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ARIZONA SUPREME COURT

PETITION TO AMEND RULES 55 AND
66, ARIZONA RULES OF PROCEDURE
FOR THE JUVENILE COURT, ON AN
EXPEDITED BASIS

Arizona Supreme Court
No. R-09-_____

Pursuant to Rule 28, Arizona Rules of the Supreme Court, the Office of the Attorney General for the State of Arizona petitions this Court to amend Rules 55(C) and 66(C), Arizona Rules of Procedure for the Juvenile Court, on an expedited basis to bring them into conformity with Arizona statutes, recent case law, and the Indian Child Welfare Act, 25 U.S.C. § 1912(d) through (f).

The Attorney General's proposed amendments, attached as Appendices A and B, are incorporated herein.

I. Amendments to Rule 66(C) to Conform to Arizona Revised Statutes Sections 8-537(B) and 8-863(B) and the Holdings in *Valerie M. v. Arizona Department of Economic Security* and *Kent K. v. Bobby M.*

In Arizona, the court may order the termination of parental rights if it finds by clear and convincing evidence the existence of at least one of several enumerated grounds, A.R.S. §§ 8-533, -537(B), -863(B), and by a preponderance of the evidence that termination of the parent's rights is in the child's best interests, *Kent K. v. Bobby M.*, 210 Ariz. 279, 284 ¶ 22, 110 P.3d 1013, 1018 ¶ 22 (2005).

In cases involving Indian children, the Indian Child Welfare Act, 25 U.S.C. §§ 1901 through 1963 (ICWA or the Act), further requires that the court make a determination,

supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

25 U.S.C. § 1912(f). The Act is silent regarding the standards of proof by which the court must find the state-law termination grounds and that termination is in the child's best-interests. *See* 25 U.S.C. §§ 1901-1963; *Valerie M. v. Ariz. Dep't of Econ. Sec.*, No. CV-08-0252-PR, 2009 WL 56920, ¶¶ 11, 20 (Ariz. Jan. 12, 2009).

Although A.R.S. §§ 8-537(B) and -863(B) require a clear and convincing standard and the Act is silent regarding the standards of proof by which the court must make the state-law findings, Rule 66(C), Arizona Rules of Procedure for the Juvenile Court, requires that in cases involving Indian children, the moving party or petitioner seeking to terminate parental rights prove the state-law grounds and that termination is in the child's best-interests beyond a reasonable doubt. *See* Ariz. R.P. Juv. Ct. 66(C). Addressing the conflict between A.R.S. §§ 8-537(B) and -863(B) and Rule 66(C), this Court recently held that because the Legislature is empowered to set burdens of proof as a matter of substantive law, sections 8-537(B) and -863(B) prevail over Rule 66(C), and Rule 66(C), which mandates a higher burden of proof for state-law findings than is required by the statutes, is invalid. *Valerie M.*, 2009 WL 56920, at ¶¶ 21, 22.

Rule 66(C) also requires in cases not involving Indian children that the moving party or petitioner prove by clear and convincing evidence “the allegations” in the termination motion or petition. Our case law, however, requires that in all termination cases, the moving party or petitioner prove by clear and convincing evidence the termination grounds and by a preponderance of the evidence that termination is in the child's best interests. *Kent K. v. Bobby M.*, 210 Ariz. at 284, 110 P.3d at 1018. The Attorney General therefore petitions this Court

to amend Rule 66(C) to reflect the separate burdens of proof required for the termination grounds, the best-interests finding, and the ICWA findings.

II. Amendments to Rule 66(C) to Conform to the Indian Child Welfare Act.

Rule 66(C) also requires that in cases involving Indian children, the juvenile court find beyond a reasonable doubt that “active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that those efforts have proved unsuccessful.” Ariz. R.P. Juv. Ct. 66(C). The Act, however, requires that the “party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child” merely “*satisfy the court* that active efforts have been made.” 25 U.S.C. § 1912(d) (emphasis added). The Act does not mandate that the court make the active-efforts finding by any specific burden of proof. *See* 25 U.S.C. §§ 1901-1963. In *Valerie M.*, this Court noted that “ICWA’s only specific directive concerning the burden of proof in termination proceedings appears in 25 U.S.C. § 1912(f),” relating to the finding that continued custody by the parent would likely result in damage to the child. *Valerie M.*, 2009 WL 56920, at ¶ 11. Likewise, Arizona’s juvenile dependency and termination statutes establish no particular burden of proof for the court’s active-efforts findings. *See* A.R.S. title 8, chs. 5, 10. Notably, this Court, in drafting Rule 55(C), Arizona Rules of Procedure for the Juvenile Court, adopted the language that the petitioner must “satisfy the

court” that active efforts had been made in proving a child dependent. There is no reason to require of a moving party or petitioner a different burden of proof that termination is justified in Rule 66(C); the language in the Act requiring the moving party or petitioner to “satisfy the court” that active efforts had been made applies to both foster-care placement and termination actions. *See* 25 U.S.C. § 1912(d).

