Juvenile Rules Task Force

Public Meeting, September 25, 2020
(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, John Gilmore, Magdalena Jorquez, Hon. Joseph Kreamer, Donna McQuality, Eric Meaux, William Owsley, Christina Phillis, Hon. Maurice Portley, Hon. Kathleen Quigley, Beth Rosenberg, Denise Smith, Hon. Patricia Trebesch, Edward Truman, Kent Volkmer, Hon. Rick Williams, Hon. Anna Young

Members absent: Maria Christina Fuentes, Tina Mattison, Denise Avila Taylor

Guests: Nina Preston, Carey Turner, Shari Andersen Head, Lori Ford, Beth Green

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 tenth Task Force meeting—its fifth consecutive virtual meeting—to order at 10:03 a.m. She noted that workgroups met 7 times after the August 21 Task Force meeting, that the Editorial Group has met 3 times since the August 21 meeting, and that each workgroup and the Editorial Group have set meetings in October.

The Chair reviewed materials for today's meeting. In addition to the draft August 21 meeting minutes and the rules on today's agenda, today's materials included Supreme Court Administrative Directive No. 2018-06 ("court authorized removal"), which pertains to Rule 47.3. Staff once again forwarded to members two law review articles previously provided by Mr. Owsley concerning his presentation on the appointment of counsel and GALs for children in dependency proceedings. Staff also provided members with a one-page progress summary, version 09.25.2020, which shows that as of the conclusion of the August 21 meeting, members had approved 83 rules and one form. There are ten additional rules on today's agenda that are pending approval.

The Chair announced that Judge Quigley was recently appointed to a National Task Force on State Court Responses to Mental Health. Judge Quigley was appointed to this national task force on the recommendation of Chief Justice Brutinel. Members joined the Chair in congratulating Judge Quigley on the appointment.

The Chair next asked members to consider draft minutes of the August 21, 2020 Task Force meeting. Mr. Truman requested corrections, on page 7 of those minutes, of references to Rule 48(D) as the source of Rule 48X; he noted that due to a recent rule amendment, the correct references should be to Rule 48(E).

Motion: A member then moved to approve the August 21, 2020 meeting minutes with these corrections. The motion received a second and it passed unanimously. **JRTF 010**

The Chair then proceeded with rules presentations.

2. Report from Workgroup 3 add-on. The following four rules, which the agenda refers to as the "Workgroup 3 add-on," were combined for discussion.

Rules 37 ("meaning of terms"), 38 ("assignment and appointment of an attorney; advisory attorney"), 40 ("appointment of a guardian ad litem"), and 40.1 ("duties of an appointed attorney and guardian ad litem"). Mr. Owsley, who is a member of Workgroup 4, has worked with Mr. Gilmore and other Workgroup 3 members in trying to clarify a recurring issue regarding the appointment of attorneys and GALs for children in dependency proceedings. Mr. Owsley now proposes modifications to these four rules, each of which was previously conditionally approved by the Task Force members pending further review. The proposed rule modifications are highlighted in today's meeting materials.

Mr. Owsley acknowledged that Arizona statutes are not clear on the nature of appointments for children in dependency and termination cases, and accordingly, county practices can vary. Most notably, Maricopa County initially appoints a GAL for the subject child in these cases, whereas Pima County initially appoints an attorney for the child. Mr. Owsley acknowledged that both of these practices are probably permissible. However, his proposal, which is based on the Pima model, would require the court to initially appoint an attorney for the child in every case, with discretion to subsequently appoint a GAL. Referring to the law review articles, Mr. Owsley added that this is not a new concept, but rather it has been the practice in other jurisdictions for years. A model act proposed by the American Bar Association a decade ago requires the court to appoint an attorney for a child in every dependency case. Mr. Owsley then began his review of his proposed rule modifications, beginning with Rule 37.

