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César E. Torres
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Northwest Justice Project

April 16, 2013

VIA ELECTRONIC MAIL

Clerk of the Supreme Court
ATTN: Denise Foster
Washington State Supreme Court
Temple of Justice
P.O. Box 40929
Olympia, WA 98504-0929

Re: PROPOSED FAMILY LAW CIVIL RULES

Dear Ms. Foster:

We write on behalf of Northwest Justice Project (NJP), the largest provider of civil legal services to low income people in Washington. Family law is an area of overwhelming need among our clients. In order to attempt to meet this need our legal aid delivery model consists of a wide range of services including representation, unbundled services, a statewide legal hotline and pro se assistance in clinic settings. We appreciate the opportunity to comment on the proposed family law rules and how they may impact the clients we serve and the lawyers who serve them.

We recognize and appreciate that the Washington State Bar Association Local Rules Task Force and others involved spent considerable time and effort in drafting these proposed Family Law Civil Rules. In general, we support the dual goals of uniformity and clarity for family law litigants. Nevertheless, we urge the Court to not adopt these rules in their present form. As proposed, we believe the rules would create an added barrier to access to justice.

When first established, the stated goal of the WSBA Local Rules Task Force was to assess and mitigate problems for litigants, particularly *pro se* litigants, created by the proliferation of local rules. By virtue of proposed Family Law Court Rule 83 we believe the rules will not reduce the proliferation of local rules, but will actually result in more confusion. Proposed Rule 83 would allow each county to have "Local Family Law Civil Rules" nominally limited to the "Placeholder Rules" incorporated at rules 100 – 114. While the number of "Placeholder Rules" is relatively small, it is notable that they cover topics that go to the heart of family law litigation: financial provisions, parenting plan and non-parental custody provisions, protection orders, marriage age waivers, emancipation of minors, unified family courts, title 26 RCW Guardians Ad Litem, parenting and psychological evaluations,

and relocation. If, as expected, courts take advantage of this authorization to maintain their own local rules or adopt new ones, the goal to mitigate the proliferation of local rules is frustrated.

The purported goal to provide family law litigants one uniform set of statewide rules to guide their litigation is not served by the proposed rules. In practice litigants will be required to consult the critical language of these "Placeholder Rules" for each county. Further, by giving litigants—particularly *pro se* litigants—the impression of uniformity, these rules provide the false sense that litigants should only look at one set of rules. There is no preamble or other commentary that directs *pro se* litigants to read the rules in conjunction with local rules or otherwise provides internal notice that operation of the rules may be impacted by local variations. This would have detrimental consequences for litigants and result in judicial inefficiency if, as a result of noncompliance with local variations, repeated appearances or scheduling of matters is needed.

In addition, with regard to proposed Rules 100 – 102, dealing with Alternative Dispute Resolution, Courthouse Facilitators, and Parenting Seminars, all of these rules anticipate a fee for these services. While the proposed language of these rules anticipates the provision of fee waivers, there is no cross-reference or link to GR 34, or a definition of "financial hardship" consistent with "indigency" under GR 34(a)(3). This omission has the potential of creating the proliferation of different forms and fee waiver standards and would be particularly detrimental to low-income litigants, something GR 34 seeks to avoid. In addition, the proposed Rule 101 exemption from requiring use of a GR 27 courthouse facilitator for pleadings signed by a lawyer to indicate review of a *pro se* litigant's documents directly conflicts with CR 11(b) (and proposed FLCR 11(b)), which does not require signature of a lawyer who has assisted a *pro se* litigant.

Finally, with regard to proposed rules 106-109 and 114 dealing with the most contentious of family law matters, particular attention would have to be paid to how local jurisdictions draft the language of these rules to ensure that they comply with the statutory requirements. While authorization for local rules concerns only procedural requirements, as the Task Force recognized, local rules often contain substantive legal requirements. Further, the varying policy and practices of local jurisdictions in handling these matters inevitably affects the substantive determinations and outcomes in these cases. This may be particularly true with respect to proposed Rule 114 related to relocation actions, as there is currently little guidance on how judges are to apply the statutory requirements. A local rule with respect to any of these matters has the potential of creating further confusion for all litigants, particularly *pro se* litigants. Moreover, continuous oversight and vigilant review of the local rules related to these matters will be required to ensure their limitation to procedural issues. Hence neither uniformity nor judicial efficiency is furthered by allowing proliferation of local rules related to these proceedings.

To the extent that the proposed Family Law Civil Rules presume that certain rules would not be subject to change by local jurisdictions, we are particularly concerned about Proposed Rule 16(d) authorizing the entry of Automatic Temporary Orders Preserving the Status Quo. We believe this proposed rule encourages litigation by rewarding the first

person to reach court. It also promotes litigiousness in cases where parties could only change the status quo by filing additional motions, and it is particularly detrimental to low income litigants for whom there are limited options for legal assistance statewide. Moreover, it is unclear how proposed Rule 16(d) is to be integrated with proposed Rule 65(b) regarding Temporary Restraining Orders in light of the notice requirements under 65(b). Finally, Proposed Rule 16(d) does not reference or provide any limitation with respect to pending Domestic Violence Protection Orders or other collateral proceedings that may impact the status quo or address the actual needs of a family.

The proposed rules in many instances lack necessary procedural guidance and litigants will presumably have to rely on local rules and local practice. For example, a litigant bringing a motion in King County would need to turn to the new Family Law Civil Rules, be aware of any "Local Family Law Rule" amendments, and consult with King County Local Rules when there are gaps. For example:

- The new proposed Family Law Civil Rule 7 permits local rules to establish page limits for matters to be decided by motion per proposed Rule 83. The local rules, however, must "substantially conform" to the subsections contained in proposed Rule 7(e)(1-)-(5), which sets page limits for various motions and responses at 25, 20 and 10, respectively, including all supporting declarations. King County Local Rules set a page limit on an initial motion to twelve pages excluding supporting declarations. Litigants are unable to determine which rule governs or whether the Local Rule "substantially conforms" to proposed Rule 7(e) and the differences create confusion.

- Proposed Family Law Civil Rule 55 pertains to defaults and is consistent with the State Civil Rule but lacks necessary procedural guidance, such as where to file the motions. Some direction is provided in King County Local Rules but only by reference to the more specific King County Family Law Local Rules, again requiring litigants to consult multiple sources.

- Proposed Rule 6 creates greater confusion as it sets a five day notice period for motions and for service of opposing declarations not later than one day before the hearing "unless the court permits them to be served at some other time." How will litigants know when opposing declarations are to be served and what constraints on local rules are contemplated? Similarly, the language in Rule 6(d)(1) regarding motions to shorten time grants open ended authority allowing local courts to impose unique procedural requirements "*such as* before whom the motion must be presented." It is unclear what other procedural requirements may modify the proposed rule. King County *pro se* litigants, many of whom are limited English proficient, would have no way of knowing whether a modification has been made by local rule, and if so, whether it conforms with or is authorized by the Family Law Court Rules.

Family law practitioners and *pro se* litigants will face immediate confusion over gaps and changes in rules. Superior Courts will undoubtedly amend or create new rules consistent with their local practice. Therefore, the proposed rules as drafted will not eliminate the need for local county rules, will result in an additional layer of rules that do not achieve the intent

of creating uniformity and clarity, will be particularly confusing to pro se litigants, and will be an obstacle to the speedy and inexpensive administration of justice.

Respectfully submitted,

NORTHWEST JUSTICE PROJECT

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