

Juvenile Rules Task Force
Public Meeting, December 18, 2020
(All members and guests attending telephonically)

Meeting Minutes

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

Members absent: Eric Meaux, Denise Smith

Guests: Carey Turner, Nina Preston, Lori Ford, Randi Alexander

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

1. Call to order; preliminary remarks; approval of meeting minutes. The Chair called the thirteenth Task Force meeting – its eighth consecutive virtual meeting – to order at 10:01 a.m. The Chair noted that there had been 10 workgroup meetings since the November 20 Task Force meeting, and each workgroup had met at least twice. In addition, the Editorial Group met 5 times during that 4-week interval. The December 18 agenda is the most voluminous and complex meeting agenda to date, and, staff prepared a 4-page memo to help guide members through the agenda. The memo includes hyperlinks to three Arizona opinions that are pertinent to some of today's rules: *Mario W. v. Kaipio* (Supreme Court); *DCS v. Stocking-Tate* (Division One); and *Denia L. v. DCS* (Division Two). The packet also includes staff's proposed reorganization of the Table of Contents for the juvenile rules. Workgroups were meeting as recently as Monday and Tuesday of this week, and the meeting packet was posted on Thursday, December 17.

The Chair then asked members to review draft minutes of the November 20, 2020 Task Force meeting. Members had no additions or corrections.

Motion: A member moved to approve the November 20, 2020 meeting minutes. The motion received a second and it passed unanimously. **JRTF 013**

Members then considered workgroup reports. Unless these minutes provide otherwise, after presentation and discussion of a rule or form at today's meeting members had consensus and approved the rule or form.

2. Report from Workgroup 1.

Rule 8 (“service of documents by parties”). Judge Kreamer reminded members that when they considered this rule at the October Task Force meeting, the section on methods of service did not adequately distinguish between service on an attorney and service on a self-represented party. The workgroup thereafter revised the draft rule, this time using Family Law Rule 43 (“service of other documents after service of the summons, petition, and order to appear”) as a model. Revised section (b) (“methods of service”), subpart (b)(1), generally provides that if an attorney represents a party, the attorney must be served. Subpart (b)(2) then details the methods of service. Subpart (b)(2)(E) distinguishes leaving a document for a person if the person is represented by an attorney from situations when the person who is served is not represented. Section (c) (“noting the method of service”) contains a template statement of service that now includes e-mailing (i.e., “mailed/e-mailed/hand-delivered.”) A member asked about a provision in subpart (b)(2), which provides that when a document is served by mail, “service is complete upon mailing.” Judge Kreamer responded that under the text of section (a) (“application of this rule”), Rule 8 applies only after service of a case initiating document, and that service of a case-initiating document requires a higher standard for service. The provision that “service is complete upon mailing” for post-case initiating documents is also in Civil Rule 5.1(c)(2), Criminal Rule 1.7(c)(2), and Family Law Rule 43(b)(2). Members had no other questions.

Rule 10 (“simultaneous dependency and family law proceedings”). Judge Armstrong presented this new juvenile rule, which is an analog to Family Law Rule 5.1. FLR 5.1 is a statewide rule that applies in both dependency and family law proceedings that involve the same child. Although draft Rule 10 corresponds with FLR 5.1, Judge Armstrong noted these differences. First, FLR 5.1(a) (“transfer to juvenile division”) refers to legal decision-making and parenting time, whereas Rule 10(a) uses the term “custodial issues.” Judge Armstrong noted that the latter term was more appropriate in juvenile dependency cases because these proceedings determine the custodial setting and who should have custody of the child. However, the use of different terminology should not be a concern because there is no substantive difference. He also noted that the UCCJEA uses the term “custody,” and before recent revisions to the FLR, “custody” was also used in those rules. Second, FLR 5.1(b) (“referral to family division”) allows the juvenile division to refer legal decision-making or parenting time issues to the family division. Draft Juvenile Rule 10 has a similar provision, but it also allows the juvenile division to “decide those issues.” Members had no questions for Judge Armstrong.

Rule 11 (“computation of time”). Judge Kreamer noted that this new draft rule is part of the effort to reduce the number of juvenile rules. Draft Rules 17, 43, and 72 all involve computation of time. Rule 43, which is in Part III, and Rule 72, which is in Part IV, both include cross-references to Civil Rule 6. Rule 17, a delinquency rule, has unique provisions, such as the exclusion of time, which cannot be collapsed into a single, unified rule. According, proposed Rule 11(a) refers readers to Rule 17 for computing time in a

delinquency case, and Rule 11(b) refers them to Civil Rule 6 for computing time in all other juvenile matters. This reformulation will eliminate the need for Rules 43 and 72. The resulting Rule 11 would become a Part I rule. Members had no questions.

