

Mark Brnovich  
Attorney General  
Firm State Bar No. 14000

Dawn R. Williams  
Assistant Attorney General  
State Bar No. 020730  
4211 S. Santa Rita Ave.  
Tucson, AZ 85714  
(520) 746-4443  
Dawn.williams@azag.gov  
juvappeals@azag.gov

IN THE ARIZONA SUPREME COURT

In the Matter of PETITION TO  
AMEND RULES 4.1 AND 4.2,  
RULES OF CIVIL PROCEDURE

R-21-0021

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 amendment to Rules [4.1](#) and [4.2](#), Arizona Rules of Civil Procedure. The Department opposes the proposed rule amendment, at least insofar as it would apply to juvenile dependency, severance, and guardianship proceedings, because it could delay permanency for children in DCS care.

## **I. Introduction.**

Petitioner, the State Bar of Arizona, seeks to amend the Rules of Civil Procedure regarding service of process by publication. (Petition at 1.) The stated reasons for the amendments are to “address due process concerns raised in *Ruffino v. Lokosky*, [245 Ariz. 165](#) (App. 2018),” and “to align with recent amendments to the Arizona Rules of Family Procedure.” (*Id.*) Although DCS understands the underlying concerns motivating the proposed rule amendment, it does not believe that the amendment actually addresses them. More importantly, the proposed rule amendment does not appear to have considered the potential effects on juvenile court proceedings. In that context, the unaddressed implications are severe and could serve to delay compliance with statutorily mandated timeframes.

## **II. The Proposed Amendments to Rules 4.1 and 4.2 Would Delay Permanency for Children Who Are Wards of the Juvenile Court.**

### **A. The Rule’s History and Current Practice.**

Civil Rule 4.1 governs service of process within Arizona, while its counterpart—Rule 4.2—governs service outside the state. Specifically at issue here are the provisions in Rule 4.1(*l*) and 4.2(*f*) regarding service by publication. Currently, [Rule 4.1\(\*l\*\)\(1\)](#) states:

(1) *Generally*. A party may serve a person by publication only if:

(A) the last-known address of the person to be served is within Arizona but:

(i) the serving party, despite reasonably diligent efforts, has been unable to ascertain the person's current address; or

(ii) the person to be served has intentionally avoided service of process; and

(B) service by publication is the best means practicable in the circumstances for providing the person with notice of the action's commencement.

Similarly, [Rule 4.2\(f\)\(1\)](#) states:

(1) *Generally*. A party may serve a person by publication only if:

(A) the last-known address of the person to be served is outside Arizona but:

(i) the serving party, despite reasonably diligent efforts, has not been able to ascertain the person's current address; or

(ii) the person has intentionally avoided service of process; and

(B) service by publication is the best means practicable in the circumstances for providing notice to the person of the action's commencement.

These rules govern generally in all civil proceedings in Arizona, although as Petitioner noted, Arizona Rule of Family Law Procedure [41\(m\)](#) was amended to require that a party seeking to accomplish service by publication must first file a motion and obtain a court order permitting it to proceed.

In proceedings relating to dependency, termination of parental rights, and permanent guardianship, however, a separate set of rules apply. See [Ariz. R.P. Juv. Ct. 36](#). The Rules of Procedure for the Juvenile Court are to be “interpreted in a manner designed to protect the best interests of the child, giving paramount consideration to the health and safety of the child.” *Id.* The Juvenile Rules do, however, refer to and incorporate the Civil Rules when appropriate, particularly for issues addressing service of process. See Ariz. R.P. Juv. Ct. [48\(E\)](#) (service of dependency petition as provided in Civil Rules 4.1 and 4.2); [52\(D\)\(2\)](#) (same); [64\(D\)\(3\)](#) (service of petition to terminate parental rights as provided by Civil Rules 4.1 and 4.2); [76\(A\)](#) (service of adoption petitions as provided in Civil Rules 4.1 and 4.2).

Although the rules for service in juvenile proceedings incorporate the Civil Rules, juvenile matters proceed very differently compared to typical civil cases. Juvenile matters “shall proceed in a manner *similar to* the trial of a civil action before the court,” but this Court has recognized that they should otherwise “be conducted as informally as the requirements of due process and fairness permit.” ([Ariz. R.P. Juv. Ct. 6](#)) (emphasis added).

One significant way in which these proceedings differ is that the service of the initiating document—typically a petition alleging that a child is a dependent

child as defined in [A.R.S. § 8-201\(15\)](#)—is usually effected on parents at the first hearing to review the child’s removal from the parent’s custody, *see* [A.R.S. § 8-841\(F\)](#), [Ariz. R.P. Juv. Ct. 48\(D\)](#). It is only if the parent fails to attend that preliminary hearing that service is attempted prior to the next scheduled hearing.

*Id.* Moreover, unlike in a civil matter, there is no summons issued and no responsive pleading required. [Ariz. R.P. Juv. Ct. 48\(D\)](#). Because there is no summons, the juvenile court will set a specific hearing to rule on a pending adjudication based on publication. *See* [A.R.S. § 8-842\(A\)](#) (permitting the court to “set an initial dependency hearing within a time period to allow for publication”).