Rule 37. In Rule 37, Mr. Owsley would add new definitions of "child's attorney" and "guardian ad litem." A member noted that the proposed definition of "child's attorney" refers to "an attorney who provides legal services," which Mr. Owsley said derives from the model act, but members preferred "provides legal representation," and members agreed to make that change. An Oxford comma was added in the definition after the word "confidentiality." A member asked whether the role of a "best interests attorney" for a child, which is included in the Family Law Rules, would be included in the proposed modifications; Mr. Owsley responded that it would not. Although the definition of GAL expressly provides that the appointed person is an attorney, after discussion, members agreed to include text in this provision that says the GAL "is not bound by the client's expressed preferences or the attorney-client privilege." Judge Armstrong then noted that Rule 2 also defines GAL, a definition that applies to adults as

well as minors, and in the Rule 2 definition, "best" appears before the word "interests," but "best" was not added to the definition in Rule 37 at this point in the discussion.

Rule 38. The proposed changes to this rule are in section (c) ("appointment of an attorney for a child"). Mr. Owsley noted that a proposed provision regarding the appointment of a GAL for a child is now in Rule 40, which he will address next, and the provision for appointment of a GAL was accordingly deleted in Rule 38. The proposed changes to Rule 38(c) are as follows:

> Children in dependency and termination cases are presumed indigent and are entitled to a court-appointed attorney ~~or guardian ad litem, or both~~. ~~In determining which court appointments to make for the child, the court should first consider whether the child can communicate a position to an attorney because of the child's age, mental health, or intellectual functioning.~~ The appointment of a child's attorney should be made as soon as practicable to ensure effective representation of the child and, in any event, before the first court hearing.

Mr. Owsley noted that the prior version gave the court discretion to appoint either an attorney or a GAL or both, while his version would require the appointment of an attorney as soon as practicable.

Judge Kreamer then expressed his three primary reasons for opposing the proposed changes to Rule 38(c). First, he believes the proposed changes conflict with A.R.S. § 8-221(I), which provides that in all dependency petitions containing an allegation of abuse or neglect (which is virtually every petition) that "the court shall appoint a guardian ad litem to protect the juvenile's best interests. This guardian may be an attorney or a court appointed special advocate." Second, even when the court appoints an attorney for a child, in many cases—and especially in cases involving infants and toddlers—the child's attorney by necessity performs the function of a GAL. The child needs an attorney only as the child becomes older and is better able to express preferences. Third, the GAL's input to the court is beneficial not only to the child, but also to the court, which relies on the GAL's input. Judge Kreamer noted that while the law review articles discuss the need for a child's voice to be heard in court, a two-year old has no articulable voice; the child benefits more from having a GAL. He believes that while neither Maricopa nor Pima's method is ideal, he prefers retaining the Task Force's former draft of Rule 38.

Mr. Gilmore, the proposal's co-author, then spoke. Mr. Gilmore believes Pima's system of appointing attorneys has worked well, and he added that when necessary, the court can also appoint a CASA. Although Pima's system requires the appointment of an attorney for a very young child, Mr. Gilmore observed that Ethical Rule 1.14 ("client with diminished capacity") provides appropriate guidance in that situation. His experience has shown that it's preferable to first appoint an attorney for a child, and later, if needed, the court can appoint a GAL. He added that DCS often serves in the role of protecting

the child's best interests, and that attorneys, who are not trained as social workers, might not be the most effective best interests advocates, especially if they lack experience in juvenile matters. Mr. Owsley then noted that A.R.S. § 8-221(I) was initially enacted to facilitate the State's access to federal funding, but other jurisdictions have adopted the attorney appointment model without jeopardizing that funding.

Rule 40. Mr. Owsley advised that modified Rule 40 provides the court discretion to appoint a GAL. While recognizing that A.R.S. § 8-221(I) should be amended, he also proposed modifications to A.R.S. § 8-221(A), which says in part that "in all proceedings involving offenses, dependency or termination of parent rights…that may result in detention, a juvenile has the right to be represented by counsel." He suggested deleting the words "that may result in detention" because those words have no application to dependency proceedings. In response to Judge Kreamer's comment that a GAL can be a better advocate for the interests of a child of tender years, Mr. Owsley observed that the model act and ER 1.14 allow the attorney to use "substituted judgment." He believes that an attorney who uses substituted judgment to represent a young child can be just as effective as a GAL. During the discussion of Rule 40, Judge Armstrong reiterated his belief that the word "best" should appear before "interests" in the definition of GAL in Rule 37, and Mr. Owsley then agreed with that proposed change.

