

VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES FOR FAMILY PROCEEDINGS
Minutes of Meeting
September 20, 2013

The meeting was called to order at 9:30 a.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), Peter Lawrence, Hon. Kathleen Manley, Jean Murray, Robert Sheil, and Christine Speidel. Also present were Hon. Beth Robinson, Supreme Court liaison; Scott Woodward; and Professor L. Kinvin Wroth, Reporter.

The chair reported that Hon. Barry Peterson had been appointed to replace Hon. Christine Hoyt, who had been assigned to additional judicial duties.

1. **Minutes.** The draft minutes of July 26, 2013, as previously circulated were unanimously approved.
2. **Status of proposed and recommended amendments.** Professor Wroth reported that the Supreme Court on September 10, 2013, effective November 10, had promulgated the Committee's recommended amendment to V.R.F.P. 9(l) as sent out for comment on June 18, 2013, and reviewed without comment by the Legislative Committee on Judicial Rules on August 15, 2013. At its next meeting, the Committee will consider comments that the Legislative Committee made on the Committee's revised proposed amendments to V.R.F.P. 7 and new V.R.F.P. 7.1.
3. **Proposed Restyling and Reorganization of V.R.F.P. 4.** The Committee considered specific changes made in the revised draft of proposed V.R.F.P. 4.0 and 4.1 and the April 2011 draft of proposed Rules 4.2 and 4.3 sent out in Professor Wroth's September 16 e-mail. The following specific issues identified in the minutes of the June 28 meeting were resolved and additional changes were agreed on or are proposed:

Rule 4.0.

4.0(a)(5). Deletion of venue clause (race to notice). It was agreed that this paragraph should be deleted for the reasons given in the minutes of the June 28 meeting.

4.0(b)(1)(C). Change to reflect decision on proposed amendment of V.R.F.P. 4(b)(1)(A). It was agreed to accept the revised language.

4.0(b)(2)(A). Review simplified language in April 30 draft. It was agreed to accept the revised language.

4.0(b)(3)(A). Any effect from *Samis*? It was agreed to accept the changed location of the provision.

4.0(b)(3)(B). Hold to see if affected by pending H.523. It was agreed to accept, with editorial revisions, language of amendments to 32 V.S.A. § 1431(h) in H.523, enacted as Act No. 67 of 2013, § 3.

4.0(c)(2)-(3). Consider whether they should remain as separate paragraphs. It was agreed to retain (2) and (3) as separate paragraphs, designating the last clause of (2) as (3)(A) and making clear that (3) applied only in actions other than parentage.

Former 4.0(c)(3). This paragraph should be renumbered (1) and retitled “*Civil Rule Not Applicable,*” with the remaining paragraphs renumbered accordingly.

Former 4.0(c)(4). Make clear that all provisions of this paragraph concerning hearing are subject to Rule 4.1(c) where custody involved.

Former 4.0(c)(4)(A) and elsewhere. Substitute “family division” for “family court.” It was agreed to make this change wherever “family court” appears in restructured Rules 4.0-4.3.

Former 4.0(c)(4)(B). Move last sentence of (v), defining “unfit parent,” to (ii). It was agreed to make this change.

4.0(d). Inconsistencies regarding parties and appearance. It was agreed to make minor editorial changes in (d)(1) and to revise the last sentence of (1) to read, “The hearing may be without notice to the defendant if the defendant has not entered a written appearance as provided in Rule 15(a).” It was agreed to add “as provided in Rule 15(a)” after “appearance” in (d)(2) and to consider whether to include or expressly exclude property distribution in the list of issues after further research on the reasons for its exclusion in the existing rule. **[Research shows that language came from the Maine Rule as it existed in 1972. The ME rule was amended in 1977 along with a statutory change affecting property distribution but VT did not pick up the change. No other rationale found for either VT or ME rule. Recommend including property in the absence of a current rationale for exclusion – LKW]**

4.0(e)(1). Consider deletion of “at least one week.” It was agreed to substitute “sufficiently” for “at least one week” in the last sentence.

4.0(e)(1)(C) and (e)(2). Consider combining as a new Rule 4.1(e). It was agreed to combine former Rule 4.0(e)(1)(C) and (e)(2) in a new Rule 4.1(e) and to redesignate former 4.0(e)(1)(C) as (D).

4.0(g)(4), (5), and (8)(A) [former (9)(A)]. Consider moving to Rule 4.1(b)(1). Should 4.0(g)(6) go in Rule 4.2(c)? It was agreed that Rule 4.0(g)(4)-(6) should be revised to read as shown below, with other provisions of those paragraphs moved to Rule 4.1(b) and 4.2(c) as appropriate.

