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**ARIZONA SUPREME COURT**

In the matter of:	)	
	)	
PETITION TO AMEND RULES,	)	Supreme Court No. R-21_____
10, 38, 40, 62, 64, AND 65 OF THE	)	(expedited consideration
RULES OF PROCEDURE FOR	)	and emergency adoption
THE JUVENILE COURT	)	requested)
_____	)	

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 Appendix A. The proposed amendments implement 2021 legislative enactments in SB1391, Ch. 228 affecting appointment of counsel and guardians ad litem for certain juvenile proceedings. Therefore, they require emergency adoption to be effective prior to the effective date of this new legislation.

**I. Statutory Change and Proposed Rule Amendment.**

- a. **Statute change:** A.R.S. § 8-221 as amended provides the child the right to counsel before the first hearing in delinquency, dependency, and termination of parental rights proceedings.

**Rule change:** Added provision to Rule 10 that requires appointment of counsel when a delinquency petition is filed. Also added to Rule 64, the requirement to assign counsel, as provided in Rule 38, to represent the child in the initial termination hearing.

- b. **Statute change:** A guardian ad litem is required to be an attorney. The same person may not serve as both guardian ad litem and child's attorney.

**Rule change:** Rule 40 (A) and Rule 62 are amended to make this change. Rules 62(C)(3) and 65(C)(3) are deleted due to inconsistency with the statutory change.

Rule provisions concerning appointment of counsel and of a guardian ad litem in adoption proceedings contained in rules 69 and 70 not are not amended because they are not within the scope of the amendments to A.R.S. § 8-221.

## **II. 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. A draft was shared with the presiding juvenile court judges of Maricopa, Pima, and Yavapai counties, and their comments were considered.

### **III. Request for Emergency Adoption.**

The legislation identified in this petition will become effective on the general effective date, which is likely to be sometime in September, 2021. Therefore, as permitted by Supreme Court Rule 28(H), petitioner requests expedited consideration and emergency adoption of the proposed rule amendments at the court's August rules agenda with a comment period to follow.

Respectfully submitted this 30th day of June, 2021.

By /S/\_\_\_\_\_  
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## APPENDIX A

### Rule 10. Appointment and Waiver of Counsel

**A. Right to Counsel.** The juvenile has the right to be represented by counsel in all delinquency and incorrigibility proceedings as provided by law. ~~The court shall appoint counsel for the juvenile if the juvenile is determined to be indigent.~~

**B. ~~Determination~~ Appointment of Counsel due to Indigence.** Upon the filing of a petition, the court shall appoint an attorney for the juvenile if the court finds that the juvenile is indigent.

1. *Definition.* The term indigent means a person not financially able to retain counsel.

2. *Determination.* The court shall order the juvenile, parent, guardian or custodian of the juvenile to provide proof of financial resources by filing a financial questionnaire provided by the court. The court may question the parent, guardian or custodian under oath. If the court determines the juvenile is entitled to appointed counsel, the parent, guardian or custodian may be ordered to pay a reasonable portion of the cost of counsel.

**C. Manner of Appointment.** If the court enters an order appointing or denying counsel, a copy of the order shall be provided to the juvenile, parent guardian or custodian, the attorney appointed and the prosecutor.

**D. Waiver of Counsel.** A juvenile may waive the right to counsel if the court finds that the waiver is knowingly, intelligently, and voluntarily given in view of the juvenile's age, education and apparent maturity. The waiver of counsel should also be obtained in the presence of the parent, guardian or custodian in attendance on behalf of the juvenile. Waiver of counsel shall be set out in writing or in the minute entry of the court. If there is a conflict of interest between the juvenile and the parent, guardian, or custodian, the court shall impose such safeguards on the waiver of counsel as appear in the best interests of the juvenile.