The standard of proof required for the court’s active-efforts finding is not settled. A determination of what is meant by “satisfy the court” can and should be addressed in future legislation or litigation. However, in *Pascua Yaqui v. Arizona Department of Economic Security*, No. 1 CA-JV 07-0079, 2007 WL 5515315 (Ariz. Ct. App. Nov. 27, 2007), an unpublished decision, Division One of the Court of Appeals held that the terms “active efforts” under ICWA and “reasonable efforts” under Arizona’s termination statutes are “indistinguishable,” implying that the moving party or petitioner must prove “active-efforts” under ICWA by the same clear and convincing evidence standard that it proves “reasonable efforts” under Arizona’s termination statutes. *Id.* at ¶ 42 (citing *In re S.B.*, 130 Cal. App. 4th 1148, 1165, 30 Cal. Rptr. 3d 726, 736 (2005)).

In determining the standard of proof required for the active-efforts finding, the Alaska Supreme Court reviewed the Act’s legislative history and found that the “active-efforts” provision in the Act was designed to “impose a Federal requirement” to mirror the requirement already established in most states that

“public or private agencies involved in child placements . . . resort to remedial measures prior to initiating placement or termination proceedings.” *K.N. v. State of Alaska*, 856 P.2d 468, 476 (Alaska 1993) (quoting H.R. Rep. No. 95-1386, 95th Cong., 2d Sess. 22 (1978)). It concluded that the standard of proof required for the active-efforts finding was therefore the same preponderance of the evidence standard that the Alaska rules of procedure required for its reasonable-efforts finding. *Id.*

The Idaho Supreme Court likewise found that Congress did not intend “to establish a more stringent evidentiary standard in subsection (d) [the active-efforts provision] than found in state laws after which it was patterned.” *In re Baby Boy Doe*, 127 Idaho 452, 458, 902 P.2d 477, 483 (Idaho 1995). It also noted that prior to ICWA’s passage, sections 1912(e) (requiring determination of damage to child before foster care placement) and 1912(f) (requiring determination of damage to child before termination) both required a beyond a reasonable doubt standard. *Id.* Congress then amended subsection (e) to reduce the standard to “clear and convincing” in the case of foster care placements where parental rights are not terminated. *Id.* (citing H.R. Rep. No. 95-1386). The court found that in amending the one subsection to *reduce* the standard from beyond a reasonable doubt to clear and convincing, “Congress displayed considered precision in articulating the evidentiary burdens it was imposing” and its silence regarding the standard in

subsection (d) proved that it never intended a beyond a reasonable doubt standard to apply to that subsection. *Id.*

The Idaho court went further and questioned what Congress meant by the word “satisfy,” *id.*, a term reframed in *Valerie M.* as “persuaded,” *Valerie M.*, 2009 WL 56920, at ¶ 14. The court noted that in construing a statute, ordinary words should be given their ordinary meaning and looked to the dictionary definition of “satisfy,” that is, “to persuade by argument or evidence.” *Baby Boy Doe*, 127 Idaho at 457, 902 P.2d at 482. When asked to apply a beyond a reasonable doubt standard to the active-efforts finding, the Idaho court held that it could not stretch the ordinary meaning of “satisfy” to mean the same thing as “beyond a reasonable doubt.” *Id.*

Because the language of 25 U.S.C. § 1912(d) does not require that the moving party or petitioner prove active efforts beyond a reasonable doubt, the Attorney General proposes that this Court amend Rule 66(C), Arizona Rules of Procedure for the Juvenile Court, to conform to the language of 25 U.S.C. § 1912(d), requiring that the moving party or petitioner “satisfy the court” that active but unsuccessful efforts were made to prevent the breakup of the Indian family.

