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STATE OF VERMONT

Legislative Committee on Judicial Rules

Monday, November 28, 2016

State House, Room 11

AGENDA

10:00 a.m. **Hon. Joanne M. Ertel, Probate Judge, Chair, Advisory Committee on Probate Rules, Vermont Supreme Court; Kinvin Wroth, Reporter, Advisory Committees on Civil, Probate, and Family Rules, Vermont Supreme Court**

1. Proposed Rules (proposed June 15, 2016; comments due August 15, 2016, not yet reviewed by LCJR).

a. V.R.P.P. 4(a). Form of notice and inclusion of blank Notice of Appearance form.

b. V.R.P.P. 5(e). Requiring filing of separate certificate of service after service of other documents.

c. V.R.P.P. 80.2(a). Petition for administration of estate.

10:30 a.m. **P. Scott McGee, Esq., Chair, Advisory Committee on Criminal Rules, Vermont Supreme Court; Hon. Judge Walter Morris (Ret.), Reporter, Advisory Committee on Rules of Criminal Procedure, Vermont Supreme Court**

2. Promulgated Rules (emergency rules reviewed by LCJR 6/14/16; promulgated June 15, 2016; effective August 15, 2016).

a. V.R.Cr.P. 5, 11. Required notice of potential collateral consequences of conviction to defendant pleading guilty or nolo contendere.

3. Promulgated Rule (proposed May 10, 2015; reviewed by LCJR 6/14/16; promulgated October 5, 2016; effective December 5, 2016).

a. V.R.Cr.P. 3(c)(16). Nonwitnessed misdemeanor offenses for which a law

enforcement officer with probable cause is authorized to arrest a person.

4. Proposed Rule (proposed June 15, 2016; comments due August 15, 2016, not yet reviewed by LCJR).

a. V.R.Cr.P. 7(a), (c). Clarifying that a subpoena is provided by the clerk of court but actually issued by a judicial officer, and adding an express provision for subpoenas of objects (such as documents and electronically stored information) outside the context of deposition or judicial proceedings.

11:00 a.m. **Jody Racht, Esq., Chair, Advisory Committee on Family Rules; Vermont Supreme Court; Kinvin Wroth, Reporter, Advisory Committees on Civil, Probate, and Family Rules, Vermont Supreme Court**

5. Promulgated Rules (proposed February 16, 2016; reviewed by LCJR 6/14/16; promulgated Auguast 25, 2016; effective December 5, 2016).

a. V.R.F.P. 4.0, 4.1, 4.2, 4.3. Reorganization, reformatting, and restyling of Family Rules related to divorce, annulment, legal separation, and abuse prevention.

b. V.R.C.P. 4.2; V.R.E. 503; V.R.F.P. 7(d), 8(b), 9(j), 9(k), 15(a)-(d), 15(f), 16(b), 18(a), Public Access to Court Records Rule 6(b)(33), A.O. 36, A.O. 42, A.O. 46. Conforming other Supreme Court rules with the reorganization, reformatting, and restyling of V.R.F.P. 4.0, 4.1, 4.2, and 4.3.

11:15 a.m. **Allan Keyes, Esq., Chair, Advisory Committee on Civil Rules; Vermont Supreme Court; Kinvin Wroth, Reporter, Advisory Committees on Civil, Probate, and Family Rules, Vermont Supreme Court**

6. Promulgated Rule and Emergency Amendments (reviewed by LCJR 9/24/15 (prior version) and 6/14/16 meetings; rule promulgated June 15, 2016; effective August 15, 2016; emergency amendment promulgated July 11, 2016; effective September 12, 2016).

a. V.R.C.P. 80.11. Expedited procedure for lower-value or less complex cases.

b. V.R.C.P. 80.11. Emergency amendment substituting "mediation" for "alternative dispute resolution" to reflect changes in V.R.C.P. 16.3.

7. Promulgated Rules (proposed March 7, 2016; reviewed by LCJR 6/14/16).

a. V.R.C.P. 4. Service on Vermont Attorney General under State and federal False Claims Acts.

b. V.R.C.P. 16.3. Mediation procedures, substituting "mediation" for

"alternative dispute resolution."

c. V.R.C.P. 80.10. Request for hearing after denial of a request for an order against stalking or sexual assault.

8. Proposed Rules (proposed October 10, 2016; comments due December 12, 2016; not yet reviewed by LCJR).

a. V.R.A.P. 4(f). Providing that an inmate's deposit of a notice of appeal in the internal prison mailing system can constitute a timely filing.

12:00 p.m. Adjourn

If you have questions and/or comments, please contact Agatha Kessler at 802-828-2271 or akessler@leg.state.vt.us

PROPOSED

STATE OF VERMONT
VERMONT SUPREME COURT
_____ TERM, 2016

Order Promulgating Amendments to Rules 4(a), 5(e) and 80.2 of the Vermont Rules of Probate Procedure

Pursuant to the Vermont Constitution, Chapter II, Section 37, and 12 V.S.A. § 1, it is hereby ordered:

1. That Rule 4(a) of the Vermont Rules of Probate Procedure be amended to read as follows (deleted matter struck through; new matter underlined):

RULE 4. NOTICE; PROCESS

(a) **Form of Notice.** A notice required under these rules shall bear the signature or facsimile signature of the judge or register, or petitioner's attorney; contain the name and address of the court and, as appropriate, the name of the decedent, the child or adult in need of or under guardianship, or the settlor and beneficiaries of a trust; be directed individually to each interested person identified pursuant to Rule 3(a) by name if known; state the name and postal and e-mail addresses and telephone number of the petitioner or of the petitioner's attorney; be accompanied by a copy of the petition and any annexed documents; state the date and place of hearing or reply if either is required; and advise the recipient that the action or order sought may be granted if no interested person appears to object. Where appropriate, the notice shall also state clearly that the recipient must enter an appearance to receive notice of further actions or filings in the proceeding and shall specify how the recipient can enter an appearance. ~~The court may require that a form on which the recipient may enter an appearance be attached to the notice.~~ A notice shall comply with the format provisions of the Vermont Rules for Electronic Filing, if applicable. The petitioner must include with the notice a blank Notice of Appearance form.

Reporter's Notes—2016 Amendment

Rule 4(a) is amended to adopt language of V.R.C.P. 4(b) and to address a problem that arises with increasing frequency with the increase of self-representation. It is not uncommon for a court to get a letter or answer from an unrepresented party with no return address, email address, or phone number. The court may then have an answer or other pleading but no good address to which to mail hearing notices, and no way to call or email the party if there are last minute continuances of court dates. A notice of appearance form for unrepresented parties is already in use informally in some courts, but it is only available once a party comes to the courthouse. By providing a blank notice of appearance form at the time the complaint is served,

unrepresented defendants will be encouraged to provide contact information for the court as well as to comply with V.R.P.P. 79.1(c).

2. That Rule 5(e) of the Vermont Rules of Probate Procedure be amended to read as follows: (deleted matter struck through, new matter underlined):

RULE 5. SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

(e) ~~**Proof**~~ **Certificate of Service.** ~~Proof of service shall be made by filing with the court a certificate of service stating the name and address of each party or attorney served, the date of service, and the manner of service.~~ Every document filed with the court after the petition, and required by this rule to be served upon a party, must be accompanied by a separate certificate of service that meets the following requirements:

(1) *Signing.* The certificate must be signed by the party's lawyer or an authorized employee of the lawyer, or by a self-represented party, subject to the obligations of Rule 11.

(2) *Contents.* The certificate must:

(A) certify that the document has been served upon every other party to the proceeding upon whom service is required;

(B) state the manner of service (mail, personal delivery, or other service authorized by this rule);

(C) state the name and address of each person or entity served; and

(D) state the date of the mailing or other means of delivery.

(3) *Acceptance.* The court may strike any document not accompanied by a certificate of service, may suspend running of the time for response by the other party or parties until the filing of a proper certificate of service, and may decline to act on the filing until a proper certificate is filed.

Reporter's Notes—2016 Amendment

Rule 5(e) as originally promulgated is deleted and replaced by language virtually identical to V.R.C.P. 5(h) requiring a separate certificate of service to be filed after service of any document under Rule 5. The new provision is primarily intended to address a problem resulting from the fact that more and more cases involve one or more self-represented parties. However, it applies to filings by attorneys as well as by self-represented parties.

Many self-represented parties are unfamiliar with the requirement of Rule 5(a) that every filing with the court must also be sent to all other parties or, by virtue of Rule 5(b), their lawyers. Although sometimes unrepresented parties list a "cc" to other parties, this is often not the case. It is therefore impossible to tell whether other parties have been informed of

the filing. Thus, the court may rule on a motion because the time to respond has passed and it is unopposed, only to find out later, when a motion to reconsider or reopen is filed, that the other parties were not even aware of the motion until the court's ruling. The court must then vacate the ruling, potentially wait again for the motion reaction time to pass, and then revisit the motion. This results in more work for the court staff, the judge, and the other parties who should have been served. It can also create extensive delays. To avoid this, in some courts staff routinely make photocopies of filings by self-represented litigants and mail them to the other side to be sure the other side is aware of the motion or filing. This practice, however, shifts to already overburdened staff a duty that is legally the obligation of the parties. It also shifts the costs of photocopying and mailing to the court.

Even when lawyers appear in a case there are times when it is unclear whether service has been made—for example, where new counsel came in close to the time of a filing, and it is not apparent whether the filing was served on the new counsel. This lack of clarity can lead to misunderstandings, wasted hearing time, reconsideration, or time spent by court staff calling or emailing counsel to determine who has been served.

Finally, when the courts move to electronic filing, cover letters will likely be eliminated. Thus, even the "cc" that now may appear on a cover letter will no longer be submitted to assist the court in determining whether copies of filings were sent to other parties.

All of these problems will be greatly reduced by the simple requirement of a certificate of service, by which every lawyer or party filing a document with the court certifies to whom he or she has mailed the document, on what date, and to what address. The rule is not intended to change the requirements of Rule 5 regarding what documents must be served or the manner of service. Federal Civil Rule 5(d) has required certificates of service since 1991. See 4B C. Wright & A. Miller, Federal Practice & Procedure: Civil § 1150 (3d ed. 2002).

3. That Rule 80.2(a) of the Vermont Rules of Probate Procedure be amended to read as follows (deleted matter struck through; new matter underlined):

RULE 80.2. ANCILLARY ADMINISTRATION

(a) **Petition and Attachments.** An ancillary estate shall be opened when the following are filed:

(1) A petition requesting administration of the Vermont estate including:

(i) A request for appointment of an administrator or executor for the Vermont estate with the name of the proposed administrator or executor;

(ii) A ~~description of the real and personal property of the testator in Vermont~~ representation that some or all of the real property is located in the unit in which the proceeding is brought; and

(iii) The names and addresses of all interested persons as defined in Rule 17. ~~; and~~

~~(iv) The entry fee.~~

(2) An authenticated copy of the will and the probate thereof, or such substitute for the copy as is allowed by law.

The petition shall be signed by the executor or administrator appointed in the state in which the will is probated, or some other interested person.

Reporter's Notes—2016 Amendment

Rule 80.2 is amended to conform to present practice. The petition will conform to the requirements of Rule 3 to the extent not inconsistent with this rule. The representation as to the location of real property is necessary to establish jurisdiction and venue.

4. That these rules, as added or amended, are prescribed and promulgated effective _____. The Reporter's Notes are advisory.

5. That the Chief Justice is authorized to report these amendments to the General Assembly in accordance with the provisions of 12 V.S.A. § 1, as amended.

Dated in Chambers at Montpelier, Vermont, this ____day of _____, 2016.

_____
Paul L. Reiber, Chief Justice

_____
John A. Dooley, Associate Justice

_____
Marilyn S. Skoglund, Associate Justice

_____
Beth Robinson, Associate Justice

_____
Harold E. Eaton, Jr., Associate Justice

STATE OF VERMONT
VERMONT SUPREME COURT
JUNE TERM, 2016

Order Making Permanent Emergency Amendments to Rules 5 and 11 of the Vermont Rules of Criminal Procedure

Pursuant to the Vermont Constitution, Chapter II, Section 37, and 12 V.S.A. § 1, it is hereby ordered:

1. That the emergency amendment to Rule 5(d) of the Vermont Rules of Criminal Procedure, promulgated on December 21, 2015, effective January 1, 2016, be made permanent so that the rule reads as follows:

RULE 5. APPEARANCE BEFORE A JUDICIAL OFFICER

* * * * * *

(d) Statement by the Judicial Officer. The judicial officer shall inform the defendant before taking any further action under this rule.

(1) Of the charge against the defendant and the minimum and maximum punishments for it and provide the defendant with a copy of the indictment or information and affidavit or sworn statement;

(2) Of the defendant's right to retain and consult counsel before making any statement or answering any questions at the present hearing or subsequently; in an appropriate case, of the defendant's right to request the assignment of counsel at state expense if the defendant is financially unable to retain counsel; and of the defendant's right to communicate with counsel, family, or friends;

(3) That the defendant is not required to make any statement or answer any questions at the present hearing or subsequently and that anything the defendant says may be used against the defendant;

(4) Of the general circumstances under which the defendant may secure pretrial release;

(5) If the defendant is not represented by counsel, of the nature and approximate schedule of further pretrial proceedings to be taken in the case and of the defendant's rights to discovery; and

(6) Pursuant to 13 V.S.A. § 8005(a), of the information required to be provided regarding collateral consequences of conviction.

Reporter's Note—2016 Amendment

On December 21, 2015, Rule 5(d) was amended in an emergency order to conform the rule to provisions of the Uniform Collateral Consequences of Conviction Act (UCCCA), 2013, No. 181 (Adj. Sess.), § 1, which is in pertinent part codified at 13 V.S.A. §§ 8002-8005. The emergency amendments became effective January 1, 2016. Those amendments are now made permanent.

2. That the emergency amendment to Rule 11 of the Vermont Rules of Criminal Procedure, promulgated on December 21, 2015, effective January 1, 2016, be made permanent so the rule reads as follows:

RULE 11. PLEAS

* * * * * *

(c) **Advice to Defendant.** Except as authorized by Rule 43, the court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, informing the defendant of and determining that the defendant understands the following:

* * * * * *

(6) if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant has pleaded, that the defendant's answers may later be used against the defendant in a prosecution for perjury or false statement;

(7) that if the defendant is not a citizen of the United States, admitting to facts sufficient to warrant a finding of guilt or pleading guilty or nolo contendere to a crime may have the consequences of deportation, denial of United States citizenship, or denial of admission to the United States in the future; and

(8) that there may be collateral consequences to a conviction.

(d) **Insuring That the Plea Is Voluntary.** Except as authorized by Rule 43, the court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the prosecuting attorney and the defendant or his attorney.

* * * * * *

(h) **Receipt of Notice.** Before the court accepts a plea of guilty of nolo contendere, the Court shall confirm that the defendant has received the required notice under 13 V.S.A.

§ 8005(a) and (b)(2) and has had an opportunity to discuss the notice with counsel, if represented.

Reporter's Note—2016 Amendment

On December 21, 2015, Rule 11 was amended in an emergency order to add Rule 11(c)(8) and Rule 11(h) to conform the rules to provisions of the Uniform Collateral Consequences of Conviction Act (UCCCA), 2013, No. 181 (Adj. Sess.), § 1, which is in pertinent part codified at 13 V.S.A. §§ 8002-8005. The emergency amendments became effective January 1, 2016. Those amendments are now made permanent.

3. That these rules, as now made permanent, are effective August 15, 2016. The Reporter's Notes are Advisory.

4. That the Chief Justice is authorized to report these amendments to the General Assembly in accordance with the provisions of 12 V.S.A. § 1, as amended.

Done in Chambers at Montpelier, Vermont this 15th day of June, 2016.

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Marilyn S. Skoglund, Associate Justice

Beth Robinson, Associate Justice

Harold A. Eaton, Jr., Associate Justice

STATE OF VERMONT
VERMONT SUPREME COURT
OCTOBER TERM, 2016

Order Promulgating Amendment to Rule 3(c) of the Vermont Rules of Criminal Procedure

Pursuant to the Vermont Constitution, Chapter II, Section 37, and 12 V.S.A. § 1, it is hereby ordered:

1. That Rule 3(c) of the Vermont Rules of Criminal Procedure be amended, to provide as follows (deleted matter struck through; new matter underlined):

RULE 3. ARREST WITHOUT A WARRANT; CITATION TO APPEAR

* * * * * * *

(c) **Nonwitnessed Misdemeanor Offenses.** If an officer has probable cause to believe a person has committed or is committing a misdemeanor outside the presence of the officer, the officer may issue a citation to appear before a judicial officer in lieu of arrest. The officer may arrest the person without a warrant if the officer has probable cause to believe:

* * * * * * *

(16) The person has violated 13 V.S.A. § 1304(a) (cruelty to ~~children under 10 by one over 16~~ a child).

