Juvenile Rules Task Force

State Courts Building, Phoenix

Meeting Minutes: December 13, 2019

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

Absent: Beth Beringhaus, Maria Christina Fuentes, Hon. Rick Williams

Guests: Nina Preston, Chanetta Curtis, Cheri Clark, Ana Namauleg, Jenny Black, Shari Andersen-Head, Rachel Roehe, Kristan Landry

AOC Staff: Joseph Kelroy, Mark Meltzer, Angela Pennington

1. Call to order; preliminary remarks; approval of meeting minutes. The Chair called the third Task Force meeting to order at 10:00 a.m. She noted that the Court's recent Administrative Order No. 2019-142 allows the public to record open sessions of committee meetings, including meetings of this Task Force, subject to limitations described in that Order. The Chair advised that workgroups met 6 times after the November 8 Task Force meeting, and collectively, the workgroups have met for more than 30 hours since September 27. Today's meeting packet contains clean and redline versions of 18 rules, along with materials regarding ICWA provided by David Withey, the AOC's Legal Counsel. Two additional documents were posted on the Task Force webpage: the U.S. Department of the Interior's "final rule" regarding ICWA, and Division One's 2011 opinion in *Yvonne L. vs. A.D.E.S.*

The Chair then referred members to draft meeting minutes of the November 8, 2019 Task Force meeting, which were also in the meeting packet. Members had no corrections to the draft.

Motion: A member moved to approve the November 8, 2019 meeting minutes. The motion received a second and it passed unanimously. **JRTF 002**

2. Presentation on ICWA. The Chair invited Mr. Withey to speak about the relationship between ICWA regulations and Arizona's juvenile rules. Mr. Withey began by noting that federal ICWA regulations have the full force and effect of federal law, which is supreme under the United States Constitution. Federal law recognizes Indian children as a special responsibility of the federal government (i.e., "our kids"), and procedures in state courts must follow that law. The federal ICWA regulations became

effective in 2016; the Arizona Supreme Court by Order No. R-17-0025 adopted conforming amendments to numerous juvenile rules in 2017.

Accordingly, Juvenile Rule 8(C) now requires an Arizona trial court to follow the federal regulations if the court "has reason to know" that the child is an Indian child, and to treat the child as an Indian child until the court determines otherwise. A comment to current Rule 8 includes circumstances that, under the regulations, indicate a "reason to know." Current Rule 8(D) authorizes the trial court to transfer a proceeding involving an Indian child to tribal court, and the comment provides details of federal regulations that support transfer or establish good cause for denying transfer. Mr. Withey acknowledged that recently restyled rules frequently omit lengthy comments, but if the Task Force deletes the comment to Rule 8, he suggested that the Task Force preserve the comment's substance in the body of the rule. He also noted that time limits concerning a preliminary protective hearing under current Rule 50, and placement preferences in current Rule 50.1, also derive from federal regulations, and he urged the Task Force to retain pertinent references to the regulations in these rules.

Mr. Withey was aware that a workgroup had discussed the standard of proof for "active efforts" under Rule 63, and he provided a handout containing an excerpt from the Code of Federal Regulations ("CFR") on this point. The CFR reported that the Department of the Interior "declines to establish a uniform standard of proof on this issue ['active efforts'] in the final rule but will continue to evaluate this issue for consideration in any future rulemaking." Members then discussed whether Arizona's standard for "active efforts" should be clear and convincing evidence, or proof beyond a reasonable doubt. During that discussion, a member cited *Valerie M. vs. A.D.E.S.*, a 2009 opinion of the Arizona Supreme Court, which held that in a termination proceeding governed by ICWA, the trial court correctly applied the correct standard of proof: clear and convincing evidence. The Chair observed that the standard can be at or above a standard required by federal law, but it cannot fall below that standard. See further the discussion of ICWA in Rule 63 below. Mr. Withey invited members to contact him if additional ICWA questions arise. The Chair then proceeded to the workgroup reports.

3. **Report from Workgroup 3.** Judge Quigley revisited two rules that the workgroup presented at the November 8 meeting.

