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IN THE SUPREME COURT
STATE OF ARIZONA

PETITION TO AMEND RULE 44, ARIZONA RULES OF PROCEDURE FOR THE JUVENILE COURT

Supreme Court No. R-15-0013

Comment of a Parent Attorney in Response to the Department of Child Safety and the Arizona Attorney General Request to Amend Rule 44

Pursuant to Rule 28, Arizona Rules of the Supreme Court, Dana Pyles, as an individual attorney for parents in dependency, submits this Comment regarding the Petition to Amend Rule 44, R-15-0013.

Introduction

The request for a rule change by the Arizona Department of Child Safety (DCS) does nothing to further fundamentally fair practices or outcomes. If anything, it is an attempt to blatantly skew the balances of justice. The DCS makes little effort to comply with the law as it is written, but this revision is an attempt to codify the bad practices of that office.

Disclosure is typically untimely. Attorneys for parents and children are constantly behind in "current information". The DCS has a problem with its database CHILDS, as it is apparently very cumbersome and onerous. Rather than employ current rules to allow for a specific exception to disclosure or update/fix its database, it is attempting to change the rules of play. There was mention of good faith effort to resolve disclosure disagreements in the petition (page 3, first paragraph). Virtually all disclosure in dependency cases comes from the DCS. Little, if any, disclosure is created or produced by the parent or child. So, problems with lack of or no disclosure are almost exclusively a problem for the DCS. There is little to no good faith effort from the DCS to produce timely disclosure as almost all subpoenas to obtain

said documents are issued AFTER the due date for those documents. It is ironic that the DCS would suggest that the other parties are failing to make good faith efforts.

The request for the changes is to solely benefit the DCS. It does nothing to further fundamentally fair practices or even the playing field.

A. General Disclosure

The initial paragraph about disclosure appears to rewrite that which was said in the section immediately following. A major change is that it now says that only *potentially* relevant information is to be disclosed (the use of the conjunctive at the end of the list demands that all four elements be met). Who is to determine what is relevant? Currently, everything that is not privileged is to be disclosed. This is a slippery slope of who decides what is actually potentially relevant to the proceeding.

Furthermore, with the advent of electronic disclosure (either by a shared/cloud space or by compact disc), there is no need to have an exception where a party may only view without copying said disclosure. All documentation can and should be disclosed.

B. On Going Disclosure.

The DCS is trying to move ongoing disclosure requirements from every 5 days to only 30 days before a trial or adjudication. On top of that enormous time change, the DCS is submitting for an additional 15 days for redaction. In this area of law, very little is subject to redaction. It is essentially limited to who made the hotline report, social security numbers, and confidential addresses. Nonetheless, many other items are redacted such as the substantive information contained in the hotline report and other non-identifying information. Despite the aggressive redacting that the DCS does currently, 15 days is excessive to accomplish that which the law requires. If the DCS makes a timely effort to obtain documents in time for court, but the documents are not produced to the DCS in time, then a discussion about resetting the hearing is appropriate if those documents are necessary for that hearing. The rule change makes no allowance for it. Nor does the rule change require that the DCS make timely requests. DCS delays are at the heart of the issue here.

Currently, all parties must disclose any discoverable material within five days. If the DCS case manager is doing the job correctly, there should be updates on all services each week. These documents include substance abuse classes, drug testing, parenting classes, visitation, counseling notes, and possibly psychological evaluations. This is how the case manager would stay abreast of the progress of the entire family. In actual practice, however,

DCS often times possesses disclosure for weeks and months, failing to disclose to counsel, absent a direct request or an upcoming court hearing. The change request would fully strike this requirement. This would leave all of the other parties in limbo and guessing about the progress of the case. The parties are then encouraged to rely solely upon the written opinions of the case managers in their court reports. There would be no facts provided to back up those opinions. There would be no proof that this case manager is actually staying abreast of the issues in the case. Parents and children are to simply trust the government ("they're here to help"). This adds to a transparency problem as well. This is not only highly detrimental to the parents in the case, but also the children who rely upon the Department for services while out of care. In the absence of intense legislative oversight, the DCS will likely find itself in the same situation it found itself in with the CHILDS controversy and the current lawsuit by children in the Arizona foster care system.

Disclosure of the progress of all parties is necessary to have honest and productive conversations with the appointed attorneys. There is no ongoing disclosure requirement if no adjudication is set (if the parent chooses not to contest allegations). Without ongoing disclosure, attorneys are hamstrung in their efforts to provide legal advice and they have no actual report from the service providers. This will become "hearing by ambush", as no one but the DCS will know what is happening in the case prior to court (as it is rare to receive a court report in the mandatory time frames). Further, the court will not know whether the Department is fulfilling its statutory duty to the entire family.

