Task Force on the Rules of Procedure for the Juvenile Court

Meeting Agenda

Friday, December 13, 2019
10:00 a.m. to 4:00 p.m.
State Courts Building * 1501 West Washington * Conference Room 119 * Phoenix, AZ

Item no. 1	**Call to Order**	*Hon. Rebecca Berch, Chair*
Item no. 2	**Approval of the November 8, 2019 meeting minutes**	*Justice Berch*
Item no. 3	**ICWA**	*Mr. David Withey*
Item no. 4	**Workgroup reports and discussion of rules** **Workgroup 1: Rules 2 and 3 (revisited); Rules 3.1 (new) and 5** **Workgroup 2: Rules 10 and 11 (revisited); Rules 12, 13, 14, 22, 24, 25** **Workgroup 3: Rules 36, 37, and 38 (revisited)** **Workgroup 4: Rules 61 and 62 (revisited), Rule 63**	 *Judge Armstrong* *Ms. Phillis, Mr. Cardy, Ms. Smith, Mr. Meaux* *Judge Quigley* *Prof. Atwood, Judge Portley, Judge Williams, Ms. Coughlin*
Item no. 5	**Roadmap** **Next meetings:** Friday, January 24, 2020 (Room 119) Friday, February 28, 2020 (Room 119)	*Justice Berch*
Item no. 6	**Call to the Public** **Adjourn**	*Justice Berch*

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: November 8, 2019

Members attending: Hon. Rebecca Berch (Chair), Hon. Mark Armstrong, Professor Barbara Atwood, Beth Beckmann (by telephone), 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 Avila Taylor, Hon. Patricia Trebesch, Edward Truman, Kent Volkmer, Hon. Rick Williams, Hon. Anna Young

Absent: Maria Christina Fuentes, Denise Smith

Guests: Carey Turner, Ana Namauleg, Shari Andersen-Head, Nina Preston, Chanetta Curtis, Jessica Fotinos, Cheri Clark

AOC Staff: Caroline Lautt-Owens, Joseph Kelroy, Mark Meltzer, Angela Pennington

1. Call to order; preliminary remarks; approval of meeting minutes. The Chair called the second Task Force meeting to order at 10:00 a.m. She noted that workgroups met 5 times after the September 27 Task Force meeting, and she commended the members' efforts in getting 12 rules ready for review today. Today's meeting packet contains clean and redline versions of those 12 revised rules, along with additional materials prepared by Judge Armstrong and Judge Warner, a comment that the Solicitor General filed in R-00-0004, and draft minutes of the September 27 Task Force meeting. The Chair advised that it would be useful for members to bring their rule books to Task Force meetings to compare proposed rule revisions with the current rules. She requested that in the future, members make edits only in the "rules by numbers" folder on SharePoint, and that they no longer utilize the "member drafts" folder, which was intended for use only until the first round of workgroup meetings. Use of the "rules by numbers" folder will avoid duplicate drafts of individual rules and will assist staff with version control. During the afternoon session of today's meeting, Ms. Pennington reviewed with members the process for locating, editing, and saving documents in the "rules by number" folder on SharePoint. She invited members to contact her if they needed additional assistance.

The Chair noted a correction in the September 27 draft meeting minutes at page 4: proposed comment titles should be "comment to the 2022 amendment" rather than "comment to the 2021 amendment." The Chair asked members if there were other necessary corrections, and there were none.

Motion: A member then moved to approve the September 27, 2019 meeting minutes with the noted correction. The motion received a second and it passed unanimously. **JRTF 002**

Before proceeding to today's rules, the Chair advised Task Force members that they should strive to develop consensus on each draft rule, but she does not anticipate a vote during Task Force meetings following the presentation of a rule. Rather, members will formally vote to approve the rules later. She explained that initial drafts, even those on which the members have reached consensus, might require subsequent revisions after they consider other rules or additional issues. Deferring a vote to approve the rules until completing the review will allow the process to be more flexible and meaningful. Members had no objection to proceeding in this manner.

2. Report from Workgroup 1. Judge Kreamer, Judge Armstrong, and Ms. Mattison presented Workgroup 1's rules.

Rule 1 ("scope and construction"). Judge Kreamer noted that current Rule 1 is lengthy, but it has only a single sentence on "applicability," and instead addresses at length other subjects, including definitions and document formatting. The workgroup concluded that Rule 1 should be introductory, like the corresponding civil, criminal, and family rules, and that topics like "definitions" and "formatting" should be contained in separate, standalone rules. Accordingly, the workgroup limited its proposed Rule 1 to two concise sections, one on "scope" and the other on "construction."

Section (a) on scope would include two additional areas that are omitted from the applicability provision in current Rule 1: in-home intervention and extended foster care.

During its discussion of section (b) on construction, the workgroup contemplated who would construe these rules. The corresponding civil, criminal, and family rules address this question differently. The workgroup concluded that "parties should use" the juvenile rules, and "courts should construe and enforce them, in a manner that is in the child's best interests…." A member did not think the phrase "in the child's best interests" was an appropriate principle of construction for the delinquency rules, and that a reference to protecting "constitutional rights" would be more suitable. Other members thought the "best interests" included "constitutional rights," or that "protects the child's rights and interests…" would be a more appropriate alternative. Another member observed that parents in dependency proceedings and victims in delinquency proceedings have rights that also require protection. One member noted that subsequent, more specific rules, as well as statutes, have provisions for protecting parties' rights, so including a similar provision in Rule 1 would be redundant. (As examples, Rule 21 addresses victims' rights; and the "interpretation" provision of Rule 36(b) refers to interpreting the dependency rules to "protect the child's best interests.") After further discussion, members agreed to remove from Rule 1(b) the phrase that requires

construction of the juvenile rules in manner that "is in the child's best interests." Ms. Jorquez requested permission to obtain further input from her DCS colleagues concerning this revision, which the Chair granted; but otherwise, members approved the rule with today's modifications.

Rule 2 ("definitions"). Judge Armstrong observed that the current juvenile rules do not include a rule with a comprehensive set of definitions, and draft Rule 2 would fill that gap. He noted that numerous other definitions are included in A.R.S. Title 8, and the list of definitions in Rule 2, although lengthy, is not intended to include all the statutory definitions. Draft Rule 2 is an evolving rule, and Judge Armstrong anticipates other definitions will be added, or existing definitions will be modified, as the Task Force progresses. He asked members to continue to suggest terms that Rule 2 should define. One member suggested a definition—or possibly a new rule—concerning the Interstate Compact on the Placement of Children. Another member requested a definition of ADJC. Judge Armstrong then noted several defined terms in draft Rule 2.

(1) "Fiduciary" appears only in Rule 104 and the word is undefined in that rule. Judge Armstrong derived a definition of "fiduciary" from the Probate Code because Rule 104 seems to refer to persons appointed under Title 14 statutes. But members believed a definition of "fiduciary" might be unnecessary if Workgroup 1, which is assigned Rule 104, uses an alternative term in that rule, such as "party representative." Members agreed to retain Judge Armstrong's proposed definition of "fiduciary" in Rule 2 pending the workgroup's review of Rule 104.

(2) "Guardian ad litem ('GAL')" has not yet been defined and now appears in draft Rule 2 only as a placeholder. Judge Armstrong suggested that if a definition becomes necessary, it might say that a GAL is "a person appointed by the court to represent a party's best interests." A member observed that the GAL's function is not always to do what is in the party's best interests, but Judge Armstrong noted a court-appointed GAL customarily acts in a party's best interests. Another member noted that a GAL can have many roles and proposed that the definition say, "to represent a party's best interests or as further directed by the court." Judge Armstrong also observed that current Rule 40 ("appointment of guardian ad litem") lacks a comprehensive definition of GAL. He will present a proposed definition of GAL at a future meeting. Members also discussed whether a court-appointed GAL must be an attorney. While smaller counties may appoint a non-attorney GAL as a matter of necessity, those appointments can raise complications and concerns. Judge Young might bring the issue of non-attorney GAL appointments to the Committee on Juvenile Court.

(3) Judge Armstrong added a definition of the Family First Prevention Services Act ("FFPSA"). However, if Arizona adopts its own statutory version of the federal act, the definition may instead refer to the Arizona statutes.

(4) "Juvenile" is patterned after the current definition in Rule 1(b). However, saying that it means a person under the age of 18 (or age 19 in the delinquency context) would omit older youths who are in an extended foster care program and still under the jurisdiction of the juvenile court. Judge Armstrong will work with Mr. Truman to fashion a broader definition.

Rule 3 ("priority of proceedings; conducting proceedings; applicability of other rules"). Judge Armstrong explained that Rule 3 was a new juvenile rule, but sections (a) ("priority"), (b) ("informality") and (c) ("order of trial") were modeled on provisions found elsewhere in the current juvenile rules. Sections (d) ("applicability of other rules of procedure") and (e) ("applicability of the Arizona Rules of Evidence") were borrowed from other recently restyled rule sets. Judge Armstrong discussed each of these five sections with the members, but proposed section (e) generated the greatest discussion.

In preparing his draft of section (e), Judge Armstrong reviewed the current juvenile rules and located 17 references to evidentiary standards or the Arizona Rules of Evidence. He asked members whether the draft rules should continue to include these 17 references, or whether the draft should instead propose a unified standard. A unified standard might say, "Any non-privileged evidence tending to make a fact at issue more or less probable is admissible under the court determines the evidence lacks reliability or will cause unfair prejudice, confusion, or waste of time." Judge Armstrong also cited to recently restyled Probate Rule 4(a); under that rule, the evidence rules apply in contested proceedings unless the parties agree otherwise, and they do not apply in uncontested proceedings, where all relevant evidence is admissible unless its probative value is outweighed by specified factors. The alternative to the unified standard is a rule that would say that the Evidence Rules apply except as provided in the 17 other Juvenile Rule provisions, which would leave those current provisions intact. Members generally supported the unified standard, which would eliminate the need for multiple references to the Evidence Rules and would be helpful to judges and practitioners. Judge Armstrong proposed locating the unified standard in a new Rule 3.1. However, one member cautioned about the unintended consequence of changing the meaning of those 17 rule references by integrating all of them into a single rule. Another member suggested that there should be higher standards for the admissibility of evidence in a termination proceeding than in a dependency action. Judge Armstrong will consider these comments and present a draft of Rule 3.1 at a future meeting.

The other aspect of draft Rule 3(e) that required discussion was the admissibility of expert reports. Expert reports in juvenile proceedings are generally admissible if they are timely disclosed and the author is available to testify. Judge Armstrong noted that whether the author is available to testify is a confusing and undefined concept. Judge Warner's suggested definition of "available for cross-examination" was based on whether the expert is "subject to the court's subpoena power," unless the person is subpoenaed but is then unable or unwilling to comply with the subpoena. Members would like the workgroup to revisit Judge Warner's draft and recommended an

improved version that would be located either in Rule 3 or, possibly, in Rule 45 ("admissibility of evidence").

***Rule 4 ("Indian Child Welfare Act ['ICWA']).*"** Ms. Mattison reviewed the draft rule, which is based on current Rule 8. Section (a) ("application") is a more concise statement of current section (a). Section (b), "inquiry," is new and requires the court to inquire at the start of "any" dependency, termination, or guardianship proceeding if any party has reason to believe the child is subject to ICWA. The requirement derives from A.R.S. § 8-815, and although some members believe the requirement is burdensome and unrealistic, it is statutorily mandated. (The federal requirement is "knows or has reason to know." The draft rule and the Arizona statute say "believes," which appears to be broader than "knows.") Members might later consider relocating this inquiry requirement to the dependency rules. In draft Rule 4(e) ("jurisdiction"), the workgroup changed "foster placement," which is the term used in federal law, to "out of home placement," which members believe includes foster placement. The workgroup recommends deleting the lengthy comment to the current rule.

Members also discussed concerns about repeated references to ICWA throughout the juvenile rules. One member would prefer to see ICWA provisions confined to a single rule, with a comment to the rule containing links to ICWA and the Arizona Supreme Court's guide on ICWA. Solicitor General Scott Bales' comment in R-00-0004 cautioned against paraphrasing ICWA in the juvenile rules or selectively referring to portions of ICWA's requirements. Although members supported the idea of a comment with pertinent hyperlinks and the reduction of repetitive ICWA references, they agreed to defer consideration of those alternatives until they review the remaining rules.

3. <u>Report from Workgroup 4.</u> The Chair then asked Professor Atwood to present Workgroup 4's rules.

Rule 61 ("motion, notice of hearing, service of process, and order for permanent guardianship"): Professor Atwood noted that the current rule is relatively complex and difficult to follow. Among other reasons, the rule applies to both pre- and post-dependency adjudication guardianships. The workgroup's draft rule attempts to clarify the procedural distinctions of each proceeding.

Professor Atwood then reviewed draft section (a) ("motion"). A member asked the workgroup to further clarify that the last sentence of that draft section applied only to pre-adjudication guardianships. Members also discussed who can file a pre-adjudication guardianship motion. Although members initially disagreed on who could file this motion, Professor Atwood cited A.R.S. § 8-871(A)(1) as authority that only the DCS could do so. The issue of filing the motion is further complicated in circumstances where the child has been adjudicated dependent in a proceeding as to one but not both parents. A judge member noted that the legislative intent in adopting this statute was to facilitate DCS's ability to establish a guardianship early in the process, without the

necessity of a dependency adjudication. Another member observed that the workgroup's draft deleted a consent provision that is a statutory requirement for a pre-adjudication motion, and the workgroup will need to add that back.

In section (b) ("notice of hearing"), members substituted a phrase used in the current rule, "information required by law," with "information required by A.R.S. § 8-872." However, Professor Atwood questioned whether this change was accurate or even necessary, and after discussion, members agreed to remove that phrase. Section (c) ("service") of the current rule is a long block paragraph; the workgroup reorganized the provision for clarity. Members discussed whether service under ICWA could be made by certified mail rather than registered mail because certified mail is less expensive, but members agreed to use registered mail because that's what the federal statute requires.

During their discussion of section (d) ("hearing involving an Indian child"), members again considered reducing repetitive references to an ICWA requirement for service. But other members believed that having the requirement appear in multiple rules would assist judges and practitioners in determining when the requirement applies. The workgroup could not locate legal authority for the requirement that a parent who requests a hearing under this section must do so by registered mail, and it eliminated that requirement in this section. Section (e) ("service of the notice of hearing on other persons") was also reorganized by separating it from the general service provisions of section (c).

