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IN THE SUPREME COURT

STATE OF ARIZONA

In the Matter of PETITION TO AMEND THE RULES OF PROCEDURE FOR THE JUVENILE COURT, AND TO AMEND CIVIL RULE 81	)	R-20-0044
	)	**COMMENT TO PETITION**

The undersigned Judges on the Arizona Court of Appeals, Division One, individually provide this comment, pursuant to Arizona Supreme Court Rule of Court 28, to one portion of proposed Rule 601, Arizona Rules of Procedure for the Juvenile Court. The undersigned urge the rejection of Proposed Rule 601(b)(2)(E), which if enacted would contradict case law, the best interests of children, the goals of prompt permanency and finality, and create uncertainly and unintended consequences.

DISCUSSION

Proposed Rule 601(a) provides that an aggrieved party may appeal "from a final order of the juvenile court." The quoted language is identical to the current rule. *See* Ariz. R.P. Juv. Ct. 103(A).

"Arizona appellate opinions have not spoken with one voice about what constitutes a 'final order' from which an appeal can be taken in a juvenile matter." *Jessicah C. v. Dep't of Child Safety*, 248 Ariz. 203, 206, ¶ 12 (App. 2020). Recognizing this, Proposed Rule 601(b) seeks to specify what is an appealable "final order." The proposal seeks to do so both "in delinquency and incorrigibility proceedings" (Proposed Rule 601(b)(1)) and "in all other juvenile proceedings," which would include dependency, guardianship, and termination of parental rights proceedings ("Dependency Proceedings" for short) (Proposed Rule 601(b)(2)).

Proposed Rule 601(b)(2)(E), applicable to Dependency Proceedings, states that "final orders include . . . an order entered in a dependency removing a child who has been adjudicated dependent from a parent's physical custody." The proposal also

includes a proposed comment,[1] which concedes that Proposed Rule 601(b)(2)(E) contravenes published case law. The proposed comment adds, however, that the Arizona Supreme Court "has determined" that such a change of physical custody order should be a "final order" from which an appeal can be taken:

> "The Court recognizes that subpart (b)(2)(E) may be considered inconsistent with certain case law, *see, e.g., Jessicah C. v. Department of Child Safety*, 248 Ariz. 203, 206, ¶ 14 (App. 2020), but has determined that an order encompassed by this subpart should be deemed a final, appealable order."

Proposed Comment to Proposed Rule 601 2022 Amendment. No supporting rationale is provided.

The undersigned submit that the approach reflected by Proposed Rule 601(b)(2)(E): (1) is contrary to existing case law; (2) is contrary to the best interests of children; (3) is contrary to the goals of prompt permanency and finality in juvenile court; and (4) would create uncertainly and unintended consequences.

[1] Although uncertain, the proposed comment may have been added in response to an informal suggestion provided by one of the undersigned opposing Proposed Rule 601(b)(2)(E).

I. Proposed Rule 601(b)(2)(E) Conflicts with Existing Case Law.

The Proposed Comment to Proposed Rule 601(b)(2)(E) correctly states that it conflicts with existing case law. Although the Proposed Comment cites *Jessicah C.*, appellate decisions trailing back more than 35 years have found that a juvenile court order resolving a motion for change of physical custody (including an order removing a dependent child from the physical custody of a parent) is not a "final order" from which an appeal may be taken. *See, e.g.*, *Jessicah C.*, 248 Ariz. at 205-07, ¶¶ 8-17 (order granting motion for change of physical custody of dependent child from parent to another placement is not a "final order"); *Brionna J. v. Dep't of Child Safety*, 247 Ariz. 346, 349, ¶¶ 9-12 (App. 2019) (order denying motion for change of physical custody from placement to parent is not a "final order"); *Jewel C. v. Dep't of Child Safety*, 244 Ariz. 347, 350-51, ¶ 8 (App. 2018) (order granting motion for change of physical custody from one placement to another placement is not a "final order"); *In re Maricopa Cty. Juv. Action No. J-57445*, 143 Ariz. 88, 92 (App. 1984) (same); *see also In re Pima Cty. Juv. Action No. S-933*, 135 Ariz. 278, 280 (1982) ("[a] final order is one which ends the proceedings, leaving no question open

for further judicial action"); *Sheena W. v. Dep't of Child Safety*, 2021 WL 2434328, *6 ¶ 27 (App. June 15, 2021) ("assuming for purposes of this decision that we lack jurisdiction to address the denial of the Rule 59 motion as part of the parents' direct appeal, we accept special action jurisdiction to review the claim"); *Stacy S. v. Dep't of Child Safety*, 2021 WL 100543, *11 ¶ 43 (App. Jan. 12, 2021) (same); *Samir v. Dep't of Child Safety*, 2020 WL 2950540, *4 ¶ 17 (App. June 3, 2020) (noting two "recent Arizona cases have determined that a juvenile court's decision under Rule 59 is not appealable;" "declin[ing] special action jurisdiction" where there was no "prompt[] challenge" to the denial of a Rule 59 motion) (citing *Jessicah C.* and *Brionna J.*).[2]

Thus, adopting Proposed Rule 601(b)(2)(E) would conflict with decades of case law finding that an order resolving a motion to change physical custody for a dependent child is not an appealable "final order."