III. Amendments to Rule 55(C) to Conform to Arizona Revised Statutes Section 8-844(C)(1) and the Holding in *Valerie M.*

Under Arizona law, the juvenile court may adjudicate a child dependent if it finds the allegations in the dependency petition are true by a preponderance of the evidence. A.R.S. § 8-844(C)(1). The Legislature did not impose a heightened burden of proof in cases involving Indian children. *See* A.R.S. title 8, ch. 10, art. 3. Under ICWA, in cases involving Indian children the court must also make

a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child

before ordering the foster care placement of the child. 25 U.S.C. § 1912(e). This provision mirrors the requirement in § 1912(f) that the court make the same finding before ordering the termination of parental rights. This Court reasoned in *Valerie M.* that in the absence of a “specific directive concerning the burden of proof” required for state-law findings, Congress intended that the specified burden of proof apply only to the ICWA determination of damage to the child. *Valerie M.*, 2009 WL 56920, at ¶ 11. The elevated burden of proof did not apply to state-law findings regarding termination of parental rights. *Id.* at ¶¶ 11, 16, 20.

The analysis is the same for the required findings in a dependency adjudication involving an Indian child. Because the Act is silent regarding the burden of proof required for state-law dependency findings, and because Arizona’s

Legislature has established the preponderance of the evidence standard as the appropriate burden of proof for those findings, Rule 55(C), Arizona Rules of Procedure for the Juvenile Court, which mandates a higher burden of proof than is required by our statutes, is invalid. *See Valerie M.*, 2009 WL 56920, at ¶¶ 21-22.

The Attorney General therefore petitions this Court to amend Rule 55(C) to reflect the proper burdens of proof for state-law and ICWA findings.

IV. Justification for Emergency Adoption of Amendments.

The Attorney General requests that this Court consider this Petition on an expedited basis and order the emergency adoption of the proposed amendments to Rules 55(C) and 66(C), Arizona Rules of Procedure for the Juvenile Court. This Court may “consider a rule change petition on an expedited basis” and take “immediate action . . . for the adoption or amendment of a rule” when “a rule change petition presents an urgent matter for which compelling circumstances render the annual rule processing cycle inadequate.” Ariz. R. Sup. Ct. 28(G).

This Court’s recent holding in *Valerie M.* clarifies the burdens of proof in termination cases for the required state-law and ICWA findings. Amending Rule 66(C) to conform to our statutes and this Court’s holding in *Valerie M.* will eliminate confusion on the proper burdens to apply and avoid unnecessary appeals. A similar amendment to Rule 55(C), based on an extension of this Court’s holding in *Valerie M.* to the burdens of proof required in dependency adjudications

involving Indian children, will likewise eliminate confusion and avoid unnecessary appeals.

Because this Petition to amend the Rules of Procedure for the Juvenile Court presents an urgent matter for which compelling circumstances render the annual rule processing cycle inadequate, this Court should consider it on an expedited basis and order the emergency adoption of the proposed amendments.

V. Conclusion.

For all of the foregoing reasons, the Attorney General respectfully requests that this Court consider this Petition on an expedited basis and order the emergency adoption of the proposed amendments to Rules 55(C) and 66(C), Arizona Rules of Procedure for the Juvenile Court.

Dated this _____ day of February, 2009.

Terry Goddard
Attorney General

by _____
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Assistant Attorney General,
Patricia Trebesch,
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Mary O'Grady
Solicitor General

Original and six (6) copies and a CD of the foregoing and appendices were filed this __ day of January, 2009, with:

Arizona Supreme Court
1501 West Washington
Phoenix, Arizona 85007

By _____

Traci Roa
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APPENDIX A

PROPOSED AMENDMENTS TO RULE 66

Rule 66. Termination Adjudication Hearing

A. – B. [No change.]

C. Burden of Proof. The moving party or petitioner has the burden of proving the grounds for termination alleged ~~allegations contained~~ in the motion or petition by clear and convincing evidence and that the termination would serve the child's best interests by a preponderance of the evidence ~~or, in the case of an Indian child, beyond a reasonable doubt~~. In addition, if the child is an Indian child, the moving party or petitioner must ~~also~~ prove, beyond a reasonable doubt, including testimony from a qualified expert witness, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. The moving party or petitioner must also prove beyond a reasonable doubt satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that those efforts have proven unsuccessful.

D. – F. [No change.]

APPENDIX B

PROPOSED AMENDMENTS TO RULE 55

Rule 55. Dependency Adjudication Hearing

A. – B. [No change.]

C. Burden of Proof. The petitioner must prove the allegations in the petition by a preponderance of the evidence ~~or, in the case of an Indian child, by clear and convincing evidence.~~ In addition, if the child is an Indian child, the petitioner must prove, by clear and convincing evidence, including testimony from a qualified expert witness, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. The petitioner must also satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that those efforts have proven unsuccessful.

D. – E. [No change.]