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**ARIZONA SUPREME COURT**

In the matter of:	)	Supreme Court No R-
	)	
PETITION TO AMEND RULES 3, 36,	)	(expedited consideration
AND 37, AND TO PROPOSE NEW	)	and emergency adoption
RULE 37.1, RULES OF FAMILY LAW	)	requested)
PROCEDURE	)	
_____	)	

Pursuant to Rule 28 of the Rules of the Supreme Court, David K. Byers, Administrative Director, Administrative Office of the Courts, respectfully petitions this Court to amend the rules specified above as proposed in the Appendix. The proposed amendments to the family law rules implement a legislative enactment from the 2021 legislative session as more particularly described below.

**I. Purpose of the Proposed Rule Amendments. (Laws 2021, Ch. 303)**

The Governor recently signed Senate Bill 1389, which will go into effect on the general effective date. This bill added a provision to Title 25, Chapter 11 authorizing a court in a family law matter to appoint a guardian ad litem (“GAL”) for an adult party to investigate whether the adult party is incapacitated or in need of protection as defined in Title 14, and in need of a guardian or conservator. The court

may order an independent evaluation of the adult party by a licensed physician who is competent to perform such an evaluation. The bill also provides for reasonable compensation to be paid by the adult party, the assets of the marital community, or, if there are insufficient funds available, the county.

This petition proposes amendments to Rules 3, 36 and 37, as well as the adoption of a new Rule 37.1.

## **II. Rule 3 (Definitions)**

The proposed amendments to Rule 3 add and define “adult in need of protection,” “conservator,” and “incapacitated person.” These words and phrases appear in the new statute, and their definitions are consistent with Title 14 (Trusts, Estates, and Protective Proceedings).

## **III. Rule 36 (Real Party in Interest)**

The proposed amendments to Rule 36 replace “minor or an incompetent person” with a separate provision for minors, and change “incompetent person” to “incapacitated person or adult in need of protection.” The word “incompetent” is not defined in Title 25, and is not consistent with Title 14 or the language of the new statute. The proposed rule also clarifies that the fees and expenses of a minor’s representative are to be allocated between the parties as the court deems appropriate.

#### **IV. Rule 37 (Substitution of Parties: Death, Incompetency, and Transfer of Interest)**

The proposed amendments to Rule 37 change the word “incompetency” to “incapacity” in the title and subtitle, and make conforming changes to the existing rule that allows the continuance of an action on motion or stipulation. The proposed rule also clarifies that service of a motion must be served on the incapacitated person’s representative.

#### **V. Rule 37.1 (Appointment of a GAL for an Alleged Incapacitated Person or an Adult in Need of Protection)**

The proposed rule implements the new statute.

Subsection (a) authorizes the court, on motion or on the court’s own initiative, to appoint a GAL for an alleged incapacitated person or adult in need of protection.

Subsection (b) specifies the qualifications for a GAL, including that the GAL must be an attorney.

Subsection (c) imposes an automatic stay on the family law proceeding unless otherwise ordered.

Subsection (d) defines the GAL’s role.

Subsection (e) authorizes the GAL to perform specified acts.

Subsection (f) expresses the requirements for the order appointing the GAL.

Subsection (g) delineates the privileges and confidentiality that apply to communications between the GAL and the subject person.

Subsection (h) authorizes, on motion or on the court's own initiative, an evaluation of the subject person by a licensed physician. The report of any such evaluation will be provided to the GAL only, and is not subject to discovery in the family law case.

Subsection (i) requires the GAL to file, within a time set by the court, a report regarding the status and results of the GAL's investigation. The proposed rule allows the GAL to request to file the report under seal, and to provide the parties to the family law case with a copy that does not include privileged or confidential information.

Subsection (j) provides for reasonable compensation and reimbursement of costs for the GAL and any physician appointed. The court must determine what, if any, portion of the fees and costs should be paid by the subject person and by the marital community. If the subject person and the marital community have insufficient funds, the court may order all or any part of the reasonable fees and costs to be paid by the county.

