

Task Force on the Rules of Procedure for the Juvenile Court

Meeting Agenda

Friday, November 8, 2019

10:00 a.m. to 4:00 p.m.

State Courts Building * 1501 West Washington * Conference Room 345 * Phoenix, AZ

Item no. 1	Call to Order	<i>Hon. Rebecca Berch, Chair</i>
Item no. 2	Approval of the September 27, 2019 meeting minutes	<i>Justice Berch</i>
Item no. 3	Workgroup reports and discussion of rules Workgroup 1: Rules 1, 2, 3, and 4 Workgroup 2: Rule X (“scope of the delinquency rules”), Rule XX (“definitions”), Rules 10 and 11 Workgroup 3: Rules 36, 37, and 38 Workgroup 4: Rules 61 and 62	<i>Judge Kreamer, Judge Armstrong, Ms. Mattison</i> <i>Ms. Phillis</i> <i>Judge Quigley</i> <i>Professor Atwood</i>
Item no. 4	Roadmap Next meetings: Friday, December 13, 2019 (Room 119) Friday, January 24, 2020 (Room 119)	<i>Justice Berch</i>
Item no. 5	Call to the Public Adjourn	<i>Justice Berch</i>

The Chair may call items on this Agenda, including the Call to the Public, out of the indicated order.

Please contact Mark Meltzer at (602) 452-3242 with any questions concerning this Agenda.

Persons with a disability may request reasonable accommodations by contacting Angela Pennington at (602) 452-3547. Please make requests as early as possible to allow time to arrange accommodations.

Juvenile Rules Task Force

State Courts Building, Phoenix

Meeting Minutes: September 27, 2019

Members attending: Hon. Rebecca Berch (Chair), Hon. Mark Armstrong, Barbara Atwood, Beth Beckmann, Beth Beringhaus, Dale Cardy, Kathleen Coughlin, John Gilmore, Magdalena Jorquez, Hon. Joseph Kreamer, Tina Mattison, Donna McQuality, Eric Meaux, William Owsley, Christina Phillis, Hon. Maurice Portley, Hon. Kathleen Quigley, Beth Rosenberg, Denise Smith, Denise Avila Taylor, Hon. Patricia Trebesch, Edward Truman, Hon. Rick Williams (by telephone), Hon. Anna Young

Absent: Maria Christina Fuentes, Kent Volkmer

Guests: Hon. Robert Brutinel, Nancy Rodriguez, Carey Turner, John Rogers, Aaron Nash, Patrick Hansen, Nina Preston, Christina Lawler, Mike Hawk

AOC Staff: Caroline Lutt-Owens, Joseph Kelroy, Mark Meltzer, Angela Pennington, Theresa Barrett

1. Call to order; welcome by the Chief Justice; introductions; review of A.O. No. 2019-74; preliminary matters. The Chair called the first meeting of the Task Force to order at 10:00 a.m. and invited Chief Justice Robert Brutinel to welcome the members.

Chief Justice Brutinel thanked the members for their participation in this Task Force and encouraged them to obtain input from other stakeholders as the project progresses. In recognizing the importance of this Task Force's work to improve the juvenile justice system, he noted that Administrative Order No. 2019-74, which established this Task Force, was the first order he entered after he became Chief Justice.

The Chief Justice also noted that several sets of Arizona procedural rules, including rules of evidence, civil appeals, civil procedure, criminal procedure, protective order procedure, family law, and probate, have been restyled during the last 10 years, and this project will encompass restyling of the current juvenile rules. The juvenile rules were comprehensively restated 20 years ago, and since then, the juvenile justice system has seen a number of changes – such as the establishment of a new Department of Child Safety (“DCS”) and Office of Child Welfare Investigations, reduced use of detention, more alternatives in dependency proceedings, special consideration of dually adjudicated (“cross-over”) youth, specialized juvenile dockets, such as drug and health and wellness courts, and new federal and state legislation. The Chief Justice added that the goal of this project is not merely to restyle the juvenile rules. The goal also includes recommending substantive revisions in response to the many changes in this area of law during the past two decades. The Task Force's objective should be proposing the best

possible set of juvenile rules, and the Chief Justice accordingly confirmed that substantive rule changes would be appropriate.

The Chief Justice briefly mentioned two specific issues. A.O. No. 2019-74 directs the Task Force to consider whether there should be separate rule sets for delinquency and dependency cases. Members should not read this directive as a recommendation for two rule sets, but rather it is an issue they should discuss. He also noted accelerated hearings in termination cases under the current rules. He asked members to suggest provisions in their proposed rules that would balance the due process rights of parents in these cases with the reality that some parents have little or no interest in the case outcomes.

Reflecting on his experience as a juvenile court judge, Chief Justice Brutinel observed that juvenile proceedings can make a significant difference in people's lives, and procedural rules have a substantial impact on court proceedings. Arizona has been a leader in juvenile justice innovations, and he believes the members' work product will further that reputation. He looks forward to seeing the Task Force's recommendations.

The Chair thanked the Chief Justice for his welcoming remarks. She then invited the members, Task Force staff, and meeting guests to introduce themselves and provide descriptions of their current positions and their backgrounds in juvenile law.

The Chair proceeded to review meeting materials, including documents in today's meeting packets as well as other items posted on the Task Force webpage on the Arizona Judicial Branch website. The meeting packets include rules for conducting Task Force business, data summaries, summaries of the Family First Prevention Services Act ("FFPSA"), and restyling materials. Bryan's Garner's *Guidelines for Drafting and Editing Court Rules* were posted on the webpage. Also posted were a rule petition and Order in R-19-0037, which Ms. Preston will discuss later; amended rule petition No. R-00-0004 (a 2000 petition that proposed a restatement of the juvenile rules); Judge Armstrong's compendium of Arizona opinions on juvenile proceedings; and a 2007 Division Two opinion, *John M. v ADES*, concerning ineffective assistance of counsel in termination cases. Staff also provided members with a 200-page spiral-bound binder that contains staff's initial draft restyling of the current juvenile rules. The Chair encouraged members to retain today's printed materials for future reference.

The Chair advised that Task Force meetings are open to the public, and each meeting would include a call to the public. She reviewed the requirements of A.O. No. 2019-74, and specifically noted that the Task Force must file its rule petition by January 10, 2021. The Order's requirement that the Task Force "seek input from various interested persons and entities" will require the Task Force to have a complete draft of proposed rules at least a few months before the filing date. Because there are currently 116 juvenile rules, the timeline to completion will require the members' dedication and diligent effort.

The meeting materials included a single-page sample of Rules for Conducting Business for a previous Task Force. The Chair reviewed these rules, including a provision that members provide staff 24-hours' notice of an intent to use a proxy for a Task Force meeting. These rules require the members' approval.

Motion: A member moved to approve these Rules for Conducting Business, with its title changed to the Juvenile Rules Task Force. The motion received a second and it passed unanimously. **JRTF: 01**

2. Rules restyling principles; introduction to SharePoint. The Chair then invited Supreme Court staff attorney John Rogers, who participated in previous rule restyling projects, to introduce the principles of restyling. Mr. Rogers began by noting that the key to restyling is good writing. Good writing will improve the rules' clarity. Restyling also uses terminology consistently and improves the rules' organization, both of which make the rules easier to comprehend. Some rules are not clearly written. Mr. Rogers noted that over the years, rules have grown in complexity, and they became harder to find and more difficult to understand. He compared the 1977 volume of the Arizona Rules of Court with the 2017 volume. The latter is nearly double the length of the former. The 2017 volume also used smaller font on larger pages, and had a double rather than a single column, to accommodate more text. Recent Arizona restylings have utilized good writing and reorganization to simplify many of these formerly complex rules.

Bryan Garner's *Guidelines* demonstrate a variety of techniques for accomplishing these restyling goals. Mr. Rogers and staff also prepared materials that are in the meeting packet, which summarize restyling principles and provide examples on how to apply them to the current juvenile rules. Mr. Rogers explained the principles and provided examples, which included the following:

- Improving the formatting, which includes the generous use of subparts and subheadings
- Breaking-up or simplifying unduly long sentences
- Avoiding the use of ambiguous terms (including the word "shall")
- Avoiding the use of redundant terms (e.g., "the court may in its discretion")
- Avoiding the use of archaic terms
- Using simpler words (e.g., use "later" rather than "subsequently") and proper word choice
- Minimizing the use of "of" phrases (e.g., use "superior court clerk" rather than "clerk of the superior court")
- Minimizing the use of "by" phrases (e.g., say "unless the court orders otherwise" rather than "unless otherwise ordered by the court")
- Using the active voice

- Deleting outdated comments or comments that repeat or contradict a rule, relocating substantive provisions in the current comments into the body of the restyled rules, eliminating “applicability” notes, and formatting comments uniformly

On the last point, Judge Armstrong noted that because the Court has adopted comments that appear in the rules, it is not necessary to refer to a comment as a “State Bar Comment” or a “Committee Comment.” The template for comments in the restyled juvenile rules should simply be, “Comment to ~~2021~~ 2022 Amendment.”

Mr. Rogers’ presentation led to Ms. Pennington’s introductory explanation of SharePoint, which members will be utilizing for their rule revisions. Ms. Pennington advised members that she had recently sent them a link to the SharePoint site for this project. Members should click on that link, accept her invitation, and bookmark the SharePoint page to easily return to it. A SharePoint folder will contain each juvenile rule. Revisions should be done in the “desktop” application.

The Chair thanked Mr. Rogers and Ms. Pennington for their presentations.

3. Workgroups. The Chair has divided the 116 current juvenile rules by subject matter into 4 groups. Each workgroup has been assigned one group of rules for discussion, review, and revision. The Chair assigned members to a workgroup based on their areas of expertise, if possible, and to promote geographic diversity. Each workgroup has a designated leader. Workgroup 1, which will be led by Judge Kreamer, has the general rule provisions, and rules on emancipation and appeals. Workgroup 2 will be led by Ms. Phillis; Workgroup 2 has the delinquency rules. Judge Quigley will lead Workgroup 3, which has the dependency rules. Workgroup 4, which has the rules on guardianships, terminations, and adoptions, will be led by Professor Atwood. The Chair requested workgroups to meet at least once between each Task Force meeting, and to provide its work product to staff at least a week before Task Force meetings. Staff provided each member with a list of their workgroup assignments. The Chair noted that Mark Meltzer would like to attend every workgroup meeting; he is a resource for questions and restyling conventions, and he monitors the progress of the workgroups, thereby assisting the Chair. Each workgroup should have a scribe who makes edits in SharePoint, and Mark has agreed to serve as the designated scribe.

The meeting materials included a set of guidelines for the workgroups. Each workgroup should prepare 3 or 4 rules for discussion at upcoming Task Force meetings and decide which member will present each rule. A member can attend meetings of another workgroup. The Chair added that the Task Force rule petition should present recommendations pursuant to the members’ consensus, but it also can express areas of disagreement and minority viewpoints.

4. Discussion of preliminary issues. Today's meeting agenda noted several issues for preliminary discussion.

(a) *Should the delinquency and dependency rules be separate, standalone rule sets?* A.O. No. 2019-74 directed the Task Force to consider this issue. At present, the members preferred to maintain the delinquency and dependency rules in a single, combined set. Many judges and attorneys have cases in both areas, and it's easier for them to refer to a single set of rules. Moreover, a single set of rules facilitates those who work on cases involving cross-over youth. Rules on subjects such as appeals are common to both case types, and separate rule sets could require duplication of these provisions. Another member recommended keeping the rules in a single set because they traditionally have been combined and separating them now might be time-consuming and have only marginal benefit. The manner of integrating new provisions of the Juvenile Justice Reform Act might also be a consideration. No one offered a cogent reason for having separate sets of rules, and the Chair indicated, at least for the time being, that the Task Force will proceed with a single set of rules.