Section (f) (now, "investigation and report") was derived from current section (D) ("orders") and given a new title that more accurately describes the section's subject matter. Members discussed repeating the content of this section in Rule 62 but declined to do so. They also (1) in (f)(1) eliminated the word "the" before "DCS" (this should be a global edit); (2) changed the requirement in (f)(1) that the court "must" order DCS to prepare a report to "may," because A.R.S. § 8-872(E) allows the court to waive the requirement; (3) modified (f)(2) to allow a party, rather than only the child's attorney or GAL, to prepare the report; and (4) decided to remove (f)(4) concerning the filing of a report, because it is not merely filing the report, but rather, its admission into evidence, that allows a judge to consider it. The workgroup extracted from this section a provision on "other orders," which does not pertain to reports, and that new section is now section (g).

Rule 62 ("initial guardianship hearing"). The draft rule is generally modeled on current Rule 62, but certain portions have been reorganized to enhance clarity and to eliminate redundancy with items already covered by Rule 61. Professor Atwood also noted that the workgroup used the word "attorney" rather than "counsel" throughout this rule.

One provision that prompted discussion was section (c) ("procedure"), subpart 7, which requires the court to determine whether the parent admits, denies, or does not contest the motion. The subpart contains another alternative: that the parent failed to

appear. In that circumstance, the draft allows the court to proceed with adjudication of the motion if the parent had notice of the hearing and had received specified admonitions concerning the consequences of a non-appearance. Professor Atwood advised that the workgroup would like to further consider the consequences of non-appearance following the Supreme Court's recent *Tricia A.* opinion. For example, should Rule 62(c) include a list of additional requirements that the court must consider before proceeding with an adjudication following a non-appearance? Should a motion to set aside an adjudication following a non-appearance require the moving party to demonstrate a meritorious defense? Alternatively, should Form 2 contain this requirement? Should the Task Force consolidate Forms 1 and 2 and call them "advice to parent in a dependency action?"

A judge member questioned a requirement in section (d) ("findings and orders") that the judge make specific findings that the court advised the parent of the consequences of failing to appear at a future proceeding. Should the requirement be revised to simply require the court to give the advice, rather than the court find that it gave the advice? Alternatively, could it say that the court is required to give the parent the form, and then make a finding that it provided the form? The Chair believes a reviewing court would find it useful if the record contained the findings required by the workgroup's draft, and that due process is served by making those findings.

A member noted that draft Rules 61 and 62 do not address the timing of pre-adjudication hearings for permanent guardianship. But Rule 62(b) provides that the court may "order or permit otherwise [the time for the hearing]", and this should provide the court with the necessary flexibility.

Workgroup 4 will revise Rules 61 and 62 to conform to today's discussions.

4. **Report from Workgroup 2.** Ms. Phillis, who presented today's rules for Workgroup 2, advised that in the future, the workgroup will propose a reorganization of the delinquency rules in a manner that makes them sequential, i.e., that follows the order in which delinquency proceedings occur.

Rule X ("scope of the delinquency rules"). This rule is new and has not been assigned a number. It has two sections: (a) ("application"), and (b) ("incorrigibility"). Section (a) recognizes that delinquency proceedings may still occur in limited jurisdiction courts. A member suggested, and Ms. Phillis agreed, that in section (a), the word "delinquency" can be removed in the phrase "these delinquency rules." Section (b)'s reference to incorrigibility ("courts should construe the delinquency rules as applicable to incorrigibility proceedings") should eliminate the need to say "and incorrigibility" after "delinquency" because section (b) clarifies that these rules apply to both. Members generally approved the rule as presented and modified today.

Rule XX ("definitions"). Ms. Phillis explained that this rule, which replaces current Rule 9 ("definitions") does not currently contain any definitions, but this rule will serve as the placeholder for future definitions of delinquency terminology.

Rule 10 ("appointment of an attorney"). Ms. Phillis reviewed the four sections of this draft rule. Like Workgroup 4, Workgroup 2 prefers the word "attorney" rather than "counsel." In section (a) ("right to an attorney"), a member suggested adding for completeness, after the phrase "initiated by a petition," the words "or a citation," and Ms. Phillis agreed. The same words will be added after "a petition" in section (b).

Section (b) ("appointment of an attorney") is new. To facilitate appointments upon the filing of a petition, the draft says that "a juvenile is presumed indigent." The workgroup reasoned that if the juvenile was not presumed indigent, the court could not make a finding of indigency, and consequently appoint an attorney, until the juvenile's initial court appearance, and that might impede the efficiency of the advisory hearing. However, members were concerned with creating a presumption of indigency, and thought, for example, that the presumption might be rebutted if the juvenile was employed. Accordingly, and to shift away from the connotations of a presumption, members agreed to change the wording in section (b) to say instead that a juvenile is "deemed indigent."

The subject of appointments led to a discussion about assessing the cost of a court-appointed attorney, which is addressed by draft section (d) ("assessment of the cost of court-appointed attorney"). If the juvenile has adequate resources (e.g., a trust fund), could the court assess the juvenile (in addition to a parent or custodian) for that cost? Ms. Phillis referred to A.R.S. § 8-221(G), which allows the court to make the assessment. Members revised section (d) to reflect the court's ability to do that; they also agreed to revise this section to allow the court to make appropriate inquiries concerning the juvenile's financial resources. They will further revise this provision to clarify that it's the juvenile's own financial resources, and not the parents', that determines the juvenile's ability to pay. Draft section (d) does not allow the court to make the assessment against the DCS, ADJC, or a foster parent, but to expand the application of this provision to any individual who might be receiving financial assistance from the State, members changed "foster parent" to "out of home placement under court supervision."

Section (e) ("waiver of counsel") prompted a discussion of a juvenile waiving counsel because of pressure from a parent who wants to avoid an assessment for the cost of a court-appointed attorney. However, the terms of this provision should not preclude a parent from hiring an attorney for a child, even when the child is indigent, and the workgroup will consider this issue and present a revised provision at a future meeting. Ms. Phillis noted that the workgroup has added a new requirement of a colloquy between the juvenile and the court to assure that any waiver of counsel is knowing, intelligent, and voluntary. Members agreed to delete a sentence shown with strikethrough at the

end of section (e) that would have required the court to impose safeguards on the waiver if there's a conflict of the interests of the juvenile and a parent.

Rule 11 (attorney's appearance). The draft rule, like the current rule, has two sections, and the workgroup revised both. Section (a) would permit counsel to file a notice of appearance or to orally announce an appearance in open court. For case management systems, it might be preferable to require counsel to file a written notice of appearance and a written notice of withdrawal. Nonetheless, Rule 10 requires the court to issue a minute entry when it appoints counsel, so appointments of those attorneys should already be reflected in the case file. Draft section (b) ("withdrawal of an attorney") pertains only to court-appointed counsel. It automatically relieves the attorney of representing a juvenile if no further hearings are scheduled and the time for filing a notice of appeal has expired. A member raised an issue that court-appointed attorney contracts in some Arizona counties require the attorney to remain as counsel of record for 6 months after case completion, but members did not believe this contractual provision would undermine the application of the draft rule. Members discussed a process that would allow retained counsel to withdraw by notice versus by motion. Members agreed that the draft was deficient because it did not address the withdrawal of retained counsel, and Rule 11 was returned to the workgroup for further revision. Members also requested the workgroup to consider whether probation officers or GALs should receive copies of filings concerning withdrawal.

5. **Report from Workgroup 3.** Judge Quigley presented Workgroup 3's rules.

Rule 36 ("scope of rules"). Current Rule 36 is a standalone subpart of the dependency, guardianship, and termination rules in Part III. The workgroup eliminated this unnecessary subdivision and instead made Rule 36 the first rule in a larger subpart on "general provisions." Draft Rule 36 separates the substance of current Rule 36 into two sections, section (a) on "application" and section (b) on "interpretation." The workgroup added "in-home intervention" and "extended foster care" to the content of section (a). In section (b), the workgroup considered deleting the phrase, "and gives paramount consideration to the child's health and safety." However, because the provision omits any reference to parental rights, and especially after hearing the discussion earlier today concerning Rule 1, the workgroup would like to revisit this rule and bring it back to the Task Force at another meeting.

Rule 37 ("meaning of terms"). Judge Quigley explained that the workgroup expanded the definition of "participant" to encompass multiple placements and multiple tribes, but the workgroup will need to improve upon the awkward phrase "or more than one of the foregoing." Members agreed with the workgroup's decision to retain the first six "definitions under ICWA" in section (c) ("parent," Indian child," "Indian child's tribe," "Indian custodian," "Indian tribe," and "extended family member") and to relocate the seventh definition ("foster care or pre-adoptive placement preferences") because it is more substantive and is not merely a defined term. Because subpart (c)(7)

was in the draft, staff initially titled Rule 37 "meaning of terms," but in anticipation of its relocation, members agreed to change the title of Rule 37 to "definitions." During a broader discussion of ICWA, members asked the workgroup to consider adding to Rules 40 ("appointment of guardian ad litem"), 40.1 ("duties and responsibilities of appointed counsel and guardians ad litem"), or 40.2 ("duties and responsibilities of appointed counsel for parental representation") a duty to have knowledge of ICWA.

Rule 38 ("assignment and appointment of an attorney"). Like the other workgroups, Workgroup 3 utilized "attorney" rather than "counsel." Members agreed that the process of assigning attorneys in dependency cases before their appointment was effective, but the workgroup might relocate draft subpart (a)(3), which describes limitations on the role of an assigned attorney. The workgroup will also determine the appropriate statutory reference in section (b) ("appointment of an attorney"), and whether it's necessary or helpful to include the reference in this rule.

6. **Roadmap.** To equalize the presentation time of each workgroup, the Chair will endeavor to take workgroups in a different order at future Task Force meetings. The Chair observed that there are recurring topics in the juvenile rules, and members should identify and consider those topics early in this project, which might expedite later discussions. The next Task Force meeting is set for **Friday, December 13, 2019**, beginning at **10:00 a.m.** in **Room 119**. The Chair also noted that each workgroup has a meeting scheduled in November.

7. **Call to the public; adjourn.** There was no response to a call to the public. The meeting adjourned at 2:21 p.m.

ICWA Regulations Amendments to the Arizona Juvenile Court Rules of Procedure

PowerPoint titles:

1. Cover Page
2. Rule 8(A) Supremacy of Federal Law
3. Rule 8(C) Indian Child Presumption
4. Identifying Indian Children Move text to Rule 8(C) from Comment
5. Rule 8 (D) Transfer to Tribal Court
6. Good Cause to Deny Transfer to Tribal Court Move to Rule 8(D) from Comment
7. Rule 50 Preliminary Protective Hearing Emergency Hearing under ICWA
8. Petitioner Duty to Verify Indian Child Rules 50(C)(3) and 52(D)(3)
9. Rule 50.1 Deviation from Placement Preferences

ICWA Regulations Amendments to the Arizona Juvenile Court Rules Of Procedure

Review for Juvenile Rules Task Force

Friday, December 13, 2019

Rule 8(A) Supremacy of Federal Law

- "All provisions of the Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963 ("ICWA"), and Part 23 of Title 25 of the Code of Federal Regulations ("Regulations"), including any amendments to those provisions, govern proceedings subject to ICWA."
- Alert to mandatory federal law and regulations

Rule 8(C) Indian Child Presumption

- "Under the regulations, if the court has reason to know the child is an Indian child as defined by ICWA, the court shall make all findings pursuant to the standards and burdens of proof as required under ICWA and the Regulations and otherwise **treat the child as an Indian child unless and until it is determined on the record that the child does not meet the definition of an Indian child under ICWA.**"

Identifying Indian Children
Move text to Rule 8(C) from Comment

- "Under the Regulations, a court has "reason to know" that a child is an Indian child upon the occurrence of any of the following:"
- (1) court informed by party to proceeding or an official;
- (2) discovered information indicating that the child is an Indian child;
- (3) child reports he or she is an Indian child;
- (4) court informed of reservation residence of the child, parent, or custodian
- (5) court informed child is or has been a ward of a tribal court
- (6) court informed either parent or the child has tribal membership card

Rule 8 (D) Transfer to Tribal Court

- "Under the Regulations, if the court determines or has reason to know the child is an Indian child as defined by ICWA and the proceeding is for foster care placement or termination of parental rights, the court shall determine **whether to grant a petition to transfer the proceeding to tribal court according to the standards required under 25 U.S.C. § 1911(b) and 25 C.F.R. §§ 23.115-119**."
- Transfer considerations include denial for "good cause."

Good Cause to Deny Transfer to Tribal Court Move to Rule 8(D) from Comment

The regulations provide that in determining whether good cause exists, the court must ***not*** consider any of the following:

- (1) whether the foster-care or termination of parental rights proceeding is at an advanced stage if the Indian child's parent, Indian custodian, or Tribe did not receive notice of the child-custody proceeding until an advanced stage;
- (2) whether there have been prior proceedings involving the child for which no petition to transfer was filed;
- (3) whether transfer could affect the placement of the child;
- (4) the Indian child's cultural connections with the Tribe or its reservation; or
- (5) socioeconomic conditions or any negative perception of Tribal or Bureau of Indian Affairs ("BIA") social services or judicial systems.

Rule 50 Preliminary Protective Hearing Emergency Hearing under ICWA

- "The preliminary protective hearing may be held as an emergency hearing as provided in Section 1922 of ICWA and 25 C.F.R. § 23.113."
- "When the preliminary protective hearing is held as an emergency hearing under 25 U.S.C. §§ 1922 and 25 C.F.R. 23.113 the 10-day notice requirement does not apply." (Rule 48 Com.)

Petitioner Duty to Verify Indian Child Rules 50(C)(3) and 52(D)(3)

- "Under the Regulations, confirm based on a report, declaration, or testimony included in the record or by court order that the Department of Child Safety or other **petitioner has used or will use due diligence** to identify and work with all tribes of which there is reason to know the child may be a member (or eligible for membership), to verify **whether the child is in fact a member (or a biological parent is a member and the child is eligible for membership**)."

Rule 50.1 Deviation from Placement Preferences

- "Under 25 C.F.R. § 23.132, the determination to depart from the placement preferences in Section 1915 of ICWA must be made in the following manner:"
- The procedures and considerations contained in the regulations are provided in this rule verbatim.

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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of	)	
	)	
PETITION TO AMEND RULES 8	)	
37, 48, 50, 52, 53, 54, 55, 56, 57, 58	)	Supreme Court No. R-17____
59, 60, 61, 62, 63, 63.2, 64, 65, 66,	)	
68, 69, 76, 78, 79, 84, AND 85 AND	)	
TO ADOPT NEW RULE 50.1 OF	)	
ARIZONA RULES OF PROCEDURE	)	
FOR THE JUVENILE COURT	)	
_____	)	

Pursuant to Rule 28 of the Arizona Supreme Court, David K. Byers, Administrative Director, Administrative Office of the Courts respectfully petitions this Court on behalf of the Indian Child Welfare Act (ICWA) Committee of the Arizona State, Tribal, and Federal Court Forum to amend Rules 8, 37, 48, 50, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 63.2, 64, 65, 66, 68, 69, 76, 78, 79, 84, and 85 and to add a new Rule 50.1 of the Arizona Rules of Procedure for the Juvenile Court. These changes are proposed to incorporate recently adopted federal regulations that implement the Indian Child Welfare Act.

