Juvenile Rules Task Force

Public Meeting, April 12, 2021
(All members and guests attending telephonically)

Meeting Minutes

Members attending: Hon. Rebecca Berch (Chair), Randi Alexander, Hon. Mark Armstrong, Professor Barbara Atwood, Beth Beckmann, Beth Beringhaus, Dale Cardy, Kathleen Coughlin, Maria Christina Fuentes by her proxy Steve Selover, John Gilmore, Hon. Joseph Kreamer, Donna McQuality, Tina Mattison, 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. Anna Young

Members absent: Denise Smith, Hon. Rick Williams

Guests: Carey Turner, Lori Ford, Beth Green, 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 sixteenth Task Force meeting—its eleventh consecutive virtual meeting—to order at 10:00 a.m. The sixteenth meeting was prompted by the volume of prefiling comments to the second draft set of rules, which were posted on the JRTF webpage on February 17. The Task Force discussed many of those prefiling comments at its fifteenth meeting, on March 5, but members also recognized that it would be appropriate to refer a substantial number of comments to workgroups for further review and discussion. Between the March 5 and April 12 Task Force meetings, workgroups met nine times. Most of these meetings were three hours or longer. Workgroup 3, which has a majority of the rules on today's agenda, met four times. The Chair characterized the efforts of the workgroups as "impressive."

The primary matter on today's agenda is a review of workgroup changes to the second draft set of rules that were made subsequent to the March 5 Task Force meeting. There are more than 30 rules on today's agenda that contain recent substantive changes. A summary of each of those changes is contained in the meeting packet in a document titled "post-March 5 TF meeting workgroup revisions to the second draft set of juvenile rules." Some of these changes, although substantive, are relatively minor and should not require much discussion. The Chair requested workgroup leaders to present these changes, assisted by other workgroup members having special expertise on particular rules. The Chair noted that in addition to the document noted above, the packet also contains a revised Form 1; two new tables (a derivation table and a table of ICWA references); SB 1332 (Chapter 0144, Laws 2021); and clean and redline versions of a second draft of the rule petition. SB 1391 was also provided. This bill has not yet been signed by the Governor, but it is pertinent to Rules 206, 303, and 305 regarding the appointment of attorneys and GALs.

Recognizing the challenge of meeting the March 31 petition filing deadline, the Chair filed a motion on March 18 requesting a one-month filing extension. The Court granted the motion and the new petition filing deadline is April 30, 2021. On March 24, the Court also entered Administrative Order No. 2021-43. That Order appointed Randi Alexander to the Task Force to replace Magdalena Jorquez, who resigned from the Task Force because she is no longer with DCS.

Before proceeding to the comments, the Chair asked members to review draft minutes of the March 5, 2021 Task Force meeting. David Euchner, who spoke on March 5, wrote to say, "In the middle paragraph on page 3, in the middle of the paragraph, it says: 'One area of his comment asked whether the list of appealable final orders in Rule 103(b) was actually inclusive, as it purports to be.' In order to represent the language in page 5 of my comment, I think the phrase 'actually inclusive' should be changed to 'actually exhaustive.' The Chair concurred with Mr. Euchner's suggested change.

> **Motion:** With this modification, a member moved to approve the March 5, 2021 meeting minutes. The motion received a second and it passed unanimously. **JRTF 016**

The Chair proposed that the Task Force proceed through the rules on today's agenda in numerical order, beginning with the rules in Part I.