[2] Two opinions suggesting a different approach applied a prior rule, *In re Maricopa Cty. Juv. Action No. JD-500116*, 160 Ariz. 538, 542-53 (App. 1989), or exercised appellate jurisdiction without discussion, *Gila River Indian Comm. v. Dep't of Child Safety*, 238 Ariz. 531, 533, ¶ 7 (App. 2015). *See also Jessicah C.*, 248 Ariz. 203, 206, ¶ 13 (discussing these cases).

II. Proposed Rule 601(b)(2)(E) Would Delay Resolution of Challenges to Orders Removing a Dependent Child From a Parent's Physical Custody.

The best interests of children are the keystone in juvenile court Dependency Proceedings. "Recurring review of a child's placement ensures that the court's orders remain in his [or her] best interests – a consideration that 'permeates dependency and severance proceedings.'" *Dep't of Child Safety v. Superior Court*, 247 Ariz. 108, 114, ¶ 15 (App. 2019) (citation omitted). Whether the court's physical placement of a child is appropriate is a cornerstone of that child's best interests. In addition, every change in physical custody is traumatic. For these and other reasons, it is essential that an appellate challenge to a ruling on a motion to change physical custody of a dependent child be addressed by an appellate court on an expedited basis.

Currently, that expedited review is by special action petition seeking review by the Court of Appeals. *See Jessicah C.*, 248 Ariz. at 207, ¶¶ 16-17. Although discretionary, special action review is necessary and appropriate because a ruling on request to change physical custody is not a "final order," *id.* at 206-07, ¶ 15 (citing cases); because review of such a ruling "should be available on an

expedited basis," *id.* at 207, ¶ 16, and because there is no "'equally plain, speedy, and adequate remedy by appeal,'" *id.* (quoting Ariz. R.P. Spec. Act. 1(a)). Comparing the time to resolve a special action with the time to resolve a juvenile appeal is instructive.

When a petition for special action is filed, a response typically is due within 7 days of filing and a reply within 5 days of the response. *See* 1 ARIZONA APPELLATE HANDBOOK 2.0 at 4.23 (2020). Given this accelerated schedule, in Division One, the special action typically will be conferenced (discussed by the three Judges assigned to the matter) within "about 3 weeks after the filing date of the petition," with comparable (or perhaps even accelerated timing) in Division Two. *See* 1 ARIZONA APPELLATE HANDBOOK 2.0 at 4.23 (2020). The Appellate Time Standards applicable to all special actions direct that at least 75 percent will be resolved within 40 days of the filing of the petition, with 95 percent resolved within 80 days of filing of the petition. https://www.azcourts.gov/performancemeasures/Appellate-Time-Standards. Thus, special actions afford an opportunity for an expedited review by the appellate courts, critical for orders addressing the physical custody of a child.

Proposed Rule 601(b)(2)(E) would preclude this expedited review for the orders where it would apply. By defining an order removing a dependent child from the physical custody of a parent an appealable "final order," such a ruling could be challenged only by an appeal as of right, not by an expedited special action. Such an appeal as of right involves several steps requiring additional time that is not involved in a special action. Those steps include: (1) a notice of appeal filed with the Superior Court; (2) the Superior Court transferring the file to the Court of Appeals; (3) appellant's counsel designating the record for appeal; (4) preparing and providing transcripts; (5) filing appellate briefs (opening, answering, and an opportunity to file a reply brief); (6) assigning the case to a panel of Judges; (7) setting and holding a conference to consider the case; and (8) issuing the decision.

An appeal typically takes significantly longer than a special action, with a few examples proving the point. While a special action typically may be conferenced by the Judges assigned to the matter within three weeks (21 days), *see* 1 ARIZONA APPELLATE HANDBOOK 2.0 at 4.23 (2020), in a juvenile appeal, the Superior

Court has 15 days in which to provide the notice of appeal to the Court of Appeals, Ariz. R.P. Juv. Ct. 104(A). As another example, the court reporter or authorized transcriber has 30 days from the filing of the notice of appeal to provide transcripts. *See* Ariz. R.P. Juv. Ct. 103(A). As a final example, after the record on appeal is complete, the parties then have at least 50 days in which to file their briefs, with an additional procedural mechanism to secure extensions of those deadlines. *See* Ariz. R.P. Juv. Ct. 106.