* * * * * * *

Reporter's Note—2016 Amendment

Rule 3(c) prescribes those nonwitnessed misdemeanor offenses for which a law enforcement officer, having probable cause, is authorized to arrest a person. This amendment is made to conform the nomenclature describing the offense of cruelty to a child to legislative enactment amending 13 V.S.A. § 1304. Per Act No. 60 of 2015, § 25, the Legislature amended the statute to create a felony offense of cruelty to a child, but retained codification of a misdemeanor offense in § 1304(a), which is the subject of V.R.Cr.P. 3(c)(16), recaptioning the section title as "Cruelty to a Child," and deleting former reference in the section title to the age of either the child or the defendant. The amendment makes a nonsubstantive change to the title of the offense specified.

2. That this rule, as amended, is prescribed and promulgated to become effective December 5, 2016. The Reporter's Notes are advisory.

3. That the Chief Justice is authorized to report this amendment to the General Assembly in accordance with the provisions of 12 V.S.A. § 1, as amended.

Dated in Chambers at Montpelier, Vermont this 6th day of October, 2016.

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Marilyn S. Skoglund, Associate Justice

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice

PROPOSED

STATE OF VERMONT
VERMONT SUPREME COURT
_____ TERM, 2016

Order Promulgating Amendments to Rule 17 of the Vermont Rules of Criminal Procedure

Pursuant to the Vermont Constitution, Chapter II, Section 37, and 12 V.S.A. § 1, it is hereby ordered:

1. That Rule 17 of the Vermont Rules of Criminal Procedure be amended to read as follows (deleted matter struck through; new matter underlined):

RULE 17. SUBPOENA

(a) **For Attendance of Witnesses; Form; Issuance.** A subpoena ~~shall~~ will be ~~issued~~ provided by the clerk. It ~~shall~~ must state the name of the court and the title, if any, of the proceeding, and ~~shall~~ must command each person to whom it is directed to attend and give testimony at the time and place specified therein. ~~The clerk shall issue a subpoena,~~ The subpoena must be issued signed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served. A subpoena ~~shall~~ will be issued by a judicial officer in a proceeding before him or her, and notice must be given as required in paragraph (c)(2) below.

(b) **Defendants Unable to Pay.** The court ~~shall~~ must order at any time that a subpoena be issued for service on a named witness upon an ex parte application of a defendant upon a satisfactory showing that the defendant is financially unable to pay the fees of the witness and that the presence of the witness is necessary to an adequate defense. If the court orders the subpoena to be issued the costs incurred by the process and the fees of the witness so subpoenaed ~~shall~~ must be paid in the same manner in which similar costs and fees are paid in cases of a witness subpoenaed in behalf of the state.

(c) **For Production of Documentary Evidence and of Objects.** A subpoena may also command the witness to whom it is directed to produce the books, papers, documents or other objects designated therein. ~~The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents, or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents, or objects or portions thereof to be inspected by the parties and their attorneys.~~ Such a subpoena may not be directed to an individual defendant. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive.

(1) *Subject Matters of Subpoena; Electronically Stored Information; Motions to Quash.* A command to produce evidence or to permit inspection, copying, testing, or sampling may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately.

A subpoena may specify the form or forms in which electronically stored information is to be produced. A person commanded to produce and permit inspection, copying, testing, or sampling of books, papers, documents or tangible things, or of designated electronically stored information or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing, or trial. Upon a motion to quash a subpoena, the court may direct that books, papers, documents, or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence for an in camera review.

(2) *Protection of Persons Subject to Subpoenas.* A party or an attorney responsible for the issuance and service of a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. A person who has been subpoenaed to produce and or permit inspection, copying, testing, or sampling may within 14 days after service file written objection or a motion to quash. The subpoena must provide notice of the person's right to object, or to seek to quash, and the procedures for doing so. In the event of an objection, all parties have the right to be heard. If objection has been made, the party seeking the materials will not be entitled to inspect and copy the materials except pursuant to a court order. When a party seeks access to a person's school records, or to any other records of a person which are by law confidential, the party must provide written notice to the other party that the records have been requested prior to the service of any subpoena requesting the records.

* * * * * *

Reporter's Notes – 2016 Amendment

Rule 17(a) is amended to clarify that a subpoena is provided by the clerk of court, but actually issued by a judicial officer, subject to certain notice of rights on the part of persons subject to subpoena to object thereto, and the procedures for doing so. The amended provisions related to provision and issuance of subpoenas are intended to conform to current practice in the criminal division.

Rule 17(c) is amended to add express provision for "nonproceedings" subpoenas duces tecum, that is, for production of specified objects, including but not limited to documents and electronically stored information, outside of the context of deposition or judicial proceedings. The former rule had only addressed document production in connection with witness attendance at deposition, hearing, or trial, and thus did not provide guidance as to those circumstances in which a party was solely interested in seeking production of documents or tangible objects related to a pending case without the necessity of a witness's attendance or personal appearance. The amendment is consistent with the equivalent civil rule, V.R.C.P. 45(a)(1), which already provides for such "nonproceedings" subpoenas duces tecum.

In default of clear provision for "nonproceedings" subpoenas, attorneys and parties in criminal cases were using existing forms which specified a

deposition or court hearing date and time, with the understanding that the documents sought would actually be produced at an agreed location, usually the serving party's office, and not the court as indicated. The amendment serves to conform the rule to the practice which has evolved, clarifying the court's role in issuance of subpoenas duces tecum as well as in responding to objections raised on the part of persons served with such subpoenas. The amendment is also consistent with decisions of the Court suggesting that recourse to discovery process is the preferred course when a party seeks production of records which may be considered sensitive. See State v. Rehkop, 2006 VT 72, ¶ 9, 180 Vt. 228, 908 A.2d 488; State v. Barbera, 2005 VT 13, ¶ 11, 178 Vt. 498, 872 A.2d 309 (mem.); State v. Simoneau, 2003 VT 83, ¶ 28 176 Vt. 15, 833 A.2d 1280; State v. Roy, 151 Vt. 17, 34, 557 A.2d 884, 894-95 (1989), overruled on other grounds by State v. Brillon, 2008 VT 35, 183 Vt. 475, 955 A.2d 1108.

New paragraph (c)(1) specifies that a subpoena commanding production of evidence or to permit inspection, copying, testing, or sampling may be issued independently from, but as well as for, trial, hearing, or deposition. In the case of a "nonproceedings" subpoena, if the requested items are produced, the person commanded to respond need not appear in person at the place of production or inspection. The paragraph carries forward the procedure authorizing the court in event of a motion to quash to direct that the documents or objects sought be produced before the court for in camera review. The new paragraph also specifies for the first time that a subpoena may issue for electronically stored information, with a requirement that the subpoena identify the form or forms in which such information is to be produced.

New paragraph (c)(2) prescribes certain protections for persons who are subject to the issuance of subpoenas. First, a party or attorney responsible for the issuance and service of a subpoena is obligated to take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. Second, express provision is made for filing of objection or motion to quash in response to subpoena within 14 days after service, and all parties have a right to be heard. In event of objection, the materials in issue shall not be provided to the requesting party except pursuant to court order. In addition, when a party seeks access to a witness's school records, or to any other records of a witness which are by law confidential, the party shall provide written notice to the other party that the records have been requested prior to the service of any subpoena requesting such records. This requirement is consistent with existing protection accorded to certain records of alleged victims under 13 V.S.A. § 6607, which provides:

> When a defendant seeks access to a victim's school records, or to any other records of a victim which are by law confidential, the defendant shall provide written notice to the

prosecutor that the records have been requested prior to the service of any subpoena requesting the records.

In addition, federal law serves to protect and apply to any release of an individual's substance abuse records and school records. See 42 U.S.C. § 290dd-2(a); In re B.S., 163 Vt. 445, 659 A.2d 1137 (1995). Substance abuse treatment records are not subject to subpoena unless the court finds good cause for disclosure. See 42 U.S.C. § 290dd-2(b)(2)(C); 42 C.F.R. § 2.64(d). Similarly, under the Family Educational Rights and Privacy Act of 1974 (FERPA) a school may not release such records without a valid release except "in compliance with judicial order, or pursuant to any lawfully issued subpoena," if the student and, under certain conditions, parents have been notified. 20 U.S.C. § 1232g(b)(2)(B). The purpose of the notification of the parents or the adult student is so they may seek protective action in a motion to quash. 34 C.F.R. § 99.31(a)(9)(ii). Thus the FERPA also anticipates a motion to quash the subpoena duces tecum as the appropriate procedure to follow. 20 U.S.C. § 1232g(b)(2)(B). The amended rule recognizes these provisions of law and their likely applicability in the court's determination of any objection or motion to quash a subpoena duces tecum.

References to "shall" are generally amended to "must" or "will" consistent with general restyling of the Rules of Procedure by the Court. The change in terminology is stylistic, rather than substantive.

2. That these rules, as amended are prescribed and promulgated to become effective _____. The Reporter's Notes are advisory.

3. That the Chief Justice is authorized to report these amendments to the General Assembly in accordance with the provisions of 12 V.S.A. § 1, as amended.

Dated in Chambers at Montpelier, Vermont this _____day of _____, 2016.

_____
Paul L. Reiber, Chief Justice

_____
John A. Dooley, III, Associate Justice

_____
Marilyn S. Skoglund, Associate Justice

_____
Beth Robinson, Associate Justice

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Harold E. Eaton, Jr., Associate Justice

STATE OF VERMONT
VERMONT SUPREME COURT
AUGUST TERM, 2016

Order Promulgating Amendments to the Vermont Rules for Family Proceedings

Pursuant to Chapter II, Section 37, of the Vermont Constitution, it is hereby ordered:

1. That Rule 4 of the Vermont Rules for Family Proceedings be abrogated and replaced by Rules 4.0-4.3 of the Vermont Rules for Family Proceedings, which are promulgated to read as shown in the appendix attached to this order.

2. That Rule 4 is abrogated, and Rules 4.0-4.3 are prescribed and promulgated, effective on December 5, 2016. The Reporter's Notes are advisory.

3. That the Chief Justice is authorized to report these amendments to the General Assembly in accordance with the provisions of 12 V.S.A. § 1, as amended.

Dated in Chambers at Montpelier, Vermont, this 25th day of August, 2016.

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Marilyn S. Skoglund, Associate Justice

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice

APPENDIX TO PROMULGATION ORDER
AUGUST 25, 2016

RULE 4. DIVORCE, ANNULMENT AND LEGAL SEPARATION; ABUSE PREVENTION [ABROGATED]

Reporter's Notes—2016 Abrogation

Rule 4 is abrogated simultaneously with the promulgation of Rules 4.0-4.3, which reorganize and restyle its provisions. See Reporter's Notes to those rules.

RULE 4.0. DIVORCE AND OTHER FAMILY PROCEEDINGS

(a) **Applicability of Rules.**

(1) In General. This rule applies to actions for divorce, legal separation, dissolution of a civil union, affirmation or annulment of marriage, parentage, desertion, and nonsupport, except as modified or supplemented by Rule 4.1 for cases involving minor children, Rule 4.2 for motions after judgment, and Rule 4.3 for certain special procedures.

(2) Rules of Civil Procedure.

(A) The Vermont Rules of Civil Procedure apply to actions under this rule and Rules 4.1-4.3 except as provided in (B) and (C) and as otherwise provided in specific rules.

(B) V.R.C.P. 16.3 (Alternative Dispute Resolution) and 79.1 (Appearance and Withdrawal of Attorneys) do not apply to actions under this rule and Rules 4.1-4.3.

(C) V.R.C.P. 58 (Entry of Judgment) applies to actions under this rule and Rules 4.1-4.3, except that a judgment need not be set forth in a separate document.

(b) **Complaint; Commencing an Action; Service; Parties.**

(1) Complaint. The complaint must:

(A) state facts establishing the jurisdiction of the family division;

(B) state the particular facts of the claim and the relief sought;

(C) be signed and sworn to by the plaintiff, if of sound mind and of the age of 16 years;

(D) state the residence of the defendant or allege that it is not known by the plaintiff and cannot be ascertained by reasonable diligence;

(E) have attached a report in the form prescribed by the Commissioner of Health providing statistical data about the parties; and

(F) state whether any divorce, annulment, abuse prevention complaint, or separate support proceedings have been filed by either party against the other and whether any orders have been issued in those proceedings. A copy of any order issued, if available, must be filed with the complaint.

(2) Commencing an Action; Service.

(A) The action must be commenced in accordance with V.R.C.P. 3. In any published notice of an action for divorce in which adultery is a ground, the words "a certain person named in the complaint" must appear in place of the name of any alleged paramour of the defendant.

(B) Service may be made by any of the following methods:

(i) The defendant may be served personally by any method provided in V.R.C.P. 4(d), (e), or (k) with a summons and complaint and the notice of hearing signed by the clerk.

(ii) The summons, complaint, and notice of hearing may be served by mailing them to the defendant at one or more of the addresses supplied by the plaintiff or by the defendant or otherwise, by certified mail, return receipt requested and delivery restricted to the addressee. The plaintiff must pay the expense.

(iii) If certified mail is refused by the defendant, the clerk may serve the notice of hearing, summons, and complaint by mailing them to the defendant by ordinary first-class mail and by certifying that such service has been made.

(iv) Service may be made by publication by order of the court, as provided in V.R.C.P. 4(g).

(v) At any time, service may be made by delivering to the defendant by any method chosen by the plaintiff the summons and a request that the defendant waive service by any other method. The summons and request must be accompanied by the complaint, the notice of hearing, and a waiver of service form. The defendant must sign and date the waiver of service and return it to the court no later than 20 days from the date the documents were delivered, or 60 days from that date if the documents and requests are delivered to the defendant outside a state or territory of the United States. If the defendant answers the complaint, the defendant must do so within 20 days of the date that the defendant signed the waiver or, if the waiver is undated, within 20 days of the date that the waiver is filed with the court. Failure to comply with a request to waive service may result in the imposition of costs, including reasonable attorney's fees, against the defendant for expenses incurred in effecting service by another means.

(C) Real or personal property may be attached, or trustee process may be used, in connection with the commencement of an action for divorce.

(3) Parties.

(A) Notwithstanding the provisions of V.R.C.P. 17(b), a minor who is a party to a proceeding need not be represented by next friend, guardian ad litem, or other fiduciary, unless the court so orders.

(B) When any party to an action to which this rule applies has been authorized to proceed in forma pauperis under V.R.C.P. 3.1(b), and during the course of the proceeding and prior to a final judgment, the court determines that the applicant has the ability to pay all or a part of the waived fee, the court may order either party to reimburse the state for the fees waived or costs paid. If the applicant fails to pay the fee within a reasonable time, the court may dismiss the proceeding. The court may assess the waived fees and costs as a charge against the marital assets if the court finds that the marital assets are sufficient for the support of the parties and any dependent children. If such reimbursement is not made voluntarily upon demand, the clerks are authorized to proceed by execution or action to recover all fees or costs that any party becomes liable to reimburse under this subparagraph.

(c) **Proceedings Prior to Judgment.**

(1) Civil Rule Not Applicable. V.R.C.P. 65 (Injunctions) does not apply to proceedings for orders under this subdivision.

(2) Interim Domestic Orders. Upon commencement of a proceeding under this rule and Rule 4.1, the court will issue an interim domestic order on a form to be prepared by the Court Administrator. The order may include any or all of the following provisions:

- Orders concerning removal of personal property from the family residence;
- Prohibitions on each party's interference with the personal liberty of the other;
- Orders prohibiting the selling, concealing, or otherwise disposing of real or personal property of the parties after the proceeding's commencement;
- Orders requiring the forwarding or delivering of the parties' mail;
- Orders concerning the continuation of credit cards or credit accounts of each party;
- Orders concerning the incurring of debt by the parties after the proceeding's commencement;
- Orders requiring the continuation of the insurance policies, including health insurance, maintained by either party for the benefit of the other or any minor children;
- Orders prohibiting the removal of the parties' minor children from the state, except for brief temporary absences;
- Orders permitting the use of bank accounts for usual and customary living and business expenses;
- Orders prohibiting derogatory remarks about the other parent in the presence of minor children.

An interim order under this section does not change any interim or final abuse order that already may be in effect. Those orders remain in full effect. Either party, on motion and notice, may object to and obtain a hearing on any provision of the interim order.

(3) Temporary Relief. At any time after the proceeding's commencement, either or both parties may apply for temporary relief. The court may make any orders pending final hearing that the court would be authorized to make upon final hearing except as provided in paragraph (4).

(4) Actions Other Than Parentage. In actions other than parentage actions:

(A) The court may change title of real or personal property without the parties' consent only for good cause.

(B) At any time after the proceeding's commencement, on motion of either party the court may enjoin the other party from conveying, concealing, or interfering with the property or clothing of the moving party or of that party's minor children or from interfering with the possession, use, and control of any property in the possession of either party and claimed by the other.