2. **Part I rules.** Judge Kreamer and Judge Armstrong presented the changes to Rules 102 and 104. Rule 102 ("definitions") now includes a definition for "A.R.S." Rule 102 also includes a new definition of "court day," which is intended to replace "business day" used elsewhere in the proposed set. A definition of "minute entry" was added to Rule 102 to replace the "minute entry" provisions in the prior version of Rule 324. The new Rule 102 definition includes a reference to Supreme Court Rule 125, which is the primary explanation of a minute entry; the new definition also provides that "an unsigned minute entry may constitute an order of the court. However, to be appealable, and order must be signed as required by Rule 601." The last change to Rule 102 is a modified definition of "parent," which now includes a second sentence derived from A.R.S. § 25-401(4). (See further a prefiling comment from Commissioner Bibbens.) The change to Rule 104 ("applicability of the rules of evidence, admissibility of evidence and reports") was in subpart (d)(9) ("reports offered but not admitted"). The change clarifies that a report that is marked but not admitted becomes part of the appellate record only by a party's supplemental designation of the record. (See further a change to Rule 604, *infra.*)

3. **Part II rules.** Rule 205 ("notice to appear; service; failure to appear") includes a subpart (c)(1) titled "provisional warrant." Workgroup 2 expanded the explanation of a provisional warrant. Generally, a provisional warrant is used to obtain the next court date for an alleged delinquent who failed to appear without the need for the juvenile's arrest and detention. Ms. Phillis noted that some counties are already using

these warrants, but they are called by different names and might be used differently. The workgroup intended that its explanation be sufficiently flexible to accommodate those variations on usage. The next rule, Rule 217 ("mandatory judicial determinations") was modified by Workgroup 3 upon learning that juvenile probation departments in the future might request Title IV funding for placement of a delinquent in a QRTP. Judge Quigley noted that Workgroup 3 added a reference to the Family First Prevention Services Act in section (a) ("application") of Rule 217. Most noteworthy was the addition of a new section (f) ("QRTP"), which refers the reader to Rule 335 when a child in placed in a QRTP in a delinquency proceeding.

Ms. Phillis observed that after discussing a prefiling comment concerning Rule 218(c) ("length of detention"), the workgroup recommended no changes to the draft rule. The rule precludes a juvenile from being held in detention for longer than 24 hours if no petition has been filed, or from being held if not brought before the court within 24 hours after the filing of the petition. In the vast majority of cases, these deadlines are met. But particularly in a smaller county, if a minor misses the initial court appearance by a short time, the next court appearance might be slightly past the deadline. Like the workgroup, the Task Force considered whether setting a flat 48-hour deadline might be clearer than two 24-hour deadlines. They both concluded, however, that each of the 24-hour deadlines was discrete, and a single 48-hour deadline might inadvertently extend rather than expedite the process. Accordingly, members made no changes to Rule 218(c) as previously proposed. Finally, in Rule 221(e) ("judgment of acquittal"), Ms. Phillis noted the use of the word "judgment," because there was not an appropriate substitute term. She added that the rule requires the court to enter a "judgment" rather than an "order of dismissal" because the latter term does not convey that the matter had proceeded to adjudication.

4. **Parts III rules.** Judge Quigley noted that the previous version of Rule 302 ("definitions") included sections (d) ("child's attorney") and (e) ("guardian ad litem"). However, sections (d) and (e) are not strictly definitions. Accordingly, the substance of section (d) was relocated in Rule 303(c) ("appointment of an attorney for a child"), and the substance of Rule 302(e) was moved to Rule 305 ("appointment of a GAL"). When SB 1391 becomes law, the Task Force should consider adding to these provisions that the attorney under Rule 302 does not have the role of a GAL, and vice versa in Rule 305. The relocated provision from Rule 302(e) included text that said, "A GAL is not bound by the client's expressed preferences or the attorney-client privilege." Some members objected to keeping this language in Rule 305, although they were unable to cite any authority that contravened the language. The word "privilege" is not in the corresponding current rule. After further discussion, members changed the language of the last sentence of Rule 305 to instead say, "A GAL is not bound by the minor's, incompetent's, or protected person's expressed preferences, and communications are not privileged." In related rules, a provision concerning an attorney's withdrawal from a case was modified by adding, "The attorney remains the person's attorney of record until the court grants the motion

to withdraw." (See Rule 304(c).) A definition of "parent" in Rule 307 ("duties of attorneys who represent parents, etc.") was deleted because it duplicated the definition of "parent" in Rule 302.

