Juvenile Rules Task Force

Public Meeting, October 23, 2020
(Members and guests attending telephonically)

Meeting Minutes

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

Members absent: Dale Cardy, Kent Volkmer, Hon. Rick Williams

Guests: Nina Preston, 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 eleventh Task Force meeting—its sixth consecutive virtual meeting—to order at 10:01 a.m. Although there were only four weeks between the September 25 meeting and today's meeting, the Chair observed that there were six workgroup meetings and two Editorial Group meetings during that interval. For a longer perspective, the Chair noted that since the first workgroup meeting on October 21, 2019, which was about three weeks after the first Task Force meeting, there have been 68 more workgroup meetings, 10 more Task Force meetings, and 8 meetings of the Editorial Group. She shared staff's calculation that during the past year, there has been a Task Force, a workgroup, or an Editorial Group meeting about once every three or four business days. Given that the Editorial Group has two pending meetings, each workgroup has set at least one more meeting, and the Task Force has 3 pending meetings, the total number of meetings by the end of December will certainly exceed 100. These numbers demonstrate the commitment and diligence of Task Force members, and the Chair expressed her appreciation for the members' dedication.

The Chair reviewed materials for today's meeting. In addition to the draft September 25 meeting minutes and the rules on today's agenda, today's materials included staff's memo regarding Civil Rule 81.1. Attached to staff's October 21 email to members were three Court of Appeals opinions concerning the appealability of the denial of adoption certification that are pertinent to Rule 77. That email also included a link to a Division One opinion earlier this month, *Timothy B.*, which concerned termination and parenting rights of two incarcerated fathers. Staff also provided members with a one-page progress summary, version 10.23.2020, which shows that members have now approved more than 90 rules.

The Chair next asked members to consider draft minutes of the September 25, 2020 Task Force meeting. Members had no additions or corrections.

Motion: A member moved to approve the September 25, 2020 meeting minutes. The motion received a second and it passed unanimously. **JRTF 011**

Members then proceeded with a rule presentation from Workgroup 4, followed by presentations from Workgroups 3 and 1. Workgroup 2 had no rules to present.

2. Report from Workgroup 4.

Rule 77 ("certification to adopt"). Professor Atwood presented this rule. She noted that the current rule omits various requirements of A.R.S. § 8-105, and the workgroup accordingly added certain statutory requirements to this rule. She further noted that the first section of the current rule is "dismissal of application" and the current rule therefore omits the prerequisite of filing the application. The draft rule addresses this omission by including a new section (a) ("application for certification") that states this initial requirement. Draft section (a) also instructs that "this requirement does not apply to individuals identified in A.R.S. § 8-105(N)," for example, a prospective adoptive parent who is the spouse of the birth parent or a licensed foster parent where the child is already placed in that person's home.

Draft section (b) ("dismissal of the application due to insufficient information") includes a new alternative that enhances procedural efficiency. In lieu of the court dismissing an incomplete application, draft section (b) would allow the applicant to submit supplemental information. The current rule does not mention the submission of an investigative report and recommendation, which are required by A.R.S. § 8-105; draft section (c) ("court action") fills that gap. Draft section (c) also describes the court's options after receiving the investigative report and recommendations. Moreover, and parallel to the above-noted change in section (b), section (c) provides the court a new alternative: it may "require further investigation if it finds that additional information is necessary for making an appropriate decision regarding certification." Finally, although the current rule vaguely implies that the court must inform the applicant of the reasons for its denial of an application, it is not explicit on this point; the draft rule is.

Professor Atwood then reviewed remaining sections (d) through (i). The workgroup made only a few minor changes to those sections. The workgroup's title of section (d), taken verbatim from the current rule, was "motion for reconsideration of denial of certification." For greater accuracy, the Task Force agreed to change this to "motion for hearing on denial of certification." The workgroup's draft of section (h) ("findings and orders") says that "the court may consider all reliable evidence." After discussion, Task Force members changed "may" to "must."