Rule 36 ("scope of rules"). At the November 8 meeting, Task Force members raised concerns that the draft of Rule 36(b) ("interpretation") omitted any mention of parental rights. Accordingly, the workgroup today proposed modifying the phrase "protect the child's best interests" in the previous draft to "protects the rights of the parties and the child's best interests…." The new draft still includes the phrase, "gives paramount consideration to the child's health and safety." Some members believed that the latter phrase subordinated parents' statutory rights. However, most members concluded that parental rights yield to the court's responsibility to protect children's health and safety, and further observed that during the past several years, similar language in the current

rule has not been problematic. Members then approved the workgroup draft without further changes.

Members discussed two related matters. First, although statutes refer to both "best interest" and "best interests," they agreed that the rules should refer to "best interests" as a plural noun. Second, they discussed adding a new Rule 36(c) that would incorporate in Part III of the Juvenile Rules all the Civil Rules, unless specific civil rules were excluded. Workgroup 1's draft Rule 3 only applies civil rules that are specifically incorporated by reference. Proposed Rule 36(c) would have the benefit of making a broader spectrum of Civil Rules applicable in Part III juvenile proceedings, for example, rules for withdrawal or substitution of counsel (Civil Rule 5.3), judgment as a matter of law, and relief from a judgment or order (Civil Rule 60). Workgroup 3 will discuss further the options of adding a new Rule 36(c) versus amending draft Rule 3.

Rule 37 ("definitions"). Judge Quigley reported that the workgroup revised section (b), a definition of "participant," and noted that a statutory reference in the draft should be removed. She reaffirmed the workgroup's decision to relocate a provision on placement preferences in Rule 37(c) because it is an ICWA standard rather than a defined term. One member proposed a new standalone rule that would include all the ICWA provisions, but another member requested that the Task Force study the proposal further before making this determination. Mr. Withey preferred that ICWA references be in the rules where the standards would apply, because stakeholders will more likely notice standards when they are embodied in the related rule. The Chair advised that the Task Force would consider a standalone rule concept only after it has reviewed more rules. But the Task Force otherwise approved the definitions in Rule 37.

Workgroup 3 is studying several other rules, and it will report on those rules at a future meeting.

4. **Report from Workgroup 4.** Professor Atwood presented Workgroup 4's rules, two of which (Rules 61 and 62) had been previously presented.

Rule 61 ("motion, notice of hearing, service of process, and order for permanent guardianship"): Professor Atwood advised that the workgroup reorganized and reformatted this rule to more clearly delineate pre- and post-adjudication guardianships. Although the federal regulations apparently permit service under Rule 61(c) by either registered or certified mail, the workgroup limited service to registered mail to be consistent with an Arizona statute. However, the Task Force's list of proposed legislative changes should include adding the option of certified mail, which is less expensive than registered mail. The revised rule was then opened for member comments.

A judge member had a concern with draft Rule 61(a)(1), which would allow any party to a dependency proceeding to file a post-adjudication guardianship motion. The concern centered on giving any party an opportunity to file the motion even when a

permanent guardianship was not the court's plan. Compare current Rule 61(a), which permits the filing of a guardianship motion only "if the court determines that the establishment of a permanent guardianship is in the best interests of a [child]…." Although the judge member thought the draft rule diluted the judge's ability to control the filing of the motion, the judge would ultimately decide the motion on its merits and in that sense would still retain control of the outcome. Another judge member advised that the original version of a bill concerning Title 8 guardianships would have allowed anyone to file a preadjudication guardianship petition, which is beneficial to everyone because it avoids the need for dependency proceedings, and the member suggested that this be added to the Task Force's list of proposed legislative amendments. Ms. Jorquez will ask her colleagues if they agree with this proposal. Another member expressed concern about how pre-adjudication consent could be obtained from a parent who cannot be located, and this issue might need to be re-examined in the context of other Part III rules. In draft Rule 61(f)(2), if the DCS is not the legal custodian, the court may order "a party" to prepare the investigative report. Members discussed changing this to "a person," but left the provision unchanged because a person who prepares a report would probably be doing so at the request of a party.

