AGENDA
COLORADO SUPREME COURT
RULES OF JUVENILE PROCEDURE COMMITTEE

Friday, May 3, 2019, 9:00 AM
Supreme Court Conference Room 4th Floor
Ralph L. Carr Colorado Judicial Center
2 E. 14th Ave., Denver CO 80203
Supreme Court Conference Room

I. Call to Order

II. Chair's Report
A. Approval of the 3/15/19 meeting minutes

III. Old Business
A. Reviewing Current Rules
1. D&N specific C.R.J.P. 2.1 (appointment of counsel)-*see* new draft
2. D&N specific C.R.J.P. 2.3 (emergency orders)-Mag. Spangler
3. C.R.J.P. 4.5 (contempt)-integrate rule and statute-Pam & Traci

B. Reaching Consensus: Revisiting Matters Left Unresolved at Previous Meetings
1. Default? Yes or No-*see* history packet

IV. Any New Business
A. Rule on Formal End to D&N Case-*see* email from D. Ayraud
B. HB19-1232 (ICWA)
C. Draft Rules in One Document

V. Adjourn
A. Next Meeting: June 21, 2019, 9 AM, Supreme Court Conference Room

Conference call information

To join the call please **dial 720-625-5050** and, when prompted, enter **participant code, 98202879#** (don't forget the pound sign).

Adobe Connect link

https://connect.courts.state.co.us/wallace/

Colorado Supreme Court Rules of Juvenile Procedure Committee
Minutes of March 15, 2019 Meeting

I. Call to Order

The Rules of Juvenile Procedure Committee came to order around 9:00 AM in the court of appeals full-conference room on the third floor of the Ralph L. Carr Colorado Judicial Center. Members present or excused from the meeting were:

Name	Present	Excused
Judge Karen Ashby, Chair	X	
David P. Ayraud	X	
Magistrate Howard Bartlett		X
Jennifer Conn		X
Sheri Danz	X	
Traci Engdol-Fruhwirth	X	
Judge David Furman	X	
Ruchi Kapoor	X	
Shana Kloek	X	
Wendy Lewis		X
Peg Long	X	
Judge Ann Meinster		X
Judge Dave Miller		X
Chief Judge Mick O'Hara		X
Trent Palmer		X
Professor Colene Robinson		X
Magistrate Fran Simonet		X
Judge Traci Slade		X
Magistrate Kent S. Spangler		X
John Thirkell	X	
Pam Wakefield		X
Non-voting Participants		
Justice Richard Gabriel, Liaison	X	
Terri Morrison	X	
J.J. Wallace	X	
Judge Craig Welling, Chair Designate	X	

Attachments & Handouts:
(1) Rule 2.1 (appointment of counsel) draft
(2) Rule 2.3 (emergency orders) draft
(3) Memo on Rule 2.4 (magistrates)

1

(4) Rule 4.5 and § 19-3-504, C.R.S (2018)
(5) Memo on Rule 4.3(b) (jury trial)
(6) Continued (deferred) adjudications draft rule

II. Chair's Report

A. The 2/1/19 minutes were approved without amendment.

III. Old Business

A. Review of Present C.R.J.P
1. Rule 2.1 (appointment of counsel)

Ruchi Kapoor indicated that the biggest problem she sees state-wide with counsel is an absence of uniform withdrawal requirements. Judge Ashby added that another problem came up at the appellate training last week-confusion over counsel when the court of appeals does a limited remand for ICWA findings: Does appellate counsel deal with the issue? Is trial counsel from before the appeal still appointed? Should a new trial counsel be appointed for the ICWA remand proceedings?

Ruchi related that ORPC has a policy to leave trial RPC in place until the appeal is over and a mandate is issued. She says that new trial counsel is substituted during the appeal if appellate counsel raises an ineffective assistance of counsel claim on appeal. She stated that it's ORPC's practice that when an appellate counsel decides to raise and IAC claim, the appellate counsel contacts her so she can facilitate a substitution of counsel in the trial court. This should cover limited remand situations, but there has been resistance and some jurisdictions do not follow ORPC's policy.