(b) *What is the relationship between the juvenile rules and other rule sets (e.g., civil, criminal, and family rules)?* Members discussed whether other rules could be cross-referenced in the juvenile rules, or if the substance of those other rules should be incorporated in the juvenile rules. One member preferred incorporating substantive provisions to customize the juvenile rules for juvenile proceedings. But another member observed that if that was done, a change to a corresponding rule in another set might require amendment of a juvenile rule. Another member noted that the juvenile rules incorporate more than a dozen ARCAP rules by reference, which is efficient and keeps the juvenile rules from becoming lengthier and unwieldy. Members reached no consensus on this issue today and they might revisit it later.

(c) *Who are the anticipated users of the juvenile rules?* Members believe most users of these rules will be law trained, especially compared with other rule sets, such as the family rules where many users are self-represented litigants. However, non-law-trained individuals might be required to use, or might receive, some juvenile forms, and anecdotally, self-represented litigants occasionally file appellate petitions for review. The Task Force will need to be mindful of the needs of non-law-trained stakeholders.

(d) *Can the Task Force propose substantive changes to the rules?* The meeting agenda was prepared in advance and in anticipation of a discussion of this issue. However, the Chief Justice addressed this issue during his remarks at the beginning of the meeting. See section 1 of these minutes.

5. FFPSA and R-19-0037. The Chair requested Judge Portley and Ms. Preston, respectively, to summarize these two topics.

Judge Portley noted that the FFPSA offers each state a two-year window for implementing provisions of this federal legislation; Arizona will do so toward the end of that window, in October 2021. The director of the Arizona Department of Child Safety is having an ongoing dialogue with the Legislature concerning implementation.

The FFPSA impacts a variety of child placement, treatment, and funding matters. Placements include Qualified Residential Treatment Programs (“QRTPs”), which have timeliness and other significant requirements detailed in Section 50742 of the federal legislation. Another portion of the FFPSA deals with judicial, staff, and attorney training on the new requirements, while another portion requires states to use an electronic interstate case management system for exchanging information and expediting interstate placements. Other sections concern the Chafee Foster Care Independence Programs to support youth who are aging out of foster care, and which encourage the use of transition services and expanding available supports.

Judge Portley noted that Arizona court rules concerning the FFPSA requirements should be effective by October 2021. Because the Task Force’s 2021 proposed rules would customarily become effective on January 1, 2022, Judge Armstrong raised a possible need to adopt Arizona rule provisions pertinent to the FFPSA on an emergency basis.

Ms. Preston advised that rule petition R-19-0037 was prompted by recent Arizona legislation that became effective on August 27, 2019. The Court adopted rules proposed by that petition on an emergency basis, to be concurrent with the legislation’s effective date. These amendments to Rules 47.1 and 79 concern the extended foster care program, which is designed to assist older children in making a successful transition to adulthood. Ms. Preston summarized the amendments, including hearing requirements and expedited hearings under certain circumstances. She noted that the rule amendments were written in the current style and were not restyled. She added that the rules are open for public comment until October 7, 2019.

The Chair thanked Judge Portley and Ms. Preston for their updates.

6. Roadmap. The meeting materials included a schedule of Task Force meeting dates through December 2020. The Chair envisions 14 meetings, including today’s meeting, during that period. There are uniform intervals between these meetings. Although each member might not be able to attend every meeting, the Chair would like the members to calendar these dates. The Chair would like the Task Force to review at least 10 rules during each of the upcoming meetings. The next meeting is set for **Friday, November 8, 2019**, beginning at **10:00 a.m.** in **Room 345**.

7. Call to the public. Patrick Christian Hansen responded to a call to the public midway through the meeting, and he offered his comments to the members. There was no response to a second call to the public before adjournment.

8. **Concluding remarks; adjourn.** The Chair thanked the members for their service on this Task Force and expressed her confidence that their work would greatly improve the juvenile rules.

The meeting adjourned at 1:10 p.m.

JRTF 11.08.2019

MISCELLANEOUS DOCUMENTS

- A. Judge Armstrong’s references to Rules of Evidence [Cross-reference draft Rule 3]

- B. Judge Warner’s analysis and proposed provision on “available for cross-examination”
[Cross-reference draft Rules 3(d) and 45]

- C. Solicitor General’s comment in R-00-0004
[Cross-reference ICWA]

References to Rules of Evidence or Standards of Admissibility

Rule 7. Form of Filed Documents; Proposed Orders

Subpart (c)(4). Original. An electronically filed document (or a scanned copy of a document filed in hard copy) constitutes an “original” under Arizona Rule of Evidence 1002.

Rule 32. Revocation of Probation

Subpart (bb). Procedure. . . . The court may admit any reliable evidence not legally privileged, which may include hearsay.

Rule 45. Admissibility of Evidence

Subpart (a) Admissibility. Except as provided in these rules, the Arizona Rules of Evidence govern the admissibility of evidence.

-Applies in dependency, termination, and Title 8 guardianship cases. Rule 36(a) (applicable to Part III, Rules 36-66).

Subpart (c). Admissibility of a Report.

Subpart (f). Evaluation Report.

-Provides for admissibility of report if properly disclosed and the author is available for cross-examination.

Subpart (g). Child’s Statement or Conduct.

-Provides for admissibility if reliable.

Rule 47.3. Court Authorized Removal

Subpart (k) Evidence. Evidence in support of an application may include reliable hearsay, in whole or in part.

Rule 51. Review of Temporary Custody

Subpart (b) Burden of Proof.

-Sets forth standards of proof.

Subpart (c) Procedure.

-Allows admission of “hearsay evidence, in whole or in part, or as provided by statute.”

Rule 53. Settlement Conference.

Subpart (c)(2) Statements made in the course of settlement negotiations must not be used in future hearings, except as permitted by Rule 408, Ariz. Rules of Evidence.

Rule 55. Dependency Adjudication Hearing

Subpart (d). Procedure. The presentation of evidence at the dependency adjudication hearing should be as informal as the requirements of due process and fairness permit and shall generally proceed in a manner similar to the trial of a civil action before the court without a jury.

Rule 56. Disposition Hearing

Subpart (d) Procedure.

-Sets forth evidence that may be considered at disposition.

Rule 58. Review Hearing

Subpart (e) Procedure

- (1) Absent any party’s objection, the court may consider the oral or written reports of the parties, documents entered into evidence at prior proceedings, documents agreed upon by the parties, and any other reports,

Rule 59. Return of the Child

Subpart (d) Procedure. The court must consider evidence in the form of testimony or documents, admitted into evidence and that may include hearsay, to determine whether the child can be returned to the parent, guardian, or Indian custodian. The court must consider any failure of the parent, guardian, or Indian custodian to comply with the terms of the case plan as evidence that return of the child would create a substantial risk of harm to the child.

Rule 60. Permanency Hearing

Subpart (d) Procedure. At the permanency hearing the court must consider evidence from the parties that may include hearsay, and an age-appropriate consultation with the child, in order to determine what permanent legal status is appropriate for the child. The court also must consider the final plan prepared by the DCS pursuant to a prior court order.

Rule 63. Guardianship Adjudication Hearing

Subpart (d) Procedure. The presentation of evidence at the guardianship adjudication hearing may be as informal as the requirements of due process and fairness permit. The trial should generally proceed in a manner similar to the trial of a civil action before the court without a jury.

Subpart (e) Reports. In addition to reports admitted into evidence pursuant to Rule 45, the court must admit into evidence and consider the investigative report prepared pursuant to Rule 61(D).

Rule 66. Termination Adjudication Hearing

Subpart (d) Procedure. The presentation of evidence at the termination adjudication hearing must be as informal as the requirements of due process and fairness permit. The hearing should generally proceed in a manner similar to the trial of a civil action before the court without a jury.

Subpart (k) Social Study. A social study prepared pursuant to A.R.S. § 8-536 or by court order is admissible as evidence unless a party has filed a notice of objection as required by Rule 44 (B)(2)(e) and (D)(2). If the court sustains any objections, the court may:

- (l) admit the social study into evidence after redacting those portions to which objections were sustained; and
- (m) allow the petitioner a reasonable opportunity to call additional witnesses to testify regarding the redacted portions of the social study.

Rule 77. Certification to Adopt

Subpart (g) Procedure. The hearing must be informal, and the court may consider all reliable evidence, including hearsay. Documents that the parties wish the court to consider must be marked and entered into evidence. The court for good cause may continue the hearing.

There are a few other rules that merely provide the court shall consider evidence, in the form of testimony and/or documents, which have been entered into evidence. These rules provide no real standard, however. Staff has queried whether such rules are necessary or helpful.

Rule 45 Admissibility of Reports

Rule 45(D) of the Rules of Procedure for the Juvenile Court provides:

D. Reports of evaluation. Prior to any dependency hearing, a report of any psychological, psychiatric, medical, neurological, psycho-educational, psycho-sexual, substance abuse or similar evaluation of any party or participant, or any person with whom a child is or may be residing shall be admitted into evidence if the report has been disclosed to the parties pursuant to Rule 44(B)(1) and the author of the report is available for cross-examination.

The Rule permits admission of psychological and similar evaluations if proper disclosure is made and the author “is available for cross-examination.”

What does “available for cross-examination” mean in Rule 45(D)? There is no controlling Arizona authority on the issue. The closest analog in Arizona law is the definition of “unavailable” for hearsay purposes in Rule 804. Under the Rules of Evidence, certain hearsay exceptions only apply if the witness is unavailable. Rule 804 defines “unavailable” as follows:

Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant:

- (1) is exempted from testifying about the subject matter of the declarant’s statement because the court rules that a privilege applies;
- (2) refuses to testify about the subject matter despite a court order to do so;
- (3) testifies to not remembering the subject matter;
- (4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or
- (5) is absent from the trial or hearing and the statement’s proponent has not been able, by process or other reasonable means, to procure:
 - (A) the declarant’s attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or
 - (B) the declarant’s attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

But this subsection (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

Ariz. R. Evid. 804(a).

Under Rule 804, a witness is not unavailable if they are subject to subpoena, able and willing to comply with the subpoena, and not otherwise exempted from testifying. It makes sense—and is consistent with the Rule's purpose—to interpret “available for cross-examination” the same way. The Rule is meant to streamline dependency and termination trials by dispensing with the need for evaluator testimony when the report itself is sufficient. But it preserves the parties' ability to cross-examine the evaluator on the report if they want to. All they have to do is subpoena the evaluator to testify.

Rule 45(F)

F. Available for Cross Examination. A person is available for cross examination if the person is subject to the court's subpoena power, unless the person is subpoenaed and is unable or unwilling to comply with the subpoena.

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IN THE SUPREME COURT OF THE STATE OF ARIZONA

FILED
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NOEL K. DESSAINT
CLERK SUPREME COURT
BY 375

JUL 31 2000

CLERK SUPREME COURT

In the Matter of Petition for
Restatement of Arizona Rules of
Procedure for the Juvenile Court

Arizona Supreme Court
No. R-00-004

COMMENTS TO AMENDED PETITION
FOR RESTATEMENT OF ARIZONA
RULES OF PROCEDURE FOR THE
JUVENILE COURT

By order dated May 18, 2000, this Court extended until July 31, 2000, the deadline for submitting comments on the Amended Petition for Restatement of Arizona Rules of Procedure for the Juvenile Court. Because the initial and the Amended Petitions are identical except for provisions concerning the Indian Child Welfare Act, these comments address the Amended Petition.

This Office agrees that the existing juvenile rules should be amended to provide consistency and to reflect best practices within the juvenile courts. Although it supports many of the provisions contained in the original and Amended Petitions, this Office opposes the inclusion of select provisions of the Indian Child Welfare Act within the text of these procedural rules. Additionally, this Office urges changes to the provisions regarding disclosure and discovery.

RESPECTFULLY SUBMITTED this 31st day of July, 2000.

