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ARIZONA SUPREME COURT

In the matter of:	)	
	)	
PETITION TO ADD NEW RULE 47.3	)	Supreme Court No. 17-0046
CONCERNING CHILD REMOVAL	)	
TO THE RULES OF PROCEDURE	)	PETITIONER'S REPLY TO
FOR THE JUVENILE COURT	)	COMMENTS
	)	

Pursuant to Arizona Supreme Court Rule 28, David K. Byers, Director, Administrative Office of the Courts, Arizona Supreme Court, respectfully submits this reply to the four comments received in this matter pursuant to order of this court. Changes recommended by commenters and accepted by petitioner or recommended by petitioner in response to the comments and other feedback provided during the comment period are explained below and contained in Appendix A of this reply.

1. Background and Purpose of the Proposed Rule New Rule

As explained in the petition, the Department of Child Safety (DCS) has authority based on the criteria stated in A.R.S. § 8-821 (B) to take custody of a child pre-petition without a court order. The statute as amended does not expressly delineate when the department must seek court authorization to take temporary

custody of a child rather than taking temporary custody on its own authority. Instead, federal appellate civil rights case law provides direction regarding when court authorization must be obtained in order to take custody of a child. Consequently, the proposed rule provides a due process and Fourth Amendment compliant procedure for the Department to obtain a court order authorizing temporary custody but does not address when this procedure must be used nor provide for review of DCS use of the procedure.

Commenter Del McCardle contends this court should require the judge to determine "the propriety of the seizure (of a child) in a ruling for the record" at the preliminary protective hearing (Rule 50) when the Department of Child Safety (DCS) took temporary custody of a child without court authorization. Currently, if DCS has taken a child into temporary custody Rule 50(A) requires the court to "determine whether continued temporary custody of the child is necessary." Therefore, the issue of the pre-petition authority of DCS to have taken a child into temporary custody is not before the court at this proceeding. Even if DCS should obtain court authorization as provided in this proposed rule before a child is initially taken into temporary custody the court must determine at the time of the hearing whether continued temporary custody of the child is "clearly necessary to protect the child from suffering abuse or neglect." It appears the issue of DCS compliance with the case law concerning the need for court authorization to take temporary custody

of a child more likely falls under the special action jurisdiction rather than the dependency jurisdiction of the courts. Legislative clarification of the handling of this issue may be warranted. Petitioner recommends the Court reject the change proposed by Mr. McCardle.

2. Purpose

The Department of Child Safety comment recommends the proposed rule be limited to providing a process to obtain authority to take temporary custody of a child pre-petition. The comment states, "The Department will seek law enforcement assistance to enter premises when required." This is consistent with the authority provided to the court in 8-821(A) to "issue an order that authorizes the department to take temporary custody of a child." Since the petition was filed petitioner discussed with DCS and court personnel and reviewed the Arizona statutory authority of DCS and law enforcement to conduct an involuntary search for a child who is the subject of an emergency temporary custody order, especially in a private place other than the residence of the child. This review revealed that there is no express statutory authority for such a search as there is to search for the subject of an arrest warrant.[1] Without such specific statutory authority, petitioner agrees the words "to enter premises to locate a child and" should be deleted from proposed Rule 47.3(A) and (C)(1) and the requirement to identify locations to be searched at

[1] A.R.S. § 13-3912(A)(6)

(C)(1)(f), (D)(1)(c), and the last sentence in (D)(1) also should be deleted as unnecessary.

3. Standard of Proof

The petition proposed to implement the requirement of A.R.S. § 8-821(A) that temporary custody is "clearly necessary to protect the child from suffering abuse or neglect," and for Indian children the additional requirement under the Indian Child Welfare Act and 25 C.F.R. § 23.113(b)(1) that "the facts stated must provide probable cause that emergency temporary custody is necessary to prevent imminent physical damage or harm to the child."