## **VI. Preliminary Comments**

This petition has not been sent to the court community for pre-filing comments because of its technical nature and due to the short period of time since the enactment of the new statutory provisions. However, petitioner received substantial assistance from the Presiding Probate and Family Law judges in Maricopa County who drafted

the proposed rule amendments. The draft was also shared with the State Bar Rules Administrator, who provided it to members of the Family Law Practice & Procedure Committee. Their comments were considered. The State Bar offered its own proposed rule related to the appointment of a GAL for an adult in a family law proceeding (R-21-0014), but it was drafted and filed prior to the passage of the legislation, and is not as comprehensive as this proposal.

**VII. Request for Emergency Adoption.**

The legislation identified in this petition will become effective on the general effective date, which is expected to be in September. Therefore, petitioner requests expedited consideration and emergency adoption of all proposed rules at the Court’s August Rules Agenda, with a formal comment period to follow, as permitted by Supreme Court Rule 28(h).

Respectfully submitted this \_\_\_\_ day of June, 2021.

By: \_\_\_\_\_  
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## APPENDIX

*For existing rules, deletions are reflected by ~~strikethrough~~ and additions are reflected by underline.*

### Rule 3. Definitions

(a) Adult in Need of Protection. “Adult in need of protection” means a person 18 years of age or older for whom the court could appoint, or has appointed, a conservator or enter another protective order under A.R.S. § 14-5401(A)(2).

(b) Conservator. “Conservator” is defined in A.R.S. § 14-1201.

~~(a)-(c)~~ Guardian. [No change in text.]

~~(b)-(d)~~ In Camera Review. [No change in text.]

(e) Incapacitated Person. “Incapacitated person” is defined in A.R.S. § 14-5101.

~~(e)-(f)~~ Party. [No change in text.]

~~(d)-(g)~~ Pleading. [No change in text.]

~~(e)-(h)~~ Sealing. [No change in text.]

~~(f)-(i)~~ Title IV-D. [No change in text.]

~~(g)-(j)~~ Witness. [No change in text.]

### Rule 36. Real Party in Interest

(a) Generally. [No change in text.]

(b) Minor or an Incompetent Person-Incapacitated Person or Adult in Need of Protection. A guardian, or conservator, child’s attorney, or similar fiduciary may bring or defend an action, or otherwise act on behalf of, a ~~minor or an incompetent person~~ incapacitated person or an adult in need of protection.

(c) Minor. A guardian, conservator, or a best interests attorney may bring or defend an action, or otherwise act on behalf of, a minor.

~~(e)~~**(d) Compensation.** The court may allocate between the parties the fees and expenses of the minor ~~or incompetent person's~~ representative under ~~(b)~~**(c)** as the court deems appropriate.

~~(d)~~**(e) Action in the Name of the State for Another's Use.** [No change in text.]

### **Rule 37. Substitution of Parties: Death, ~~Incompetency~~, Incapacity, and Transfer of Interest**

**(a) Death.** [No change in text.]

**(b) ~~Incompetency or~~ Incapacity.** If a party becomes incompetent ~~On motion or stipulation, the court may of the parties and the incompetent party's representative~~ continue an action by or against the party's representative of an incapacitated person or of an adult in need of protection. Anyone filing such a motion must serve the motion on the parties as provided in Rule 43 and on the ~~incompetent or incapacitated party's person's~~ representative in the same manner that a summons and pleading are served under Rule 40(f)(1) or 41, as applicable.

**(c) Transfer of Interest.** [No change in text.]

### **Rule 37.1 Appointment of a Guardian ad Litem for an Alleged Incapacitated Person or an Adult in Need of Protection**

**(a) Appointment.** Any party, including the attorney for a party who might be incapacitated or in need of protection, may move for the appointment of a guardian ad litem (hereinafter referred to as a "GAL"). On such motion, or own its own initiative, the court may appoint a GAL for a party if the court finds reasonable cause to believe that the party is, or may be, an incapacitated person or an adult in need of protection and the party is or may be in need of a guardian or conservator, or both, or other protective order under Chapter 5 of Title 14 of the Arizona Revised Statutes. The court must notify the parties and the GAL of the appointment within 3 days.

**(b) GAL's Qualifications.** A GAL appointed under this rule must be an attorney licensed to practice in Arizona. A GAL must not have ever represented any of party; must not be related to any party or to a party's attorney; and must have no personal interest in the family law case.