Rule 12 (“virtual proceedings; declared emergencies”). The detailed provisions of Rule 42, which members previously approved, are limited to Part III proceedings. Judge Kreamer explained that new draft Rule 12 would replace draft Rules 42 and 71 and would become a single rule for virtual proceedings and declared emergencies in any juvenile case. Most of the substance of draft Rule 12, including its title, was taken from draft Rule 42. However, new section (a) distinguishes delinquency and non-delinquency matters. Subpart (a)(1) provides that “this rule and Rules 12 and 13 govern virtual appearances in delinquency matters.” [Staff note: Current draft Rules 12 (“the juvenile’s attendance at court proceedings” and 13 (“attendance of witnesses and counsel by telephone or video conference”) would be renumbered as Rules 27 and 28 in staff’s proposed Table of Contents.] Subpart (a)(2) permits the court to allow “virtual testimony, argument, or appearances” in any non-delinquency proceeding on a party’s motion or the court’s own motion. A new subpart (a)(3) recognizes and requires the court in any juvenile matter to consider due process principles before granting a request for a virtual proceeding. Sections (b) (“meaning of ‘virtual’”) and (c) (“non-evidentiary hearing”) are substantially the same as the provisions in draft Rule 42. While section (d) (“request to testify virtually; evidentiary hearing”) requires a written motion as a requisite for allowing virtual testimony, the section has new provisions in subpart (d)(2) (“time”) to accommodate the shorter time frames for setting delinquency hearings and the relatively longer time frames for setting hearings in non-delinquency matters. A new subpart (d)(2)(C) provides that in all matters, the court may rule on the motion with or without a hearing. Section (e) (“introducing documents during virtual testimony”) is largely unchanged.

Section (f) governs “evidentiary hearings during declared emergencies.” Subpart (f)(1)(B) has been modified to provide a shorter time for filing a response in a delinquency case; in non-delinquency matters, responses must be filed as provided by Rules 46 or 74, the general rules on Part III and Part IV motions. Subpart (f)(2) (now, “case specific determinations in evidentiary hearings”) was modified to broaden the scope of the court’s inquiry if a party objects to a virtual proceeding. The subpart now requires the court to make “a case-specific determination that the objecting party’s constitutional rights, including the rights to due process, will be satisfied by the evidentiary hearing.” The workgroup’s intent was that this new language would require the court to consider constitutional rights—in addition to general principles of due process—that might be applicable in a specific case, such as a delinquent’s right to confront witnesses. As modified, Rule 12 would become a Part I rule. Members had no questions.

Rule 14 (“combining hearings”). Judge Kreamer explained that draft Rule 14 permits the court to combine delinquency hearings, which he acknowledged the court could probably do now without a rule, but Rule 14 codifies this practice. That draft

provision has been renumbered as Rule 14(a). Proposed Rule 14(b), which is new, would allow the court to aggregate hearings for cross-over youth by setting a youth's dependency and delinquency hearings on the same date and at the same time, but not by consolidating the cases. This practice would permit families to appear for both hearings at the same date and time, which would be more convenient for them. A newly proposed Rule 14(c) would allow the court to combine Part III hearings, as long as the court provided the parties with notice of this intent, and that it complied with applicable time limits and preserved the parties' due process rights. Doing so would allow the court to accomplish as much as possible at a single Part III court hearing. Rule 14 would be relocated as a Part I rule. Members had no questions.

Forms 5(a) and 5(b) ("notices of appeal"). Ms. Beckmann revisited Form 5(a), a notice of appeal in a Part II delinquency proceeding, and Form 5(b), a notice of appeal in a Part III, IV, or V proceeding. The recent revisions to Form 5(a) clarify that the order which is the subject of the appeal is the comprehensive final order. This will usually include the adjudication and the disposition. In the event new counsel is appointed on the appeal, the workgroup wanted the form to specify who currently has the client's file, and the recent revisions address this. Members agreed that the avowal by the appealing party's attorney does not apply if the appealing party is the agency that is prosecuting the case on behalf of the State.

Form 5(b) aligns the specified grounds for appeal with the grounds enumerated in Rule 103, including those grounds recently approved by the Task Force, such as appealing from a denial of adoption certification. Because the State in a non-delinquency appeal appears through a cognizable entity, usually the DCS, the avowal requirement in Rule 104(b) continues to apply to the appellant's attorney in every Form 5(b) notice of appeal.

Form 6 ("supplemental designation of the record"). Ms. Beckmann noted that Form 6 includes introductory text that references Rule 104.1 ("record on appeal"). Both the workgroup and the Task Force questioned the benefit of allowing the appellant to exclude items from the presumptive record, but the provision is in current Rule 104(E) and a similar provision is in Criminal Rule 31.8(a). According members agreed to retain that option in Form 6, as permitted by draft Rule 104.1(b)(2).

3. Report from Workgroup 2. Workgroup 2 presented one rule and three pairings of rules that involved common issues or subject matters.

