

THE IDAHO RULES OF FAMILY LAW PROCEDURE: A PILOT PROJECT IN THE FOURTH JUDICIAL DISTRICT

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Returning refreshed and inspired from the 2008 Idaho Judicial Conference in Sun Valley, the two of us hatched the idea to form a set of procedural rules specific to the practice of law and administration of justice in domestic relations cases. The Idaho Rules of Civil Procedure ("IRCP"), in our opinion, failed to address certain recurring issues that are unique to family law including (i) how to obtain children's wishes regarding custody, (ii) how and when children should participate in these cases, (iii) a lack of disclosure of basic financial information by one party or both of them, and (iv) case management issues caused by the vagaries of notice pleading, particularly in modification cases.

In addition, we groused from time to time about the organizational structure of the IRCP, particularly the scattered nature of the rules that applied to family law. Only the experienced lawyer would know to look under Rule 16 – a rule originally dedicated to pre-trial conferences – to find rules applicable to mediation, supervised visitation and parenting coordinators. Without specific direction, a self-represented litigant would not likely find the rule applicable to filing and serving a motion to modify a custody order under the same set of rules that applies to relief from judgments, and yet there it is in Rule 60(c).

In the last 17 years we have seen the innovative development of institutions throughout the state, such as Court Assistance Offices and Family Court Services, that (i) assist children and families with gaining access to the court, (ii) provide parties with education, skills and opportunities to resolve their issues in a non-adversarial manner, and (iii) help the court make better custody decisions by providing investigation and analysis in cases where the parties are indigent and unskilled. We felt it was time for Idaho to explore the efficacy of having a self-contained set of rules to complement the specialty into which family law cases have evolved.

Four years later, in November 2012, the Idaho Supreme Court approved the Idaho Rules of Family Law Procedure ("IRFLP") as a pilot project in the Fourth

Judicial District. The IRFLP will go into effect January 1, 2013 in Ada, Elmore, Boise and Valley Counties.

The IRFLP represent the collective effort of the dedicated members of the Ada County Family Law Working Group ("the Group") that we formed in the fall of 2008. We wanted the Group to be a cross-section of attorneys who possessed diverse experience in domestic relations cases; we wanted input from the point of view of law firms large and small, and from the solo practitioner. The members who accepted our invitation to the Group were Stanley W. Welsh, James Bevis, Joanne Kibodeaux and Matthew Gustavel. Mr. Bevis' paralegal, Karen Hall, attended all of the meetings in the first few years and donated extensive hours recording the Group's activities and decisions as the project developed.

The concept of specialized family law rules is not a new one; many other states have them either as stand-alone rules, or as rules that merely supplement the civil rules of procedure for that state. The Group reviewed examples of each from Florida, Arizona, Minnesota, West Virginia and Delaware. We decided to draft our rules as a stand-alone set representing an amalgam of the Arizona Rules of Family Procedure, the IRCP and, in a few cases, rules we drafted. We divided up responsibility for drafting each section of the rules among the members and met at least quarterly (monthly, by the end of the project) over many lunch hours to discuss, argue and settle the language of each rule. Judge Day and Ms. Kibodeaux spent countless hours reformatting the rules and cross-referencing them to the IRCP. Our final product includes all the new rules, as well as all rules from the IRCP that remain applicable to family law cases.

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Whenever possible, we kept rules from the IRCP intact; however, many of them were modified to remove references that apply only to juries or jury trials because all procedures to which these Rules apply are tried to the court without a jury. At this time, most rules incorporated from the IRCP have not been changed except insofar as necessary to match the format and structure of the IRFLP. Therefore, most practitioners will recognize the majority of these rules as essentially identical to the IRCP. In the future, we anticipate that some of these rules will be further modified to reflect current practices and to better suit family litigation.