Rule 40.1. Mr. Owsley substantially reorganized proposed Rule 40.1(a) ("explain the role") by adding two subparts. Subpart (1) includes a lengthy description of the attorney's duties, and it includes references to ER 1.14 and "substituted judgment." Most significantly, Mr. Owsley explained that the rule places the responsibility on the child's attorney, rather than on the court, of making a diminished capacity determination. He believes that the child's counsel, not the court, is in the best position to make that determination. He highlighted certain language in subpart (1), particularly the words "when a child client has diminished capacity, the child's attorney shall make a good faith effort to determine the child's needs and wishes." He said that this language was derived from the model act. The last sentence of this subpart requires the attorney to advise the court of the determination of capacity, so that the court knows whether the attorney is using substituted judgment or advocating for the child's wishes. Subpart (2), which is a single sentence, requires the GAL to "assist the court in determining what is in the child's best interest and is not bound by the client's expressed preferences."

In making the capacity determination, Rule 40.1 requires counsel to contemplate whether the child is capable of making "an adequately considered decision." One member criticized this language and questioned whether there can be an objective basis for an attorney to make the determination. Mr. Owsley replied that this language is taken from the model act and includes the child's ability to thoughtfully communicate. The member would prefer that the text refer to the child's ability to vocalize his or her wishes, but Mr. Owsley replied that a developmentally disabled child might be able to vocalize but still have diminished decision-making capacity. A judge member added that a five-year old's communications alone doesn't rise to the level of considered decision-making.

One member reminded the Editorial Group that if these provisions go forward, it will need to make them gender neutral (e.g., Rule 40.1(a)(1) refers to "his or her"). Another member expressed concerns with the application of these rules to guardianship proceedings (see further A.R.S. § 8-872(D), which refers to the appointment of an attorney for a child when a GAL has not been appointed), but no changes followed the discussion of this point. And another member asked whether proposed Rule 38(c), which refers to the appointment of an attorney in a dependency or termination case, should also refer to guardianship proceedings, but (1) A.R.S. § 8-872(D) addresses this, and (2) a dependency proceeding precedes a Title 8 guardianship, and the court's appointments in the dependency should remain effective during the guardianship.

The Chair then asked Mr. Owsley and Judge Kreamer to summarize their positions. Mr. Owsley emphasized that every child should have a court-appointed attorney at the very beginning of a case in which the child is the primary subject. He noted that although the court sometimes appoints a GAL at the start of a case involving a young child with the expectation that the court will appoint an attorney as the child ages, this rarely happens in practice. He added that the attorney rather than the court is in the best position to determine whether the child has diminished capacity and whether it is necessary for the attorney to exercise substituted judgment. He concluded that this change is consistent with the ethical rules and represents a good compromise. Judge Kreamer responded that this was not a compromise but was instead a substantial change, because Maricopa would no longer be able to continue its practice of appointing a GAL at the inception of a case rather than a lawyer. Not only will the court lose the benefit of information that a GAL could provide, but the child will lose a person who will advocate for the child's best interests. He concluded by saying that substituted judgment is another way of advocating for the child's best interests, and it would align the title of the appointment more closely with that function by allowing the court to appoint a GAL for the child rather than an attorney.

> Straw vote: The Chair then called for a straw vote on the issue. An aye vote would support Mr. Owsley's proposed rule modifications, and a no vote would not and would instead retain the previous draft, particularly without the proposed strikethrough in Rule 38(c). The vote was 9 aye and 7 no. Note that 3 members who were present during the vote took no position, and 3 members who were present at the start of the meeting were absent when the vote occurred.

The Chair said that the Task Force's rule petition would note this division and explain the reasons for its recommendation. The rule petition will be opened for public comments, and the Task Force should anticipate feedback on this issue.