I. Background and Purpose of the Proposed Rule Amendments.

The United States Department of the Interior issued new regulations implementing the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901-1963. These regulations became effective December 12, 2016. See 23 C.F.R. §§ 23.101- 44. Previously the Bureau of Indian Affairs (BIA) had issued guidelines concerning ICWA that have been considered persuasive but did not have the full force and effect of law. The Arizona Rules of Procedure for Juvenile Court make reference to ICWA at appropriate places in the rules and recognize the BIA Guidelines. These new regulations have been implemented by the Arizona Courts through education programs and reference materials provided to judges. This petition proposes implementation of the new regulations through appropriate amendments to the rules.

II. Contents of the Proposed Rule Amendments and New Rules.

The proposed changes are based on a systematic review of the current rules in order to identify all references to "ICWA" and "Indian child" and to simply add a reference to the new federal regulations or to specific regulations, where appropriate, as additional governing authority. This is a sufficient recognition of many of the new regulations that more clearly pronounce rather than make changes in the current interpretation of ICWA. However, some of the regulations require specific attention in the rules in order to prompt a change in current

practice, to address a specific conflict, or to provide required procedures or specific criteria for findings.

The proposed changes in Rule 8(C) reflect the new requirement that when there is "reason to know" a child is an "Indian child" the child is presumed to be an "Indian child" for ICWA coverage purposes until the child is determined not to be an "Indian child." Additionally, due to their significance, the committee proposes that the criteria stated in the regulations for "reason to know" be provided in the comment to Rule 8. Alternatively, this language could be adopted in Rule 8(C) itself. The New Mexico Children's Court Rules Committee proposed Rule Proposal 2016-064 that contains this language.

Due to the significance of jurisdiction, the committee proposes the addition of a Rule 8(D) on that subject and an additional paragraph in the comment containing the requirements stated in the federal regulations concerning the "good cause" exception to transfer of an ICWA case to tribal jurisdiction. This language could instead be included in Rule 8(D).

The comment to Rule 48 and Rule 50(A) are amended to recognized and authorize that, where appropriate under the circumstances of a case, the preliminary protective hearing may be held as an emergency hearing as provided in 25 U.S.C. § 1922 and 25 C.F.R. § 23.113.

The committee proposes replacement of the language in both Rule 50(C)(3) and Rule 52(D)(3) with the specific requirement of the new regulations regarding the responsibility to determine whether a child for whom there is reason to know the child is an "Indian child" is, in fact, an "Indian child."

Due to the importance of foster care placement preferences under Section 1915 of ICWA, Subsection 23.132 of the regulations provide a specific process and criteria for the court to find good cause to deviate from these preferences. This process and criteria are proposed to be incorporated in the rules as a new Rule 50.1.

A few of the proposed changes are proposed as cleanup due to recognition of inconsistencies or lack of clarity in the rules in the course of implementing the new federal regulations. Rule 8(A) is clarified by recognizing incorrigibility cases are excluded from application of ICWA because these cases do not involve out of home placement and by specifying this provision refers to **criminal** transfer rather than ICWA transfer. The option of notice by certified mail has been added to the rules where relevant in order to conform to the regulations.

III. Pre-Petition Distribution and Comment.

Drafts of the proposed rules have been distributed for comment and changes to the Arizona, State, Tribal, and Federal Court Forum and participants in its

meetings and to the Forum's ICWA committee composed of state and tribal juvenile court judges, Arizona and tribal attorneys who handle dependency cases for their respective clients, state and tribal child welfare agency representatives and others, including professors, with particular expertise and interest in ICWA. Judge Quigley, Presiding Juvenile Court Judge in Pima County is a Co-chair of this committee. This petition will be presented for comment with a request for approval at the January 26, 2017 meeting of the Committee on Juvenile Court (COJC).

IV. Comment Periods and Effective Date of the Proposed New Rules.

Considering the primarily technical nature of the proposed rule changes, to implement changes in federal law, petitioner requests the Court schedule a comment period that terminates on March 17, 2017 and permit a supplemental petition to be filed by March 31, 2017 to allow petitioner to include any changes recommended by the COJC and any commenters prior to the Court's consideration of the petition. Since the motivating regulations for this petition are already in effect, petitioner requests accelerated consideration of this petition by the Court and, if the petition is approved, an effective date one week after adoption to allow time for distribution to the courts and interested parties.

Wherefore petitioner respectfully requests that the Supreme Court amend the Rules of Procedure of the Juvenile Court as set forth in Appendix A.

RESPECTFULLY SUBMITTED this ____ day of ____, 2017.

By _____
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APPENDIX A
17B A.R.S. Juvenile Court Rules of Procedure
Proposed Rule Changes

Rule 8. Applicability of the Indian Child Welfare Act

A. The Indian Child Welfare Act, 25 U.S.C. § 1901 et seq., ~~shall~~ does not apply to delinquency, incorrigibility when there is no out-of-home placement or criminal transfer proceedings involving an Indian child.

B. Incorporation. All provisions of the Indian Child Welfare Act and Part 23 of Title 25 of the Code of Federal Regulations ~~shall be~~ are incorporated by reference, including any amendments to ~~the Act~~ these provisions.

C. Findings. If the court determines or has reason to know the child is an Indian child as defined by the Indian Child Welfare Act and regulations, ~~T~~the court shall make all findings pursuant to the standards and burdens of proof as required by the Indian Child Welfare Act and Part 23 of Title 25 of the Code of Federal Regulations and otherwise treat the child as an Indian child subject to the Act unless and until it is determined on the record that the child does not meet the definition of an Indian child under the Act.

D. Jurisdiction. If the court determines or has reason to know the child is an Indian child as defined by the Indian Child Welfare Act and the proceeding is for foster care placement or termination of parental rights, the court shall determine whether to grant a petition to transfer the proceeding to tribal court according to the standards required by 25 U.S.C. § 1911(b) and 25 C.F.R. §§ 23.115-119.

~~Committee~~ Comment

Because of the importance of the Indian Child Welfare Act and its applicability to state court proceedings, key provisions of the Act and Part 23 of Title 25 of the Code of Federal Regulations have been incorporated in these rules. However, not all provisions are set forth in these rules and the Act and Part 23 of Title 25 of the Code of Federal Regulations should be carefully reviewed, particularly as it relates to adoption proceedings. Any conflict between these rules and the Act and federal regulations shall be resolved in favor of the Act and federal regulations. ~~The Bureau of Indian Affairs Guidelines for State Courts in Indian Child Custody Proceedings may be of assistance in interpreting provisions of the Act.~~
The federal regulations governing Indian Child Welfare Act Proceedings, 25 C.F.R. Part 23, provide mandatory standards for applying the Indian Child Welfare Act in state courts. According to the regulations, a court has "reason to know" that a child is an Indian child upon the occurrence of any of the following: (1) any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that the child is an Indian child; (2) any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization , or agency informs the court that it has discovered information indicating that the child is an Indian child; (3) the child who is the subject of the proceeding gives the court reason to know he or she is an Indian child; (4) the

court is informed that the domicile or residence of the child, the child's parent, or the child's Indian custodian is on a pueblo, reservation, or in an Alaska Native village; (5) the court is informed that the child is or has been a ward of a Tribal court; or (6) the court is informed that either parent or the child possesses an identification card indicating membership in an Indian Tribe. 25 C.F.R. § 23.107.

The regulations governing petitions to transfer proceedings to tribal court, 25 C.F.R. §§ 23.115-119, address the criteria for ruling on transfer petitions and the determination of "good cause" to deny transfer. Under 25 U.S.C. § 1911(b), the court must grant a petition by a parent, Indian custodian, or the child's Tribe to transfer the foster care placement or termination of parental rights proceeding to tribal court, absent objection by either parent or tribal declination of transfer, or when there is good cause to deny transfer. The regulations provide that in determining whether good cause exists, the court must *not* consider any of the following: (1) whether the foster-care or termination of parental rights proceeding is at an advanced stage if the Indian child's parent, Indian custodian, or Tribe did not receive notice of the child-custody proceeding until an advanced stage; (2) whether there have been prior proceedings involving the child for which no petition to transfer was filed; (3) whether transfer could affect the placement of the child; (4) the Indian child's cultural connections with the Tribe or its reservation; or (5) socioeconomic conditions or any negative perception of Tribal or BIA social services or judicial systems.

Rule 37. Definitions

A. – B. [no changes]

C. Definitions and Mandatory Placement Preferences pursuant to the Indian Child Welfare Act, 25 U.S.C. 1903 and 1915 and Part 23 of Title 25 of the Code of Federal Regulations:

1. – 7. [no changes]

Rule 48. Petition, temporary orders and findings, notice of hearing, and service of process

A. Petition. A dependency petition invokes the authority of the court to act on behalf of a child who is alleged to be a dependent child. A petition on behalf of a dependent child shall be generally in the form and contain the information required by law. The action shall be captioned, "In the Matter of _____ a person under the age of 18 years," may be based upon information and belief and shall state whether there is reason to know the child is an Indian child as defined by the Indian Child Welfare Act and Part 23 of Title 25 of the Code of Federal Regulations. The petitioner shall indicate a request for in-home intervention by including the words "In-home intervention requested" in parentheses below the words "Dependency Petition."

B. – C. [no changes]

D. Service of petition. The petitioner shall serve a copy of the petition, notice of hearing and temporary orders upon those persons as required by law. The petitioner shall provide any parent, guardian or Indian custodian appearing at the preliminary protective hearing with a copy of the petition, notice of hearing and temporary orders which shall constitute service, as provided by law. Otherwise, the petition, notice of hearing and temporary orders shall be served in the manner provided for in Rules 4.1 or 4.2, Arizona Rules of Civil Procedure. Except for service of process that occurs at the preliminary protective hearing or the execution of an acceptance of service and waiver, service of process shall be completed no less than five (5) days prior to the court hearing. In dependency proceedings:

1. – 8. [no changes]

9. If the petition alleges or the court has reason to ~~believe~~ know the child at issue is an Indian child as defined by the Indian Child Welfare Act and Part 23 of Title 25 of the Code of Federal Regulations, in addition to service of process as required by these rules, notification shall be given to the parent, Indian custodian and child's tribe or tribes. Notice shall be provided by registered or certified mail with return receipt requested. If the identity or location of the parent or Indian custodian cannot be determined, notice shall be given to the Secretary of the Interior by registered or certified mail and the Secretary of the Interior shall have fifteen (15) days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. The notice shall advise the parent or Indian custodian and the tribe of their right to intervene. No hearing shall be held until at least ten (10) days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary. The court shall grant up to twenty (20) additional days to prepare for the hearing if a request is made by the parent or Indian custodian or the tribe.

10. The parent, Indian custodian or the child's tribe may waive the ten (10) day notice requirement, pursuant to the Indian Child Welfare Act and Part 23 of Title 25 of the Code of Federal Regulations, for purposes of proceeding with the preliminary protective hearing within the time limit as provided by state law.

E. [no changes]

~~Committee~~ Comment

It was the determination of the committee that a provision permitting the parent, Indian custodian or the child's tribe to waive the ten (10) day notice requirement is not in conflict with the Indian Child Welfare Act and is reflective of current practice in some counties. Some of the tribes currently waive the federal 10-day notice requirement ~~time~~ in order to permit the preliminary protective hearing to proceed within Arizona's ~~the~~ statutory time limits if the tribe is provided with sufficient information concerning the case in advance of the hearing. It is the belief of the committee that the inclusion of the waiver provision is necessary to ensure timely disposition of cases without interfering with the rights afforded the parent, Indian custodian or the tribe pursuant to the Indian Child Welfare Act. When the preliminary protective hearing is held as an emergency hearing under 25 U.S.C. § § 1922 and 25 C.F.R. 23.113 the 10 day notice requirement does not apply.

Rule 50. Preliminary Protective Hearing

A. **Purpose**. At the preliminary protective hearing, the court shall determine whether continued temporary custody of the child is necessary and shall enter appropriate orders as to custody, placement, visitation and the provision of services to the child and family. The preliminary protective hearing may be held as an emergency hearing as provided in 25 U.S.C. §§ 1922 and 25 C.F.R. 23.113.

B. Procedure. t the preliminary protective hearing, the court shall:

1. Inquire if any party has reason to ~~believe~~ know that the child at issue is subject to the Indian Child Welfare Act and Part 23 of Title 25 of the Code of Federal Regulations;

2. – 12. [no changes]

C. Findings and orders. All findings and orders, including any agreements reached by the parties shall be in the form of a signed order or contained in a minute entry, and shall be provided to the parties at the conclusion of the hearing. The court shall:

1. – 2. [no changes]

3. ~~Order the petitioner to obtain verification of the child's Indian status from the child's Indian tribe or from the United States Department of Interior, Bureau of Indian Affairs, if the court has reason to believe the child is an Indian child;~~ Confirm based on a report, declaration, or testimony included in the record or by court order that the Department of Child Safety or other petitioner has used or will use due diligence to identify and work with all Tribes of which there is reason to know the child may be a member (or eligible for membership), to verify whether the child is in fact a member (or a biological parent is a member and the child is eligible for membership);

4. – 5. [no changes]

6. If the Indian Child Welfare Act and Part 23 of Title 25 of the Code of Federal Regulations applies, the court shall make findings pursuant to the standards and burdens of proof as required by the Act, including whether placement of the Indian child is in accordance with Section 1915 of the Act and 25 C.F.R. § 23.131 or whether there is good cause to deviate from the preferences, unless the proceeding is an emergency proceeding governed by Section 1922 of the Act; and

7. – 8. [no changes]

~~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 written

copy of the admonition in order to protect the due process rights of the parent, guardian or Indian custodian. See Form 1.

Rule 50.1 Deviation from placement preferences.

