Legal Aid Society
OF THE DISTRICT OF COLUMBIA
MAKING JUSTICE REAL

September 8, 2017

Via Electronic Mail to laura.wait@dcsc.gov

Laura M.L. Wait
Assistant General Counsel
Superior Court of the District of Columbia
500 Indiana Avenue, N.W., Room 6715
Washington, D.C. 20001

Re: Comments on Proposed Amendments to the Superior Court Rules of Procedure for the Domestic Violence Unit

Dear Ms. Wait,

The Legal Aid Society of the District of Columbia[1] ("Legal Aid") submits these comments on the proposed amendments to Superior Court Rules of Procedure for the Domestic Violence Unit ("DV Rules").

The Superior Court Rules Committee ("the Committee") has proposed comprehensive amendments to the DV Rules. As a result of the passage of time, some of the current rules are vague and others are inconsistent with current practice in the Domestic Violence Unit ("DV Unit"), especially with respect to service of process, contempt procedures, and the interplay between civil protection orders and related cases.[2] Legal Aid supports the Committee's effort to bring these long-needed rules amendments to fruition.

Our comments are organized into two parts: (A) comments regarding proposed rule amendments that would help establish a more transparent and fair process for all parties, but especially self-represented parties, in matters before the DV Unit; and (B) specific proposals we recommend that the Committee consider to increase access to justice in the DV Unit.

---

[1] Legal Aid is the District's oldest and largest general civil legal services organization. Since 1932, Legal Aid lawyers have been making justice real in individual and systemic ways for persons living in poverty in the District. We have a special interest in promoting access to justice for District residents, including persons who engage the court as self-represented litigants.

[2] Since 2005, Legal Aid attorneys have been working at one or both of the Domestic Violence Intake Centers, providing same-day advice and long-term representation to domestic violence survivors. From this vantage point of working cooperatively with Superior Court, we have a unique perspective on the interplay between practice and rules in the Domestic Violence Branch.

A. Comments on the Proposed Amendments

1. Rule 2 (Commencing an Action)

Rule 2 addresses the commencement of an action. As amended, the word "trial" is substituted for "hearing" throughout the rule. This reflects current practice in the DV Unit, whereby cases are regularly set for trial rather than for status hearings. However, the reference to trial in the rules sometimes results in a lack of clarity. For example, subsection (b)(2) would read: "An oral motion to amend or supplement the petition made *during the trial* must be granted in the absence of a showing of prejudice to the respondent." (Emphasis added.) We are uncertain whether this means during any hearing in a case set for trial, only while trial is in progress, or simply any time in the case prior to the conclusion of trial. The rule should make clear when this option is available to petitioners.

The amended rule also would provide additional guidance as to when cases may be consolidated. Whereas the current rule states that divorce, custody, paternity and child support cases involving the same parties *shall* be consolidated, the amended rule acknowledges only that cases *may* be consolidated and provides factors for judges to consider. Notably absent from the factors is the "One Family, One Judge" principle outlined in D.C. Code § 11-1104. *See also* Family Court Transition Plan, Vol. 1: Case Management (April 5, 2002), available at http://www.dccourts.gov/internet/documents/FamilyCourtTransitionPlan.pdf, at 9. While we agree that guidance on consolidation is helpful, the rule should take "One Family, One Judge" into account and list it as a factor.

2. Rule 5 (Serving a Petition or Other Filing)

Rule 5(a)(4) addresses proper service when the petitioner is a minor. Under D.C. Code § 16-1003, minors 16 years of age or older are permitted to file without a parent, guardian, or custodian under any circumstances; and minors ages 12 to 16 may file without a parent, guardian, or custodian if they are filing as a result of intimate partner violence. There are many reasons a minor may choose to file without involving their parents, ranging from a desire for privacy to a fear of repercussions or violence at home. In these instances, notifying parents may undermine the protections afforded to minors by the statute, and would likely dissuade minors from feeling comfortable coming to the court for protection. We suggest the addition of a comment to Rule 5(a)(4) to emphasize the court's discretion when deciding whether notification of a parent, guardian or other custodian is contrary to the best interests of the minor.

