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- “If we don’t stand up for children, then we don’t stand up for much.”  
-Mariam Wright Edelman
- “A child like all other human beings, has inalienable rights.”  
-Lucretia Mott
- “We’re talking about a crisis in the Family Court System. We have a system that is **broken**. I’ve worked inside this system. It is not fair; it is not equitable...Come on, we are talking about the welfare, the benefit, the safety of our children!! Keeping a family unified should be the **#1 objective**. To take a child away from that parent and place that child in foster care should be the **last and bad alternative** because it does nothing but put people in the system with no path toward reunification...”  
-Dr. Phil McGraw
- “The system has become a well-oiled machine working for profit. Many people in it are driven by money, and many good parents have had their children wrongfully removed so that others can greedily line their pockets for profit.”  
-Melissa Diegel, The Liberty Beacon

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**ARIZONA SUPREME COURT**

In the matter of: )  
)  
PETITION TO ADD NEW RULE 47.3 )  
CONCERNING CHILD REMOVAL ) Supreme Court No. \_\_\_\_\_  
TO THE RULES OF PROCEDURE ) (Emergency or Expedited  
FOR THE JUVENILE COURT ) Adoption Requested)  
\_\_\_\_\_ )

Pursuant to Arizona Supreme Court Rule 28, David K. Byers, Director, Administrative Office of the Courts, Arizona Supreme Court, respectfully petitions this court to adopt the attached proposed new Rule 47.3 of the Rules of Procedure for the Juvenile Court. The following rule should be applied in all circumstances in which DCS seeks to obtain an individual warrant for each child(ren)'s removal.

**I. Background and Purpose of the Proposed Rule Amendments and New Rules**

The proposed new rule is needed to implement an amendment to A.R.S. § 8-821(A) by Laws 2017, Chapter 282. Sec. 3 which provides:

The juvenile court on a DEPENDENCY petition by an interested person, a peace officer, A CHILD WELFARE INVESTIGATOR or a child safety worker under oath AND WEARING AN ACTIVE BODY CAMERA WITH AUDIO OR ON A SWORN STATEMENT OR TESTIMONY BY A PEACE OFFICER, A CHILD WELFARE INVESTIGATOR, OR A CHILD SAFETY WORKER MAY ISSUE AN ORDER THAT AUTHORIZES THE DEPARTMENT TO TAKE TEMPORARY CUSTODY OF A CHILD after DCS has taken active measures to locate family member(s) or kinship(s) to accept removed child(ren).

The amended language clearly provides for the court to issue a **pre-petition** order that authorizes the department to take temporary custody of a child while taking active measures to locate family member(s) or kinship(s) to accept removed child(ren). ~~The Department has authority based on the criteria stated in A.R.S. § 8-821 (B) to take custody of a child pre-petition without a court order. A.R.S. § 8-821 (B) does not expressly delineate when the Department must seek court authorization to take temporary custody of a child(ren). While subsection B provides additional criteria that must be met the statute does not expressly delineate when the department must seek court authorization to take temporary custody of a child rather than taking temporary custody on its own authority.~~ Instead, federal appellate case law provides direction regarding this issue that is quite similar to the direction provided to law enforcement officers searching for evidence of crimes. This direction is based on the U.S. Constitution's 4<sup>th</sup> Amendment requirement to obtain court authorization unless

“exigent circumstances”<sup>define</sup> exist that require temporary custody to protect a child before court authorization can be obtained.<sup>1</sup>

(T)he Fourth Amendment safeguards children’s “right ... to be secure in their persons ... against unreasonable ... seizures” without a warrant, U.S. Const. amend. IV, although we similarly recognize an exception to the warrant requirement where the exigencies<sup>define</sup> of the situation are ~~so compelling~~ immediate danger that a warrantless seizure is objectively reasonable under the Fourth Amendment...<sup>2</sup>

~~Whether exigent circumstances exist under the 4<sup>th</sup> Amendment often requires case by case fact specific consideration of the totality of the circumstances rather than a rule or set of rules that apply in all circumstances.<sup>3</sup> Consequently, the~~ This proposed rule provides a due process and 4<sup>th</sup> Amendment compliant procedure for the Department to obtain a court ordered warrant for each child authorizing temporary custody until family member(s) or kinship(s) can be located to accept removed child(ren). DCS must obtain a warrant (per child) under all circumstances of removal. ~~but does not address when~~ This procedure must be used only if child(ren) are in immediate danger.

