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## Memorandum

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**To:** C.R.J.P. Committee (Main)

**From:** Office of Respondent Parents' Counsel (ORPC)

**Re:** ORPC's Position on Presumption on Deposition of Youth<sup>1</sup>

**Date:** 11.29.23

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**SUMMARY:** The current draft rule on depositions of minors aged 12 and up sets forth a presumption that it is not in the best interest of those children to be deposed. The ORPC believes the rule is overly broad given that children 12 and up direct the course of their own cases – even when that course is against the advice of their Counsel for Youth (CFY). Because of that, the ORPC proposes the following.

1. As set forth in the current version of the draft rules, guardians ad litem (GAL) and children under 12 are not subject to discovery requests absent an order by the juvenile court for good cause shown. DISCOVERY, § (i)(1)(B), *Persons Exempted from Disclosure and Discovery*.
  - a. It is the ORPCs position this rule excludes depositions of children under 12, absent a court order for good cause shown.
  - b. **The ORPC proposes this draft rule remain unchanged.**

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<sup>1</sup> It is the ORPC's understanding that the memoranda requested were intended to present the respective positions on the presumption of depositions. Accordingly, the ORPC will address the other issues contained in OCRs brief during the meeting.

2. However, the draft rule also states that “[i]t is presumed that depositions of children or youth are not in their best interests and require a court order supported by good cause shown.” DRAFT RULE, DISCOVERY, § (i)(4), *Oral Depositions*.

a. **The ORPC does not support the proposed presumption.**

b. Instead, the ORPC proposes a requirement for a court order to depose children 12 and up for good cause shown.

**EXPLANATION:** As agreed upon by the drafting subcommittee, “[d]ependency and neglect cases are unique civil cases requiring an intricate balance of the important and interrelated rights and interests of parents, legal guardians and/or legal custodians; children and youth; and the government.” DRAFT RULE, DISCOVERY, *Purposes of this Rule*, § (a)(1).

The ORPC is committed to thorough discovery procedures that are fair for all parties. While such procedures ensure the protection of parents’ rights, they likewise create significant efficiencies for the court, thereby speeding permanency for children. To that end, there are several reasons that counsel against such the proposed presumption that oral depositions are not in a youth’s best interest.

**1. There is no basis for a presumption.**

a. As an initial matter, it should be noted depositions of children in dependency cases are not new. *See e.g., In Int. of K. A. J.*, 635 P.2d 921

(Colo. App. 1981)(reversing a grant of summary judgment made by the juvenile court in favor of a parent because multiple depositions from the child created a factual dispute). In addition to not being new, *K.A.J.* highlights that depositions are also to the benefit of the department/GAL/CFY, in addition to protecting parents' rights.

b. Additionally, the Office of Child Representative (OCR) has provided a sampling of other states' discovery rules to the members of this committee. Critically, none of the sample states offered provide for a blanket presumption stating that depositions are not in the child's best interest.

i. Instead, the sample state of Vermont requires that "no deposition shall be taken of a minor unless the court orders the deposition, under such conditions as the court may order, on the ground that the deposition would further the purposes of Chapter 53 of Title 33 of the Vermont Statutes Annotated." Vermont Family Proceedings Rule 2; *but see* V.R.Cr.P. 15(f)(2) (restricting depositions in criminal cases of children under age 16).

Vermont's rule, then, is similar to the rule proposed by the ORPC. In coming to its decision, Vermont noted that "[t]he present rule strikes a balance between the needs of the parties and the needs of children by prohibiting the depositions of minor children absent a

court order.” Reporter’s Notes.<sup>2</sup> This reasoning is also similar to that agreed upon by the drafting subcommittee as set forth in the *Purposes of the Rule*, discussed above.

**2. Creating a presumption risks the juvenile court not receiving facts needed to make an informed decision that is in the ultimate best interest of the child.**

- a. With the creation of youth-directed representation, CFY’s are now required to argue for adjudication, termination, and other positions at the behest of the youth. In other words, the court can no longer rely on the CFY to argue for what is in the child’s best interest.
- b. The problem this creates is that, in Colorado, it is statutorily understood that children and youth can be “out-of-control.” *See* C.R.S. § 19-3-102(1)(f)(“A child is neglected or dependent if: (f) The child has run away from home or is otherwise beyond the control of his or her parent, guardian, or legal custodian.”).
- c. As this committee knows, out-of-control youth may rebel and fabricate stories to avoid the rules imposed by parents. Creating a presumption that depositions are not in the child’s best interest when the state recognizes that a youth may be out of control creates a disservice to the parents, the

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<sup>2</sup> Though unclear, Reporter’s Notes appear to be the equivalent of comments in Colorado.

youth, and the juvenile court when handling these difficult cases. Put simply, limiting the information before the Court in such circumstances fundamentally risks the juvenile court not receiving facts needed to make an informed decision that is in the best interest of the child.

**3. The presumption is unnecessary.**

a. The presumption that a deposition is not in the child's best interest is also unnecessary.

b. First, under the draft rules, the juvenile court retains the authority to,

**limit or expand discovery for good cause considering factors such as the purposes of the Children's Code**, the complexity of the case, the importance of the issues at stake, the parties' alternative access to the relevant information, the importance of discovery in resolving the issues before the juvenile court, and whether the burden or delay associated with the proposed discovery outweighs its likely benefits.

DRAFT RULE, DISCOVERY, *Expansion of Limitation for Good Cause*, § (i)(10)

(emphasis added).

Given this retained authority, the juvenile court will already be considering the purposes of the Children's Code, including the best interest of the child, when determining whether a youth can be deposed. Because of this, a presumption is unnecessary.

c. Second, with all respect to the Committee, none of us knows what case will be before a juvenile court at any given time. It is for that reason the Committee has provided to the juvenile court the above explicit retained

authority. Providing this authority implicitly recognizes what has long been understood: that the “trial court [is] in the best position to appraise [the] situation.” *Reed v. People*, 467 P.2d 809, 812 (Colo. 1970); *see also Mulberry Frontage Metro. Dist. v. Sunstate Equip. Co., LLC*, 537 P.3d 391, 400 (Colo. App. 2023) (“The trial court is in the best position to determine whether an action, defense, or part thereof satisfies these standards.”). Given this, an entrenched presumption does little for justice, risks harming the ultimate best interest of the child, and limits the court’s authority to address the issues before it.

- d. Accordingly, the ORPC opposes the inclusion of a presumption that depositions are not in a youth’s best interest. Instead, the ORPC proposes that the Rule require a motion for a court order whenever a deposition of a youth is sought. This will allow the court to review the issues before it without its hands tied, act in the ultimate best interest of the child, and enter any orders needed to protect the child should the court grant the motion for good cause shown.