## **Rule 38. Assignment, Appointment of Counsel**

**A. Assignment of Counsel.** Counsel shall be assigned to represent those persons entitled to counsel as provided by law and the Indian Child Welfare Act, from the filing of a dependency petition through the preliminary protective hearing until the court formally appoints counsel or otherwise relieves assigned counsel. The attorney for a child shall meet with the child before the preliminary protective hearing, if possible, or if not possible, within fourteen (14) days after the preliminary protective hearing. The attorney for the child shall also meet with the child before all substantive hearings. Upon a showing of extraordinary circumstances, the judge may modify this requirement for any substantive hearing. Assigned counsel is not counsel of record for purposes of accepting service of process for a parent, guardian or Indian custodian who does not appear for the preliminary protective hearing.

### **B. Appointment of Counsel Due to Indigence.**

1. Definition. The term indigent means a person not financially able to retain counsel.
2. Determination. The court shall order the appointment of counsel for those persons entitled to counsel as provided by law, and determined to be indigent, ~~as provided by law~~. In determining whether a person is indigent, the court shall order the person to provide proof of financial resources by filing a financial questionnaire provided by the court. The court may question the person under oath. If the court determines the person is not indigent the court may order the person to pay a reasonable portion of the cost of counsel or deny the request for appointment of counsel. A person may knowingly, intelligently, and voluntarily waive the right to counsel. Waiver of counsel shall be set out in writing or in the minute entry of the court.

**C. Manner of Appointment.** If the court enters an order appointing or denying counsel, a copy of the order or minute entry shall be provided to the parties and any attorney appointed.

## **Rule 40. Appointment of Guardian Ad Litem**

**A.** The court may appoint a guardian ad litem to protect the interest of the child. The guardian ad litem ~~may~~shall be an attorney, ~~volunteer special advocate or other qualified person~~ and shall not also serve as the child's attorney in dependency proceedings. The guardian ad litem shall meet with the child before the preliminary protective hearing, if possible, or if not possible, within fourteen (14) days after the preliminary protective hearing. The guardian ad litem shall also meet with the child before all substantive hearings. Upon a showing of extraordinary circumstances, the judge may modify this requirement for any substantive hearing.

**B.** In any proceeding where a parent, guardian or Indian custodian is under eighteen (18) years of age, the court may appoint a guardian ad litem to protect the interests of such parent.

**C.** If the court has reason to believe a parent, guardian or Indian custodian may be incompetent, the court shall appoint a guardian ad litem to conduct an investigation and report to the court as to whether the parent, guardian or Indian custodian may be incompetent and in need of protection. The court shall conduct hearings and enter orders as determined to be necessary to protect the interests of the parent, guardian or Indian custodian.

## **Rule 62. Initial Guardianship Hearing**

**A - B.** [No change]

**C. Procedure.** At the initial hearing the court shall:

1. Under the Regulations, inquire if any party has reason to know that the child at issue is an Indian child as defined by ICWA;
2. Appoint counsel pursuant to Rule 38~~(B)~~, unless counsel had previously been appointed;
3. ~~Appoint counsel for the child if a guardian ad litem has not been appointed;~~
- 4 – 8 [renumber]

**D.** [No change]

## **Rule 64. Motion, Petition, Notice of Hearing and Service of Process and Orders**

**A-D. [No change]**

**E. Orders.** The court shall assign counsel for the child as provided in Rule 38 for the initial termination hearing unless counsel was previously appointed and may enter other orders, pending the hearing, as the court determines to be in the best interests of the child.

## **Rule 65. Initial Termination Hearing**

**A-B. [No change]**

**C. Procedure.** At the initial hearing the court shall:

1. Under the Regulations, inquire if any party has reason to know that the child at issue is an Indian Child as defined by the ICWA;
2. Appoint counsel pursuant to Rule 38(B); unless counsel had previously been appointed;
3. ~~Appoint counsel for the child if a guardian ad litem has not been appointed;~~
4. – 7. [renumber]

**D. [No change]**