## II. Section by Section Discussion of Proposed New Rule 47.3

### A. Purpose

This subsection states the purpose of the proposed rule as follows: “On application under oath and wearing an active body camera with audio by a

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<sup>1</sup> Kirkpatrick v. County of Washoe, 843 F.3d 784, 790 (9<sup>th</sup> Cir. 2016)

<sup>2</sup> Id at 789

<sup>3</sup> Missouri v. McNeely, 569 U.S. 141, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013)

child safety worker, a child welfare investigator, or a peace officer, the court will determine ex parte whether to authorize the applicant to enter premises to locate a child and to take emergency temporary custody of the child until family member(s) or kinship(s) can be notified of removal and given opportunity to take child(ren).

## **B. Burden of Proof**

This subsection states the applicant's burden to meet the 4<sup>th</sup> amendment requirement for probable cause,<sup>define</sup> the A.R.S. § 8-821(A) requirement for a determination that temporary custody until family member(s) or kinship(s) can take custody is "clearly necessary to protect the child from ~~suffering abuse or neglect,~~"<sup>2</sup> immediate danger and the federal IV-E requirement that remaining at home is contrary to the child's welfare. The additional criteria for temporary custody required by the Indian Child Welfare Act regulations are stated.

## **C. Procedure**

### **1. Application**

This subsection identifies the persons eligible to apply for a court order that authorizes a search for a child and temporary custody of the child until family member(s) or kinship(s) can take temporary custody and provides for the Presiding Judge of Maricopa County to designate a judicial officer

to receive and respond to the application due to 24/7 staffing and statewide coverage that can be provided by that court. It specifies the contents of the application including the description of the child or each child if more than one, the location to be searched,<sup>4</sup> whether authority is needed to execute the order between ten p.m. and six-thirty a.m.,<sup>5</sup> the ~~specific~~ immediate danger from which the child cannot be protected without temporary custody,<sup>6</sup> documentation proving family member(s) or kinship(s) were attempted to be located for temporary custody and the availability of voluntary options<sup>define</sup> that will remove the danger.<sup>7</sup> Additional information is required under federal law when there is reason to know a child is an Indian child. The application is required to be submitted under oath.<sup>8</sup> while wearing an active body camera with audio.

## 2. Form

The Administrative Director is authorized to approve the format in which the application is submitted. The current plan is to adapt a web interface

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<sup>4</sup> See A.R.S. § 13-3913, §13-3915(C)

<sup>5</sup> See A.R.S. § 13-3917

<sup>6</sup> See A.R.S. § 13-3914(B)

<sup>7</sup> Wallis v. Spencer, 202 F.3d 1126, 1140-1141

<sup>8</sup> See A.R.S. § 13-3914(C)

that is currently used by the Superior Court in Maricopa County for warrant request from law enforcement officers statewide for use to communicate the application and order between the applicant and the judicial officer as required by the proposed rule. Active body camera with audio footage, paper forms and oral communication are provided to be ~~available~~ used as backup.

### **3. Hearsay Evidence**

Reliance on reliable <sup>define</sup> hearsay with a sworn statement under oath is authorized consistent with Rule 51(C)(1) concerning a temporary custody hearing. Hearsay witness must submit a written sworn testimony as to incident(s) that constitutes immediate danger, which the Department includes as evidence of procuring a warrant.

### **4. Consideration**

The proposed coverage by judicial officers is 24/7 with capability to respond to applications under the proposed rule. ~~when they are submitted.~~ Consideration of the application would be ex parte with the option to request additional information from the applicant other than the required information, including but not limited to, body camera with audio video footage.

## **D. Findings and Order**

## **1. Content**

The order must state whether the applicant has met the burden of proof and include other content required by A.R.S. § 13-3915 for a warrant. This subsection is also consistent with the requirement of the 4<sup>th</sup> Amendment of the U.S. Constitution that a warrant particularly describe the place to be searched and the persons or things to be seized. If requested, the order would state whether it includes authorization that the order be executed with the participation of law enforcement officers and outside normal hours for execution of a search warrant. For an Indian child the order must make an additional determination required by federal law. A separate warrant is required for each child and location required to be searched in order to locate the child(ren).

