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IN THE ARIZONA SUPREME COURT

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 ON PETITION

The Department of Child Safety (DCS or the Department), by and through undersigned counsel, offers its comment under Rule 28(d), Arizona Rules of the Supreme Court, to the proposed Arizona Rules of Procedure for the Juvenile Court (Juvenile Rules) and provides the attached Appendix outlining its suggested changes to the proposed Juvenile Rules.

I. Introduction.

The Department is a party to nearly all dependency, Title 8 guardianship, and termination actions, and it has a significant interest in the rules governing

those matters. The Department therefore offers its comments to the following nine rules in numerical order.

II. Comments on Part I, General Provisions; Specifically, Rule 104.

Current Juvenile Rule 45(C) governs the admissibility of written reports prepared by DCS's child safety workers (CSWs) and provides that "[p]rior to any dependency hearing, the court *may* review reports prepared by the child safety worker and *shall* admit those reports into evidence if the worker who prepared the report is available for cross-examination and the report was disclosed to the parties" according to timelines determined by the type of hearing. Ariz. R.P. Juv. Ct. 45(C) (emphasis added).

Proposed Rule 104(d)(2), however, flips the requirements: "In any dependency, Title 8 guardianship, or termination hearing, the court *must* review a child safety worker's report and *may* admit the report into evidence if the worker or workers who prepared or approved the report are available for cross-examination and the report was disclosed to the parties" according to relevant timelines. (Proposed Rule 104, emphasis added.)

Mandating the reports' admission as required by current Rule 45 serves important purposes. The Legislature requires DCS to submit written reports, and DCS submits progress reports for permanency and dependency review hearings. *See* A.R.S. §§ 8-824(H) (PPH report); 8-872(E) (guardianship report); 8-536

(termination petition social study). In light of the Legislature's mandate to prepare reports for the court, the proposed rule diminishes the reports' evidentiary importance and undermines the statutes.

The Department's reports contain valuable information regarding the family's history, the circumstances that brought the family into court, the efforts to remediate those circumstances, and the success of such efforts. Courts routinely review the reports prior to review hearings and contested matters. Parents can challenge the contents of those reports by cross-examination. Any challenges to information in a report should go to its weight, not its admissibility. It is then up to the juvenile court as the trier of fact to "weigh the evidence, observe the parties, judge the credibility of witnesses, and make appropriate findings." *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 280, ¶ 4 (App. 2002). Admitting the reports into evidence ensures a clear record of the information the court considered; failing to admit the reports into evidence could undermine appellate review of the juvenile court's decisions.

Further, appellate courts have upheld the practice of admitting properly disclosed reports. *James A. v. Dep't of Child Safety*, 244 Ariz. 319, 322, ¶ 8 (App. 2018) (discussing the admissibility of a report and noting the court's responsibility to "hear any competent and potentially significant evidence that bears on the best interests of the child"). The court of appeals noted that requiring the report to be

timely disclosed and making the preparer available for cross-examination adequately protect a parent's due process rights. *Maricopa Cty. Juv. Action No. JD-6123*, 191 Ariz. 384, 391 (App. 1997) (discussing an earlier version of the rule mandating admission of CSW reports). The appellate court previously upheld A.R.S. § 8-537(B) (providing that the juvenile court "*may consider* any and all reports required by [A.R.S. Title 8, ch. 4, art. 5] or ordered by the court pursuant to [that] article and such reports *are admissible in evidence without objection*" (emphasis added)), concluding that it was "a 'reasonable and workable' supplement to the rules of evidence" insofar as it "does not conflict with or engulf a general rule of admissibility, but rather provides a narrow exception to the hearsay rule for reports required by statute." *Maricopa Cty. Juv. Action No. JS-501904*, 180 Ariz. 348, 353 (App. 1994).

Finally, the change appears to directly contradict the comment to the rule proposed by the Juvenile Rules Task Force (JRTF), which states that "[t]here is no intent to change any result in any ruling on evidence admissibility." (Comment to 2022 Amendment to Rule 104.) Clearly the new language can change the result of a party's attempt to admit a child safety worker's report.