(C) The court may make any mandatory or other orders in respect to the possession, control, or use of the real and personal property of either spouse, of the minor children, or of the couple jointly, that may be just and equitable.

(D) The court may enjoin either party from conveying or removing from the state any portion of his or her property that the court finds may be necessary to secure the maintenance which may be decreed, or the rights of either party, or the performance of any order or decree that may be made during the action's pendency.

(E) The court may issue a temporary order for spousal maintenance.

(5) Status Conference; Scheduling; Discovery Orders. Subject to the provisions of Rule 4.1(c) if parental rights and responsibilities are involved:

(A) Unless requested earlier by a party or scheduled by the court, a status conference will be held when the action is ripe for final hearing. A superior judge assigned to the family division in the unit in which the complaint was filed will preside over the status conference. The conference may be held by telephone, in a courthouse in another county, and as part of any other duly noticed hearing held by the superior judge. The court may hold an uncontested final hearing immediately upon the conclusion of, or in lieu of, a status conference.

(B) At the status conference the judge will determine whether the matter is contested or uncontested. If the matter is contested, the judge will:

(i) schedule a hearing date or a further status conference;

(ii) inquire whether issues relating to infidelity, physical abuse, sexual abuse, child abuse or neglect as defined in 33 V.S.A. § 4912, or parental unfitness will be raised at the hearing. An unfit parent is defined, for purposes of this rule, as a parent who is demonstrably incapable of providing an appropriate home for his or her child;

(iii) determine whether or not expert witnesses will be called to testify;

(iv) issue orders authorizing or compelling discovery under subdivision (g) of this rule and Rule 4.1(b); and

(v) issue any other order appropriate under V.R.C.P. 16.

(C) Unless the court orders otherwise, parties represented by counsel need not be

present at a status conference.

(d) **Hearing Required; Exceptions; Appearance by Parties.**

(1) The court will enter a final judgment in an action for divorce, legal separation, dissolution of a civil union, or parentage only after hearing, unless the judgment is:

(A) a dismissal for want of prosecution; or

(B) entered in accordance with subdivision (e) of this rule.

(2) The hearing may be held without notice to the defendant if the defendant has not entered a written appearance as provided in Rule 15(a).

(3) Even if the defendant does not file an answer, the defendant may, upon entering a written appearance as provided in Rule 15(a), be heard on issues of parental rights and responsibilities, spousal maintenance, child support, maintenance supplement, property distribution, and counsel fees. If the defendant or any other party joined in the proceeding files a responsive pleading, that party must provide under oath the information required by the Uniform Child Custody Jurisdiction and Enforcement Act, 15 V.S.A., chapter 20.

(4) The court may exclude from the hearing all persons except officers of the court and parties in interest.

(e) **Exception for Uncontested Proceedings.**

(1) In any action for divorce, legal separation, or dissolution of a civil union, the court may grant a final judgment without hearing where the record demonstrates that the action is not for parentage, desertion, or nonsupport and where the following documents have been filed with the court sufficiently before a scheduled final hearing:

(A) A request signed by both parties that the court proceed without final hearing.

(B) A stipulation outlining an agreement executed by both parties that sets out the terms and conditions of resolution for all issues in the divorce action. The stipulation must also specifically state the facts upon which the court may base a decree of divorce, legal separation, or dissolution of a civil union and which bring the matter within the court's jurisdiction and that:

(i) the terms and conditions may be incorporated by the court in its final order;

(ii) both parties are aware of their right to appear before the court for final hearing and are, by the execution of the agreement, knowingly and voluntarily waiving their right to appear in person before the court;

(iii) neither party is the subject of a final abuse prevention order in a proceeding between the present parties;

(iv) each party is entering the stipulation freely and voluntarily; and

(v) the parties have exchanged all financial information, including, but not limited to, income, assets, and liabilities.

(C) A proposed final order containing the terms and conditions of the parties' agreement. The proposed final order will be approved as to form by both parties' attorneys, if any.

(2) Upon the filing of all documents required under paragraph (1), the court may grant

and enter the final order without a hearing after the court has reviewed all of the documents and has determined that the terms and conditions of the parties' agreement are fair and equitable. If the court determines that the agreement of the parties is not fair or equitable, or for any other reason, the court may order a final hearing.

(f) **Counterclaim.** A counterclaim may state any cause within the jurisdiction of the family division, including a demand for divorce or annulment of marriage, and may be filed by leave of the court at any time prior to judgment. In an action for divorce, defendant's failure to assert counterclaims for divorce or nullity of marriage or any other claim will not bar assertion of those claims in a subsequent action.

(g) **Discovery.** Discovery may be taken as in civil actions, except as follows:

(1) The court may order discovery of any matter discoverable under this subdivision, whether or not a party has requested such discovery.

(2) Depositions, physical examinations, and mental examinations may be taken only by order for good cause, and subject to Rule 5, except that depositions may be taken without court order on issues of child support, spousal maintenance, and property division as in civil actions.

(3) Interrogatories may be served and used only as follows:

(A) A party may through written interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions as to which the expert is expected to testify and a summary of the grounds for each opinion.

(B) A party may not serve on any other party more than 25 additional interrogatories, including all discrete subparts, without leave of court or written stipulation. Leave to serve a greater number of interrogatories will be granted only for information that was not, or could not have been, included in a timely filed Form 813 and to the extent consistent with the principles of V.R.C.P. 26(b)(1).

(C) Interrogatories, requests to admit, and requests to produce may only be obtained on an issue of infidelity, physical abuse, sexual abuse, child abuse, or neglect as defined in 33 V.S.A. § 4912, or parental unfitness by order for good cause.

(4) Following final judgment in any proceeding under this rule, in response to a party's request made no more often than once per calendar year (or tax year, if different), a party must furnish the information required by paragraph (6) and Rule 4.1(b)(4). When a motion to modify is filed, parties must file affidavits and documents pursuant to paragraph (6) and Rule 4.1(b)(4), regardless of prior disclosures made during that calendar year. Failure to comply will subject a party to the sanctions set forth in 15 V.S.A. § 662 and V.R.C.P. 37.

(5) A party may request that tax records or other private information be sealed by filing a motion for protective order under V.R.C.P. 26(c).

(6) Certificate or Affidavit of Income and Assets.

(A) In any action subject to this rule in which a party is not, or may not subsequently be, obligated to pay child support, the parties must file a certificate, subject to the obligations of V.R.C.P. 11, that they have disclosed to each other all financial

information, including, but not limited to, income, assets, and liabilities; but on order of the court, each party must file an affidavit of income and assets. The certificate must be filed on the earlier of the following dates: 30 days after the service of the complaint or on the date of the case management conference or, if no conference is scheduled, at least five working days before the date of the first-scheduled court appearance. The affidavits must be filed on the date set in the court's order requiring the filing.

(B) An affidavit filed pursuant to subparagraph (A) must be accompanied by:

- that party's pay stubs for the four most recent pay periods in which employment income was received, if any;
- monthly income and expense statements or equivalent documents covering the period following a self-employed person's last-filed income tax return; and
- documentation of all other income received during the period following any person's last filed income tax return (including social security, workers' compensation, unemployment compensation, disability, and pensions).

On or before the date when the affidavit must be filed, the parties must exchange tax returns for the two most recent years in which returns were filed, together with all schedules and other documentation that were submitted to the Internal Revenue Service.

Reporter's Notes

Rules 4.0-4.3 are adopted to replace former Rule 4 as originally promulgated and subsequently amended. The new rules are not intended to make any "substantive" change in former Rule 4, except as noted in the next paragraph. Their purpose is to make the provisions of the former rule more accessible by reorganizing them in a functional order that will make their purpose and interaction clearer and by "restyling" them in clearer and more consistent language and format similar to that of the restyled Vermont Rules of Appellate Procedure, adopted in 2013, and most sets of federal procedural rules.

A small group of "substantive" amendments developed during the process of reorganization and restyling was proposed and reviewed simultaneously in a separate promulgation order. Those amendments and their Reporter's Notes are now incorporated in new Rules 4.0-4.3

Reorganization has been accomplished by dividing the provisions of former Rule 4 among the four new rules. New Rule 4.0 contains provisions that are generally applicable to all civil family proceedings—divorce, legal separation, dissolution of a civil union, the affirmation or annulment of a marriage, parentage, desertion, and nonsupport. Rule 4.1 contains additional special provisions for cases involving minor children and parentage. Rule 4.2 contains provisions pertaining to motions after judgment. Rule 4.3 contains provisions

considered to be "special procedures" within the context of civil family proceedings. The following table shows the disposition of the provisions of former Rule 4 among the provisions of new Rules 4.0-4.3:

Disposition Table—Former Rule 4 Sections to New Rules 4.0-4.3 Sections

Former Location	New Location	
(a)	4.0(a)	
(b)(1)(A)	4.0(b)(1), 4.1(a)(1)(A)	
(b)(1)(B)	4.3(a)(1), (2)	
(b)(1)(C)	4.1(a)(1)(B)	
(b)(2)(A)	4.0(b)(2)(A)	
(b)(2)(B)	4.0(b)(2)(B), 4.1(a)(2)	(b)(2)(B) repeated in both places
(b)(2)(C)(i)	4.0(b)(2)(C)	
(b)(2)(C)(ii)	4.0(b)(2)(A)	
(b)(2)(C)(iii)	4.0(b)(3)(B)	
(b)(2)(C)(iv)	4.0(b)(3)(A)	
(b)(2)(D)	4.1(a)(3)	
(c)	4.0(c)	
(d)	4.0(d)(1)-(3)	
(e)	4.0(e)	
(e)(1)(C)	4.1(e)	
(f)	4.0(f)	
(g)(1)	[Previously abrogated]	
(g)(2)	4.0(g), 4.1(b)(1)	
(g)(2)(A)	4.0(g)(2)	
(g)(2)(B)	4.0(g)(3)	
(g)(2)(C)	4.1(b)(3)	
(g)(2)(D)(i)	4.1(b)(4)(A)	
(g)(2)(D)(ii)	4.0(g)(6)(A)	
(g)(2)(D)(iii)	4.0(g)(6)(B), 4.1(b)(4)(B), 4.2(c)(3)	(g)(2)(D)(iii) repeated in all three places
(g)(2)(E)	4.0(g)(1)	
(g)(2)(F)	4.0(g)(4)	
(g)(3)	4.0(g)(5)	
(g)(4)	4.0(d)(4)	
(g)(5)	4.1(b)(2)	
(h)	4.1(c)	
(i)	[Not carried forward]	See Rule 4.0(a) Reporter's Note
(j)(1)	4.2(a)	
(j)(2)	4.2(b)	
(j)(3)	4.2(c)	
(j)(4)	4.2(d)	
(j)(5)	4.2(e)	
(j)(6)	4.2(f)	

(k)	4.0(a)(1)	
(l)	4.1(f)	
(m)	4.3(a)(1)	
(n)	4.3(a)(2)-(6)	
(o)	4.3(b)	
(p)	4.3(c)	
(q)	4.1(d)	
(r)	4.3(d)	
(s)	4.3(e)	

Restyling follows general drafting guidelines and principles used in restyling the Federal Rules of Appellate, Criminal, and Civil Procedure. See Bryan Garner, Guidelines for Drafting and Editing Court Rules (Administrative Office of the United States Courts, 1996), http://www.lawprose.org/wordpress/wp-content/uploads/Guidelines-for-Drafting-and-Editing-Court-Rules.pdf [https://perma.cc/NJ6S-RW5S]. See generally Introductory Reporter's Note to 2013 promulgation of restyled Vermont Rules of Appellate Procedure. The restyling changes in the Family Rules fall into two general categories:

- Format. For clearer presentation, the restyled rules are broken down into constituent parts, substituting progressively indented numbered or bulleted subparagraphs or clauses for lengthy horizontal chains of clauses. Cross-references are made uniform. "Rule" refers to a provision of the Family Rules. Provisions of other sets of rules are referred to by their abbreviations—for example, "V.R.C.P." A cross-reference within a rule or section of a rule to another section of that rule or section is shortened to, for example, "paragraph (3)," "subparagraph (B)." Statutes are cited in abbreviated form—for example, "15 V.S.A. § 1103."

- Language. The restyled rules reduce inconsistencies in language by using the same words to express the same meaning and eliminating redundant and archaic words and phrases. For example, "minor" is used throughout, rather than "infant." "Deemed" becomes "considered." "The court in its discretion may" becomes "the court may." To avoid ambiguity, "shall," which can have many meanings depending on context and interpretation, has been replaced with "must" to reflect required action by a party or the court or court personnel. When the rule simply describes a future procedural step that the court or court personnel is to take, "will" is used. "May" indicates that the court has discretion, and "should" is used in the sense of "ought to."

The project to reorganize and restyle former Rule 4 began as part

of a larger undertaking of the Reporter's Advanced Civil Procedure course in the 2010 fall semester at Vermont Law School to restyle the entire body of the Vermont Rules for Family Proceedings. The Family Rules Advisory Committee and the Reporter express their special gratitude for his work on the Rule 4 project to Scott Woodward, J.D., Vermont Law School 2012 and member of the Vermont Bar. While a student in the course, Mr. Woodward devised the plan and prepared the initial draft that divided former Rule 4 into separate rules. Thereafter, as a student, and then as a member of the bar, he worked with the Committee and Reporter on a series of drafts through which the text of what are now Rules 4.0-4.3 was developed and refined.

Rule 4.0(a) carries forward former Rule 4(a) in restyled format. Paragraph (1) makes clear that the new rule applies to all civil family matters within the jurisdiction of the Family Division of the Superior Court, except as modified or supplemented by new Rules 4.1-4.3. It includes "affirmation or annulment of marriage" previously covered separately in former Rule 4(k). The final sentence of former Rule 4(a)(1) referring to the provisions of former Rule 4(n) concerning abuse prevention actions has been omitted as unnecessary. See Reporter's Notes to Rule 4.3(a).

The race-to-notice venue clause of former Rule 4(i) is not carried forward. The unnecessarily rigid first-in-time standard appears to have originated as a County Court rule of procedure, rather than being compelled by statute. See original Reporter's Notes to V.R.C.P. 80(i) (1971). The trial court has authority inherently and by analogy to other rules to order joint hearings of separate actions and determine the order of trial in the most appropriate unit. Cf. Hallet v. Mullin, 155 Vt. 650, 583 A.2d 101 (1990) (mem.); former V.R.F.P. 4(n); V.R.C.P. 42(a).

Rule 4.0(b) carries forward former Rule 4(b)(1)(A) (except for language concerning actions involving children), (2)(A), and (2)(C) in restyled format. Other provisions of former Rule 4(b) have been placed in Rules 4.1 and 4.3.

Rule 4.0(b)(2)(B)(v) is derived from former Rule 4(b)(2)(B)(vi), which was optional in cases not involving minor children. It is revised to make clear that the waiver of service procedure may be initiated by any delivery method that the plaintiff elects and to make clear that the defendant is not required to file an answer in the waiver situation.

Rule 4.0(c) carries forward former Rule 4(c)(1) in restyled format, making clear that not all provisions of the rule apply to parentage proceedings and that Rule 4.1 modifies or supplements this rule in

cases involving parental rights and responsibilities. Subparagraph (E) is added to Rule 4.0(c)(4) to make clear that a temporary order may be issued for spousal maintenance.

Rule 4.0(d) carries forward former Rule 4(d) in restyled format, updating the statutory reference in paragraph (3). Paragraph (4) is former Rule 4(g)(4). Rule 4.0(d)(2) and (3) were derived from former Rule 4(d). The language of that rule came from the 1972 form of a Maine rule that was amended in 1977 along with a statutory change affecting property distribution. Vermont did not pick up the change. Property distribution is now added as a critical component in current practice and in the absence of a current rationale for exclusion. Other changes are intended to make clear the difference between child support and spousal maintenance.

Rule 4.0(e) carries forward former Rule 4(e) in restyled format, except that subparagraph 4(e)(1)(C) and paragraph (2) have been placed in Rule 4.1(e).

Rule 4.0(f) carries forward former Rule 4(f) with some restyling of language.

Rule 4.0(g) carries forward former Rule 4(g) in restyled format, except that subparagraphs (2)(C) and (D)(i) have been placed in Rule 4.1(b).

RULE 4.1. CASES INVOLVING MINOR CHILDREN

(a) **Complaint; Service; Case Management Conference.**

(1) Complaint.

(A) If a proceeding under Rule 4.0 involves one or more minor children, the complaint or an accompanying affidavit must contain the information required by the Uniform Child Custody Jurisdiction and Enforcement Act, 15 V.S.A. § 1079.

(B) Recipients of Public Assistance.