## **2. Form**

The web interface proposed to implement this proposed rule allows the application to be made and the order to be provided without the applicant and judicial officer being in each other's presence. Both will sign electronically. This subsection also permits the use of other remote alternatives including uploading body camera footage with audio as are authorized for warrants as a backup for the web interface.<sup>9</sup>

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<sup>9</sup> A.R.S. § 13-3915(D) & (E)

### **3. Notice**

This subsection requires that the applicant provide the parent the application and order that grants temporary custody when custody of the child is taken as is required for the temporary custody notice (TCN)<sup>10</sup> if family member(s) or kinship(s) cannot be located or are unavailable to take temporary custody of child(ren).

### **4. Execution and Duration**

This subsection provides that the temporary custody authorized under this rule continues “until a family member(s) or kinship(s) comes forward to accept the child(ren). ~~there is a material change in the factual basis for the probable cause determination~~” as required by 4<sup>th</sup> Amendment law<sup>11</sup> and for ~~a maximum of ten days~~. When the order is executed the applicant must provide notice to the issuing court. Temporary custody by family, kinship or DCS obtained under the order expires unless a dependency petition is filed within the period stated as prescribed by statute.<sup>12</sup> Continuation of

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<sup>10</sup> A.R.S. § 8-823

<sup>11</sup> U.S. v. Garcia, 707 F.3d 1190, 1195-1196

<sup>12</sup> A.R.S. § 8-821(F)

temporary custody with Department or family or kinship is then reviewed at the Preliminary Protective Hearing.

## **5. Filing**

This subsection requires that the application and order be filed in the court that would have jurisdiction over a dependency involving the child who is the subject of the application and order. After noting on the order whether the child was taken into temporary custody under the Department, family or kinship the applicant would file these documents either with the dependency petition or within 72 hours of issuance.

## **III. Pre-Petition Distribution and Comment**

The proposed rules were circulated for pre-petition comments to the attendees of a 2017 Judicial Conference session on this subject, the Committee on Juvenile Courts, the Department of Child Safety, Attorney General staff who handle dependency matters, and the Court Improvement Program Advisory Committee which includes a broad range of stakeholders in dependency matters. Changes were made to the draft rules based on some of these comments.

## **IV. Expedited Consideration of the Proposed New Rule**

Petitioner requests that the Court consider this petition ~~on an emergency basis~~ every removal of child(ren) in any instance due to the July 1, 2018 statutory effective date. Petitioner suggests distribution for comment until October 27, 2017 to enable

the Court to consider this matter for adoption at its December, 2017 rules agenda. If adopted this will allow judicial and Department of Child Safety training concerning this rule in early 2018 prior to a July 1 effective date for the rule that coincides with the effective date of the statute.

Respectfully submitted this 5th day of September, 2017.

By /S/  
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# Appendix A

### **Rule 47.3 Court Authorized Removal**

**A. Purpose.** On application under oath by a child safety worker, a child welfare investigator, or a peace officer, wearing an active body camera with audio the court will determine ex parte whether to authorize the applicant to enter premises to locate a child and to take emergency temporary custody of the child while actively locating family member(s) or kinship(s) to take temporary custody of the child(ren).

**B. Burden of Proof.** The applicant shall have the burden of stating explicit facts and providing proof of those facts including but not limited to body camera video footage with audio that provide probable cause to believe:

1. emergency temporary custody of the child is clearly necessary to protect the child from ~~suffering abuse or neglect~~ immediate danger;
2. no alternative means to effectively protect the child is available including family or kinship care; and
3. remaining in the child's current home is ~~contrary to the welfare of the child~~ poses immediate danger to the child(ren).

Additionally, for an Indian child, under 25 C.F.R. § 23.113(b)(1) the facts stated must provide probable cause that emergency temporary custody is necessary to prevent imminent physical damage or harm to the child.

### **C. Procedure.**

1. **Application.** A child safety worker, a child welfare investigator, or a peace officer who is wearing an active body camera with audio may apply for authorization to enter premises to locate a child and to take emergency temporary custody of the child by submitting an application in writing or by recorded oral statement under oath to one of the judicial officers designated by the presiding judge of the superior court in Maricopa County to receive and respond to applications under this rule. The application or recorded oral statement must state:

- (a) the professional qualifications of the applicant,
- (b) the particular reasons each child is presently ~~or in imminently in~~ immediate danger ~~of abuse or neglect,~~
- (c) a detailed account of circumstances sworn affidavit and video footage from an active body camera with audio that require emergency temporary custody including the facts that support the reasons given if child(ren) are not able to be placed with family member(s) or kinship(s) care,

(d) the availability of remedial services or other voluntary options<sup>define</sup> that would remove or control the danger, i.e. family or kinship

(e) the identity and description and a warrant application for each child to be placed in emergency temporary custody, until child(ren) can be placed with family or kinship.