Professor Atwood then raised the issue of whether a denial of certification to adopt is an appealable final order, or whether appellate review is instead by way of special action. Court of Appeals cases provided by Professor Atwood and Ms. Beckmann indicated that the remedy was an appeal, although special action might be appropriate if an appeal was not sufficiently speedy. The next issue was whether these orders should be expressly included in the list of appealable orders in draft Rule 103, or whether they fall within the catchall provision of Rule 103(b)(2)(N) ("any other order that is final pursuant to Arizona case law"). Although it appears that appeals from these orders are rare, the intent of Rule 103 is to include every identifiable and appealable final order, and members agreed to add the denial of adoption certification to the Rule 103 list. Ms. Beckmann will draft the additional language. Members had no further comments, and they approved Rule 77 with these modifications.

3. <u>Report from Workgroup 3.</u>

Rule 50 ("preliminary protective hearing"). Judge Quigley presented Rule 50, which Workgroup 3 had discussed at length.

In section (a) ("generally"), the workgroup added the word "physical" in the phrase "temporary physical custody of DCS," because a parent challenges physical custody at a preliminary protective hearing ("PP5"). Section (b) ("ICWA") is derived from section (a) of the current rule; it was separated into a freestanding section because it concerns a different subject than draft section (a). Judge Quigley then advised that the workgroup spent considerable time discussing and reorganizing the next three sections of the draft—sections (c) ("procedure"), (d) ("findings"), and (e) ("orders"). These three sections are derived from current sections (B) ("procedure") and (C) ("findings and orders"). The workgroup's draft improves on the current rule by providing a logical sequence for the PP5 proceeding. Judge Quigley noted that statutory requirements for the PP5 are spread throughout Title 8. Draft Rule 50 attempts to aggregate those requirements and include useful cross-references to pertinent statutes.

Section (c) lists the PP5 procedures. Section (c) contains 10 subparts; a few of these have further subparts. Judge Quigley reviewed all those subparts, some of which were modified or relocated during her presentation and the ensuing discussion. Judge Quigley noted that subpart (c)(2)(C), which concerns paternity, is currently in Rule 52(c)(5), but it has been relocated in Rule 50. Subpart (c)(2)(D), concerning reasonable efforts, is a new determination that is derived from A.R.S. § 8- 8-825(D), and the statute is referenced in this subpart. Subpart (c)(2)(E) was added. This subpart requires a probable cause determination ("that continued temporary physical custody is clearly necessary to prevent abuse or neglect pending the [dependency] hearing"). Although a parent may request a temporary custody hearing where that finding would be made, the requirement to find probable cause appears to apply to any PP5 proceeding, even when a parent does not request a temporary custody hearing. *See further* A.R.S. § 8- 8-824(F). Subpart (c)(2)(G), on whether the parent admits, denies, or doesn't contest the allegations, is not

in current Rule 50(B), but it was added because it's required under A.R.S. § 8-824(I). Judge Quigley raised the issue of whether the rule could state "parent" rather than "parent, guardian, or Indian custodian." See a further discussion of this issue under Rule 53 below. The workgroup also added a subpart about whether to close the proceeding, which is also a mandatory determination under the statute and the rule cited in that subpart. The workgroup had included this subpart further down in section (c), but a member suggested that the court needed to make this determination early in the proceeding and it was relocated toward the beginning of section (c) as subpart (c)(2)(B).