Members had no further changes to Rule 61 and they approved the revised draft.

Rule 62 ("initial guardianship hearing"). Professor Atwood noted that the workgroup revised the time limit in section (b) for setting the initial guardianship hearing to account for cases in which there had not been a permanency hearing. The revised provision says, "Unless the court orders or permits otherwise under A.R.S. § 8-864, the initial guardianship hearing must be held within 30 days after the Rule 60 permanency hearing, or if there has not been a permanency hearing, within 30 days after the filing of a motion for permanent guardianship."

A member suggested deleting the reference to the permanency hearing as a starting point for measuring time because, while there will not always be a preceding permanency hearing, there will always be a preceding motion. The member also suggested adding the words "good cause" after "permits otherwise." Other members acknowledged that the decision to proceed with a permanent guardianship might not be made at a permanency hearing. Another member noted that all hearings after the permanency hearing, including report and review hearings, are in effect "permanency hearings," although they are not titled as such. One member disagreed with removing a reference to a permanency hearing in section (b) because A.R.S. § 8-862(f)(2) specifically includes that reference. Some members suggested that legislative changes to A.R.S. §§ 8-864 and 8-872 would be useful in clarifying what is otherwise an inconsistent and confusing statutory process. But even without those changes, a member proposed a new provision in Rule 60 ("permanency hearing") that would expressly say that any hearing after a disposition hearing is a permanency hearing. This would add flexibility in setting the hearing date under the present draft of Rule 62(b). Further discussion concerning Rule 62(b) will abide Workgroup 3's consideration of Rule 60.

Professor Atwood also discussed the workgroup's proposed changes to Rule 62(c)(7), which concerns the procedure at the initial guardianship hearing. The workgroup reorganized subpart (C) on "failure to appear," and the draft begins with a statement that "the court may proceed with the guardianship adjudication hearing under Rule 63" if the parent or custodian fails to appear at the initial guardianship hearing without good cause, and the court finds that the parent or custodian had notice of the initial guardianship hearing, was properly served, and had been admonished regarding the consequences of failing to appear at the initial guardianship hearing. Members agreed that good cause for a failure to appear could be established after the initial guardianship hearing.

Rule 63 ("guardianship adjudication hearing"). The discussion of time limits under Rule 62(b) was revisited during the discussion of the time limits in Rule 63(b), which again makes the permanency hearing the beginning point for measuring time. After further consideration, members revised the time limit for the guardianship adjudication hearing to "90 days after the filing of a motion for permanent guardianship," unless the court orders or permits otherwise under A.R.S. § 8-864. However, removing the reference to the permanency hearing deviates from the statute, and the Chair suggested that each workgroup maintain a list of this and other proposed statutory changes. A member asked whether the 90-day requirement applied to the commencement or the conclusion of the hearing; members agreed that requiring that the hearing "be held" refers to the commencement of the hearing. However, the Chair cautioned that courts should not construe a provision that the hearing must start within 90 days as a suggestion to set the hearing on the ninetieth day; the hearing should be set sooner if feasible.

A provision in draft Rule 63(c) ("burden of proof"), subpart 2, says that if the child is an Indian child, "the moving party must prove [by clear and convincing evidence] that active efforts have been made to provide remedial services…." Professor Atwood suggested removing the bracketed language because the first sentence of subpart (2) already establishes the burden of proof as beyond a reasonable doubt, and it would be illogical to have different burdens of proof regarding active efforts in guardianships and terminations.

A provision in current Rule 63(D), which was preserved in draft Rule 63(d) and that concerns conducting the hearing informally, was removed because it duplicates a provision that is already in draft Rule 3(b) ("informality"). In draft Rule 63(d)(1) ("admitted or not contested"), the workgroup substituted the words "not contested" for the former phrase "plea of no contest" to remove a connotation that this proceeding is criminal in nature. The workgroup revised draft Rule 63(d)(2) ("failure to appear") similarly to its revisions to draft Rule 62(c)(7). Draft Rule 63(d)(3) ("child's interests") was also revised. One member suggested adding a provision that would require the court to consider parental rights, but members declined to do this because that consideration was addressed by Rule 36. For the same reason, members deleted a draft

provision about giving primary consideration to the child's needs. After additional discussion, members retitled this subpart as "child's position," and shortened it to simply say, "The court may appoint as guardian the person nominated by a child 12 years of age or older, unless that court finds it would not be in the child's best interests to do so."