In light of the long history requiring the admission of CSW reports, the statutes requiring the juvenile court to receive and consider such reports, and the appellate courts' recognition of both the utility of such reports and the lack of

detrimental impact on the rights of parents when such reports are properly admitted, DCS requests that this Court amend proposed Rule 104(d)(2), (4), and (7) to reflect that the juvenile court "must review a child safety worker's report and must admit the report into evidence" if the admission requirements are met. (*See* Appendix at 3.)

III. Comments on Part II, Delinquency Provisions; Specifically, Rule 218.

Proposed Rule 218 addresses allegedly delinquent children who have been detained but have not had a required detention hearing within 24 hours. Of concern here, proposed Rule 218(c)(2) requires the juvenile court to release such a child to DCS if no parent or other responsible person can be located to assume custody of the child.[1] Ordering an allegedly delinquent child not already in DCS's custody into its custody without a finding under A.R.S. § 8-821(B) violates the parents' and child's constitutional and statutory rights, violates the separation of powers, and unnecessarily forces the child and family to navigate both the delinquency and dependency systems.

A. The Juvenile Court Lacks the Authority to Place a Child into DCS Custody as Outlined in Rule 218(c)(2).

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1. Current Rule 23(C) also requires the court to release a child to DCS under the same circumstances, but like the proposed rule, it also fails to comply with recently promulgated Rule 47.3, A.R.S. § 8-821, and Ninth Circuit case law, as set forth below.

Proposed Rule 218(c)(2) exceeds the authority of the juvenile court, a court of limited jurisdiction. Although the juvenile court has "original jurisdiction over all delinquency proceedings" brought under A.R.S. Title 8 and "exclusive original jurisdiction over all [other] proceedings" brought under Title 8, A.R.S. § 8-202(A), (B), its jurisdiction is nevertheless "as provided by the legislature or the people by initiative or referendum," Ariz. Const. art. VI, § 15, and thus Title 8 proceedings "and the court's jurisdiction over them are circumscribed by statute," *Ariz. Dep't of Econ. Sec. v. Stanford*, 234 Ariz. 477, 479, ¶ 8 (App. 2014).

The juvenile court is responsible for two different, but occasionally co-existing, types of proceedings involving juveniles: delinquency and dependency. A.R.S. § 8-202. In a delinquency, the juvenile court has "inherent discretion . . . in determining the disposition of a delinquent," *Mohave Cty. Juv. Court No. J-96-560*, 189 Ariz. 515, 517 (App. 1997), but is still constrained by concepts of due process, *In re Kory L.*, 194 Ariz. 215, 219 (App. 1999). In a dependency, the juvenile court has certain "inherent powers for the protection of children," but those powers may not be exercised in a way that is "inconsistent with statutory or constitutional provisions or other rules of the court." *Stanford*, 234 Ariz. at 480, ¶ 12 (internal quotes and citations omitted).

Dependent children are those adjudicated to be "[i]n need of proper and effective parental care and control and who ha[ve] no parent or guardian. . .

willing to exercise or capable of exercising such care and control;" "[d]estitute or who [are] not provided with the necessities of life;" or living in a home that "is unfit by reason of abuse, neglect, cruelty or depravity by a parent" or custodian. A.R.S. § 8-201(15)(a).

Orders to take a child into custody in the dependency context are controlled by statutes enacted to address parents' and children's fundamental rights of familial association and freedom from unreasonable seizure. *See, e.g.*, *Kirkpatrick v. Cty. of Washoe*, 843 F.3d 784 (9th Cir. 2016). A child may be taken into temporary custody only upon a court order, the child's parent's consent, or a showing of "exigent circumstances" including that temporary custody is clearly necessary to protect the child. A.R.S. § 8-821(A), (D). And any court order authorizing temporary custody under subsection (A) must be based "on a dependency petition filed by an interested person, a peace officer, a child welfare investigator or a child safety worker under oath or on a sworn statement or testimony" and a "finding that probable cause exists to believe that temporary custody is clearly necessary to protect the child from suffering abuse or neglect and it is contrary to the child's welfare to remain in the home." A.R.S. § 8-821(B); *see also* current Rule 47.3(A), (B). And before seeking a temporary-custody authorization, the party must state the "efforts made to determine the availability of less restrictive voluntary options, including care by a parent or

relative, that effectively removes or controls the danger" that warrants temporary custody. Ariz. R.P. Juv. Ct. 47.3(C)(1)(d). None of these requirements are reflected in proposed Rule 218(c)(2). As a result, the rule exceeds the juvenile court's authority.