A modification to Rule 309 on "education requirements for court-appointed attorneys and GALs, section (d) ("later training") generated a lengthy discussion. The initial modification, which was proposed by Commissioner Bibbens and the Pima County LGBTQ Task Force, was limited to adding training on LGBTQ issues. At the March 5 meeting, members agreed to expand this amendment to include training regarding other similarly affected groups. Ms. Rosenberg contacted national experts, who proposed language that included the phrase, "diversity, equity, and inclusion." Ms. Rosenberg also observed that the name of the Court's Commission on Minorities recently changed to the Commission on Diversity, Equity, and Justice. However, a member noted the goal of that Commission was to increase diversity in the judiciary, a focus that went beyond the training contemplated under Rule 309. Members had various other concerns about the proposed new language for Rule 309(d). One concern was that the list of topics in section (d) had become so lengthy that the individual subjects were no longer distinctive. A second concern was the lack of a bridge between disproportionate involvement and other subjects, such as placement and services. Another concern was whether "diversity, equity, and inclusion," in the context in which they appeared in this draft, made sense, or whether the terms were popular but inapt as subjects for training of attorneys and GALs in child welfare proceedings. After discussion, members removed "diversity, equity, and inclusion" from the draft of Rule 309(d) and added "…cultural awareness, issues in the child welfare system related to race, ethnicity, disability, sexual orientation, gender identity and expression, and implicit bias, and other topics and issues concerning abused and neglected children." The Editorial Group will further review this language at its upcoming meeting.

In Rule 311 ("participants' rights"), section (b) ("right to be heard"), members agreed to a change that had been proposed by Ms. Jorquez. The former verbiage was, "have a right to be heard at any hearing regarding a child." The revised language is, "have a right to be heard regarding the child at any hearing." Workgroup 1 made changes to Rule 317 ("altering or amending a final order"). The changes included a new section (e) ("effect on appeal time"), which has two subparts: (1) appeal time extended, and (2) appeal time not extended. These changes, in conjunction with Rule 603, should clarify when the filing of such a motion extends the time for appeal. Rule 323 ("simultaneous dependency and legal decision-making/parenting time proceedings") now includes a revision proposed by Judge Warner: "… ~~the juvenile division has jurisdiction over~~ <u>the judge presiding over the juvenile case makes decisions concerning</u> the children."

Rule 324 ("providing notice of a change in a child's placement") is a new rule that also precipitated discussion. The objective of the rule is to assure that the parties' representatives receive prompt notice of a change in the subject child's whereabouts. Section (a) requires DCS to notify the child's attorney and GAL of the new placement

address, the type of placement, and contact information. Section (b) requires notice to the parent's attorney, but the notice must not include the new placement address or contact information, which is expressly confidential. Section (c) allows DCS to provide the notices under sections (a) and (b) "verbally or electronically, including by email." Section (c) requires that DCS provide the notices "as soon as practical before the child is relocated," and if not, "as soon thereafter as possible and no later than [blank] hours after the change of placement, excluding weekends and holidays." The ensuing discussion centered on the number of hours that should go in the blank space. Some members proposed 24 hours. They contended that the giving of notice by a voice or text message wouldn't be onerous and that counsel, especially children's counsel, had a substantial need to have this information provided as promptly as possible. Others thought 24 hours would not be doable in every county and that 72 hours would be more practical. Professor Bennett, whose comment was the genesis of this new rule, proposed 36 hours. One member noted that experienced case managers are currently providing notice within 24 hours without a rule requirement and without difficulty. Another member expressed concern about setting any time requirement if the rule did not provide a sanction for violations. On a straw vote, three-fourths of the members favored 24 hours, and one-fourth opposed that time limit. The petition should note the lack of unanimity.