Judge Armstrong observed that Rule 63(e) ("reports") repeats a provision on admissibility already covered by Rule 3.1, and he suggested deleting Rule 63(e), but his suggestion was reserved for later discussion. The workgroup revised Rule 63(f)(3) to say, "if the case involves an Indian child" instead of "if ICWA applies…." The workgroup modified Rule 63(f)(4), which governs the denial of a guardianship motion, to clarify that the court rather than a party thereafter establishes a revised permanency plan. Finally, section (g) ("successor permanent guardians,"), which in the current rules is a subpart of Rule 63(F) ("findings and orders"), was made a freestanding section because it deals with a notice to the court that is submitted by a party, which is neither a required finding nor a requirement for a court order.

Members approved the draft of Rule 63 subject to the conditions mentioned above.

5. **Report from Workgroup 1.** Judge Armstrong presented rules on behalf of Workgroup 1.

Rule 2 ("definitions"). Judge Armstrong noted that Rule 37, discussed above, now has the same title, "definitions," as Rule 2, but members did not think this would be problematic. Judge Armstrong further noted four new definitions that Workgroup 1 added to Rule 2 after the November 8 meeting: "ADJC," "child safety worker," "guardian ad litem ('GAL')," and "out-of-home placement." A second sentence was added to the definition of "juvenile." The draft comment to the 2022 amendment now includes a citation to Division Two's 2019 opinion in *Holly C. v. Tohono O'Odham Nation.*

In common parlance, a "child safety worker" is a case worker but Rule 2 defines a child safety worker because that term is used in Title 8. Members agreed to remove a reference in this definition to Article 8. The definition of guardian ad litem raised two issues: must a GAL be an attorney, and is a CASA (court-appointed special advocate) a GAL? The Committee on Juvenile Court will discuss these issues at its next meeting. Meanwhile, Judge Armstrong noted that in other rules and statutes, the term "GAL" includes a CASA. (Draft Rule 5 discussed below concerns CASAs.) A corresponding legislative change would be necessary if the Task Force proposes a rule that a GAL must be an attorney. Members also discussed that the court appoints GALs for individuals other than children, such as incompetent adults, and the duties of the GAL might vary based on the status of the protected individual. Ms. Jorquez volunteered to research statutory references to "guardian ad litem." For the time being, the definition of GAL in Rule 2 will say that it "means a person (etc.)" rather than "means an attorney (etc.)"

Members modified the definition of "juvenile" so it no longer refers to the child's age. (The draft definition refers to a person "within the juvenile court's jurisdiction under A.R.S. § 8-202.") The definition of "out-of-home placement" mirrors the definition in A.R.S. § 8-501. During their discussion of the definition of "parent," members proposed various adjectives, including "natural," "biological," "adoptive," or "legal" mother or father. They agreed to "the child's biological, adoptive, or legal mother or father whose rights have not been terminated."

Members will revisit Rule 2 at future meetings as definitions are added or as draft definitions require modification.

Rule 3 ("priority of proceedings; conducting proceedings; applicability of other rules"). Rule 3 was on the meeting agenda only to note that what in the November 8 draft was Rule 3(e) ("applicability of the Arizona Rules of Evidence") has now been deleted. The substance of Rule 3(e) has been relocated to a new Rule 3.1, also titled "applicability of the Arizona Rules of Evidence."