On the court side of things, a clerk of court indicated that counsel, as listed in Eclipse, is a case-by-case scenario. If appellate counsel files an entry of appearance in the trial court and it looks like a substitution of counsel, the clerk's office will only list appellate counsel in Eclipse. If the entry of appearance makes clear that counsel is appellate counsel, both trial counsel and appellate counsel will be listed in Eclipse. Ruchi clarified that sometimes appellate counsel enters his or her appearance in the trial court case in order to gain access to trial court records. Ruchi stated that appellate counsel often does not enter an appearance in the trial court case because they do not need access to the trial court record (an electronic record on appeal has been provided to them through the appeal).

The question was asked why substitutions of counsel require court order in D&N cases (the usual civil rule makes substitution of counsel automatic with no need for a court order). It was explained that the CJD and statutes require court appointment for RPC and GALs (and they construe this as applying to substitutions) and the court's oversight for substitutions is preferred.

Overall, committee members felt that how trial court counsel's representation is substituted, terminated, the role of counsel in limited remand situations, and the duration of counsel's representation is county-by-county and state-wide consistency would be helpful. Although ORCP has a policy on this, the committee felt a rule would be more effective and would also apply to private counsel, which could be beneficial. The committee asked Ruchi to look at these issues and come up with a framework for addressing them. Committee members recommended starting with the ordinary circumstance and then the special or extraordinary circumstance. Ruchi should also look at to whom the rule applies: just RPC? Private counsel? GALs? Although, on this issue, Sheri Danz related that she did not see these kinds of problems with GAL appointments because the CJD controlling GALs was recently clarified to address GAL appellate responsibilities.

Another committee member asked if we needed a rule that designated the formal end of a D&N case because sometimes questions over termination of the court's jurisdiction arise. Committee members agreed that this was an issue but thought it might be a best addressed separately and not necessarily in a rule discussing counsel.

2. Rule 2.3 Emergency Orders.
Last meeting, individuals were asked to seek feedback on the current emergency orders rule. Feedback from GALs indicated that the rule is most often used for medical needs. GALs suggested providing more specific procedural protections in the rule, including tasking the court or movant with sending timely notice of the order to the GAL (and other parties) and having the order include enough findings so that the parties who were not at the hearing can determine the basis of the order. Feedback from RPC made similar suggestions to beef up procedural safeguards. Judicial feedback pointed out that the rule is most often used when there is not a pending D&N case. Judicial officers favored flexibility within the rule-this is especially important for judges in rural jurisdictions that may only be in smaller counties once a week. They also pointed out that emergency orders under section 19-1-104(3)(b), C.R.S. (2018) are only valid for 24 hours and the rule does not refer to this limitation (and if the emergency has not resolved within 24 hours, the order must be continuously re-issued). County attorneys stated that, if the county has temporary legal custody, emergency orders may not be needed for them to act, but as a general rule, the county tries to reach out to the parents in an emergency situation.

Judge Ashby will email feedback to Magistrate Spangler and the committee will take up the issue again at the next meeting.

3. Rule 2.4 Magistrates:
The magistrate rules (C.R.M.) are overseen by the civil rules committee. Committee members generally agreed that there are difficulties in the interplay of the C.R.M and the Children's Code statute on magistrates. Judge Ashby asked that committee members email her and Judge Welling (the chair designate) with specific issues that need to be addressed and they will reach out to Judge Berger, the chair of the civil rules committee.

4. Rule 4.5 Contempt

The committee briefly discussed section 19-3-504(1) authorizing contempt for failure to appear upon summons, and C.R.C.P. 107, the rule of procedure on contempt. At the last meeting, Pam Wakefield mentioned harmonizing the statute with the rule to cover both situations. Traci Engdol-Fruhwirth will talk to Pam Wakefield about this and the issue will be tabled until the next meeting.