(f) the place or places to be searched,

(g) any time by which custody must be taken where there is a failure to place child(ren) with family or kinship,

(h) reason for any authorization needed to execute the order between ten p.m. and six-thirty a.m., and

(i) whether law enforcement assistance is requested.

Additionally, under 25 C.F.R. § 23.113(d), if there is reason to know the child is an Indian child, the applicant should provide any available information regarding the child's tribal affiliation, whether the child resides on a reservation and any efforts to contact a tribe. The other information that should be provided under 25 C.F.R. § 23.113(d) may be provided in the dependency petition.

2. **Form.** The application must be submitted in a format including but not limited to body camera video with audio approved by the Administrative Director of the Supreme Court.

3. **Evidence.** Evidence presented in support of an application for emergency temporary custody may include evidence which is reliable hearsay, ~~in whole or in part~~ with a minimum of one form of proof. i.e. sworn statement under oath.

4. **Consideration.** As soon as possible after receipt of an sworn oral statement or a sworn written application and proof of mandatory body camera with audio engaged, a designated judicial officer will consider the application ex parte. The judicial officer may question the applicant and any witnesses orally or in writing. Any oral questioning must be recorded.

#### **D. Findings and Order.**

1. **Content.** The order will state whether there is probable cause to believe that emergency temporary custody of the child is clearly necessary to prevent ~~abuse or neglect~~ immediate danger because no alternative means to effectively protect the child is available and whether remaining in the child's current home is contrary to the welfare of the child in the case of immediate danger. Additionally, an order

granting an application for each child must include:

- (a) a factual basis for the determination for each child,
- (b) the identity and description with reasonable particularity of each child to be placed in emergency temporary custody if means for family or kinship care has been exhausted,
- (c) the description of one location to be searched for each order, one warrant application per child,
- (d) whether law enforcement is authorized to assist, and
- (e) whether for good cause, meaning immediate danger shown the authorization includes searching for the child and taking custody at any hour after exhausting all options of child(ren) being placed with family or kinship.

Additionally, for an Indian child, under 25 C.F.R. § 23.113(b)(1) the court must find probable cause that emergency temporary custody is necessary to prevent imminent physical damage or harm to the child. A separate order must be issued for each location to be searched.

2. **Form.** If the applicant and judicial officer are not in each other's physical presence, the judge may sign the order authorizing emergency temporary custody after applicant signs sworn oath stating all measures were taken to place child(ren) with family member(s) or kinship(s) using an electronic signature to serve as the original order, ~~orally authorize the applicant to sign the judge's name on the order,~~ or sign an electronically transmitted version of the original order which is then deemed to be the original. The judicial officer will record the time and date of issuance of an orally authorized order on the original order and the applicant will send the duplicate original order to the judicial officer who issued the order who will then file these orders in the court that would have dependency jurisdiction of the child.

3. **Notice.** The applicant must provide the parent or other custodian a copy of the emergency temporary custody application and order authorizing emergency temporary custody and proof family or kinship (i.e. neighbors) were informed of the removal with the Temporary Custody Notice (TCN) upon taking custody of the child or, when a parent is not present, as soon thereafter as possible.

4. **Execution and Duration.** The applicant may execute the order until there is a material change in the factual basis for the probable cause determination and within

ten calendar days of issuance of the order. The applicant must provide notice of the execution of the order to the court that issued the order. The temporary custody authorized by the order will expire after 72 hours excluding Saturdays, Sundays and holidays unless a dependency petition is filed or family member(s) or kinship(s) cannot be located. The court with dependency jurisdiction over the child will review continuation of temporary custody as provided in rules 50 and 51 while actively pursuing family or kinship for placement of the child(ren).

**5. Filing:** The applicant must file the application and order when the TCN and the dependency petition are filed. Prior to filing the application and order the applicant must indicate on the order ~~whether~~ the child was removed only as authorized by the order. If no petition is filed following an order authorizing emergency temporary custody until family or kinship care has been exhausted under this rule the applicant must file the application and order within 72 hours excluding Saturdays, Sundays and holidays in the court that would have dependency jurisdiction of the child.