Juvenile Rules Task Force

Public Meeting, February 5, 2021
(All members and guests attending telephonically)

Meeting Minutes

Members attending: Hon. Rebecca Berch (Chair), Hon. Mark Armstrong, Professor Barbara Atwood, Beth Beckmann, Beth Beringhaus, Dale Cardy, Kathleen Coughlin, Maria Christina Fuentes by her proxy Steve Selover, Magdalena Jorquez, Hon. Joseph Kreamer, Tina Mattison, Donna McQuality, Eric Meaux, William Owsley, Christina Phillis, Hon. Maurice Portley, Hon. Kathleen Quigley, Beth Rosenberg, Denise Smith, Denise Avila Taylor, Hon. Patricia Trebesch, Edward Truman by his proxy Carey Turner, Kent Volkmer, Hon. Anna Young

Members absent: John Gilmore, Hon. Rick Williams

Guests: Chanetta Curtis, Lori Ford, Shari Anderson Head

AOC staff: Caroline Lautt-Owens, Joe Kelroy, Mark Meltzer, Angela Pennington

1. Call to order; preliminary remarks; approval of meeting minutes. The Chair called the fourteenth Task Force meeting—its ninth consecutive virtual meeting—to order at 10:31 a.m. The Chair advised members that she had provided an overview at 10 o'clock this morning to the Committee on Superior Court concerning the work of this Task Force.

The Chair noted that Workgroup 3 met twice, and the Editorial Group met 5 times, during January. Materials for today's meeting were posted on February 1. The materials included information provided by Judge Portley regarding a qualified residential treatment program ("QRTP") under the Family First Prevention Services Act ("FFPSA") that are pertinent to today's discussion of a new draft rule provisionally numbered Rule ZZ. The materials also included a page of pending legislative bills regarding Title 8, including SB 1391, which would require the trial court to appoint an attorney for a child in all dependency and termination proceedings. Attached to staff's February 1 email to the members was the Editorial Group's comprehensive progress table, version 01.27.2021. This table included a concise description of changes the Editorial Group made to the draft rules subsequent to the members' approval; the table should assist members when they read the most recent drafts.

The Chair then asked members to review draft minutes of the December 18, 2020 Task Force meeting. A member noted that at page 4, under the heading "report from Workgroup 2," the text incorrectly recited that the presentation was made by workgroup 1; it should have said "workgroup 2." There were no other corrections.

Motion: A member moved to approve the December 18, 2020 meeting minutes with this correction. The motion received a second and it passed unanimously. **JRTF 015**

2. Report from Workgroup 3. Members then heard presentations from Judge Quigley on behalf of Workgroup 3 regarding three new rules and two revisited ones.

Rule 00 ("required admonition and findings"). Multiple rules in Part III require a judge to give an admonition to parents. Rather than repeating the admonition verbiage in each of those rules, this new draft rule proposes to locate uniform admonition provisions in a single place. The text of admonitions in those other rules would be deleted, and instead, each of those rules would include a reference to Rule 00 that, in effect, would simply require the court to give the admonition as provided in Rule 00.

Judge Quigley then reviewed draft Rule 00. Section (a) ("generally"), subpart (1), would require the court "before the conclusion of every hearing in a dependency, guardianship, or termination case" to address the parents and advise them of the consequences of failing to appear and failing to participate in reunification services. A member requested that the word "during" replace the words "before the conclusion" because some parents leave the courtroom before the hearing concludes. Members agreed with this requested change. Subpart (a)(2) provides that the requirements in subpart (a)(1) do not apply to a parent whose rights have been terminated or in cases where the court has established a permanent guardianship.

Section (b) ("admonition") provides that a parent's failure to attend one of the proceedings specified in subparts (b)(1)(A), (b)(1)(B), or (b)(1)(C) would be deemed an admission of the allegation. One of the specified proceedings was "a settlement conference in a dependency proceeding." Members concurred that this provision would be contrary to Rule 53. Members had previously concluded that the sanction of "deemed admitted" was too draconian for the parent's failure to attend a voluntary settlement conference. They previously deleted this requirement in Rule 53 to encourage parental participation in settlement conferences, they did not believe that a sanction was required by A.R.S. § 8-826, and they accordingly deleted a provision in Rule 00 that would have permitted sanctions in this circumstance. After further discussion, members agreed to add a pretrial conference to the enumerated proceedings in subpart (b)(1). Subpart (b)(2) requires the court to advise the parents that if they fail to appear at the specified proceedings, "the court may adjudicate the case in their absence and, based on the evidence presented, may grant the petition or motion." Subpart (b)(3) requires the court to determine that the parents understood the admonition, and subpart (b)(4) requires that it provide the parents with Form 1, 2, or 3 and request the parents to sign and return the form to the court before the hearing adjourns. A member asked how a parent returns the form if the hearing is virtual. The practice in Pima County is to provide the form to counsel, who in turn will provide the form to the parents. The parents retain a copy of the form.