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STATEMENT OF INTEREST

The Office of the Attorney General represents the Arizona Department of Economic Security, Child Protective Services (“CPS”). This office and CPS are jointly responsible for over 5000 cases currently pending in the Arizona Juvenile Court system. In its capacity as the legal advisor for CPS, this Office is directly interested in the development and application of Arizona’s juvenile rules. Based on our experience in these proceedings we identify two key concerns with the changes proposed in the Amended Petition:

1. the inclusion of select provisions of the Indian Child Welfare Act; and,
2. the disclosure and discovery requirements contained in Rule 44.

DISCUSSION

The Indian Child Welfare Act

The Office of the Attorney General is opposed to the inclusion of select provisions of the Indian Child Welfare Act (the “Act” or “ICWA”) within the juvenile court rules. First, the Act is federal substantive law. ICWA preempts state statutes and procedural rules. Substantive rights created by statute cannot be enlarged or diminished by rules promulgated by this Court. *Daou v. Harris*, 139 Ariz. 353, 357, 678 P. 2d 934, 938 (1984). Restating select provisions of the Act in these rules is unnecessary and duplicative.

Second, this Office opposes the partial inclusion of ICWA provisions due to the potential for misinterpretation. ICWA’s provisions must be read and interpreted in conjunction with other provisions of the Act. Selectively inserting “key” provisions in the procedural rules, however, may inaccurately suggest that no further review of the Act is necessary to ensure compliance. Avoiding such a misinterpretation is very important.

Violations of the Act may jeopardize a child's permanency by invalidating determinations regarding dependency, termination of parental rights, or guardianship.

For these reasons, the Office of the Attorney General opposes the partial incorporation of ICWA within these rules.

Rule 44. Disclosure and Discovery

This rule describes the methods and time limits for disclosure in dependency, guardianship, and termination actions. The Office of the Attorney General urges changes to this rule, because, as currently written, it is unduly burdensome for CPS, this Office, and attorneys representing children and parents. This Office strongly supports the due process rights of parents and children involved in these proceedings, but the ongoing disclosure requirements and deadlines prescribed in the proposed rule are unworkable.

1. Dependency Proceedings

Although the disclosure time-frames also affect guardianship and termination matters, the rule is particularly problematic for CPS in dependency actions due to the five-day disclosure requirement. CPS is the entity primarily responsible for gathering records in dependency cases. Historically, the CPS file has been open to any of the parties involved in the case for inspection or copying during the pendency of the proceedings.

Dependency proceedings are extremely document intensive due to the numerous ongoing service providers, including health care workers, human service workers, parent aides, psychologists, and therapists. The pertinent records may include reports from alcohol and drug screening facilities, hospital medical records, psychiatric records, police records, and criminal conviction records. Each family member individually can be

involved in a range of services thereby producing a multitude of records subject to disclosure. Records are received by CPS on virtually a daily basis. Additionally, CPS case management activities such as referrals for services, coordination of appointments, contacts with family members, and placements require written requests and daily documentation in the CPS file. A dependency action may span several years.

Implementing the proposed five-day disclosure requirement may also have unanticipated adverse effects. For example, the rule may change the focus of the dependency proceedings so that resources now available for identifying needed services for families must be redirected to ensure compliance with the disclosure deadlines. The rule may also encourage delay in acquiring or preparing written reports. As an alternative to the proposed five-day disclosure requirement, the Office submits that dependency proceedings should instead be governed by the disclosure requirements described on pages 6-8 below.

2. Guardianship and Termination

As it relates to guardianship and termination actions, in place of the five-day requirement, the rule should require that all disclosure occur within thirty (30) days after the initial guardianship or termination hearing.

3. Attorneys for Parents and Children

The rule is unworkable for attorneys representing children and parents due to the provisions of subsection B (2)(e). That rule requires a party to file a Notice of Objection within 10 days of receipt of an exhibit if they object to its admission. Any objection not made within the 10-day period is deemed to be waived. Thus if CPS can comply with the new requirement to disclose each document within five days, the burden then shifts to the

parties to file objections within ten days or otherwise be barred from raising objections in the on-going proceeding. Given the number of documents subject to disclosure, an attorney for a parent or child might be faced with filing a Notice of Objection nearly every day a case is pending.

Sanctions

Finally, this Office suggests that the rules provide more guidance to the trial court in determining to impose sanctions for untimely disclosure. Due to the voluminous disclosure that is anticipated in these cases, the court should consider the prejudice resulting from untimely disclosure before the court imposes sanctions.

ATTORNEY GENERAL'S OFFICE PROPOSALS FOR RULE 44

In view of these concerns, this Office proposes that alternatives to this rule be considered. The following section contains suggested changes showing the actual text of the alternative language. In the following text, ~~strikeouts~~ are used to show proposed deletions from the rule as proposed in the Amended Petition. **BOLD CAPITALS** are used to show alternative language proposed by this Office.

Rule 44. Disclosure and Discovery.

A. Scope of Disclosure. All information which is not privileged shall be disclosed. Disclosure shall be made in the least burdensome and most cost effective manner which shall include the inspection of materials, with or without copying. Disclosure shall include, but is not limited to the following:

1. Reports prepared by or at the request of any party;
2. Reports of any social service provider;

3. Foster Care Review Board and Court Appointed Special Advocate reports;
4. Transcripts of interviews and prior testimony;
5. Probation reports;
6. Photographs;
7. Physical evidence;
8. Records of prior criminal convictions;
9. Medical and psychological records and reports;
10. Results of medical or other diagnostic tests; and
11. Any other information relevant to the proceedings.

B. Time Limits for Disclosure in Dependency Proceedings.

- ~~1. Documentary Evidence.~~ **DISCLOSURE PRIOR TO PRELIMINARY PROTECTIVE HEARING.** Within twenty four (24) hours prior to the preliminary protective hearing, the parties shall provide to each other all documents within their possession which may be subject to disclosure. ~~Unless otherwise authorized by the court, any document received by or prepared by the party thereafter shall be disclosed within five (5) days of receipt or preparation. If a hearing is scheduled prior to the expiration of the five (5) days, disclosure shall be made prior to the hearing.~~
2. Disclosure ~~Statement~~ Prior to Contested Adjudication Hearing. Unless otherwise ordered by the court, the parties shall **PREPARE A DISCLOSURE STATEMENT AND** disclose to each other the following information within sixty (60) days after the preliminary protective hearing or service of the petition upon a party not appearing at

the preliminary protective hearing if the matter is set for a contested adjudication hearing:

- a. The uncontested facts deemed material;
- b. The contested issues of fact or law which may be material or applicable;
- c. A statement of other issues of fact or law which the party believes to be material;
- d. A list of witnesses the party intends to call at trial which shall include the names, addresses and telephone numbers of the witnesses in addition to a description of the substance of the witness' expected testimony. No witness shall be used at the trial other than those disclosed in accordance with this rule except for good cause shown. Witnesses whose testimony will be offered in the form of a deposition shall be noted; and

- e. A list of and copies of all exhibits which the party intends to use at trial. If a party objects to the admission of an exhibit, **LISTED ON ANOTHER PARTY'S DISCLOSURE STATEMENT**, the **OBJECTING** party shall file a notice of objection and the specific grounds for each objection and provide a copy of the notice to all parties and the court within ten (10) days of receipt of the exhibit. Specific objections or grounds not identified in the notice shall be deemed waived, unless otherwise ordered by the court. No exhibits shall be used during the trial other than those disclosed in accordance with this rule, except for good cause shown.

F. A COPY OF ALL DOCUMENTS WITHIN THE PARTY'S POSSESSION THAT MAY BE SUBJECT TO DISCLOSURE.

3. CONTINUING DUTY TO DISCLOSE POST DEPENDENCY ADJUDICATION.

UNLESS OTHERWISE ORDERED BY THE COURT, ANY DOCUMENT RECEIVED OR PREPARED BY THE PARTY FOLLOWING THE DEPENDENCY ADJUDICATION SHALL BE DISCLOSED WHENEVER NEW OR DIFFERENT INFORMATION IS DISCOVERED OR REVEALED BUT IN NO EVENT MORE THAN FORTY-FIVE (45) DAYS AFTER THE INFORMATION IS REVEALED TO OR DISCOVERED BY THE DISCLOSING PARTY. IF A HEARING IS SCHEDULED PRIOR TO THE EXPIRATION OF THE FORTY-FIVE (45) DAYS, DISCLOSURE SHALL BE MADE PRIOR TO THE HEARING.

C. Time Limits for Disclosure in Guardianship Proceedings.

1. Documentary Evidence. Any document received by or prepared by the party **SINCE THE MOST RECENT DISCLOSURE** shall be disclosed within ~~five (5)~~ **THIRTY (30)** days ~~of receipt~~ **AFTER THE INITIAL HEARING**. ~~If a hearing is scheduled prior to the expiration of the five (5) days, disclosure shall be made prior to the hearing.~~

2. Disclosure Statement Prior to Guardianship Adjudication Hearing. Unless otherwise ordered by the court, the parties shall disclose to each other the information in subsection (B)(2)(a-eF) of this rule and the report required by A.R.S. 8-872 (E) and Rule 61(D) within thirty (30) days of the initial hearing. The provisions of subsection (B)(2)(e) shall govern objections to the admissibility of exhibits.

D. Time Limits for Disclosure in Termination Proceedings.

1. Documentary Evidence. Any document received by or prepared by the party **SINCE THE MOST RECENT DISCLOSURE** shall be disclosed within ~~five (5)~~ **THIRTY (30)** days ~~of receipt~~ **AFTER THE INITIAL HEARING**. ~~If a hearing is scheduled prior to the expiration of the five (5) days, disclosure shall be made prior to the hearing.~~
 2. Disclosure Statement Prior to Termination Adjudication Hearing. Unless otherwise ordered by the court, the parties shall disclose to each other the information identified in subsection (B)(2)(a-eF) of this rule, and any social study prepared pursuant to A.R.S. 8-536 or by order of the court within thirty (30) days after the initial hearing. The provisions of subsection (B)(2)(e) shall govern admissibility of exhibits.
- E. Methods of Discovery. The parties may utilize methods of discovery as set forth in Rules 26-37, Ariz. R. Civ. P., upon the agreement of the parties. Absent such agreement, the party seeking to utilize such methods of discovery shall file a motion with the court requesting authorization to proceed and shall file a motion with the court requesting authorization to proceed and shall set forth the reasons why such methods are necessary. Failure to complete discovery prior to the date set for the dependency adjudication hearing does not constitute good cause or extraordinary circumstances for purposes of Rule 55B.
- F. Conclusion of Discovery. All discovery shall conclude upon the filing of an individual or a joint pre-trial statement, if ordered by the court or ten (10) days prior to an adjudication hearing. The court may permit the introduction of evidence obtained after the close of discovery upon a showing of good cause. Unless otherwise ordered by the

court, the parties may supplement the list of witnesses and exhibits to be used at the adjudication hearing no later than ten (10) days prior to the hearing.

G. Sanctions. Upon motion of a party or the court's own motion, the court may impose sanctions upon a party who fails to disclose information in a timely manner as required by this rule. Sanctions may include preclusion of the evidence, granting a continuance or entering any order against a party as deemed appropriate. **IN DETERMINING THE APPROPRIATE SANCTION, THE COURT SHALL CONSIDER THE EXTENT TO WHICH ANY PARTY WAS PREJUDICED DUE TO THE UNTIMELY DISCLOSURE.** Any sanction imposed should be in accordance with the intent of these rules, as set forth in Rule 36.

* * *

RESPECTFULLY SUBMITTED this 31st day of July, 2000.

