

Juvenile Rules Task Force
State Courts Building, Phoenix
Meeting Minutes: February 28, 2020

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, Eric Meaux, William Owsley, Hon. Maurice Portley, Hon. Kathleen Quigley, Beth Rosenberg, Denise Avila Taylor, Hon. Patricia Trebesch, Edward Truman, Hon. Rick Williams, Hon. Anna Young (by telephone)

Absent: Christina Phillis, Denise Smith, Kent Volkmer

Guests: Nina Preston, Chanetta Curtis, Shari Andersen-Head, Rachel Roche, Randi Alexander, Jessica Fotinos, Carey Turner

AOC Staff: Caroline Lutt-Owens, Joseph Kelroy, Mark Meltzer, Angela Pennington

1. Call to order; preliminary remarks; approval of meeting minutes. The Chair called the fifth Task Force meeting to order at 10:00 a.m. She noted the members' excellent attendance, not only at Task Force meetings, but also at 21 workgroup meetings that have been held to-date. The Chair then reviewed materials in today's meeting packet. In addition to the agenda, draft minutes, and draft rules, the packet includes (1) a memo from Ms. Beckmann concerning appealable orders under Rule 103; (2) a recent Division One opinion, *Jessiah C. v. DCS*, also concerning appealable orders; (3) Supreme Court Administrative Order No. 2020-31 regarding juvenile referral forms; and (4) the members' approved draft of Rule 22.

The Chair then referred members to draft minutes of the January 24, 2020 Task Force meeting. Members had no corrections to the draft.

Motion: A member moved to approve the January 24, 2020 meeting minutes. The motion received a second and it passed unanimously. **JRTF 005**

2. Rule 22 ("referral; diversion"). A.O. 2020-31, filed on February 12, 2020, adopted juvenile referral forms. The Chair asked members whether they should make any changes to their draft of Rule 22, which they approved at the January 24 Task Force meeting, in response to the adoption of these forms. Some members believed that Rule 22 should include a cross-reference to the adopted forms, but this was not a unanimous view. The Chair envisioned that a future editorial group, with the members' authorization, would review the draft set of rules prior to the Task Force filing its rule petition, and that this group would make necessary and appropriate edits to the draft

rules. She suggested deferring the inclusion of a cross-reference in Rule 22 to that editorial group, which would determine if it should be added and if so, in which section of the rule the reference should be located. Members agreed with that plan.

3. Report from Workgroup 3. The Chair began today's rules review with presentations from Workgroup 3.

Rule 40 ("appointment of a guardian ad litem"). Judge Quigley presented this rule, which Workgroup 3 had previously presented to the Task Force. The workgroup's most recent revisions removed references to the CASA because the CASA is covered by Rule 5. Members approved the revised draft. They will determine later whether Rule 5 should be relocated in Part III of the Juvenile Rules.

Rule 40.3 ("duties and responsibilities of a guardian ad litem for a parent"). Mr. Gilmore presented this new rule and acknowledged Mr. Owsley's assistance in preparing the draft. Mr. Gilmore reminded members that during a discussion of Rule 40.2 ("duties and responsibilities of attorneys and guardians ad litem who represent parents, guardians, and Indian custodians") at the January 24 Task Force meeting, members agreed "that it would be appropriate to separate the respective responsibilities of attorneys and GALs that are detailed in this rule." (See those meeting minutes at page 10.) The result is this new rule, which specifically applies to the appointment and the duties of a GAL for a parent.

Section (a) ("appointment") of this new rule requires the court to define the purpose and scope of the GAL's appointment, the GAL's role in contested proceedings, and the court's expectation of the GAL's role in the case. Mr. Gilmore noted that the workgroup added this last clause because judges have varied expectations about the GAL's role. Section (b) ("confer with the client") notes the absence of an attorney-client privilege in the GAL's relationship with the client. He added that the workgroup preferred the term "client" rather than "parent" because "client" includes a parent and a guardian. After discussion, members agreed that section (a) should initially refer to a "parent, guardian, or Indian custodian," and that subsequent references could say "client." Section (c) ("investigate the case") describes the primary duties of the GAL. Members agreed to change a provision in section (c) that said, "the GAL assists in determining appropriate services for the client" to "may assist" because that function might not be pertinent in some cases. Section (d) ("attend hearings") requires the GAL to report to the court on what is in the client's best interests. It allows the GAL with the court's permission to call and cross-examine witnesses. Section (d) also instructs that "the GAL's position must not be substituted for the client's position as advocated by the client's attorney." Members approved Rule 40.3 with the noted modifications.