Intended advantages of the IRFLP

Although new rules will likely create unforeseen issues, it is our hope and belief that the IRFLP will resolve more issues than it causes and that it will improve the administration of justice in family law cases. In this regard, there are some significant differences between the IRFLP and the IRCP which are:

1. The Applicability of the Idaho Rules of Evidence. Similar to Arizona's rules, the Group crafted a rule that requires strict application of the Idaho Rules of Evidence ("IRE") only if a party gives notice within 30 days of the filing of a responsive pleading. Otherwise, all relevant and material evidence is admissible subject to a limitation on evidence (i) the probative value of which is outweighed by the danger of unfair prejudice, (ii) that is cumulative, (iii) that confuses the issues, (iv) that is unreliable or (v) that has not been timely disclosed. The advantages of this rule are:

a. It incorporates existing practices regarding the foundation of evidence that have been informally followed in most

family law cases for some time. Most attorneys dispense with calling the foundational witnesses who might otherwise be required to admit many documents in family law cases;

b. The admissibility of hearsay, which arises in nearly every custody trial, is governed by a simpler standard that is still tempered by a showing of reliability.

c. Evidence of character, which is a statutory factor in child custody cases, is no longer subject to the narrow restrictions of the IRE;

d. For those parties who wish to follow the relaxed approach, it saves them time and money;

e. It is a standard that is easier to understand for the significantly increasing number of self-represented litigants in family law cases; and

f. A strict application of the IRE is still available if one party gives notice early in the case so both parties can prepare accordingly.

2. Participation of Children and Protection of Their Interests. Currently, there is no rule in the IRCP regarding the participation of children in custody cases. There is a statute, Idaho Code Section 32-704, that authorizes the court to appoint an attorney for the child without any regard to the attorney's qualifications. As a result of the above, some children may be represented by counsel with no experience though, in most cases, children are not represented in court. Under current practice, children usually participate in custody cases in one of three ways: (i) directly as a witness at trial, (ii) directly through an "in camera interview" by the court, and (iii) indirectly through the parties or third parties (i.e., by hearsay). Under the first two methods, it is not uncommon for a child to be brought to court with little or no advance notice, causing significant stress to the parties and, especially, the child. If the child is interviewed by the court, the methodology of that interview can vary widely depending on the particular judge (e.g., on the record, off

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the record, sworn, unsworn, parties present, no parties present, etc.). The IRFLP adopt a modified approach to the Arizona rules that establish (a) qualifications for attorneys who are appointed by the court to represent children and (b) notice and other procedural requirements for parties who intend to call a child as a witness. The advantages of this approach are:

a. Children, when represented by an attorney, have one who possesses experience and skill at doing so;

b. Children can prepare for being heard in court;

c. Parties have time to consider and prepare for how their child will participate in court; and

d. The court, counsel, parties and children are protected by the requirement that any "in camera" interview be recorded, while preserving some flexibility regarding other aspects of the manner of the interview.

3. Automatic, Mandatory Disclosure of Information. Under the IRCP, once an answer is filed and the case is at issue it is then incumbent upon a party to initiate discovery by propounding discovery requests. In many cases, there is no discovery conducted at all for a variety of reasons that include (i) lack of money, (ii) lack of knowledge regarding how to propound discovery, (iii) lack of motivation, and/or (iv) laziness. At trial, this approach often translates to a lack of preparation, a lack of information, surprise and conflict. The IRFLP require that certain information common to all divorce and custody cases be disclosed by each party no later than 35 days after the filing of a responsive pleading. As an appendix to the IRFLP, the Group developed a form to help parties comply with these disclosure requirements. The advantages of automatic disclosure requirements are:

a. Relevant information is disclosed early;

b. Early disclosure means early identification of issues and earlier preparation;

c. Better preparation means timely resolution of cases; and

d. Better preparation and timely resolution of cases means costs savings to the parties and the court system.

4. Standardized Discovery. The IRCP does not standardize discovery because the rules apply to every different kind of civil case. In family law cases, however, there is certain basic information that is discoverable and relevant in nearly every type of case. There is no reason to leave the discovery of this information to the creative semantic talents of individual parties and attorneys. The IRFLP offer uniform, standardized interrogatories, the use of which is not mandatory but which may be used in conjunction with non-standard interrogatories. The advantages are:

a. Cost savings from the preparation of the same interrogatories; and

b. Fewer discovery issues that arise from interrogatories that are less artfully drafted.