Additionally, the change request would require parents to bring any number of documents to the preliminary protective hearing, prior to meeting with appointed counsel. All of those documents are ones which the DCS case manager can and should have requested prior to removal of the child or at a minimum prior to filing the dependency petition. This would be a prime source of information for the case managers to determine if interference in the family unit is necessary. These are documents that the DCS should have prior to removal so as to comply with the law that requires reasonable grounds exist before the removal of the child (8-821) and the filing a dependency petition.

C. Disclosure for trial/adjudication

The petition for change seeks to fundamentally change preparations for trial. Currently, all parties are to have a disclosure statement of witnesses and exhibits, as well as, copies of all exhibits attached to the disclosure statement sent to all parties 60 days after proper service.

This rule is clearly designed to give all parties the chance to investigate and prepare for trial. Instead, most courts exercise the right to change that deadline and require disclosure statements and exhibits only 30 days before trial. For the disclosure statement, this generally translates into the DCS using boilerplate language, such as, the Department intends on using "all reports and records from all service providers, including but not limited to […]". This violates general disclosure rules as it does not give opposing counsel actual notice of what the DCS intends on using. For exhibits, this translates into disclosing hundreds, sometimes thousands, of pages of documents past the 30 day deadline and many times days before trial. Thus, the due process rights that the Supreme Court of the United States has clearly stated that parents have, is violated.

IF provided all of the disclosure 30 days before the adjudication hearing, parent and child attorneys typically would have enough time to prepare for the hearing. Typically it is the DCS who possesses all of the relevant disclosure. The rule change would have this disclosure set at only 30 days before the adjudication hearing. Given that the DCS almost never complies with this full rule or court order, defense attorneys routinely struggle to be fully prepared for trial and routinely make "late disclosure" objections to the DCS cases and are still forced by the court to proceed with trial. The DCS has already taken the mile when given the inch by the Court, giving it another inch is asking to be twice bitten.

Even more concerning is that the DCS is requesting that the only consequence it has for late disclosure get removed from the paragraph. Originally, "no witness shall be called at trial other than those disclosed in accordance with this rule, except for good cause shown" was a substantial consequence for the DCS. Failure to alert all parties of a potential witness required exclusion unless the DCS could prove good cause. It is a heady reminder that is necessary in this section. The DCS struggles to comply with basic disclosure, so repeated reminders of the consequence are necessary. The DCS would rather be allowed to NOT disclose someone and then call that person at trial. Typically, this is called "Trial by Ambush". Arizona has worked hard to erase trial by ambush and even the playing fields. The DCS seeks to tear down that effort one brick at a time.

Guardianship and severance trials/adjudications both reference the basic disclosure rules. Again, the DCS removes the 5 day disclosure requirement and the requirement of a disclosure statement within 30 days of the initial hearing. Again, the rewrite does not further

justice, it allows the DCS to be even more lackadaisical about disclosure and disclosure statements.

D. Consequences

Currently, the only recourse parents and children have against late disclosure are motions to compel, orders to show cause, preclusion of evidence, or continuation of the hearing. Typically, courts occasionally grant continuances and/or preclusion of the evidence. The current rule requires disclosure within five days, and the DCS rarely meets that requirement. Moreover, the current effort by the DCS is to push the burden onto defense counsel.

The DCS attempts to prevent any backlash from its late disclosure problems by adding a rewritten section I.. Motions to compel and for sanctions are rarely used. Again, the DCS attempts to shift the burden of disclosure on to the other parties. Here, the DCS wants everyone else to have made best efforts to cajole the DCS into proper disclosure and submit a signed affidavit stating so. This moves the burden onto defense counsel to prove that they attempted to get information, which should have been freely disclosed, from the DCS.

It is the duty of each party to disclose on time, and if not there must be consequences. The DCS submits a revision that removes this consequence. There is no detriment to the DCS for its late disclosure or failure to act in good faith. This allows the giant in the courtroom no restraint and no consequences.

Conclusion

Many of the specific changes appear to be promulgated by the CHILDS database debacle. Clearly, the DCS needs to update it system. In the meantime, the DCS needs to require specific leave to disclose those records later than the 5 day requirement. Rewriting the bulk of the rule serves only one party, the DCS. The public and our children are the ones who suffer from this. The DCS fails to comply with many of the disclosure requirements now, and giving it the additional leeway requested only encourages the DCS to take another mile. Allowing this rule change gives away the last of the vestiges of justice that this court can provide.