Rule 40.4 ("education requirements for a court-appointed attorney or guardian ad litem"). Mr. Truman presented Rule 40.4. The versions of Rules 40.1 and 40.2 presented at the January 24 meeting each included lengthy continuing education requirements. Members agreed that "to avoid duplication, those provisions will be removed from these

rules and combined in a new rule [40.4].” (Minutes at page 10.) The workgroup’s initial draft of this rule would have made its educational requirements applicable to court-appointed attorneys in delinquency proceedings, but members disfavored that change and it was deleted because there currently is no such requirement, and if there was one, the training subjects would be different from those identified in the draft rule.

Section (c) of the draft rule requires that attorneys and GALs have later training on topics “such as the following,” and the rule then contains two long paragraphs that detail training topics. One paragraph includes topics for those representing children, and the other has topics for those representing parents and guardians. The first paragraph, subpart (d)(1), includes as a topic “the traumatic effects of parental domestic violence on a child.” Some members wanted the “traumatic effects” topic to have a broader scope, such as the effect of dependency proceedings on a child, or the impact of an out-of-home placement. After discussing several alternative ways to phrase this topic, including “the effects of out-of-home care on the health and welfare of a child,” members agreed on “trauma-informed practice.” Section (b) (“generally”) includes a reference to laws concerning education and advocacy for children in schools, and a member asked to broaden this phrasing to include, for example, issues concerning dependent children who change schools and education for disabled dependent children. Members were mindful that the focus should be on abuse and neglect, and they cautioned against a long list of training subjects, which would inevitably omit some topics. They recommended concluding the paragraphs with language such as “other issues affecting children.” Ultimately, members agreed that the topics in subparts (d)(1) and (d)(2) are largely duplicative, and the subjects in both subparts are generally applicable to anyone representing either children or parents. They accordingly returned the rule to Mr. Truman and the workgroup to consolidate these subparts.

Members agreed that lawyers in the Attorney General’s office would not be subject to these requirements, because they are not court-appointed, they represent an agency rather than individuals, and that office provides in-house training. Members made grammatical corrections to the draft rule, and they agreed that as drafted, section (e) appropriately requires attorneys and GALs to provide their proofs of completion to the presiding judge or the judge’s designee, rather than to file the proofs with the clerk.

4. Report from Workgroup 4. Professor Atwood presented Rule 64 and a portion of Rule 65, and she revisited Rule 62.

Rule 64 (“motion, petition, notice of hearing, and service of process and orders”). Rule 64 is the first of three consecutive rules on termination of parental rights. Current Rule 64 allows a termination proceeding to be initiated by motion under section (A) (if there was a previous determination of dependency) or otherwise by petition under section (B) (although a petition can be filed even after a dependency determination). The workgroup attempted to clarify these distinctions and reversed the current sequence so that the provision on petitions appears before the one on motions. Although one

proceeding may have a JS case number and the other may have a JD number, they proceed similarly. Professor Atwood reviewed other sections of the draft rule. In Rule 64, the workgroup used some of the phrasing from its guardianship rules; for example, these rules have similar language concerning a failure to appear, or for service if the child is an Indian child.

Draft section (b), which concerns a motion for termination, requires judicial determinations that a child is dependent, and that termination of parent rights “is” in the child’s best interests. Because a best interests determination is an element of a termination adjudication, and to avoid the dilemma of making that determination before the adjudication, members agreed to change the word “is” to “may be in the child’s best interests.” To address a related issue arising under A.R.S. § 8-862, members requested Workgroup 3 to add a provision in Rule 60 specifying that every review hearing after the permanency hearing will be considered a permanency hearing. Subpart (c)(2) concerns the initial hearing notice and a requirement that the notice advise of the consequence of failing to appear without good cause. Members agreed that this provision should include references to specific hearings, and they added “at the initial hearing, pretrial conference, status conference, or a termination adjudication hearing.” Members agreed that the consequences of failing to appear apply regardless of whether the termination proceeding was initiated by motion or by petition. Section (d) concerning service was reorganized to be more logical and to refer to the pertinent service requirements of the Civil Rules. If the child is an Indian child, the rule should allow service by certified rather than registered mail, which would be consistent with ICWA; but members deferred making this change because it would contradict an Arizona statute.