Rule 35 ("post transfer"). Mr. Cardy presented this rule, which specifies procedures after a judicial officer has decided to transfer the proceeding under Rule 34. Like Rule 34, Rule 35 uses the term "criminal division of the superior court" rather than "adult court," which is used in current Rule 35. Unlike the current rule, the restyled rule includes section and subpart titles. In section (a) ("court actions"), the workgroup organized the subparts in a more logical and sequential order and clarified or restyled

the language in several subparts. In subpart (a)(2) (“amendments”), the workgroup declined to include the words “formal or” in the phrase “formal or technical defects” because the meaning of “formal” was not clear. In section (b) (“time limits”), the workgroup clarified the application of Criminal Rule 8.2, which is unclear in the current rule. A member asked whether subpart (a)(3)(B) should mention the indigency determination before the appointment of counsel, but after discussion, members agreed that the workgroup’s phrasing was appropriate.

Pairing (a) (Rules 22 and XX). Rule XX was initially intended as a repository for definitions in delinquency proceedings, but the workgroup later determined that Rule XX would include only one short definition, of the word “parent,” i.e., “‘Parent’ as used in the delinquency rules includes a parent, guardian, or custodian.” The definition eliminates the need to repetitively say, “parent, guardian, or custodian,” and instead allows the delinquency rules to say “parent” that by definition includes all three. Ms. Phillis advised that the definition has now been relocated to Rule 22 (“referral; diversion”), where it has become a new section (a) (“definition of ‘parent’”).

Pairing (b) (Rules 23 and 28). Rules 23 (“detention and probable cause hearing”) and 28 (“advisory hearing”) each have provisions regarding the collection of DNA samples from juveniles charged with specified offenses. Ms. Phillis noted that while *Mario W.* allows the pre-adjudication collection of DNA samples, it precludes the processing of the samples until the juvenile has been adjudicated. Ms. Phillis also noted that the manner of DNA collection varies by county, for example, some counties, and current Rule 28(C)(8), specify collection by a law enforcement agency, and other counties have a juvenile probation officer collect the sample. To comply with *Mario W.* and to add a provision with general applicability, draft Rules 23(h) and 28(c) each include a new subpart that says, “DNA may not be submitted to DPS for testing unless the juvenile has been adjudicated delinquent for an offense in §13-610(O)(3).”

Pairing (c) (Rules 19, 30, and 104.1). An issue arose under draft Rules 19 (“records and proceedings”), 30 (“disposition”), and 104.1 (“record on appeal”) regarding the distinction between the legal file and the social file (also known as the “red file” in Maricopa County and the “blue file” in Pima County), and ways to assure that the appellate record includes social file items the trial court considered in determining a disposition. Several years ago, the concept of a “segregated portion of the legal file” was added to Rule 19 to assure that social file documents considered by a judicial officer, which had not been introduced into evidence, were nonetheless included in the court’s record. Anecdotally, the requirement was not always followed, and as a result, the record on appeal was occasionally incomplete. The Editorial Group proposed to address this issue by adding new provisions in these three rules for a “disposition file,” which would serve a similar purpose as the segregated portion of the legal file but could be maintained by the probation department or the court. Ms. Phillis advised that Workgroup 2 modified this concept by relocating the proposed disposition file provision of Rule 19 within the subpart on the legal file, thereby assuring that the court would keep the disposition file.

Members suggested adding cross-references to new Rule 19(a)(1)(D) in Rules 30(a)(6) and 104.1, and those cross-references references were added.

4. Report from Workgroup 3.

Rule 41.2 (“participant’s rights”). This rule was previously presented to the Task Force. Judge Quigley noted the workgroup thereafter added a requirement in section (a) (“right to notice”), subpart 4, saying that if DCS is a party, it must provide notice to “a participant Indian tribe that has not intervened or is not endorsed on the court’s minutes entries.” The workgroup also added a reference to 25 C.F.R. § 23.111. A tribe often will have intervened or been previously endorsed on a minute entry because DCS will generally know the tribe’s identity and DCS would have been working with a tribal social worker. In lieu of providing a separate notice, this new provision’s notice requirement will be satisfied if the tribe is endorsed on the minute entry. Judge Quigley also noted section (e) (“review hearings”), which provides that “this rule does not limit the notice requirements of A.R.S. § 8-847(B) regarding periodic review hearings.” That statute requires the court to provide notice of periodic review hearings.