3. Report from Workgroup 1. Ms. Beckmann presented Workgroup 1's rules. Each of the rules on today's agenda, except for Rules 105 and 108, had been previously presented.

Rule 46.1 ("altering or amending a final order"). During her presentation of this rule at the July 21 meeting, Ms. Beckmann noted that the workgroup had been guided in its drafting of this new rule by analogous provisions in the Family and Civil Rules. Based on members' comments on the first draft at the previous meeting, the workgroup pared the grounds for a Rule 46.1 motion. There are only two grounds for this motion in the current draft: correcting a clerical error or amending insufficient findings of fact or conclusions of law. The draft specifies that the time for filing the motion is limited to 12 days after entry of the final order. The workgroup chose this time because it had to be less than the 15-day limit for filing a notice of appeal, and 10 days would require the time calculation to exclude intermediate weekends and holidays, which then might exceed 15 days. She noted that a Rule 46.1 motion would be a time-extending motion under Rule 104, which she will discuss later today.

Ms. Beckmann then reviewed the procedure for the motion, which is detailed in section (b) ("time to file a motion; response"). Because the current draft limits the grounds for the motion, the workgroup modified section (c) ("court action") by removing provisions that would have allowed the court to take additional testimony or to require further proceedings. The workgroup also deleted a sentence that said that a new order need not be a final order, because the purpose of Rule 46.1 is to allow the court to promptly correct an error without lengthening the trial court proceeding and without delaying the appeal. Under modified section (c), the court's options are either denying the motion or vacating the previous order and entering a new or amended final order. Section (d) ("successive motions") prohibits a party from filing a motion to alter or amend an order granting or denying a party's Rule 46.1 motion. The intent is to avoid successive motions that would further delay the proceeding. Ms. Beckmann noted that this provision applies to a party's motion but not to a motion on the court's initiative.

For clarity, should the rule refer to "calendar days?" Ms. Beckmann agreed that it would be useful if the reference to 12 days was "calendar" days, while the reference to the 10-day period for filing a response should be "court" or "business" days. The Editorial Group will address this. How long will a Rule 46.1 motion delay the appeal? A member calculated that it might be as long as a couple months (12 days to file the motion + 10 or 15 days to respond + time for the court to enter an order granting or denying the motion + 15 more days in which to file a notice of appeal from that order.) The member suggested that Rule 103, which permits the trial court to rule on issues "in furtherance of the appeal," could adequately supplant Rule 46.1. Ms. Beckmann disagreed because the trial court might be reluctant to enter orders otherwise allowed under Rule 46.1 without the specific authority provided by this new rule. A judge member agreed with that point, noting that Rule 46.1 provides a clear process for correcting a final order, which becomes necessary in a significant number of cases, and the rule expresses the trial court's authority to do so. Rule 46.1 was accordingly approved.

Rule 103 ("right to appeal"). In section (b) ("final orders"), Ms. Beckmann noted the addition of a new subpart (K) and a revised subpart (L). Subpart K was prompted by the addition of Rule 46.1 and makes appealable an order altering or amending a final order under Rule 46.1, or an order denying the motion. Subpart (L) makes appealable an order granting or denying a motion to set aside a final order under Rule 46.2 (which is a Workgroup 3 pending rule) or Rule 74(f), which applies in adoption proceedings. Members approved these modifications.

Rule 104 [new] ("time for filing a notice of appeal and notice of cross-appeal") and Rule 104X ("content and distribution of the notice of appeal"). The Task Force previously considered Rule 104, which was titled "notice of appeal." The previous 104 addressed several subjects in a single, lengthy rule. Rule 104 has now been bifurcated as shown in the above titles.

