

KING COUNTY FAMILY LAWYER COMMITTEE
COMMENTS ON THE FAMILY LAW CIVIL RULES
Part 1 of 2

In October 2012, Judge Kim Prochnau forwarded the proposed statewide Family Law Civil Rules¹ (FLCR) to the King County Bar Association Family Law Section. At the request of the members an informal committee was formed to review the proposed FLCR. The following comments are the conclusions of volunteer attorneys² from this committee, reached after several months of reviewing the proposed rules, the existing rules, and conferring with other attorneys. These comments represent the opinions of a majority of the group members, and not the Family Law Section or the King County Bar Association in general.

At the outset, our committee was concerned about whether it is necessary or advisable to add another volume of rules. So long as counties have the option to create local rules to determine their own case schedules, page limits, and notice requirements (among others: see FLCR 83 regarding local rules), adding another set of court rules does not appear to further the goals to “curb the proliferation of local rules, eliminate sources of confusion and traps for the unwary, and promote and facilitate access to justice”.³ This likely reflects the necessary compromises of six years’ drafting and negotiating, and represents a start toward the desired goal.

In many cases, the proposed FLCR combines prior state and local rules, making only minor changes suited for family law cases (for example, changing plaintiff/defendant references to petitioner/respondent, making gender neutral, and eliminating references to torts, damages, and jury trials.) Those adjustments typified Rules 1-2A, 3, 4, 6, 8, 9-11, 12, 17-23.2, 38-55, and 57-113. Those rules did not raise particular concerns for the committee.

The rules that did raise concerns for committee members are set forth below along with suggested solutions to the concerns.

1. *Automatic Discovery.* Rule 16(c) deals with trial documents, while rule 26(k) applies to information exchange. Basically, the proposed state rule seems similar to King County’s required financial documents for temporary hearings on a financial motion.
 - a. One problem was referring to it as “automatic discovery”. It is important to not construe the automatic rule as discovery, but as providing supporting data for trial, so you’re still free to do discovery. Better descriptions would be “information exchange” or “pretrial document exchange”.

¹ The suggested new rules and their background can be found online at http://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplay&ruleId=282

² Committee members were Mark Alexander (Chair), Sharon Blackford, Mimi Buescher, Susan Carroll, Jennifer Forquer, Mary Hammerly, Dominik Musafia, Julie Park, Linda Roubik, and Shana Thompson.

³ GR 9 cover sheet for the Suggested FLCR.

- b. The tracing language is too technical, and difficult for a pro se to understand. The proposed rule gives the judge basic data to make decisions when dealing with pro ses, who don't know what they're supposed to provide. On tracing, attorneys understand it and will do it already. Pro ses won't understand.
 - c. The "life insurance documents" language is too vague. Not everyone knows what that means. However, debate could be endless about what should be included in this list.
2. *Automatic Temporary Orders*. FLCR 16(d) adds a new subsection allowing the issuance of Automatic Temporary Orders upon the filing of a petition⁴ under Title 26 RCW:

RULE 16 PRETRIAL PROCEDURE & FORMULATING ISSUES

(d) Automatic Temporary Orders Preserving Status Quo. Upon the filing of any petition under Title 26 RCW to dissolve a marriage or domestic partnership, the court may upon its own initiative issue a temporary order that includes any or all of the following non-exclusive provisions:

- (1) Restrains the parties from transferring or disposing of any property except in the usual course of business or for necessities of life absent written agreement or court order;
- (2) Restrains the parties from changing any automobile, health or other insurance absent written agreement or court order;
- (3) Makes each party responsible for his/her debts incurred subsequent to the filing of the petition;
- (4) Requires notification of extraordinary expenditures or liabilities incurred after issuance of the automatic temporary order;
- (5) Requires each party to grant the opposing party access to all tax, financial, legal and household records;
- (6) Authorizes each parent to have full access to the children's education and medical records absent a court order to the contrary; and
- (7) Restrains parents from exposing the children to negative or derogatory commentary about the other parent.