Subpart (c)(3) applies if DCS is the petitioner. The workgroup was not certain about the legal basis of these provisions, some which are not even included in the current rule. However, the workgroup added three statutory references in its draft of subpart (c)(3)(B) that provide a rational basis for these requirements. Subpart (c)(4), pertaining to an Indian child, now includes the language "if any party has reason to know." The words "at issue" in the phrase "child at issue" were stricken from this subpart. Subpart (c)(5) requires the court to "review any agreements reached at the preliminary protective conference." The word "stipulations" is redundant, and it was not included in the provision. A "paramount consideration to the health and safety of the child" in current Rule 50(b)(5) was not included in the corresponding draft subpart because the phrase is included in draft Rule 50(a) and it applies throughout the rule. Draft subpart (c)(6), which concerns the temporary custody hearing, includes references to the applicable statute and rule. Subpart (c)(8), concerning the right to be heard, was modified to include a relative identified as a possible placement. *See further* A.R.S. § 8- 8-824(e)(11) and (j)(2). Subpart (c)(9) contains a reference to Form 1, which Judge Quigley acknowledged might require modification. However, a reference to the form and applicable statutes in this subpart reduces the necessity of adding explanatory text in the rule itself.

The workgroup made a significant organizational change to Rule 50 by creating separate sections for findings, which are governed by section (d), and for orders, which are now addressed in section (e). The first finding in section (d) is new; subpart (d)(1) requires a finding that the court has jurisdiction over the subject matter and the persons before the court. Subpart (d)(2) requires a finding that an initial dependency hearing was held pursuant to Rule 52 for those parents who were present. (*Compare* A.R.S. § 8- 8-826 ("If a parent or guardian denies the allegations at the preliminary protective hearing the court may set the date for the dependency adjudication hearing as to that parent or guardian. An initial dependency hearing shall not be held as to that parent or guardian.") with current Rule 50(C)(2) ("Make findings and enter orders as required by Rule 52(d)."). Subpart (d)(3) requires the court to find that a temporary custody hearing was held, if one had been requested. A separate subpart (d)(4) addresses the probable cause finding. Issues regarding the ICWA findings required by subparts (d)(5) and (d)(6) were not resolved at the Task Force meeting. Specific ICWA standards and findings apply, and Professor Atwood and others will confer with Workgroup 3 to properly phrase those required findings; they may also relocate these provisions. In subpart (d)(7), members

separated findings that the parents were advised of and understood the consequences of (A) failing to participate in reunification services, and (B) failing to attend future proceedings. Subpart (d)(8), which requires a finding about siblings who are not placed together, is not included in the current rule, but the requirement of such a finding is implied by § 8- 8-824(G). Subpart (d)(9) is a catchall finding ("other findings as appropriate and required by law").

Section (e), subpart (1) requires an order "returning the child to the parent, or if the child is not returned…, regarding placement pending the determination of the dependency petition, and visitation/parenting time, if any." This differs from any orders that are found in current section (C); however, the subpart is aligned with the requirements of the referenced statutes and Rule 51. Subparts (e)(2), (e)(3), and (e)(4), which respectively concern agreements, paternity, and siblings, are straightforward and related to the previous determinations and findings. Subpart (e)(5) concerns order for reunification services and includes two subparts whose application depends on whether the child is, or is not, in DCS custody. Subparts (e)(6) and (e)(7) concern ICWA, and these provisions, like the findings noted above, are subject to further revision or relocation. The workgroup will also consider whether "tribe" should be included in pertinent provisions of section (e). Subparts (e)(10) and (e)(11) concern the setting of future hearings; subpart (e)(10) includes statutory and rule references. Subpart (e)(12) is the catchall: "enter other orders as appropriate and required by law."

A new section (f) ("copies for the parties") requires the court at the conclusion of the PP5 hearing to provide the parties who appeared at the hearing with a written copy of the court's findings and orders. This provision is derived from current Rule 50(C).

Workgroup 3 will have further discussions of this rule as noted above and will present a revised draft at a future Task Force meeting.

