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**IN THE SUPREME COURT STATE OF ARIZONA**

In the Matter of:

PETITION TO AMEND  
PROPOSED RULES 41, 47.1, 50,  
56, 58, 60 61, 63 and 79

AND

PETITION TO ADOPT  
PROPOSED RULE 61.1 and 62.1

of the Arizona Rules of Procedure  
for the Juvenile Court.

SUPREME COURT NO. R-08-0020

**COMMENT ON PETITION**

**Preliminary Statement And Scope of Comment**

The undersigned hereby respectfully submits this Comment addressing this Petition. Although serving on a Juvenile Court assignment for the Arizona Superior Court in and for Maricopa County for the past two years, the views expressed herein are those of the undersigned *individually* and do not necessarily represent those of the Arizona Superior Court in and for Maricopa County.

The Petition recommends changes and additions to the Arizona Rules of Procedure for the Juvenile Court (the “Rules”) to implement recent legislative enactments. This Comment is limited to suggestions regarding the implementation of A.R.S. § 8-874, which addresses successor permanent

guardians for Title 8 guardians pursuant to A.R.S. § 8-871, et seq. Accordingly, this Comment is limited to the Petition's request to add proposed Rules 61.1 and 62.1.

It is clear that Rules need to be promulgated to implement A.R.S. § 8-874. This Comment suggests changes to Petition's proposed Rules 61.1 and 62.1 to more fully implement that statute, to prevent confusion (including by parties and pro se litigants), to be consistent with other Juvenile Court Rules and for other reasons set forth below. For ease of reference, Attachment A hereto is a redline of proposed Rules 61.1 and 62.1 to include the changes recommended in this Comment.

### **Suggested Changes to Proposed Rules 61.1 and 62.1**

#### **I. Expressly State That Proposed Rules 61.1 and 62.1 Apply Only To Title 8 Guardianships.**

Stated simply, in Juvenile Court, guardianships may be put in place pursuant to Title 8 (A.R.S. § 8-872) or Title 14 (A.R.S. § 14-5207). The characteristics of a Title 8 guardianship differ substantially from those of a Title 14 guardianship. Unfortunately, there can be a good deal of confusion between these two types of guardianships, particularly by parties and pro se litigants.

Rules 61.1 and 62.1 are limited to successor permanent guardians in Title 8 guardianships (and are not applicable to Title 14 guardianships). To help avoid confusion between these two types of guardianships, the first sentence of proposed Rule 61.1(A) should be changed to read: "If a permanent guardian appointed pursuant to A.R.S. § 8-872 is unable . . ." This change would mirror the legislation more closely and also makes plain that the Rule governs only Title 8 (and not Title 14) guardianships.

## **II. Provide For More Specificity Regarding the Motion to Appoint Successor Permanent Guardian And Affidavit of Proposed Successor Permanent Guardian.**

The last sentence of proposed Rule 61.1(A) states that the motion to appoint a successor permanent guardian “shall contain all information required by law.” The statute, however, provides additional specificity for what is required. *See* A.R.S. § 8-874(A). To more closely track the statute and to give additional guidance (including to parties and pro se litigants), the last sentence of proposed Rule 61.1(A) should be changed to read: “The motion shall be verified by the person filing the motion and shall contain all information required by law, including the name, sex, address and date and place of birth of each child who is the subject of the motion; the name and address of the permanent guardian; the reason why the permanent guardian is no longer able or willing to serve as permanent guardian of the child and the name and address of the proposed successor permanent guardian, if any.”

Proposed Rule 61.1(B) states that an affidavit of a proposed successor permanent guardian shall “include[] the information required by law.” The statute, however, provides additional specificity for what is required. *See* A.R.S. § 8-874(B). To more closely track the statute and to give additional guidance (including to parties and pro se litigants), proposed Rule 61.1(B) should be changed to read: “If the motion identifies a proposed successor permanent guardian, the motion shall be accompanied by an affidavit by the proposed successor permanent guardian that includes the information required by law, including the relationship between the proposed successor permanent guardian and the child and the proposed successor permanent guardian’s agreement to assume the duties and responsibilities of permanent guardian, including compliance with all court orders.”

### **III. Change Terms to Avoid Confusion and Comport With Current Usage.**

Proposed Rules 61.1(D)(1) and 62.1 (throughout) make reference to “an initial guardianship review hearing” to be set after the filing of a motion for successor permanent guardianship. Although that language tracks the statute, using the phrase “review hearing” likely will cause confusion given pre-existing usage of that term in guardianships and related contexts.

For example, a “report and review hearing” must be held within one year of granting a Title 8 guardianship. A.R.S. § 8-872(I); *see also* Rule 63(F)(2)(d) (requiring “annual review” hearing where Title 8 guardianship is granted). In addition, “periodic review hearings” are held in dependencies, which are different than (but may precede) a Title 8 guardianship. A.R.S. § 8-847(A); *see generally* Rule 58 (“**Review Hearing**”). Given this current use of the phrase “review hearing,” using that same phrase in proposed Rules 61.1(D) and 62.1 would result in the same phrase being used both in successor guardianships and other matters to mean two very different things. Given this current usage, to avoid confusion and to give additional guidance (including to parties and pro se litigants), proposed Rules 61.1(D) and 62.1 should be changed to refer to “an initial successor permanent guardianship hearing.”