- a. Constitutionality. While a majority of this committee felt that the automatic temporary orders envisioned in 16(d) could be beneficial in family law cases, there was serious concern whether the automatic property restraint under 16(d)(1) violates either substantive or procedural due process. Contrast FLCR 65(a)(1): "Notice. No preliminary injunction shall be issued without notice to the adverse party." Note that the possible automatic "temporary orders" are not called "temporary restraining orders" (for which there are specific facts and irreparable

⁴ There is no apparent reason why 16(d) is limited to dissolution actions, and not to legal separations or declarations of invalidity.

injury required in FLCR 65(b) if prior notice is not provided) nor a “preliminary injunction” (for which 65(a) flatly requires prior notice in all cases). Automatic orders dispense with notice, as well as any specific facts or threat of irreparable injury. Is there really any substantive difference between the labels, which permits dispensing with the due process requirement of prior notice? If it passes constitutional muster, the committee makes the following comments.

- b. Not Child Residence. The proposed rule does not automatically restrain a party from changing a child’s residence. Thus, a party could not use the proposed rule to gain a tactical advantage by first removing a child from the family home then make the living arrangement temporarily court-ordered by filing a petition.⁵
- c. Property. Subsection (1) restrains the parties from transferring or disposing of property except in the ordinary course of business or for necessities of life. The Committee recommends that the proposed rule should mirror the language of RCW 26.09.060(2)(a) that also prohibits parties from “encumbering or concealing” any property.
- d. Insurance. The Committee is concerned that Subsection (2)’s restraint from “changing any automobile, health or other insurance” may be too simplistic. The language of the proposed rule should mirror the current mandatory form language that, in addition to restraining from changing insurance (medical, health, life or auto), restrains a party from assigning, transferring, borrowing, lapsing, surrendering of any insurance policies of either or both parties.⁶
- e. Post-Filing Debts. Subsection (3) should be removed because it does not necessarily preserve the status quo and disadvantages the spouse with little income.⁷
- f. Extraordinary Expenditures. The Committee agrees with the proposed Subsection (4). This language is mirrored in the current mandatory form.
- g. Access to Financial Records. The Committee feels that Subsection (5) needs to be rewritten. The intent of Subsection (5) appears to give equal access to financial records, but the language raises questions regarding enforcement and

⁵ By contrast, the current local rules in Snohomish, Skagit, Spokane and Island counties restrain a party from changing a child’s residence until further court order. In Spokane County, the local rule provides that the automatic temporary order provision does not preclude a party from accessing funds in a reasonable amount to retain counsel.

⁶ The local rules for Snohomish, Skagit and Island counties mirror the mandatory form language that is more detailed than a general prohibition on “changing” insurance.

⁷ The local rules for Snohomish, Skagit, Spokane and Island counties do make each party responsible for his/her debts incurred post-filing.

interpretation. This provision also could conflict with the proposed rule on automatic discovery. For example, it is unclear what would qualify as “household records” and whether such records would already be included under “financial records.” The term “legal records” also is problematic, as it should not include attorney/client privileged information, but could include “joint legal” records.⁸ Domestic violence situations suggest the advisability of including language (as in subsection 6) permitting a contrary court order. Further, rather than using the unqualified “requires . . . to grant . . . access”, it would be better to include “reasonable” as well as to include a prohibition about destroying records. An example of a revised subsection could be: “Authorizes each party to have reasonable access to all tax, financial, and joint legal records, absent a court order to the contrary, and neither party shall destroy any records.”

- h. Access to Children’s Records. Other than referring to “minor children,” the Committee agreed to this proposed rule. Although Subsection (6)’s authorization for access to the children’s records is not in the current mandatory form, counties with automatic orders have adopted this rule. In a domestic violence situation, specific orders addressing address confidentiality would need to be considered.
- i. Derogatory Comments. The rule should be clarified to refer to “minor children”. It may be largely unenforceable because it usually involves child hearsay.

⁸ The current mandatory form does not grant automatic access to financial records. However, the local rules of Snohomish, Spokane and Island refer to “legal and household records”.