Rule 48X (“service of the petition, temporary orders, and notice of hearing”). Mr. Truman reminded members that the Task Force previously approved this rule, but the Editorial Group subsequently revised it and returned it to Workgroup 3 for reconsideration. The meeting materials include the workgroup’s further revisions. Mr. Truman noted that Rule 48X, which is derived from current Rule 48(D) (“service of petition”), applies only to service of the dependency petition and related documents. Rule 48X is a unique rule on service of documents because of the short interval between the filing of a dependency petition and the occurrence of a preliminary protective hearing. Accordingly, revised section (a) (“service or acceptance of service”), subpart 1, allows service to be completed when the documents are “provided to a parent at the preliminary protective conference or at the preliminary protective hearing.” Mr. Truman believes this is the preferred method of service, although he added that this method ceases to be available after the preliminary protective hearing. Subpart (a)(2) is broader and provides that service is complete if the parent signs an acceptance of service “any time after the dependency petition is filed.” If neither option provided by section (a) is utilized, the remaining sections of the draft rule include methods of service that are available under Civil Rules 4(f), 4.1, and 4.2. Section (h), which is not in the Civil Rules, provides for “service under ICWA.” Although other sections of Rule 48X use the term “parent” to refer to “parent, guardian, or Indian custodian,” section (h) expressly refers to “parent or Indian custodian.” Members agreed to retain the comment to this rule but made edits to the form of ICWA citations in the comment.

Rule 50 (“preliminary protective hearing”). Judge Quigley presented this rule at the October Task Force meeting, but members asked Judge Quigley to reconsider the ICWA provisions. Judge Quigley thereafter met with individuals having special ICWA expertise, including Professor Atwood, Mr. Withey, Ms. Preston, and Mr. Turner,

particularly with regard to emergency proceedings under 25 C.F.R. § 23.113. Judge Quigley noted that draft Rule 50(b), now titled “ICWA,” incorporates the federal emergency hearing requirement upon the child’s removal, but Rule 50(b) also recognizes the overlap of federal and state requirements on this subject. Most notably, subpart (b)(2) provides that if there is reason to know the child is an Indian child and the child was removed from the physical custody of the parent or Indian custodian, the preliminary protective hearing must be held as an emergency hearing as provided by § 23.113, and the court must find, under subpart (b)(1)(A), whether the emergency removal was necessary to prevent imminent physical damage or harm to the child *unless those findings were made prior to the removal pursuant to Rule 47.3(D)(1) and C.F.R. § 23.113(d);*” The court also must find, under subpart (b)(2)(B), “that the emergency removal or placement terminated upon the filing of the dependency petition.” Thus, if the state court conducts a preliminary protective hearing, that hearing constitutes an emergency hearing under ICWA, and the filing of the dependency petition terminates the emergency. Subpart (b)(2)(B) also includes a new provision that provides that “if there is a request to transfer the proceeding to the jurisdiction of the Indian tribe, see Rule YY [Rule YY will be subsequently drafted].”

In section (c) (“procedure”), subpart (c)(2)(C), the draft provides that at the preliminary protective hearing, the court must determine whether paternity has been established as to any father, and if not, the court “must/may” ask the mother and “must/may” take her testimony concerning the identity and location of any potential father. Judge Quigley asked members to decide which verb was appropriate. After discussion, members concluded that the court “must ask the mother, and may take her testimony” Finally, in section (e) (“orders”), subpart 7, “reason to believe” that the child is an Indian child was changed to “reason to know.” Members approved Rule 50 with these changes.

Rules 50.1 and 50.2 (as proposed, “placement preferences” and “ICWA placement preferences”). Mr. Gilmore presented these two rules. Current Rule 50.1 is inappropriately named “deviation from placement preferences” because it specifically concerns deviations from ICWA placement preferences. That rule has been retitled by adding the word “ICWA,” and it has been renumbered as Rule 50.2. The workgroup drafted a new Rule 50.1 to fill a void in the current rules by addressing placement preferences in cases not subject to ICWA. New Rule 50.1 is derived from A.R.S. § 8-514(B). Section (a) (“generally”) mirrors the statute by providing, “A child should be placed in the least restrictive placement available, consistent with the best interests of the child.” Section (b) (“placement preferences”) parallels the prescribed order of placement (i.e., parent, grandparent, kinship, etc.). Section (c) concerns a child with developmental disabilities and requires the court’s consideration of A.R.S. § 8-514.01. Section (d) (“Indian child”) refers the reader to Rule 50.2 for placement preferences for an Indian child.

Current Rule 50.1 specifies deviations from ICWA placement preferences. Its successor, Rule 50.2, goes a step further by first specifying the placement preferences under ICWA, and then providing criteria for deviating from those preferences. The rule has application beyond dependency proceedings. Section (a) (“placement preferences”) provides that the provisions of this rule also apply “in any foster care, guardianship, pre-adoption, or adoption proceeding.” Section (a) also states that “if a tribe has established preferences, those preferences apply to the placement of an Indian child.” Section (b) (“deviation from ICWA placement preferences”) includes subpart titles, which are not used in the current rule. Members agreed to relocate the comment to current Rule 50.1 as a comment to new Rule 50.2. Members approved Rules 50.1 and 50.2 as presented.

