

To: N.H. Supreme Court Advisory Committee on Rules
From: David Peck
Re: 2020-005, Superior Court Rule 41 & a. -- Subcommittee Report
Date: December 8, 2020

At its September meeting, the Rules Committee created a subcommittee to review the proposals for rule amendments in my June 14, 2020 submission to the Committee. The subcommittee met virtually on October 29, and thereafter prepared and considered this memorandum by email exchange.

I. Superior Court Rule 41 (and District Division Rule 1.27, Probate Division Rule 172, and Family Division Rule 1.32)

With respect to the proposal to amend Superior Court Rule 41, the subcommittee agreed to recommend to the Committee that the proposal, as set forth in Appendix A, be put out for public comment and placed on the agenda for the next public hearing. In addition, the subcommittee agreed to recommend that similar rules for the District Division, Family Division, and Probate Division be put out for public comment and placed on the agenda for the next public hearing. Those proposals are set forth in Appendices B, C, and D.

In reviewing these proposals, please note that paragraph (b) in each proposal contains provisions providing for dismissal of actions for want of prosecution at any time more than three years after the last docket entry showing any action taken by plaintiff other than a motion to continue. Currently, the rules that address dismissal for cases that have been pending without action do not all provide for the same time period – Superior Court Rule 41 and District Division Rule 1.27 provide for dismissal after three years, but Probate Division Rule 172 and Family Division Rule 1.32 provide for dismissal after two years. The subcommittee was unaware of reasons for this difference, and the four proposed amendments in the appendices all provide for three years. If the Committee is aware of reasons why the Probate and Family Division rules currently provide for the shorter two-year period, then the proposed amendments can be altered accordingly.

II. Other Rule Amendments

My June 14 memorandum also suggested minor amendments or repeal of a number of court rules described below. The subcommittee agreed to recommend to the Committee that these proposals be deemed technical changes that the Chair of the Committee may submit directly to the Court. See Sup. Ct. R. 51(c)(3).

A. District Division Rule 1.8-A is entitled “Continuances and postponements,” and the Rule is listed in the Table of Contents as “Rule 1.8-A. Continuances and postponements.” See Supreme Court Order dated October 29, 2019 (Appendix H). Most of the contents of Rule 1.8-A relate to continuances, but paragraph H of the rule provides:

All grounds for recusal that are known or should reasonably be known prior to trial or hearing shall be incorporated in a written motion for recusal and filed promptly with the Court. Grounds for recusal that first become apparent at the time of or during the hearing shall be immediately brought to the attention of the judge. Failure to raise a ground for recusal shall constitute a waiver as specified herein of the right to request recusal on such ground. If a record of the proceedings is not available, the trial judge shall make a record of the request, the Court's findings, and its order. The Court's ruling on the motion shall issue promptly. If the motion is denied, the Court's ruling shall be supported by findings of fact with respect to the allegations contained in the motion.

Accordingly, it is suggested that title of Rule 1.8-A be amended to state as follows:

Rule 1.8-A. Continuances and postponements and motions for recusal

and that the Table of Contents to the District Division Rules be amended to reflect that change.

B. District Division Rule 3.11 (applicable to cases filed after electronic filing) is entitled “Motions-General.” However, the Table of Contents to the District Division Rules, as adopted in the court's October 29, 2019 order, lists Rule 3.11 as simply “Motions.” The proposal is to amend the Table of Contents to say “Rule 3.11. Motions-General”

C. Supplemental Rules of Circuit Court for Electronic Filing 11 and 12 each contain a Comment regarding the filing of motions to gain access to sealed court records. The Comment cites “Superior Court Rule (Civil) 203” and “Superior Court Rule (Criminal) 169-A”. Those rules have been repealed. The proposal is to change those citations to “Superior Court Rule 13B(e)” and “New Hampshire Rule of Criminal Procedure 50(e).”

D. District Division Rules 4.1 to 4.13, which govern small claims actions, were adopted on a temporary basis by court order dated June 2, 2014. It does not appear that those rules have been adopted on a permanent basis (they continue to be described in the LexisNexis rule book as temporary rules). The proposal is to adopt these rules on a permanent basis.

E. Superior Court Administrative Rules 7-1 to 7-5 address marital and divorce proceedings in the superior court. RSA 490-D:2 appears to provide exclusive jurisdiction over divorce and marital proceedings in the family division (now circuit court). Accordingly, the proposal is to repeal Rules 7-1 to 7-5.