Commenter Christina Phillis contends on behalf of the Arizona Public Defender Association (APDA) that providing a different standard of removal for Indian and non-Indian children violates "the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution." Petitioner maintains that the proposed rule does not involve state establishment of "different standards based upon race, national origin." Instead the Court would be applying the standards for removing a child from the custody of parents or a guardian already established by the Indian Child Welfare Act (ICWA). There is no basis under federal law for the Court to apply the ICWA standard to all children as Ms. Phillis proposes and in doing so the Court would be ignoring the standard established by Arizona law. Additionally, federal courts have found justification in federal Indian law and history

for disparate treatment of Indian people for reasons other than race or national origin.[2] Therefore, petitioner recommends rejection of the suggested changes.

Petitioner recommends rejection of commenter Lori Ford's suggested changes in the rule to require proof of "immediate" danger to a child before removal from the home may be authorized. This is inconsistent with the requirement of A.R.S. § 8-821(A) that temporary custody is "clearly necessary to protect the child from suffering abuse or neglect." This provision does not contain any limitation that an identified threat of abuse or neglect must be immediate rather than imminent as provided in proposed subsection (C)(1)(b). In order for DCS to remove a child without court authorization A.R.S. § 8-821(B)(1) requires "probable cause exists to believe that the child is…1. A victim or will imminently become a victim of abuse or neglect…" The more broadly worded grounds for the court to authorize emergency temporary custody should not be construed to be more narrow than the DCS authority to take temporary custody without court authorization.

Ms. Ford recommends incorporation of language throughout the rule concerning placement of a child in family or kinship care instead of taking emergency temporary custody of a child. Consideration of family and kinship care is required by the subsection (B)(2) requirement that "no alternative means to

[2] Morton v. Mancari, 417 U.S. 535 (1974). See also Bethany R. Berger, *Reconciling Equal Protection and Federal Indian Law*, 98 Cal. L. Rev. 1165 (2010).

effectively protect the child is available. Therefore, petitioner agrees with the suggestion to add the words "including family or kinship care." to this phrase in (B)(2) and (D)(1) and after "voluntary options" in (C)(1)(d).

4. Application Content

Proposed subsection (C)(1)(d) would require the applicant to state "the availability of remedial services or other voluntary options that would remove or control the danger." The DCS comment recommends deletion of the words "remedial services or other" because "It is likely too early in the process to identify services needed as a family functioning assessment has not been done." Commenter Christine Phillis criticizes "the availability of remedial services" as insufficient under the ICWA regulations, "This is drastically different than describing what efforts were made to provide those available services or remedial measures to the parents, as required in 25 C.F.R. § 23.113(d)(10). Petitioner agrees with DCS that the delivery of remedial services is an unlikely option to remove or control the danger to the child in the circumstances of emergency temporary custody authorization. Petitioner also agrees with Ms. Phillis that a description of efforts to identify voluntary options would be useful to the court in determining whether DCS meets its burden under Subsection B(2) of proving "no alternative means to effectively protect the child is available." Therefore, petitioner recommends that

Subsection (C)(1)(d) be amended by adding "efforts made to determine" and deleting "remedial services or other."

In its comment DCS struck proposed subsection (C)(1)(g) without explanation. It would require the applicant to state any point in time by which action to protect the child must be taken. Based on discussion with the commenter this requirement is neither practical nor needed. Therefore, petitioner agrees with the DCS recommendation that it be deleted.

Proposed subsection (C)(1)(h) requires the applicant to state whether authority is needed to execute the order between ten p.m. and six-thirty a.m. and subsection (d)(1)(e) requires the court to find good cause for this request as provided by statute in order for a search warrant to be executed during these hours.[3] On behalf of APDA Ms. Phillis contends "if the removal of a child from his or her parent is necessary to the extent that DCS or law enforcement is asking for an emergency order and cannot wait for a hearing on the merits, then the removal should be necessary at any time of day or night." If the Court agrees with petitioner's recommendation to remove from the proposed rule the authorization to conduct an involuntary search for the child authorized to be removed, petitioner agrees the additional authorization to conduct a search during these hours should also be deleted.