A member also asked about the wording of the priority provision in draft Rule 3(a). The draft now says that juvenile court proceedings have priority "over other proceedings in state court." Members discussed changing this to "superior court," but thought this might inadvertently suggest that a juvenile proceeding has priority over, for example, an order of protection, or that a juvenile traffic case has priority over an appellate court hearing. Members then agreed that juvenile proceedings have priority over other proceedings "except as otherwise provided by law," and modified Rule 3(a) accordingly. On a collateral matter, Judge Armstrong noted that A.R.S. § 8-291.01(B) includes an incorrect cross-reference to Juvenile Rule 3(f). The correct reference is currently Rule 23(D).

Draft Rule 3 was approved as modified.

Rule 3.1 ("applicability of the Arizona Rules of Evidence"). Judge Armstrong explained that newly drafted Rule 3.1 incorporates all the evidentiary standards in the current rules except one regarding settlement conferences. He noted that the words "contested adjudication proceedings" in Rule 3.1(a) ("contested adjudication proceedings") are synonymous with trial. A member asked whether this term includes pretrial evidentiary hearings. Judge Armstrong believes that the rules of evidence are more relaxed in those hearings, but members might reconsider whether the evidence rules should apply in these ancillary proceedings. In Rule 3.1(b) ("other proceedings"), and to allow for the admissibility of such items as a psychological evaluation, members agreed to change "any non-privileged evidence…is admissible" to "any evidence…is admissible unless the evidence…is subject to a privilege." "Waste time" was changed to "waste of time." Rule 3.1(c) ("admissibility of a child's statement or conduct") is an exception to sections (a) and (b). Members changed the word "any" to "all" ("in all

dependency, termination, and Title 8 guardianship proceedings, etc."), and deleted the extraneous words "for all purposes" in the phrase "admissible for all purposes." One member suggested that the workgroup review each of the 17 references to the admissibility of evidence in the current rules, as noted by Judge Armstrong at a previous meeting, to assure that each reference was adequately addressed by draft Rule 3.1.

Rule 3.1(d) ("admissibility of reports") was the subject of extended discussion. One of the issues concerned an interpretation of current Rule 45 ("admissibility of evidence"), section (c) ("admissibility of reports"), which says that "the court may review reports prepared by the child safety worker and shall admit those reports into evidence…." Because "shall" is a disfavored word in restyled rules, members discussed whether its use in the current rule meant "must" or "may." One member suggested that the admission of an unreliable child safety worker's report will at least assure that it becomes part of the record. Another member responded that it's illogical to say that the court may review a report but must admit it regardless of whether it was reviewed. Members then agreed to "must review" and "may admit" the child safety worker's report. An ensuing discussion addressed how the report would become part of the record on appeal if it was reviewed (i.e., considered) but not admitted. Although practices differ, the consensus was that the report should be admitted and made part of the record if the judge considered the report in the slightest degree. In this circumstance, the judge could make a record about what portions of the report were relied upon. Members further codified this decision by adding to Rule 3.1(d) a new subpart (6) that provides, "If the court considers and affords any weight to a report under this section, the court must admit the report into evidence." Although members generally agreed that requiring automatic admission of an unreliable report might give the report undue credence, one member suggested that the report should always be admitted and that the court could then find on the record that it gave the report no weight. How to make an unadmitted report part of the record on appeal will be deferred to a discussion of the appellate rules.

Another issue in draft Rule 3.1(d) concerned the phrase "if the workers who prepared the report are available for cross-examination." The use of the plural, "workers," was intended to include supervisors who reviewed the report, or anyone at DCS who participated in preparing the report or who had knowledge of its contents. To be more explicit, members changed this phrase to "if the worker or workers who prepared or approved the report are available for cross-examination." Draft Rule 3.1(d)(1)(B) further requires that the report be disclosed to the parties not later than ten days before a hearing. Members thought this period was too short and changed it to fifteen days. Rule 3.1(d)(3) ("report under Rule 61(e)") had another "may/must" couplet concerning the guardianship report. After discussion and consideration of pertinent statutes and rules, members agreed to "must review the investigative report prepared under Rule 61(f) and may admit it into evidence." One member proposed filing these reports to assure they become part of the record, but members declined that proposal because doing so could make confidential information publicly available. (One county

currently files these reports and places them in a "social file," but references to materials in a social file are vague and not specific enough for appellate review.)