RULE 4.0(g)

(4) Following final judgment in any proceeding under this rule, in response to a party's request made no more often than one time per calendar year (or tax year, if different), a party must furnish the information set forth in subparagraph (96A) below and rRule 4.1(b)(1)(A). ~~When a motion to modify is filed, parties must file affidavits and documents pursuant to subparagraph (96) below and rRule 4.1(b)(1)(A), regardless of prior information disclosures during that calendar year.~~ Failure to comply will subject a party to the sanctions set forth in 15 V.S.A. § 662 and Vermont Rule of Civil Procedure V.R.C.P. 37. **[Deleted second sentence has been moved to 4.2(c)(2). Final sentence appears here and in 4(c)(2), because it applied to first sentence before second sentence was added by 1991 amendment- LKW]**

(65) Certificate or Affidavit of Income and Assets.

(A) In any ~~other~~ action subject to this rule that does not involve minor children, the parties must file a certificate, subject to the obligations of ~~Vermont Rule of Civil Procedure~~ V.R.C.P. 11, that they have disclosed to each other all financial information, including, but not limited to, income, assets, and liabilities; but on order of the court, each party must file an affidavit of income and assets. The certificate must be filed on the earlier of the following dates: 30 days after the service of the complaint or on the date of the case management conference or, if no conference is scheduled, at least five working days before the date of the first scheduled court appearance. The order of the court requiring affidavits to be filed will set the date for filing.

(B) An affidavit filed pursuant to ~~this~~ subparagraph ~~(DA)~~ must be accompanied by that party's pay stubs for the four most recent pay periods in which employment income was received, if any, monthly income and expense statements or equivalent documents covering the period following a self-employed person's last-filed income tax return, and documentation of all other income received during the period following any person's last filed income tax return (including social security, workers' compensation, unemployment compensation, disability and pensions). On or before the date on which the affidavit must be filed the parties will exchange tax returns for the two most recent years in which returns were filed, together with all schedules and other documentation that were submitted to the Internal Revenue Service.

~~(56)~~ A party may request that tax records or other private information be sealed by filing a motion for protective order under V.R.C.P. 26(c).

4.0(h)(1). Consider moving to a new Rule 4.1(f). It was agreed to move former Rule 4.0(5) to Rule 4.1(f).

Rule 4.1.

4.1(a)(1)(A). It was agreed to adopt this subparagraph with the indicated revisions to make clear that the rule applies to parentage as well as to custody and support actions and to correct the statutory reference:

(A) If ~~eustody of a child, including visitation rights, is in issue in a~~ proceeding under Rule 4.0 involves one or more minor children, the complaint or an accompanying affidavit must contain the information required by the Uniform Child Custody Jurisdiction and ~~Support~~ Enforcement Act, 15 V.S.A. § 1079.

4.1(a)(1)(B). Ms. Arnell will propose language to describe appropriately the assistance that invokes the rule.

4.1(a)(2). Paragraph (2) was divided into paragraphs (2) and (3) for clarity, with minor editorial changes indicated:

(2) *Commencement of Action; Service of the Complaint.* If either party is or may

be obligated to pay child support to the other party or to the Office of Child Support, the action must be commenced, and service of process must be made, ~~according to as~~ provided in this paragraph.

(A) The complaint must be filed and a hearing or case manager's conference must be scheduled before the complaint is served.

(B) After filing, the family court clerk will complete a notice of hearing or notice of case manager's conference and must attempt to schedule the hearing or case manager's conference so that it is held from 45 to 60 days after the summons and complaint were filed, unless because of unavailability of magistrates, judges, or case managers, or because of a subsequent failure to complete service, it is not practical to do so.

(C) After a hearing or case manager's conference has been scheduled, the clerk, or upon request, the plaintiff's attorney, must provide for prompt service upon the defendant.

(D) Service may be made by personally serving the defendant with a summons and complaint and the notice of hearing or case manager's conference signed by the clerk.

(E) In the alternative, the summons, complaint and notice of hearing or case manager's conference may be served by mailing them to the defendant at one or more of the addresses supplied by the plaintiff or by the defendant or otherwise, by certified mail, return receipt requested and delivery restricted to the addressee, the expense being paid by the plaintiff.

(F) If certified mail is refused by the defendant, the clerk may serve the notice of hearing or case manager's conference, summons and complaint by mailing it to the defendant by ordinary first class mail and by certifying that such service has been made. The clerk also may provide for service by mail pursuant to Vermont Rule of Civil Procedure 4(l).

~~(G) If custody of a child, including visitation rights, is in issue, the complaint or an accompanying affidavit must contain the information required by Chapter 19 of Title 15 V.S.A., the Uniform Child Custody Jurisdiction Act.~~
[Deleted because covered in (a)(1)(A)-LKW]

(3) Case Management Conference. ~~In any action under this rule where a~~ If either party is or may be obligated to pay child support to the other party or to the Office of Child Support, a case management conference will be held unless the conference is waived as provided in this subparagraph. The purpose of the conference is to consider all financial and other issues pending between the parties in order to encourage settlement and clarify and simplify the issues for hearing.

(A) The conference will be conducted by a case manager assigned to the Family Division or by another Family Division staff member designated by the judge.

(B) The conference must be held after the date of service of process on the defendant and not later than the date set for hearing.