Scott Bales
Solicitor General
Office of the Attorney General
1275 West Washington St.
Phoenix, Arizona 85007

Original and Six copies
Filed with the Clerk of
The Supreme Court, Room 402
1501 West Washington St.
Phoenix, Arizona 85007

Copy mailed this
31st day of July, 2000, to:

The Honorable William J. O'Neil
Pinal County Superior Court
100 N. Florence
P.O. Box 847
Florence, AZ 85232-0847

By M. G. Hoffman

JRTF 11.08.2019

RULES ON TODAY'S AGENDA

The rules are in numerical order.

There is a clean version of each proposed rule, followed by a redline showing changes to the rule as it appeared in the spiral booklet, except for WG-2's new rules X and XX.

PART I. GENERAL PROVISIONS

Rule 1. Scope and Construction

(a) Scope. These rules apply in all juvenile court proceedings, including delinquency, incorrigibility, diversion, dependency, emancipation, in-home intervention, extended foster care, Title 8 guardianship, termination of parental rights, and adoption.

(b) Construction. Parties should use these rules, and courts should construe and enforce them, in a manner that is in the child's best interests, and that ensures a simple and fair resolution of juvenile proceedings, reduces unnecessary delay and expense, protects individual rights, and preserves the public welfare.

Derivation: Section (a): from current Rule 1(A).

PART I. GENERAL PROVISIONS

Rule 1. Scope and Construction [~~Staff Note: Current Rule 1 packs a variety of subjects into a single rule. This draft presents each of those subjects separately. Draft Rule 1 therefore serves as an introductory rule.~~]

- (a) **Scope.** These rules ~~govern~~ apply in [~~Staff Note: The current rule uses the word “govern,” but perhaps the words “apply in” should be substituted, because statutes also “govern” juvenile court procedures~~] proceedures all juvenile court proceedings, including ~~proceedures~~ delinquency, ~~and~~ incorrigibility, ~~actions~~, diversion, dependency, emancipation, in-home intervention, extended foster care, Title 8 guardianships, termination of parental rights, and ~~adoptions~~. [~~Staff Note: The current rule, and this draft, omit emancipation proceedings. Should the draft provision include emancipation? See further Rules 88 et seq.~~]
- (b) **Construction.** Parties should use these rules, and courts should construe ~~these rules, and courts should~~ and enforce them, in a manner that is in the child’s best interests, and that ensures a simple and fair resolution of juvenile proceedings, reduces unnecessary delay and expense, protects individual rights, and preserves the public welfare. [~~Staff Note: Current Juvenile Rule 1 does not have a similar provision, but Civil Rule 1, Criminal Rule 1, Family Rule 1, and Probate Rule 1 all contain a “construction” provision. This proposed provision is derived from Criminal Rule 1.2 and FLR 1(b).~~]

Derivation: Section (a): from current Rule 1(A).

Rule 2. Definitions [Staff Note: Current Rule 1 includes the word “definitions” in its title, but the rule contains only two definitions: “juvenile” and “authorized transcriber.” Draft Rule 2 is new. Other rule restyling committees found it useful to have a comprehensive set of definitions near the beginning of the rules. See, for examples, Criminal Rule 1.4, FLR 3, and Probate Rule 2.]

- (a) **“ARCAP”** means the Arizona Rules of Civil Appellate Procedure.
- (b) **“Authorized transcriber”** means a certified court reporter or a transcriber under contract with an Arizona court. [Staff Note: The preceding sentence was derived from current Rule 1(C).] References to a “reporter” or “transcriber” include the plural if there was more than one reporter or transcriber in a case.
- (c) **“Civil Rule”** means a rule in the Arizona Rules of Civil Procedure.
- (d) **“Clerk”** means the superior court clerk, ~~sometimes referred to as the “juvenile court clerk,”~~ unless specified otherwise. The Supreme Court clerk and the Court of Appeals clerk are referred to by those titles, or if the context warrants, as the “appellate clerk.”
- (e) **“Criminal Rule”** means a rule in the Arizona Rules of Criminal Procedure.
- (f) **“DCS”** means the Arizona Department of Child Safety. [Staff Note: Statutes also use the “DCS” abbreviation; for example, see A.R.S. §§ 8-201, 8-455, 8-456, 8-807.]
- (g) **“Family Law Rule”** means a rule in the Arizona Rules of Family Law Procedure.
- (h) **“FFPSA”** means the Family First Prevention Services Act as codified in the Bipartisan Budget Package/Continuing Resolution (Public Law 115-123).
- (i) **“Fiduciary”** includes a personal representative, guardian, conservator and trustee.. [Staff Note: “Fiduciary” appears for the first and only time in these rules in Rule 104, concerning appeals. The word is not defined in Rule 104 and it’s not clear what it means in the context that it is used.] [This definition comes from A.R.S. § 14-1201, the probate code definitions section.]
- (j) **“Guardian ad Litem”** means....
- (k) **“ICWA”** means the Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963, and Part 23 of Title 25 of the Code of Federal Regulations (“Regulations”), including any amendments to those provisions, or, if required by the context of a Juvenile Rule, either the Act or the Regulations. [Derivation and Staff Note: This is derived from current Rule 8(A). If a current rule says that “the court must proceed pursuant to ICWA and the regulations,” a draft rule providing that “the court must proceed pursuant to ICWA” would therefore include the regulations.]

- (l) **“Judicial officer”** includes a judge, a judge pro tempore, and a commissioner. [Staff Note: This is derived in part from current Rule 2.]
- (m) **“Juvenile”** means a person under the age of 18 years and may be referred to in these rules as a “child,” “youth,” or “minor.” “Juvenile” also includes a person who is under the age of 19 years if the juvenile court has retained jurisdiction over that person under A.R.S. § 8-202(H). [Staff Note: This is derived from current Rule 1(B).]
- (n) **“Juvenile court”** means a division or department of the superior court designated to preside over juvenile court proceedings, as provided in Rule 1(a).
- (o) **“Presiding judge”** means “presiding judge of the juvenile court,” unless these rules specify otherwise.
- (p) **“State”** means the State of Arizona.
- (q) **“Supreme Court Rule”** means a rule in the Rules of the Supreme Court of Arizona.
- (r) **“UCCJEA”** means the Uniform Child Custody Jurisdiction and Enforcement Act, A.R.S. §§ 25-1001 to 25-1067, which defines a “[c]hild custody proceeding” under the Act to include “a proceeding for divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights and protection from domestic violence, in which legal custody, physical custody or visitation with respect to a child is an issue or in which that issue may appear.” § 25-1002(4).

COMMENT TO 2022 AMENDMENT

This rule does not provide a comprehensive set of definitions. Other terms are defined throughout these rules as well as by statute, including A.R.S. § 8-101 (definitions relating to adoption), A.R.S. § 8-201 (definitions relating to the juvenile court), A.R.S. § 501 (definitions relating to child welfare and placement), and A.R.S. § 8-531 (definitions relating to termination of parental rights).

Staff Note: New Family Law Rule 5.1 (“Simultaneous Dependency and Legal Decision-Making/Parenting Time Orders”) contains references to the juvenile court. If there is going to be a new Juvenile Rule that corresponds to FLR 5.1, then these definitions might need to include “Family Law Rule.” [WG1 Note: A recent court of appeals case discusses the interplay between Title 8, ICWA, and the UCCJEA in the context of a private dependency case. *Holly C. v. Tohono O’Odham Nation, G.C., and Brian S.*, ___ Ariz. ___ (Ariz. App. Div. 2 2019).]

Rule 2. Definitions [Staff Note: Current Rule 1 includes the word “definitions” in its title, but the rule contains only two definitions: “juvenile” and “authorized transcriber.” Draft Rule 2 is new. Other rule restyling committees found it useful to have a comprehensive set of definitions near the beginning of the rules. See, for examples, Criminal Rule 1.4, FLR 3, and Probate Rule 2.]

- (a) **“ARCAP”** means the Arizona Rules of Civil Appellate Procedure.
- (b) **“Authorized transcriber”** means a certified court reporter or a transcriber under contract with an Arizona court. [Staff Note: The preceding sentence was derived from current Rule 1(C).] References to a “reporter” or “transcriber” include the plural if there was more than one reporter or transcriber in a case.
- (c) **“Civil Rule”** means a rule in the Arizona Rules of Civil Procedure.
- (d) **“Clerk”** means the superior court clerk, ~~sometimes referred to as the “juvenile court clerk,” unless specified otherwise.~~ ~~For clarity in the context of rules concerning appeals from the juvenile court, the clerk is sometimes referred to as the “juvenile court clerk.”~~ The Supreme Court clerk and the Court of Appeals clerk are referred to by those titles, or if the context warrants, as the “appellate clerk.”
- (e) **“Criminal Rule”** means a rule in the Arizona Rules of Criminal Procedure.
- (f) **“DCS”** means the Arizona Department of Child Safety. [Staff Note: Statutes also use the “DCS” abbreviation; for example, see A.R.S. §§ 8-201, 8-455, 8-456, 8-807.]
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- ~~(g)~~(j) **“Guardian ad Litem”** means...
- ~~(h)~~(k) **“ICWA”** means the Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963, and Part 23 of Title 25 of the Code of Federal Regulations (“Regulations”), including any amendments to those provisions, or, if required by the context of a Juvenile Rule, either the Act or the Regulations. [Derivation and Staff Note: This is derived from current Rule 8(A). If a current rule says that “the court must proceed pursuant to

ICWA and the regulations,” a draft rule providing that “the court must proceed pursuant to ICWA” would therefore include the regulations.]

(j)(l) “**Judicial officer**” includes a judge, a judge pro tempore, and a commissioner. [Staff Note: This is derived in part from current Rule 2.]

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(j)(n) “**Juvenile court**” means a division or department of the superior court designated to preside over juvenile court proceedings, as provided in Rule 1(a).

(k)(o) “**Presiding judge**” means “presiding judge of the juvenile court,” unless these rules specify otherwise.

(h)(p) “**State**” means the State of Arizona.

(q) “**Supreme Court Rule**” means a rule in the Rules of the Supreme Court of Arizona.

(m)(r) “**UCCJEA**” means the Uniform Child Custody Jurisdiction and Enforcement Act, A.R.S. §§ 25-1001 to 25-1067, which defines a “[c]hild custody proceeding” under the Act to include “a proceeding for divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights and protection from domestic violence, in which legal custody, physical custody or visitation with respect to a child is an issue or in which that issue may appear.” § 25-1002(4).

COMMENT TO 2022 AMENDMENT

This rule ~~is not intended to~~ does not provide a comprehensive set of definitions. Other terms are defined throughout these rules as well as by statute, including A.R.S. § 8-101 (definitions relating to adoption), A.R.S. § 8-201 (definitions relating to the juvenile court), A.R.S. § 501 (definitions relating to child welfare and placement), and A.R.S. § 8-531 (definitions relating to termination of parental rights).

Staff Note: New Family Law Rule 5.1 (“Simultaneous Dependency and Legal Decision-Making/Parenting Time Orders”) contains references to the juvenile court. If there is going to be a new Juvenile Rule that corresponds to FLR 5.1, then these definitions might need to include “Family Law Rule.” [WG1 Note: A recent court of appeals case discusses the interplay between Title 8, ICWA, and the UCCJEA in the context of a private dependency case. *Holly C. v. Tohono O’Odham Nation, G.C., and Brian S.*, Ariz. _____ (Ariz. App. Div. 2 2019).]

Rule 3. Priority of Proceedings; Conducting Proceedings; Applicability of Other Rules

- (a) Priority.** Juvenile court proceedings have priority over other proceedings.-
- (b) Informality.** Juvenile court proceedings must be conducted as informally as the requirements of due process and fairness allow.
- (c) Order of Trial.** A trial under these rules proceeds like the trial of a civil action by the court sitting without a jury. But in a delinquency or an incorrigibility proceeding the juvenile may not be compelled to be a witness.
- (d) Applicability of Other Rules of Procedure.** The Civil, Civil Appellate, Criminal, Family Law, Probate, Protective Order and Supreme Court Rules are applicable only as specifically set forth or incorporated by reference in these rules. [Text to be determined. These rules occasionally refer to the Civil, Criminal, Supreme, and Civil Appellate Rules.]
- (e) Applicability of the Arizona Rules of Evidence.** The Arizona Rules of Evidence apply to juvenile court proceedings, except as provided by these rules or by agreement of the parties.