And in cases where the initial dependency petition has alleged that a parent’s identity or location is unknown (because the father is unknown and listed as “John Doe,” incomplete information is known about a parent, or DCS’s initial investigation has already revealed that a parent’s whereabouts are unknown), the court will often proactively set a publication hearing with the understanding that it can be vacated or used as an initial hearing after personal service if the parent is identified and located. Thus, from the outset, the juvenile court is directly involved in service by publication.

Another significant distinction from other civil practice is that the initial service attempt is not always the end of efforts to locate or serve a party. If the

juvenile court orders a change in the case plan goal from family reunification to severance and adoption or permanent guardianship, then a party files a severance motion or petition or a guardianship motion and must give the parties notice of the new proceeding, either by formal service or by providing a copy to the party or counsel, if they have appeared in the matter. *See* Ariz. R.P. Juv. Ct. [64\(D\)\(3\)](#); [61\(C\)](#).

Likewise, when DCS is involved in a dependency matter, an adjudication in absentia does not end the case for the absent party. Indeed, if DCS obtains information that would enable it to locate or contact a parent who has been previously served by publication, DCS must do so in order to assess the parent in relation to the case plan. *See, e.g.*, A.R.S. §§ [8-845\(C\)](#) (requiring juvenile court to review permanent plan established for a dependent child and to seek to reunite the family insofar as possible); [8-846\(A\)](#) (requiring juvenile court to order DCS to provide reunification services when child is removed from home); and [8-846\(D\)\(1\)](#) (providing an exception to that requirement upon a showing “that a reasonably diligent search has failed to identify and locate the parent within three months after the filing of the dependency petition”).

This reflects the fact that, unlike a typical civil lawsuit, a dependency matter is not premised on a static event or set of facts. Instead, as the dependency

proceeds, the court’s findings and orders are “subject to continuous review.” *Dep’t of Child Safety v. Stocking-Tate*, [247 Ariz. 108](#), 113, ¶ 12 (App. 2019). When DCS determines that a child is subjected to or at risk of abuse or neglect, it must act quickly to protect that child, which often means filing a dependency petition before having the full opportunity to acquire all available information regarding a missing or absent parent. *See, e.g., Donald W. v. Dep’t of Child Safety*, [247 Ariz. 9](#), 13-14, ¶¶ 3-5 (App. 2019) (noting that DCS’s original petition named the mother’s husband but was later amended when DCS learned of a different biological father for the child). As a result, DCS may initiate publication based on its initial inability to locate or identify an absent parent, concurrently with efforts to gather additional information to locate and personally serve that parent. In the event that DCS does obtain identifying information, it will proceed with attempts at personal service—or service on counsel if the parent has come forward and availed himself or herself of counsel—and will not take further action on the case solely on the basis of the publication which may already be complete.

Additionally, proceedings involving juveniles take place on abbreviated timelines. For example, once a party files a dependency petition, it must serve the parent or guardian “as soon as possible after the petition is filed,” [A.R.S. § 8-841\(F\)](#), typically at the preliminary protective hearing, which is held “not fewer

than five days nor more than seven days after the child is taken into custody, excluding [weekends] and holidays,” [A.R.S. § 8-824\(A\)](#). If the parent does not appear at the preliminary protective hearing, the petitioner must serve the parent “at least five days before the initial dependency hearing,” [A.R.S. § 8-841\(F\)](#), which itself must be set within twenty-one days of the date the dependency petition is filed, although that hearing may be set later if service by publication is required, [A.R.S. § 8-842\(A\)](#). Then, the dependency adjudication hearing must be completed within ninety days after service of the dependency petition. [A.R.S. § 8-842\(C\)](#). The court must also hold a permanency hearing within twelve months of the child’s removal from home (shortened to six months for children under age 3) to determine whether to continue reunification services for the parents or change the case-plan goal to termination of parental rights, permanent guardianship, or another permanent arrangement for the child. [A.R.S. § 8-862](#).

These shortened timeframes exist because this Court has exhorted juvenile courts to “be mindful [when] dealing with the care and custody of a very young child and vigilant to protect his right to a suitable and speedy placement.” *Bechtel v. Rose*, [150 Ariz. 68](#), 71 (1986). Thus courts should “avoid[ ] delay and prejudice to the child,” *Maricopa Cty. Juv. Action No. JS-7135*,

whom the child is to be raised and nurtured,” *Pima Cty. Severance Action No. S-114487*, [179 Ariz. 86](#), 97 (1994).

**B. The Proposed Amendments to Rules 4.1 and 4.2 Would Inject Needless and Prejudicial Delay in Juvenile Proceedings.**

The proposed amendment to Rules 4.1 and 4.2 is simple: it adds the requirement that *prior to* initiating service by publication, a party file a motion to do so, supported by an affidavit setting forth the party’s “reasonably diligent efforts to serve the person.” (Petition at Attachment A.) This motive—attempting to ensure that every effort is made to serve a party by a means other than publication whenever possible—is laudable in general, but the unintended consequences of this particular change make its application in juvenile matters exceptionally problematic.