Rule 51 (“review of temporary custody”). Ms. Avila Taylor presented Rules 51, 52, and 58. The most significant question posed by Rules 51 and 52 is this: does a parent who did not appear at a Rule 50 preliminary protective hearing, presumably because of lack of service or notice, have a right to a review of temporary custody after the parent is subsequently served and appears for a Rule 52 initial dependency hearing? Ms. Avila Taylor believes that Division One did not answer this question in *DCS v Stocking Tate*, and she therefore proposes to answer it in the restyled rules. She contended that upon a parent’s request, the court has a duty to do an initial review of temporary custody and the duty continues when a parent was not served until after the preliminary protective hearing. She asked, how can a parent waive the right to request a temporary custody hearing if the parent had not been served and advised of that right? She further noted that although no Title 8 statute provides authority for her proposal, no statute precludes it. But she believes that if the court at the initial dependency hearing has authority to affirm temporary custody, then it arguably can hold a hearing to make that determination. Finally, she proposed a change in the title of Rule 51, from “review of temporary custody” to “contested review of temporary custody,” because if a parent requests a hearing, then temporary custody has become contested.

Not all members of the workgroup agreed with Ms. Avila-Taylor’s position, and Mr. Truman presented an opposing view. He began by noting that there is statutory direction on this issue, citing A.R.S. § 8-824 for the proposition that a parent must make the request for a review of temporary custody at the preliminary protective hearing (specifically section (F), which provides, “The petitioner has the burden of presenting evidence as to whether there is probable cause to believe that continued temporary custody is clearly necessary to prevent abuse or neglect pending the hearing on the dependency petition.”). He noted that a parent who does not attend the preliminary protective hearing has a right to subsequently request a return of the child under Rule 59. He also noted the history of the temporary custody hearing and said that it originated during the 1990’s in a Pima County “model court” and in omnibus legislation, both of which intended to “frontload” the hearing for challenging temporary custody. He cited *Stocking Tate’s* analysis that as a dependency case proceeds, the available evidence typically expands, leading to logistical and evidentiary issues if a temporary custody

hearing is held at a later time. Mr. Truman concluded with a recommendation that if Ms. Avila Taylor's proposal has merit, it should be adopted by legislation rather than a rule change.

Other members then offered comments. A member who participated in Pima's model court confirmed that this program was designed to promptly get parents into court, appoint their counsel, and then afford them an immediate hearing on temporary custody. Unfortunately, not every parent was served before the hearing, although the member observed that the unserved parent in some cases might have been an appropriate placement for the child. The member believed that depriving that parent of a temporary custody hearing after later service would prejudice the parent, whereas providing a hearing at a later stage would not prejudice the State. The member also noted that although the Rule 59 process might be available at a later stage, it is not prompt; under current Rule 59(b), the court has 30 days to set a hearing on a Rule 59 request. The member supports Ms. Avila Taylor's proposal. Another member supported Mr. Truman's position, contending that the legislature alone can articulate the dependency process, and that this new proposal would impose an unintended burden on the State. Two judge members supported Ms. Avila Taylor's proposal. One judge noted that a parent should have a right to challenge custody at the parent's first court appearance, and that given the short time between the filing of a dependency petition and the preliminary protective hearing, some parents aren't served and are otherwise unaware of the court date. The judge echoed Ms. Avila Taylor contention: how can a parent be deprived of a right that exists at a hearing if the parent was not notified of the hearing? Another judge member recounted instances where one parent failed to inform DCS of the other parent's ability to provide a safe home for the child. The judge affirmed that it is difficult to set a Rule 59 hearing within fewer than 30 days.

The Chair asked for a straw vote on the issue. Two members supported Mr. Truman's position. The remaining members supported Ms. Avila Taylor's position. With this in mind, Ms. Avila Taylor's presentations of Rules 51 and 52 will incorporate her proposal. The Task Force's petition will do likewise, although the Chair noted that Mr. Truman will have the opportunity to elaborate on his viewpoint in that filing.

According, Rule 51, section (a) ("generally") now begins, "if requested by the parent at the preliminary protective hearing or at the initial dependency hearing, if the parent was not served and did not appear for the preliminary protective hearing, the court must" Members discussed whether the words "was not served" should be replaced by the words "was not notified," but concluded that "served" was more accurate, and that "notified" could result in collateral litigation over the meaning of notice, e.g., can a phone call constitute notice? In subparts (a)(1) and (c)(2), the word "physical" was added in the phrase "temporary physical custody" because the hearing applies only in cases of out-of-home placement. In subpart (a)(2), the workgroup added the word "clearly" in the phrase "whether removal of the child from the home was clearly necessary."