(i) In any action for divorce or parentage, when either party receives a grant for public assistance from or through the Economic Services Division of the Vermont Department for Children and Families on behalf of the children involved in the action, the complaint must recite that fact and a copy of the summons and complaint must be served on the Office of Child Support by certified mail, return receipt requested.

(ii) If during the pendency of the action either party applies for and receives a grant for public assistance from or through the Economic Services Division of the Vermont Department for Children and Families on behalf of the children involved in the action, the plaintiff must file an amended complaint reciting that fact and must

serve the summons, complaint and amended complaint on the Office of Child Support by certified mail, return receipt requested.

(iii) In any action in which the Commissioner avers that a party is, or during the pendency of the action has become, such a recipient, the Office of Child Support may intervene as a party to protect the interests of the Department. Such intervention must be accomplished by timely filing and service of a notice, together with any affidavit, on all parties as provided in V.R.C.P. 5.

(iv) In any action under this rule which is commenced by the Office of Child Support as assignee of rights to child support, the complaint must recite that fact, and the Office of Child Support will provide the court clerk with a current mailing address for the assignor. The clerk must serve the summons, complaint, and notice of hearing on the assignor by certified mail when arranging for service on the defendant.

(2) Commencing an Action; Service. If either party is or may be obligated to pay child support to the other party or to the Office of Child Support, the action must be commenced, and service of process must be made, as provided in this paragraph.

(A) The complaint must be filed and a hearing or case manager's conference must be scheduled before the complaint is served.

(B) After filing, the family division clerk will complete a notice of hearing or notice of case manager's conference and must attempt to schedule the hearing or case manager's conference so that it is held from 45 to 60 days after the summons and complaint were filed, unless because of unavailability of magistrates, judges, or case managers or because of a subsequent failure to complete service, it is not practical to do so.

(C) After a hearing or case manager's conference has been scheduled, the clerk, or upon request, the plaintiff's attorney, must make prompt service on the defendant.

(D) Service may be made by personally serving the defendant by any method provided in V.R.C.P. 4(d), (e), or (k) with a summons, complaint, and the notice of hearing or case manager's conference signed by the clerk.

(E) In the alternative, the summons, complaint, and notice of hearing or case manager's conference may be served by mailing them to the defendant at one or more of the addresses supplied by the plaintiff or by the defendant or otherwise, by certified mail, return receipt requested and delivery restricted to the addressee. The plaintiff must pay the expense.

(F) If certified mail is refused by the defendant, the clerk may serve the notice of hearing or case manager's conference, summons, and complaint by mailing it to the defendant by ordinary first-class mail and by certifying that such service has been made.

(G) Service may be made by publication by order of the court, as provided in V.R.C.P. 4(g).

(H) At any time, service may be made by delivering to the defendant by any method chosen by the plaintiff the summons and a request that the defendant waive service by any other method. The summons and request must be accompanied by the complaint, the notice of hearing or case manager's conference if applicable, and a waiver of service form. The defendant must sign and date the waiver of service and return it to the court no

later than 20 days from the date the documents were delivered, or 60 days from that date if the documents and request are delivered to the defendant outside a state or territory of the United States. If the defendant answers the complaint, the defendant must do so within 20 days of the date that the defendant signed the waiver or, if the waiver is undated, within 20 days of the date that the waiver is filed with the court. Failure to comply with a request to waive service may result in the imposition of costs, including reasonable attorney's fees, against the defendant for expenses incurred in effecting service by another means.

(3) Case Management Conference. If either party is or may be obligated to pay child support to the other party or to the Office of Child Support, a case management conference will be held unless the conference is waived as provided in subparagraph (C). The purpose of the conference is to consider all financial and other issues pending between the parties to encourage settlement and clarify and simplify the issues for hearing.

(A) The conference will be conducted by a case manager assigned to the family division or by another family division staff member designated by the judge.

(B) The conference must be held after the date of service of process on the defendant and not later than the date set for hearing.

(C) If, before the scheduled date of the conference, the parties have filed and exchanged all information and material required under paragraph (b)(4), a stipulation approved by the court as to any issues that have been resolved, and a statement setting forth issues that have not been resolved, the presiding judge or magistrate or, if approved by the judge, the case manager, may waive the conference.

(b) **Discovery and Required Information.**

(1) In actions under this rule, discovery may be taken as provided in Rule 4.0(g)(1)-(6), except as provided in paragraphs (2)-(4).

(2) In any action under this rule in which parentage or child support is in issue, when an order is entered each party must file with the court information on location and identity of the party, including Social Security number, residential and mailing addresses, telephone number, driver's license number, and name, address, and telephone number of employer. Each party must inform the court of any changes in the information provided. Any information filed pursuant to this paragraph will be available only to the parties and their counsel. The court, for good cause, may withhold any or all information provided by a party from any other party or counsel.

(3) In parentage proceedings under 15 V.S.A. §§ 301-308, the parties must comply with 15 V.S.A. § 304.

(4) Affidavit of Income and Assets.

(A) In any action under this rule in which a party is or may be obligated to pay child support to the other party or the Office of Child Support, each party must file the affidavit of income and assets required by 15 V.S.A. § 662 on or before the date of the case management conference scheduled pursuant to Rule 4.1(a)(3) or, if no conference is

scheduled, at least five working days before the date of the first scheduled hearing before the magistrate.

(B) An affidavit filed pursuant to subparagraph (A) must be accompanied by:

- that party's pay stubs for the four most recent pay periods in which employment income was received, if any;
- monthly income and expense statements or equivalent documents covering the period following a self-employed person's last-filed income tax return; and
- documentation of all other income received during the period following any person's last filed income tax return (including social security, workers' compensation, unemployment compensation, disability, and pensions).

On or before the date when the affidavit must be filed, the parties must exchange tax returns for the two most recent years in which returns were filed, together with all schedules and other documentation that were submitted to the Internal Revenue Service.

(c) **Delay Where Minor Children Are Involved.** No divorce action in which minor children of the parties are involved will be heard on the merits sooner than six months from the date of service unless the court otherwise orders because:

(1) the parties have demonstrated by joint motion and affidavit that a stable and effective agreement for parental rights and responsibilities has existed and has been in operation for at least six months, or

(2) extraordinary circumstances exist.

(d) **Magistrates.** Except as provided in 4 V.S.A. §§ 462, 463, and Rule 4.3(b), a magistrate will hear and determine all proceedings to establish or modify child support. However, when a superior judge assigned to the family division may hear and determine an issue of child support under 4 V.S.A. §§ 462, 463, and Rule 4.3(b), the family division will have all of the powers provided by law or by rule to magistrates.

(e) **Exception for Uncontested Proceedings Involving Minor Children.**

(1) If the parties have minor children, or any other children for whom there is or may be a duty of support under 15 V.S.A. § 658, the stipulation required in Rule 4.0(e)(1)(B) must also specifically include:

(A) the names and dates of birth of the children for whom there is or may be a duty of support;

(B) a parenting agreement that provides for parental rights and responsibilities of the parties and addresses such matters as parent-child contact by the noncustodial parent, transportation, medical care, and schooling;

(C) a statement that both parents are in compliance with all provisions of a final child support order, a copy of which is on file or attached to the stipulation; and

(D) a statement that both parties are represented and have been assisted by counsel in

this agreement. In cases where parental rights and responsibilities are shared or divided, the stipulation must also contain a statement that the parents have been and will continue to be able to communicate effectively and work together cooperatively in matters affecting the child or children and a dispute resolution provision requiring mediation or arbitration in the event the parties themselves are unable to resolve disputes concerning parental rights and responsibilities.

(2) In any action for parentage under this rule, the court, without a hearing, may accept and approve the parties' stipulation, which will become an order of the court.

(f) **Orders of Support.**

(1) Every child support or spousal maintenance order made or modified under this rule must, if contested, contain findings and conclusions and must, in all cases, contain a separately captioned order. Child support orders must also be mailed to the registry.

(2) In uncontested cases if the court does not issue findings the court will attach to and incorporate into the ruling a worksheet setting forth the figures used in calculating support under 15 V.S.A. § 656, including childcare costs. The order must contain the information required by 15 V.S.A. § 663 and every order must also set forth each child's date of birth, the total arrearage (if any) as of a given date, the date or dates on which payments of support and arrearage are to commence and the amount thereof, and termination and reduction dates. Every order and set of findings also must contain the order for immediate wage withholding or the findings and provisions for future wage withholding set forth in 15 V.S.A. § 781. Every order of support must be served on each party and the registry in accordance with V.R.C.P. 5.

Reporter's Notes

Rule 4.1 is adopted as part of the replacement of former Rule 4 by Rules 4.0-4.3 to make the provisions of the former rule more accessible by reorganizing them in a functional order and by "restyling" them. See Reporter's Notes to simultaneous adoption of Rule 4.0. Rule 4.1 supplements and modifies the general provisions of Rule 4.0 in cases involving minor children and parentage.

Rule 4.1(a) carries forward in restyled format the last sentence of former Rule 4(b)(1)(A), with an updated statutory reference, and former Rule 4(b)(1)(C), (2)(B), and 2(D). Rule 4.1(a)(2)(H) was derived from former Rule 4(b)(2)(B)(vi), which was a permitted form of service in cases involving minor children. The new rule makes clear that the waiver of service procedure may be initiated by any delivery method that the plaintiff elects and that the defendant is not required to file an answer in the waiver situation.

Rule 4.1(b) generally incorporates the provisions of Rule 4.0(g) concerning discovery with the exceptions from former Rule 4(g)(2)(C), (D)(i) and (iii), and (5) in restyled format.

Rule 4.1(c) carries forward the provisions of former Rule 4(h) in restyled format.

Rule 4.1(d) carries forward the provisions of former Rule 4(q) in restyled format.

Rule 4.1(e) carries forward the provisions of former Rule 4(e)(1)(C) and (2) in restyled format.

Rule 4.1(f) carries forward the provisions of former Rule 4(*l*) in restyled format. The terms "child support" and "spousal maintenance" are used consistent with revisions of Rule 4.0(d)(3). Only child support orders need to be mailed to the registry.

RULE 4.2. MOTIONS AFTER JUDGMENT

(a) **Applicability.** This rule applies to all post-judgment proceedings in actions for divorce under Rules 4.0 and 4.1 except motions for relief under V.R.C.P. 59 or 60 and actions seeking wage withholding under Rule 4.3(b). Notwithstanding the pendency of an appeal, the court may entertain motions under this rule as provided in Rule 12(d).

(b) **Motion and Service.** Any proceedings under this rule to modify or enforce the judgment in an action for divorce must be made on motion and supported by affidavit. Copies of the motion and affidavit must be served in the same manner as a complaint by the appropriate method provided in this subdivision.

(1) Cases Not Involving Minor Children.

(A) Except as provided in paragraph (2), service of a motion not involving minor children must be made on the party, and not the party's attorney, whether the party is within the state or not, by one of the following methods:

(i) by personal service;

(ii) by registered or certified mail, return receipt requested, with delivery restricted to the addressee;

(iii) by delivery to the party by any method chosen by the moving party with a request that the responding party waive service by any other method. The motion with a request must be accompanied by the notice of hearing or case manager's conference if applicable and a waiver of service form. The responding party must sign and date the waiver of service and return it to the court no later than 20 days from the date the documents were delivered, or 60 days from that date if the documents and request are delivered to the responding party outside a state or territory of the United States. If the party served responds, that party must do so within 20 days of the date that the party signed the waiver or, if the waiver is undated, within 20 days of the date that the waiver is filed with the court. Failure to comply with a request to waive service may result in the imposition of costs, including reasonable attorney's fees, against the responding party for expenses incurred in effecting service by another means; or

(iv) by ordinary mail or by publication or both, if the court so orders on a showing by a party that service cannot with due diligence be made by any of the other methods permitted by this paragraph.

(B) If a hearing is to be held, the clerk will serve notice of the hearing by first-class mail on each party.

(2) Cases Involving Minor Children. In proceedings for modification or enforcement of a judgment for child support, maintenance supplement, or parental rights and responsibilities, service must be made on the party, and not the party's attorney, whether the party is in the state or not, as provided in Rule 4.1(a)(2). When a party seeks modification or enforcement of other provisions of a judgment simultaneously with modification or enforcement of child support, maintenance supplement, or parental rights and responsibilities, service must be made as provided in that paragraph.

(3) Party's Location Unknown. In any child support enforcement proceeding under this rule, upon sufficient showing that diligent effort has been made to ascertain the location of a party, the court may deem service sufficient if service has been made by delivery of copies of the motion, affidavit, and written notice of hearing to the most recent residential or employer address filed with the court pursuant to Rule 4.1(b)(2) by one of the following methods:

(A) mailing to the party by certified mail, return receipt requested and delivery restricted to the addressee, the expense being paid by the moving party; or

(B) if the certified mail pursuant to subparagraph (A) is refused by the party, mailing to the responding party by ordinary first-class mail and certifying that service has been made.

(c) **Affidavits.**

(1) Form. Affidavits required by this rule must set forth specific facts sufficient to warrant the required findings and must be on the affiant's own knowledge, information, or belief; and, to the extent based upon information and belief, must state that the affiant believes the information to be true.

(2) Affidavits of Income and Assets. When a motion to modify a judgment regarding child support or spousal maintenance is filed, all parties must file affidavits and documents pursuant to Rules 4.0(g)(6) or 4.1(b)(4), as appropriate, regardless of prior disclosures under Rule 4.0(g)(4) during that calendar year. Failure to comply will subject a party to the sanctions set forth in 15 V.S.A. § 662 and V.R.C.P. 37.

(3) Supporting Documents. An affidavit filed pursuant to paragraph (2) must be accompanied by:

- that party's pay stubs for the four most recent pay periods in which employment income was received, if any;
- monthly income and expense statements or equivalent documents covering the period following a self-employed person's last-filed income tax return; and
- documentation of all other income received during the period following any person's last filed income tax return (including social security, workers' compensation, unemployment compensation, disability, and pensions).

On or before the date when the affidavit must be filed, the parties must exchange tax returns for the two most recent years in which returns were filed, together with all schedules and other documentation that were submitted to the Internal Revenue.

(4) Protective Order. A party may request that tax records or other private information be sealed by filing a motion for protective order under V.R.C.P. 26(c).

(d) **Determining a Change of Circumstances.** If a hearing is to be held on a motion under this rule to modify a judgment, the court may bifurcate the hearing and first determine and make findings as to whether there has been a real, substantial, and unanticipated change of circumstances; if no such change is found, the court may dismiss the motion without reaching the merits of the action.

(e) **Venue.**

(1) Place of Hearing. A motion pursuant to this rule must be filed and heard in the county where the original judgment was rendered if the opposing party resides there or if neither party is a resident of the state. Otherwise, the motion may be filed and heard in the county in which either party resides. If motions by opposing parties are filed and are pending simultaneously in different counties that are both appropriate for hearing, the matter may be heard in either county if the parties agree; if the parties cannot agree on a single county for hearing, the court in which the first motion was filed will determine and order where the motions are to be heard.

(2) Responsibilities of Moving Party for Filing Papers. When a motion is to be heard in a county other than that where the original judgment was rendered, it is moving party's responsibility to file certified copies of the decree or order sought to be modified or enforced, and of the docket sheet, with the clerk of the county where the motion is to be heard prior to the hearing. When the motion is for modification of child support, the moving party must also file certified copies of the affidavit of income and assets and the financial worksheet from the original proceeding.

(f) **Automatic Child Support Hearing.** When a judgment for physical responsibility is modified, the court will set a child support modification hearing and provide notice to the parties as provided in Rule 4.1(a)(2). Unless there is good cause, the court will simultaneously issue a temporary order pending the modification hearing, if adjustments to those portions of any existing child support or wage withholding order that pertain to any child affected by the modification are necessary to assure that support and wages are paid in amounts proportional to the modified allocation of responsibility between the parties. A temporary order pursuant to this paragraph does not affect any portion of a payment allocated to arrearages under a child support order. Unless the court orders otherwise, the parties must file and exchange all information and material required under Rules 4.0(g)(6) and 4.1(b)(4). In appropriate circumstances, the court may order a case management conference to be held as provided in Rule 4.1(a)(2)(B).

Reporter's Notes

Rule 4.2 is adopted as part of the replacement of former Rule 4 by Rules 4.0-4.3 to make the provisions of the former rule more accessible by reorganizing them in a functional order and by "restyling" them. See Reporter's Notes to simultaneous adoption of Rule 4.0. Rule 4.2 incorporates the provisions of former Rule 4(j) concerning post-judgment motions.

Rule 4.2(a) carries forward the provisions of former Rule 4(j)(1) in restyled format.

Rule 4.2(b) carries forward the provisions of former Rule 4(j)(2) in restyled format. Subparagraph (b)(1)(A) incorporates the provisions of Rule 4.0(b)(2)(B).

Rule 4.2(c) carries forward the provisions of former Rule 4(j)(3) and (g)(2)(D)(iii) and (F), and (3) in restyled format.