Rule 326 is a new rule titled "required admonition and findings." The rule would supplant the admonition provisions that are already in various dependency, guardianship, and termination rules, however, those provisions remain in these rules. The workgroup inquired whether the Task Force preferred to retain Rule 326 and to delete those other provisions, or to simply delete Rule 326. The workgroup had no preference, nor did the Task Force. If Rule 326 is retained, members saw a need to carefully review the admonition provisions in those other rules to assure they are adequately replicated in the new rule. After discussion, members agreed to retain Rule 326 and to also retain the admonition provisions in the other rules, to note the duplication in the rule petition, and to solicit comments on stakeholder preferences.

Rule 335 ("Qualified Residential Treatment Program; Judicial Review") was introduced by workgroup 3 at the February meeting as Rule ZZ, and it has been the subject of ongoing revisions. Judge Quigley reviewed the most recent version of Rule 335. Section (b)'s definition of "qualified individual" now includes the waiver option under federal law in case DCS seeks such a waiver in the future. Section (c) ("time to complete the assessment and documentation") now distinguishes these various requirements and provides additional details. Members had a lengthy discussion of section (d) ("QRTP placement and approval"), particularly concerning the process and the time for notifying the parties and court of the placement and providing the assessment and supporting documentation. As a result of that discussion,

- In subpart (d)(1)(A), DCS must notify the parties of the child's placement in a QRTP within 24 hours, in the manner prescribed in Rule 324;

- In subpart (d)(2)(B), DCS must file a notice with the court of the child's placement in a QRTP not later than 5 days (formerly 10 days) after the placement;
- In subpart (d)(2)(A), upon receiving notice of the placement from DCS, the court must set a hearing on the placement not later than 60 days thereafter;
- In subpart (d)(2)(B), DCS must file a motion with supporting documents seeking approval of the placement no later than 10 days after receiving the assessment (under section (c), the assessment must be completed within 30 days after the placement); and
- In subpart (d)(2)(C), the court must consider specified items when deciding the motion, even if the motion is uncontested.

Judge Quigley further reviewed the required findings and orders in section (d), the process for continuing review of a QRTP placement in section (e), and discharge of the minor from a QRTP in section (f). In subpart (d)(4)(C), which contemplates entry of an order when the court does not approve the QRTP placement, members modified the workgroup's language to now provide that the court must "[order] DCS to investigate alternative placements and [set] a further hearing if necessary."

In Rule 346 ("guardianship adjudication hearing"), an amendment to subpart (g)(2)(E) now requires the court at the conclusion of the hearing to "direct DCS to assist the permanent guardian in making an application for guardianship subsidy, if available." (Rule 348(g), which concerns a successor permanent guardian, already includes such a provision.)

The former version of Rule 349 ("petition, motion, notice of hearing, and service of process and orders") included section (d) on service, but the section did not specify the manner of service. The workgroup addressed this omission in a new subpart (d)(1)(B). A termination petition must be served pursuant to Civil Rules 4.1 or 4.2. A termination motion must be served as provided by Juvenile Rule 106. If the matter involves the parent of an Indian child, additional service must be accomplished as provided in subpart (d)(2) ("service involving an Indian child"). A member noted that subpart (d)(1)(A) ("who must be served") required service on "any individual who is in loco parentis to the child." Members found this provision to be problematic (for example, would that person be entitled to services?), but they agreed the person should receive notice. They accordingly removed the in loco parentis language and substituted that service must be made on "the person with legal custody or decision-making regarding the child." They also removed service on the child's guardian because "parent" as defined in Rule 302 includes a guardian under Title 8 or Title 14.

Rule 350 ("initial termination hearing"), section (d) ("findings and orders") requires the court to address the parent and advise that a failure to appear at certain proceedings, including a settlement conference, could be deemed an admission of the allegations. A.R.S. § 8-537(C) does not mention a settlement conference, but it does

mention a status conference. While acknowledging that loss of parental rights is a significant consequence for failure to attend a court event, members accordingly deleted the reference to settlement conference and added status conference to this provision. A reference in Rule 351 ('termination adjudication hearing"), section (g) ("social study") to Rule 104(d)(4) was corrected to Rule 104(d)(5).