The workgroup's most notable changes in new Rule 104 are in section (c) ("effect of certain post-judgment motions on the time for filing a notice of appeal"), which is modeled on ARCAP 9(e) and concerns time-extending motions. The specific time-extending motions identified in section (c) are timely-filed motions under Rules 46.1, 46.2, and 74(f). Section (c) has 3 subparts, each addressing a different scenario. Subpart (1), as indicated by its title, applies when there has been "no previous notice of appeal." Subpart (2), titled "previous notice of appeal," applies when a notice of appeal was filed prior to the filing of the motion or while the motion was pending. The procedure specified in this subpart allows the appellate court to "suspend" the appeal (this is the term used in the ARCAP, although some still use the term "stay" the appeal) until the trial court has disposed of the motion. Finally, subpart (3) applies when a final order has been altered or amended on the court's own initiative. If a party has previously filed a notice of appeal, subpart (3) provides that the party is not required to file a new or amended notice to appeal from subsequent sua sponte order. Two members expressed continuing objections to the provisions on time-extending motions because they believed those provisions would delay the finality of permanency determinations in dependency proceedings.

Rule 104(d) ("other post-judgment motions") provides that post-final order motions, other than the motions expressly referred to in this rule but that concern the final order, do not extend the time for filing a notice of appeal or cross-appeal. Once a proper notice of appeal is filed, the rule provides that the juvenile court is divested of jurisdiction to hear the motion unless the appellate court suspends jurisdiction and re-vests jurisdiction in the juvenile court. In that event, a party who challenges the juvenile court's subsequent order must file a new or amended notice of appeal. Ms. Beckmann then briefly reviewed section (e) ("delayed appeal or cross-appeal"), which the workgroup had not recently changed.

Rule 104X was derived from previously drafted Rule 104 sections (b) ("content of the notice of appeal") and (c) ("distribution of the notice of appeal"). Ms. Beckmann advised that other than being relocated to a free-standing rule, the substance of these provisions is the same. Notwithstanding the objection to the time-extending motions noted above, members approved new Rule 104 and Rule 104X.

Rule 104.1 ("the record on appeal"). The changes in Rule 46.1 and elsewhere concerning post-final order motions prompted a change in section (a) ("presumptive record on appeal"). The previously approved version of Rule 104.1 provided that the presumptive record included any documents filed with the clerk "before and including" the filing of the notice of appeal. To assure that post-final order motions also were included in the presumptive record, section (a)(1)(A) now requires the clerk to transmit documents "filed with the clerk before the record is transmitted." Members had no objections to this change.

Rule 105 ("assigning an appellate case number; filing, serving, and transmitting the record on appeal"). This rule is presented for the first time. It concerns the mechanics of the appeal in the appellate court after the filing of the notice of appeal. Ms. Beckmann reviewed the rule, which contains subjects such as assigning an appellate case number, and transmitting the record to, and filing the record in, the Court of Appeals.

In subpart (a)(2), Ms. Beckmann detailed the process for filing a motion in the Court of Appeals prior to the assignment of a case number. This occasionally occurs when a party asks the appellate court to stay a trial court's final order. She noted that a statute precludes the trial court from staying its own order, even though it has the most familiarity with the case, and she suggested addressing this anomaly by a statutory amendment. Section (b) requires the appellate court to notify court reporters of the assigned case number, which facilitates inclusion of the case number on the reporters' transcripts. Ms. Beckmann emphasized the importance of section (e) ("notice of completion of the record") because it triggers the briefing schedule in Rule 106. She also advised that the workgroup deleted a portion of section (f) (now, "supplementing the record by appellate court") that required the superior court clerk to immediately forward to the appellate court any document filed in the superior court after the initial transmission of the record. The workgroup concluded that this requirement was burdensome and unnecessary because many of those documents were not pertinent to the appeal. The modified provision allows the appellate court to request any document, exhibit, or other item necessary for determining the appeal. Members had no questions concerning draft Rule 105 and approved it as presented.

Rule 108 (currently, "service, how made, filing, extensions of time," and as proposed, "abrogated"). Ms. Beckmann noted that although this is the final rule on juvenile appeals, it contained information that properly belonged in previous rules. Pertinent content has therefore been relocated to other rules, and the workgroup now proposes the abrogation of Rule 108. The members agreed.

Report from Workgroup 4. Rules 73 and 75 were presented a second time, with modifications, and Rule 79 was presented for the first time.