[WG1 Note: Consider a unified standard when the Arizona Rules of Evidence are not applicable: “Any non-privileged evidence tending to make a fact at issue more or less probable is admissible unless the court determines the evidence lacks reliability or will cause unfair prejudice, confusion or waste time.” *See also* References to Rules of Evidence or Standards of Admissibility.]

[WG1 Note 2: The restyled Probate Rules, eff. January 1, 2020, provides as follows in Rule 4(a) with respect to applicability of the rules of evidence:

(2) Rules of Evidence.

(A) Contested Hearings. The Arizona Rules of Evidence apply in contested hearings unless all parties and the court agree those rules will not apply.

(B) Uncontested Hearings. The Arizona Rules of Evidence do not apply in uncontested hearings.

(C) Admissibility of Evidence When the Arizona Rules of Evidence Do Not Apply. When the Arizona Rules of Evidence do not apply, all relevant evidence is admissible, except the court may exclude any relevant evidence if its probative value is outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, needlessly presenting cumulative evidence, or lack of reliability.]

Staff Note: For example, the delinquency and dependency rules don't address such things as a motion for reconsideration (except for a motion to reconsider the denial of adoption certification under Rule 77C), or a motion for new trial.

Derivation:

- Sections (a) and (b): from current Rule 6,
- Section (c): from current Rule 7, and
- Section (d): tbd.

Staff Note: A.R.S. section 8-291.01(B) provides in part, "The court shall not order a juvenile who is under the jurisdiction of the juvenile court to participate in a treatment program for the restoration of competency unless the court made a prior finding of probable cause pursuant to rule 3(f), rules of procedure for the juvenile court." Rule 3(f) is an incorrect cross-reference. What is the correct reference? [The correct reference is current Rule 23(D),]

Rule 3. Priority of Proceedings; Conducting Proceedings; Applicability of Other Rules

(a) **Priority.** Juvenile court proceedings have priority over other proceedings ~~in state court.~~ ~~[Staff Note: This section derives from current Rule 7, which says “priority over all other state court proceedings. Should “state court” in this draft be changed to “the superior court?”].~~

(b) **Informality.** Juvenile court proceedings must be conducted as informally as the requirements of due process and fairness allow.

(c) **Order of Trial.** A trial under these rules proceeds like the trial of a civil action by the court sitting without a jury. But in a delinquency or an incorrigibility proceeding the juvenile may not be compelled to be a witness.

(d) **Applicability of ~~Criminal and Civil~~ Other Rules of Procedure.** The Civil, Civil Appellate, Criminal, Family Law, Probate, Protective Order and Supreme Court Rules are applicable only as specifically set forth or incorporated by reference in these rules. [Text to be determined. These rules occasionally refer to the Civil, Criminal, Supreme, and Civil Appellate Rules.]

~~(1) In Delinquency and Incorrigibility Proceedings.~~

~~(2) In Dependency, Guardianship, Termination, and Adoption Proceedings.~~

(e) **Applicability of the Arizona Rules of Evidence.** The Arizona Rules of Evidence apply to juvenile court proceedings, except as provided by these rules or by agreement of the parties.

[WG1 Note: ~~Possible~~ Consider a unified standard when the Arizona Rules of Evidence are not applicable: “Any non-privileged evidence tending to make a fact at issue more or less probable is admissible unless the court determines the evidence lacks reliability or will cause unfair prejudice, confusion or waste time.” See also References to Rules of Evidence or Standards of Admissibility.]

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(C) Admissibility of Evidence When the Arizona Rules of Evidence Do Not Apply. When the Arizona Rules of Evidence do not apply, all relevant evidence is admissible, except the court may exclude any relevant evidence if its probative value is outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, needlessly presenting cumulative evidence, or lack of reliability.]

Staff Note: For example, the delinquency and dependency rules don't address such things as a motion for reconsideration (except for a motion to reconsider the denial of adoption certification under Rule 77C), or a motion for new trial.

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- Sections (a) and (b): from current Rule 6,
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Rule 4. Indian Child Welfare Act (“ICWA”)

(a) Application. The court must apply ICWA when required by law.

(b) Inquiry. At the beginning of any proceeding involving dependency, termination, or Title 8 guardianship, the court must inquire if any party has reason to believe that the child named in the petition is subject to ICWA. This inquiry is not necessary if the court has already determined that ICWA applies. [**WG Note:** Consider legislative change to A.R.S. § 8-815.]

(c) Excluded Proceedings.

(1) *Delinquency and Incurigibility.* ICWA does not apply in delinquency or incurigibility proceedings unless there is an out-of-home placement.

(2) *Criminal Transfers.* ICWA does not apply to criminal transfer proceedings involving an Indian child.

(d) Findings. If the court determines or has reason to know the child is an Indian child as defined by ICWA, the court must make the findings required under ICWA. The court must then treat the child as an Indian child unless and until the court enters a determination on the record that the child does not meet the definition of an Indian child under ICWA.

(e) Jurisdiction. If the court determines or has reason to know a child is an Indian child and the proceeding is for out-of-home placement or termination of parental rights, the court must determine whether to order a transfer of the proceeding to a tribal court according to the ICWA standards.

Rule 4. Indian Child Welfare Act (“ICWA”)

(a) Application. ~~The court must apply the requirements of ICWA when applicable. governs [Staff Note: Should “governs” be changed to “applies in” because ICWA may not be the only authority in those proceedings? juvenile court proceedings that are subject to ICWA. The court must apply ICWA when required by law.~~

(b) Inquiry. At the beginning of any proceeding involving dependency, termination, or Title 8 guardianship, the court must inquire if any party has reason to believe that the child named in the petition is subject to ICWA. This inquiry is not necessary if the court has already determined that ICWA applies. [WG Note: Consider legislative change to A.R.S. § 8-815.]

~~(b)~~**(c) Excluded Proceedings.**

(1) Delinquency and Incurribility. ICWA does not apply in delinquency or incurribility proceedings ~~when~~ unless there is ~~no~~ an out-of-home placement.

(2) Criminal Transfers. ICWA does not apply to criminal transfer proceedings involving an Indian child.

~~**(c) Inquiry.** At the beginning of any proceeding involving dependency, termination, or guardianship, the court must inquire if any party has reason to believe that the child named in the petition is subject to ICWA. This inquiry is not necessary if the court has already determined that ICWA applies. [Staff Note: This was added; it derives from A.R.S. § 8-815. Including this provision in Rule 4 might eliminate the need to repeat this provision in several dependency rules. TM comment: I sent a note to Workgroup 3 to let them know of this addition.]~~

(d) Findings. If the court determines or has reason to know the child is an Indian child as defined by ICWA, the court must make the findings required under ICWA. The court must then treat the child as an Indian child unless and until the court enters a determination on the record that the child does not meet the definition of an Indian child under ICWA.

(e) Jurisdiction. If the court determines or has reason to know a child is an Indian child and the proceeding is for ~~foster care~~ out-of-home placement ~~[Staff Note: Should “foster care placement” be replaced by “out of home placement”?]~~ or termination of parental rights, the court must determine whether to order a transfer of the proceeding to a tribal court according to the ICWA standards in 25 U.S.C. § 1911(b) and 25 C.F.R. §§ 23.115-119. ~~[Staff Note: To be consistent with the convention in these draft rules, the statutory reference should be deleted and replaced by “ICWA,” which includes the federal statutes and the regulations.]~~

~~Question~~ What, if anything, are we doing with the COMMENTS sections?

Rule X. Scope of the Delinquency Rules [new]

(a) Application. These delinquency rules apply to delinquency proceedings in the superior court and in limited jurisdiction courts.

(b) Incurrigibility. Courts should construe the delinquency rules as applicable to incurrigibility proceedings.

Rule XX. Definitions [Cross reference current Rule 9]

Content to be determined.

Rule 10. Appointment of an Attorney

- (a) Right to an Attorney.** A juvenile has the right to be represented by an attorney in all delinquency proceedings initiated by a petition.
- (b) Appointment of an Attorney.** Upon the filing of a petition, the court must appoint an attorney for the juvenile if the court finds that the juvenile is indigent. “Indigent” means that a juvenile is not financially able to retain an attorney. A juvenile is presumed indigent and has the right to be represented by a court-appointed attorney as provided in A.R.S. Title 8. The court may order the juvenile to provide proof of financial resources by completing the court’s financial questionnaire.
- (c) Manner of Appointment.** The court must provide a copy of its order or minute entry appointing an attorney to the juvenile, the juvenile’s parent, guardian, or custodian, the appointed attorney, and the State.
- (d) Assessment of the Cost of a Court-Appointed Attorney.** The court may order the juvenile’s parent, guardian, or custodian to pay a reasonable portion of the cost of the appointed attorney after requiring the parent, guardian, or custodian to complete the court’s financial questionnaire, or questioning them about their available financial resources. This section does not apply to the DCS, ADJC, or a foster parent.
- (e) Waiver of Counsel.** A juvenile may waive the right to an attorney if the court finds, after a colloquy with the juvenile and considering the juvenile’s age, education and apparent maturity, that the juvenile’s waiver is knowing, intelligent, and voluntarily. A waiver of the right to an attorney must be in writing or in a minute entry. The court should obtain a waiver of an attorney in the presence of the juvenile’s parent, guardian or custodian. ~~If there is a conflict of interest between the juvenile and the parent, guardian or custodian, the court must impose safeguards on the waiver to protect the best interests of the juvenile.~~

Rule 10. Appointment of an Attorney for a Juvenile

~~Staff Note: This rule does not include a provision on when the court should make the appointment, e.g., upon arrest, upon filing a petition, at the juvenile's initial court appearance. Should it include such a provision?~~

~~(a) Right to an Attorney.~~ A juvenile has the right to be represented by an attorney in all delinquency ~~and incorrigibility~~ proceedings initiated by a petition as provided by law.

~~(a) Appointment of an Attorney.~~ The Upon the filing of a petition, the court must appoint an attorney for the juvenile if the court finds that the juvenile is indigent.

~~(b) Finding of Indigent.~~

~~(b) Meaning of Indigent.~~ “Indigent” means that a ~~person juvenile~~ [Staff Note: Does “a person” referred to in this provision refer only to the juvenile, or does it include the juvenile’s parent, guardian, or custodian? See the next subpart.] is not financially able to retain an attorney. A juvenile is presumed indigent and has the right to be represented by a court-appointed attorney as provided in A.R.S. Title 8. The court may order the juvenile to provide proof of financial resources by completing the court’s financial questionnaire.

~~(c) Manner of Appointment.~~ The court must provide a copy of its order or minute entry appointing an attorney to the juvenile, the juvenile’s parent, guardian, or custodian, the appointed attorney, and the State.

~~(1)~~

~~(2)~~ (d) Determination Assessment of the Cost of a Court-Appointed Attorney. The court may order the juvenile, or the juvenile’s parent, guardian, or custodian, to provide proof of financial resources by completing the court’s financial questionnaire. The court also may question the parent, guardian, or custodian under oath about their available financial resources. ~~If the court determines the juvenile is entitled to appointed counsel,~~ the court may order the juvenile’s parent, guardian, or custodian to pay a reasonable portion of the cost of the appointed attorney after requiring the parent, guardian, or custodian to complete the court’s financial questionnaire, or questioning them about their available financial resources. This section does not apply to the DCS, ADJC, or a foster parent.

~~(e) Manner of Appointment.~~ The court must provide a copy of its order or minute entry appointing, or denying the appointment of, an attorney to the juvenile, parent, guardian, or custodian, the appointed attorney, and the State.