Judge Quigley concluded the presentation of Part III rules by noting Professor Bennett's comment about the attendance of attorneys and GALs at a DCS staffing. Workgroup 3 discussed his comment but determined the issues were too complex to resolve in the limited time that was available.

5. **Part IV rules**. Professor Atwood led the discussion. In Rule 402 ("meaning of terms"), members added a new definition: "'Agency' has the meaning provided in A.R.S. § 8-101(2)." The objective is to no longer refer to DCS as an agency. Any references in the proposed rules to "division" or "department" should also be changed to "DCS." Members also added a second sentence to the definition of "parent" in Rule 402 to make it consistent with the definitions of that word that appear in Rules 102 and 302.

Members considered together the changes to Rule 407 ("motions"), section (f) ("motions to set aside") and Rule 417 ("setting aside an adoption"). Professor Atwood explained that Workgroup 4 considered ways to relocate the substance of Rule 407(f) to Rule 417. It was not possible to do this, however, because Rule 407(f) addresses motions to set aside in adoption proceedings other than Rule 417 motions concerning final orders. Accordingly, the workgroup added a sentence at the end of Rule 407(f) that says, "If a motion under this section seeks to set aside a final order of adoption, Rule 417 also applies." The second, third, and fourth sentences of Rule 417(a) ("motion to set aside") were deleted, either because they duplicated or because they conflicted with other Part IV provisions. Members agreed that Rule 603 should include a reference to Rule 417, in addition to Rule 407(f).

6. **Part V rules.** Mr. Volkmer presented the changes to these rules on behalf of Workgroup 1. The changes were necessary because of the enactment of SB 1332. In Rule 502 ("petition and documentation requirements"), section (a) ("requirements"), the workgroup deleted a subpart that provided as a requisite for emancipation that the petitioner was not a ward of the court. However, because that information might be useful for the judge considering the emancipation petition, Task Force members added a provision in section (b) ("content of petition") requiring that the petition state whether the petitioner was a ward of the court or in the care, custody, or control of a state agency. The workgroup also added to section (b) a newly required allegation about "whether the petitioner is employed or has obtained an offer of employment." The workgroup made modifications in Rule 505 ("determination and order of emancipation") that corresponded with the modifications in Rule 502.

7. **Part VI rules**. Ms. Beckmann presented the Part VI rule changes. She began with Rule 601 ("right to appeal"), section (b) ("final orders"). In delinquencies, Workgroup 1 added a catch-all that an appeal may be taken from "any other order that is final pursuant to Arizona case law." Pursuant to the earlier discussion of the adoption rules, the provision in Rule (b)(2)(M) concerning motions to set aside now includes a reference to Rule 417. Also, recent input from a Division One judge prompted the workgroup to add a comment to the rule concerning subpart (b)(2)(E), which allows an appeal from an order in a dependency that removed a child who has been adjudicated dependent from a parent's physical custody. The comment recognizes the subpart (b)(2)(E) "may be considered inconsistent with certain case law," including *Jessicah C. v. DCS* (Division One, 2020), but, the comment continues, the Court has determined that such orders should be deemed final and appealable.

Rule 602 ("general provisions"), section (a), ("caption on the notice of appeal"), now an example caption that accommodates more than one child in the case. Rule 603 ("notice of appeal"), subpart (a)(3), now includes a reference to Rule 417 in the provisions on time extending motions. In the delayed appeal provisions of Rule 603(a)(5), the workgroup added a sentence that says, "Good cause may include but is not limited to clerical errors of counsel that are not attributable to the client." A modification to Rule 604 ("the record on appeal"), subpart (a)(1)(B), deleted a reference to reports marked but not admitted under Rule 104(d)(8); these reports are not part of the presumptive record under section (a) but they may be included in the record by a supplemental designation under section (b). At Mr. Euchner's suggestion, the workgroup removed in its entirety section (f) ("sanctions") concerning unnecessary supplemental designations. The workgroup acknowledged that this sanction is available under current Rule 105(J), but Task Force members concurred in removing the provision.