[3] See A.R.S. § 13-3917

Proposed subsection (C)(1)(i) would require the applicant to state "whether law enforcement assistance is requested." DCS comments, "Every order should authorize and require law enforcement assistance in effectuating the judge's order." Petitioner notes the court is authorized by A.R.S. § 8-821(A) only to "…issue an order that authorizes the department to take temporary custody of a child..." The only statutory basis for law enforcement participation in removal of a child is to prevent a crime under A.R.S. § 8-821(G) which states, "A person who knowingly interferes with the taking of a child into temporary custody under this section is guilty of a class 2 misdemeanor." Participation on this basis is discretionary in the performance of the duty of law enforcement officers to enforce the law. Without additional statutory authority this cannot be court ordered as DCS suggests. Therefore, petitioner recommends deleting subsection (C)(1)(i) as DCS requests and also proposed subsection (D)(1)(d) which would provide for the court to authorize law enforcement assistance.

Proposed subsection (C)(1) requires that specified information be included in the application if there is reason to believe the child is an Indian child. Ms. Phillis is mistaken in her comment that "25 C.F.R. § 23.113(d)(1-10) lists information that **must** be included in the actual request (called a "petition for a court order" under ICWA language) for emergency removal." This subsection of the regulations actually states that the listed information **should** be included in the emergency

removal petition. The word should was used in the regulations advisedly. When the BIA issued the proposed rule in 2015, it stated: "We welcome comments on all aspects of this rule. We are particularly interested in the use of 'should' versus 'must.'" 80 Fed. Reg. 14880, 14882 (Mar. 20, 2015). The commentary indicates "should" was used when an absolute standard was not generally accepted in all jurisdictions.

The information about an Indian child required by proposed subsection (C)(1) is needed by the court to determine the appropriate burden of proof under subsection B and whether efforts have been made to identify voluntary options under subsection (B)(2). The other information listed in 25 C.F.R. § 23.113(d) may be appropriate for a petition but not an application for an ex parte order for which these proposed rules provide. Additionally, under proposed subsection (D)(4) emergency temporary custody authorized under the proposed rule will terminate unless a dependency petition is filed within 72 hours of the removal of the child. Subsection (C)(1) tracks § 23.113(d) by providing that the dependency petition **should** contain the additional listed information.

Commenter Lori Ford suggests changes throughout the rules that would require a separate application and order for each child for whom removal authority is sought. Prior to this comment, Petitioner considered and rejected the need for such a requirement. Instead, the proposed rule requires "particular reasons each

child" is in danger ((C)(1)(b)) and "a detailed account of circumstances… including the facts that support the reasons given" ((C)(1)(c)). Similarly, proposed subsection (D)(1)(a) requires the temporary custody order to provide "a factual basis for the determination for each child." Consequently, petitioner recommends rejection of the suggested language.

5. Application Form

The Presiding Judge of Maricopa County is authorized to designate a judicial officer to receive and respond to applications under this rule submitted from anywhere in the state. Judge Barton submitted a comment requesting clarification that the web interface designed by the Superior Court in Maricopa County will be the primary form of communication of the application as provided by the proposed rule. Oral communication is provided to be available as a backup only. Judge Barton recommends deleting references to oral statements from proposed subsection (C)(1) and adding clarifying language to subsection (C)(2). Petitioner recommends deletion and adoption of the language recommended by Judge Barton as edited as follows:

> 2. **Form.** The application must be submitted in a written format approved by the Administrative Director of the Supreme Court. ~~except that~~ If an applicant is unable to submit a written application using ~~the~~ an approved written format, ~~then~~ the applicant may apply for emergency temporary custody by recorded oral statement or by other means acceptable to the court made under oath ~~to one of the judicial officers designated by the presiding judge of the superior court in maricopa county to receive and respond to applications under this rule~~. The recorded oral statement or other means of communication must

~~contain the information required by paragraph (c)(1) of~~ otherwise comply with this rule.

This change addresses the concern expressed by Judge Barton and also permits authorization of other means of communication such as fax and encrypted email as a backup to the primary internet based system. Subsection (C)(1) clearly requires submission of the application to judicial officers of the Superior Court in Maricopa County.

6. Evidence

Proposed subsection (C)(3) permits use of "reliable hearsay" in the decision whether to authorize emergency temporary custody. Mr. McCardle commented, "I don't believe it's wise for us to allow hearsay from caseworkers. If we're to allow "reliable" hearsay, we must make the warrant application conducive for the DCS Seizing Worker to supply any and all exculpatory information as evidence to be considered prior to granting a warrant." Petitioner disagrees regarding the use of reliable hearsay. Use of reliable hearsay for this ex parte pre-petition proceeding is reasonable and consistent with Fourth amendment law[4] and with Rule 51(C)(1) concerning use of hearsay for the temporary custody hearing.