~~(d)~~(e) **Waiver of Counsel.** A juvenile may waive the right to an attorney if the court finds, after a colloquy with the juvenile and considering the juvenile's age, education and apparent maturity, that the juvenile's waiver is knowing, intelligent, and voluntarily. A waiver of the right to an attorney must be in writing or in a minute entry. ~~[Staff Note: Isn't a waiver obtained on the record in open court?]~~ The court should obtain a waiver of an attorney in the presence of the juvenile's parent, guardian or custodian. ~~If there is a conflict of interest between the juvenile and the parent, guardian or custodian, the court must impose safeguards on the waiver to protect the best interests of the juvenile.~~

Rule 11. Attorney's Appearance

- (a) Appearance.** An attorney, whether court-appointed or privately retained, must enter an appearance by personally appearing in open court and advising the court that he or she is representing the juvenile, or by filing a notice of appearance and providing copies to the assigned judicial officer and the State.
- (b) Withdrawal of an Attorney.** Unless the court orders otherwise, a court-appointed attorney is relieved of representing a juvenile (1) if no hearings are scheduled, and (2) the time for filing a notice of appeal has expired.

Rule 11. Attorney's Appearance

- (a) **Appearance.** An attorney, whether court-appointed or privately retained, must enter an appearance by personally appearing in open court and advising the court that he or she is representing ~~a party~~the juvenile, or by filing a notice of appearance and providing copies to the assigned judicial officer and the State. [~~Staff Note: Current Rule 9 defines parties as the juvenile and the State. Appointed defense counsel shouldn't need to provide the notice of appearance to the juvenile, which is counsel's own client, and staff accordingly changed "all parties" in the current rule to "the State" in this draft. But is the State, which has filed the petition, required to provide a notice of appearance? If so, this section will need to be modified.~~]
- (b) **Withdrawal of an Attorney.** Unless the court orders otherwise, ~~an a court-~~appointed attorney is relieved of representing a juvenile [~~appointed to represent a juvenile~~] ~~must represent the juvenile until~~ (1) if no hearings are scheduled, and (1~~2~~) the time for filing a notice of appeal has expired. in any pending matter has expired, and (2) ~~no hearings are scheduled. An attorney may file a notice of withdrawal at that time advising of the date the appeal time expired and that no hearing is pending.~~

PART III: DEPENDENCY, GUARDIANSHIP, AND TERMINATION OF PARENTAL RIGHTS

BEGINNING OF SUBPART 1 [“GENERAL PROVISIONS”]

Rule 36. Scope of Rules

- (a) Application.** Rules in Part III govern procedures in dependency, in-home intervention, extended foster care, Title 8 guardianship, and termination of parental rights cases.
- (b) Interpretation.** The court should interpret the rules in Part III in a manner that protects the child’s best interests [and gives paramount consideration to the child’s health and safety. Magdalena will f/u on this last phrase]

PART III: DEPENDENCY, GUARDIANSHIP, AND TERMINATION OF PARENTAL RIGHTS

BEGINNING OF SUBPART 1 [“GENERAL PROVISIONS”]

Rule 36. ~~Application and Interpretation~~ Scope of Rules [Staff Note: This is a new title. The current title is the same as the subpart title, i.e., “scope of rules.”]

- (a) **Application.** Rules in Part III govern procedures in dependency, in-home intervention, extended foster care, Title 8 guardianship, and termination of parental rights, ~~and Title 8 guardianship~~ cases.
- (b) **Interpretation.** The court should interpret the rules in Part III in a manner that protects the child’s best interests [and gives paramount consideration to the child’s health and safety. Magdalena will f/u on this last phrase]

Rule 37. Meaning of Terms

(a) **“Party”** means a child, parent, guardian, the DCS or other petitioner, and any person, Indian tribe, or entity who has been permitted to intervene pursuant to Civil Rule 24 [WG Note: see Judge Warner’s draft juvenile rule] or ICWA.

(b) **“Participant”** includes a current placement, a foster parent in whose home the child resided within the last six months, a non-intervening tribe, other person permitted by the court or authorized by law to participate in the proceedings, or more than one of the foregoing. [Participants must be notified of all applicable proceedings, as required by law or court order.] [WG Note: WG will consider putting this bracketed sentence in a separate rule, which will also specify what it means to “participate” and the pertinent hearings that allow participation.]

[Staff Note: Would it be appropriate to include a definition of “parent,” such as “A parent includes the natural or adoptive mother or father of a child, or the child’s guardian or Indian custodian?” (See further the definitions of “parent” in Rules 68 and 89.) This would eliminate the need to repeat throughout these rules, “parent, guardian, or Indian custodian.” Also, would it be helpful to include a definition of “parental rights?” These rules, and particularly provisions concerning admonitions, repeatedly use the term “parental rights.” Is the meaning of this term clearly and universally understood, or should a rule explain it? WG Note: These are issues the workgroup defers for further consideration by the Task Force.]

(c) Definitions Under ICWA.

- (1) **Parent.** The term parent means any biological parent of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established.
- (2) **Indian Child.** The term Indian child means any unmarried person under the age of eighteen (18) and who is either a member of an Indian tribe or is eligible for membership in an Indian tribe and is the biological child of a member of the Indian tribe. The findings and elevated burden of proof required by the Indian Child Welfare Act shall not apply until the court finds that the child is either a member of an Indian tribe or is eligible for membership in an Indian tribe and is the biological child of a member of the Indian tribe.
- (3) **Indian Child’s Tribe.** The term Indian child’s tribe means the Indian tribe in which an Indian child is a member or eligible for membership or, in the case of an Indian child who is a member of or eligible for membership in more than one

tribe, the Indian tribe with which the Indian child has the more significant contacts.

- (4) ***Indian Custodian.*** The Indian custodian means any Indian person who has legal custody of an Indian child under tribal law or custom or under state law, or to whom temporary physical care, custody and control has been transferred by the parent of the child.
- (5) ***Indian Tribe.*** Indian tribe means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary of the Interior because of their status as Indians, including any Alaska Native village as defined in 43 U.S.C. 1602(c).
- (6) ***Extended Family Member.*** The term extended family member means a person as defined by law or custom of the Indian child's tribe, or, in the absence of such law or custom, means a person who has reached the age of eighteen (18) and who is the Indian child's grandparent, aunt or uncle, sister or brother, sister-in-law or brother-in-law, niece or nephew, first or second cousin, or step-parent.
- (7) ~~***Foster Care or Preadoptive Placement Preferences.***~~ Any child accepted for foster care or preadoptive placement shall be in the least restrictive setting which most approximates a family and in which the child's special needs, if any, may be met. The child shall be placed within a reasonable proximity to the child's home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with:
- (A) ~~a member of the Indian child's extended family;~~
 - (B) ~~a foster home licensed, approved or specified by the Indian child's tribe;~~
 - (C) ~~an Indian Foster home licensed or approved by an authorized non-Indian licensing authority;~~
 - (D) ~~an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the child's needs.~~

WG Note: The workgroup recommends retaining definitions(1) through (6), but item 7 regarding placement preferences is not a definition and might be relocated into a separate rule, possibly Rule 51.

WG Note: Include in the rule on attorney responsibilities the duty to be familiar with ICWA. Also consider adding a comment like what is in J. Bales comment in R-00-0004.

Rule 37. Meaning of Terms

- (a) **“Party”** ~~in a dependency or termination proceeding~~ means a child, parent, guardian, the DCS or other petitioner, and any person, Indian tribe, or entity who has been permitted to intervene pursuant to Civil Rule 24 [WG Note: see Judge Warner’s draft juvenile rule] or ICWA.
- (b) **“Participants”** includes ~~a foster parents and other persons~~ current placement, a foster parent in whose home the child resided within the last six months, a non-intervening tribe, other person permitted by the court or authorized by law to participate in the proceedings, or more than one of the foregoing. [Participants must be notified of all applicable proceedings, as required by law or court order.] [WG Note: WG will consider putting this bracketed sentence in a separate rule, which will also specify what it means to “participate” and the pertinent hearings that allow participation.]

[**Staff Note:** Would it be appropriate to include a definition of “parent,” such as “A parent includes the natural or adoptive mother or father of a child, or the child’s guardian or Indian custodian?” (See further the definitions of “parent” in Rules 68 and 89.) This would eliminate the need to repeat throughout these rules, “parent, guardian, or Indian custodian.” Also, would it be helpful to include a definition of “parental rights?” These rules, and particularly provisions concerning admonitions, repeatedly use the term “parental rights.” Is the meaning of this term clearly and universally understood, or should a rule explain it? WG Note: These are issues the workgroup defers for further consideration by the Task Force.]

- (c) ~~Definitions and Mandatory Placement Preferences pursuant to the Indian Child Welfare Act, 25U.S.C. 1903 and 1915 ;~~ Under ICWA.

~~[Staff Note: If the court can refer to the federal statutes, is this section necessary? Also, if the rule retains these explanations, the rule would require amendment if the statutes are modified.]~~

- (1) **Parent.** The term parent means any biological parent of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established.
- (2) **Indian Child.** The term Indian child means any unmarried person under the age of eighteen (18) and who is either a member of an Indian tribe or is eligible for membership in an Indian tribe and is the biological child of a member of the Indian tribe. The findings and elevated burden of proof required by the Indian Child Welfare Act shall not apply until the court finds that the child is either a

member of an Indian tribe or is eligible for membership in an Indian tribe and is the biological child of a member of the Indian tribe.

- (3) ***Indian Child's Tribe.*** The term Indian child's tribe means the Indian tribe in which an Indian child is a member or eligible for membership or, in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts.
- (4) ***Indian Custodian.*** The Indian custodian means any Indian person who has legal custody of an Indian child under tribal law or custom or under state law, or to whom temporary physical care, custody and control has been transferred by the parent of the child.
- (5) ***Indian Tribe.*** Indian tribe means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary of the Interior because of their status as Indians, including any Alaska Native village as defined in [43 U.S.C. 1602\(c\)](#).
- (6) ***Extended Family Member.*** The term extended family member means a person as defined by law or custom of the Indian child's tribe, or, in the absence of such law or custom, means a person who has reached the age of eighteen (18) and who is the Indian child's grandparent, aunt or uncle, sister or brother, sister-in-law or brother-in-law, niece or nephew, first or second cousin, or step-parent.
- (7) ***Foster Care or Preadoptive Placement Preferences.*** ~~Any child accepted for foster care or preadoptive placement shall be in the least restrictive setting which most approximates a family and in which the child's special needs, if any, may be met. The child shall be placed within a reasonable proximity to the child's home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with:~~
 - ~~(A) a member of the Indian child's extended family;~~
 - ~~(B) a foster home licensed, approved or specified by the Indian child's tribe;~~
 - ~~(C) an Indian Foster home licensed or approved by an authorized non-Indian licensing authority;~~
 - (D) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the child's needs.

WG Note: The workgroup recommends retaining definitions(1) through (6), but item 7 regarding placement preferences is not a definition and might be relocated into a separate rule, possibly Rule 51.

(D) WG Note: Include in the rule on attorney responsibilities the duty to be familiar with ICWA. Also consider adding a comment like what is in J. Bales comment in R-00-0004.

Rule 38. Assignment and Appointment of an Attorney[WG Note: Recommends changing “counsel” to “attorney” globally.]

(a) Assignment of an Attorney.

- (1) **Assignment.** The court must assign an attorney in a dependency proceeding to persons who are entitled to representation by law or by ICWA.
- (2) **Duration.** The assigned attorney must provide representation from notice of the assignment until the court formally appoints or otherwise relieves the assigned attorney.
- (3) **Limitation.** The assigned attorney is not attorney of record for purposes of accepting service of process for a parent, guardian, or Indian custodian who does not appear. [WG Note: Consider moving subpart (3) to the appointment provisions.]