Rule 4.2(d) carries forward the provisions of former Rule 4(j)(4) in restyled format.

Rule 4.2(e) carries forward the provisions of former Rule 4(j)(5) in restyled format.

Rule 4.2(f) carries forward the provisions of former Rule 4(j)(6) in restyled format. Its language was incorporated in 15 V.S.A. § 668(b), enacted by Act 119 of 2011 (Adj. Sess.), § 7.

RULE 4.3. SPECIAL PROCEDURES

(a) **Procedure Where Divorce, Annulment, and Abuse Prevention Actions Are Pending.**

(1) Pending Abuse Prevention Action. If an abuse prevention action brought under Rule 9 is pending in the family division when the complaint for divorce is filed, the plaintiff must so indicate in the complaint.

(2) Prior Abuse Prevention Action. Notwithstanding V.R.C.P. 42(a), if a party to an abuse prevention action subsequently files a complaint for divorce or annulment, the court where the subsequent complaint is filed will immediately consolidate the abuse prevention action with the divorce or annulment action. All orders in effect in the abuse prevention action will continue in effect after consolidation until expressly discharged or modified by the court. For the purposes of 15 V.S.A. § 1108 (enforcement), a temporary or final order issued as part of the consolidated action will be considered an abuse prevention order to the extent that it orders relief provided in 15 V.S.A. §§ 1103 or 1104.

(3) Prior Divorce or Annulment Action. If a party to a Vermont divorce or annulment action subsequently files an abuse prevention action, the court where the abuse prevention action was filed will act on any requests for relief without notice to the other party or for expedited relief pursuant to Rule 9. On motion of either party or the court's own motion the court will consolidate the abuse prevention action with the prior divorce or annulment action. Upon consolidation, where temporary or final orders are outstanding between the parties in the divorce or annulment action, the abuse prevention complaint will be treated as a motion to modify the outstanding orders.

(4) Motions to Consolidate. In lieu of filing a separate abuse prevention complaint, any party to a divorce under this rule may invoke the court's authority as provided by 15 V.S.A. ch. 21, and may seek any of the relief provided by that chapter, upon motion pursuant to these rules. If relief is granted pursuant to that chapter, the actions will be deemed to have been consolidated.

(5) Orders in Consolidated Actions. When an abuse prevention action is consolidated with a divorce or annulment action under this subdivision, the abuse prevention provisions of the temporary or final order of the consolidated action will also be entered on the Temporary or

Final Order for Relief From Abuse form provided by the Court Administrator's office. The appropriate order form will be signed by the judge and attached to the front of the order issued pursuant to the consolidated action. Copies of these orders will be filed with the appropriate police and sheriff's departments and the state police district offices in accordance with 15 V.S.A. § 1107. The party at whose request the order was issued may deliver the order for filing to the appropriate law enforcement agencies; the court also will mail copies to each agency. All orders in effect in the abuse prevention action will continue in effect after consolidation until expressly discharged or modified by the court. For the purposes of 15 V.S.A. § 1108 (enforcement), a temporary or final order issued as part of the consolidated action will be considered an abuse prevention order to the extent that it orders relief provided in 15 V.S.A. §§ 1103 or 1104.

(6) Extensions of Abuse Orders in Consolidated Actions. In any consolidated action, at the expiration of the fixed period of time set forth in 15 V.S.A. § 1103(e), in anticipation of that expiration, or after the time period has expired, regardless of the status of the divorce action, the court may extend the abuse order for whatever period of time it deems necessary to protect a party or a party's child and it may subsequently extend such an order. No showing of change of circumstances is required for an extension. Orders will be entered, signed, and filed as set forth in paragraph (5) of this subdivision.

(b) **Wage Withholding.**

(1) Application of Civil Rules. Except as provided in this subdivision, the Vermont Rules of Civil Procedure apply to actions seeking wage withholding. Petitions for wage withholding to secure child support, spousal support, and arrearages of child support or spousal support are governed by this subdivision. If a petition is filed seeking both wage withholding for spousal support and wage withholding for child support, or arrearages thereof, the action will be heard entirely by a single superior judge assigned to the family division without any individualized finding under 4 V.S.A. § 463.

(2) Petition. A petition for wage withholding pursuant to 15 V.S.A. § 780 et seq. must set forth the petitioner's name, and, if different, the name of the person legally entitled to receive child or spousal support, the defendant, the defendant's employer(s), if known, and any other information required by law.

(3) Service and Filing of Petition. The court or the Office of Child Support will serve a copy of the petition on the defendant either:

(A) in person in accordance with V.R.C.P. 4; or

(B) by certified mail, return receipt requested with instructions to deliver to addressee only. If acceptance of service is refused, the court may serve the obligor by sending the petition to the obligor by ordinary first-class mail and by certifying that such service has been made. In the alternative, the court may provide for mail service as provided in V.R.C.P. 4(f) and (*l*).

(4) Notice of Hearing; Objections. A plaintiff who seeks wage withholding must submit a blank notice of hearing to the court together with the petition, for completion by the clerk and service with the petition. A hearing date will be scheduled within 10 days of the filing of the petition. A party who objects must present the objection at the hearing provided for in the notice of hearing. If the Office of Child Support has notified the obligor to commence wage

withholding pursuant to 15 V.S.A. § 782(f), the obligor must file any objection and a request for hearing within 10 days of receiving the notification.

(5) Findings and Order. The court's ruling will, if contested, contain findings and conclusions, must in all cases contain a separately captioned order, and must also be served on each party and the registry in accordance with V.R.C.P. 5. The order will contain the information required by 15 V.S.A. § 785.

(c) **Grandparent Visitation.** Whenever custody or visitation of a minor child is in issue in an action subject to Rule 4.0 and 4.1, a child's grandparent may, in accordance with V.R.C.P. 5, request visitation rights with the grandchild. The grandparent is not a party to the proceeding but may be called as a witness by the court and, when called, will be subject to cross-examination by the parties. A grandparent who has visitation rights has the right to move under Rule 4.2 to enforce or modify a judgment with respect to those visitation rights.

(d) **Property Masters.**

(1) Appointment by the Court. In any action subject to Rule 4.0 where equitable division of the marital estate or spousal maintenance is in issue, the court may appoint a master to determine the following matters:

(A) The value of any items of tangible property such as household furnishings;

(B) The value of assets and liabilities, including but not limited to the value of businesses owned by either or both parties;

(C) The amount of each party's annual income from all sources;

(D) The amount of each party's annual living expenses.

(2) Appointment by Agreement. In any action subject to Rule 4.0 where equitable division of the marital estate or spousal maintenance is in issue, the court, with the agreement of the parties, may appoint a master to determine the matters set forth in paragraph (1) of this subdivision and also to determine the fair allocation of the marital estate between the parties and an award of spousal maintenance if appropriate.

(3) Compensation and Necessary Expenses. The compensation and necessary expenses to be allowed to a master will be fixed by the court.

(A) In an appointment pursuant to paragraph (1) of this subdivision, such compensation and necessary expenses will be paid by the state, except that if

(i) the distribution of property is contested and governed by 15 V.S.A. § 751 and the value of the property to be distributed exceeds $500,000; or

(ii) one or both parties seek an award of maintenance under 15 V.S.A. § 752 and the parties have nonwage income of $150,000 or more, excluding up to $500,000 of income from the sale of a primary residence or jointly owned business,

the court may order the compensation and necessary expenses of a master to be shared by the parties, with the shares specified in the order.

(B) In an appointment pursuant to paragraph (2), such compensation and necessary expenses will be paid by the parties as agreed or ordered by the court.

(4) Powers. The order of reference to the master may specify or limit the master's powers and may direct the master to report only on particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report.

(5) Proceedings.

(A) In General. V.R.C.P. 53(d) governs proceedings before a master appointed pursuant to this subdivision, so far as applicable.

(B) Evidence. The Vermont Rules of Evidence apply to proceedings before a master, except that evidence not admissible under those rules may be admitted if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs and is not precluded by statute or privilege.

(C) The Record. The master will maintain a taped record of the hearing and a log of all exhibits.

(6) Report.

(A) In General. V.R.C.P. 53(e)(1) and (4) govern the report of a master appointed pursuant to this subdivision, so far as applicable.

(B) Objections; Effect of Master's Report.

(i) In an action where the master has been appointed by agreement pursuant to paragraph (2) of this subdivision, if the parties have waived the right to object to the acceptance of the report, the master's findings of fact and conclusions of law will be conclusive on the parties, subject to the court's approval.

(ii) In any other action, any party may, within 10 days after being served with notice of the filing of the report, serve written objections on the other party. Any party may, within 30 days after service of written objections by either party or, if no timely written objections have been served by either party, within 30 days after service of notice of the filing of the report, move the court for action on the report and any timely written objections to it. Whether or not a timely motion is filed, the court, with or without hearing, must review the report. In reviewing the report, the court must accept the master's findings of fact so long as they are supported by substantial evidence and may accept, modify, or reject the master's conclusions of law and recommendations. On the basis of that review, the court may adopt, modify, or reject the report in whole or in part, may receive further evidence, or may recommit it with instructions.

(e) **Parent Coordination.**

(1) Appointment of Parent Coordinator. In an action under Rules 4.0 and 4.1 in which parental rights and responsibilities have been adjudicated, and determination, modification, or

enforcement of parent-child contact is a substantial issue, the court, at the request of a party or on its own motion, may appoint a parent coordinator if to do so will serve the best interests of the children and one or more of the following conditions is impeding the resolution of parent-child contact issues:

(A) A high level of conflict between the parents;

(B) Domestic abuse in the relationship;

(C) Substance abuse on the part of either or both parties; or

(D) Any other condition that in the opinion of the court significantly impedes the resolution of parent-child contact issues.

(2) Order of Referral. If the court determines that parent coordination may be in the best interests of the children pursuant to paragraph (1) of this subdivision, the court may issue an order of referral to parent coordination that requires the parties to meet with a designated parent coordinator for an initial intake and informational meeting. The order will:

(A) Designate a specific individual qualified as provided in paragraph (9) of this subdivision to serve as parent coordinator for the purpose of resolving issues related to parent-child contact in accordance with protocols established by administrative order of the Supreme Court;

(B) Direct each parent to contact the parent coordinator for the purpose of setting up an initial intake and informational meeting; and

(C) Delineate the scope of the parent coordinator's recommendations to include one or more of the following: Modification of the conditions of parent-child contact designed to improve compliance (e.g., communication between parents, pick-up and drop-off protocols, supervision requirements); minor schedule changes consistent with the percentage of time the child spends with each parent under the current parent-child contact order; modification of schedule and percentage of time spent with each parent. In post-judgment cases, the judge will not order recommendations that include modifications in the percentage of time spent with each parent unless a party has filed a motion to modify parent-child contact and the judge has determined that the moving party has made a prima facie case for a real, substantial, and unanticipated change of circumstances.

(3) Intake and Informational Meeting. At the intake and informational meeting, the parent coordinator will interview each parent individually as required under subparagraph (5)(C) of this subdivision. If the parent coordinator determines that the case is appropriate for parent coordination and the parties agree to engage in the parent coordination process, the parent coordinator will submit to the court a signed parent coordination agreement and a proposed appointment order. The parent coordinator will inform the court if the parent coordinator determines that the case is not appropriate for parent coordination or the parties do not agree to engage in the process or fail to attend the intake meeting.

(4) Parent Coordination Order. Upon the filing of a stipulation and proposed order, the court will issue a parent coordination order. The order will:

(A) Designate a specific individual qualified as provided in paragraph (9) of this subdivision to serve as parent coordinator for the purpose of resolving issues related to

parent-child contact in accordance with protocols established by administrative order of the Supreme Court;

(B) Delineate the scope of the parent coordinator's recommendations to include one or more of the following: Modification of the conditions of parent-child contact designed to improve compliance (e.g., communication between parents, pick-up and drop-off protocols, supervision requirements); minor schedule changes consistent with the percentage of time the child spends with each parent under the current parent-child contact order; modification of schedule and percentage of time spent with each parent. In post-judgment cases, the judge will not order recommendations that include modifications in the percentage of time spent with each parent unless a party has filed a motion to modify parent-child contact and the judge has determined that the moving party has made a prima facie case for a real, substantial, and unanticipated change of circumstances;

(C) Direct each parent to contact the parent coordinator for the purpose of setting up further meetings; and

(D) Set a date for a status conference ten to twelve weeks from the date of the order or at another mutually agreed-upon time.

(5) Duties of the Parent Coordinator.

(A) The parent coordinator will review the case file before the initial intake and informational meeting with the parties.

(B) The parent coordinator will hold the initial intake and informational meeting with each party separately at the courthouse or a facility with comparable security. All subsequent meetings with the parties will be held separately and at such a facility unless the parties and the parent coordinator agree to hold joint meetings.

(C) The parent coordinator will conduct an initial intake and informational meeting as described in paragraph (3) of this subdivision. At the initial meeting with each party, the parent coordinator will explain the purpose and process of parent coordination, inform the parties that information gained by the parent coordinator in the process will not be confidential, and outline the rights of the parties and the fees for the service.

(D) If at any time the parent coordinator determines that parent coordination proceedings should be terminated, the parent coordinator will report that fact to the court, and the matter will be set for a status conference.

(E) After meeting with both parties, if the parties agree, the parent coordinator will file a stipulation signed by both parties authorizing the parent coordinator to obtain confidential information concerning the children from professionals and others who have worked with the children. If the parties do not agree, the parent coordinator or a party may request that the court issue an order permitting the parent coordinator to obtain such confidential information.

(F) The parent coordinator may meet with the children, the parties' attorneys, other professionals involved with the children, and family members or others who know the children well.

(G) If the parties agree on a parent-child contact plan, the parent coordinator will

draft a stipulation that, if signed by each party, will be filed with the court prior to the date set for the status conference.

(H) If the parties cannot agree on a parent-child contact plan, the parent coordinator will submit a report to the court, including a narrative summary of the parent coordinator's meetings with the parties and others and detailed recommendations for a parent-child contact plan. The recommendations of the parent coordinator must not exceed the scope delineated in the parent coordination order. The report will be filed with the court and mailed to the parties at least 14 days prior to the date set for the status conference.

(6) Objections. A party who objects to the parent-child contact plan proposed by the parent coordinator must file written objections with the court within 10 days after the mailing to the parties of the parent coordinator's report and recommendations.

(7) Status Conference. At the status conference, if there is a stipulation, the court will review the plan, may revise it, and will issue a final order for parent-child contact based on the stipulated plan and any revisions. If there is no stipulation, the court will consider the parent coordinator's report and any objections. If there are no longer contested issues, the court may issue a final order for parent-child contact based on the parent coordinator's recommendations and any revisions that the court may make. If there is no stipulation or report, or if contested issues remain, the court will set the matter for hearing. Pending the hearing, the court may issue a temporary order for parent-child contact based on the parent coordinator's recommendations, if any.

(8) Hearing. At the hearing, the parent coordinator may be called by either party or the court to testify, provided that the parent coordinator will not be permitted to testify to statements made by a party that would otherwise be inadmissible as an offer of compromise under V.R.E. 408. Following the hearing, the court will issue a final parent-child contact order.

(9) Training and Qualifications of Parent Coordinators. The Supreme Court will provide by administrative order for qualifications and training of parent coordinators that will enable them to carry out all of their responsibilities under this subdivision.

Reporter's Notes

Rule 4.3 is adopted as part of the replacement of former Rule 4 by Rules 4.0-4.3 to make the provisions of the former rule more accessible by reorganizing them in a functional order and by "restyling" them. See Reporter's Notes to simultaneous adoption of Rule 4.0. Rule 4.3 incorporates the provisions of former Rule 4(m)-(s) considered to be "special procedures" within the context of civil family proceedings.

Rule 4.3(a) carries forward the provisions of former Rule 4(m) and (n) in restyled format.

Rule 4.3(b) carries forward the provisions of former Rule 4(o) in restyled format. Rule 4(o)(4) concerning decrees issued or modified

prior to July 1, 1990, has been omitted as obsolete, and other provisions of former Rule 4(o) have been modified to reflect statutory changes made subsequent to the adoption of that rule.

Rule 4.3(c) carries forward the provisions of former Rule 4(p) in restyled format.

Rule 4.3(d) carries forward the provisions of former Rule 4(r) in restyled format. Paragraphs (1)-(3) incorporate the language of the amendment to former Rule 43(r) promulgated January 11, effective March 11, 2016. V.R.C.P. 53(d) and (e)(1) and (4) are incorporated "so far as applicable" to reflect differences in Family Division practice, including the absence of jury trial.

Rule 4.3(e) carries forward the provisions of former Rule 4(s) in restyled format.