Members approved Rule 64 with these modifications.

Rule 65 (“initial termination hearing”). Professor Atwood noted that draft Rule 65, consistently with draft Rule 64, refers to the petition process before the motion process. In section (c) (“procedure”), subpart (2), members discussed an issue raised by the workgroup: can the court appoint counsel for a private petitioner? Members concluded it could not for two reasons. First, the statute governing appointment of counsel does not provide for this; also, unlike a parent in a termination proceeding, the petitioner is not at risk for losing parenting rights, which have a constitutional dimension. In subpart (c)(3), members concurred on language that would permit the court to appoint an attorney or a GAL for a child, or both, if none had been previously appointed.

Professor Atwood explained that the workgroup revised subpart (c)(6) (which concerns admitting, denying, or failing to appear) in the same manner as similar provisions in other restyled rules. However, Professor Atwood noted that the restyled versions might have omitted essential language in the current rules (i.e., “based on the record and evidence presented”), and this language therefore was added to the draft of subpart (c)(6)(C). Members also discussed whether, if the parent fails to appear at the initial termination hearing, the court proceeds to take evidence at the initial hearing or at

a later adjudication hearing. A judge member observed that conducting the adjudication concurrently with the initial hearing under this circumstance is not a favored practice. Even if the parent failed to appear, the parent's attorney has a right to examine witnesses, and counsel might not be prepared to do so if testimony is taken at the initial hearing. Additionally, the absent parent might have a good reason for failing to appear, which could moot the need for an accelerated or so-called "drive-by" adjudication. See *Tricia A. vs DCS*. However, to avoid confusion about the court process following a failure to appear, and considering *Tricia A.*, members agreed to remove a proposed reference to Rule 66 in draft Rule 65(c)(6). One member also proposed retaining the current comment to Rule 65; members will determine that later. Members agreed to delete a proposed subpart (c)(8), which would have required the court at the initial termination hearing to set a deadline for amendments to a termination petition, because setting a rigid deadline might impair a late amendment that is in the child's best interests. The workgroup will present the remainder of Rule 65 at a future meeting.

Rule 62 ("initial guardianship hearing"). Although members had previously approved Rule 62, the workgroup added language to Rule 62(c)(7)(C) like the language it added to Rule 65(c)(6)(C), as mentioned in the preceding paragraph. And like a change to Rule 65(c)(6)(C) described above, the workgroup deleted a reference in Rule 62(c)(7)(C) to Rule 63. Professor Atwood recognized that other edits to Rule 62(c)(7)(C) might be necessary to add further clarity, particularly concerning the words "has proven," which the editorial group should consider later.

5. Report from Workgroup 2. Ms. Beringhaus presented Rules 16, 18, and 21 on behalf of the workgroup, and Mr. Meaux presented Rule 19

Rule 16 ("discovery"). Ms. Beringhaus noted that Rule 16 was substantially reorganized, and it is now easier to read and more closely tracks corresponding Criminal Rule 15 ("disclosure"). Unlike the current juvenile rule, which begins with a section on "general standards," the restyled rule begins with section (a) on "disclosure by the State," which aligns with the disclosure provisions in Criminal Rule 15. A provision in restyled Rule 15(a) requires the State to disclose statements of the juvenile "and of any co-defendant—juvenile or adult," which is new. The workgroup changed another provision in section (a) that requires disclosure of experts to conform to a corresponding provision in Criminal Rule 15. In Rule 16(b) ("disclosure by juvenile"), the workgroup added a provision in subpart (1) ("physical evidence") that requires a court order if, for example, the juvenile must appear in a line-up or provide hair or fluid samples. That new provision follows the current practice in Maricopa County. Requirements for the juvenile's disclosure of experts mirrors the requirements for the State's disclosure of experts. Ms. Beringhaus reviewed the other sections of Rule 16, including section (f) ("sanctions"). Section (f) is somewhat different from the corresponding provision in Criminal Rule 15, and in addition to specified sanctions, it permits the court to impose "any other appropriate sanction." Members approved the workgroup's draft of Rule 16.