Rule 5(c) addresses proof of service. As amended, the rule states that a server's affidavit is required. The amended rule also provides information required for a proper return of service, including: "the server's name, residential or business address, and the fact that he or she is 18 years of age or older." The current practice in the DV Unit, however, is to permit a process server to give oral testimony in lieu of an affidavit. Moreover, it is also the current practice of the DV Unit that the process server need not provide his or her address.

We recommend that the Committee consider preserving these customs in the DV Unit. Our experience is that many petitioners – our clients as well as those who are self-represented – rely on friends and family members to attempt service. Given the sensitivity of the issues

adjudicated in the DV Unit, we are concerned that friends and family will be far less likely to help a petitioner with service if they also must provide a home or business address, where the respondent may find them to retaliate. When petitioners already have such difficulty serving respondents, this creates an unnecessary barrier to access to justice. Further, the existing return of service form already presents challenges to those asked to fill it out. Adding additional requirements only increases the chance that forms will not be completed properly, thus frustrating petitioners and delaying the court process.

3. Rule 6 (Temporary Protection Orders)

Rule 6, as amended, addresses temporary protection orders. In subsection (a), the amended rule requires: "The clerk must schedule a hearing on the request for the same day or the next business day." We are concerned that this language is both too limiting and offers too much discretion to the clerks. Given the option to schedule for the same day or next business day, this permits a clerk to delay a temporary protection order hearing, even when a petitioner has arrived and filed within plenty of time to see a judge the same day. Clerks should be required to schedule a hearing for the same day unless the court cannot accommodate the hearing. On the other hand, this language could be detrimental for petitioners who are unable to attend same day or next day hearings. The proposed amendment does not account for a petitioner who does not have time for a hearing the day of filing, and wishes to return two or three days later.

The amended rule could read: "The clerk must schedule a hearing on the request for the same day, unless the court is unable to accommodate a hearing. If the court is unable to accommodate a same day hearing, the clerk must schedule a hearing on the request for the next day, or for a later date of petitioner's choosing."

4. Rule 7 (Motions)

Rule 7 addresses motions.[3] The amended rule makes substantial additions to the rule, and attempts to account for a wide range of motions that might be filed in DV Unit.

Subsection (c) would require: "A respondent's motion for continuance must include a statement whether he or she consents to the extension of an existing protection order." We understand that providing this information in a motion for continuance would be preferable, but such a requirement places a high burden on *pro se* respondents, who may not know that such a

[3] Many of the proposed amendments attempt to make these rules more consistent with the Civil Rules. However, the motions contemplated by Rule 7, as amended, could benefit from greater clarity. For example, Civil Rule 60(b) provides grounds for relief from a final judgment or order; a motion under that rule typically would be called a motion to vacate. The proposed language of subsection (j) borrows from Civil Rule 60(b), but calls this a motion to reconsider (a matter generally addressed under Rule 59 of the Civil Rules). Subsection (i) defines a motion to vacate as something different entirely. We recognize the colloquialisms of the DV Unit, but note the inconsistencies. The comment to the amended rule does address this point, but the committee should take uniformity into account when finalizing these amendments.

representation is necessary to make an otherwise routine request for a continuance. We recommend deleting this additional requirement.

Subsection (d), as amended, addresses motions to dismiss, but focuses only on such motions by respondents. The amended rule is more detailed than the current rule, yet omits the possibility of a petitioner filing a motion to dismiss his or her own case. The subsection on motions to dismiss should not be amended, or if amended, should provide similar guidance to petitioners that it does to respondents.

Subsections (g)(3) and (i)(3), as amended, include an explanation of the effect of the motion. This is not consistently applied to all motions identified under the amended Rule 7. To avoid confusion, particularly for self-represented parties, we recommend that the rule not be changed to include a discussion of the effect of each type of motion.