**(c) Stay of Proceedings Upon Appointment.** Unless the court orders otherwise, the court's appointment of a GAL under this rule automatically stays the

family law proceeding, except that all previously issued orders, including the preliminary injunction, remain in effect. This stay remains in effect until the court enters an order lifting the stay.

(d) **Role.** The role of a GAL appointed under this rule is limited to investigating whether the adult party for whom the GAL was appointed (hereinafter referred to as the “subject person”) may be in need of a guardian, conservator, or other protective order under Title 14 of the Arizona Revised Statutes, and, if so, to initiate and prosecute proceedings under Chapter 5 of Title 14 of the Arizona Revised Statutes. The GAL does not represent the subject person in the family law proceeding and may not be called to testify in that proceeding or be asked to advise the subject person or the court on any pending issue in the family law case except on whether the subject person may be in need of a guardian, conservator, or other protective order under Title 14 of the Arizona Revised Statutes.

(e) **Authority.** The GAL may perform the following acts:

(1) Communicate with, and obtain and review records from, any person or entity who has knowledge or information relevant to whether the subject person is in need of a guardian, a conservator, or other protective order under Title 14 of the Arizona Revised Statutes. This power to obtain records includes access to all medical, substance abuse, psychiatric, psychological, and counseling records of the subject person, including records that are otherwise privileged or confidential.

(2) Meet with the subject person at any location where that person may be located and meet and interview other individuals living in the same household as the subject person or, if the subject person is at a care facility, treatment agency, or hospital, the persons in charge of providing treatment to, or care of, the subject person.

(3) Obtain and review court records in any case, including a court-ordered mental health care and treatment case, filed in any court, concerning the subject person.

(4) Obtain and review financial records, including records of the subject person that are otherwise privileged or confidential.

(5) Consult with any person who may be entitled to initiate, or has initiated, guardianship, conservatorship, or other protective proceedings under Chapter 5 of Title 14 of the Arizona Revised Statutes, and investigate and review the background

of any person who is interested in becoming the guardian or conservator, including but not limited to the person's criminal arrests and convictions and credit history.

(6) Initiate and prosecute proceedings under Chapter 5 of Title 14 of the Arizona Revised Statutes.

(7) Any other acts specifically authorized by the court.

**(f) Order of Appointment.** The order appointing the GAL must set forth the basis for the GAL's appointment, the scope and duration of the GAL's appointment, and the GAL's powers, including those described in Rule 37.1(e).

**(g) Privileges and Confidentiality.**

(1) *Between the GAL and the Subject Person.* The subject person has no privilege or confidentiality concerning the person's communication with the GAL. When the GAL first communicates with the subject person, the GAL must inform the subject person that their communications are neither privileged nor confidential.

(2) *Subject Person's Privileges and Confidentiality.* The appointment of a GAL for a subject person and the receipt of otherwise privileged or confidential documents or information by the GAL does not waive any of that person's privileges or rights of confidentiality. As a result, the GAL may not be compelled by any party to the family law case to produce any privileged documents the GAL obtains.

**(h) Independent Evaluation.** On the GAL's motion, or on its own initiative, the court may order an evaluation of the subject person by a licensed physician to assist the GAL in determining whether the adult party is an incapacitated person or an adult in need of protection. The physician must provide the results of that evaluation only to the guardian ad litem, and the evaluation is not subject to discovery in the family law case.

**(i) Report.** Within the time set by the court, the GAL must file in the family law case a report regarding the status and results of the GAL's investigation, including whether the GAL, or anyone else, intends to or has initiated guardianship proceedings, conservatorship proceedings, or both. If the report contains privileged or confidential information, the GAL must request to file the report under seal. The GAL must provide the parties to the family law case with a copy of the report but not any privileged or confidential information.

**(j) Fees and Costs of GAL and Physician.** A GAL and any physician appointed under this rule are entitled to receive reasonable compensation for the

work they performed and costs they incurred. The court must determine what, if any, portion of their reasonable fees and costs should be paid by the subject person and what, if any, portion should be paid from community property. If the court determines that the subject person and the marital community have insufficient funds to pay fees and costs, the court may order all or any part of the reasonable fees and costs to be paid as a county expense.