Rule 18 (“speedy justice”). Ms. Beringhaus explained that the current rule differentiates the duties of the prosecutor and the duties of defense counsel. The draft rule eliminates this distinction so that both attorneys have responsibility for advising the court of the “impending expiration of time limits in the juvenile’s case.” Members approved the draft as presented.

Rule 19 (“records and proceedings”). As the titles of the draft and the current rule suggest, the rule applies to access to records as well as access to proceedings. In section (a) (“juvenile court delinquency files”) the court’s records (also referred to as “files”) are either in a “legal file” or a “social file.” Mr. Meaux explained how the workgroup reorganized the provisions to delineate in a parallel manner when the public does, or does not, have access to these files, who maintains the files (the clerk versus a probation officer), and the contents of the files. Mr. Meaux noted that A.R.S. § 8-208 might require legislative changes to conform to the restyled rule. In section (b) (“proceedings”), the workgroup used the word “proceedings” consistently in its draft, rather than intermittently using the word “hearing,” which appears in the current rule.

Members discussed distinctions between files that are “closed,” “sealed,” and “confidential.” Mr. Meaux explained that in practice, juvenile court files are not sealed, but certain documents are segregated and are considered confidential. The term “closed” is ambiguous; does it mean “sealed” or “archived?” Members agreed to use the term “confidential” rather than “closed,” and this revision may require additional edits in section (a). The Chair also asked the workgroup to consider the terminology in, and relationship between, subparts (1)(A) and (1)(D). Workgroup members might also consider using parallel language in the “closed” provisions of sections (a) and (b). Also, in section (a), staff inquired whether the word “clear” was necessary in the phrase “clear public interest in confidentiality.” A member explained that it was necessary because it emphasizes the First Amendment interest in open court files. In subpart (b)(1)(A), members agreed to add the word “reasonable,” so it now says, “must give the parties reasonable notice of the request.”

Members also discussed section (c) (“release of juvenile court files”). Judge Kreamer recommended that the section provide more specificity and guidance for judicial officers. For example, when the court receives a records request, should it go to the presiding judge, the judge assigned to the case, or to any judicial officer? The rule should also identify categories of requests. Judge Kreamer will take into consideration Pima County’s practices in this area and he will prepare draft revisions to section (c) for the members’ consideration at a future meeting.

Rule 21 (“victims’ rights”). The restyled rule has two sections: (a) (“applicable offenses”) and (b) (“enforcement”). Ms. Beringhaus noted that although the applicable offenses in restyled section (a) are described differently than they are currently, the restyled and current versions are substantively equivalent. The rights in section (b) are not individually enumerated; rather, the rule refers to the Victims’ Bill of Rights and

A.R.S. §§ 8-381 et seq. Members agreed to add after the VBR a specific reference to the Arizona Constitution, Article 2, Section 2.1. With that change, members approved Rule 21.

6. Report from Workgroup 1. Workgroup 1 made the final presentation.

Rule 7 (“form of filed documents”). Ms. McQuality presented Rule 7. Draft Rule 7 is modeled on Civil Rule 5.1 and replaces the format provisions of current Juvenile Rule 1(D). The draft includes a provision on electronic filing, even though there is no e-filing in juvenile court today, in anticipation of its availability in the future. Although the first sentence of section (a) (“the filing of documents with the court is accomplished by filing them with the clerk”) is self-evident, it is identical to the respective Civil Rule provision, so members retained it. Section (a) also contemplates the circumstance of filing a document with a judge. In section (b)(1)(C), members removed a requirement that the clerk notify a party of a rejected filing by e-mail to allow the clerk to provide that notification by other means. The draft rule, like the corresponding Civil Rule, requires 13-point font, and after discussion, members left this requirement unchanged. Ms. McQuality reviewed other sections of the draft rule, and after further discussion, members approved the draft.

