

VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES FOR FAMILY PROCEEDINGS
Minutes of Meeting
July 26, 2013

The meeting was called to order at 1:30 p.m. in the Environmental Division court room, Barre, by Jody Racht, chair. Present were Committee members Robin Arnell, Mary Frost (by phone), Hon. David Howard (by phone), Michael Kainen, Hon. Kathleen Manley, Jean Murray, Susan Murray, Robert Sheil, and Christine Speidel. Also present were Hon. Beth Robinson, Supreme Court liaison; Michele Olvera, Vermont Network liaison; and Professor L. Kinvin Wroth, Reporter.

The Committee welcomed Michael Kainen, Windsor County State's Attorney, to his first meeting as a member of the Committee.

1. **Minutes.** The draft minutes of the meeting of May 3, 2013, were approved as previously circulated. The Committee accepted the report of the meeting of June 28, 2013, at which a quorum was not present.
2. **Status of proposed and recommended amendments.** Professor Wroth noted that on June 18, 2013, the Court Administrator had sent out for comment the Committee's revised proposed amendments to V.R.F.P. 7 and new V.R.F.P. 7.1 and 9(l), with comments due on August 16, 2013, and that the Legislative Committee on Judicial Rules had scheduled a meeting for August 15, 2013, at which the proposed amendments might be on the agenda. Chairwoman Racht agreed to consult with Judge Davenport concerning a presentation on those amendments.
3. **Required mediation in domestic cases.** The Committee considered Professor Wroth's revised draft 2, July 23, 2013, copies of which were distributed at the meeting. He noted that it differed only in minor details from the previously circulated draft of that date and was intended to reflect the decision of the Committee at the November 16 meeting that mediation should be voluntary. In discussion, Committee members noted that there was a significant amount of voluntary mediation already taking place in family cases and that providing a procedure to authorize it could result in deterring parties from its use. Ms. Olvera expressed her continuing concern that mandatory mediation would put pressure to settle on parties who may have been victims of domestic violence, whether disclosed or undisclosed. Voluntary mediation was acceptable, provided that it was conducted by well-trained mediators who could recognize the potential presence of violence or other power imbalance factors.

In further discussion, Committee members suggested that the draft agreement, rather than the original request, be served on OCS, which was technically a party where child support was concerned; that the Family Division mediators to be used under the draft rule were well trained; that perhaps the parties should be required to meet separately with the mediator; and that mediation should not be allowed in cases under Rule 9. On motion duly made and seconded, there being no further discussion, it was voted, eight in favor, two opposed, to ask Professor

Wroth to prepare a further revised draft providing that the court had discretion to order mediation in cases other than those under Rule 9 after due consideration of the possibility of the presence of domestic violence.

4. **Electronic filing amendments to Family Rules.** Chairwoman Racht and Professor Wroth reported that there was no apparent progress on the effort to extend electronic filing beyond civil cases in Rutland and Windsor counties. On motion duly made and seconded, there being no further discussion, it was voted unanimously to remove this item from the agenda pending further direction from the Supreme Court.

5. **Effect on Family Rules of Act 119, effective 7/1/12, Relating to Child Support Enforcement.** Ms. Arnell reported that V.R.F.P. 16 had originally been adopted to fill gaps in the former statute that had now been addressed by provisions of Act 119 of 2011 (adj. sess.) incorporated in 15 V.S.A. § 603. She distributed a comparison of the statute and rule that she had prepared with Magistrate Hoyt, noting that the notice provisions were the biggest inconsistency. It was agreed that Professor Wroth would assist the subcommittee in preparing draft amendments that would incorporate appropriate statutory provisions in Rule 16.

6. **Consideration of *Columbia v. Lawton*, 2013 VT 2 (1/18/13).** The subcommittee (Ms. Arnell, Ms. Murray, and Chairwoman Racht) reported on the question whether V.R.C.P. 60(b) as applied in Family Court should be amended, or another rule adopted, to permit a non-party to a parentage case to set aside a parentage judgment. A remedy for non-party constitutional issues is needed not only in parentage cases, but in all cases where parentage is to be established. V.R.C.P. 60(b)(6) applies only to parties. The few federal cases that have stretched the comparable Federal Rule to non-parties as a matter of equity are very fact-bound. A more defined rule is needed in the present situation. A rule should be drafted and circulated to start the conversation on significant policy issues—should there be exemptions, time bars, age limits? Should a rule apply only to actions under the Parentage Act? Is legislative action needed in view of the fact that the Uniform Parentage Act has not been adopted in Vermont?

In discussion, it was noted that adoption of the Uniform Parentage Act would not address the problem when raised in other types of cases. The task is not to identify or decide the constitutional issues but to provide a mechanism for dealing with them—*e.g.*, the recent amendments of V.R.Cr.P. 41 covering warrants for electronic tracking devices. Rather than incorporate V.R.C.P. 60(b) directly or by reference, its approach should be used as appropriate. On motion duly made and seconded, there being no further discussion, it was voted, nine in favor, one opposed, to ask the subcommittee and Professor Wroth to prepare a draft rule for consideration at the next meeting.

7. **Comment on proposed amendment of V.R.C.P. 43(e) regarding appointment and compensation of interpreters (incorporated by reference in Family Rules).** Professor Wroth reported that the Civil Rules Committee was giving further consideration to this matter. It was agreed to defer action pending the outcome of that consideration.

8. **Comment on status and effect of pending legislation: S.31 (revocable trust and wills in property settlements); H.523 (side judges in child support contempt proceedings).**

Professor Wroth reported that S. 31 had been adopted as Act 63 of 2013 and that an amendment to H.523 that would have included side judges in child support proceedings was not adopted.

9. Consideration of *In re K.F.*, 2013 VT 39, note 2 (6/7/13) (request to develop procedure for addressing ineffective assistance of counsel claims by parents in TPR proceedings). In discussion of the Supreme Court's request, it was noted that the Defender General's Appellate Division should have the opportunity to comment on the question. It was agreed that a subcommittee consisting of Messrs. Kainen and Sheil and Chairwoman Racht should consider what other states do with respect to timing and other issues, to look at the actual practice, and report at the next meeting.

10. Consideration of request by Civil Rules Committee to consider effect of potential adaptation in V.R.C.P. 6(a) of 2009 amendment of F.R.C.P. 6(a) establishing "day is a day" rule for computing time. Professor Wroth reported that the Civil Rules Committee was developing an adaptation of the "day as a day" rule of F.R.C.P. 6(a) for computing time and was exploring the ways in which other time provisions of the Civil Rules would be affected. Since V.R.C.P. 6(a) is presently incorporated in the Family Rules, it will be necessary to determine the effects of the new rule in family cases and to decide whether variations would be needed for the Family Rules. He agreed to report the status of the Civil Rules project at the next meeting.

12. Dates of next meetings. The next meeting will be held on September 20, 2013, in the Environmental Division court room, Barre, from 9:30 until 12:00 p.m. to address the remainder of the Rule 4 restyling and restructuring drafts. Professor Wroth agreed to ask Committee members their availability for a subsequent meeting on the afternoon of October 25 or the morning of November 1.

There being no further business, the meeting was adjourned at 4:30 p.m.

Respectfully submitted,

L. Kinvin Wroth, Reporter