Section (b) specifies the burden of proof: “probable cause” in subpart (1), and “clear and convincing evidence” in subpart (2), which applies to an Indian child and that includes an “active efforts” showing. Section (c) (“procedure”) now includes citations to pertinent statutory provisions. Current subpart (C)(3) says that the parent “shall” be permitted to present evidence; draft subpart (c)(3) says “must” be permitted. That subpart also includes a new sentence that says, “The court may consider as mitigating factors the participation of the parent in healthy families or whether the availability of reasonable services would prevent or eliminate the need for removal and the effort to obtain and participate in these services.” Current section (D) (“findings and orders”) has been bifurcated into new sections (d) (“findings”) and (e) (“orders”). Subpart (d)(2) specifically applies if the child is an Indian child. At Professor Atwood’s request, the Editorial Group will determine if the word “that” in the second sentence (“that active efforts have been made”) should be replaced by the word “whether.” Section (e) has two subparts set out in the alternative. Subpart (1) applies if the petitioner failed to meet the burden of proof and requires the court to order return of the child to the parent. Subpart (2) applies if the petitioner has met the burden of proof and allows the court to declare the child a temporary ward of the court. Judge Quigley concluded the discussion of Rule 51 by confirming with Mr. Truman that a reference in Rule 50 to Rule 51 was correct.

Rule 52 (“initial dependency hearing”). Current Rule 52 and the restyled rule are both lengthy. Ms. Avila-Taylor noted that the workgroup in preparing the new draft rule reviewed several statutes, including A.R.S. §§ 8-842, -843, -844, -824, and -825, as well as Rules 50 and 51. It also considered circumstances where the initial dependency hearing could be a parent’s first court appearance in the case.

Ms. Avila Taylor reviewed each of the sections and subparts of draft Rule 52. In section (a) (“generally”), the workgroup added a new sentence, derived from A.R.S. § 8-843: “The court must give paramount consideration to the health and safety of the child.” Draft section (b) (“time for the hearing”) differentiates the time for the initial dependency hearing, depending on whether the parent did not appear at the preliminary protective hearing or whether service by publication is required. The content of section (c) (“procedure”) reflects corresponding content in Rule 50. Notably and based on the earlier discussion of Rule 51, subpart (c)(3) requires the court to conduct a temporary custody hearing if requested by a parent at the initial dependency hearing. Current Rule 52(C)(6) amalgamates the provisions concerning admission, denial, and failure to appear. However, in draft Rule 52, the provisions on admission and denial are in subpart (c)(7), and provisions on failure to appear are in a new section (d) (“failure to appear”).

Similarly, findings and orders, which are consolidated in current Rule 52(D), are separated in draft Rule 52(f) (“findings”) and (g) (“orders”). Ms. Avila Taylor noted in subpart (g)(1) that the court must enter orders “returning the child to the parent, or if the child is not returned to the parent, affirming or modifying the prior orders regarding the placement of the child” Members discussed and revised draft subpart (g)(7) regarding

placement of siblings. As revised, the subpart now directs the court to enter an order, “if siblings have not been placed together, requiring that DCS make reasonable efforts to place a child with siblings if such placement is in the children’s best interests or if that is not possible, to maintain frequent visitation or other ongoing contact between the siblings.” Subpart (g)(8) requires the parent to “immediately” inform the court of new information concerning the location of a relative. Members discussed changing “immediately” to “promptly” but did not because “immediately” is used in the statute. Subpart 13 allows the court to enter other orders “as appropriate and required by law.” After discussion, members changed this to “as appropriate or required by law.”

Rule 58 (“review hearing”). Ms. Avila Taylor noted that although the workgroup restyled and reorganized this rule and added a couple new statutory references, it did not intend to make substantive changes. Members had questions and suggestions following Ms. Avila Taylor’s overview of the draft. A member inquired why section (e) (“procedure”) did not require DCS to provide a safety plan concerning a child’s potential return to the home. During the ensuing discussion, members strongly supported that addition; they added subpart (e)(4) as a placeholder for the provision and requested the Editorial Group to draft its content. In subpart (f)(1)(B), members deleted the word “specific” in a provision that required the court to “make specific findings.” (Current Rule (F)(2) says “specific findings.”) In subpart (f)(2)(A), members replaced the phrase “educational stability,” which they found ambiguous, with “educational needs.” The workgroup added subpart (f)(2)(B), which requires the court, if it does not place the child with a parent, to “determine whether DCS has identified and assessed whether placement of the child with a relative or person who has a significant relationship with the child is possible.” In subpart (f)(2)(G), which concerns ICWA, members replaced the introductory phrase, “if ICWA applies,” with the more conventional “if the child is an Indian child.”

Rule 60 (“permanency hearing”). Ms. Jorquez presented Rule 60. She noted that section (A) of the current rule requires the court to “determine the future permanent legal status of the child.” The workgroup changed this to “determine the child’s permanency plan.” In light of the Task Force’s anticipated approval earlier today of Rule 14 (“combining hearings”), the workgroup believed that current Rule 60(B) (“consolidation of hearings”) would no longer be necessary, and the workgroup recommended that draft Rule 60 not include a section that corresponds to current section (B). The workgroup restyled section (c) (“time limits”) for greater clarity. The workgroup reorganized current section (D) (“procedure”), now section (c) (“procedure”) into subparts. The current section permits the court to consider “an age-appropriate consultation with the child.” Members restated that provision in subpart (c)(3) as, “may allow the child to speak with the court during the hearing to assist the court in determining a permanency plan for the child.” The provision is designed to remove uncertainty about whether the child would speak with the judicial officer in open court and on-the-record.