Rule 53 ("settlement conference"). Judge Young, who presented Rule 53, noted that the draft rule contained no substantive changes. Although draft section (a) ("generally") does not expressly state that a settlement conference is voluntary, she confirmed that the parties must agree to participate in the conference. Judge Young also clarified that this rule does not apply to a mediation or a conciliation conference. In draft section (b) ("settlement conference memorandum"), Judge Young noted that the workgroup deleted a current provision that requires the parties to identify "matters not in dispute" because workgroup members did not believe that this information was helpful for resolving disputed issues. Although all Task Force members did not agree with this belief, the Task Force nonetheless omitted that provision in the draft. Section (b) also requires the parties to "provide" the court with their memos, but members agreed this was insufficient and they added the words, "but not file or exchange [the memo] with other parties." The draft also required the parties to do so at least 5 days before the conference, and members added the words, "or as otherwise provided by the court." In section (c) ("procedure"), subpart (1), in the phrase "the assigned trial judge may only

participate in the conference," members changed "participate" to "conduct." In other subparts of this section, members changed settlement "discussions" or "negotiations" to "settlement conference." Subpart (c)(4) modified the phrasing of the current provision; the draft provision now says, "the parties must inform the assigned judge of the result of the settlement conference." In draft section (d) ("findings and orders; further proceedings") and elsewhere, members used only the word "parent." This change was conditioned on adding a universal definition of "parent" that includes a "guardian or Indian custodian." Because an adjudication hearing might already be set, members changed "set" a hearing date to "set or affirm" the date.

A new section (e) ("admonitions") was derived from current section (d). Among other things, the current provision permits the settlement conference judge to adjudicate a child dependent if the parent fails to appear for the settlement conference. Members questioned the rationale for this provision because, as noted previously, a settlement conference is a voluntary proceeding. One judge member rationalized the current provision by explaining that although the parent need not participate in the conference, the court could still require the parent to appear. But other judge members noted that an attorney could be discouraged from requesting a voluntary settlement conference if the client's failure to appear at the conference could have such dire consequences. The members accordingly agreed to omit a default provision. (There are far fewer settlement conferences than mediations, and none of the judge members recalled conducting an adjudication following a parent's failure to appear at a conference.) Regardless, section (e) retained the other portions of the admonition. Subpart (e)(3) requires the court to find not only that it advised the parent of the admonition, but also to find that the parent "understands" the consequences of failing to appear or to participate in reunification services. During the discussion of section (e), members agreed that the admonition should be uniform throughout the rules and they requested the Editorial Group to review the language of the admonition.

Section (f) is titled "ICWA." Members did not revise the draft of this section other than modifying the ICWA cite. The modified cite is now ICWA followed by a section symbol and then a section number. Members adopted this as the convention for ICWA citations throughout the draft rules. This convention parallels citations to the A.R.S. and the C.F.R. Finally, in section (g) ("other findings and orders"), a reference to a Rule 56 disposition report was deleted inasmuch as the workgroup anticipates recommending a deletion of a reference to the report when it presents Rule 56. Members then approved Rule 53 as modified.

4. <u>Report from Workgroup 1.</u>

Civil Rule 81.1 ("juvenile emancipation"). Judge Kreamer presented an issue concerning Civil Rule 81.1. This single-sentence rule provides, "These rules [the Civil Rules] apply to juvenile emancipation proceedings except as provided in Part V, Rules of Procedure for Juvenile Court." Workgroup 1 had previously presented a set of

emancipation rules that was entirely self-contained and did not require the reader to refer to the Civil Rules. Accordingly, the workgroup believed that Civil Rule 81.1 was unnecessary and possibly confusing, and it recommended the abrogation of Rule 81.1.

Although Task Force members did not know the origin of Rule 81.1, they surmised it was added because emancipation proceedings are governed by Title 12, the title on civil proceedings, and individuals looking for rules on emancipation would accordingly consult the civil rules rather than the juvenile rules. Rule 81.1 therefore might provide some useful guidance, much like recently adopted Civil Rule 16.3 serves to direct readers to a new probate rule. Members then agreed, in lieu of abrogating Rule 81.1, to instead propose that it be amended as follows: "The rules that apply to juvenile emancipation proceedings are located in Part V of the Rules of Procedure for the Juvenile Court." The Task Force will need to include this requested amendment to the Civil Rules in its rule petition.