Rule 103 (now, “general provisions regarding appeals,” and as proposed, “right to appeal”). Ms. Beckmann presented only sections (a) (“who may appeal”) and (b) (“final orders”) of the current rule, which would become a new freestanding Rule 103 with the title “right to appeal.” The remaining sections (C) through (G) of current Rule 103 would become a new Rule 103.1 titled “general provisions.” In addition to her oral presentation, the meeting materials included Ms. Beckmann’s February 20, 2020 memo, which contained numerous citations to statutes and case law concerning appealable orders. In summary, unlike other statutes and procedural rules for civil and criminal appeals, neither A.R.S. § 8-235 nor current Rule 103 specifies the types of orders from which a party may appeal. Instead, a body of case law has developed that identifies who is an “aggrieved party” and which orders are final and appealable. Ms. Beckmann explained that the workgroup’s draft attempts to incorporate this body of law into the provisions of new Rule 103.

Section (a) (“who may appeal”) limits appeals to aggrieved parties and defines that term based on case law. Section (b) (“final orders”) contains three requisites for an appealable order: it must be in writing, signed by a judge, and filed with the clerk. Section (b) also provides that a final order “includes the following,” which is followed by two subparts, one pertaining to delinquency and incorrigibility proceedings, and the other to all other juvenile proceedings. A disposition order is included in the list of appealable delinquency orders, and another provision in the first subpart addresses the appealability of a restitution order that is entered after the date of the disposition order. The workgroup’s initial draft required that the appellate court “must” consolidate appeals from these separate orders, but after discussion, members modified this provision to say

that the appeals “if practicable...should be consolidated.” Members discussed but declined to put a time limit on the entry of a restitution order.

Ms. Beckmann then turned to subpart (2), which concerns appealable orders in other juvenile proceedings. Subpart (2)(A) instructed that an order granting a dependency petition and declaring a child dependent was an appealable order. Members thereafter added to this provision a portion of another subpart that allowed an appeal from an order denying or dismissing a dependency petition. Subpart 2(B) provided that a disposition order entered after a dependency adjudication was appealable. Subpart 2(C), which provided in part that an order was appealable if the court reaffirmed a prior finding that a child was dependent, prompted some discussion about whether every order changing placement should be appealable. This could be problematic because some placements are only temporary. The workgroup will study this issue further. A judge member expressed concern with a provision allowing the appealability of orders entered after periodic dependency reviews because it might lead to repetitive appeals, but Ms. Beckmann noted that the Court of Appeals now treats those order as appealable. One member proposed that such an order be appealable only when it changes the status quo, but Ms. Beckmann again responded that appellate courts treat the judicial finding of continuing dependency as appealable. Another member was concerned with increasing volumes of dependency appeals and suggested distinguishing orders that are appealable of right from those that are amenable to discretionary special action review, but that suggestion had no support. As a practical matter, will a party appeal from an order that maintains the status quo? The Chair asked that the Task Force’s rule petition include a discussion of this issue for the Court’s consideration.

Ms. Beckmann reviewed other provisions of draft Rule 103. She specifically noted subpart (2)(F), which permits appeals from “an order entered in a dependency proceeding removing a child who has been adjudicated dependent from the parent’s physical custody.” (*See Jessica C. vs DCS.*) Members removed from the foregoing subpart the phrase “that affects a party’s substantial rights” because that is subsumed under the description of an aggrieved party in section (a). The final subpart, (2)(M), allows an appeal from “any other order determined to be final under Arizona case law,” which, along with the words “includes the following” at the beginning of section (b) would permit appeals from other, less common final orders. A member proposed adding to subpart (b)(2) appeals from orders entered under Rule 59 (“return of the child”), although Ms. Beckmann noted case law instructing that those orders are not appealable. This led to a discussion about whether the Task Force could recommend adoption of a rule that deviated from case law. The Chair observed that it was possible, but any such recommendation in the rule petition should be supported by a good reason.

Rule 103 was returned to the workgroup for further consideration.

7. **Roadmap; call to the public; adjourn.** The next Task Force meeting is set for April 3, 2020. The Chair noted that the Task Force has not yet reviewed even half of

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the current rules, and it has added several new rules. To achieve the goals reiterated in the roadmap section of the January 24 meeting minutes, the Chair encouraged workgroups to try to complete three rules, and more if possible, at each of their upcoming meetings.

Jessica Fotinos responded to a call to the public.

The meeting adjourned at 2:48 p.m.