Draft section (d) is titled “findings and orders.” The workgroup proposed adding a provision in this section, initially discussed at a Task Force meeting a year ago, which would deem a review hearing conducted subsequent to a permanency hearing to be a permanency hearing. This would facilitate compliance with statutory requirements concerning the time for filing guardianship and termination actions. However, a member noted that doing so could require the court to make all of the permanency findings again at every subsequent review hearing. After discussion, members agreed to address this issue by providing in subpart (d)(2) that the court must set a review hearing, “but every review hearing after a permanency hearing for that child may be designated a permanency hearing.”

5. Report from Workgroup 4. Professor Atwood and Judge Portley, who presented the following rules, credited Rita Meisner, a subject matter expert on adoptions, for her assistance to the workgroup in preparing these drafts.

Rule 74 (“motions”). Professor Atwood explained that the workgroup, in conjunction with its review of Rule 85 (“setting aside an adoption”), made a change to Rule 74(f) (“motion to set aside judgment”). A.R.S. § 8-123 provides, “After one year from the date the adoption decree is entered, any irregularity in the proceeding shall be deemed cured and the validity of the decree shall not thereafter be subject to attack on any such ground in any collateral or direct proceeding.” *Denia L.*, which was provided in the materials, considered the meaning of “irregularity.” The opinion held that a void judgment is not merely an irregularity, and A.R.S. § 8-123 should not operate as a time bar. Civil Rule 60, incorporated by reference in Rule 74(f), sets forth the grounds and time limits for setting aside a judgment. After considering *Denia L.*, the workgroup concluded that Rule 74(f) should clarify that a challenge that an adoption decree is void should not be time limited. Accordingly, the workgroup added this sentence to Rule 74(f): “A motion to set aside a judgment under Civil Rule 60(b)(4) may be filed at any time.”

Rule 80 (“birth parent living expenses”). Judge Portley noted that the intent of the rule is to discourage adoption fraud. The substance of the current comment to the rule has been relocated to section (a) (“motion for approval”), and the comment has been eliminated. Section (a) of the draft rule now requires that a person or agency wishing to pay living expenses for a birth parent in excess of one-thousand dollars must file a motion supported by an affidavit justifying those expenses, as provided by A.R.S. § 8-114. Section (b) specifies the procedure, which includes a requirement that the court verify the birth parent’s identity before entering any orders. The court for good cause may waive a hearing on the motion, but if it holds a hearing, it may require the attendance of the birth parent or the person who will be paying the expenses. Section (c) requires a determination of whether the proposed expenses are permissible under the statute.

A judge member asked if a motion to approve expenses and an adoption petition concerning the same child could be filed in different counties. The judge asked whether

the rule should specify the venue for filing the motion, thereby minimizing county-shopping. Judge Portley responded that expenses under this section should be included with the accounting that is filed with the court under Rule 83, which should close the loop. Nonetheless, the judge member had concerns because the motion to approve expenses might be assigned a miscellaneous case number and would be difficult to match with an adoption petition number. Another member advised that in her county, a motion in an adoption proceeding cannot be filed unless there is a pending adoption petition with an assigned case number. Due to the lateness of the hour, members agreed that the Editorial Group should consider this issue.

Rule 81 (“consent to adopt”). Professor Atwood presented this rule. Draft section (a) has general application, while the content of draft section (b) is limited to consents in out-of-state adoptions and adoptions under ICWA. The workgroup revised section (b) to clarify this limited scope by, among other things, relocating instructive content from the current comment to the body of the draft rule. Section (A) of the current rule has the odd name, “motion to set hearing.” The workgroup added new section (a) (“generally”) as a more instructive introduction, and then combined current sections (A) and (B) (“procedure”) into a new section (b) titled “consent in open court for an out-of-state adoption.” Section (b) contains a detailed yet practical procedure. For example, while the current rule requires the person giving consent to arrange for the presence of a court reporter, the draft allows either that person or the prospective adoptive parent to make the arrangement. Draft section (c) is “consent to adopt an Indian child,” which parallels current section (C). Draft section (d) (“findings and orders”) includes references to ICWA authorities. In cases involving an Indian child, the workgroup changed the phrase “terms and conditions” in the current section to “terms and consequences” in the draft. Draft section (e) (“invalid consent”) is similar to the current section.