STATE OF VERMONT
VERMONT SUPREME COURT
AUGUST TERM, 2016

Order Promulgating Amendments to Conform Provisions of the Vermont Rules of Civil Procedure, Rules of Evidence, Rules for Family Proceedings, and Rules for Public Access to Court Records, and Administrative Orders of this Court to Rules 4.0-4.3 of the Vermont Rules for Family Proceedings

Pursuant to Chapter II, Section 37, of the Vermont Constitution, it is hereby ordered:

1. That Rule 4.2(a) of the Vermont Rules of Civil Procedure be amended to read as follows (new matter underlined; deleted matter struck through):

RULE 4.2. TRUSTEE PROCESS

(a) **Availability of Trustee Process.** In any personal action in which an attachment would be available under Rule 4.1(a), trustee process may be used, in the manner and to the extent provided by law and by this rule, to attach goods, effects, or credits of the defendant in the hands of a third person for the purpose of securing satisfaction of any judgment for damages and costs which the plaintiff may recover; provided, however, that trustee process shall issue against any person for an amount due from such person to the defendant as earnings only as provided in subdivision (j) of this rule; provided further that proceedings for wage withholding to secure child support, spousal support, or arrearages thereof shall be conducted only as provided in Rule 4~~(o)~~ 4.3(b) of the Vermont Rules for Family Proceedings.

Reporter's Notes—2016 Amendment

V.R.C.P. 4.2(a) is amended for conformity with the simultaneous abrogation of former V.R.F.P. 4 and promulgation of restyled and reorganized V.R.F.P. 4.0-4.3. See Reporter's Notes to those rules.

2. That Rule 503(d)(7) of the Vermont Rules of Evidence be amended to read as follows (new matter underlined; deleted matter struck through):

RULE 503. PATIENT'S PRIVILEGE

* * * * * *

(d) **Exceptions.**

* * * * * *

(7) *Risk of harm to a child.* In any proceeding under ~~Family Court Rule 4~~ Rules 4.0-4.3 of the Vermont Rules for Family Proceedings to determine parental rights or responsibilities or parent-child contact, and in any proceeding under Chapter 55 of Title 33, Vermont Statutes Annotated, there is no privilege under this rule if the court, after hearing, finds on the basis of evidence other than that sought to be obtained, that: (1) in any such case lack of disclosure of the communication would pose a risk of harm to the child as defined in 33 V.S.A. § 4912, or in a

proceeding to terminate parental rights the communication would be relevant under 33 V.S.A. § 5540(3); (2) the probative value of the communication outweighs the potential harm to the patient; and (3) the evidence sought is not reasonably available by any other means.

Reporter's Notes—2016 Amendment

V.R.E. 503(d)(7) is amended for conformity with the simultaneous abrogation of former V.R.F.P. 4 and promulgation of restyled and reorganized V.R.F.P. 4.0-4.3. See Reporter's Notes to those rules.

3. That Rule 7 of the Vermont Rules for Family Proceedings be amended to read as follows (new matter underlined; deleted matter struck through):

RULE 7. REPRESENTATION BY GUARDIANS AD LITEM AND ATTORNEYS OF MINORS WHO ARE SUBJECTS OF PROCEEDINGS UNDER RULES-4 4.0-4.3 AND 9

* * * * * *

(d) **Child as Witness.**

(1) In any proceeding in which a party seeks to call as a witness a minor child who is a subject of the proceeding, the court shall hold a hearing to determine whether to allow the child to testify. If a guardian ad litem and an attorney for the child have not previously been appointed under (b) or (c), then, to assist the court in that determination:

(A) in a proceeding under Rules-4 4.0-4.3, the court shall appoint a guardian ad litem and an attorney for the child;

* * * * * *

(2) If the court finds after hearing that the testimony of the child is necessary to assist the court in determining the issue before it, that the evidence sought is not reasonably available by any other means, and that the probative value of the testimony outweighs the potential detriment to the child from being called as a witness, the court may allow the testimony, subject to the following conditions:

(A) In a proceeding under Rules-4 4.0-4.3, the court shall continue the appointment of the guardian ad litem and the attorney for the child.

* * * * * *

Reporter's Notes—2016 Amendment

The title of V.R.F.P. 7 and V.R.F.P. 7(d)(1)(A) and (2)(A) are amended for conformity with the simultaneous abrogation of former V.R.F.P. 4 and promulgation of restyled and reorganized V.R.F.P. 4.0-4.3. See Reporter's Notes to those rules.

4. That Rule 8(b) of the Vermont Rules for Family Proceedings be amended to read as follows (new matter underlined; deleted matter struck through):

RULE 8. MAGISTRATES PROCEEDINGS

* * * * * *

(b) **In General.** ~~Family Court Rule 4~~ Rules 4.0-4.3 shall provide the procedure under this rule, except as set forth below.

* * * * * *

Reporter's Notes—2016 Amendment

V.R.F.P. 8(b) is amended for conformity with the simultaneous abrogation of former V.R.F.P. 4 and promulgation of restyled and reorganized V.R.F.P. 4.0-4.3. See Reporter's Notes to those rules.

5. That Rules 9(j) and (k) of the Vermont Rules for Family Proceedings be amended to read as follows (new matter underlined; deleted matter struck through):

RULE 9. ABUSE PREVENTION

* * * * * *

(j) **Orders Granting the Defendant Relief From Abuse.** The court may issue an order granting the defendant relief from abuse only: (1) upon the filing and service of an affidavit and complaint, or affidavit and motion, executed by the defendant, and upon notice and opportunity to be heard, or (2) in cases in which a complaint or petition has been filed under ~~Rule 4 of these rules~~ Rule 4.0 or 4.1, pursuant to ~~subdivision (n)(2) of that rule~~ Rule 4.3(a)(3) or (4).

(k) **Automatic Child Support Hearing.** Whenever the physical responsibility provisions of a final order issued under this rule would modify the physical responsibility provisions of a final order issued in a proceeding under Rule 4 4.1, the court shall order a child support modification hearing to be set and shall proceed as provided in Rule ~~4(j)(6)~~ 4.2(f).

Reporter's Notes—2016 Amendment

V.R.F.P. 9(j) and (k) are amended for conformity with the simultaneous abrogation of former V.R.F.P. 4 and promulgation of restyled and reorganized V.R.F.P. 4.0-4.3. See Reporter's Notes to those rules.

6. That Rules 15(a)-(d) and (f) of the Vermont Rules for Family Proceedings be amended to read as follows (new matter underlined; deleted matter struck through):

RULE 15. APPEARANCE AND WITHDRAWAL OF ATTORNEYS

(a) **Appearance: In General.** This rule applies to all proceedings under ~~Family~~ Rules 2, 3, ~~4~~ 4.0-4.3, and 9.

* * * * * *

(b) **Same: Divorce, Parentage, and Other Actions under Rules ~~4~~ 4.0-4.3.** The appearance of an attorney for a party in a divorce, parentage, or other action under Rules ~~4~~ 4.0-4.3 shall constitute the attorney's appearance for that party in all related matters in the Family Court, except when otherwise provided in subdivisions (c), and (d), and in a limited appearance under subdivision (h).

(c) **Same: Abuse Prevention Actions.**

(1) An attorney who has entered an appearance for any party in an abuse prevention action shall not be obliged to appear in a subsequently filed divorce, parentage, or other action under Rules ~~4~~ 4.0-4.3 unless the final hearing on the abuse prevention order is consolidated with a hearing for temporary relief in the action under ~~Rule 4~~ those rules. In the event of such a consolidation, the attorney must represent the party for all purposes at that hearing. After entry of the final order in the abuse prevention action, the attorney shall not be obliged to undertake further representation of the party in the action under Rules ~~4~~ 4.0-4.3 unless the attorney enters a separate appearance in that action.

(2) Except as may be otherwise agreed or ordered pursuant to a limited appearance under subdivision (h), an attorney who has entered an appearance for any party in an abuse prevention action shall be obliged to appear in a previously filed divorce, parentage, or other action under Rules ~~4~~ 4.0-4.3 if the relief sought in the abuse prevention action would have the effect of modifying an order previously entered in the action under ~~Rule 4~~ those rules.

(3) Except as may be otherwise agreed or ordered pursuant to a limited appearance under subdivision (h), the appearance of an attorney for any party in a divorce, parentage, or other action under Rules ~~4~~ 4.0-4.3 shall be deemed an appearance for that party in an abuse prevention action subsequently filed pro se by that party during the pendency of the original action. When an abuse prevention action is filed pro se, the clerk, subsequent to the issuance of any order, shall notify all counsel of record and parties in any pending divorce, parentage, or other action under Rules ~~4~~ 4.0-4.3 between the parties to the abuse prevention action.

(d) **Same: Child Support Hearings.** Except as may be otherwise agreed or ordered pursuant to a limited appearance under subdivision (h), an attorney who has entered an appearance for any party in a divorce, parentage, or other action under Rules ~~4~~ 4.0-4.3 shall participate in all child support hearings and shall comply with all provisions for the exchange and filing of all required financial documents. In the discretion of the judge or magistrate, and for good cause shown, an attorney may be excused from attending a child support hearing, provided that not less than 5 days prior to the scheduled hearing date, the attorney files (1) all financial affidavits and other documentation required by statute and these rules; and (2) a joint waiver of representation, signed by attorney and client and setting forth that the client has affirmatively requested to appear pro se at the child support hearing and understands the nature and scope of the hearing; and further provided that parental rights and responsibilities are the subject of a court order or an existing written stipulation on file with the court.

* * * * * *

(f) **Withdrawal.**

(1) *In General.* Except as may be otherwise agreed or ordered pursuant to a limited appearance under subdivision (h):

(A) *Actions under Rules~~-4~~ 4.0-4.3 and Rule 9.* In any action under Rules~~-4~~ 4.0-4.3 or Rule 9, the appearance of an attorney shall be deemed to be withdrawn upon the entry of final judgment and the expiration of the time for appeal therefrom. Prior to the expiration of the time for appeal from a final judgment in such an action, an attorney who has entered an appearance may withdraw only with leave of court granted as provided in paragraph (2) or (3) of this subdivision.

* * * * * *

Reporter's Notes—2016 Amendment

V.R.F.P. 15(a)-(d) and (f) are amended for conformity with the simultaneous abrogation of former V.R.F.P. 4 and promulgation of restyled and reorganized V.R.F.P. 4.0-4.3. See Reporter's Notes to those rules.

7. That Rule 16(b)(2) of the Vermont Rules for Family Proceedings be amended to read as follows (new matter underlined; deleted matter struck through):

RULE 16. CIVIL CONTEMPT PROCEEDINGS

* * * * * *

(b) **Procedure.**

* * * * * *

(2) *Notice; Service.* The order of the court initiating the proceeding shall set the matter for evidentiary hearing and shall order that notice of the hearing, together with a copy of the order initiating the proceeding and any motion and affidavit, shall be served upon the person against whom the contempt proceedings are brought (the respondent) by the appropriate method provided in Rule 4~~(j)(2)~~ 4.2(b) of these rules. The notice shall set forth the title of the action and the date, time, and place of the hearing, shall order the respondent to appear at the hearing to show cause why he or she should not be held in contempt, and shall allow the respondent a reasonable time, not less than 15 days before the date set for hearing, to file an answer and prepare a defense. The notice may include an order to produce documents requested by the moving party or the court. The notice shall inform the respondent that failure to appear at the hearing may result in the issuance of an arrest warrant directing a law enforcement officer to transport the respondent to court. The notice shall also contain a warning that if the court finds the respondent to be in contempt, the court may impose sanctions, whether or not the respondent has answered or appeared in the proceeding. If the court has determined that it may consider imprisonment as a sanction, the notice shall so state and shall also advise the respondent that failure to retain or request counsel will result in a waiver of the right to be represented by counsel at the hearing.

Reporter's Notes—2016 Amendment

V.R.F.P. 16(b)(2) is amended for conformity with the simultaneous abrogation of former V.R.F.P. 4 and promulgation of restyled and reorganized V.R.F.P. 4.0-4.3. See Reporter's Notes to those rules.

8. That Rule 18(a) of the Vermont Rules for Family Proceedings be amended to read as follows (new matter underlined; deleted matter struck through):

RULE 18. MEDIATION

(a) **Applicability.** This rule applies to all actions and proceedings under V.R.F.P. 4~~(a)-(q)~~ 4.0-4.2, 4.3(a)-(c), and V.R.F.P. 8.

Reporter's Notes—2016 Amendment

V.R.F.P. 18(a) is amended for conformity with the simultaneous abrogation of former V.R.F.P. 4 and promulgation of restyled and reorganized V.R.F.P. 4.0-4.3. See Reporter's Notes to those rules.

9. That Rule 6(b)(33) of the Vermont Rules for Public Access to Court Records be amended to read as follows (new matter underlined; deleted matter struck through):

Rule 6. CASE RECORDS

* * * * * *

(b) *Exceptions.* The public shall not have access to the following judicial branch records:

* * * * * *

(33) Affidavits of income and assets as provided in 15 V.S.A. § 662 and Rules ~~4~~ 4.0-4.2 of the Vermont Rules for Family Proceedings.

Reporter's Notes—2016 Amendment

V.R.P.A.C.R. 6(b)(33) is amended for conformity with the simultaneous abrogation of former V.R.F.P. 4 and promulgation of restyled and reorganized V.R.F.P. 4.0-4.3. See Reporter's Notes to those rules.

10. That Administrative Order No. 36 be amended to read as follows (new matter underlined; deleted matter struck through):

Administrative Order No. 36

EXPERIMENTAL RULES FOR PROCEEDINGS IN THE PILOT FAMILY COURTS

Pursuant to the Vermont Constitution, Chapter II, Section 37, ~~Family Court Rule 4(a),~~ Rule 4.0(a) of the Vermont Rules for Family Proceedings, and Rule 81(e) of the Vermont Rules of Civil Procedure, it is hereby ordered that until modified or terminated by further Administrative Order, the following procedures are adopted for proceedings in the following Family Courts, which are hereby designated Pilot Family Courts: The Family Courts for Bennington, Caledonia, Chittenden, Washington, and Windsor counties. Any provision of the Vermont Rules for Family Proceedings, the Vermont Rules of Civil Procedure, or any Administrative Order inconsistent with the procedures provided herein is hereby suspended for proceedings in these Family Courts for the duration of this order.

* * * * * *

§ 2. Discretionary Procedures Available to the Court in an Action Under V.R.F.P.-4 4.0-4.3.

In any action under V.R.F.P.-4 4.0-4.3, the court may on the application of any party or on its own initiative:

* * * * * *

(e) Require each party, at least three days prior to the first scheduled hearing, to file and exchange the financial information required by 15 V.S.A. § 662 and V.R.F.P. ~~4(g)(2)(d)~~ 4.0(g)(6), 4.1(b)(4), or 4.2(c), regardless of whether there are children of the marriage. A judge or magistrate may award costs and reasonable attorney's fees if a party fails to file or exchange the required information and material on time and may impose sanctions upon any attorney who fails to file or exchange the required financial information on behalf of a party, unless the party or attorney shows good cause for the failure.

* * * * * *

Reporter's Notes—2016 Amendment

Administrative Order No. 36 is amended for conformity with the simultaneous abrogation of former V.R.F.P. 4 and promulgation of restyled and reorganized V.R.F.P. 4.0-4.3. See Reporter's Notes to those rules.

11. That Administrative Order No. 42 be amended to read as follows (new matter underlined; deleted matter struck through):

Administrative Order No. 42

QUALIFICATIONS AND TRAINING OF PARENT COORDINATORS

Pursuant to the Vermont Constitution, Chapter II, Section 37, and Rule ~~4(s)(9)~~ 4.3(e)(9) of the Vermont Rules for Family Proceedings, it is hereby ordered that the following rules are adopted to implement Rule ~~4(s)~~ 4.3(e).

Rule 1. Panel of Qualified Parent Coordinators

(a) The Court Administrator will establish and maintain a panel of parent coordinators to

carry out the functions provided by V.R.F.P. ~~4(s)~~ 4.3(e). An order designating a parent coordinator pursuant to V.R.F.P. ~~4(s)(2)(A) or (4)(A)~~ 4.3(e)(2)(A) or (4)(A) will name a specific individual from that panel.

(b) The Court Administrator will by contract appoint individuals to the panel who have the qualifications and training required by Rules 2 and 3 of this order and whom the Court Administrator determines have the skills and temperament to perform the duties required by V.R.F.P. ~~4(s)~~ 4.3(e).

* * * * * *

Reporter's Notes—2016 Amendment

Administrative Order No. 42 is amended for conformity with the simultaneous abrogation of former V.R.F.P. 4 and promulgation of restyled and reorganized V.R.F.P. 4.0-4.3. See Reporter's Notes to those rules.