[Staff Note: It appears that while indigency is a requirement for the appointment of an attorney, it is not a requirement for the assignment of counsel. If this is incorrect, these provisions will need to be modified.]

(b) Appointment of an Attorney. The court must appoint an attorney for an indigent person in a dependency proceeding who is entitled to an attorney under A.R.S. § 8-XXX. In determining whether a person is indigent, the court may order the person to provide proof of financial resources by completing and filing the court’s financial questionnaire. The court also may question the person under oath concerning their financial resources. If the court determines the person is not indigent, the court may order the person to pay a reasonable portion of the cost of an attorney, or it may deny the request to appoint an attorney.

(c) Manner of Appointment. The court must enter an order or issue a minute entry assigning, appointing, or denying a person an attorney.

Rule 38. Assignment, and Appointment of an Attorney [WG Note: Recommends changing “counsel” to “attorney” globally.]

(a) Assignment of an Attorney.

- (1) **Assignment.** The court must assign an attorney in a dependency proceeding to persons who are entitled to representation by law or by ICWA. ~~[Staff Note: Is ICWA not included in the phrase “by law?”]~~
- (2) **Duration.** The assigned attorney must provide representation from ~~the filing of a dependency petition notice of the assignment through the preliminary protective hearing, or~~ until the court formally appoints or otherwise relieves the assigned attorney. ~~[Staff Note: Does representation ever begin before a petition is filed? The answer appears to be “no,” but staff nonetheless poses the question.] [The attorney for a child shall meet with the child before the preliminary protective hearing, if possible, or if not possible, within fourteen (14) days after the preliminary protective hearing. The attorney for the child shall also meet with the child before all substantive hearings. Upon a showing of extraordinary circumstances, the judge may modify this requirement for any substantive hearing.] [Staff Note: The sentences within the brackets are redundant to Rule 40.1(D) and should be deleted.]~~
- (3) **Limitation.** The assigned attorney is not attorney of record for purposes of accepting service of process for a parent, guardian, or Indian custodian who does not appear ~~for the preliminary protective hearing.~~ [WG Note: Consider moving subpart (3) to the appointment provisions.]

[Staff Note: It appears that while indigency is a requirement for the appointment of an attorney, it is not a requirement for the assignment of counsel. If this is incorrect, these provisions will need to be modified.]

(b) Appointment of an Attorney. The court must appoint an attorney for an indigent person in a dependency proceeding who is entitled to an attorney counsel, as provided by law under A.R.S. § 8-XXX. ~~[Staff Note: Staff has an ongoing concern with inserting the phrase “as provided by law” repeatedly in these rules, as noted at the beginning of this draft.]~~ In determining whether a person is indigent, the court ~~must~~ ~~[may?]~~ may order the person to provide proof of financial resources by completing and filing the court’s financial questionnaire. The court also may question the person under oath concerning their financial resources. If the court determines the person is not indigent, the court may order the person to pay a reasonable portion of the cost of an attorney, or it may deny the request to appoint an attorney.

(c) **Manner of Appointment.** The court must enter an order or issue a minute entry assigning, appointing, or denying ~~counsel to~~ a person an attorney.

SUBPART 3. PERMANENT GUARDIANSHIP

Rule 61. Motion, Notice of Hearing, Service of Process, and Order for Permanent Guardianship

(a) Motion. Any party to a dependency proceeding may file a motion for permanent guardianship of a dependent child or a child who is the subject of a pending dependency petition filed by the DCS. The motion must contain all information required under A.R.S. §§ 8-871 and 8-872. If the child has not been adjudicated dependent, all parties must consent to the permanent guardianship. If any party objects to the motion, the court may schedule a settlement conference or mediation, or it may strike the motion and proceed with the dependency petition.

(b) Notice of Hearing. A notice of hearing must advise the parent, guardian, or Indian custodian of the location, date and time of the initial guardianship hearing. In addition to the information required by A.R.S. § 8-872, the notice of hearing must advise the parent, guardian, or Indian custodian that their failure to appear without good cause may result in a finding that they waived legal rights and are deemed to have admitted the allegations in the motion for guardianship. The notice also must advise the parent, guardian, or Indian custodian that the hearing may go forward in their absence and may result in the establishment of a permanent guardianship based upon the record and evidence presented.

(c) Service.

(1) The moving party must serve the motion for guardianship and notice of hearing on the parties pursuant to Civil Rule 5(c).

(2) If the motion alleges or the court has reason to know the child at issue is an Indian child, then in addition to service of process as required by this rule, the moving party must also give notification to the child's parent or Indian custodian and tribe by registered [WG Note: or certified?] mail with return receipt requested. If the identity or location of the parent or Indian custodian cannot be determined, the moving party must give notice by registered mail [WG Note: or certified?] to the Secretary of the Interior, who has 15 days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. The notice must advise the parent or Indian custodian and the tribe of their right to intervene.

(d) Hearing Involving an Indian Child. The court may not hold a hearing until at least 10 days after receipt of notice by the child's parent or Indian custodian and the tribe or the Secretary of the Interior. On written request by the parent, Indian custodian, or tribe, the court must grant up to 20 additional days to prepare for the hearing. The child's parent, Indian custodian, or tribe may waive the 10-day

notice requirement for purposes of proceeding with the initial guardianship hearing.

(e) Service of the Notice of Hearing on Other Persons. In addition to service of the notice of hearing upon the parties, the moving party must also provide a copy of the notice of hearing to the following persons:

- (1) the child's current physical custodian;**
- (2) any foster parent with whom the child has resided within six (6) months prior to the date of the hearing;**
- (3) the prospective guardian if the guardian is not the current physical custodian; and**
- (4) any other person the court orders to be provided with the notice of hearing.**

(f) Investigation and Report.

- (1) After the filing of a motion for guardianship, the court must order the DCS, if it is legal custodian of the child, to conduct an investigation and prepare a report for the initial guardianship hearing addressing whether the prospective guardian is a fit and proper person to become guardian of the child and whether it is in the best interests of the child to grant the guardianship.**
 - (2) If the DCS is not the legal custodian, the court may order the child's attorney or a guardian ad litem to prepare and file this report.**
 - (3) If the child is an Indian child, the report must address whether the prospective guardian falls within the placement preferences required under ICWA or whether good cause exists to deviate from the placement preferences.**
 - (4) A copy of the report must be provided to the parties and the court at least 10 days before the initial guardianship hearing.**
- (e) Other Orders.** Pending the hearing, the court may enter other orders that it determines are in the child's best interests.

SUBPART 34. PERMANENT GUARDIANSHIP AND SUCCESSOR PERMANENT GUARDIANSHIP [~~Staff Note: Suggest that the words “and successor permanent guardianship” be deleted from the subpart title, because the successor guardian is a variant of a permanent guardian.~~]

Rule 61. Motion, Notice of Hearing, Service of Process, and Order for Permanent Guardianship

~~(e) (a) Motion. Any party to a dependency proceeding for permanent guardianship may file a motion for permanent guardianship of a dependent child or a child who is the subject of a pending dependency proceeding petition filed by the DCS. The motion must contain all information required under A.R.S. §§ 8-871 and 8-872. If the child has not been adjudicated dependent, all parties must consent to the permanent guardianship. If any party objects to the motion, the court may schedule a settlement conference or mediation, or it may strike the motion and proceed with the dependency petition. If the court determines that the establishment of a permanent guardianship is in the best interests of a dependent child or a child who is the subject of a pending dependency petition that was filed by the DCS, and all parties agree, the court shall [Staff Note: Should this be “must” or “may?”] order that a motion for guardianship be filed by DCS or by the child’s attorney or guardian ad litem within 10 days. [Staff Note: A question about the preceding sentence: A.R.S. § 8-872 (“permanent guardianship; procedure”) does not contain these requirements. The statute says, “any party to a dependency proceeding or a pending dependency proceeding may file a motion for permanent guardianship.” What is the origin of the requirements that the court order, and that all parties agree, to the filing of a motion?] The motion must contain all information required by law [Staff Note: Would that be the information required under A.R.S. § 8-872? If so, shouldn’t the rule refer to the statute?] and under the Regulations, must state whether there is reason to know the child is an Indian Child as defined by ICWA [Staff Note: if the answer to the last question is “yes,” then this reference to ICWA can be deleted because the statute refers to ICWA.].~~

~~(d) (b) Notice of Hearing. A notice of hearing must advise the parent, guardian, or Indian custodian of the location, date and time of the initial guardianship hearing. In addition to the information required by A.R.S. § 8-872 law, t [Staff Note: What law does this refer to?], the notice of hearing must advise the parent, guardian, or Indian custodian that their failure to appear without good cause may result in a finding that ~~the~~ they waived legal rights and are ~~deemed~~ to have admitted the allegations in the motion for guardianship. The notice also must advise the parent, guardian, or Indian custodian that the hearing may go forward in their absence and may result in the establishment of a permanent guardianship based upon the record and evidence presented.~~

~~(g) Service.~~

(1) The moving party must serve the motion for guardianship and notice of hearing on the parties pursuant to Civil Rule 5(c).

~~(2) If the motion alleges or the court has reason to know the child at issue is an Indian child, then in addition to service of process as required by this rule, the moving party must also give notification to the child's parent or Indian custodian and tribe by registered [WG Note: or certified?] mail with return receipt requested. If the identity or location of the parent or Indian custodian cannot be determined, the moving party must give notice by registered mail [WG Note: or certified?] to the Secretary of the Interior, who has 15 days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. The notice must advise the parent or Indian custodian and the tribe of their right to intervene.~~

~~— Hearing Involving an of the Arizona Rules of Civil Procedure on the parties. [Staff Note: Staff relocated to a new Section (D) the requirement in Sections (B) and (C) to serve other persons. That was done because both the current rule and A.R.S. § 8-872(C) provide that these other persons only receive a copy of the notice, and not the motion, and this seems to be a clearer way of differentiating which documents need to be served.]~~

~~— (D1) If reason to know child is Indian eChild.~~

~~— (1) If the motion alleges or the court has reason to know the child at issue is an Indian child as defined by the ICWA, then in addition to service of process as required by this rule, the moving party must also give notification to the child's parent or, Indian custodian, and child's tribe. Notice by must be provided by registered or certified mail [Staff Note: A.R.S. § 8-872(B) says registered but not certified. However, for mailing a document with no monetary value, certified mail would be appropriate] mail with return receipt requested. If the identity or location of the parent or Indian custodian cannot be determined, the moving party must give notice by registered or certified mail to the Secretary of the Interior, who has 15 days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. The notice must advise the parent or Indian custodian and the tribe of their right to intervene.~~

~~(e) (22) 10-day period and waiver. The court may not hold a hearing until at least 10 days after receipt of notice by the child's parent or Indian custodian and the tribe or the Secretary of the Interior. On written request by the parent, Indian custodian, or tribe, the The court must grant up to 20 additional days to prepare for the hearing. if a request is made by the parent or Indian custodian or the tribe by registered or certified mail. [Staff Note: What is the rationale for requiring the parent or Indian custodian to request additional time only by registered or certified mail? Wouldn't ordinary first-class mail be sufficient?]~~

~~(h) Waiver.~~ [Staff Note: There is no subpart (2) in the current rule, and this subheading is therefore unnecessary.] After receipt of notice, tThe child's parent,^s Indian custodian, ~~and/or~~ the child's tribe may waive the 10-day notice requirement for purposes of proceeding with the initial guardianship hearing^e

~~(f) (e) within the time limit as provided by state law.~~ [Staff Note: Wouldn't it be clearer to specify that time limit than say "as provided by state law?"]