B. Proposed Rule 218(c)(2) Ignores the Child's and Parents' Fundamental Right to Familial Association Without State Interference and Right to Due Process When the State Removes a Child from a Parent's Custody.

"A parent has a constitutional right to raise his or her child without government intervention" and the state—whether the court or DCS—"may not interfere with that fundamental right unless the court finds that: (1) the parent is unable to parent the child for any reason defined by statute; and (2) the parent has been afforded due process." *Carolina H. v. Ariz. Dep't of Econ. Sec.*, 232 Ariz. 569, 571, ¶ 6 (App. 2013); *see also Kent K. v. Bobby M.*, 210 Ariz. 279, 284, ¶ 24 (2005) (citing *Santosky v. Kramer*, 455 U.S. 745, 753 (1982)) (parents' fundamental liberty interest in custody of children); *Timothy B. v. Dep't of Child Safety*, 250 Ariz. 139, ¶ 10 (App. 2020) (citing *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)) (parents' and children's shared right of association). To that end, the Legislature and this Court "have established significant procedural safeguards to protect the fundamental right at stake in juvenile proceedings." *Francine C. v. Dep't of Child Safety*, 249 Ariz. 289, 295, ¶ 12 (App. 2020). Because of the

importance of those fundamental rights, "the rationality of statutes which abridge [the maintenance of the parent-child relationship] is subject to strict scrutiny." *Maricopa Cty. Juv. Action No. JS-7359*, 159 Ariz. 232, 236 (App. 1988).

Rule 218(c)(2) interferes with those fundamental rights by placing a child in DCS's custody without a finding, or even an allegation, that the parent is unfit or that the child is in any way at risk. Indeed, the rule does not require that anything more than a cursory effort to locate a parent or other responsible adult is made before the child is remanded into DCS's custody. This cannot satisfy the parents' and child's rights to due process.

The Department recognizes that the child in question has a right to be released from detention when a timely hearing is not held. That does not mean, however, that the child's right to associate with family should be infringed upon, particularly when the child is not at risk of abuse or neglect.

C. The Rule Usurps DCS's Statutory Duty to Investigate Allegations of Abuse and Neglect Prior to Taking Custody of a Child.

The Department is statutorily responsible for, among many other things, investigating and responding to allegations of child abuse and neglect. *See*, *e.g.*, A.R.S. § 8-304(B); *Ariz. Dep't of Econ. Sec. v. Superior Ct.* [*Estay*], 178 Ariz. 236, 240 (App. 1994) (noting DCS's predecessor agency's duty to "fully investigate all complaints of alleged dependency").

The Department fulfills its duty to investigate allegations of child abuse and neglect by receiving reports through a "centralized intake hotline" to ensure that investigations are handled in a timely, efficient, and transparent manner. A.R.S. § 8-455(A), (B). The Department has specially trained investigators who are required to use "[u]niform safety and risk assessment tools to determine whether the conduct [in the report] constitutes abuse or neglect" and to determine whether the family is in need of services and whether the child needs to be taken into temporary custody. A.R.S. § 8-456(A), (C), (E). The Department, through its investigative function, may be able to locate and engage a parent to ensure that the child can be picked up by a parent or other responsible adult upon the child's release from detention, avoiding the imposition of an unwarranted removal. And, if after investigation DCS has determined that a child is *not* dependent, the juvenile court cannot order DCS to take responsibility for the child until the court has adjudicated the child dependent.[2]

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2. *See Estay*, 178 Ariz. at 240-41. In *Estay*, the court of appeals recognized the juvenile court's inherent power to substitute DCS's predecessor agency as a petitioner to a dependency where that agency *had independently concluded* that the child should be adjudicated dependent. But no Arizona court has held that the judiciary may usurp DCS's executive authority to determine the conclusion of its own investigation by ordering DCS to take custody of a child that the agency has concluded after investigation is *not* dependent *and to compel DCS to prove the opposite.*