Section (c) ("failure to participate in reunification services") requires the court at every hearing to advise a parent of the consequences of not remedying the circumstances that caused their child to be in an out-of-home placement. To be consistent with subpart (a)(2), members added text to section (c) to clarify that the requirements of that section apply only to parents whose rights have not been terminated. Section (d) ("failure to appear") specifies the findings the court must make before it proceeds with an adjudication for a parent who failed to appear. Section (e) ("adjudication") provides, "If the requirements of section (d) are satisfied, the court may proceed with the adjudication as provided by Rules 55, 63, or 66, as applicable." Section (f) ("minute entries") specifies the required findings the court must make that confirm it provided the admonition. Draft subpart (f)(2) said, "before the conclusion of the hearings described in subpart (b)(1) ...." A member did not believe that a pretrial conference, one of the proceedings specified in subpart (b)(1), should be subject to the requirements of subpart (f)(2). Members agreed. They accordingly deleted a general reference in subpart (f)(2) to subpart (b)(1) hearings, and substituted the more specific terms "preliminary protective hearing, initial dependency, initial guardianship, or initial termination hearing …." Members agreed that all sections of the rule should use the term "hearing" rather than "proceeding."

Judge Quigley then provided members with an alternative of (a) adopting Rule 00, or (b) leaving the admonition provisions in the dependency, guardianship, and termination rules as they are now. If members prefer to adopt Rule 00, the Editorial Group would need to remove the redundant provisions in those other rules. If the members prefer to include Rule 00, a member further proposed that the affected Part III rules each include a short provision stating that the court must give the admonition as provided in Rule 00. A workgroup note dated 1/15/21 at the end of the draft anticipated this suggestion. Members agreed to include Rule 00 in their rule petition.

Rule YY ("transfer to a tribal court"). The current juvenile rules do not include a procedure for transferring a case to a tribal court. Judge Quigley drafted a new rule that fills this gap. She noted that the substance of the new rule derives from ICWA and the Regulations, which are both specifically referenced in section (a) ("generally") of her draft rule. Judge Quigley reviewed the remaining sections of the draft. Section (b) ("procedure"), subpart (2) concerns "notice to tribe." Judge Quigley noted issues concerning the best way of providing notice to Arizona tribal courts (for example, does the notice go to the clerk or to the presiding judge?) and the manner in which tribes would respond (subpart (b)(3)(B) permits the tribe to respond orally or in writing). Judge Quigley would like to discuss the draft provision further with tribal judges. The tribe's response is significant because the draft subpart provides that the superior court "may consider the tribe's failure to respond as a declination of the request to transfer."

Section (c) ("considerations") provides in subpart (c)(1) that the court must grant the request unless one of three criteria are met. Those criteria are that a parent objects, the tribe declines transfer, or there is good cause to decline the transfer. Subpart (c)(2) identifies factors that the court must not consider in determining good cause, which

Judge Quigley advised are based on federal law. She then reviewed sections (d) ("findings") and (e) ("orders"). Subpart (e)(2) requires the court to order the petitioner to expeditiously transfer records or reports in the petitioner's possession that were not admitted into evidence; members agreed to add to that provision the words "or previously disclosed to an intervening tribe." Section (f) ("court oversight of the transfer") requires the superior court to communicate with the tribal court to ensure an orderly transfer, including transfer of the child's custody, "in a manner that minimizes the disruption of services to the family." Members also reviewed and made edits to the proposed "comment to 2022 amendment." Those edits included a correction to the citation of an Arizona case.

Rule ZZ ("qualified residential treatment program; judicial review"). This new rule would address a procedure required by the FFPSA. Judge Quigley drafted her rule based on an analogous rule in Washington State and on the materials provided by Judge Portley, which had been prepared by the Director of the Arizona DCS. She added that the federal QRTP requirements have an October 1, 2021 effective date, and this proposed rule would need to have the same effective date. As Judge Quigley was introducing her draft, Ms. Jorquez noted that a group of stakeholders, including her DCS colleagues and Mr. Turner, had used Judge Quigley's draft as a starting point for a revised draft, which Ms. Jorquez provided to staff this morning. At that point in the meeting, the revised draft was added to SharePoint, and the remaining discussion of Rule ZZ, which was led by Mr. Turner, concerned this revised version.