5. Time Increments. For consistency, whenever possible, time increments were used that are multiples of seven.

6. Reorganization. The existing IRCP follows a loose organization that has become increasingly disorganized as time has progressed. Rules have been expanded and, within some of them, there is little room to grow in a way that makes sense. For example, as discussed above, Rule 16 of the IRCP is denominated as a rule about pre-trial procedure, yet it has been expanded over the years to cover alternative trial techniques, like the Informal Custody Trial, and service providers who are specific to family law cases such as mediators, visitation supervisors and parenting coordinators. In another

*Rules of
Family Law Procedure
are at*

www.isc.idaho.gov/irflp_home

example, IRCP 11 covers such disparate issues as the signing of pleadings to the withdrawal of attorneys. The IRFLP are organized in separate numerical categories. The advantages are:

a. They are easier to use and logically follow the progression of civil litigation. Pleadings are in the 200 series; Judgments are in the 800's. No longer are discovery rules spilling over the mid-twenties into the thirties; rather, all discovery rules are contained in the 400 series;

b. Each numbered rule covers only one specific topic; and

c. There is considerable room to expand and/or modify the rules within each category while keeping the integrity of the overall organization of the rules.

7. Reformating. As the IRCP has expanded and changed over time, there has been little attention paid to formatting them consistently. Thus, the formatting of paragraphs and subparagraphs varies from rule to rule. The IRFLP have been formatted so that the structure is uniform throughout. The advantages of this are:

a. Citation to the rules can be consistent;

b. Changes and additions to the rules can be easily made to match the format of existing rules;

c. A useful and accurate Table of Contents and/or Index can be created automatically; and

d. The rules have a more uniform and professional appearance.

How to access the IRFLP

The IRFLP are accessible now both electronically and by hard copy. Electronically, any attorney or party can access and print the rules through:

(i) the Fourth Judicial District website <http://www.fourthjudicialcourt.idaho.gov/>, and

(ii) the Idaho Supreme Court website <http://www.isc.idaho.gov>.

There will also be hard copies available at the offices of (a) every county clerk in the Fourth Judicial District, (b) Family Court Services on the Fourth Floor of the Ada County Courthouse, and (c) the Court Assistance Office at the Ada County Courthouse. The IRFLP are extensive, and if one intends to print them one will need approximately 180 pages (the rules are 143 pages and the forms are about 35 pages).

Scope and duration of the pilot project

The IRFLP will apply to all family law cases including divorce, paternity,

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child custody, child support, civil domestic violence protection orders and all proceedings related to the establishment, modification and enforcement of such decrees or judgments, excluding contempt. They will NOT apply to cases involving adoption, termination of parental rights, guardianship, conservatorship or petitions arising under the Child Protection Act.

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Conclusion

Whether the IRFLP is a success or an IRF-L-O-P, the process of developing them has been a humbling one. As water-tight as we would like to believe these rules are, every re-read reveals a new issue or two that we overlooked. As we were developing them, we tried to keep pace with on-going changes in the IRCP with mixed results. We just recently discovered that at least one rule (i.e., IRCP Rule 60(c)) was modified and became effective last July was accidentally omitted from the IRFLP, causing us to tweak the latest draft to make them as current as we could. They are not perfect and, like any set of rules, the IRFLP will require periodic amendments and modifications. Like the mythological Dutch boy, we just hope we have enough fingers to plug the inevitable leaks.

We expect that the IRFLP will cause certain cultural changes in the way fam-

ily law cases are handled by the bench and bar, and there will be some pain in that process. Divorces are emotional and stressful; for some of your clients, it is very difficult to focus on organizing information that is needed to prepare for the issues in his or her case. We have seen many cases, particularly involving self-represented parties, where there is literally no useful information presented to the court with which to make an equitable decision about the division of property and debt, or very little evidence with which to form a judgment about the best interests of a particular child – all because there has been no effort made by the parties during the case to garner relevant information. As difficult as it may be to force parties to organize facts early in the case, we hope and believe it will ultimately improve the quality and efficiency of justice we can deliver to them.

About the Authors

Russell A. Comstock and David E. Day are magistrate judges in Ada County whose dockets are specialized in domestic relations cases including divorce, paternity, child custody, child support, and domestic violence protection orders. Both were appointed as magistrates in 1995 and both are graduates of the University of Idaho College of Law - Judge Day in 1983 and Judge Comstock in 1984. They have been members of the Idaho State Bar since then.