In 2019, the Legislature limited an interested party's ability to file a dependency petition concerning a child who is involved in delinquency proceedings. A.R.S. § 8-841(B). Such a petition cannot be filed until the petitioner contacts DCS's hotline "at least fourteen days before filing the petition and provides [DCS] with notice of the intent to file a petition" and the facts supporting the allegations to be contained in the petition. A.R.S. § 8-841(B)(1). Importantly, if a petition is filed under subsection (B), "the court may not issue any temporary orders with respect to the department, including placing the child in the department's legal or physical custody." A.R.S. § 8-841(H). The court must "provide the department . . . at least seventy-two-hours written or electronic notice of [a] hearing [on the petition] and an opportunity to be heard as to any proposed orders." *Id.* The law provides DCS the opportunity to investigate whether an allegedly delinquent child lacks proper and effective parental care and control before that child is unilaterally placed into DCS custody.

For all of the reasons outlined above, this Court should modify proposed Rule 218(c)(2). (*See* Appendix at 4.)

IV. Comments on Part III, Dependency, Guardianship, and Termination of Parental Rights; Specifically Rules 313, 324, 329, 333, 334, and 335.

A. Rule 313.

The Department seeks to modify proposed Rule 313 to allow it to access a court file in cases where DCS is ordered to investigate but is not a party.

Rule 313(a)(1) governs access to juvenile files without a court order and provides that DCS "may inspect and copy case records" only "when named as a party." Otherwise, under subsection (a)(2)(C), DCS must obtain a court order to access records and, to do so, must make "a showing that inspection is required to carry out DCS responsibilities." This requirement delays DCS's ability to review pleadings or other documents on file with the juvenile court that may be invaluable to DCS's ability to promptly and thoroughly investigate the child's dependency status, as it is required to do. A.R.S. §§ 8-304(B); 8-451(B)(1). Denying DCS access to that information could compromise child safety by causing delay while DCS obtains a court order.

The Department requests to be added to the list of entities entitled to access juvenile court records without a court order in cases where it is not a party but has been ordered to conduct an investigation. (*See* Appendix at 4.)

B. Rule 324.

Proposed Rule 324, a new rule, requires DCS to provide notice of placement changes to all parties. Compliance will require two separate notices, one to the minor's attorney and/or guardian ad litem (GAL) that contains the actual placement location and contact information, and a second to other parties' counsel

that advises only that a change in placement occurred. The rule would require DCS to provide those notices in advance except when DCS is unable to do so because the placement change was necessary to protect the child. In those cases, DCS must provide the notices within 24 hours of the placement change, excluding weekends and holidays. The proposed rule places an unrealistic burden on DCS.[3]

Although DCS may provide advance notice of a placement change, the proposed rule requires that when the placement change is necessary to protect the child, DCS must notify the parties within 24 hours of the placement change. But in such emergency situations, a CSW's focus must be on the child's safety and well-being, and thus the requirement is unreasonable. In such situations, the CSW works diligently to ensure a smooth transition into the child's new home. The CSWs are likely transporting children themselves to the new placement; coordinating mental, behavioral-health, educational, and medical services; and addressing any other needs the children may have, all while working from the field, rather than an office. Completing those tasks may take more than 24 hours. Requiring CSWs to notify the parties of the placement change within the first 24

3. The proposed rule contemplates DCS generating at least two notices for each placement change. In fiscal year 2020, DCS made almost 16,000 placement changes.

hours takes attention away from the children and their needs and shifts it to compliance with this rule.

The Department appreciates the need for prompt notification of a change in a child's placement, particularly for the child's attorney or GAL. However, providing notice to the proper parties will take time in addition to the time already needed to coordinate and implement the placement change itself. Consequently, DCS requests that the notification period be extended from 24 hours to 72 hours from the time of the placement change. (*See* Appendix at 5.)