The determination to depart from the placement preferences in Section 1915 of the Indian Child Welfare Act as provided in 25 C.F.R. § 23.132 must be made in the following manner:

(a) If any party asserts that good cause not to follow the placement preferences exists, the reasons for that belief or assertion must be stated orally on the record or provided in writing to the parties to the child-custody proceeding and the court.
(b) The party seeking departure from the placement preferences should bear the burden of proving by clear and convincing evidence that there is "good cause" to depart from the placement preferences.
(c) A court's determination of good cause to depart from the placement preferences must be made on the record or in writing and should be based on one or more of the following considerations:
(1) The request of one or both of the Indian child's parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference;
(2) The request of the child, if the child is of sufficient age and capacity to understand the decision that is being made;
(3) The presence of a sibling attachment that can be maintained only through a particular placement;
(4) The extraordinary physical, mental, or emotional needs of the Indian child, such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences live;
(5) The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements meeting the preference criteria, but none has been located. For purposes of this analysis, the standards for determining whether a placement is unavailable must conform to the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which the Indian child's parent or extended family members maintain social and cultural ties.
(d) A placement may not depart from the preferences based on the socioeconomic status of any placement relative to another placement.
(e) A placement may not depart from the preferences based solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA.

Rule 52: Initial Dependency Hearing

A. – B. [no changes]

C. Procedure. At the initial hearing the court shall:

1. Inquire if any party has reason to ~~believe~~ know that the child at issue is subject to the Indian Child Welfare Act and Part 23 of Title 25 of the Code of Federal Regulations;

2. – 6. [no changes]

D. Findings and Orders. All findings and orders shall be in the form of a signed order or contained in a minute entry. At the conclusion of the initial hearing the court shall:

1. – 2. [no changes]

3. ~~Order the petitioner to obtain verification of the child's Indian status from the child's Indian tribe or from the United States Department of Interior, Bureau of Indian Affairs, if there is reason to believe the child is an Indian child;~~ Confirm based on a report, declaration, or testimony included in the record or by court order that the Department of Child Safety or other petitioner has used or will use due diligence to identify and work with all Tribes of which there is reason to know the child may be a member (or eligible for membership), to verify whether the child is in fact a member (or a biological parent is a member and the child is eligible for membership);

4. – 8. [no changes]

9. If the Indian Child Welfare Act applies, the court shall make findings pursuant to the standards and burdens of proof as required by the Act and Part 23 of Title 25 of the Code of Federal Regulations, including whether placement of the Indian child is in accordance with Section 1915 of the Act and 25 C.F.R. § 23.131 or whether there is good cause to deviate from the preferences; and

10. – 11. [no changes]

E. Continuance. The court may continue the initial dependency hearing, upon a showing of good cause, for reasons which may include:

1. Service of process and/or notification pursuant to the Indian Child Welfare Act and Part 23 of Title 25 of the Code of Federal Regulations has not been completed as to the parties;

2. Additional time is requested by the child's tribe or if additional time is required to comply with the requirements of the Indian Child Welfare Act and Part 23 of Title 25 of the Code of Federal Regulations; or

3. [no changes]

Rule 53: Settlement Conference

A. – C. [no changes]

D. Findings and Orders. All findings and orders shall be in the form of a signed order or contained in a minute entry. At the conclusion of the settlement conference, the court may:

1. – 4. [no changes]

5. If the Indian Child Welfare Act applies, the court shall make findings pursuant to the standards and burdens of proof as required by the Act and Part 23 of Title 25 of the Code of Federal Regulations, including whether placement of the Indian child is in accordance with Section 1915 of the Act and 25 C.F.R. § 23.131 or whether there is good cause to deviate from the preferences; and

6. [no changes]

Rule 54: Findings and Orders

A. – B. [no changes]

C. Findings and Orders. All findings and orders shall be in the form of a signed order or contained in a minute entry. At the conclusion of the pretrial conference, the court may:

1. [no changes]

2. Adjudicate the child dependent and enter findings and orders pursuant to Rule 55 and set or conduct a disposition hearing pursuant to Rule 56 if the court finds that the parent, guardian or Indian custodian failed to appear at the pretrial conference without good cause shown, had notice of the hearing, was properly served pursuant to Rule 48 and had been previously admonished regarding the consequences of failure to appear, including a warning that the hearing could go forward in the absence of the parent, guardian or Indian custodian and that failure to appear may constitute a waiver of rights and an admission to the allegations contained in the dependency petition. The court may adjudicate the child dependent based upon the record and evidence presented if the petitioner has established grounds upon which to adjudicate the child dependent;

a. - b. [no changes]

c. If the Indian Child Welfare Act applies, the court shall make findings pursuant to the standards and burdens of proof as required by the Act and Part 23 of Title 25 of the Code of Federal Regulations, including whether placement of the Indian child is in accordance with Section 1915 of the Act and 25 C.F.R. § 23.131 or whether there is good cause to deviate from the preferences; and

d. [no changes]

Rule 55: Dependency Adjudication Hearing

A. – D. [no changes]

E. Findings and Orders. All findings and orders shall be in the form of a signed order or contained in a minute entry. As to each parent, guardian or Indian custodian, based upon the record and evidence presented, the court shall:

1. – 6. [no changes]

7. If the Indian Child Welfare Act applies, the court shall make findings pursuant to the standards and burdens of proof as required by the Act and Part 23 of Title 25 of the Code of Federal Regulations, including whether placement of the Indian child is in accordance with Section 1915 of the Act and 25 C.F.R. § 23.131 or whether there is good cause to deviate from the preferences; and

8. [no changes]

Rule 56: Disposition Hearing

A. – D. [no changes]

E. Findings and Orders. All findings and orders shall be in the form of a signed order or contained in a minute entry. The court shall determine the appropriate case plan and shall:

1. – 5. [no changes]

6. If the Indian Child Welfare Act applies, the court shall make findings pursuant to the standards and burdens of proof as required by the Act and Part 23 of Title 25 of the Code of Federal Regulations, including whether placement of the Indian child is in accordance with Section 1915 of the Act and 25 C.F.R. § 23.131 or whether there is good cause to deviate from the preferences; and

7. – 8. [no changes]

Rule 57: Provision of Reunification Services Hearing

A. – B. [no changes]

C. Findings and Orders. All findings shall be in writing, in the form of a minute entry or order. If the court finds, by clear and convincing evidence, that reunification efforts are not required, the court shall:

1. – 5. [no changes]

6. If the Indian Child Welfare Act applies, the court shall make findings pursuant to the standards and burdens of proof as required by the Act and Part 23 of Title 25 of the Code of Federal Regulations; including whether placement of the Indian child is in accordance with Section 1915 of the Act and 25 C.F.R. § 23.131 or whether there is good cause to deviate from the preferences; and

7. [no changes]

Rule 58: Review Hearing

A. [no changes]

B. Notice.

1. **Right to participate.** At a proceeding to review the disposition orders of the court, the court shall provide the following persons notices of the review and the right to participate in the proceeding and any future proceedings:

a. The authorized agency charged with the child's care and custody and the child's tribe as required by the Indian Child Welfare Act and Part 23 of Title 25 of the Code of Federal Regulations.

b. Any foster parents in whose home the child resided within the last six months or resides at present, except for those foster parents who maintain a receiving foster home where the child has resided for ten days or less. The petitioner shall provide the court with the names and addresses of all foster parents who are entitled to notice pursuant to statute.

c. A shelter care facility or receiving foster home where the child resides or has resided within the last six months for more than thirty days. The petitioner shall provide the court with the names and addresses of all shelter care facilities and receiving foster homes that are entitled to notice pursuant to this paragraph.

d. The child's parent or guardian unless the parental rights of that parent or guardian have been terminated by court action or unless the parent has relinquished rights to the child to an agency or has consented to the adoption of the child as provided in A.R.S. § 8-107 and the child's Indian custodian as defined by the Indian Child Welfare Act and Part 23 of Title 25 of the Code of Federal Regulations.

e. The child, if twelve years of age or older.

f. The child's relative, as defined in A.R.S. § 8-501, if that relative files a written notice of right of participation with the court.

g. A person permitted by the court to intervene as a party in the dependency proceeding.

h. A physical custodian of the child within the preceding six months.

i. Any person who has filed a petition to adopt or who has physical custody pursuant to a court order in a foster-adoptive placement.

j. Any other person as the court may direct.

2. [no changes]

C. – E. [no changes]

F. Findings and Orders. All findings and orders shall be in the form of a signed order or contained in a minute entry. At the conclusion of the hearing, the court shall:

1. – 6. [no changes]

7. If the Indian Child Welfare Act applies, the court shall make findings pursuant to the standards and burdens of proof as required by the Act and Part 23 of Title 25 of the Code of Federal Regulations, including whether placement of the Indian child is in accordance with Section 1915 of the Act and 25 C.F.R. § 23.131 or whether there is good cause to deviate from the preferences; and

8. [no changes]

Rule 59: Return of the Child

A. – D. [no changes]

E. Findings and Orders. All findings and orders shall be in the form of a signed order or contained in a minute entry. The court shall:

1. – 4. [no changes]

5. If the Indian Child Welfare Act applies, the court shall make findings pursuant to the standards and burdens of proof as required by the Act and Part 23 of Title 25 of the Code of Federal Regulations, including whether placement of the Indian child is in accordance with Section 1915 of the Act and 25 C.F.R. 23.131 or whether there is good cause to deviate from the preferences; and

6. [no changes]

Rule 60: Permanency Hearing

A. – D. [no changes]

E. Findings and Orders. All findings and orders shall be in the form of a signed order or contained in a minute entry. The court shall make findings based upon the evidence presented and shall:

1. – 4. [no changes]

5. If the Indian Child Welfare Act applies, the court shall make findings pursuant to the standards and burdens of proof as required by the Act and Part 23 of Title 25 of the Code of Federal Regulations; including whether placement of the Indian child is in accordance with Section 1915 of the Act and 25 C.F.R. § 23.131 or whether there is good cause to deviate from the preferences; and

6. – 7. [no changes]

Rule 61: Motion of Hearing, Service of Process and Orders for Permanent Guardianship

A. Motion. If the court determines that the establishment of a permanent guardianship is in the best interests of a dependent child, the court shall order that a motion for guardianship be filed by the Department of Child Safety or by the child's attorney or guardian ad litem within ten (10) days of the permanency hearing. The motion shall contain all information required by law and shall state whether there is reason to know the child is an Indian child as defined by the Indian Child Welfare Act and Part 23 of Title 25 of the Code of Federal Regulations.

B. [no changes]

C. Service. The motion for guardianship and notice of hearing shall be served by the moving party upon the parties and any other person as provided by law, pursuant to Rule 5(c), Ariz. R. Civ. Pro. If the motion alleges or the court has reason to ~~believe~~ know the child at issue is an Indian child as defined by the Indian Child Welfare Act and Part 23 of Title 25 of the Code of Federal Regulations, in addition to service of process as required by this rule, notification shall be given to the parent, Indian custodian and child's tribe. Notice shall be provided by registered or certified mail with return receipt requested. If the identity or location of the parent or Indian custodian cannot be determined, notice shall be given to the Secretary of the Interior by registered or certified mail and the Secretary of the Interior shall have fifteen (15) days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. The notice shall advise the parent or Indian custodian and the tribe of their right to intervene. No hearing shall be held until at least ten (10) days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary. The court shall grant up to twenty (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.

1. [no changes]

D. Orders. Upon the filing of a motion for guardianship, the court shall order the Department of Child Safety, an agency or a person designated as an officer of the court to conduct an

investigation and prepare a report 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. If the child is an Indian child, the report shall address whether the prospective guardian falls within the placement preferences as required by the Act and Part 23 of Title 25 of the Code of Federal Regulations or whether good cause exists to deviate from the placement preferences. A copy of the report shall be provided to the parties and the court ten (10) days prior to the initial guardianship hearing. The court may enter any other orders, pending the hearing, as the court determines to be in the best interests of the child.

Rule 62: Initial Guardianship Hearing

A. – B. [no changes]

C. Procedure. At the initial hearing the court shall;

1. Inquire if any party has reason to ~~believe~~ know that the child at issue is subject to the Indian Child Welfare Act and Part 23 of Title 25 of the Code of Federal Regulations;

2. – 8. [no changes]

D. Findings and Orders. All findings and orders shall be in the form of a signed order or contained in a minute entry. At the conclusion of the hearing, the court shall:

1. – 4. [no changes]

5. If the Indian Child Welfare Act applies, the court shall make findings pursuant to the standards and burdens of proof as required by the Act and Part 23 of Title 25 of the Code of Federal Regulations, including whether placement of the Indian child is in accordance with Section 1915 of the Act and 25 C.F.R. § 23.131 or whether there is good cause to deviate from the preferences; and

6. [no changes]

Rule 63: Guardianship Adjudication Hearing

A. – E. [no changes]

F. Findings and Orders. All findings and orders shall be in the form of a signed order or contained in a minute entry. At the conclusion of the hearing the court shall:

1. – 3. [no changes]

4. If the Indian Child Welfare Act applies, the court shall make findings pursuant to the standards and burdens of proof as required by the Act and Part 23 of Title 25 of the Code of

Federal Regulations, including whether placement of the Indian child is in accordance with Section 1915 of the Act and 25 C.F.R. § 23.131 or whether there is good cause to deviate from the preferences;

5. – 6. [no changes]

Rule 63.2: Initial Successor Permanent Guardianship Hearing

A. – B. [no changes]

C. Procedure. At the initial successor permanent guardianship hearing, the court shall:

1 Inquire if any party has reason to ~~believe~~ know that the child at issue is subject to the Indian Child Welfare Act;

2. [no changes]

D. – E. [no changes]

Rule 64: Motion, Petition, Notice of Hearing and Service of Process and Orders

A. Motion for Termination of Parental Rights. If the court determines that termination of parental rights is in the best interests of a dependent child, the court shall order that a motion for termination of parental rights be filed by the Department of Child Safety or the child's attorney or guardian ad litem within ten (10) days of the permanency hearing. The motion shall allege the grounds for termination of parental rights as provided by law and shall state whether there is reason to know the child is an Indian child as defined by the Indian Child Welfare Act and Part 23 of Title 25 of the Code of Federal Regulations.

B. Petition for Termination of Parental Rights. If the child at issue is not a dependent child or is a dependent child who was the subject of a dependency petition filed prior to July 1, 1998, the petitioner shall file a petition for termination of parental rights, pursuant to A.R.S. § 8-534 and shall state whether the child is an Indian child as defined by the Indian Child Welfare Act and Part 23 of Title 25 of the Code of Federal Regulations. Nothing in this rule shall preclude the filing of a petition in those cases where the child was the subject of a dependency petition filed after July 1, 1998.

C. [no changes]

D. Service. If the motion or petition alleges or the court has reason to ~~believe~~ know the child at issue is an Indian child as defined by the Indian Child Welfare Act and Part 23 of Title 25 of the Code of Federal Regulations, in addition to service of process as required by this rule, notification shall be given to the parent, Indian custodian and the child's tribe or tribes. Notice shall be provided by registered or certified mail with return receipt requested. If the identity or

location of the parent or Indian custodian cannot be determined, notice shall be given to the Secretary of the Interior by registered or certified mail and the Secretary of the Interior shall have fifteen (15) days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe.