Commenter Lori Ford suggests the Court include language in the proposed rule requiring applicants to submit evidence of abuse or neglect in the form of audio

[4] State v. Watling, 104 Ariz. 354, 453 P.2d 500 (1969)

and video from a body camera. She does not explain this suggestion or provide authority for the court to dictate by rule how a party must meet its burden of proof. Petitioner recommends rejection of the suggested changes to the proposed rule.

7. Consideration

Proposed subsection (C)(4) provides, "The judicial officer may question the applicant and any witnesses orally or in writing. Any oral questioning must be recorded." This provision is based on the requirement for search warrants in A.R.S. § 13 3914(C) that "In lieu of, or in addition to, a written affidavit, or affidavits, as provided in subsection A, the magistrate may take oral statement under oath which shall be recorded on tape, wire or other comparable method." In discussions of this rule personnel of the Superior Court in Maricopa County indicated a requirement to record any oral communication with DCS staff would serve no useful purpose and should be deleted.

8. Notice

Proposed subsection (D)(3) requires that the applicant provide the parent of guardian the application and order that grants temporary custody when custody of a child is taken. Petitioner agrees with DCS that the time for delivering this notice should be the same as provided by A.R.S. § 8-823 for delivery of the temporary custody notice. Since this time varies with the circumstances petitioner agrees the notice be provided "as required by law" rather than "as soon thereafter as possible."

9. Execution and Duration

Proposed subsection (D)(4) requires, "The applicant must provide notice of the execution of the order to the court that issued the order." The Arizona Association of Superior Court Clerks (Clerks) and DCS recommend deletion of this requirement. Based on the comment by the Clerks and discussion concerning this provision it appears this notice would serve no useful purpose. Proposed subsection (D)(5) will require the applicant to file the application and order when a dependency petition is filed. Therefore, petitioner agrees with deletion of this requirement.

10. Filing

The petitioner agrees with the DCS recommendation to delete the unnecessary reference to the Temporary Custody Notice (TCN) from the requirement that the application and order be filed with the dependency petition. The petitioner also agrees with the Clerks and DCS recommended deletion of the proposed requirement that applications and orders be filed with the court even if no dependency petition is filed. Based on the comment by the Clerks and discussion concerning this provision it appears this filing would serve no purpose.

The Clerks suggest the option of authorizing the clerks to maintain a record of the application and order in the court's case management system. Based on discussion of the practice used for search warrants, the Superior Court in Maricopa County intends to maintain a database of applications and orders it has handled as it

does with search warrants. Petitioner is not aware of any reason this administrative practice must be authorized by rule.

Respectfully submitted this 31st day of October, 2017.

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Appendix A

Rule 47.3 Court Authorized Removal

A. Purpose. On application under oath by a child safety worker, a child welfare investigator, or a peace officer, the court will determine ex parte whether to authorize the applicant ~~to enter premises to locate a child and~~ to take emergency temporary custody of the child.

B. Burden of Proof. The applicant shall have the burden of stating explicit facts that provide probable cause to believe:

1. emergency temporary custody of the child is clearly necessary to protect the child from suffering abuse or neglect;

2. no alternative means to effectively protect the child is available, including family or kinship care; and

3. remaining in the child's current home is contrary to the welfare of the child.

Additionally, for an Indian child, under 25 C.F.R. § 23.113(b)(1) the facts stated must provide probable cause that emergency temporary custody is necessary to prevent imminent physical damage or harm to the child.