12. That Administrative Order No. 46 be amended to read as follows (new matter underlined; deleted matter struck through):

Administrative Order No. 45

DELIVERY OF NOTICES OF HEARING AND OTHER COURT DOCUMENTS BY E-MAIL

Pursuant to the Vermont Constitution, Chapter II, §§ 30, 31, and 37, it is hereby ordered:

§ 1. Pursuant to V.R.C.P. 77(d), V.R.Cr.P. 56(d), and V.R.P.P. 77(d), the Court Administrator is authorized to allow the superior court to send designated types of documents to lawyers who are appearing for a client in specified units and divisions of the court, and to persons specified in §§ 5 and 6 of this order, by electronic mail (e-mail). The order applies to the Family and Environmental Divisions by virtue of the incorporation of V.R.Cr.P. 56(d) in V.R.F.P. 1(a) and the incorporation of V.R.C.P. 77(d) in V.R.F.P. 2(a), ~~4(a)~~ 4.0(a)(2)(A), and V.R.E.C.P. 4(a), 5(a). The expectation is that all units in all divisions will send specified documents to lawyers by e-mail where technologically possible by January 1, 2013. E-mail delivery of documents will occur under §§ 2, 5, and 6 of this administrative order.

* * * * * *

Reporter's Notes—2016 Amendment

Administrative Order No. 46 is amended for conformity with the simultaneous abrogation of former V.R.F.P. 4 and promulgation of restyled and reorganized V.R.F.P. 4.0-4.3. See Reporter's Notes to those rules.

13. That these rules as amended are prescribed and promulgated effective December 5, 2016. The Reporter's Notes are advisory.

14. That the Court finds that these amendments must be promulgated without the notice and comment period required by Administrative Order No. 11 so that they may take effect on the effective date of the abrogation and replacement of V.R.F.P. 4 with V.R.F.P. 4.0-4.3 in order to avoid confusion that would result because the provisions amended incorporated references to former V.R.F.P. 4. The present amendments are entirely editorial in nature, substituting appropriate references to new V.R.F.P. 4.0-4.3 but making no substantive change.

15. That the Chief Justice is authorized to report these amendments to the General Assembly in accordance with the provisions of 12 V.S.A. § 1, as amended.

Dated in Chambers at Montpelier, Vermont, this 25th day of August, 2016.

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Marilyn S. Skoglund, Associate Justice

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice

STATE OF VERMONT
VERMONT SUPREME COURT
JUNE TERM, 2016

Order Promulgating Addition to the Vermont Rules of Civil Procedure

Pursuant to the Vermont Constitution, Chapter II, Section 37, and 12 V.S.A. § 1, it is hereby ordered:

1. That Rule 80.11 of the Vermont Rules of Civil Procedure be added to read as follows:

RULE 80.11. PROCEDURE IN EXPEDITED ACTIONS

(a) **Applicability.**

(1) *Designation.* A civil action will proceed as an expedited action under this rule when
(A) The complaint expressly designates the case as an expedited action and seeks only money damages not exceeding a total of $50,000, exclusive of interest, attorney's fees, and costs; or
(B) All parties to the action file a joint stipulation that the action will be designated as an expedited action; or
(C) The court, on the motion of a party, finds that designation of the action as an expedited action will serve the interests of the parties and the court in its just, speedy, and inexpensive determination.

(2) *Waiver.* Unless the parties have stipulated otherwise:
(A) Any plaintiff bringing a claim pursuant to subparagraph (a)(1)(A) of this rule waives the right to recover any judgment exceeding a total of $50,000, exclusive of interest, attorney's fees, and costs.
(B) Except as provided in (C), the filer of a counterclaim, cross-claim, or third-party claim in an action designated as expedited under paragraph (1) waives the right to recover any judgment exceeding a total of $50,000, exclusive of interest, attorney's fees, and costs.
(C) Any party to an action designated as expedited under paragraph (1) who seeks to recover, by counterclaim, cross-claim or third-party claim, damages exceeding a total of $50,000, exclusive of interest, attorney's fees, and costs, or nonmonetary relief, must file and serve with that party's pleading a request that the action no longer be so designated. The judge shall then strike the "expedited" designation, and the action shall proceed as an ordinary civil action under the Vermont Rules of Civil Procedure.

(3) *Identification in Filings.* When an action is designated as an expedited action, it shall be clearly identified in the caption of all subsequent filings as an "EXPEDITED ACTION."

(4) At any time on motion of a party in an action that has been designated as an expedited action under paragraph (1), the court, on a showing of good cause, may order that the action will no longer be so designated and will proceed as an ordinary civil action under the Vermont Rules of Civil Procedure.

(5) The Vermont Rules of Civil Procedure apply to actions under this rule except as otherwise provided in the rule or when inconsistent with its provisions.

(6) Any deadline or limitation stated in this rule may be eliminated or extended by the court on a showing of good cause. Any motion seeking to extend any deadline or limitation made after the expiration of the specified period must establish that the failure to act was the result of excusable neglect.

(b) **Scheduling Conference.** Unless the parties file a stipulation on a form to be provided by the Court Administrator as to the matters enumerated in V.R.C.P. 16.2(i)-(v) and a certificate and report or stipulation as to the scheduling of alternative dispute resolution under subdivision (d) of this rule, the court shall hold a scheduling conference within 21 days after the filing of the last answer to consider those matters and shall issue a scheduling order as provided in V.R.C.P. 16.2.

(c) **Motions.** Motions may be filed for all purposes, and in the manner, provided in the Rules of Civil Procedure, except that:

(1) A memorandum in support of or opposition to a motion may not exceed 3000 words, and a reply memorandum may not exceed 1500 words. The memorandum must include a statement by the attorney, or self-represented party, certifying that it complies with the word-count limit. The person preparing the certificate may rely on the word count of the word-processing system used to prepare the memorandum. The certificate must state the number of words in the memorandum and identify the word-processing system used.

(2) A party filing a nondispositive motion must certify that the party has made a good faith attempt to obtain the opposing party's agreement to the requested relief. If obtained, the statement of agreement must be in the body of the motion, and the word "Stipulated" must be in the document caption.

(d) **Alternative Dispute Resolution.** Unless the parties have filed a certificate and report of voluntary alternative dispute resolution as provided in V.R.C.P. 16.3(a)(1)(B), they must undertake alternative dispute resolution in the manner provided in V.R.C.P. 16.3(c)(2)-(7), (d)-(f), except that:

(1) Scheduling of the alternative dispute resolution proceeding must take place within 21 days after the filing of the last answer.

(2) The alternative dispute resolution proceeding must be completed within 90 days after the filing of the last answer unless the court extends the date on motion of a party.

(3) The alternative dispute resolution proceeding shall not last more than 6 hours unless the parties agree to extend the time.

(4) The cost of alternative dispute resolution must be divided equally among the parties except as otherwise provided in V.R.C.P. 16.3(e)(1)-(3). If one or both parties are unable to pay, the court shall determine whether alternative dispute resolution is required.

(e) **Discovery.** Discovery may be had as provided in V.R.C.P. 26-37, except as provided in this subdivision.

(1) *Timing of Discovery.* All discovery other than expert disclosures under paragraph (3) must be completed within 180 days after the filing of the last answer.

(2) *Initial Disclosures.* A party shall, within 30 days after the filing of the last answer, and without waiting for a discovery request, provide to the other parties:

(A) The name and, if known, address, telephone number, and email address, of each individual likely to have discoverable information regarding the claims and defenses asserted, and a statement identifying the subjects of information, unless the use of the information would be solely for impeachment;

(B) A copy of each document, data compilation, and tangible thing and all electronically stored information in the possession or control of the disclosing party which may be used in the party's case in chief, unless the use of the information would be solely for impeachment;

(C) A copy of each document referenced in the party's pleadings;

(D) A computation of any damages claimed by the party and a copy of all discoverable documents or evidentiary material on which such computation is based, including materials about the nature and extent of the injuries suffered; and

(E) A copy of any agreement under which any other person or entity may be liable to satisfy part or all of a judgment or to indemnify or reimburse for payments made to satisfy the judgment.

(3) *Disclosure of Retained Expert Testimony.*

(A) Disclosures. A party shall, without waiting for a discovery request, disclose the identity of any retained expert witness it may use at trial to present evidence under V.R.E. 702. This disclosure must be accompanied by a written report including: (i) the expert's name and qualifications, including a list of all publications authored within the preceding ten years, and a list of any other cases in which the expert has testified as an expert within the preceding four years; (ii) a brief summary of the opinions to which the expert is expected to testify; (iii) all data and other information that will be relied upon by the witness in forming those opinions; and (iv) the compensation to be paid to the witness.

(B) Timing. The party who bears the burden of proof on the issue for which expert testimony is offered shall provide the information required in subparagraph (3)(A) within 15 days after the close of fact discovery. If expert testimony is intended solely to rebut or contradict an expert disclosed by another party, the rebuttal expert shall be disclosed within 15 days after the deposition of the other party's expert.

(4) *Limits on Discovery.*

(A) Interrogatories under V.R.C.P. 33. Each party may serve on any other party no more than 15 written interrogatories, including all discrete subparts.

(B) Requests to Produce. The parties shall be limited to 15 Requests for Production under V.R.C.P. 34, including all discrete subparts.

(C) Requests for Admission. The parties shall be limited to 15 Requests for Admission under V.R.C.P. 36, including all discrete subparts.

(D) Depositions. The parties shall be limited to a total of 15 hours each for oral depositions of parties and fact witnesses under V.R.C.P. 30.

(E) Depositions of Experts. An expert may be deposed under V.R.C.P. 26(b)(4) within thirty days after being disclosed. A deposition of an expert shall last no more than three hours.

(5) *Additional Discovery.*

(A) Stipulation. The parties may stipulate to additional discovery within the deadlines established by this rule or by the court

(B) Motion. The court may grant additional discovery pursuant to paragraph (a)(6).

(f) **Trial Readiness; Pretrial Conference.**

(1) *Timeframe.* Every action under this rule shall be ready for trial within 270 days after the filing of the last answer unless the court grants an extension for good cause on motion filed before the deadline.

(2) *Pretrial Conference.* When the action is ready for trial, the court will hold a pretrial conference to set or confirm the trial date, specify the issues to be tried, determine the number of days required for trial, and address any other matters pertaining to trial raised by the parties or the court.

(3) *Pretrial Disclosures.* Not later than 14 days prior to trial, the parties shall exchange witness and exhibit lists, including a marked copy of each exhibit that may be used at trial. Unless good cause is shown, failure to adhere to this requirement shall result in preclusion of the witness or exhibit. Objections to the proffered witnesses and exhibits, including the grounds therefor, shall be filed seven days prior to trial.

(g) **Effective Date.**

This rule applies to cases filed after its effective date. Parties to a case pending at the time this rule becomes effective may opt in to its provisions by stipulation.

Reporter's Notes

Rule 80.11 is added to address the widely recognized problem that the cost and time needed to litigate civil claims are often disproportionate to the value of the cases. Currently, simple non-monetary claims and any case exceeding the small claims threshold of $5000 must be brought as a civil action under the Vermont Rules of Civil Procedure. As a result, the pursuit of potentially meritorious claims and defenses may be discouraged because of the cost entailed, or litigants may represent themselves—a course that is ineffective and imposes significant costs on opposing parties and court resources.

The new rule is designed to provide an effective, efficient, and predictable case management process for lower-value or less-complicated cases. Its intent is to make it economically feasible for lawyers to take on these cases and for litigants to be able to afford to hire lawyers. Rule 80.11 will also result in the more efficient conduct of litigation in cases where litigants are self-represented or have limited representation under V.R.C.P. 79.1(h). Making representation both more economical and less time-consuming will increase access to justice.

The rule was developed by a committee of the Vermont Bar Association (VBA) working in conjunction with the Civil Division Oversight Committee and the Court's Advisory Committee on the Rules of Civil Procedure. After an initial comment period and public presentation at the fall 2014 VBA meeting, a draft rule, revised by the VBA committee on the basis of extensive comments received, was sent out for comment at the request of the Court's Advisory Committee on Rules of Civil Procedure. The present rule incorporates further changes resulting from review by the Advisory Committee after the second comment period. With the adoption of Rule 80.11, Vermont will join several federal district courts and the courts of a number of other states that have developed rules to expedite procedures in less-complicated civil cases. See Inst. for the Advancement of the Am. Legal Sys., A Summary of the Short, Summary, and Expedited Civil Action Programs Around the Country (2015) http://iaals.du.edu/sites/default/files/documents/publications/summary_chart_of_current_sse_programs.pdf [https://perma.cc/N56V-C4C5].

Rule 80.11(a)(1)(A) provides that the expedited procedures apply when a case is expressly designated as an "expedited action" in a complaint alleging that no more than $50,000 is in controversy, exclusive of interest, costs, and attorney's fees. Subparagraph (B) allows the parties to agree that an action will be commenced and carried on as an expedited action regardless of the amount in controversy, or to agree that an action commenced under the ordinary provisions of the rules may subsequently be designated and carried on as expedited. Subparagraph (C) allows the court, on any party's motion, to designate an action as expedited regardless of the amount in controversy if designation will advance "the just, speedy, and inexpensive determination" standard of V.R.C.P. 1.

Rule 80.11(a)(2)(A) provides that a plaintiff, by filing an action designated as expedited, waives recovery of any damages in excess of $50,000. Subparagraph (B) makes similar provision for the filer of a counterclaim, cross-claim, or third-party claim in response to an expedited filing, subject to the provision of subparagraph (C) that if the filer of an ancillary claim, seeking relief beyond that allowed for application of the rule, so requests in the pleading, the judge will strike the expedited action designation and the action will proceed as an ordinary civil action.

Rule 80.11(a)(3) requires that all filings subsequent to designation, whenever and however it occurs, must be clearly labeled "EXPEDITED ACTION."

Paragraph (4) allows the court on motion to remove the action from the expedited process on a showing of good cause—for example that more than $50,000 is in controversy and there is no contrary

showing of need for the expeditious process pursuant to subparagraph (1)(C), or that there is a demonstrable need for procedural steps not permitted by other provisions of Rule 80.11. Note that paragraph (6) provides that the court, for good cause, may make exceptions to deadlines or other limits provided in the rule, subject to a showing of need based on excusable neglect if the request is made after the deadline. See also Rule 80.11(e)(5) (stipulation or motion for additional discovery). These provisions may address specific concerns that might otherwise require removal of the action from expedited status.

Rule 80.11(a)(5) provides that the general provisions of the Civil Rules apply to expedited actions unless otherwise provided in, or inconsistent with the rule; however, careful attention should be paid to the significant differences in key procedural areas.

Unless the parties stipulate as to the matters listed in V.R.C.P. 16.2 and the provisions of Rule 80.11(d) for scheduling ADR, Rule 80.11(b) requires a scheduling conference and scheduling order early in the case to address those matters. Under Rule 80.11(c), there are important limitations on motion practice, including a requirement that the party filing a nondispositive motion must certify that the party has made a good faith attempt to obtain the opposing party's agreement to the requested relief. Rule 80.11(d) requires parties who have not voluntarily undertaken ADR to engage in ADR in accordance with V.R.C.P. 16.3 but on a tight schedule and under other limitations. Paragraph (d)(4) requires the court to make a specific determination as to whether to require ADR if either or both parties cannot pay its cost.

Rule 80.11(e) imposes significant limits on discovery to minimize its time and cost. Under Rule 80.11(e)(1), all discovery except of retained experts must be completed within 180 days after the last answer is filed. Paragraph (2) requires that initial disclosures like those required under the federal rules must be made within 30 days after the last answer is filed. Similarly, under paragraph (3), automatic disclosures of the identity of retained experts and the substance of their testimony are required. Rule 80.11(e)(4) provides limits on specific forms of discovery: The parties are limited to 15 Rule 33 interrogatories, 15 Rule 34 requests to produce, and 15 Rule 36 requests for admission in each case including discrete subparts. Oral depositions other than of experts are limited to 15 hours total for each party. Expert depositions may be taken within 30 days after disclosure and are limited to three hours each. Rule 80.11(e)(5)(A) allows stipulations for additional discovery within existing deadlines. Under subparagraph (B), the court may extend deadlines or other limitations on additional discovery for good cause as provided in Rule 80.11(a)(6).

The foregoing provisions expediting all aspects of pretrial procedure culminate in the requirement of Rule 80.11(f)(1) that all cases must be ready for trial within nine months of the time the answer is filed. Once a case is ready, further provisions of subdivision (f) expedite the trial itself, requiring a pretrial conference covering issues pertaining to trial and mandating the exchange of witness and exhibit lists and copies of exhibits under penalty of preclusion of a witness or exhibit. Objections must be filed seven days prior to trial.

Rule 80.11(g) provides that the rule applies to all cases filed after its effective date and that parties to cases pending on that date may jointly stipulate that their cases may go forward under the rule. See subparagraph (a)(1)(B).

2. That this rule is prescribed and promulgated effective August 15, 2016. The Reporter's Notes are advisory.

3. That the Advisory Committee on the Rules of Civil Procedure is directed to review the operation of this rule and to advise the Court not later than August 17, 2018, whether the rule should be further revised or made permanent. In the absence of further order, the rule will be void and of no further effect in any civil action commenced after August 16, 2019.

