigator must authorize the special investigator to:

- (1) Communicate with, and review and obtain records from, any person or entity who has knowledge or information relevant to the issue of whether the adult party for whom the special investigator was appointed is in need of a guardian, a conservator, or other protective order under Title 14, *Arizona Revised Statutes*. This right of access must include access to all medical, psychiatric, psychological and counseling records of the adult party for whom the special

investigator was appointed, including records that are otherwise privileged or confidential.

- (2) Meet with the adult party for whom the special investigator was appointed at any location where he or she may be located and meet and interview all persons living in the same household as the adult party for whom the special investigator was appointed.
- (3) Obtain and review court records in any case filed in any court, including a mental health court, concerning the adult party for whom the special investigator was appointed.
- (4) Obtain and review financial records, including records of the adult party for whom the special investigator was appointed that are otherwise privileged or confidential.
- (5) Request an order from the court that directs the adult party for whom the special investigator was appointed to submit to an examination by a qualified physician, psychologist, or registered nurse designated by the court to determine the adult party's capacity to make reasonable personal and financial decisions.
- (6) Consult with any person who is or may be entitled to initiate guardianship, conservatorship, or other protective proceedings under Title 14, *Arizona Revised Statutes*, and investigate and review the background of any person who is interested in becoming, the guardian or conservator, including, but not limited to, criminal arrests and convictions, and credit history.
- (7) Initiate guardianship, conservatorship, or other protective proceedings under Title 14, *Arizona Revised Statutes*.

The Order may include any other authorization necessary to assist the Special Investigator to carry out the purpose of this appointment.

(e) Privileges and Confidentiality.

- (1) Between Special investigator and Adult Party.** The adult party for whom the special investigator is appointed has no privilege or confidentiality with respect to communication with the special investigator.
- (2) Adult Party's Privileges and Confidentiality.** The appointment of a special investigator for an adult party and the receipt of otherwise privileged or confidential documents or information by the special investigator does not constitute an implied waiver of any of that adult party's privileges or rights of confidentiality. As a result, the special investigator may not be compelled to testify in the family court case, nor may the special investigator be compelled by any party to the family court case to produce any of the documents obtained by the special investigator.

(f) Report. Within the time set by the court, the special investigator must file in the family court case a report regarding the status and results of the special investigator's investigation, including whether the special investigator, or anyone else, intends to, or has, initiated guardianship proceedings, conservatorship proceedings, or both. The report shall not contain privileged or confidential information; if the report needs to contain privileged or confidential information it will be filed under seal.

(g) Initiation of Guardianship and Conservatorship Proceedings. If the special investigator or any other interested person believes that sufficient evidence exists to support the appointment of a guardian or conservator or other protective order for an adult party to the family court proceeding, the special investigator or interested person may request the appropriate relief only by initiating a separate proceeding pursuant to Title 14, *Arizona Revised Statutes*, and following the procedures set forth in the Arizona Rules of Probate Procedure.

(h) court Appointed Special Investigator Qualifications; Fees and Costs.

(1) An investigator appointed by the court under this section must have a background in law, nursing or social work. The investigator must have no personal interest in the proceedings and must not be a person closely related to any party to the proceedings or the attorneys representing them. The appointment must be made from a list of individuals maintained by the court to perform the duties described herein.

(2) A special investigator appointed by the court and any evaluator designated by the court to evaluate the capacity of an adult party to the proceedings pursuant to this rule is entitled to receive reasonable compensation for the work performed by the investigator or evaluator. After considering the ability of either or both parties to pay the fees or costs of the investigator or evaluator, the court may issue an order that one of the parties pay the fees and costs, that the fees and cost be allocated between the parties or that the fees and costs be paid out of an appropriate community fund or asset. If the fees and costs of an investigator or evaluator are unable to be paid for by the parties or the community, the court shall determine whether the fees or costs or any portion of them can be paid by some other source including state or county funds.