(C) If the parties have filed and exchanged all information and material required under paragraph (b)(4) ~~and Rule 4.0(g)(6)~~, a stipulation approved by the court as to any issues that have been resolved, and a statement setting forth issues that have not been resolved before the scheduled date of the conference, the presiding judge or magistrate or, if approved by the judge, the case manager, may waive the conference.

4.1(b) and (c). Subdivisions 4.1(b) and (c) were revised to read as previously agreed, with minor editorial changes, as follows:

(b) Discovery and Required Information.

(1) In actions under this rule, discovery may be taken as provided in Rule 4.0(g)(1) ~~(56)~~, except as follows:

(2) In any action under this rule in which parentage or child support is in issue, *[upon entry of an order?—Ms. Arnell to check limit to entry of order in light of 2000 Reporter's Notes and federal statute]* each party must file with the court information on location and identity of the party, including Social Security number, residential and mailing addresses, telephone number, driver's license number, and name, address, and telephone number of employer. Each party must inform the court of any changes in the information provided. Any information filed pursuant to this paragraph will be available only to the parties and their counsel. The court, for good cause, may withhold any or all information provided by a party from any other party or counsel.

(3) In parentage proceedings under 15 V.S.A. §§ 301-306, the parties must comply with 15 V.S.A. § 304.

(4) Affidavit of Income and Assets.

(A) In any action ~~subject to~~ under this rule ~~where~~ in which a party is or may be obligated to pay child support to the other party or the Office of Child Support, each party must file the affidavit of income and assets required by 15 V.S.A. § 662 on or before the date of the case management conference scheduled pursuant to Rule ~~4.2(a)(2)(D)~~ 4.1(a)(3) or, if no conference is scheduled, at least five working days before the date of the first scheduled hearing before the magistrate.

(B) An affidavit filed pursuant to this subparagraph must be accompanied by that party's pay stubs for the four most recent pay periods in which employment income was received, if any, monthly income and expense statements or equivalent documents covering the period following a self-

employed person's last-filed income tax return, and documentation of all other income received during the period following any person's last filed income tax return (including social security, workers' compensation, unemployment compensation, disability and pensions). On or before the date on which the affidavit must be filed the parties will exchange tax returns for the two most recent years in which returns were filed, together with all schedules and other documentation that were submitted to the Internal Revenue Service.

(c) Delay Where Custody of Children Involved. No divorce action in which custody of children is involved will be heard on the merits sooner than six months from the date of service unless the court otherwise orders ~~where~~ because:

(1) the parties have demonstrated by joint motion and affidavit that a stable and effective agreement for parental rights and responsibilities has existed and has been in operation for at least six months, or

(2) extraordinary circumstances exist.

4.1(d)-(f). It was agreed that subdivisions (d)-(f) were all right as revised, subject to editorial corrections to substitute “family division” and “V.R.C.P.”

Rule 4.2.

4.2(c). It was agreed to adapt provisions of Rule 4.0(g)(4)-(6) in this rule, as follows:

(c) Affidavits.

(1) *Form*. Affidavits required by this rule must set forth specific facts sufficient to warrant the required findings and must be upon the affiant's own knowledge, information, or belief; and, ~~so far as to the extent based~~ upon information and belief, must state that the affiant believes ~~this~~ the information to be true.

(2) *Affidavits Required*. When a motion to modify a judgment is filed, all parties must file affidavits and documents pursuant to Rules 4.0(g)(5) or 4.1(b)(4) as appropriate, regardless of prior information disclosures under Rule 4.0(g)(4) during that calendar year. Failure to comply will subject a party to the sanctions set forth in 15 V.S.A. § 662 and ~~Vermont Rule of Civil Procedure V.R.C.P.~~ 37.

(3) *Supporting Document*. An affidavit filed pursuant to paragraph (2) must be accompanied by the party's pay stubs for the four most recent pay periods in which employment income was received, if any, monthly income and expense statements or equivalent documents covering the period following a self-employed person's last-filed income tax return, and documentation of all other income received during the period following any person's last filed income tax return (including social security, workers' compensation, unemployment compensation, disability and pensions). On or before the date on which the affidavit must be filed the parties will exchange tax returns for the two most recent years in which returns were filed, together with all schedules and other documentation that were submitted to the Internal Revenue Service.

(4) *Protective Order*. A party may request that tax records or other private information be sealed by filing a motion for protective order under V.R.C.P. 26(c).

The Committee agreed with minor revisions suggested in proposed Rule 4.2, but will consider further questions, such as whether “divorce” should be eliminated, at a subsequent meeting.

Rule 4.3.

Proposed Rule 4.3 will be reviewed at a subsequent meeting.

4. Next Meeting. The next meeting of the Committee will be held at Vermont Law School from 9:30-12:30 on Friday, October 25, 2013, to consider agenda items remaining after the July 26 meeting.

There being no further business, the meeting was adjourned at 12:30 p.m.

Respectfully submitted,

L. Kinvin Wroth, Reporter