E. [no changes]

Rule 65: Initial Termination Hearing

A. – B. [no changes]

C. Procedure. At the initial hearing the court shall:

1. Inquire if any party has reason to ~~believe~~ know that the child at issue is subject to the Indian Child Welfare Act and Part 23 of Title 25 of the Code of Federal Regulations;

2. – 7. [no changes]

D. Findings and Orders. All findings and orders shall be in the form of a signed order or contained in a minute entry. At the conclusion of the hearing, the court shall:

1. – 3. [no changes]

4. If the Indian Child Welfare Act applies, the court shall make findings pursuant to the standards and burdens of proof as required by the Act and Part 23 of Title 25 of the Code of Federal Regulations, including whether placement of the Indian child is in accordance with Section 1915 of the Act and 25 C.F.R. § 23.131 or whether there is good cause to deviate from the preferences; and

5. [no changes]

Rule 66: Termination Adjudication Hearing

A. – E. [no changes]

F. Findings and Orders by the court. All findings and orders shall be in the form of a signed order or set forth in a signed minute entry. At the conclusion of the hearing the court shall:

1. [no changes]

2. If the moving party or petitioner has met its burden of proof, the court shall:

a. – d [no changes]

e. If the Indian Child Welfare Act applies, the court shall make findings pursuant to the standards and burdens of proof as required by the Act and Part 23 of Title 25 of the Code of Federal Regulations, including whether placement of the Indian child is in accordance with Section 1915 of the Act and 25 C.F.R. § 23.131 or whether there is good cause to deviate from the preferences.

3. [no changes]

Rule 68: Definitions

A. [no changes]

B. 1 – 7 [no changes]

8. **Adoptive Placement Preferences.** In any adoptive placement of an Indian child, a preference shall be given, where the child's tribe has not established a different order of preference and in the absence of good cause to the contrary, to a placement with:

a. A member of the Indian child's extended family;

b. Other members of the Indian child's tribe; or

c. Other Indian families.

Rule 69: Appointment, Appearance and Withdrawal of Counsel

A. Appointment. The court may appoint counsel for those persons entitled to counsel and determined to be indigent as provided by law, these rules or the Indian Child Welfare Act and Part 23 of Title 25 of the Code of Federal Regulations. In determining whether a person is indigent, the court shall:

1. [no changes]

B. – D. [no changes]

Rule 76: Service of Process

A. [no changes]

B. Notice. If the petition to adopt alleges or the court has reason to ~~believe~~ know the child at issue is an Indian child as defined by the Indian Child Welfare Act and Part 23 of Title 25 of the Code of Federal Regulations, in addition to service of process as required by these rules, notification shall be given to the parent, Indian custodian and child's tribe of any involuntary

proceeding involving an Indian child. Notice shall be provided by registered or certified mail with return receipt requested. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, notice shall be given to the Secretary of the Interior by registered or certified mail and the Secretary of the Interior shall have fifteen (15) days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. The notice shall advise the parent or Indian custodian and the tribe of their right to intervene. No hearing shall be held until at least ten (10) days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary. The court shall grant up to twenty (20) additional days to prepare for the hearing if a request is made by the parent or Indian custodian or the tribe.

Rule 78: Temporary Custody

A. Petition for Temporary Custody. A person seeking temporary custody of child shall file a petition and a notice of hearing with the clerk of the court within five (5) days of obtaining the child. The petition shall set forth how the child came into the prospective adoptive parent's care, how long the child has resided with the prospective adoptive parent, why continued custody is in the best interests of the child and whether there is reason to know the child is subject to the Indian Child Welfare Act and Part 23 of Title 25 of the Code of Federal Regulations.

E. Findings and Orders. All findings and orders shall be in writing and signed by the court, in the form of an order or minute entry. The court shall;

1. [no changes]

2. If the Indian Child Welfare Act applies, the court shall make findings pursuant to the standards and burdens of proof as required by the Act and Part 23 of Title 25 of the Code of Federal Regulations, including whether placement of the Indian child is in accordance with Section 1915 of the Act and 25 C.F.R. § 23.131 or whether there is good cause to deviate from the preferences.

F. – G. [no changes]

Rule 79: Petition to Adopt

A. Petition to Adopt. The petition to adopt and notice of hearing shall be filed with the clerk of the court. A petition to adopt shall be captioned, "In the Matter of___, a person under the age of 18 years," and may be based upon information and belief. In addition to information required by law, each petition to adopt shall contain the following information:

1. Whether there is reason to know the child to be adopted is an Indian child subject to the requirements of the Indian Child Welfare Act and Part 23 of Title 25 of the Code of Federal Regulations. If the Act applies, the petition shall include the following:

a. Whether the placement preferences required by Section 1915 of the Act and 25 C.F.R. § 23.130 have been complied with;

b. – d. [no changes]

2. – 4. [no changes]

B. – C. [no changes]

Rule 84: Hearing to Finalize Adoption

A. – B. [no changes]

C. Procedure. At the hearing the court shall:

1.-5. [no changes]

6. If an Indian child subject to the Act is being adopted, the court shall determine whether:

a. The tribe was notified of the proceedings and the right to intervene, if applicable;

b. The parent or Indian custodian's consent to the adoption was taken in accordance with the Indian Child Welfare Act and Part 23 of Title 25 of the Code of Federal Regulations;

c. The placement complies with the preferences set forth in Section 1915 of the Act and 25 C.F.R. § 23.130 or whether good cause exists for deviation from the placement preferences; and

d. [no changes]

D. Findings and Orders. The court shall make its findings in writing, in the form of a minute entry or order and shall grant or deny the petition to adopt at the conclusion of the hearing. The court may take the matter under advisement if information required by law had not been received by the court prior to or at the hearing, as required by these rules. If the Indian Child Welfare Act applies, the court shall make findings and enter orders pursuant to the standards and burdens of proof as required by the Act and Part 23 of Title 25 of the Code of Federal Regulations.

1. [no changes]

Rule 85: Motion and Hearing to Set Aside Adoption

A. Motion to Set Aside Adoption. A person seeking to set aside a final order of adoption shall file a motion to set aside the adoption with the clerk of the court. The motion shall allege grounds only as permitted by Rule 60(b)-(d), Ariz. R. Civ. P. or by the Indian Child Welfare Act

and Part 23 of Title 25 of the Code of Federal Regulations. Upon receipt of the motion, the court shall set an initial hearing within ten (10) days and shall advise the parties as to the date, time and location of the initial hearing. If there is reason to know the child is an Indian child, the court shall proceed in the manner set forth in the Indian Child Welfare Act and Part 23 of Title 25 of the Code of Federal Regulations.

B. – F. [no changes]

G. Findings and Orders. The court shall make its findings in writing, in the form of a minute entry or order. The court shall advise the parties of their right to appeal and shall enter orders concerning the custody of the child if the adoption is set aside. If the Indian Child Welfare Act applies, the court shall make findings and enter orders pursuant to the standards and burdens of proof as required by the Act and Part 23 of Title 25 of the Code of Federal Regulations.

Rule 2. Definitions A term defined in the singular includes the plural, and a term defined in the plural include the singular.

(a) **"ADJC"** means the Arizona Department of Juvenile Corrections.

(b) **"ARCAP"** means the Arizona Rules of Civil Appellate Procedure.

(c) **"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.

(d) "Child safety worker" means a person who has been selected by and trained under the requirements prescribed by DCS, and who assists in carrying out the provisions of Title 8, Article 8.

(d) **"Civil Rule"** means a rule in the Arizona Rules of Civil Procedure.

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(f) **"Criminal Rule"** means a rule in the Arizona Rules of Criminal Procedure.

(g) **"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.]

(h) **"Family Law Rule"** means a rule in the Arizona Rules of Family Law Procedure.

(i) **"FFPSA"** means the Family First Prevention Services Act as codified in the Bipartisan Budget Package/Continuing Resolution (Public Law 115-123).

(j) **"Fiduciary"** means 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.] [**WG 1 Note:** This definition comes from A.R.S. § 14-1201, the probate code definitions section.]

(k) **"Guardian ad litem"** means a person [an attorney?] appointed by the court to protect the best interest[s?] of a party or as otherwise directed by the court. [**WG1 Note:** This definition is substantially similar to the definition in A.R.S. § 8-531(7).]

(l) **"ICPC"** means the Interstate Compact on the Placement of Children under A.R.S. §§ 8-548through 548.06.

(m) **"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.]

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

(o) "Juvenile" means a person under the age of 18 years and may be referred to in these rules as a "child," "youth," or "minor." For purposes of these rules, "juvenile" also includes a person within the juvenile court's jurisdiction under A.R.S. § 8-202.

(p) "Juvenile court" means a division or department of the superior court designated to preside over juvenile court proceedings, as provided in Rule 1(a).

(q) "Out-of-home placement" means the placing of a child in the custody of an individual or agency other than the child's parent or legal guardian and includes placement in temporary custody pursuant to A.R.S. § 8-821, voluntary placement pursuant to A.R.S. § 8-806 or placement due to a dependency action. [**WG1 Note:** This definition mirrors the definition in A.R.S. § 8-501(9).]

(r) "Parent" means the biological or adoptive mother or father of a child.

(s) "Presiding judge" means "presiding judge of the juvenile court," unless these rules specify otherwise.

(t) "State" means the State of Arizona.

(u) "Supreme Court Rule" means a rule in the Rules of the Supreme Court of Arizona.

(v) "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 form 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

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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.]

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(c) "Civil Rule" means a rule in the Arizona Rules of Civil Procedure.

(d) "Clerk" means the superior court clerk. 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."

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(b) "ICWA" means the Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963, andPart 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.]

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

(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?"]

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

(b) 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.

(c) 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.

~~**[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?] [**WG1 Note**: The correct reference is current Rule 23(D).]

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(c) 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.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.

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 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:

(21) ***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.]

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(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 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.

~~**[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?] [**WG1 Note**: The correct reference is current Rule 23(D).]

Rule 3.1. Applicability of the Arizona Rules of Evidence. [NEW]

(a) Contested Adjudication Proceedings. The Arizona Rules of Evidence apply in contested adjudication hearings in delinquency, dependency, termination, and Title 8 guardianship proceedings, except as otherwise provided by these rules or by agreement of all parties and the court.

(b) Other Proceedings. In any proceeding not covered by section (a), any non-privileged evidence, including hearsay, 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**.**

(c) Admissibility of a Child's Statement or Conduct. In any dependency, termination, and Title 8 guardianship proceeding, evidence of a child's statement or nonverbal conduct regarding acts of abuse or neglect perpetrated on the child is admissible if the time, content, and circumstances of the statement or conduct provide sufficient indicia of its reliability.

(d) Admissibility of Reports.

(1) Child Safety Worker's Report. Before any dependency, Title 8 guardianship, or termination hearing, the court may review a child safety worker's report and [shall?] admit the report into evidence if the workers who prepared the report are available for cross-examination and the report was disclosed to the parties not later than:

(A) one day before a Rule 51 temporary custody hearing; or

(B) ten days before any other hearing at which the report may be introduced.

(2) Evaluation Report. Before any dependency, Title 8 guardianship, or termination hearing, an evaluation report of any psychological, psychiatric, medical, neurological, psycho-educational, psycho-sexual, substance abuse, or similar matter concerning any party or participant, or any person with whom a child is or may be residing, is admissible into evidence if the report has been disclosed to the parties under Rule 44(b)(1) and the author of the report is available for cross-examination.

(3) Report Ordered Under Rule 63(e). In a Title 8 guardianship adjudication hearing, in addition to reports admitted into evidence under this section [should this say, under Rule 63(e)?], the court [must?] admit into evidence the investigative report prepared under Rule 61(f).

(4) Social Study. In a termination adjudication proceeding, 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:

(A) admit the social study into evidence after redacting those portions to which objections were sustained; and

(B) allow the petitioner a reasonable opportunity to call additional witnesses to testify regarding the redacted portions of the social study.

(5) Other Reports. The court may admit any other report that is court-ordered or required by statute or rule, if the report has been timely disclosed and the author of the report is available for cross-examination.

Available for Cross-Examination. For purposes of this rule, a person is available for cross-examination if the person appears in court or is subject to the court's subpoena power, unless the person is subpoenaed and is unable or unwilling to comply with the subpoena.

~~R~~Rule 3.1. Applicability of the Arizona Rules of Evidence. [NEW]

(a) Contested Adjudication Proceedings. The Arizona Rules of Evidence apply in contested ~~delinquency~~ adjudication hearings in~~,~~ delinquency, dependency ~~adjudication~~, termination ~~adjudication~~, and Title 8 guardianship ~~adjudication~~ proceedings, except as otherwise provided by these rules or by agreement of all parties and the court.

(b) ~~Admissibility of Evidence When the Arizona Rules of Evidence Do Not Apply~~Other Proceedings. In any proceeding not covered by section (a), any non-privileged evidence, including hearsay, 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.

(c) Admissibility of a Child's Statement or Conduct. In any dependency, termination, and Title 8 guardianship proceeding, evidence of a child's statement or nonverbal conduct regarding acts of abuse or neglect perpetrated on the child is admissible ~~for all purposes~~ if the time, content, and circumstances of the statement or conduct provide sufficient indicia of its reliability.

(d) Admissibility of Reports.

(1) Child Safety Worker's Report. Before any dependency, Title 8 guardianship, or termination hearing, the court may review a child safety worker's report and [shall?] admit the report into evidence if the workers who prepared the report are available for cross-examination and the report was disclosed to the parties not later than:

(A) one day before a Rule 51 temporary custody hearing~~the preliminary protective hearing~~; or

(B) ten days before any other hearing at which the report may be introduced.

(2) Evaluation Report. Before any dependency, Title 8 guardianship, or termination hearing, an evaluation report of any psychological, psychiatric, medical, neurological, psycho-educational, psycho-sexual, substance abuse, or similar matter concerning any party or participant, or any person with whom a child is or may be residing, is admissible into evidence if the report has been disclosed to the parties under Rule 44(b)(1) and the author of the report is available for cross-examination.

(3) Report Ordered Under Rule ~~61~~63(~~e~~e). In a Title 8 guardianship adjudication hearing, in addition to reports admitted into evidence under this section [should this

say, under Rule 63(e)?], the court [~~must~~ must?] admit into evidence the investigative report prepared under Rule 6~~1~~1(~~e~~f).