C. Rule 329.

The State Bar proposed an amendment to Arizona Rules of Civil Procedure 4.1 and 4.2, requiring that a party seeking to serve another party by publication move for the trial court's permission before publishing, and that the motion be "supported by [an] affidavit that sets forth the serving party's reasonably diligent efforts to serve the person." (Petition to Amend Rules 4.1 and 4.2, Attachment A, filed in R-21-0021 on 1/8/21.) The Department commented to address its concerns that the proposed amendment requires the serving party to submit the affidavit of diligent search when making the motion to permit service by publication, contrary to the current practice in juvenile court whereby the serving party asks that the court accept service by publication and supplies the affidavit *at*

the time of the publication hearing. See Comment filed in R-21-0021 on 4/30/21 (incorporated herein by reference).

The State Bar replied that its amendment does not change current practice, but allows "the serving party in a juvenile dependency, termination, or guardianship case" to "move the juvenile court to set a publication hearing . . . and then follow up at the publication hearing by submitting" the affidavit described in the amended rules. (Reply filed in R-21-0021 at 6.) However, juvenile courts and practitioners might interpret proposed Rules 4.1 and 4.2 differently.

The State Bar also suggested that DCS should direct its comment to proposed Rule 329.[4] (*See* Reply at 7.) For the reasons outlined in DCS's comment in R-21-0021, DCS requests that this Court clarify Rule 329 to allow the court, a petitioner, or a movant in a dependency, guardianship, or termination matter to set or request that the court set a publication hearing, and that the serving party may submit an affidavit of diligent search at the time of the publication hearing, rather than requiring that such affidavit be filed when service by publication is requested or initiated. (*See* Appendix at 5-6.)

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4. The State Bar did not provide notice of its proposed amendment to the JRTF prior to or even after filing the petition, and so the proposed amendment was not a part of the discussions regarding service by publication and the incorporation of Civil Rules 4.1 and 4.2.

D. Rules 333 and 334.

The Legislature established a procedure for the juvenile court to review the taking of temporary custody of a child. A.R.S. §§ 8-824(A), (establishing that the purpose of the preliminary protective hearing (PPH) is "to review the taking into temporary custody of a child"); 8-825(C) (requiring temporary custody determination at PPH). A parent who wishes to challenge the petitioner's continued custody of the child need only appear at the PPH and contest it. A.R.S. § 8-824(E); Ariz. R.P. Juv. Ct. 51. To effectuate its intent, the Legislature required the petitioner to provide the parent with notice of the PPH. A.R.S. § 8-823(B)(7).

Separately, the Legislature established an initial dependency hearing (IDH). *See* A.R.S. §§ 8-842, -843. Nowhere in those statutes is the juvenile court authorized to conduct a review of temporary custody at an IDH. *Id.* Notwithstanding that the Legislature explicitly established the PPH and IDH as separate hearings with separate purposes and findings, and that this Court promulgated current Rule 51 to be consistent with that statutory scheme, proposed Rules 333 and 334 conflict with the statutes by requiring the court to conduct a temporary-custody review at an IDH. When a rule conflicts with a valid statute, the statute must prevail. *See Valerie M. v. Ariz. Dep't of Econ. Sec.*, 219 Ariz. 331, 336, ¶ 22 (2009).

The court of appeals recently addressed the distinction between the IDH and PPH, concluding that because a parent "did not challenge temporary custody at the PPH, Rule 51 d[id] not apply." *Dep't of Child Safety v. Stocking-Tate*, 247 Ariz. 108, 114, ¶ 17 (App. 2019). But, as the *Stocking-Tate* court noted, a parent's "failure to avail himself of Rule 51 does not mean he is unable to challenge temporary custody." *Stocking-Tate*, 247 Ariz. at 114, ¶ 18. At any time after the temporary custody hearing, the parent can still seek an order returning the child to the parent's physical custody, but must do so under the provisions of A.R.S. § 8-861 and current Rule 59 (proposed Rule 342).