Rule 73 (now, "disclosure and discovery in contested adoptions"). Ms. Coughlin presented the modifications to Rule 73. The duty to disclose arises only in contested adoptions. The Task Force asked the workgroup to clarify when an adoption matter is contested. The solution proposed by the workgroup is new language in section (a)(1) that requires a judicial determination "at any stage of the proceeding, on its own or upon request of a party…." This removes guesswork about when an adoption is contested, because a judicial officer makes that determination, and it allows a determination at a late stage of the adoption if the contest arises at a later time, such as a late challenge under ICWA. For clarity, the title of this rule now includes the words, "in contested adoptions." Members had no questions or objections and approved the modified rule as presented.

Rule 75 ("release of information"). Mr. Owsley presented the modifications to Rule 75. Members believed the workgroup's previous draft unartfully parsed the statutory requirements for release of information. In response, the workgroup deleted almost all of the specified requirements in its previous draft and replaced that language with "as provided by A.R.S. §§ 8-121 and 8-129." Mr. Owsley also proposed adding to the foregoing clause a reference to A.R.S. § 8-134, which, like § 8-129, is referenced in § 8-121. He suggested that adding this third statutory reference would make Rule 75 more complete. Members discussed whether the rule should refer to all three statutes or only to § 8-121, which refers to the other two. They concluded that the single statutory reference would be sufficient to make readers aware of all three statutes, and they revised the draft accordingly. They also changed the title of section (b) from "request for record" to "release of information," which is more accurate. They agreed to delete the comment to the current rule, which is substantially contained in draft section (c) ("records of Indian adoption"). Members approved Rule 75 with these revisions.

Rule 79 ("petition to adopt"). Professor Atwood noted that the Task Force recently approved Rule 79.1 ("service of the petition to adopt and notice of hearing"), which was formerly included as Rule 79(c) and is now a freestanding rule. Professor Atwood reported that the workgroup did not make substantive changes in Rule 79(a) ("contents of the petition") but she noted restyling changes, including use of the phrase "if the child is an Indian child" in subpart (a)(4). However, she recommended an amendment to A.R.S. § 8-109 ("petition to adopt; contents") concerning whether the child is an Indian child. Both current and draft Rule 79(a) contain a requirement to include this information in the adoption petition, but the requirement is omitted in the statute.

Professor Atwood advised that the workgroup spent considerable time on section (b) ("setting a hearing on a petition"), which is not easily understandable in the current rule. She reviewed each of the subparts in section (b): subpart (1), on time limits, subpart (2), on expedited hearings, and subpart (3), if the child is an Indian child. The subpart on

time limits clarifies provisions concerning the child's residence in the prospective adoptive parent's home and the nuance concerning the length of time a prospective adoptive parent has been married to the birth or legal parent. The subpart on expedited hearings derives from a recent statutory amendment and is substantively unchanged. In subpart (c), Professor Atwood suggested adding the ICWA cite, ICWA section 1912, in addition to the CFR cite. On CFR cites, Judge Armstrong advised that the Editorial Group is using periods after each letter, as recommended by the Blue Book, even though the government's CFR website does not follow that convention. Members approved Rule 79 following this discussion.

4. **Workgroup 3.** Workgroup 3 revisited Rule 42 and made its initial presentation of Rule 47.3. Rule 48X was on the agenda because the Editorial Group had made a significant change to the rule, but it was taken off calendar because a member requested additional time to discuss the change with colleagues.