~~(3)~~**(4) Social Study.** In a termination adjudication proceeding, 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:

(A) admit the social study into evidence after redacting those portions to which objections were sustained; and

(B) allow the petitioner a reasonable opportunity to call additional witnesses to testify regarding the redacted portions of the social study.~~)~~

(5) Other Reports. The court may admit any other report that is court-~~ordered, or~~ordered or required by ~~law~~ statute or rule, if the report has been timely disclosed and the author of the report is available for cross-examination.

Available for Cross-Examination. For purposes of this rule, a person is available for cross-examination if the person appears in court or is subject to the court's subpoena power, unless the person is subpoenaed and is unable or unwilling to comply with the subpoena.

Rule 5. Court-Appointed Special Advocate ("CASA")

The court may appoint a CASA under A.R.S. § 8-523 to assist and advocate for a child, to assure that all appropriate services are made available to the child, and otherwise to protect the best interests of the child in the action in which the CASA is appointed. The court may appoint a CASA in a dependency, Title 8 guardianship, or termination ~~delinquency, or incorrigibility~~ action. CASAs are not civilly or criminally liable for good faith actions they take in connection with their responsibilities.

Derivation: Current Juvenile Rule 3, modified. [**Staff Note:** This rule does not distinguish between the roles of a special advocate and a GAL. Should it? Consider as an alternative to the last sentence that "the court may appoint a volunteer special advocate in any proceeding in which it may appoint a guardian ad litem." *See* further staff notes in Rule 40.1.] [**WG 1 Note 1**: The CASA program is authorized by 8-523 and -524. The immunity provision is contained in § 8-523.] [**WG1 Note 2**: Recommend deleting "volunteer special advocate from Rule 40(a).] [**WG1 Note 3:** also consider § 8-522 for possible amendment.]

Rule 5. Court-Appointed Special Advocate ("CASA")

The court may appoint ~~a volunteer special advocate~~ a CASA under A.R.S. § 8-523 to assist and advocate for a child, to assure that all appropriate services are made available to the child, and otherwise to protect the best interests of the child in the action in which the ~~special advocate~~CASA is appointed. The court may appoint a ~~volunteer special advocate~~CASA in a dependency, Title 8 guardianship, or termination~~, delinquency, or incorrigibility~~ action. ~~Court appointed special advocates~~CASAs are not civilly or criminally liable for good faith actions they take in connection with their responsibilities.

Derivation: Current Juvenile Rule 3, modified. [**Staff Note:** This rule does not distinguish between the roles of a special advocate and a GAL. Should it? Consider as an alternative to the last sentence that "the court may appoint a volunteer special advocate in any proceeding in which it may appoint a guardian ad litem." *See* further staff notes in Rule 40.1.] [**WG 1 Note 1**: The CASA program is authorized by ~~A.R.S. §~~ 8-523 and -524. The immunity provision is contained in § 8-523.] [**WG1 Note 2**: Recommend deleting "volunteer special advocate from Rule 40(a).] [**WG1 Note 3:** also consider § 8-522 for possible amendment.]

~~**Rule 5. Appointment of a Special Advocate**~~

~~The court may appoint a volunteer special advocate to assist and advocate for a child, to assure that all appropriate services are made available to the child, and otherwise to protect the best interests of the child in the action in which the advocate is appointed. The court may appoint a volunteer special advocate in a dependency, guardianship, termination, delinquency, or incorrigibility action.~~

~~**Derivation**: Current Juvenile Rule 3, modified. [**Staff Note:** This rule does not distinguish between the roles of a special advocate and a GAL. Should it? Consider as an alternative to the last sentence that "the court may appoint a volunteer special advocate in any proceeding in which it may appoint a guardian ad litem." See further staff notes in Rule 40.1.]~~

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 or citation.

(b) Appointment of an Attorney. Upon the filing of a petition or citation, the court must appoint an attorney for the juvenile if the court finds that the juvenile is indigent. A juvenile is deemed indigent and has the right to be represented by a court-appointed attorney as provided in A.R.S. Title 8.

(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 and the juvenile's parent or guardian to pay a reasonable portion of the cost of the appointed attorney after requiring the juvenile and the juvenile's parent or guardian to complete the court's financial questionnaire or questioning them about their available financial resources. This section does not apply to DCS or ADJC.

(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 understanding, that the juvenile's waiver is knowing, intelligent, and voluntary. 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.

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 or citation ~~as provided by law~~.

~~(a)~~ **Appointment of an Attorney**. ~~The~~ Upon the filing of a petition or citation, 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 deemed indigent and has the right to be represented by a court-appointed attorney as provided in A.R.S. Title 8.

(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, t~~The court may order the juvenile~~,~~ and the juvenile's parent~~, guardian, or custodian~~ or guardian to pay a reasonable portion of the cost of the appointed attorney after requiring the juvenile and the juvenile's~~,~~ parent or guardian to complete the court's financial questionnaire or questioning them about their available financial resources. This section does not apply to ~~the~~ DCS or~~,~~ ADJC.~~.~~

~~**(c) 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~~understanding, that the juvenile's waiver is knowing, intelligent, and voluntar~~il~~y. 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 and Withdrawal

(a) Appearance.

(1) ***Court Appointed Attorney.*** A court-appointed attorney 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 prosecutor.

(2) ***Retained Attorney.*** A retained attorney must file a notice of appearance and provide copies to the assigned judicial officer and the prosecutor.

(b) Withdrawal.

(1) ***Court Appointed Attorney.*** Unless the court permits otherwise, a court-appointed attorney is automatically relieved of representing a juvenile (1) if no hearings are scheduled, and (2) the time for filing a notice of appeal has expired.

(2) ***Retained Attorney.***

(A) *Before the disposition hearing.* A retained attorney may withdraw from a case before the disposition hearing only by motion.

(B) *After the disposition hearing.* A retained attorney may file a notice of withdrawal (1) if no hearings are scheduled, and (2) the time for filing a notice of appeal has expired.

Rule 11. Attorney's Appearance and Withdrawal

(a) Appearance.

(1) ***Court Appointed Attorney.*** ~~An attorney~~A court-appointed attorney ~~-~~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~~prosecutor. ~~[**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.]~~

~~(a)~~**(2)** ***Retained Attorney.*** A retained attorney must file a notice of appearance and provide copies to the assigned judicial officer and the prosecutor.

(b) Withdrawal ~~of an Attorney~~.

(1) ***Court Appointed Attorney.*** Unless the court ~~orders~~ permits otherwise, ~~an~~ a court-appointed attorney is automatically 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.~~

~~(1)~~**(2)** ***Retained Attorney.***

(A) *Before the disposition hearing.* ~~-~~A retained attorney may withdraw from a case before the disposition hearing only by motion.

~~(b)~~**(B)** *After the disposition hearing.* A retained attorney may file a notice of withdrawal (1) if no hearings are scheduled, and (2) the time for filing a notice of appeal has expired.

Rule 12. The Juvenile's Attendance at Court Proceedings; Restraints

(a) Personal Appearance. A juvenile must personally appear in court for the following proceedings:

(1) a detention hearing;

(2) an advisory hearing;

(3) a transfer hearing;

(4) a change of plea hearing;

(5) an adjudication hearing;

(6) a disposition hearing;

(b) Telephonic or Video Appearance. If the parties agree and if authorized by the court, the juvenile may personally appear by telephone or by video conferencing.

(c) Voluntary Absence. The court may infer that a juvenile's absence is voluntary if the juvenile:

(1) was notified of the date, time, and place of the hearing;

(2) was ordered to be present at the hearing,

(3) was advised that the hearing would proceed in the juvenile's absence if the juvenile failed to appear; and

(4) has not provided an acceptable reason for the non-appearance.

(d) Failure to Appear. The court may proceed with a hearing, other than a disposition hearing, if the juvenile voluntarily fails to appear. Following the juvenile's non-appearance at any hearing, the court also may issue a warrant to secure the juvenile's attendance for a future hearing.

(e) Mechanical Restraints. Mechanical restraints include handcuffs, leg irons, belly chains, zip ties, spit hoods and masks, and any other device used to restrain movement of the arms, legs or torso.

(1) When a juvenile appears before a judicial officer at a hearing in the juvenile's delinquency case, the juvenile must be free of mechanical restraints, unless there are no less restrictive alternatives that will prevent flight or physical harm ~~to the juvenile or another person~~. A juvenile appearing before a judicial officer ~~in mechanical restraints~~ may object to the use of restraints ~~through counsel~~. After the judicial officer has heard from the juvenile, the State, and any detention

personnel, and considered the factors in subpart (2), the judicial officer must approve or disapprove of the use of restraints.

(2) Relevant factors in determining whether the use of mechanical restraints is warranted include:

(A) the juvenile has displayed threatening or physically aggressive behavior ~~towards others~~;

(B) the juvenile ~~is likely to flee,~~ has expressed an intention to flee or has previously attempted to flee from detention;

(C) ~~a probation juvenile detention officer, detention administrator or designee has recommended the use of mechanical restraints;~~

(D) a present security situation in the courtroom or courthouse, including a risk of gang violence or gang-related conduct or a specific concern due to a witness' presence, that warrants the use of mechanical restraints.

(3) A prior judicial determination that the juvenile should appear free of mechanical restraints remains in effect until the court orders otherwise.

(4) The use of mechanical restraints outside the courtroom is governed by the ~~Policies and Procedures in effect for the courts in the specific county and as required by the~~ Arizona Juvenile Detention Standards.

(5) Any restraints must allow the juvenile to read, handle documents, and write.

Rule 12. The Juvenile's Attendance at Court Proceedings; Restraints

(a) Personal Appearance. ~~A~~ A juvenile must personally appear in court ~~as the court directs and~~ for the following proceedings:

~~(a)~~ **(1)** a detention hearing;

(2) ~~An~~an advisory hearing;

(3) ~~y~~ a transfer hearing;

(4) a change of plea hearing;

~~(1)~~**(5)** an adjudication hearing;

~~(2)~~**(6)** a~~ny~~ disposition hearing;

~~(3) any transfer hearing; and~~

~~(4) any change of plea.~~

(b) Telephonic or Video Appearance. If the parties agree and if authorized by the court, the juvenile may personally appear by ~~telephonically~~ telephone or by video conferencing. ~~[**Staff Note:** The rule should clarify whether a telephonic appearance under (b) constitutes a personal appearance under (a).]~~

(c) Voluntary Absence. The court may infer that a~~the~~ juvenile's absence is voluntary if the juvenile ~~was notified of the following~~:

(1) was notified of the ~~the~~ date, time, and place of the hearing;

(2) ~~the right~~was ordered to be present at the hearing, ~~and [**Staff Note:** Does the court advise the juvenile of the right to be present, or does it order the juvenile to appear?]~~

(3) ~~that~~ was advised that the hearing would proceed in the juvenile's absence if the juvenile failed to appear; and~~.~~

~~(3)~~**(4)** has not provided an acceptable reason for the non-appearance.

(d) Failure to Appear. The court may proceed with a hearing, other than a disposition hearing, if the juvenile voluntarily fails to appear. ~~[**Staff Note:** The preceding sentence does not distinguish between a voluntary and involuntary absence. Should it?]~~ Following the juvenile's non-appearance at any hearing, the court also may issue a warrant to secure the juvenile's attendance for a future hearing. ~~[**Staff Note:** Because the preceding sentence refers to "any hearing," does it conflict with section (c), which suggests that a voluntary absence is permitted?]~~

(e) Mechanical Restraints. Mechanical restraints include handcuffs, leg irons, belly chains, zip ties, spit hoods and masks, and any other device used to restrain movement of the arms, legs or torso. ~~[**Staff Note:** The preceding, descriptive provision was relocated from the end of current section (e).]~~

(1) When a juvenile appears before a judicial officer at a hearing in the juvenile's delinquency case, the juvenile must be free of mechanical restraints, unless there are no less restrictive alternatives that will prevent flight or physical harm ~~to the juvenile or another person~~. A juvenile appearing before a judicial officer ~~in mechanical restraints~~ may object to the use of restraints ~~through counsel~~. After the judicial officer has heard from the juvenile, the State, and any detention personnel, and considered the factors in subpart (2), the judicial officer must approve or disapprove of the use of restraints.

~~(1)~~**(2)** Relevant factors in determining whether the use of mechanical restraints is warranted include:

(A) the juvenile has displayed threatening or physically aggressive behavior ~~towards others~~;

(B) the juvenile ~~is likely to flee,~~ has expressed an intention to flee~~,~~ or has previously attempted to flee from detention~~secure care [**Staff Note:** Is "secure care" another way of saying "detention?"]~~;

(C) ~~a probation juvenile detention officer, detention administrator or designee, or juvenile detention officer has recommended the use of mechanical restraints;~~

(D) a present security situation in the courtroom or courthouse, including a risk of gang violence or gang-related conduct or a specific concern due to a witness' presence, that warrants the use of mechanical restraints.

~~(2)~~**(3)** A prior judicial determination ~~by a court~~ that the juvenile should appear ~~in~~ free of mechanical restraints remains in effect until ~~further order of~~ the court orders otherwise.

~~**(3)** A juvenile brought before the judicial officer in mechanical restraints may object to the restraints through counsel. After the judicial officer has heard from the juvenile, the State, and any detention personnel, and considered the factors listed in subpart (1), the judicial officer must approve or disapprove of the use of restraints.~~

(4) ~~Except when a juvenile appears before a judicial officer at a hearing in the juvenile's delinquency case, [**Staff Note:** Not certain what the preceding phrase means. Don't subparts 1-3 apply only to delinquency cases? If this provision~~

~~applies to the use of restraints outside of court, or if it applies when the juvenile appears in a case other than their own, it would be clearer if the rule explicitly said so] the~~ The use of mechanical restraints outside the courtroom is governed by the ~~Policies and Procedures in effect for the courts in the specific county and as required by the~~ Arizona Juvenile Detention Standards.

(5) Any restraints must ~~provide the juvenile with limited hand movement that~~ allow~~s~~ the juvenile to read, handle documents, and write.

Rule 13. Attendance of Witnesses and Appearance of Attorneys by Telephone or Video Conference

(a) At Adjudication Proceedings. All witnesses must personally appear for adjudication proceedings, unless the court orders otherwise after considering the juvenile's constitutional right of confrontation.

(b) At Other Proceedings. For proceedings other than adjudications, a party may request the court to permit witness testimony or an attorney's appearance by telephone or video conferencing. Unless the court orders otherwise, the request must be in writing.