4. That the Chief Justice is authorized to report this rule to the General Assembly in accordance with the provisions of 12 V.S.A. § 1, as amended.

Dated in Chambers at Montpelier, Vermont, this 15th day of June, 2016.

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Marilyn S. Skoglund, Associate Justice

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice

STATE OF VERMONT
VERMONT SUPREME COURT
JULY TERM, 2016

Order Promulgating Emergency Amendments to Rule 80.11 of the Vermont Rules of Civil Procedure

Pursuant to the Vermont Constitution, Chapter II, Section 37, and 12 V.S.A. § 1, it is hereby ordered:

1. That Rule 80.11 of the Vermont Rules of Civil Procedure be amended to read as follows (deleted matter struck through; new matter underlined):

RULE 80.11. PROCEDURE IN EXPEDITED ACTIONS

* * * * * *

(b) **Scheduling Conference.** Unless the parties file a stipulation on a form to be provided by the Court Administrator as to the matters enumerated in V.R.C.P. 16.2(i)-(v) and a certificate and report or stipulation as to the scheduling of ~~alternative dispute resolution~~ mediation under subdivision (d) of this rule, the court shall hold a scheduling conference within 21 days after the filing of the last answer to consider those matters and shall issue a scheduling order as provided in V.R.C.P. 16.2.

* * * * * *

(d) ~~**Alternative Dispute Resolution**~~ **Mediation.** Unless the parties have filed a certificate and report of voluntary ~~alternative dispute resolution~~ mediation as provided in V.R.C.P. 16.3(a)(~~1~~ 2)(B), they must undertake ~~alternative dispute resolution~~ mediation in the manner provided in V.R.C.P. 16.3~~(c)(2) (7), (d) (f)~~, except that:

(1) Scheduling of the ~~alternative dispute resolution~~ mediation proceeding must take place within 21 days after the filing of the last answer.

(2) The ~~alternative dispute resolution~~ mediation proceeding must be completed within 90 days after the filing of the last answer unless the court extends the date on motion of a party.

(3) The ~~alternative dispute resolution~~ mediation proceeding shall not last more than 6 hours unless the parties agree to extend the time.

(4) The cost of ~~alternative dispute resolution~~ mediation must be divided equally among the parties except as otherwise provided in V.R.C.P. 16.3(e c)(1)~~(3)~~. If one or both parties are unable to pay, the court shall determine whether ~~alternative dispute resolution~~ mediation is required.

* * * * * *

Reporter's Notes—2016 Amendment

Rule 80.11 as added June 15, effective August 15, 2016, is amended to reflect the abrogation and replacement of V.R.C.P. 16.3. New Rule 16.3 significantly simplifies the procedure of the former

rule and provides only for mediation, rather than for a variety of alternative dispute resolution methods. The present amendments are intended to reflect those changes by substituting "mediation" for "alternative dispute resolution" wherever it appears and replacing cross-references to former Rule 16.3 with references to the appropriate provisions of the new rule.

For clarity and convenience, the paragraph of the original Reporters Notes to V.R.C.P.80.11 referring to "ADR" under former Rule 16.3 is repeated here with references corrected to substitute "mediation" for the former term and correct cross-references:

> Unless the parties stipulate as to the matters listed in V.R.C.P. 16.2 and the provisions of Rule 80.11(d) for scheduling mediation, Rule 80.11(b) requires a scheduling conference and scheduling order early in the case to address those matters. Under Rule 80.11(c), there are important limitations on motion practice, including a requirement that the party filing a nondispositive motion must certify that the party has made a good faith attempt to obtain the opposing party's agreement to the requested relief. Rule 80.11(d) requires parties who have not voluntarily undertaken mediation to engage in mediation in accordance with V.R.C.P. 16.3 but on a tight schedule and under other limitations. Paragraph (d)(4) requires the court to make a specific determination as to whether to require mediation if either or both parties cannot pay its cost.

2. That the Court finds that these amendments must be promulgated without the notice and comment period required by Administrative Order No. 11 so that they may take effect on the effective date of the abrogation and replacement of V.R.C.P. 16.3, in order to avoid confusion that would result because these amendments incorporate references to new Rule 16.3 but make no substantive change.

3. That this rule as amended is prescribed and promulgated effective September 12, 2016, and is subject to the review and termination provisions of paragraph 3 of the Court's order of June 15, 2016, originally promulgating V.R.C.P. 80.11. The Reporter's Notes are advisory.

4. That the Chief Justice is authorized to report this rule to the General Assembly in accordance with the provisions of 12 V.S.A. § 1, as amended.

Dated in Chambers at Montpelier, Vermont, this 11th day of July, 2016.

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Marilyn S. Skoglund, Associate Justice

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice

STATE OF VERMONT
VERMONT SUPREME COURT
JULY TERM, 2016

Order Promulgating Amendments to Rules 4, 16.3, and 80.10 of the Vermont Rules of Civil Procedure

Pursuant to the Vermont Constitution, Chapter II, Section 37, and 12 V.S.A. § 1, it is hereby ordered:

1. That Rule 4(d)(2) of the Vermont Rules of Civil Procedure be amended to read as follows (new matter underlined):

RULE 4. PROCESS

* * * * * *

(d) **Summons: Personal Service Within the State.** The summons and complaint shall be served together. Personal service within the state shall be made as follows:

* * * * * *

(2) Upon the State of Vermont or any agency or officer thereof, by delivering a copy of the summons and of the complaint to the Attorney General or the Deputy Attorney General. Service of a copy of the complaint and written disclosure of material evidence and information required to be served pursuant to 32 V.S.A. § 632(b)(3), enacted by Act No. 25 of 2015, or 31 U.S.C. § 3730(b)(2), shall be by any method of delivery requiring the signature of an addressee or an agent of an addressee.

Reporter's Notes—2016 Amendment

Rule 4(d)(2) is amended to provide a uniform, easily administered method of service of complaints and material information on the Vermont Attorney General as required by the state and federal False Claims Acts. See 32 V.S.A. § 632(b)(3); 31 U.S.C. § 3730(b)(2). The state act provides for service on the Attorney General "in accordance with the Rules of Civil Procedure." 32 V.S.A. § 632(b)(3). F.R.C.P. 4(j) requires service on the state to be on the chief executive officer or pursuant to the state rules of civil procedure.

With the enactment of 32 V.S.A. § 632, Vermont has been added to several pending and anticipated federal qui tam suits by relators' counsels. The most common methods of service of the complaint and material disclosures by the federal qui tam bar in other jurisdictions have been by registered or certified mail or by private process servers. In Vermont, relators' attorneys have agreed to accomplish service by sheriff. The provision in the rule for service "by any method of delivery requiring the signature of an addressee or an agent of an

addressee" is intended to include service by registered mail, certified mail, commercial carrier, or in-hand delivery. Availability of these commonly used methods of process for both state and federal cases will obviate the need for the Attorney General's Office to contact counsel in every case to request service by sheriff.

2. That Rule 16.3 of the Vermont Rules of Civil Procedure be abrogated and replaced to read as follows:

RULE 16. 3. MEDIATION

(a) **Applicability; When Mediation Required.**

(1) Except as provided in paragraph (2), the parties must participate in mediation pursuant to this rule unless excused by the judge.

(2) Unless the judge orders otherwise, mediation shall not be required under this rule in the following cases:

(A) Small claims actions under the Vermont Rules of Small Claims Procedure;

(B) Actions in which at or before the filing of the last required pleading, the parties jointly certify that they have in good faith engaged in mediation regarding the dispute that is the subject of the action and file with the court a report of the mediator, describing the process employed and the results;

(C) Actions to foreclose a mortgage or evict a tenant;

(D) Actions to renew a judgment;

(E) Appeals under Rules 74-75; and

(F) Proceedings for a writ of habeas corpus or for post-conviction relief.

(b) **Stipulation for Mediation.**

(1) *When filed.* In every action in which mediation is required under this rule, the parties must file a stipulation for mediation within thirty days of the filing of the last answer. If the parties fail to do so, the court may appoint a mediator and set a deadline for mediation.

(2) *Contents*. The stipulation for mediation must contain:

(A) The designation of a specific individual, who need not be an attorney, to serve as the mediator;

(B) Any agreement concerning the payment of the mediator's fees and expenses; and

(C) A deadline for the completion of mediation.

(3) *Participation.* All parties and their counsel must attend a scheduled mediation unless the parties stipulate otherwise or the court, for good cause, excuses a person from participation or

authorizes a person to participate by telephone. A corporation, partnership, or other entity that is a party, and a liability insurer that is defending the action or that sues in the name of its insured, must each be represented by a person (other than outside counsel) who has settlement authority and authority to enter stipulations. With the agreement of all parties and the mediator, any nonparty having an interest that may be materially affected by the outcome of the proceeding, or whose presence is essential to its resolution, may be invited to attend the session in person or by counsel.

(c) **Mediators.** The following provisions apply to mediations held pursuant to this rule:

(1) *Fees and Expenses; Payment for Services; Taxation as Costs.*

(A) The fees and expenses of a mediator selected by the parties will be agreed upon by the parties and the mediator.

(B) Each party must pay an equal share of the fees and expenses of any selected or designated mediator unless otherwise agreed or ordered. Any party that believes it is financially unable to pay the fee may file a motion with the court requesting that mediation not be required in the case.

(C) If mediation under this rule does not result in settlement or other final disposition of the action, payments made to a mediator may be taxed as costs to the prevailing party in the discretion of the court.

(2) *Impartiality; Disclosure; Conflict of Interest.* A mediator selected by the parties or designated by the clerk must not accept the assignment, or must withdraw, if the neutral mediator does not reasonably believe that the assignment can be undertaken impartially. If the mediator accepts the assignment, the mediator must disclose at any time to the parties any interest or relationship likely to affect his or her impartiality or to create an appearance of bias. If a mediator selected by the parties does not accept the assignment or withdraws, or if any party objects to a mediator on grounds of conflict of interest, unless otherwise provided by the agreement or by law, the parties must agree on another mediator within fourteen days or the clerk will select another mediator.

(d) **Excuse or Modification for Cause.** The court at any time, by its own order or on the motion of a party, may for good cause excuse any party or parties from the application of any or all provisions of this rule or may modify provisions of the rule to fit particular circumstances.

(e) **Confidentiality.** All written or oral communications made in connection with or during a mediation proceeding conducted under this rule are governed by chapter 194 of Title 12 of the Vermont Statutes Annotated.

(f) **Sanctions.** If a party, lawyer, or other person who is required to participate in a mediation under this rule does not appear at the mediation, or does not comply with any other requirement of this rule or any order made under it, unless that person shows good cause for not appearing or not complying, the court will impose one or more of the following sanctions:

(1) The court will require the party or lawyer, or both, to pay the reasonable expenses, including attorney's fees and costs, of the opposing party, and any fees and expenses of the

mediator, incurred by reason of the nonappearance, unless the court finds that such an award would be unjust in the circumstances.

(2) In addition, the court may order the parties to submit to mediation, dismiss the action or any part of the action, render a decision or judgment by default, or impose any other sanction that is just and appropriate in the circumstances.

Reporter's Notes

Rule 16.3, originally promulgated in 1999, is abrogated and replaced by the present rule, which is intended to conform to present practice. The new rule combines provisions of the former rule with a simpler organization similar in form to recently promulgated V.R.F.P. 18 and recently recommended V.R.P.P. 16.1. Thus, the title of the new rule and references throughout are "Mediation," rather than "Alternative Dispute Resolution," reflecting that preliminary evaluation (former Rule 16.3(d)) and forms of ADR other than mediation are no longer required or governed by the rule.

New Rule 16.3(a) essentially carries forward in simplified form the substance of former Rule 16.3(a). New Rule 16.3(b) incorporates in simplified form many of the provisions of former Rule 16.3(c), omitting detailed provisions for selection of the neutral, scheduling, and the contents and timing of the neutral's report. Paragraph (b)(3) provides that a party may be excused from personal attendance at a mediation by stipulation or court order and that nonparties who have a material interest or others such as experts or spouses whose presence is essential may be invited to attend by agreement. New Rule 16.3(c) is derived from former Rule 16.3(e), eliminating provisions for income guidelines for state payment of part of the neutral's fees and administrative orders listing preliminary evaluators and other neutrals available for referral.

New Rule 16.3(d)-(f) carry forward with little modification the provisions of former Rule 16.3(f)-(h).

3. That Rule 80.10(e) of the Vermont Rules of Civil Procedure be amended to read as follows (new matter underlined):

RULE 80.10. ORDERS AGAINST STALKING OR SEXUAL ASSAULT

* * * * * *

(e) **Denial of Ex Parte Temporary Orders.** When a judge denies an application for temporary order under this rule, the judge shall record the reasons for the denial in writing and shall give the written denial to the plaintiff. In addition, any denial in whole or in part shall inform the plaintiff that, within five business days after entry of the denial on the docket, he or she may request that the court hold a hearing on the complaint after notice to the defendant. Any

such hearing shall be scheduled no more than ten days from the date of the request.

Reporter's Notes—2016 Amendment

Rule 80.10(e) is amended consistent with the amendment of V.R.F.P. 9(e), effective September 21, 2015, to provide that the denial of a stalking or sexual assault order under Rule 80.10 must inform the plaintiff that a request for hearing may be entered within five business days after the order is entered on the docket.

The amendment is intended to expedite proceedings for holding a hearing when an ex parte temporary relief from abuse order has been denied by requiring that the written denial must inform the plaintiff that the request for hearing must be filed within five business days after entry of the denial on the docket. The time period is stated as "five business days" for the benefit of self-represented litigants. It is consistent with Rule 6(a), which provides that a five-day period does not include Saturdays, Sundays, or legal holidays.

4. That these rules as amended or added are prescribed and promulgated effective September 12, 2016. The Reporter's Notes are advisory.

5. That the Chief Justice is authorized to report these amendments and rules to the General Assembly in accordance with the provisions of 12 V.S.A. § 1, as amended.

Dated in Chambers at Montpelier, Vermont, this 11th day of July, 2016.

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Marilyn S. Skoglund, Associate Justice

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice

PROPOSED

STATE OF VERMONT
VERMONT SUPREME COURT
_____TERM, 2016

Order Promulgating Addition of Rule 4(f) to the Vermont Rules of Appellate Procedure

Pursuant to the Vermont Constitution, Chapter II, Section 37, and 12 V.S.A. § 1, it is hereby ordered:

1. That Rule 4(f) of the Vermont Rules of Appellate Procedure be added to read as follows:

RULE 4. APPEAL AS OF RIGHT WHEN TAKEN

(f) **Appeal by an Inmate Confined in an Institution.**

(1) A notice of appeal filed by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a notarized statement accompanying the notice of appeal stating the date the notice of appeal was deposited in the institution's internal mailing system. The notarized statement establishes a presumption that the notice of appeal was deposited in the institution's internal mailing system on the date shown in the statement. The presumption may be rebutted by documentary or other evidence.

(2) If an inmate files the first notice of appeal under this Rule 4(f), the 14-day period provided in Rule 4(a)(6) for another party to file a notice of appeal runs from the date when the superior court dockets the first notice.

(3) Nothing in this rule precludes other evidence of timely filing such as a postmark or an official date stamp showing the filing date of the document.

Reporter's Notes—2016 Amendment

Rule 4(f) is adopted in response to the Supreme Court's request in In re Bruyette, 2016 VT 3, ¶ 8, __ Vt. __, 136 A.3d 575 (per curiam), that the Civil Rules Committee "propose appropriate amendments . . . to facilitate application of" the prison mailbox rule in Vermont. The rule is similar, but not identical to, F.R.A.P. 4(c)(1) as most recently amended effective December 1, 2016. The Vermont rule provides that deposit of a notice of appeal in the internal prison mailing system can constitute timely filing and requires use of a prison "legal mail" system if available. The rule also explicitly creates a rebuttable presumption that the filing is timely if accompanied by a notarized statement showing deposit in the institution's internal mailing system

on or before the last day for filing. Paragraph (3) follows the federal rule in allowing evidence of timely filing other than the notarized statement. Unlike the federal rule, the rule does not require a statement that postage has been or "is being" prepaid, nor does it give the Court discretion to allow later filing of the notarized statement.

2. That this rule, as added, is prescribed and promulgated effective _____, 2016. The Reporter's Notes are advisory.

3. That the Chief Justice is authorized to report this amendment to the General Assembly in accordance with the provisions of 12 V.S.A. § 1, as amended.

Dated in Chambers at Montpelier, Vermont, this ___day of _____, 2016.

_____
Paul L. Reiber, Chief Justice

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John A. Dooley, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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Beth Robinson, Associate Justice

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Harold E. Eaton, Jr., Associate Justice