The fact that Petitioner cites the *Ruffino* case to support the need for the amendment to the publication rule highlights the difference between standard civil litigation and matters in the juvenile court. In *Ruffino*, the plaintiff sued the defendant based on online comments, but then failed to use the online platforms that gave rise to the claim to attempt to contact the defendant to effectuate service. *Ruffino*, [245 Ariz. at 169, ¶ 14](#).

As noted above, in dependency matters, efforts to locate and engage parents are ongoing throughout the action. *See* A.R.S. §§ [8-823\(B\)\(11\)](#) (requiring a notice of taking temporary custody to advise the parent to immediately provide DCS “the names, the type of relationship and all available information necessary to locate persons who are related to a child” and immediately provide any updated information when the parent becomes aware of it later), [8-824\(E\)\(7\)](#) (requiring the court to order the parent to provide the court with names and location information for anyone related to the child and to update the court with new information), [8-841\(E\)\(5\)](#) (requiring that notice of dependency proceedings advise the parent to be prepared to provide the “names, the type of relationship and all available information necessary to locate persons who are related to the child”), [8-842\(B\)\(1\)](#) (the court must order the parent to provide the court with names and information to locate persons related to the child and update the court with new information).

Thus the crucial consideration in juvenile matters is whether DCS (or any other petitioner or movant) can show diligent efforts to locate the party at the time the court *accepts* the service of publication, rather than at the time the serving party *initiates* such service. By initiating service by publication promptly on a parent whom DCS has reason to believe will be difficult or impossible to locate and serve by other means, it can avoid delays in permanency and more efficiently meet its

statutory timelines. But because service by publication, by its nature, takes time, if DCS locates the parent in the interim, it must advise the court of that fact and then attempt service by another means. That may result in the loss of publication fees for DCS, but has no effect on the parent's due process rights. Either DCS is unable to locate the parent while the publication is happening and the court therefore accepts the declaration of diligent search that is filed when the court accepts the service by publication or DCS locates and serves the parent by another means and the publication is not acted upon.

The Department thus does not object to the rule change as a whole, only to the portion of the rule requiring that a motion (and affidavit) be filed and granted before publication begins. It is DCS's position that the necessary due process protection comes when the court accepts service by publication—supported by an affidavit outlining the party's duly diligent efforts to attempt service by other means before such service is accepted—rather than at the time the publication is initiated. Only the publishing party bears any risk by proceeding this way (*i.e.*, the risk being that the cost of publication will be forfeited if in the interim the party is able to locate or serve the party subject to the published notice).

**III. If This Court Adopts the Proposed Amendment, It Should Incorporate the Following Additional Amendment to Rules 4.1 and 4.2.**

If this Court intends to adopt the proposed amendment to Rules 4.1 and 4.2, DCS suggests, as an alternative, that an additional subsection be added as described below.

**RULE 4.1. Service of Process Within Arizona**

[(a) – (k) – no change]

(l) Service by Publication.

[(1) – (4) – no change]

(5) In Juvenile Matters. In proceedings initiated under Title 8, chapter 4, Arizona Revised Statutes, the provisions for service by publication outlined above apply, except that a motion is not required prior to initiating service by publication. Before proceeding to adjudication on service by publication, the juvenile court must find that service by publication was the best means practicable under the circumstances based on review of documentation submitted by the serving party that shows such service was completed and one or more affidavits that set forth the serving party's reasonably diligent efforts to identify, locate, and serve the person.

**RULE 4.2. Service of Process Outside Arizona**

[(a) – (e) – no change]

(f) Service by Publication.

[(1) – (4) – no change]

(5) In Juvenile Matters. In proceedings initiated under Title 8, chapter 4, Arizona Revised Statutes, the provisions for service by publication outlined above apply, except that a motion is not required prior to initiating service by publication. Before proceeding to adjudication on service by publication, the juvenile court must find that service by publication was the best means practicable under the circumstances based on review of documentation submitted by the serving party that shows such service was completed and one or more affidavits that set forth the serving party's reasonably diligent efforts to identify, locate, and serve the person.

The Department's alternative proposal comports with due process and ensures that the currently effective and protective procedures in dependency (and related) matters in juvenile court continue to promote timely permanency.

///

#### **IV. Conclusion.**

The Department objects to the proposed amendment to Rules 4.1 and 4.2 because it do not serve the expressed purpose—protecting the served party’s due process rights—and would delay permanency for children involved in dependency, termination, and guardianship matters. The Department therefore requests that this Court deny the Petition or, in the alternative, amend the proposal as outlined in this Comment.

DATED this \_\_\_\_\_ day of April, 2021.

---

Dawn R. Williams  
Assistant Attorney General

A copy of this comment has been e-mailed  
this \_\_\_\_\_ day of April, 2021, to:

State Bar of Arizona  
Lisa M. Panahi, General Counsel  
Patricia.seguin@staff.azbar.org  
Petitioner

By /s/ Dawn R. Williams  
Dawn R. Williams, AAG  
HDM#9420037