Rule 8 ("service of documents by parties"). Judge Kreamer then presented this newly proposed juvenile rule. He noted that juvenile rules have provisions for service of a case-initiating document, i.e., a petition, but these rules have no comprehensive provisions for service of subsequently filed documents. This new rule, like Civil Rule 5, Family Law Rule 43, and Justice Court Civil Rule 120, fills that void.

Section (a) ("application of this rule") provides that the rule applies "after service of the initial petition, charging document, or other case initiating document that is assigned a new case number." An application for adoption certification, which is assigned a case number, would fall into the third category. Section (b) ("methods of service") requires a party to serve on the other parties or their attorneys "a complete and exact copy of every document" the party files with the court, except for documents that are "confidential," including documents deemed confidential under Juvenile Rule 19 or Supreme Court Rule 123, or documents filed under seal. The draft rule provides that if an attorney represents a party, then service must be on the attorney unless the court orders otherwise. Judge Kreamer then reviewed the specified methods of service. While he was reviewing those methods, it became apparent that the workgroup had not appropriately distinguished which of those methods apply only to service on attorneys, which apply only to service on a party, and which methods might apply to both. The Task Force requested the workgroup to clarify these distinctions in its draft. Pending that, in section (c) ("noting the method of service"), members agreed to add "e-mail" to the service alternatives in the certificate of service. Civil Rule 5(c)(4) and Family Law Rule 43(c) include more stringent requirements for serving post-judgment motions. Members discussed but declined to include a similar requirement for post-final order motions in juvenile proceedings. Workgroup 1 will address the issue noted above and present its revisions at a future Task Force meeting.

Rule 106 ("briefing in the Court of Appeals; transfer to the Supreme Court") and Rule 106.1 ("dismissal and other action by the Court of Appeals; no motion for

reconsideration"). Ms. Beckmann presented these two rules, which resulted from the bifurcation of current Rule 106.

Draft Rule 106, unlike the current rule, contains useful section titles. The draft rule also reverses the order of current sections (A) and (B), so the draft rule begins with provisions on due dates rather than on the length of briefs. Draft Rule 106 provides that ARCAP 13, 14, and 15 continue to apply to due dates and briefs, with specified exceptions. Draft section (b) has separate provisions on the length of briefs depending on whether the brief is filed electronically, in which case its length is based on word count, or filed in paper at the clerk's counter, in which case the length limit is based on the number of pages. Exclusions for determining the length of a brief that are specified in ARCAP 4(b)(9) are shown in a corresponding provision in draft Rule 106(b)(3). The provision concerning a victim identifier was modified by omitting "in which the victim was a juvenile at the time of the offense" because that is subsumed under "the victim's name," which remains in the provision. Ms. Beckmann observed that a draft provision on the binding of paper briefs should be acceptable to both divisions of the Court of Appeals. Draft section (c) ("extensions of time") reflects the objectives of Chief Justice Brutinel's earlier committee on delay reduction in juvenile appeals. Under this draft section, the Court of Appeals may grant an initial extension (20 days for an opening or answering brief, 10 days for a reply) for good cause, but it will grant further extensions only for extraordinary circumstances. Section (d) ("amicus curiae brief") clarifies that amicus may not file a reply brief.