### **IV. Clarify That The Proposed Successor Guardian Has No Right to Court Appointed Counsel.**

Proposed Rule 61.1(D)(2) states that, “[u]pon the filing of a motion for successor permanent guardian, the court shall . . . [a]ppoint counsel for the proposed successor guardian pursuant to Rule 38(b).” Rule 38(B), however, states that the court “shall order the appointment of counsel for those persons entitled to counsel and determined to be indigent, as provided

by law.” Because Rule 38(B) does not set forth a right to court-appointed counsel for all proposed successor guardians, proposed Rule 61.1(D)(2) could be read as erroneously providing for a right to court-appointed counsel for all proposed successor guardians. Accordingly, proposed Rule 61.1(D)(2) should be changed to read “Appoint counsel for the proposed successor guardian if such appointment is appropriate pursuant to Rule 38(B).”

**V. Conform Proposed Rule 62.1(A) to Other Juvenile Court Rules.**

Although proposed Rule 62.1(A) is titled “Purpose,” the substance of that subpart addresses what the court should do if certain findings are made. Consistent with other Juvenile Court rules for initial hearings (including Rules 52(A), 55(A) and 62(A)), proposed Rule 62.1(A) should be changed to read: “At the initial successor permanent guardianship hearing, the court shall determine whether service has been completed, whether notice of the hearing has been provided as required by Rule 61.1(C) and whether the permanent guardian, parent or Indian custodian admits, denies or does not contest the allegations contained in the motion for appointment of a successor permanent guardian.”

**VI. Specificity Regarding Burden of Proof.**

In addressing other types of adjudications, the Rules set forth in a separate sub-part the applicable burden of proof. *See* Rules 51(B) (temporary custody); 55(C) (dependency); 63(C) (guardianship); 66(C) (termination). Given the structure of the current Rules, to avoid confusion and to give additional guidance (including to parties and pro se litigants), a “Burden of Proof” subsection should be added to proposed Rule 62.1 to read “**Burden of Proof.** The moving party has the burden of proving the allegations contained in the motion by clear and convincing evidence.”

Correspondingly, proposed Rule 62.1(D) should be modified to reference the burden of proof (and also note that the court should appoint a successor guardian if that burden is met), so that proposed Rule 62.1(D) would read begin: “At the hearing, if the court finds that the movant has met its burden of proof that the proposed successor permanent guardian is suitable to assume the responsibilities of permanent guardian and that appointment would be in the child’s best interests, the court shall grant the motion, terminate the appointment of the current permanent guardian and appoint the proposed successor permanent guardian as permanent guardian of the child. At the hearing, the court may also enter any orders as may be necessary for the safety and well-being of the child, including:” If this suggested change is made, it would include the substance of proposed Rule 62.1(D)(3) and, accordingly, proposed Rule 62.1(D)(3) should then be deleted as unnecessary.

**VII. Renumber Proposed Rules to Reflect Chronology of Hearings.**

The current Rules governing motions for appointment of Title 8 guardians appear in chronological order for how such a motion proceeds:

Current Rule	Title of Rule
Rule 61	<b>“Motion [for appointment of permanent guardianship], Notice of Hearing, Service of Process and Orders”</b>
Rule 62	<b>“Initial Guardianship Hearing”</b>
Rule 63	<b>“Guardianship Adjudication Hearing [for appointment of permanent guardianship]”</b>

If adopted as suggested in the Petition, the Rules would no longer appear in chronological order for how a guardianship would proceed and, instead, would appear as follows:

Rule (if Petition is adopted as written)	Title of Rule
Rule 61	<b>“Motion [for appointment of permanent guardianship], Notice of Hearing, Service of Process and Orders”</b>
Rule 61.1	<b>“Motion [for appointment of successor permanent guardianship], Notice of Hearing, Service of Process and Orders for Successor Permanent Guardianship”</b>
Rule 62	<b>“Initial Guardianship Hearing”</b>
Rule 62.1	<b>“Initial Successor Guardianship Review Hearing”</b>
Rule 63	<b>“Guardianship Adjudication Hearing [for appointment of permanent guardian]”</b>

Given the structure of the current Rules, to avoid confusion and to give additional guidance to all involved (including parties and pro se litigants), proposed Rules 61.1 and 62.1 should be renumbered to Rules 63.1 and 63.2, so that the Rules would be as follows:

Rules (as proposed in this Comment)	Title of Rule
Rule 61	<b>“Motion [for appointment of permanent guardianship], Notice of Hearing, Service of Process and Orders”</b>
Rule 62	<b>“Initial Guardianship Hearing”</b>
Rule 63	<b>“Guardianship Adjudication Hearing [for appointment of permanent guardianship]”</b>
Rule 63.1	<b>“Motion [for appointment of successor permanent guardianship], Notice of Hearing, Service of Process and Orders for Successor Permanent Guardianship”</b>
Rule 63.2	<b>“Initial Successor Guardianship Review Hearing”</b>

### **VIII. Technical Corrections.**

Along with the suggested changes set forth above, three additional technical corrections should be made: (1) proposed Rule 62.1(B)(2) refers to Rule 61(b) when, instead, it should refer to proposed Rule 61.1(C); (2) the Petition contains two proposed Rules 62.1(B) and the second one should be changed to proposed Rule 62.1(C) and (3) miscellaneous technical corrections (including capitalizations) to correspond to the current Rules. These technical corrections are incorporated in Attachment A hereto.

#### **Conclusion**

The undersigned respectfully requests that the Court consider adopting the proposed Rules to incorporate the suggestions set forth in this Comment.

May 15, 2009

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An original and six copies of this Comment are submitted this 15<sup>th</sup> day of May, 2009. A copy of this comment has been hand-delivered this 15<sup>th</sup> day of May 2009 to:

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