Rule 13. Attendance of Witnesses and Appearance of Attorneys ~~and Counsel~~ by Telephone or Video Conference

(a) At Adjudication Proceedings. All witnesses must personally appear for adjudication proceedings, unless the court orders otherwise after considering the juvenile's constitutional right of confrontation. ~~[**Staff Note:** Staff's draft deleted "parties." If parties under current Rule 9 are the juvenile and the State, and if the juvenile can appear by phone under Rule 12(b), shouldn't this provision apply only to witnesses?]~~

(b) At Other Proceedings. For proceedings other than adjudications, a party may ~~move~~ request the court to permit witness testimony or ~~argument~~an attorney's appearance~~, or the appearance of counsel,~~ by telephone or video conferencing. Unless the court orders otherwise, the ~~motion~~ request must be in writing. ~~[**Staff Note**: Should this section include a specific reference to witnesses?]~~

Rule 14. Combining Hearings

The court may conduct at one time any combination of the advisory, adjudication, disposition, or other delinquency hearings. The court also may combine a delinquency hearing and a dependency hearing involving the same child.

Rule 14. ~~Consolidation of~~ Combining Hearings

~~The court may hear multiple matters at one time, including the advisory hearing, the detention hearing—if one is necessary—the adjudication hearing, the disposition hearing, or any combination of hearings. But this provision does not apply to a hearing concerning a transfer to another court.~~The court may conduct at one time any combination of the advisory, adjudication, disposition, or other delinquency hearings. The court also may combine a delinquency hearing and a dependency hearing involving the same child.

Rule 22. Referral; Diversion

(a) Referral. A referral for incorrigible or delinquent conduct must include:

(1) a concise statement of facts—including with reasonable particularity the time, date, place, and manner of the alleged acts of the juvenile—that bring the juvenile within the court's jurisdiction, and the law or standard of conduct that the acts allegedly violated;

(2) the name, age, gender, and address of the juvenile named in the referral;

(3) the names and addresses, if known, of the parent, guardian, or custodian of the juvenile or the juvenile's spouse, if any; and

(4) if the juvenile is in custody, the place of detention and the date and time the juvenile was taken into custody.

(5) The signature of the person responsible for filing the referral.

(b) Record of Referral. Any authorized juvenile court personnel who receives a referral must make a record of the referral in the manner prescribed by the juvenile court in each county.

(c) Diversion.

(1) ***Meaning.*** "Diversion" is a way of resolving a referral under A.R.S. § 8-321 without filing a petition.

(2) ***Prosecutorial Discretion.*** The prosecutor has sole discretion to divert the prosecution of a juvenile to a community-based program or to a program administered by the juvenile court.

(3) ***Notice to the Victim.*** If the juvenile is accepted into such a program, the victim must be notified as provided by A.R.S. § 8-388.

(d) Submission. If the juvenile is not eligible for diversion, the authorized juvenile court personnel must submit the referral to the prosecutor.

Rule 22. Referral; Diversion

(a) Referral. A referral ~~from an individual or agency~~ for incorrigible or delinquent conduct must include:

(1) a concise statement of facts—including with reasonable particularity the time, date, place, and manner of the alleged acts of the juvenile—that bring the juvenile within the court's jurisdiction, and the law or standard of conduct that the acts allegedly violated;

(2) the name, age, gender, and address of the juvenile named in the referral;

(3) the names and addresses, if known, of the parent, guardian, or custodian of the juvenile or the juvenile's spouse, if any; and

(4) if the juvenile is in custody, the place of detention and the date and time the juvenile was taken into custody.

(5) The signature of the person responsible for filing the referral.

(b) Record of Referral. ~~An authorized juvenile court officer~~Any authorized juvenile court personnel ~~[**Staff Note:** Staff suggests including in Rule 2 a definition of "authorized juvenile court officer" to distinguish this person from a judicial officer.]~~ who receives a referral must make a record of the referral in the manner prescribed by the juvenile court in each county. ~~[**Staff Note:** How does the court typically make a record of a referral? Are referrals assigned a case number? Who has access to the record?]~~

(c) Diversion ~~or Deferral~~. ~~[**Staff Note:** Are these two terms interchangeable? If they mean different things, should the rule include an explanation of the difference? Staff also suggests a standalone rule on diversion; compare Criminal Rule 38.]~~

(1) ***Meaning.*** "Diversion" ~~or "deferral" are ways of processing a juvenile delinquency~~ is a way of resolving a referral under A.R.S. § 8-321 ~~or incorrigibility matter that obviate~~without filing a petition ~~the need for a~~ .~~court adjudication. [**Staff Note:** The preceding sentence, as modified, was taken from current Rule 9(A). It is of some value, but it does not distinguish the meaning of these two terms.]~~

(2) ***Prosecutorial Discretion.*** The prosecutor has sole discretion to divert ~~or defer~~ the prosecution of a juvenile ~~who is accused of an incorrigible or delinquent act~~ to a community~~-~~based ~~alternative~~ program or to a program administered by the juvenile court.~~.~~

(3) ***Notice to the Victim.*** If the juvenile is accepted into such a program, the ~~court administering the program must notify the victim,~~victim must be notified as provided by A.R.S. § 8-388. ~~by law. [**Staff Note:** If the diversion process avoids a court proceeding, shouldn't the prosecutor rather than the court have the duty to notify the victim?]~~

(d) Submission. If the juvenile is not eligible for diversion,~~After reviewing a referral, t~~ the authorized juvenile court ~~officer~~ personnel must submit the referral to the prosecutor. ~~if the offense has not been designated for diversion. [**Staff Note:** Does the substance of sections C and D require clarification? Section D requires the juvenile court officer to submit a referral to the prosecutor if the offense is not designated for diversion; but if – as section C requires – the prosecutor alone has discretion to defer, the only way the prosecutor could have made that decision is if the juvenile court officer had already referred the matter to the prosecutor.]~~

Rule 24. Content of a Petition

(a) Content. ~~A prosecutor may file a petition alleging delinquent or incorrigible acts. A~~ petition must be captioned: "In the Matter of___, a person under the age of 18 years." The petition must be under oath and ~~may be based on information and belief. The petition must~~ include the following information:

(1) a concise statement of the facts, with reasonable particularity regarding the time, date, place, and manner of the alleged acts of the juvenile, and the law ~~or standard of conduct [**Staff Note:** Does "standard of conduct" refer to incorrigibility rather than delinquency?]~~ allegedly violated by such acts that bring the juvenile within the jurisdiction of the court;

(2) the name, age, gender, and address of the juvenile named in the petition;

(3) the names and addresses, if known, of the parent, guardian, or custodian of the juvenile or the juvenile's spouse, if any; and

(4) if the juvenile is in custody, the place of detention and the date and time the juvenile was taken into custody.

(b) Amendments to a Petition. Prior to adjudication, a prosecutor may file a motion requesting a court order that permits amendments to a petition. If the court grants the motion, it must allow the parties sufficient time to respond to the new allegations.

Rule 24. Content of a Petition

(a) Content. ~~A prosecutor may file a petition alleging delinquent or incorrigible acts.~~ A~~The~~ petition must be captioned: "In the Matter of___, a person under the age of 18 years." The petition must be under oath and ~~may be based on information and belief. The petition must~~ include the following information:

(1) a concise statement of the facts, with reasonable particularity regarding the time, date, place, and manner of the alleged acts of the juvenile, and the law ~~or standard of conduct [**Staff Note:** Does "standard of conduct" refer to incorrigibility rather than delinquency?]~~ allegedly violated by such acts that bring the juvenile within the jurisdiction of the court;

(2) the name, age, gender, and address of the juvenile named in the petition;

(3) the names and addresses, if known, of the parent, guardian, or custodian of the juvenile or the juvenile's spouse, if any; and

(4) if the juvenile is in custody, the place of detention and the date and time the juvenile was taken into custody.

(b) Amendments to a Petition. Prior to adjudication, a~~The court~~ prosecutor may file a motion requesting a court order that permits ~~may order~~ amendments to a petition ~~on any party's motion before adjudication,~~. ~~but the~~If the court grants the motion, it must allow ~~court must grant~~ the parties sufficient time to ~~meet~~ respond to the new allegations.

Rule 25. Filing a Petition

(a) Filing. All petitions must be filed with the court clerk.

(b) Time Limits for Filing. A petition must be filed within the following time limits:

(1) ***Detained Juvenile.*** If the juvenile is detained, the petition must be filed within 24 hours of the initial detention.

(2) ***Juvenile Not Detained.*** If the juvenile is not detained, the petition must be filed within 45 days after submission of the referral to the prosecutor. The time for filing a petition is extended for an additional 30 days pending the prosecutor's further investigation. No more than one 30-day extension is allowed unless the court for good cause orders otherwise.

(3) ***Diversion.*** The time limit for filing a petition is tolled during the period required to comply with the terms of diversion. If the juvenile does not complete diversion, a petition must be filed not later than 30 days after the matter is resubmitted to the prosecutor for action.

Rule 25. Filing a Petition

(a) Filing. All petitions ~~alleging delinquent or incorrigible acts~~ must be filed with the court clerk. ~~[**Staff Note:** Is this necessary? Do prosecutors have questions about where to file a petition? If so, perhaps there should be a general rule that contains this information. See, for example, Civil Rule 5.1(a), which says, "The filing of documents with the court is accomplished by filing them with the clerk."]~~

(b) Time Limits for Filing. A petition must be filed within the following time limits:

(1) ***Detained Juvenile.*** If the juvenile is detained, the petition must be filed within 24 hours of the initial detention.

(2) ***Juvenile Not Detained.*** If the juvenile is not detained, the petition must be filed within 45 days after submission of the referral to the prosecutor. The time for filing a petition is extended for an additional 30 days pending the prosecutor's further investigation. No more than one 30-day extension is allowed unless the court for good cause orders otherwise.

~~(c)~~ **(3)** ***Diversion.*** ~~If a referral is sent to a diversion program administered by the juvenile court, the prosecutor, or a community based alternative program, t~~The time limit for filing a petition is tolled during the period required to comply with the terms of diversion. ~~If the juvenile is deemed ineligible for diversion, the p~~If ~~rosecutor must file a petition not later than 30 days~~ the juvenile does not complete diversion, a petition must be filed not later than 30 days after the matter is resubmitted to the prosecutor for action. ~~after the matter is resubmitted to the prosecutor.~~

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 rights of the parties and the child’s best interests, and gives paramount consideration to the child’s health and safety.

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 rights of the parties and the child's best interests, and ~~and~~ gives paramount consideration to the c~~e~~hild's health and safety.

Rule 37. Definitions

(a) "Party" means a child, parent, guardian, DCS or other petitioner, and any person, Indian tribe, or entity that the court has allowed to intervene.

(b) "Participant" includes one or more of the following: the current placement, a foster parent or other physical custodian [from A.R.S. 8-847(B)(8)] in whose home the child resided within the last six months, a non-intervening tribe, and any other person permitted by the court or authorized by law to participate in the proceedings. [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~~Definitions

(a) "Party" ~~in a dependency or termination proceeding~~ means a child, parent, guardian, ~~the~~ DCS or other petitioner, and any person, Indian tribe, ~~or~~ or entity ~~who has been~~ that the court has ~~permitted~~ allowed to intervene ~~by the court~~pursuant to Civil Rule 24 ~~[WG Note: see Judge Warner's draft juvenile rule] or ICWA~~.

(b) "Participant~~s~~" includes one or more of the following: the ~~foster parents and other persons~~current placement, a ~~a~~ foster parent~~s~~ or other physical custodian [from A.R.S. 8-847(B)(8)] in whose home the child resided within the last six months, a ~~a~~ non-intervening tribe~~s~~, and any other person~~s~~ permitted by the court or authorized by law to participate in the proceedings. [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.

SUBPART 4. PERMANENT GUARDIANSHIP

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

(a) Motion.

(1) ***Generally.*** Any party to a dependency proceeding may file a motion for permanent guardianship for a child who has been adjudicated dependent. The motion must contain all the information required under A.R.S. §§ 8-871 and 8-872.

(2) ***Pre-adjudication Motion.*** A motion may be filed before the dependency adjudication only when the dependency petition was filed by DCS. If the child has not been adjudicated dependent, all parties must consent to the permanent guardianship. If any party objects to the pre-adjudication 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.

(1) ***Generally.*** A notice of hearing must inform the parent, guardian, or Indian custodian of the location, date and time of the initial guardianship hearing.

(2) ***Failure to Appear.*** The notice of hearing also 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.

(c) Service.

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

(2) ***Indian Child.*** 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 parent, Indian custodian, and tribe by registered 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 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) Providing Notice of Hearing to Other Persons. In addition to serving the notice of hearing on 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 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) Upon the filing of a motion for guardianship, the court may order 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 DCS is not the legal custodian, the court may order the child's attorney, guardian ad litem, or a party to prepare 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.

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

SUBPART 4. PERMANENT GUARDIANSHIP ~~AND SUCCESSOR PERMANENT GUARDIANSHIP [Staff Note: Suggest 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

(a) Motion.

(1) ***Generally.*** Any party to a dependency proceeding ~~for permanent guardianship~~ may file a motion for permanent guardianship for a child who has been adjudicated dependent. The motion must contain all the information required under A.R.S. §§ 8-871 and 8-872.

~~(a)~~**(2)** ***Pre-adjudication Motion.*** A motion may be filed before the dependency adjudication only when ~~of a dependent child or a child who is the subject of a pending dependency proceeding~~ petition filed by DCS. ~~The motion must contain all the information~~ ~~required under A.R.S. §§ 8-871 and 8-872.~~ ~~If the child has not been adjudicated dependent~~the dependency petition was filed by DCS. ~~, all parties must consent to~~ If the child has not been adjudicated dependent, all parties must consent to the permanent guardianship~~the permanent guardianship~~. If any party objects to the pre-adjudication ~~pre-adjudication dependency~~ 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.].~~

(b) Notice of Hearing.

(1) ***Generally.*** A notice of hearing must ~~advise~~ inform the parent, guardian, or Indian custodian of the location, date and time of the initial guardianship hearing.

~~**(b)**~~**(2)** ***Failure to Appear.*** ~~In addition to the information required by law [**Staff Note:** What law does this refer to?], t~~The notice of hearing also must ~~advise~~ 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.

(c) Service.

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

(2) ***Indian Child.*** 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 parent, Indian custodian, and ~~child's~~ tribe~~. Notice 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]~~ 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.

~~**(c)**~~**(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, ~~T~~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?]~~ The child's parent, Indian custodian, or tribe may waive the 10-day notice requirement for purposes of proceeding with the initial guardianship hearing.