C. Procedure.

1. **Application.** A child safety worker, a child welfare investigator, or a peace officer may apply for authorization ~~to enter premises to locate a child and~~ to take emergency temporary custody of the child by submitting an application in writing ~~or by recorded oral statement under oath~~ to one of the judicial officers designated by the presiding judge of the superior court in Maricopa County to receive and respond to applications under this rule. The application ~~or recorded oral statement~~ must state:

(a) the professional qualifications of the applicant,

(b) the particular reasons each child is presently or imminently in danger of abuse or neglect,

(c) a detailed account of circumstances that require emergency temporary custody including the facts that support the reasons given,

(d) efforts made to determine the availability of ~~remedial services or other~~ voluntary options, including family or kinship care, that would remove or control the danger, and

(e) the identity and description of each child to be placed in emergency temporary

custody,

~~(f) the place or places to be searched,~~

~~(g) any time by which custody must be taken,~~

~~(h) reason for any authorization needed to execute the order between ten p.m. and six-thirty a.m.,~~ and

~~(i) whether law enforcement assistance is requested~~.

Additionally, under 25 C.F.R. § 23.113(d), if there is reason to know the child is an Indian child, the applicant should provide any available information regarding the child's tribal affiliation, whether the child resides on a reservation and any efforts to contact a tribe. The other information that should be provided under 25 C.F.R. § 23.113(d) may be provided in the dependency petition.

2. **Form.** The application must be submitted in a written format approved by the Administrative Director of the Supreme Court. If an applicant is unable to submit a written application using an approved written format, the applicant may apply for emergency temporary custody by recorded oral statement or by other means acceptable to the court made under oath. The recorded oral statement or other means of communication must otherwise comply with this rule.

3. **Evidence.** Evidence presented in support of an application for emergency temporary custody may include evidence which is reliable hearsay, in whole or in part.

4. **Consideration.** As soon as possible after receipt of an oral statement or a written application, a designated judicial officer will consider the application ex parte. The judicial officer may question the applicant and any witnesses orally or in writing. ~~Any oral questioning must be recorded~~.

D. Findings and Order.

1. **Content.** The order will state whether there is probable cause to believe that emergency temporary custody of the child is clearly necessary to prevent abuse or neglect because no alternative means to effectively protect the child is available, including family or kinship care, and whether remaining in the child's current home is contrary to the welfare of the child. Additionally, an order granting an application must include:

(a) a factual basis for the determination for each child and

(b) the identity and description with reasonable particularity of each child to be placed in emergency temporary custody,

~~(c) the description of one location to be searched for each order,~~

~~(d) whether law enforcement is authorized to assist, and~~

~~(e) whether for good cause shown the authorization includes searching for the child and taking custody at any hour.~~

Additionally, for an Indian child, under 25 C.F.R. § 23.113(b)(1) the court must find probable cause that emergency temporary custody is necessary to prevent imminent physical damage or harm to the child. ~~A separate order must be issued for each location to be searched.~~

2. **Form**. If the applicant and judicial officer are not in each other's physical presence, the judge may sign the order authorizing emergency temporary custody using an electronic signature to serve as the original order, orally authorize the applicant to sign the judge's name on the order, or sign an electronically transmitted version of the original order which is then deemed to be the original. The judicial officer will record the time and date of issuance of an orally authorized order on the original order and the applicant will send the duplicate original order to the judicial officer who issued the order ~~who will then file these orders in the court that would have dependency jurisdiction of the child~~.

3. Notice. The applicant must provide the parent or other custodian a copy of the emergency temporary custody application and order authorizing emergency temporary custody with the Temporary Custody Notice (TCN) upon taking custody of the child or, when a parent is not present, as <u>provided by law</u>~~soon thereafter as possible~~.

4. Execution and Duration. The applicant may execute the order until there is a material change in the factual basis for the probable cause determination and within ten calendar days of issuance of the order. ~~The applicant must provide notice of the execution of the order to the court that issued the order.~~ The temporary custody authorized by the order will expire after 72 hours excluding Saturdays, Sundays and holidays unless a dependency petition is filed. The court with dependency jurisdiction over the child will review continuation of temporary custody as provided in rules 50 and 51.

5. Filing: The applicant must file the application and order when ~~the TCN and~~ the dependency petition is~~are~~ filed. ~~Prior to filing the application and order the applicant must indicate on the order whether the child was removed as authorized~~

~~by the order. If no petition is filed following an order authorizing emergency temporary custody under this rule the applicant must file the application and order within 72 hours excluding Saturdays, Sundays and holidays in the court that would have dependency jurisdiction of the child~~.