F. Superior Court Administrative Rule 9-1 is entitled “Procedure Under Rule 13,” and addresses the procedure to be followed in scheduling trials when motions are granted under Superior Court Administrative Rule 13. Prior to 2003, chapter 13 of the Superior Court Administrative Rules was entitled “Regular and Special Master Program,” and consisted of Rules 13.1 to 13.14, but the chapter was repealed in 2003. The proposal is to repeal Rule 9-1.

G. Superior Court Administrative Rule 6-3 provides that “a petition in equity is a proper procedure for instituting a proceeding in the Superior Court under the Uniform Act on Paternity.” The Uniform Act itself states that paternity shall be established upon the filing of “[a] petition to the superior court” RSA 168-A:2, I.

The Superior Court Rules now provide that there shall be one form of action, known as a “civil action,” and that includes an action authorized by law to be initiated by petition. See Superior Court Rule 4. A civil action is commenced by filing a complaint, not by filing a petition. Superior Court Rule 4(b). Thus, it would seem to be confusing at best to state that a petition in equity is

a proper procedure to commence a proceeding under the Uniform Act on Paternity in light of Superior Court Rule 4. Accordingly, the recommendation is to repeal Rule 6-3.

APPENDIX A – SUPERIOR COURT RULE 41

Proposed additions are in **[bold and brackets]**; proposed deletions are in ~~strike through~~.

Rule 41. Dismissal of Actions

~~All cases which shall have been pending upon the docket for 3 years, without any action being shown on the docket other than being placed on the trial list, shall be marked “dismissed,” and notice thereof sent to the parties or representatives who have appeared in the action.~~

[(a) Voluntary Dismissal: Effect Thereof.

(1) By Plaintiff; by Stipulation. Subject to the provisions of Superior Court Rule 16(k) and of any applicable statute, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action; provided, however, that no action wherein a receiver has been appointed shall be dismissed except by order of the court. A dismissal under this paragraph may be as to one or more, but fewer than all claims, and may be as to one or more, but fewer than all plaintiffs and defendants. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this state or any other state or the United States an action based on or including the same claim.

(2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the counterclaim shall remain pending for independent adjudication by the court despite the dismissal of the plaintiff's claim. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) Involuntary Dismissal: Effect Thereof.

(1) On Court's Own Motion. The court, on its own motion, shall dismiss an action for want of prosecution at any time more than three years after the last docket entry showing any action taken therein by the plaintiff other than a motion for continuance; notice of the dismissal shall be sent to the parties or their representatives who have appeared in the action.

(2) On Motion of Defendant. For failure of the plaintiff to prosecute for three years or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant.

(3) Effect. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision (b) and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party, operates as an adjudication upon the merits.

(c) Dismissal of Counterclaim, Cross-Claim, or Third-Party Claim. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim.

(d) Costs of Previously-Dismissed Action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.]

APPENDIX B – DISTRICT DIVISION RULE 1.27

Proposed additions are in **[bold and brackets]**; proposed deletions are in ~~strike through~~.

Rule 1.27. Dismissal of Cases Pending Without Action

~~With the exception of a case which has been accepted for appeal by the New Hampshire Supreme Court, any non-criminal matter which has been pending without action for three calendar years from the date of the last court action may be dismissed by the court. Thirty days prior to dismissal the court shall send a notice of the pending dismissal to the last known address of all parties and counsel of record. A case may be considered “pending without action” in the following circumstances:~~

- ~~1. No court hearing has been scheduled or requested;~~
- ~~2. No pleadings are pending before the court;~~
- ~~3. No judgment has been entered in the case; and~~
- ~~4. No court order has been issued to stay the case.~~

[(a) Voluntary Dismissal: Effect Thereof.

(1) By Plaintiff; by Stipulation. Subject to the provisions of any applicable statute, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action; provided, however, that no action wherein a receiver has been appointed shall be dismissed except by order of the court. A dismissal under this paragraph may be as to one or more, but fewer than all claims, and may be as to one or more, but fewer than all plaintiffs and defendants. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this state or any other state or the United States an action based on or including the same claim.

(2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the counterclaim shall remain pending for independent adjudication by the court despite the dismissal of the plaintiff's claim. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) Involuntary Dismissal: Effect Thereof.

(1) On Court's Own Motion. The court, on its own motion, shall dismiss an action for want of prosecution at any time more than three years after the last docket entry showing any action taken therein by the plaintiff other than a motion for continuance; notice of the dismissal shall be sent to the parties or their representatives who have appeared in the action.

