

Board of Directors

Lisa E. Brewer, **President, 2021-22**
Douglas P. Becker, **President-Elect, 2022-23**
Roy N. Martin, **Treasurer**
Cameron Fleury, **Secretary**
Richard L. Bartholomew, **Legislative Liason**
Douglas P. Becker, **Webmaster**



Board of Directors

Sunitha Anjilvel
Elizabeth E. Christy
Matthew E. Fischer
Ezra Glanzer
Monique Gilson-Moreau
Melissa Jane Rogers
Amir John Showrai

July 30, 2021

Clerk of the Supreme Court
P.O. Box 40929
Olympia, Washington 98504-0929

E: supreme@courts.wa.gov

Re: Comment on Proposed General Rule 40 Informal Domestic Relations Trial

Dear Clerk of the Court:

Domestic Relations Attorneys of Washington (“DRAW”) is a statewide group of approximately 600 Family Law (or Domestic Relations) attorneys. DRAW vigorously supports the cost effective and timely exercise of justice. For that reason, we support the *concept* of the proposed GR 40, subject to strong protections being built into the rule for civil and constitutional rights.

Due Process Concerns

As officers of the Court, we have a duty to guard against unconstitutional reductions in due process, particularly to “*those most disparately impacted by the justice system...including people of color, victims of domestic and sexual violence, the self-represented and low-income persons.*” (Comments GR9.)¹ Speedy, low cost, and informal do not always constitute justice as we envision it. While clearing court docket backlogs remains a concern to the orderly administration of justice, that does not translate to individuals going through the justice system, particularly when cases present issues of child custody and domestic violence.

DRAW fears a “paternalistic outcome” where, under the guise of “access to justice,” disenfranchised parties end up with *fewer* rights than more traditionally privileged groups.

Evidence and Right To Appeal

First, DRAW believes the Rules of Evidence should be preserved to the greatest extent possible.² For instance, exclusion of hearsay forms a bedrock principle of American jurisprudence, and for good reason. Hearsay evidence often contains unreliable and prejudicial information. Not being subject to cross-examination can diminish the credibility and weight of such evidence compared to statements that are tempered by cross-examination. Proposed GR 40 allows for such evidence to be admitted without cross-examination.

¹ DRAW would add indigenous peoples and non-Anglophone immigrants.

² On this point, DRAW and the WSBA Family Law Section’s Executive Committee take different positions.

More specifically, the word “received” as written in the first sentence of Sections (3)(f), and (g) is ambiguous. DRAW advises these sentences be replaced as follows:

3(f) Expert reports will be admitted into evidence as exhibits.

3(g) The Court will admit into evidence any exhibits offered by the parties.

Second, another bedrock principle of American jurisprudences is the right to appeal, which should be preserved as a Federal and State Constitutional mandate that curtails judicial mistake or overreach. (Wa.Const. IV, Sec 4, “appellate jurisdiction in all actions and proceedings.”). This must not be a process where parties are required to “abandon hope, all ye who enter here.” When the parties use such an unstructured and discretionary system, the right of appeal is *more* important, not less. In addition, the process should *not* place a higher burden on appealing findings of fact, but rather a *lesser* burden, given the lack of procedural safeguards GR 40 provides. The intent may be to streamline the process at the trial level, *but not* at the appellate level.

Mutual, Knowing, and Voluntary Waiver

Waiving one’s right to a full trial must be (a) mutual, (b) genuinely knowing, and (c) voluntary. The judicial officer should make findings of fact that specifically address:

- Whether the parties have more than a minimal competency (i.e., rule out dementia, debilitating mental health disorders, current addiction or intoxication that precludes clear thought, mental function, or both);
- Inquiry into written literacy and confirmation of such;
- Inquiry into language fluency and confirmation of such;
- Inquiry into history of domestic violence (i.e., have there been RCW 26.09.191 findings, issuance of a DVPO, criminal charges, JIS background check, etc.);
- Inquiry into whether there is undue economic or emotional control or coercion. (i.e. vastly unequal resources, economic control, etc.);
- Inquiry into each party’s consent and understanding of the IDRT rules and process, including the pros and cons of each system. (See Exhibit A);
- Failure to make such inquiries and findings should constitute reversible error.

Preserving Due Process During Trial

It is extremely dangerous to ask litigants who agree to an informal process to give up *all* rights. Only children and the financially less-advantaged or unsophisticated party will be prejudiced.

Thus, both parties should have a right to bring a motion during the pendency of the trial to terminate the informal trial in favor of a traditional trial with full procedural safeguards with all the rules of evidence in play. Such a motion should be granted unless good cause exists to deny the motion, and although there is a presumption in favor of granting such a motion, it should be subject to the formal trial addressing any claims of costs and fees incurred by the non-moving party from the start of the informal trial until that process ends. The motion should be required to be heard and the court should be required to make written findings.