Members also discussed what was renumbered as draft Rule 3.1(d)(7) ("available for cross examination"). The language of this provision was suggested by Judge Warner. However, members disagreed on which party has the burden of demonstrating that the witness is "subject to the court's subpoena power." Must the proponent of the witness' report show that the witness is available, or does the adverse party have the burden of showing that the witness is not subject to subpoena, which might necessitate subpoenaing the witness and unintentionally making an unfavorable witness available? Resolving this issue also might require consideration of which party bears the cost of compelling the witness' attendance. A rule that require the witness to be available in the courtroom could be a logistical burden. A telephonic appearance might be insufficient for cross-examination. Members did not reach agreement on the meaning of "available for cross-examination," but instead suggested that members poll judges and request additional input for further Task Force discussion.

Rule 5 ("Court-Appointed Special Advocate ('CASA').") Judge Armstrong's draft of Rule 5 eliminates references to "volunteer special advocate," a term used in current Rule 3; and differentiates CASAs and GALs. The proposed revisions might require legislative changes, and Judge Armstrong's draft noted the pertinent statutes that would require modification. Another member also observed that the changes proposed in this draft rule might require revisions to certain sections of the Arizona Code of Judicial Administration, particularly § 7-101 ("Court Appointed Special Advocate Program"). The members approved the draft of Rule 5 subject to further consideration of the GAL's role.

6. **Report from Workgroup 2.** Ms. Phillis revisited a rule that members had discussed on November 8.

Rule 10 ("appointment of an attorney"). In section (a) ("right to an attorney"), after the phrase "right to be represented by an attorney in all delinquency proceedings initiated by a petition," members had previously added the words "or a citation." (They had made a corresponding change in section (b) ("appointment of an attorney").) Members reconsidered those revisions at today's meeting. Adding these words could require the appointment of counsel on citations to juveniles to appear in a municipal traffic court, or for other low-level offenses where the appointment of counsel might not be warranted. Members expressed concern with creating a right to counsel by rule—especially one that creates a financial burden on municipalities—that does not exist under the constitution or by statute. However, Ms. Phillis believed that a juvenile was entitled to court-appointed counsel even on a misdemeanor, because the juvenile could be detained on that charge. After reviewing A.R.S. § 8-221(B), members consolidated draft Rule 10(b) and (c) ("finding of indigent") into a revised Rule 10(b), which now simply

provides, "**Appointment of an Attorney.** After the filing of a petition or citation in juvenile court, the court must appoint an attorney for the juvenile as provided in A.R.S. § 8-221."

Earlier versions of Rule 10 had alternatively said that a juvenile was "deemed indigent" or was "presumed indigent," which would allow the court to appoint counsel promptly upon receipt of a delinquency petition. Doing so would eliminate the need for a subsequent court hearing to make a finding of indigency, which could create delay. These alternative phrases were removed at today's meeting because members determined that A.R.S. § 8-221(C) requires the court to appoint counsel "before any court appearance which [sic] may result in institutionalization or mental health hospitalization of a juvenile."

Members also revisited draft section (d) ("assessment of the cost of court-appointed attorney"). Members previously agreed that an assessment for the cost of counsel should not be made against the DCS or ADJC when the juvenile was in the custody of either of those entities, and this draft section expresses that intent. Today, some members construed this provision as not relieving the juvenile's parents from the assessment notwithstanding that the juvenile was in custody. Other members disagreed with that construction and contended that if the juvenile was in DCS or ADJC custody, parents should not bear that assessment. Due to the lateness of the hour, the discussion of this issue ended without a resolution. However, in the last sentence of section (e) ("waiver of counsel"), members agreed to change "the court should obtain a waiver [of counsel from the juvenile's parent]" to "the court must also obtain a waiver…."

Members approved the draft of Rule 10 subject to the items mentioned above.

7. Call to the public; roadmap; adjourn. There was no response to a call to the public. The next Task Force meeting is set for **Friday, January 24, 2020**, beginning at **10:00 a.m.** in **Room 119**.

The meeting adjourned at 4:17 p.m.