The proposed rules require the court to conduct a contested temporary-custody hearing on a parent's request at an IDH if the parent was not served prior to the PPH and did not appear at that hearing, even if the parent had notice of the PPH under A.R.S. § 8-823. Rule 333(a) conflates the notice required prior to a PPH with service of the dependency petition, further demonstrating the proposed rules' disharmony with relevant statutes.[5] The Legislature requires the petitioner to provide parents with *notice* of the PPH *before* that hearing and requires the petitioner to *serve* the parents *at* the PPH. A.R.S. §§ 8-823(B)(7), (E); -841(F).

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5. Similarly, proposed Rule 334(C)(3) cites to the temporary-custody statute—A.R.S. § 8-825—without reference to the fact that the statute explicitly refers to "[t]he court's determination in the *preliminary protective hearing*," not an IDH.

Because of the short timeframes involved, it is virtually impossible for the petitioner to serve a parent prior to the PPH. Ariz. R.P. Juv. Ct. 48(E) (service of process "shall be completed five (5) days prior to the court hearing"); A.R.S. § 8-824(A) ("[t]he court shall hold a [PPH] to review the taking into temporary custody . . . .not fewer than five days nor more than seven days after the child is taken into custody, excluding Saturdays, Sundays and holidays" and may grant one continuance that does not exceed five days if "clearly necessary to prevent abuse or neglect"). The Legislature knew that parents would not be *served* in advance of the PPH, but that the petitioner would *notify* the parents of that hearing, and the parents would need to attend if they wished to immediately contest continued temporary custody.

Because the proposed rules permitting a contested temporary-custody review at an initial dependency hearing exceed the scope established by statute and are not necessary to preserve a parent's opportunity to contest temporary custody, this Court should instead adopt the version of Rules 333 and 334 in DCS's Appendix, which are consistent with current Rule 51 and applicable statutes. (*See* Appendix at 6.)

E. Rule 335.

The Department filed a comment to the JRTF's proposed Rule 52.1, an interim rule addressing placement of children in Qualified Residential Treatment

Programs (QRTPs) pursuant to federal law. *See* Comment filed June 14, 2021, in R-20-0044. The JRTF filed a reply in which it suggested alternate language. The Department requests that this Court adopt language in Rule 335 consistent with the JRTF's reply. (*See* Appendix at 6-8.)

V. Comments on Part VI, Appeals; Specifically Rule 601.

Although the JRTF's list of final orders in proposed Rule 601 might be helpful, the court of appeals correctly decided *Jessicah C. v. Department of Child Safety*, 248 Ariz. 203 (App. 2020), the case cited in the JRTF's comment. Accordingly, including orders removing a child from a parent's physical custody under subsection (b)(2)(E) is an incorrect statement of the law and should be removed.

The Department will not rehash the appellate court's thorough analysis and sound reasoning in *Jessicah C.*, except to note that the court correctly held that a parent whose child has been removed from his or her custody is not deprived of review. On the contrary, special-action review "is preferable" in cases involving a child's placement "[g]iven the fluid, time-sensitive nature of placement determinations," the fact that any remedy by appeal is not "equally plain, speedy, and adequate," and the "accelerated review" afforded by special action. *Jessicah C.*, 248 Ariz. at 207, ¶ 15 (quoting *Brionna J. v. Dep't of Child Safety*, 247 Ariz. 346, 350, ¶ 14 (App. 2019); Ariz. R.P. Spec. Act. 1(a)).

If an appellant disagrees with *Jessicah C.*, review of that holding is not necessarily foreclosed because under subsection (b)(2)(N) of the proposed rule, an aggrieved appellant may assert that the appeal is from "any other order that is final pursuant to Arizona case law." The Department therefore recommends that this Court delete subsection (b)(2)(E) and the corresponding proposed Comment to the rule. (*See* Appendix at 8.)

VI. Conclusion.

The Department recognizes and appreciates the efforts of the JRTF and other stakeholders in drafting the proposed rules of procedure for juvenile proceedings. The rules identified herein are but a small subset of the proposed rules and reflect DCS's effort to ensure that juvenile proceedings continue to result in prompt and just determinations for children and families while promoting children's safety, health, and welfare. To that end, DCS submits proposed amendments to the proposed rules addressed in this Comment and the attached Appendix.

DATED this 22nd day of July, 2021.

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