The final Workgroup 1 changes involved Rules 609 ("petition for review) and 610 ("appellate court mandate"). Under Rule 609, a party has 30 days to file a petition for review. Anecdotally, few petitions are filed in juvenile cases, but as a consequence of this rule, issuance of the mandate is unnecessarily delayed for 30 days, which adversely affects a child's need for finality and permanency. The workgroup addressed this dilemma by adding in Rule 609 a new section (b) titled "notice of intent to file petition for review." A party who intends to file a petition for review must file this new notice within 15 days after a disposition by the Court of Appeals. A party who files such a notice may ultimately decide not to file a petition, without consequence. However, a party who fails to file the notice within 15 days loses the opportunity to subsequently file one. Under new Rule 610(b) ("no notice of intent to file petition for review"), the Court of Appeals clerk may issue the mandate if a notice of intent is not timely filed.

8. **Second draft rule petition; roadmap.** Staff initially drafted the rule petition, the Chair then reviewed and edited the document, and the draft was presented to members at the March 5 Task Force meeting. A second draft of the rule petition was included in the April 12 packet. The second draft takes into consideration discussions at

the March 5 meeting and at subsequent workgroup meetings. The Chair requested members who have comments or suggestions concerning the second draft to send them to staff as soon as possible. The Chair reminded members that their comments can address items on which there was not consensus. The petition will include a link to the rule-by-rule meeting minutes, which will be posted on the JRTF webpage and provide stakeholders with a record of Task Force discussions concerning each of the proposed rules. The filed petition will be accompanied by the rules, although due to document size limits on the Court Rules Forum, the rules might need to be filed as several separate documents.

The rules package will include the derivation and ICWA tables, which should facilitate navigation and make the rules more user-friendly. The package will also include forms. The Chair asked members whether it would be more functional to have the forms appended to the rules, as they are now, or instead to post them on the Arizona Judicial Branch website. Posting them on the website would facilitate making changes to the forms, if necessary, and members generally favored that option. However, the proposed rules should provide information concerning the location of the forms, who can change the forms, and the process for making changes.

Rule 335 will require an earlier effective date than the other rules. The petition will ask the Court to consider this rule on an expedited basis, at its August agenda. The rule is likely to generate comments. Members discussed the possibility of the Court accepting comments not only before the August agenda, but in conjunction with the general comment period for the rule petition. If the Governor signs SB 1391 into law, it would become effective 90 days after *sine die*. The Editorial Group, which will meet on April 14, should consider whether rules affected by that legislation should also be adopted on an expedited basis.

Deadlines derived from the Court's March 19, 2021 Order in R-20-0044 are as follows:

April 30, 2021: Petition filing deadline

July 23, 2021: Close of public comments (suggested deadline)

Sept. 30, 2021: Petitioner's Reply is due (suggested deadline)

December 2021: The Court will consider the petition at its December rules agenda

July 1, 2022: Effective date of any adopted or amended rules

It is difficult to forecast the scope or volume of public comments on the rule petition. Regardless, members should plan on meeting in late July or early August to discuss public comments. Staff will begin contacting workgroup leaders regarding possible meeting dates. More than one Task Force meeting, or workgroup meetings in

the interval between future Task Force meetings, might be necessary. Members should also remain mindful of the potential need for future statutory amendments that conform to the proposed new rules or that adopt desirable changes. This initiative would require collaboration with the AOC's legislative group.

9. Call to the public; adjourn. Ms. Lori Ford responded to a call to the public and addressed the members.

The Chair concluded the meeting by thanking members for their outstanding work and dedication to this project.

The meeting adjourned at 3:35 p.m.