Rule 42 (now, "virtual proceedings; declared emergencies"). Judge Quigley, who presented this rule, noted that Judge Agne joined the workgroup to discuss modifications proposed at the August 21 Task Force meeting. As recommended by the members on August 21, the word "virtual" rather than "telephonic" is used throughout the rule. The workgroup also made other non-substantive changes. For example, in section (b) ("meaning of virtual"), it changed "audio or video technology" to "audio or visual technology" in anticipation of future technological innovations. In section (d)(2) ("time"), it changed "objecting party" to "moving party." The workgroup also added a sentence in this section, as well as in section (f) ("evidentiary proceedings during declared emergencies") that says, "responses must be filed as provided by Rule 46 or as the court otherwise directs." In section (e) ("introducing documents during virtual testimony"), and in section (f), the workgroup changed "judicial officer to which the case has been assigned" to "assigned judicial officer." Section (f) now includes the words "if practicable" in the phrase "will be audible and, if practicable, visible to every other person…." In response to a question, Judge Quigley said that the rule would apply to termination proceedings as well as dependencies, but the court in both circumstances must make appropriate due process determinations. A presumption in section (d) includes a presumption that evidentiary proceedings in non-emergency circumstances will be conducted in-person. She also clarified that section (f) is not triggered by a county or a court declaration; it instead requires a gubernatorial declaration, signifying a bona fide statewide emergency. There were no further questions and Rule 42 was approved.

Rule 47.3 ("court authorized removal"). Ms. Jorquez, who presented this rule, noted that Mr. Truman and Mr. Turner collaborated on the proposed revisions, and because the rule is relatively new, those revisions are stylistic rather than substantive. Section (a) of the draft ("generally") adds this new concluding sentence, which they believe adds clarity and direction: "The court must then determine whether to authorize DCS to take temporary custody of a child." In section (b) ("burden of proof"), the word "current" was removed from the phrase "child's current home." The word "current"

overlooks the possibility that the child might be in a location other than the "current home." For example, the child might be in a temporary shelter, living in a car, or even homeless. (See further A.R.S. § 8-821(B), which says, "…it is contrary to the child's welfare to remain in the home.") The word "why" was added in section (c) ("procedure") subpart 1 ("application") in the phrase "the particular reasons why each child is presently or imminently in danger…." The phrase "presently or imminently in danger" is used in current Rule 47.3(C)(1)(b), whereas A.R.S. § 8-821(B) uses the phrase "clearly necessary," but the draft rule tracks the current rule in this regard rather than the statute. Section (c) also includes organizational changes.

Section (d) ("findings and orders") includes a subpart on notice that refers to certain statutes, including A.R.S. § 8-807(L). The (L) designation was removed so that the entirety of the statute is applicable. Subpart (d)(4) of the current rule ("execution and duration") includes provisions regarding whether the child is or is not receiving inpatient care. This subpart was reorganized into new and separate subparts, one titled "duration of the order," which is generally applicable, and the other titled "inpatient care extension of order," when that circumstance is present. These subparts allow 10 days for execution of the order. A member asked why DCS should have 10 days to execute an order for a child who is not in-patient if the situation is a true emergency. After discussion, it appears that situations may occur where DCS cannot immediately locate the child, or that DCS attempts to work with the family over the ensuing days to alleviate circumstances that prompted it to obtain the order. In subpart (d)(4)(c), the words "temporary custody authorization order will expire after…" were replaced by the words, "a child shall not remain in temporary custody for more than…." In three places, Rule 47.3 referred to 25 CFR § 23.113; in each instance, members added to these references the underlying statute, ICWA section 1922. Members had no other suggested revisions and approved the rule with these modifications.

5. <u>Report from Workgroup 2.</u> Workgroup 2 presented Rules 30 and 31.

Rule 30 ("disposition"). Ms. Phillis presented this rule. She noted in section (a) (now, "disposition report") that the workgroup changed the word "shall" in the current rule to "may" as follows: "…the court ~~shall~~ <u>may</u> order the juvenile probation officer [to prepare a report]." The workgroup believed the court should have discretion to proceed to disposition without a report. Ms. Phillis also explained that subparts (a)(1) ("contents of the report") and (a)(2) ("availability of report to the victim") were revised, but the content of those subparts is substantively equivalent to the current provisions.