The proposed amendments also would allow motions to extend and motions to vacate to be made orally. The amended rule seems to presuppose that oral motions will be made in the presence of both parties and that such motions should always be heard immediately. As amended, subsection (h)(2) would require the clerk to set a hearing only on a written motion to extend. A motion to extend made orally should also be set for a hearing, and proper service on respondent should be required. Similarly, although we believe the rules should allow a petitioner to vacate his or her order without the respondent present, a respondent making an oral motion to vacate should be required to serve the petitioner and return for a hearing on the motion.

5. Rule 8 (Discovery)

Rule 8 addresses discovery. The current rules require that "any discovery methods used shall be initiated *within five (5) calendar days of service* of the petition on the respondent." (Emphasis added.) However, as amended, the rule would allow a motion for discovery to be filed up to seven (7) days after service. Following Civil Rule 6, this amendment provides at least an additional two (2) days for discovery to be initiated. Per Civil Rule 6(a)(1)(c), the time to file discovery could be even longer if the last day of the 7-day period falls on a weekend. Discovery in the DV Unit is usually initiated by respondents.

This amendment would operate to delay the entry of a civil protection order to the disadvantage of petitioners and would reward respondents who do not act expediently to prepare a defense. The rule should continue to set a limit of five (5) calendar days, given the short turnaround for civil protection order cases.

The current language of Rule 8 includes a comment regarding discovery in criminal contempt cases. This comment should be amended consistent with the proposed amendments to the rule.

6. Rule 10 (Dismissal of Petition)

Rule 10 addresses dismissal of a petition for a civil protection order. As amended, the rule would address the dismissal of a previously dismissed petition, including the following

language: "After a petition has been dismissed once by the petitioner or for the petitioner's failure to proceed with the case, the court may dismiss the petition with prejudice."

We recommend that the Committee amend this language to read: "Unless otherwise stated by the court, a dismissal will be without prejudice." While a judge may always choose to dismiss a petition with prejudice, we are concerned that the proposed language might create a presumption that judges *should* dismiss petitions with prejudice the second time a petitioner files without proceeding with the case.

Petitioners choose to dismiss and reinstate their cases for a wide variety of reasons. Sometimes, childcare issues or medical needs prevent a client from arriving on time to court. It is also well-known that domestic violence survivors may finally go forward and leave an abuser only after several attempts. Absent case-specific reasons that make dismissal with prejudice appropriate, petitioners should not be left without recourse through the court.

7. Rule 11 (Failure to Appear)

Rule 11, as amended, addresses failure to appear at a hearing or trial. As amended, the rule explains that, in the event a default civil protection order is issued, a temporary protection order remains in effect until the respondent is served. To be comprehensive, this rule should account for other scenarios, such as situations when a default order is issued but there was no temporary order; or when a respondent was served with the petition and notice of hearing, but not the temporary order.

The rule also addresses bench warrants, in subsection (c). The rule would allow the court to issue a bench warrant without bond if *any party* fails to appear, under certain circumstances. It is not clear under what circumstances a bench warrant should be issued for a petitioner. In a domestic violence matter, there are many reasons a petitioner may not appear for court. If a petitioner chose not to appear for a respondent's motion, the court could choose to grant or deny the motion in petitioner's absence, without issuing a bench warrant.

8. Rule 13 (Issuance of Orders)

Rule 13, as amended, addresses the issuance of civil protection orders. The current rule states: "The Court may, as a condition of the issuance of a civil protection order in favor of any party, [. . .], require that party to abide by such fair and reasonable conditions as are consistent with the requirements of D.C. Code § 16-1005(c)." As amended, the rule would narrow this so a petitioner would have to abide by conditions consistent with D.C. Code § 16-1006(c)(6)-(7) *only*. Those provisions relate to custody and visitation. However, there might be circumstances not encompassed by this amendment. For example, civil protection orders frequently include agreements on real and personal property, which may impose responsibilities on the petitioner.

The comment to the current rule, however, discusses requiring action by petitioner or members of petitioner's family. The comment further suggests that the court may decide to issue

orders against both parties – presumably even where a petition has not been filed. This comment should be removed in its entirety.