~~(d)~~**(e)** ~~**Service of**~~**Providing** ~~**the**~~ **Notice of Hearing** ~~**on**~~ **to Other Persons.** In addition to serving the notice of hearing on 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)~~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) ~~**Orders**~~**Investigation and Report.**

(1) Upon the filing of a motion for guardianship, the court ~~shall may~~must may~~[**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~~, guardian ad litem, or a party to ~~file~~ prepare 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)~~**(g) Other Orders.** ~~The court p~~Pending the hearing, the court may enter ~~any~~ other orders ~~, as the court~~ that ~~it determines to be~~are in the ~~best interests of 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 under Rule 61(c), whether notice of the hearing has been provided to those persons identified in Rule 61(e), 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, or if there has not been a permanency hearing, within 30 days after the filing of a motion for permanent guardianship.

(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.*** The court may proceed with the guardianship adjudication under Rule 63 if the parent, guardian, or Indian custodian fails to appear at the initial guardianship hearing without good cause, and the court finds that the parent, guardian, or Indian custodian:

(i) had notice of the initial guardianship hearing;

(ii) was properly served pursuant to Rule 61; and

(iii) had been admonished regarding the consequences of failing to appear at the initial guardianship hearing, including a warning that the hearing could go forward in their absence and that failing to appear may constitute a waiver of rights and an admission to the allegations contained in the guardianship motion.

(d) Findings and Orders. At the conclusion of the hearing, the court must:

(1) Enter findings as to service upon the parties and notification of those persons designated to receive notice, and the court's jurisdiction over the subject matter and persons before the court.

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

(3) Address the parent, guardian, or Indian custodian in open court and advise that:

(A) 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.

(B) 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.

(4) Make specific findings that it advised the parent, guardian, or Indian custodian of the consequences of failure to attend subsequent proceedings.

(5) If ICWA applies, make findings pursuant to the standards and burdens of proof as required under ICWA.

(6) Make findings and enter other orders that may be appropriate or required by law.

(e) Form. The court may provide the parent, guardian, or Indian custodian with a copy of Form 2, "Notice to Parent in a Guardianship Action." 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.

Rule 62. Initial Guardianship Hearing

(a) Generally. At the initial guardianship hearing, the court determines whether service has been completed under Rule 61(c), whether notice of the hearing has been provided to those persons identified in Rule 61(e), 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.] t~~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, or if there has not been a permanency hearing, within 30 days after the filing of a motion for permanent guardianship.

(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~~ 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.*** The court may proceed with the guardianship adjudication under Rule 63 if the parent, guardian, or Indian custodian fails to appear at the initial guardianship hearing without good cause, and~~If the parent, guardian, or Indian custodian fails to appear at the initial guardianship hearing without good cause, and~~ the court ~~finds~~ finds that the parent, guardian, or Indian custodian:

(i) ~~the parent, guardian, or Indian custodian~~ had notice of the initial guardianship hearing;~~,~~

(ii) was properly served pursuant to Rule 61;~~,~~ and

(iii) had been ~~previously~~ admonished regarding the consequences of fail~~ure to~~ing to appear at the initial guardianship hearing~~appear~~, including a warning that the hearing could go forward in their absence and that ~~failure~~ failing 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.~~ .

~~(C) The court must enter its findings and orders pursuant to Rule 63.~~

~~(D)~~ (d) **Findings and Orders.** ~~All findings and orders shall be in a signed order or contained in a minute entry. At~~At the conclusion of the hearing, the court must:

(1) Enter findings as to service upon the parties and notification of those persons designated to receive notice, and the court's jurisdiction over the subject matter and persons before the court.

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

~~(i)~~

~~(ii) 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.]~~

(3) Address ~~and advise~~ the parent, guardian, or Indian custodian in open court and advise that:

(A) 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~~

(B) 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.

~~(iii)~~**(4)** ~~The court must m~~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,~~ Notice to Parent in a Guardianship Action ~~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)~~**(5)** 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~~.

~~(v)~~**(6)** Make findings and enter ~~any~~ other orders ~~as~~ that may be appropriate or required by law.

Form. The court may provide the parent, guardian, or Indian custodian with a copy of Form 2, "Notice to Parent in a Guardianship Action." 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.~~**COMMITTEE COMMENT**~~

(e) ~~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.~~

Rule 63. Guardianship Adjudication Hearing

(a) Generally. At a guardianship adjudication hearing, the court determines whether the prospective guardian is a fit and proper person to become the permanent guardian of the child, and whether guardianship is in the best interests of the child.

(b) Time Limits.

Unless the court orders or permits otherwise under A.R.S. § 8-864, the guardianship adjudication hearing must be held within 90 days after the most recent Rule 60 permanency hearing, or if there has not been a permanency hearing, within 90 days after the filing of a motion for permanent guardianship.

(2) The court may continue the hearing for not more than 30 days beyond the 90-day limit if it finds that the continuance is necessary for the full, fair, and proper presentation of evidence and the best interests of the child would not be adversely affected.

(3) The court may continue the hearing for a longer period only on a finding of extraordinary circumstances. Extraordinary circumstances include but are not limited to acts or omissions that are unforeseen or unavoidable. Any party requesting a continuance must file a motion that specifies the extraordinary circumstances. The party must file the motion within 5 days of discovering those circumstances. The court's finding of extraordinary circumstances must be in writing and set forth the factual basis for the continuance.

(c)Burden of Proof.

(1) The moving party has the burden of proving the allegations by clear and convincing evidence, except as provided in subpart (2).

(2) If the child is an Indian child, the moving party has the burden of proving the allegations beyond a reasonable doubt for an Indian child. The moving party also must prove beyond a reasonable doubt, including testimony from a qualified expert witness, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. The moving party must prove [by clear and convincing evidence] that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that those efforts have proven unsuccessful.

(c) (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. [**Staff Note:** This duplicates what is in Rule 3.]~~

(1) ***Admitted or Not Contested.*** The parent, guardian, or Indian custodian may waive the right to trial on the allegations contained in the guardianship motion by admitting or not contesting the allegations orally or in writing. In either circumstance, the court must:

(A) determine whether the party understands the rights being waived;

(B) determine whether the party knowingly, intelligently, and voluntarily admits or does not contest the allegations;

(C) determine whether a factual basis exists to support the establishment of a guardianship; and

(D) proceed with entering the findings and orders as set forth in subsection (F) of this rule.

(2) ***Failure to Appear.*** The court may grant the guardianship based on the record and evidence presented if the parent, guardian, or Indian custodian fails to appear at the guardianship adjudication hearing without good cause, and the court finds that the parent, guardian, or Indian custodian:

(A) had notice of the guardianship adjudication hearing,

(B) was properly served pursuant to Rule 61, and

(C) had been admonished regarding the consequences of failing to appear at the guardianship adjudication hearing, including a warning that the hearing could go forward in their absence and that failing to appear may constitute a waiver of rights and an admission to the allegations contained in the guardianship motion.

(3) ***Child's Interests.*** The court must give primary consideration to the physical, mental, and emotional needs of the child in determining whether to grant the guardianship motion. Unless the court finds it would not be in the child's best interest to do so, the court must appoint as guardian the person nominated by a child 12 years of age or older. The court must consider the child's objection to the appointment of the person nominated as permanent guardian.

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

(f) Findings and Orders. At the conclusion of the hearing the court must:

(4) Enter findings as to the court's jurisdiction over the subject matter and persons before the court.

(5) If the moving party has met its burden of proof:

(A) make specific findings of fact in support of the establishment of a guardianship and appoint a permanent guardian;

(B) enter appropriate orders governing the powers and duties of the guardian as set forth in A.R.S. § 14-5209;

(C) enter visitation orders, if appropriate;

(D) order the parent to contribute to the support of the child, if appropriate;

(E) set an annual review and order the preparation of a report, as required by A.R.S. § 8-872; and

(F) dismiss the dependency action.

(6) If ICWA applies, the court shall 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~~.

(7) If the moving party fails to meet the burden of proof, the court must deny the guardianship motion, set a review hearing, and order the parties to submit a revised case plan before the hearing.

(8) Make findings and enter any other orders as may be appropriate or required by law.

(g) Successor Permanent Guardians. At the guardianship hearing, or by notice filed after the appointment of a permanent guardian or a successor permanent guardian under A.R.S. § 8-874, the guardian may inform the court of the identity and contact information of potential successor permanent guardians.

~~**COMMITTEE COMMENT**~~

~~Although the Indian Child Welfare Act does not specifically reference guardianship proceedings, affording the Indian parent the same protections afforded in termination of parental rights proceedings is consistent with the intent of the Act. While states are required to comply with the requirements of the Act, there is nothing to preclude states from affording Indian families greater protection than that provided by the Act.~~

Rule 63. Guardianship Adjudication Hearing

(a) Generally. At a guardianship adjudication hearing, the court determines whether the prospective guardian is a fit and proper person to become the permanent guardian of the child, and whether guardianship is in the best interests of the child.

~~(b)~~ Time Limits.

(b)

~~(1)~~ ~~(1)~~ Unless the court orders or permits otherwise under A.R.S. § 8-864, the guardianship adjudication ~~8-864, the initial guardianship~~ hearing must be held within 90 days after the most recent Rule 60 permanency hearing, or if there has not been a permanency hearing, within ~~6~~90 days after the filing of a motion for permanent guardianship.~~-~~

(1)

~~The court must set the guardianship adjudication hearing no later than 90 days after the permanency hearing. [**Staff Note:** Why is this setting based on the permanency hearing rather than the initial guardianship hearing?]~~

(2) ~~(2)~~ The court may continue the hearing ~~beyond the 90-day limit~~ for not more than 30 days beyond the 90-day limit if it finds that the continuance is necessary for the full, fair, and proper presentation of evidence and the best interests of the child would not be adversely affected.

~~(2)~~ ~~(3)~~ The court may continue the hearing ~~beyond that date~~for a longer period only on a finding of extraordinary circumstances. Extraordinary circumstances include but are not limited to acts or omissions that are unforeseen[1] or unavoidable. ~~[**Staff Note:** The printed volume shows a footnote for the word "unforeseen" that says, "so in original." Correcting this spelling error to "unforeseen" should allow removal of the footnote.]~~ Any party requesting a continuance must file a motion that specifies the extraordinary circumstances. The party must file the motion within 5 days of discovering those circumstances. The court's finding of extraordinary circumstances must be in writing and set forth the factual basis for the continuance.

(3)

(c) ~~(c)~~Burden of Proof.

(1) The moving party has the burden of proving the ~~motion's~~ allegations by clear and convincing evidence, except as provided in subpart (2). ~~or~~

~~(b)~~(2) If the child is an Indian child, the moving party has the burden of proving the allegations beyond a reasonable doubt for an Indian child. ~~If the child is an Indian child, t~~The moving party also must prove beyond a reasonable doubt, including testimony from a qualified expert witness, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. The ~~petitioner~~ moving party must prove [~~satisfy the court~~by clear and convincing evidence] that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that those efforts have proven unsuccessful.

~~(c)~~(d) ~~(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. [**Staff Note:** This duplicates what is in Rule 3.]~~

(1) ***Admitted or Not Contested.*** The parent, guardian, or Indian custodian may waive the right to trial on the allegations contained in the guardianship motion ~~for guardianship~~ by admitting or not contesting the allegations orally or in writing~~the allegations. An admission or plea of no contest may be oral or in writing~~. In ~~accepting an admission or plea of no contest~~either circumstance, the court must:

(A) determine whether the party understands the rights being waived;

(B) determine whether ~~the admission or plea of no contest~~ the party ~~is~~ knowingly, intelligently, and voluntarily admits or does not contest the allegations~~y~~;

(C) determine whether a factual basis exists to support the establishment of a guardianship; and

(D) proceed with entering the findings and orders as set forth in subsection (F) of this rule.

(2) ***Failure to Appear.*** The court may grant the guardianship based on the record and evidence presented if the parent, guardian, or Indian custodian fails to appear at the guardianship adjudication hearing without good cause, and the court finds that the parent, guardian, or Indian custodian:

(A) had notice of the guardianship adjudication hearing,

(B) was properly served pursuant to Rule 61, and-

(C) had been admonished regarding the consequences of failing to appear at the guardianship adjudication hearing, including a warning that the hearing could go forward in their absence and that failing to appear may constitute a waiver of rights and an admission to the allegations contained in the guardianship motion.-

~~(2)~~ ***Child's Interests.*** ~~*If the court finds the parent, guardian, or Indian custodian failed to appear at the guardianship adjudication hearing without good cause, had notice of the hearing, was properly served under 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 grant the guardianship based upon the record and evidence presented. The court must enter its findings and orders pursuant to subsection (F) of this rule.*~~

(3) The court must give primary consideration to the physical, mental, and emotional needs of the child in determining whether to grant the ~~motion for~~ guardianship motion. ~~and~~ Unless the court finds it would not be in the child's best interest to do so, the court must appoint as guardian the person nominated ~~as guardian~~ by a child 12 years of age or older~~, unless the court finds it would not be in the child's best interest to do so~~. The court must consider the child's objection to the appointment of the person nominated as permanent guardian.

~~(3)~~

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

~~(d)~~

(f) ~~(f)~~ **Findings and Orders.** ~~All findings and orders shall be in a signed order or contained in a minute entry.~~ At the conclusion of the hearing the court must:

~~(e)~~

(1) Enter findings as to the court's jurisdiction over the subject matter and persons before the court.

(2) If the moving party has met its burden of proof:

(A) make specific findings of fact in support of the establishment of a guardianship and appoint a permanent guardian;

(B) enter appropriate orders governing the powers and duties of the guardian as set forth in A.R.S. § 14-5209;

(C) enter ~~appropriate~~ visitation orders, if appropriate;

(D) order the parent to contribute to the support of the child, if appropriate;

(E) set an annual review and order the preparation of a report, as required by A.R.S. § 8-872~~law~~; and

(F) dismiss the dependency action.

~~**(3)** If the moving party fails to meet the burden of proof, the court must deny the guardianship motion, set a review hearing, and order the parties to submit a revised case plan prior to the hearing.~~

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

(4) If the moving party fails to meet the burden of proof, the court must deny the guardianship motion, set a review hearing, and order the parties to submit a revised case plan before the hearing.

~~**(4)**~~

(5) Make findings and enter any other orders as may be appropriate or required by law.

~~**(5)**~~

(g) ~~**(g)**~~ **Successor Permanent Guardians.** At the guardianship hearing, or by notice filed after the appointment of a permanent guardian or a successor permanent guardian ~~pursuant to~~under A.R.S. § 8-874, the guardian may ~~advise~~ inform the court ~~as to the~~of the identity and contact information of potential successor permanent guardians.

~~**COMMITTEE COMMENT**~~

~~Although the Indian Child Welfare Act does not specifically reference guardianship proceedings, affording the Indian parent the same protections afforded in termination of parental rights proceedings is consistent with the intent of the Act. While states are~~

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