The revised draft was intended to accomplish two objectives: first, that it would mirror federal law, which would enable Arizona to receive federal funding; and second, that it would be sufficiently flexible to permit DCS' administration of this newly created program. Members agreed with draft section (a) ("generally"), which says, "A child may be placed in a qualified residential treatment program under the conditions set forth in this rule, subject to approval and review by the court." However, members had concerns regarding section (b) ("definitions"). (The three defined terms in section (b) are "qualified residential treatment program," "qualified individual," and "QRTP assessment.") For example, the definition of "qualified individual" means "a trained professional or licensed clinician who (A) is qualified to conduct a QRTP assessment," followed by two more requirements prefaced with the word "not" ("not an employee of DCS" and "not connected to…any placement setting in which children are placed by the State"). Saying, in essence, that a qualified individual means a person who is qualified, is circular. One member suggested changing this to "qualified by education or training," but after discussion, members left the definition unchanged to ensure that implementation of this new law would comply with federal requirements. Mr. Turner emphasized that placements in this program are not level one placements under current Arizona law, and that QRTP placements don't currently exist under Arizona statutes. Rather, federal law now determines the requirements for a QRTP. Various states, including Arizona, are still developing these programs. Because the programs are expected to evolve as they are

more fully developed, Mr. Turner cautioned that this rule should not be unduly rigid. For example, Judge Quigley's original draft included a reference to the CASII ("child and adolescent service intensity instrument") in the definition of "QRPT assessment" because Arizona assessments frequently use this tool. By comparison, the revised draft is more generic and does not refer to CASII. Mr. Turner explained that federal law does not refer to the CASII; instead, it says that the test or tool must be approved by the Department of Health and Human Services, which has not yet approved specific assessments. The philosophy of the drafters of the revised rule was to say less now, with the expectation that more details could be added in the future, if necessary.

Section (c) of the revised draft ("time to complete the QRTP assessment") requires the QRTP assessment to be completed 30 days after the child's placement in the QRTP. Mr. Turner noted that although the QRTP assessment is a confidential document, he did not believe the rule needed to include that qualification, and members agreed. In section (d) ("QRTP placement and approval"), subpart (1) ("notice and disclosure"), Judge Quigley's draft required DCS to provide the assessment to the court no later than 5 days after DCS received it; the revised draft enlarged this to 10 days. DCS must also file a motion seeking court approval of the child's placement in the QRTP. Subpart (d)(2) ("procedure") permits the court to set a hearing on the motion no later than 60 days after the child's placement in a QRTP. At that hearing, the court would review the necessity of the placement, but in the absence of an objection, the court may approve the placement without a hearing. In subpart (d)(3) ("findings"), the revised draft added "kinship care" and "relative care" to the enumerated placements that cannot meet the child's needs. Additional findings are required if the child is an Indian child.

Section (e) is titled "continuing review of QRTP placement." If the child remains in a QRTP for more than 60 days, this section requires periodic reviews of the placement at every subsequent hearing under Rules 58 and 60, or at a QRTP placement review. A member was concerned that a child could be "warehoused" unless there were more frequent reviews; the member recommended that the court review a QRTP placement at least every 60 days. However, members declined to create a substantive right to more frequent reviews and noted that Rule 59 provided another avenue for a parent to seek recourse. Members agreed that the rule should provide for notice to the parent when a child is released from a QRTP. This was codified in a new section (f) ("discharge"). Although members contemplated that DCS would file a motion for change of physical custody to obtain court approval before the discharge, they also recognized that exigent circumstances might arise. While the rule requires the motion to be filed "prior to discharge," if exigent circumstances exist, the new provision permits the motion to be filed "upon discharge or as soon as practicable."

Members added the words "judicial review" to the title of the rule. They agreed that the new rule should be located somewhere in the mid-50's of the current rule numbering.