9. Rule 14 (Contempt)

Rule 14, as amended, addresses contempt. Respondents may be held in civil or criminal contempt, depending on the nature of the violation of the order. Subsection (a)(2)(c) includes the following: "A motion for civil contempt must be filed prior to the expiration of the protection order that the party is seeking to enforce. If the order will expire before the motion for civil contempt is resolved and the party wishes to proceed with the motion for civil contempt, the party must also file a motion to extend the protection order." We respectfully suggest that this language be broadened, consistent with the law.

Several federal courts have contemplated the possibility of a contempt proceeding surviving the conclusion of a case. *See, e.g., Ohr ex rel. Nat'l Labor Relations Bd. v. Latino Exp., Inc.*, 776 F.3d 469, 479-80 (7th Cir. 2015) ("[I]f the need for the contempt order survives the termination of the underlying proceeding, such as when a party must be compensated for costs and injuries, then the contempt order does not become moot."); *U.S. v. Harris*, 582 F.3d 512, 516 (3d Cir. 2009) (discussing instances in which "orders of civil contempt can outlive the underlying proceeding); *In re Bradley*, 588 F.3d 254, 264 n.8 (5th Cir. 2009) ("[R]emedial civil contempt sanctions can be appropriate even after the underlying litigation has terminated.").

There are many circumstances in which a petitioner may need provisions of a civil protection order to be enforced beyond the expiration of the order. For example, a respondent could be ordered to pay a fixed amount of money by the expiration of the order. By the very language of such an order, a respondent would not be in contempt until the order expired. It is not in the court's interest to require a petitioner to extend an order with unwanted provisions if all the petitioner wants is the money to which they are entitled. In any event, if a respondent has missed a deadline for paying a sum of money, the respondent is in contempt of the order whether or not the stay away and no contact provisions have expired. For these reasons, we recommend that the proposed language not be adopted.

B. Specific Proposals

1. Trailing

When an act of violence leads a petitioner to file for a civil protection order, it is often the case that the respondent is also arrested and charged with a crime. Frequently, petitioners and respondents alike request that the CPO matter "trail" the related criminal case. This serves the purpose of judicial economy, and ensures that a petitioner does not endure two grueling trials on the same traumatic incident. The rules should include guidance on when trailing is appropriate, or even preferred.

A discussion of trailing would be helpful under Rule 2, which provides guidance on consolidation, but does not address how the court will handle related criminal matters. Further, as amended, Rule 2 would prohibit a civil protection order case from being assigned to a judge outside of the Family Court, which would prevent trailing related cases in the Criminal Division. D.C. Code § 11-1101 gives the Family Court original jurisdiction over civil protection order

cases, but it is not clear that this jurisdiction is exclusive. The rule should account for the possibility of trailing a related felony or other misdemeanor that is not tried in the DV Unit.

2. Motions

The proposed amendments to the DV rules include additional guidance on motions frequently filed in civil protection order cases. To the extent these rules are going to distinguish many different types of motions, some additional distinctions may be helpful. For example, motions generally may be served via first-class mail. However, a motion that could have the effect of vacating a civil protection order should require personal service. Requiring a respondent to personally serve a motion to vacate or motion to set aside best serves the interest of the parties.

Petitioners could also benefit from additional guidance on motions for alternative service. Rule 7, as amended, does not address motions for alternative service, despite covering myriad possible motions. Though Rule 5, as amended, suggests possible methods for alternative service, the rules give little guidance as to when would be appropriate to file such a motion, or what the motion should include. The DV Unit could further assist *pro se* parties by developing and providing a form motion for alternative service.

Conclusion

Legal Aid appreciates the Committee's consideration of these comments and recommendations. We would welcome an opportunity to make a presentation to the Committee on these matters, especially as to the access to justice objectives that inform these comments.

Sincerely,

Chinh Q. Le
Legal Director

Trisha Monroe
Supervising Attorney, DV/Family Law Unit

Jamie Sparano
Staff Attorney, DV/Family Law Unit