Rule 82 (“petition to revoke consent”). A.R.S. § 8-106(D) provides that a consent to adopt is revocable only for fraud, duress, or undue influence, but Professor Atwood advised that there is no statutory guidance for the revocation procedure. Rule 82 provides a procedure. She noted in draft section (a) (“petition to revoke consent”) a nuanced edit by the workgroup specifying that a person may seek to revoke only “their own consent.” Because a petition to revoke consent must be filed before the adoption is finalized, the workgroup also added a new sentence to section (a) that says, “A person who seeks to revoke consent after entry of a final adoption order must proceed under Rule 85 [‘setting aside an adoption’].” Inasmuch as these petitions are uncommon and are likely to be filed by a self-represented person, and because the court should have more knowledge than the petitioner of the location of interested parties, draft section (b) (“service”) requires that the court, not the petitioner, must prepare a notice of hearing and “provide a copy of the petition and notice of hearing to the adoptive parent or the parent’s attorney, DCS, or the agency to whom the consent was originally given.” The provision further requires the court to provide these copies “in a manner that is reasonable calculated to provide prompt notice.” However, if the original consent was

given to DCS or an agency, the entity rather than the court must provide copies to the prospective adoptive parent.

Section (c) (“appointment of counsel”), like the current rule, requires the court to appoint counsel for an indigent petitioner. Under section (d) (“appointment of a guardian ad litem”), appointment of a GAL for the child is discretionary, as is the authority of the GAL to file a dependency petition if the court grants the petition to revoke consent. Professor Atwood reviewed sections “(e) initial hearing and evidentiary hearing,” “(f) burden of proof,” “(g) procedure,” and “(h) findings and orders.” The workgroup made a change in section (i) (“revocation of consent to adopt an Indian child”). Under the current provision, a parent or Indian custodian can revoke consent at any time before entry of a final adoption order, in which case the child “shall then be returned to the custody of the parent or Indian custodian.” The workgroup’s draft provides for return of the Indian child “as soon as practicable.” The draft section also includes a reference to 25 C.F.R. § 23.128.

Rules 83 (“documentation required to adopt”), 84 (“hearing to finalize adoption”), 85 (“setting aside an adoption”), and 87 (“modification of post-placement agreements”). There was insufficient time remaining at the meeting for Workgroup 4 to present Rules 83, 84, 85, and 87. The Chair requested members to review the rules after the meeting concluded and to forward any comments or suggestions to Professor Atwood. The Editorial Group will consider these four rules at its next meeting. Professor Atwood noted an issue with a timing provision in Rule 85, which she will discuss with staff.

6. Roadmap. The Chair reminded members that she had filed a motion to extend the time for filing a rule petition, and that the Chief Justice entered an Order on December 7, 2020 extending that time until March 31, 2021. The pending rule petition has now been assigned a case number: R-20-0044. The Chair advised that a substantial amount of work still needs to be done. The Editorial Group has set 4 meetings during the first 3 weeks of January, with a goal of having a complete set of rules ready for stakeholder vetting by the end of January. The Chair asked members to provide the Editorial Group with their authority to make substantive edits to the rules that are consistent with and that further the intent of the Task Force. She noted that members will have the opportunity to review those edits before the Task Force files its rule petition.

Motion: A member moved that the Task Force give the Editorial Group the authority to make editorial and substantive edits to the proposed rules. The motion received a second and it passed unanimously. **JRTF 014**

Members have previously suggested sending the rules for vetting to the following individuals and entities: Divisions One and Two of the Court of Appeals, the Children’s Action Alliance, the Arizona Center for Law in the Public Interest, the Arizona Council of Human Service Providers, and the Governor’s legal staff. As a matter of course, presentations will be made to the Committee on Superior Court, which meets on

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February 5, 2021, and to the Committee on Juvenile Court. Staff will also submit the draft rules to the State Bar's Juvenile Law Section. The Chair asked members to submit to staff the names and contact information for any other person or entity who might review and comment on the draft rules.

As noted in staff's memo, Administrative Order No. 2019-74, which established the Task Force, directed the Task Force to, among other things, "reorganize the rules to enhance their usability." Members have now added, consolidated, relocated, abrogated, or otherwise reorganized a number of rules, and staff has prepared a proposed Table of Contents, which is in the meeting packet and that reflects these changes. The Chair asked members to review the proposed Table of Contents and to send any suggested changes to staff.

The Chair announced a tentative date for the next Task Force meeting: Friday, February 5, 2021. It appears that a quorum will be available for the meeting, but the Chair requested any members who have a conflict with this date to notify staff. The February meeting will probably be virtual. The Task Force will also need to set another meeting in March, on a date to be determined.

The Chair noted that each of the four workgroups has met at least 17 times, and two workgroups have had 25 meetings. Altogether, there have been 89 workgroup meetings to-date. In addition, the Editorial Group has met 16 times, and the Task Force has had 13 meetings, for a total of 118 meetings thus far. The Chair thanked the members for their tremendous effort, their remarkable dedication, and their generous contributions of time during the past 15 months.

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

The meeting adjourned at 4:08 p.m.