Rule 50 ("preliminary protective hearing"). Judge Quigley presented this rule at the October and December Task Force meetings, and she is presenting it again to consider further revisions to the ICWA provisions in section (b). The drafting challenge is integrating federal law into Arizona procedures. The most recent revisions to section (b) included no changes to subparts (b)(1) ("inquiry") or (b)(2) ("emergency removal or placement"), but there are changes in subpart (b)(3) ("proceedings"). The first sentence of revised subpart (b)(3)(A) requires a judge at the preliminary protective hearing in a case concerning an Indian child to determine whether the findings required by Rule 47.3(d)(1) and 25 C.F.R. § 23.113(d) had been previously made. If not, then the judge at the preliminary protective hearing must find "whether there was probable cause to believe that the emergency removal or placement was necessary to prevent imminent physical damage or harm to the child pursuant to 25 C.F.R. § 23.113(d)." Judge Quigley noted that while this federal regulation does not expressly provide an evidentiary burden concerning the child's emergency removal from the home, she believed this provision should require probable cause as a state standard. Judge Quigley also added to this provision that "at the preliminary protective hearing, a parent may request a hearing to contest the finding."

If that state court does not make that finding, 25 C.F.R. § 23.114(b) provides the child must be immediately returned to the parents, "unless returning the child to the parents would subject the child to substantial and immediate danger or threat of such danger." The corresponding Rule 50 subpart is (b)(3)(C). In this subpart, Judge Quigley proposed that the court must find substantial or immediate danger "by a preponderance of the evidence." This again would be a burden determined by state law because the federal regulation does not include one. In subpart (b)(5) ("placement preferences"), Judge Quigley proposed adding new references, including 25 C.F.R. § 23.132 and Rule 50.2 ("ICWA placement preferences"). The amendments presented today would render subpart (b)(6) ("additional findings") unnecessary and it would be deleted. After a discussion, members agreed with Judge Quigley's proposed amendments to section (b).

Rule 51 ("review of temporary custody"). Judge Quigley also proposed striking two provisions in draft Rule 51 to conform to the above amendments to Rule 50. The prior draft of Rule 51(b) ("burden of proof") contained two subparts, the first titled "probable cause" and the other titled "clear and convincing evidence." The "clear and convincing" subpart would now be unnecessary. Also, certain provisions in section (d) ("findings") were not congruent with the amendments to Rule 50, and those should also be deleted. Members agreed with these revisions and Ms. Pennington made the changes in SharePoint.

3. **Combined draft rules.** Staff posted on the Task Force webpage an initial draft set of the new rules. However, staff noted for the Chair, and the Chair noted for the members, that the initial draft set had a variety of deficiencies, such as being incorrectly numbered and not being in the right sequence. A couple rules had been inadvertently omitted, and the content and formatting of certain rules contained errors. In addition,

Rules 00, YY, and ZZ had not yet been approved by the Task Force when staff prepared the initial draft, and these rules were not included in the initial set.

The December 18 meeting materials included a draft revised table of contents. A revised table of contents was appropriate for a few reasons. First, there are several numbered rules in the current set that are "reserved," "renumbered," or "repealed." Removing these numbers from the restyled set will lead to gaps in numbering. The delinquency rules have been reorganized and re-sequenced. The 15 current emancipation rules have been consolidated into 5 rules. Other rules have been bifurcated. In addition, there are about two dozen wholly new rules. These factors will necessitate renumbering the entire restyled set. There are currently, and there will continue to be, six Parts in the juvenile rules. Staff proposed renumbering the Part I rules as 100, 101, etc., the Part II rules as 200, 201, etc., and on through Part VI. Numbering the rules in this fashion might provide better cues about the general subject matter of each rule than sequential two- and three-digit numbers. For example, users would know that Rule 402 pertains to adoptions. The Rules of Evidence are organized in this manner; and because we'll have more than 100 juvenile rules, the set will invariably include three-digit rule numbers. And if we later need to renumber certain rules, we will only need to renumber rules in a Part rather than the entire set. The Chair directed staff to number the rules in the second draft set using this numbering scheme.

4. **Roadmap.** Pending the preparation of the second draft rules, the Chair requested members to refrain from making any changes to the rules in SharePoint. Each draft rule is in a separate folder, and it's important that those folders remain stable and unchanged while Ms. Pennington prepares the next draft set. Accordingly, the Chair vacated an Editorial Group meeting set for February 11. Staff will endeavor to circulate the second draft set of rules to stakeholders that members have previously identified, inviting the stakeholders' comments that members can review at the next meeting. Staff will also prepare a draft petition for the members to review and discuss at that meeting. Following further input from the members, the Chair set the next Task Force meeting on March 5, 2021.

5. **Call to the public; adjourn.** There was no response to a Call to the Public.

The meeting adjourned at 3:29 p.m.