~~(g) (Ed)~~ **Service of the Notice of Hearing on Other Persons.** In addition to service of the notice of hearing upon the parties, the moving party must also provide a copy of the notice of hearing to the following persons:

~~(h)(1)~~ **(1)** the child's current physical custodian;

~~(i)(2)~~ **(2)** any foster parent with whom the child has resided within six (6) months prior to the date of the hearing;

~~(j)(3)~~ **(3)** the prospective guardian if the guardian is not the current physical custodian; and

~~(k)(4)~~ **(4)** any other person the court orders to be provided with the notice of hearing.

~~(Ffe)~~ **Orders Investigation and Report.**

~~(1) Upon~~ After the filing of a motion for guardianship, the court ~~shall~~ may ~~ay~~ [Staff Note: This is not a typo. The current rule says, "shall may".] order the DCS, if it is legal custodian of the child, to conduct an investigation and prepare a report for the ~~first report and review~~ initial guardianship hearing [Staff Note: Is the first report and review hearing the Rule 62 initial guardianship hearing or the Rule 63 guardianship adjudication hearing? It seems to be the Rule 62 hearing, but this should be clarified] addressing whether the prospective guardian is a fit and proper person to become guardian of the child and whether it is in the best interests of the child to grant the guardianship.

~~(2)~~ If the DCS is not the legal custodian, the court may order the child's attorney or a guardian ad litem ~~order the child's attorney or guardian ad litem~~ to prepare and file this report.

~~(3)~~ **(3)** If the child is an Indian child, the report must address whether the prospective guardian falls within the placement preferences required under ICWA or whether good cause exists to deviate from the placement preferences.

(4) A copy of the report must be provided to the parties and the court at least 10 days before the initial guardianship hearing. ~~The court pending the hearing may enter any other orders, as the court determines to be in the best interests of the child.~~

~~(m)(g)~~ **Other Orders.** Pending the hearing, the court may enter other orders that it determines are in the child's best interests.

Rule 62. Initial Guardianship Hearing

- (a) Generally.** At the initial guardianship hearing, the court determines whether service has been completed, whether notice of the hearing has been provided to those persons identified in Rule 61, and whether the parent, guardian, or Indian custodian admits, denies, or does not contest the allegations contained in the motion for guardianship.
- (b) Time Limits.** Unless the court orders or permits otherwise under A.R.S. § 8-864, the initial guardianship hearing must be held within 30 days after the Rule 60 permanency hearing.
- (c) Procedure.** At the initial guardianship hearing the court must:
- (1)** Inquire if any party has reason to know that the child at issue is an Indian child.
 - (2)** Appoint an attorney pursuant to Rule 38(B), unless an attorney had previously been appointed.
 - (3)** Appoint an attorney for the child if a guardian ad litem has not been appointed.
 - (4)** Determine whether service of process has been completed or waived as to each party pursuant to Rule 61, and whether notice of the hearing has been provided to those persons identified in Rule 61.
 - (5)** Determine whether the report ordered by the court has been completed and provided to the parties.
 - (6)** Advise the parent, guardian, or Indian custodian of their rights as follows:
 - (A)** the right to an attorney, including a court-appointed attorney if the parent, guardian, or Indian custodian is indigent;
 - (B)** the rights to call witnesses and to cross examine witnesses who are called to testify by another party;
 - (C)** The right to trial by the court on the guardianship motion; and
 - (D)** the right to use the process of the court to compel the attendance of witnesses.
 - (7)** Determine whether the parent, guardian, or Indian custodian admits, denies or does not contest the allegations contained in the motion for guardianship.
 - (A) *Admitted or Not Contested.*** If the parent, guardian, or Indian custodian admits or does not contest the allegations, the court may proceed with the guardianship adjudication hearing and enter findings and orders pursuant to Rule 63.

(B) *Denied.* If the parent, guardian, or Indian custodian denies the allegations, the court must set the matter for a trial within 90 days of the initial guardianship hearing. The court also may schedule a settlement conference, a pretrial conference or mediation, if appropriate. If the child has not been adjudicated dependent and any party objects to a permanent guardianship, the court may schedule a settlement conference or mediation or may strike the motion for guardianship and proceed with the dependency petition.

(C) *Failure to Appear.* If the parent, guardian, or Indian custodian fails to appear at the initial guardianship hearing without good cause, and the court finds the parent, guardian, or Indian custodian had notice of the hearing, was properly served pursuant to [Rule 61](#), and had been previously admonished regarding the consequences of failure to appear, including a warning that the hearing could go forward in their absence and that failure to appear may constitute a waiver of rights and an admission to the allegations contained in the guardianship motion, the court may proceed with the adjudication of guardianship based upon the record and evidence presented. The court must enter its findings and orders pursuant to [Rule 63](#). [**WG Note:** This provision requires Task Force discussion.]

(d) Findings and Orders. [**WG Note:** X-ref Rule 47.2] At the conclusion of the hearing, the court must:

- (i)** Enter findings as to notification and service upon the parties and those persons designated to receive notice, and the court's jurisdiction over the subject matter and persons before the court.
- (ii)** Set a continued initial guardianship hearing as to any party who was not served and did not appear.
- (iii)** Address the parent, guardian, or Indian custodian in open court and advise that failure to appear at the guardianship pre-trial conference, settlement conference, or guardianship adjudication hearing without good cause may result in a finding that they waived legal rights and are deemed to have admitted the allegations in the guardianship motion. The court must advise the parent, guardian, or Indian custodian that the guardianship adjudication hearing may go forward in their absence and may result in the establishment of a permanent guardianship based upon the record and evidence presented. The court must make specific findings that it advised the parent, guardian, or Indian custodian of the consequences of failure to attend subsequent proceedings. The court may provide the parent, guardian, or Indian custodian with a copy of Form 2. The court also may

request that the parent, guardian, or Indian custodian sign and return a copy of the form and note on the record that the form was provided.

- (iv) If ICWA applies, make findings pursuant to the standards and burdens of proof as required under ICWA.
- (v) Make findings and enter other orders that may be appropriate or required by law.

Rule 62. Initial Guardianship Hearing

(a) **Generally.** At the initial guardianship hearing, the court determines whether service has been completed, whether notice of the hearing has been provided to those persons identified in Rule 61, and whether the parent, guardian, or Indian custodian admits, denies, or does not contest the allegations contained in the motion for guardianship.

(b) **Time Limits.** ~~If a motion for permanent guardianship is filed, [Staff Note: Why is the preceding clause necessary? We are in Rule 62 only because the motion was filed.]~~ ~~Unless the court orders or permits otherwise under A.R.S. § 8-864,~~ the initial guardianship hearing must be held within 30 days ~~of~~ after the Rule 60 permanency hearing.

(c) **Procedure.** At the initial guardianship hearing the court must:

- (1) Inquire if any party has reason to know that the child at issue is an Indian child ~~as defined by ICWA.~~
- (2) Appoint ~~counsel~~ an attorney pursuant to Rule 38(B), unless ~~counsel~~ an attorney had previously been appointed.
- (3) Appoint ~~counsel~~ an attorney for the child if a guardian ad litem has not been appointed.
- (4) Determine whether service of process has been completed or waived as to each party pursuant to Rule 61, and whether notice of the hearing has been provided to those persons identified in Rule 61, ~~in addition to the parent, Indian custodian and the child's tribe.~~
- (5) Determine whether the report ordered by the court has been completed and provided to the parties.
- (6) Advise the parent, guardian, or Indian custodian of their rights as follows:
 - (A) the right to ~~counsel~~ an attorney, including a court-appointed ~~counsel~~ attorney if the parent, guardian, or Indian custodian is indigent;
 - (B) the rights to call witnesses and to cross examine witnesses who are called to testify by another party ~~against~~ ~~[Staff Note: Similar to a previous staff note, witnesses are called to testify, and the party has a right to cross-examine, whether the testimony is “against” or favorable. Suggest deleting “against.”]~~ ~~the parent, guardian, or Indian custodian;~~
 - (C) The right to trial by the court on the guardianship motion ~~or petition~~; and ~~[Staff Note: Why does the rule now revert to calling the filing a “motion or~~

~~petition?” The previous rule indicated it was a motion, only. Staff has no objection to referring to the filing as a “guardianship petition,” but notwithstanding A.R.S. § 8-872, which uses term “motion” shouldn’t the rule say either “petition” or “motion,” rather than both?]~~

- (D) the right to use the process of the court to compel the attendance of witnesses.
- (7) Determine whether the parent, guardian, or Indian custodian admits, denies or does not contest the allegations contained in the motion ~~or petition~~ for guardianship. [~~Staff Note: See the previous staff note.~~]
- (A) ***Admitted or Not Contested.*** If the parent, guardian, or Indian custodian admits or does not contest the allegations, the court ~~shall~~ ~~[may?]~~ may proceed with the guardianship adjudication hearing and enter findings and orders pursuant to Rule 63.
- (B) ***Denied.*** If the parent, guardian, or Indian custodian denies the allegations, the court must set the matter for a trial within 90 days of the initial guardianship hearing. The court also may schedule a settlement conference, a pretrial conference or mediation, if appropriate. If the child has not been adjudicated dependent and any party objects to a permanent guardianship, the court may schedule a settlement conference or mediation or may strike the motion for guardianship and proceed with the dependency petition.
- (C) ***Failure to Appear.*** If the parent, guardian, or Indian custodian fails to appear at the initial guardianship hearing without good cause, and the court finds the parent, guardian, or Indian custodian had notice of the hearing, was properly served pursuant to [Rule 61](#), and had been previously admonished regarding the consequences of failure to appear, including a warning that the hearing could go forward in their absence and that failure to appear may constitute a waiver of rights and an admission to the allegations contained in the guardianship motion, the court may proceed with the adjudication of guardianship based upon the record and evidence presented. The court must enter its findings and orders pursuant to [Rule 63](#). [~~WG Note: This provision requires Task Force discussion.~~]
- ~~(D)~~ **(d) Findings and Orders.** ~~All findings and orders shall be in a signed order or contained in a minute entry.~~ [~~WG Note: X-ref Rule 47.2~~] At the conclusion of the hearing, the court must:
- (i) Enter findings as to notification and service upon the parties and those persons designated to receive notice, and the court’s jurisdiction over the subject matter and persons before the court.

(ii) Set a continued initial guardianship hearing as to any party who was not served and did not appear.

~~(iii) The court may schedule a settlement conference, status conference, pretrial conference or mediation as deemed appropriate. [Staff Note: This item does not fit with the list, first, because it's already mentioned in the preceding section, and also, because this is a list of what the court must do, and subpart (3) says that the court "may" do this.]~~

~~(iv)~~(iii) Address ~~and advise~~ the parent, guardian, or Indian custodian in open court and advise that failure to appear at the guardianship pre-trial conference, settlement conference, or guardianship adjudication hearing without good cause may result in a finding that they waived legal rights and are deemed to have admitted the allegations in the guardianship motion ~~for guardianship~~. The court must advise the parent, guardian, or Indian custodian that the guardianship adjudication hearing may go forward in their absence and may result in the establishment of a permanent guardianship based upon the record and evidence presented. The court must make specific findings that it advised the parent, guardian, or Indian custodian of the consequences of failure to attend subsequent proceedings. The court may provide the parent, guardian, or Indian custodian with a copy of Form 2~~7~~. The court also may request that the parent, guardian, or Indian custodian sign and return a copy of the form and note on the record that the form was provided.

~~(v)~~(iv) If ICWA applies, ~~the court must~~ make findings pursuant to the standards and burdens of proof as required under ICWA, ~~including whether placement of the Indian child is in accordance with ICWA or whether there is good cause to deviate from the preferences.~~

~~(vi)~~(v) Make findings and enter ~~any~~ other orders as that may be appropriate or required by law.

COMMITTEE COMMENT

~~It is the recommendation of the committee that, in addition to the admonition set forth in this rule, the court should consider providing the parent, guardian, or Indian custodian with a separate written copy of the admonition in order to protect the due process rights of the parent, guardian, or Indian custodian. See Form 2.~~