Moreover, upon demand of either party, the trial court should be required to recess and allow a party to seek representation or advice of counsel at any time, and at least twice without penalty for doing so. The duration of the recess should be discretionary while allowing a party reasonable time to secure and bring counsel up to speed on the case.

Proposed Solutions and Amendments

First, the trial court should advise litigants, in writing, of all options for settlement and litigation of all claims, including an informal trial, mediation (mostly mandatory), the option to proceed under RCW 7.77 (collaborative divorce), voluntary binding arbitration, and voluntary non-binding arbitration.³ The Court should also inform litigants of both the advantage and disadvantages of proceeding with an informal trial, including the inability to conduct a direct and cross-examination of witnesses other than expert witnesses.

Based on DRAW's members' collective experience, very few people with the means to hire counsel will proceed with an informal trial. Thus, the vast majority of those who agree to an informal trial are highly unlikely to retain expert witnesses, much less know when and how to use such a witness in trial.

Second, DRAW suggests the alternative of using experienced family law practitioners to act as judges pro tempore. Judges pro tempore are cost-effective, yet knowledgeable. A pro tempore judge with subject matter expertise can better deduce the issues, statutes, and case law that applies to the facts of the case. Such judges can also inquire as to relevant issues that neither party presented on, and that a judge with little or no domestic relations expertise would know to inquire into.

Family law remains complex, particularly where issues related to child custody remain in dispute. Judges pro tempore should be those who can commit the time to conduct a trial from start to finish.

Finally, consider the use of sworn affidavits or declarations in lieu of hearsay testimony. Iowa Informal Family Law Trials. (See Exhibit A) Affidavits or declarations can be admitted or rejected and should be subject to the Rules of Evidence. While not as reliable as live testimony subject to cross-examination,

³ Certain disputes cannot be resolved in a binding arbitration, such as the residential provisions of a parenting plan.

this remains better than hearsay testimony, while remaining probative and part of an appellate record.

The DRAW Board of Directors remains available to provide further insight or development into proposed GR 40 if you have further questions of us.

Most respectfully,

DOMESTIC RELATIONS ATTORNEYS OF WASHINGTON

Lisa E. Brewer

Lisa E. Brewer

LEB/ajs

THE FOURTH JUDICIAL DISTRICT OF IOWA

**INFORMAL FAMILY LAW TRIAL
PROGRAM**

District Court Administration
Pottawattamie County Courthouse
227 S. 6th Street
Council Bluffs, Iowa 51501
(712) 328-5754 [p]
(712) 328-5891 [f]



THE BASICS

Two different types of trials are available in the Fourth Judicial District of Iowa for resolving family law cases. Family law cases include:

- Dissolution of Marriage (Divorce)
- Legal Separation
- Paternity (Unmarried Parent)
- Modifications of child custody, visitation, and child support.

The two types of trials are called a traditional trial and an informal family law trial (IFLT). You will need to choose the type of trial that you think is best for your case. Both parties must agree to an informal trial. If one or both parties does not want an informal trial, a traditional trial will be scheduled. Please read the following information carefully so that you can make the decision that is right for you.

HOW AN INFORMAL FAMILY LAW TRIAL WORKS:

- 1) The person that started the case will speak first. He or she swears to tell the truth and may speak about anything he or she wishes.
- 2) He or she is not questioned by a lawyer. Instead, the judge will ask some questions in order to make a better decision.
- 3) If the person talking has a lawyer, then that lawyer may ask the judge to ask their client questions on specific topics.
- 4) This process is repeated for the other person.
- 5) If there are any experts, the expert's report may be given to the judge. Either person may also ask to have the expert testify and be questioned by the judge or the other person.
- 6) Each person may submit documents and other evidence that they want the judge to see. The judge will look at each document and decide whether it is trustworthy and should be considered.
- 7) Each person may briefly respond to comments made by the other person.
- 8) Each person or their lawyer may make a short legal argument about how the laws apply to their case.
- 9) Once all the above steps are complete, the judge states their decision. In some cases, the judge may give the ruling at a later date.
- 10) Any of the above steps may be modified by the judge in order to make sure the trial is fair for both people.