The Appellate Time Standards recognize the additional time required for an appeal when compared to a special action. Unlike the 40/80-day expectations for special actions, the Appellate Time Standards for juvenile appeals direct that at least 75 percent will be resolved within 190 days (more than six months) from the filing of the notice of appeal, with 95 percent to be resolved within 220 days (more than seven months) from the filing of the notice of appeal. https://www.azcourts.gov/performancemeasures/Appellate-Time-Standards. Again, when considering whether an order properly determines where a dependent child will sleep at night, the expedited consideration allowed by a special action (rather than the additional

months involved in a juvenile appeal) significantly advances considerations of the child's best interests.

III. Proposed Rule 601(b)(2)(E) Would Frustrate the Goals of Prompt Permanency and Finality in Juvenile Court.

Various federal and state obligations facilitate prompt permanency and finality in juvenile court. These range from the requirement that a dependency adjudication occur within 90 days of the filing of a dependency petition, Ariz. Rev. Stat. (A.R.S.) § 8-842(C), to the requirement that a permanency hearing be held within six or twelve months after the child is removed from the home (depending on the age of the child), A.R.S. § 8-862(A), to the time-in-care grounds for termination of parental rights, which can be as short as six months, A.R.S. § 8-533(B)(8). These all reflect that a child placed in a permanent placement, without judicial intervention, is preferrable to avoidable time in an out-of-home placement under court supervision.

Under current law, where challenges to changes in physical custody are resolved by the Court of Appeals through special action, the juvenile court retains jurisdiction over the entire matter. *See Coffee v. Superior Court*, 247 Ariz. 68, 71 ¶ 14 (App. 2019) ("Unlike an appeal, jurisdiction never transfers from the superior court to the court of

appeals in the special action context.") (citations omitted). As a result, not only can the juvenile court proceed forward with ancillary proceedings, it also retains jurisdiction to reverse or revise – on the same record – the order resolving the request to change physical custody being challenged in the special action proceeding.

If Proposed Rule 601(b)(2)(E) were enacted, all that would change. Proposed Rule 601(b)(2)(E) would require that a challenge to such an order be made only in an appeal. The filing of a notice of appeal would divest the juvenile court of jurisdiction to act, on the same or similar record, in a way that would defeat the appeal. *See, e.g., City of Sierra Vista v. Sierra Vista Wards Sys. Voting Project*, 229 Ariz. 519, 521,¶ 6 n.3 (App. 2012) (superior court lacked jurisdiction to consider motion for relief from judgment where moving party/appellant had not requested or obtained stay or dismissal of pending appeal) (citing cases); *Aqua Mgmt., Inc. v. Abdeen*, 224 Ariz. 91, 93, ¶7 n.3 (App. 2010) ("A trial court loses jurisdiction once the appeal is filed, unless the matter is in furtherance of the appeal.") (citing cases). As a result, if such an order were reviewable by appeal, absent a significant change in circumstances, the juvenile

court could not alter the physical custody order if that would defeat the appeal. Similarly, it is not clear that the juvenile court would have jurisdiction to take further action (such as granting severance or placing the child in a guardianship) until resolution of the appeal of the physical custody order. As noted above, given the substantial difference in timelines for a special action when compared to a juvenile appeal, requiring that such an order be challenged in an appeal could substantially delay prompt permanency and finality of the child's placement, contrary to the juvenile court's goals and objectives.

IV. Proposed Rule 601(b)(2)(E) Would Create Uncertainty and Unintended Consequences.

Proposed Rule 601(b)(2)(E) would allow for an appeal from an order removing a dependent child from a parent's physical custody. The proposal, however, does not (1) address the many other types of orders addressing physical custody; (2) specify who can appeal such an order or (3) provide any rationale for why the one type of change of physical custody order (but not others) should be subject to an appeal.

Under Proposed Rule 601(b)(2)(E), a parent who wished to

challenge an order removing a dependent child from his or her physical custody could only use the months-long appeal process. However, because Proposed Rule 601(b)(2)(E) does not authorize an appeal from the many other types of orders changing physical custody, those other orders could be challenged using the accelerated special action procedure.

Proposed Rule 601(b)(2)(E) does not specify who could appeal from the order involving a parent. The parent from which the child was removed certainly could appeal from such an order. But how about a guardian ad litem or child's attorney who wished to challenge the order?

Finally, neither Proposed Rule 601(b)(2)(E) nor the Proposed Comment suggest why this one type of order addressing physical custody should be treated differently than all other types of custody orders.

CONCLUSION

For all of these reasons, we respectfully request that the Court not enact Proposed Rule 601(b)(2)(E).

RESPECTFULLY SUBMITTED
July 21, 2021

/s/ Samuel A. Thumma
Samuel A. Thumma

/s/ Paul J. McMurdie
Paul J. McMurdie