(2) On Motion of Defendant. For failure of the plaintiff to prosecute for three years or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant.

(3) Effect. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision (b) and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party, operates as an adjudication upon the merits.

(c) Dismissal of Counterclaim, Cross-Claim, or Third-Party Claim. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim.

(d) Costs of Previously-Dismissed Action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it

may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.]

APPENDIX C – PROBATE DIVISION RULE 1.27

Proposed additions are in **[bold and brackets]**; proposed deletions are in ~~strike through~~.

Rule 172. Dismissal of Cases ~~Pending Without Action~~

~~With the exception of a case which has been accepted for appeal by the New Hampshire Supreme Court, any non-criminal matter which has been pending without action for two calendar years from the date of the last court action may be dismissed by the court. Thirty days prior to dismissal the court shall send a notice of the pending dismissal to the last known address of all parties and counsel of record. A case may be considered “pending without action” in the following circumstances:~~

- ~~1. No court hearing has been scheduled or requested;~~
- ~~2. No pleadings are pending before the court;~~
- ~~3. No judgment has been entered in the case; and~~
- ~~4. No court order has been issued to stay the case.~~

[(a) Voluntary Dismissal: Effect Thereof.]

(1) By Plaintiff; by Stipulation. Subject to the provisions of any applicable statute, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action; provided, however, that no action wherein a receiver has been appointed shall be dismissed except by order of the court. A dismissal under this paragraph may be as to one or more, but fewer than all claims, and may be as to one or more, but fewer than all plaintiffs and defendants. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this state or any other state or the United States an action based on or including the same claim.

(2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the counterclaim shall remain pending for independent adjudication by the court despite the dismissal of the plaintiff's claim. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) Involuntary Dismissal: Effect Thereof.

(1) On Court's Own Motion. The court, on its own motion, shall dismiss an action for want of prosecution at any time more than three years after the last docket entry showing any action taken therein by the plaintiff other than a motion for continuance; notice of the dismissal shall be sent to the parties or their representatives who have appeared in the action.

(2) On Motion of Defendant. For failure of the plaintiff to prosecute for three years or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant.

(3) Effect. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision (b) and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party, operates as an adjudication upon the merits.

(c) Dismissal of Counterclaim, Cross-Claim, or Third-Party Claim. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim.

(d) Costs of Previously-Dismissed Action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it

may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.]

APPENDIX D – FAMILY DIVISION RULE 1.32

Proposed additions are in **[bold and brackets]**; proposed deletions are in ~~strike-through~~.

Rule 1.32. Dismissal of Cases Pending Without Action

~~With the exception of a case which has been accepted for appeal by the New Hampshire Supreme Court, any non-criminal matter which has been pending without action for two calendar years from the date of the last court action may be dismissed by the court. Thirty days prior to dismissal the court shall send a notice of the pending dismissal to the last known address of all parties and counsel of record. A case may be considered “pending without action” in the following circumstances:~~

- ~~1. No court hearing has been scheduled or requested;~~
- ~~2. No pleadings are pending before the court;~~
- ~~3. No judgment has been entered in the case; and~~
- ~~4. No court order has been issued to stay the case.~~

[(a) Voluntary Dismissal: Effect Thereof.]

(1) By Plaintiff; by Stipulation. Subject to the provisions of any applicable statute, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action; provided, however, that no action wherein a receiver has been appointed shall be dismissed except by order of the court. A dismissal under this paragraph may be as to one or more, but fewer than all claims, and may be as to one or more, but fewer than all plaintiffs and defendants. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this state or any other state or the United States an action based on or including the same claim.

(2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the counterclaim shall remain pending for independent adjudication by the court despite the dismissal of the plaintiff's claim. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) Involuntary Dismissal: Effect Thereof.

(1) On Court's Own Motion. The court, on its own motion, shall dismiss an action for want of prosecution at any time more than three years after the last docket entry showing any action taken therein by the plaintiff other than a motion for continuance; notice of the dismissal shall be sent to the parties or their representatives who have appeared in the action.

(2) On Motion of Defendant. For failure of the plaintiff to prosecute for three years or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant.

(3) Effect. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision (b) and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party, operates as an adjudication upon the merits.

(c) Dismissal of Counterclaim, Cross-Claim, or Third-Party Claim. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim.

(d) Costs of Previously-Dismissed Action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it

may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.]