DIFFERENCES AT-A-GLANCE

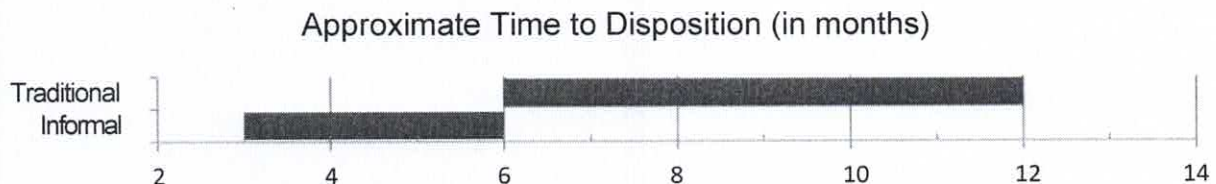
INFORMAL TRIAL		TRADITIONAL TRIAL
X	Judge asks questions directly of parties; besides the parties only expert witnesses (doctor, counselor) are generally allowed.	
	Lawyers/Self-Represented Parties ask questions of parties/witnesses in common direct examination/cross examination format.	X
	Rules of Evidence are followed; a party can object to testimony and exhibits.	X
X	Parties can submit any document or testimony for the judge to review without objection by the opposing party.	
X	Lawyers are only allowed to say what the issues are, respond if the judge asks if there are any other areas the person wants the court to ask about, and make short arguments about the law at the end of the case.	
	Lawyers are allowed to question witnesses and object to certain testimony and proposed exhibits.	X
X	Before the trial starts, each person must give the judge and the other person a copy of all documents and other evidence you plan to submit.	X
X	Financial affidavits must be filed by each party.	X
X	Proposed Parenting Plans must be filed by each party (in cases with children).	X
X	Children in the Middle must be completed by each party (in cases with children).	X
X	Mediation/Settlement Conference is typically required.	X

The Iowa Judicial Branch has provided several helpful guides and forms for self-represented parties on its website at www.iowacourts.gov. These forms include:

- Form 124 Financial Affidavit for Dissolution without Children
- Form 128 Settlement Agreement for Dissolution without Children
- Form 224 Financial Affidavit for Dissolution with Children
- Form 228 Settlement Agreement for Dissolution with Children
- Form 229 Agreed Parenting Plan
- Form 230 Proposed Parenting Plan
- Form 324 Child Support Modification Financial Statement
- Form 328 Settlement Agreement for Modification of Child Support

WHY WOULD I CHOOSE AN INFORMAL FAMILY LAW TRIAL?

- 1) Fewer rules apply, so an IFLT is more flexible. IFLTs may be easier for people who are representing themselves. The judge is more involved in asking questions and guiding the process. The judge may be able to reduce conflict between the two sides and help them focus on the children or other issues.
- 2) You can speak directly to the judge about your situation without interruption or objections from the other person or their lawyer. The other person is not allowed to ask you questions.
- 3) You do not have to worry about formal rules that limit what you can say in court. You can:
 - Speak freely about conversations between you and other people who are not in court;
 - Talk to the judge about what your children have said about custody and parenting time; and
 - Tell the judge whatever you think is important before he or she makes a decision about your case.
- 4) You can give any documents you think are important to the judge.
- 5) Informal Family Law Trials may be shorter. A lawyer may be able to prepare in a shorter amount of time. Therefore, the cost to have a lawyer represent you may be less. You may have to take less time off from work.
- 6) The judge usually, but not always, makes a decision the same day as the trial.
- 7) Your case is relatively simple. You are comfortable explaining your circumstances and the facts to the judge.



WHY WOULD I CHOOSE A TRADITIONAL TRIAL?

- 1) Rules and formal procedures are in place to protect each person's rights. The rules of evidence apply. You or your lawyer may feel more comfortable with this structure.
- 2) You like the fact that the rules of evidence will limit what people can say and the information that can be given to the judge in writing.
- 3) The question and answer format will be more effective in getting out the information about your case. It may be important to be able to ask the other person follow-up questions.
- 4) You may bring any witnesses you think are important to court.
- 5) Generally, written statements from family members, teachers, and friends will not be considered by the judge. People with something to say about your situation or the other person's situation will need to come to court.
- 6) Your case is complicated. You and the other person own a business or have lots of stocks, property, and retirement funds to divide.

From: [OFFICE RECEPTIONIST, CLERK](#)
To: [Linford, Tera](#)
Subject: FW: Comment on Proposed General Rule 40 Informal Domestic Relations Trial
Date: Monday, August 2, 2021 8:16:02 AM
Attachments: [Letter to Supreme Court 30-July-2021.pdf](#)

-----Original Message-----

From: Amir John Showrai [<mailto:president@draw.legal>]
Sent: Friday, July 30, 2021 8:53 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comment on Proposed General Rule 40 Informal Domestic Relations Trial

External Email Warning! This email has originated from outside of the Washington State Courts Network. Do not click links or open attachments unless you recognize the sender, are expecting the email, and know the content is safe. If a link sends you to a website where you are asked to validate using your Account and Password, DO NOT DO SO! Instead, report the incident.

Please see attached.