Draft section (e) ("notice and avowal in lieu of opening brief; *pro se* brief") was derived from current Rule 106(G), with modifications. The current section refers to an affidavit, whereas the draft section calls this an avowal. Under the draft, counsel's avowal can be on one or two grounds: that the appellant has failed to maintain contact with counsel (i.e., the client has abandoned the appeal), or that counsel has reviewed the record and found no non-frivolous issue to raise on appeal. If the avowal is on the second ground, the draft requires counsel to advise the appellant of two things: counsel's intent to file this avowal, and the appellant's opportunity to file a *pro se* brief. When counsel files an avowal on this ground, the avowal must inform the court whether the appellant requests to file a *pro se* brief. The draft goes on to say that if the appellate court grants the request, then the appellant has 15 days to file a *pro se* brief. When the appellant files that brief, the court may deem the case at issue or it may permit the appellee to file an answering brief, but it may not grant relief without providing the appellee that opportunity. If counsel's avowal indicates that the appellant does not request to file a *pro se* brief, or if the request was made but no *pro se* brief was timely filed thereafter, the court may dismiss the appeal and immediately issue its mandate. Although the rule does not say so, if something goes awry, e.g., the appellant does not get notice that the court granted the request to file a *pro se* brief, then the court could withdraw its mandate. A member raised a due process concern about whether the 15-day limit was unduly short, but after discussion, members made no changes to the draft.

Draft section (f) ("at issue") modestly compresses the time when an appeal is deemed to be at issue. Draft section (g) ("petition for transfer") applies ARCAP 19 to juvenile appeals, although Ms. Beckmann noted that the Supreme Court rarely grants these petitions.

Draft Rule 106.1(a) ("dismissal") derives from current Rule 106(E). It permits the court to dismiss an appeal for the specified reasons, including on its own motion for legal cause, such as a lack of jurisdiction or a lack of prosecution. Section (a) requires the appellate clerk to give prompt notice of the dismissal, which encompasses giving notice to the appropriate court reporters or transcript coordinator to avoid the expense of unnecessary transcript preparation. Draft section (b) ("action by the appellate court") has four subparts that provide alternative dispositions, including number 4, suspending the appeal and re-vesting jurisdiction in the juvenile court. That fourth alternative might be useful in a myriad of circumstances, including when a brief or non-time extending motion raises a plausible issue of ineffective assistance of trial counsel that requires further testimony or findings. Draft section (c) ("no motion for reconsideration") relocates a provision currently contained in Rule 107(A) that disallows these motions. The Task Force had previously inserted a provision in draft Rule 103.1(i)(17) concerning a motion for publication. This was relocated as draft Rule 107(d) ("motion for publication"). The revised title of draft Rule 106.1 reflects the inclusion of new sections (c) and (d).

Members agreed with the bifurcation of Rule 106. They approved Rules 106 and 106.1 as presented and modified.

5. **Roadmap.** The Chair noted that the Editorial Group is continuing to meet; it has now completed its review of about 50 rules. The Chair confirmed future Task Force meeting dates: November 20, December 4, and December 18. There are about 30 rules remaining for Task Force approval, and most of these rules are pending their initial presentation. The Chair added that the number of rules pending approval is in no way due to a lack of effort—she noted that the members' efforts have been outstanding — but approval of rules, especially those that might be complex, takes time and requires extended discussion. The Chair will probably request an extension of the January 10, 2021 petition filing date. The issue is how long an extension might be necessary. In this regard, she noted the following:

- Members should have an opportunity to review and discuss the entire set of rules, as well as the draft rule petition and the accompanying tables and appendices, such as a table of contents, an ICWA table, and a table correlating the current and draft rule numbers.

- Administrative Order No. 2019-74, which established this Task Force, directed the Task Force to "seek input from various interested persons and entities." The Task should do so as soon as a draft set of rules is available. It can advise stakeholders who might be interested in reviewing only some rules, e.g., the adoption rules, that even a partial review would be helpful. It will be easier for the Task Force to

address stakeholder comments and concerns before filing a rule petition than it would be after the filing.

- Before filing the rule petition, the Task Force should consider and address (1) the current juvenile rules' forms, as well as additional forms that could be useful; (2) the FFPSA (should the DCS director or others address the Task Force on this subject?); and (3) proposed statutory amendments.

The Task Force will continue the discussion of these roadmap issues at its upcoming meetings.

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

The meeting adjourned at 2:16 p.m.