One member disagreed with the change of "shall" to "may" and believed that a disposition report should be required in every case ("must"), even if the report is a short one, and that this report would be useful if the juvenile commits a subsequent offense. Ms. Phillis disagreed, noting first that many juveniles do not reoffend, and further, that the current practice is to dispense with a report in appropriate cases. Current Rule 30(A)(3) allows the waiver of a report, and so does draft subpart (a)(3) ("waiver of

report"), provided the victim has had an opportunity to provide input. Draft subpart (a)(3), unlike the current provision, permits the victim to provide information in writing or orally. The member asked how the victim can obtain access to the report, as provided under subpart (a)(2), if no report was prepared. Other members responded that prosecutors can provide pertinent information to victims in those circumstances, sometimes by providing a document referred to as a "current information report." After discussion, members retained the word "may" in section (a) and made no changes to subparts (a)(1) through (a)(5). (Subpart (a)(4) is "evaluation of juvenile," and subpart (a)(5) is "release of information.") Subpart (a)(6) ("filing disposition reports and records") requires that the disposition report and social file record "be filed in a segregated portion of the legal file." Ms. Beckmann observed that this can be problematic because these documents aren't always transmitted to the appellate court with the record on appeal. Ms. Phillis responded that the workgroup would reexamine the provision to address that issue.

In section (b) ("disposition hearing"), subpart (1) ("time limits"), members added the underlined words to be consistent with a change the Editorial Group recently made to Rule 29 ("adjudication hearing"): "…unless the juvenile waives time or time is excluded by the court under Rule 17." A member asked why the word "signed" was included in subpart (b)(3) ("findings and orders"). The answer was that Rule 103 requires that an appealable final order be signed. Ms. Phillis reviewed subpart (b)(4) ("advisals"), including the requirement that these advisals be provided to the juvenile in writing and that they include, when appropriate, a felony offender warning and the prohibition concerning firearms. Members approved Rule 30 subject to reexamination of the issue noted above.

Rule 31 ("probation"). Mr. Cardy presented Rule 31. In section (a) ("imposition of probation"), the current rule refers to conditions "that will promote rehabilitation and public safety." The restyled rule instead says, "designed to promote the juvenile's positive development, assure accountability, and protect the public." Although the current rule and Criminal Rule 27 refer to the probation officer imposing "regulations," the workgroup preferred the term "directives," which members agreed was the term customarily used for juvenile probationers. Section (b) ("notice") requires that when a juvenile receives oral notice of a directive under exigent circumstances, the juvenile must thereafter receive prompt written notice that confirms the oral one. The workgroup revised section (c) ("modification of probation") to clarify the parties' right to be heard on modifications of directives or conditions of probation. In subpart (c)(2), the following sentence was added: "The court must give the juvenile a written copy of a modification or clarification." Subpart (c)(4) concerns the victim's rights regarding modifications. Section (d) ("termination of probation") has a statutory basis, and the workgroup reorganized and restated current section (d).

Members discussed whether the restyled juvenile rules should include a rule on set-asides. Judge Armstrong suggested that if the Task Force adopts such a rule, it could

be as simple as referring readers to the statute, which would provide the details. The workgroup will consider this suggestion and it will consult with Judge Quigley, who was involved in drafting set-aside provisions for other projects. Although Rule 31 does not mention destruction of juvenile records, a member asked whether these records should be sealed rather than destroyed, because destruction could impact a juvenile's subsequent military enlistment. Members had no consensus on this collateral issue, but otherwise approved Rule 31 as presented.

6. Roadmap; call to the public; adjourn. The Chair confirmed future Task Force meeting dates: October 23, November 20, December 4 (which is now a firm date), and December 18. The December 18 meeting is tentatively reserved for reviewing a draft rule petition and ancillary documents, so members will need to consider a significant number of rules at the next three Task Force meetings. The Task Force has a few dozen rules remaining for review, and she encouraged members to continue to be diligent in working through those rules. The Task Force has already reviewed almost 100 rules, which reflects the members' substantial investment of time and effort. The Chair reminded members of the desirability of vetting the draft rules with stakeholders, and she requested members to send to staff the names and contact information of individuals and organizations who could review the drafts and provide input to the Task Force.

Ms. Lori Ford on behalf of the Arizona DCS Oversight Group responded to a call to the public and addressed the members.

The meeting adjourned at 3:32 p.m.