5. Rule 4.3 Jury Trials

The committee reviewed the memo on other states' rules. The committee agreed that peremptory challenges should be allocated per aligned side and that each aligned side should get equal numbers of challenges. John Thirkell (with assistance from J.J. Wallace) will work on developing a draft rule incorporating the committee's ideas.

IV. New (Yet Old) Business

A. Reaching Consensus: Revisiting Matters Left Unresolved at Previous Meetings

1. Default vs. Non-Appearing Party Rule

The following feedback was shared with the committee. From judicial officers:

- One judge noted that it would be nice to have a true default rule as an efficiency, but noted that right now, his courtroom does short evidentiary hearings;
- Some judges worried about increase docket loads if there was no default;
- Most concerns seemed driven by a desire for a mechanism to secure an adjudication when a respondent does not participate (and the non appearing party rule would do this)

The Chair suggested that the committee hold off formal voting for a better attended meeting. J.J. Wallace will circulate information setting out the historical discussion of this issue among committee members for the next meeting and will include the current drafts of the non appearing party rule and the default rule.

2. Continued (Deferred) Adjudications

The committee decided that the advisement section of the rule should reflect that all parties are aware of the terms and conditions of the continued adjudication. There was also a suggestion to add a paragraph setting out a procedure to amend the terms and conditions. Also, it was pointed out that the rule, as drafted, only covers when a respondent fails at the deferred adjudication and procedures for when a respondent succeeds should be added. Sheri Danz and David Ayraud will update the proposed rule with these changes, which will finalize the rule.

3. Mini termination Rule

Sheri related that the subcommittee will reconvene and decide if termination needs to be referenced or addressed in other rules.

V. New Business

1. The chair mentioned that discussions are underway regarding how to implement the Family First Prevention Services Act (FFPSA). FFPSA allows states to use IV-E funds for prevention services that would allow "candidates for foster care" to stay with their

parents or relatives. Committee members do not have complete information on FFPSA's implementation in Colorado, but committee members should be alert to the issue in case of impacts to the rules.

2. ICWA subcommittee update: they have a draft set of rules.

3. J.J. Wallace will email one document with all the draft rules before the next meeting. Committee members are asked to review the rules. Subcommittee chairs are asked to think if there is a need to add comments or make other revisions.

VI. Adjourn Next Meeting May 3rd

The Committee adjourned at 11:33 PM.

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Respectfully Submitted,
J.J. Wallace

RULE 2.1. ATTORNEY OF RECORD

(a) Appointment of Counsel in Article 3 proceedings

1) **Attorney of Record.** An attorney shall be deemed of record when the attorney appears personally before the court, files a written entry of appearance, has been appointed by the court, or appointed by the Office of Respondent Parents' counsel as set out in CJD 16-02.
2) **Advisement.** If a respondent appears in court without counsel, the court shall advise the respondent of the right to counsel. At first appearance, if, upon the respondent's affidavit or sworn testimony and other investigation, the court finds that the respondent meets the eligibility requirements or exceptions set out in CJD 16-02 or statute, an attorney shall be appointed to represent the respondent at every stage of the proceedings.
3) **Appointment.** Court staff shall notify an attorney appointed by the court. An order of appointment shall be entered into the court's electronic case management system.

(b) Multiple Representation by Counsel. Whenever two or more respondents have been named in a petition for dependency or neglect, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall advise each respondent of the right to the effective assistance of counsel, including separate representation. For respondents appointed counsel through the Office of Respondent Parents' Counsel, pursuant to CJD 16-02, two respondents shall not be represented by the same appointed counsel.

(c) Request for Withdrawal of a Lawyer During Proceedings.

1) **Notice of Withdrawal.** An attorney may withdraw from a case only upon order of the court. Such approval shall rest in the sound discretion of the court and shall not be granted until the attorney seeking to withdraw has made diligent efforts to give actual notice to the client. A request to withdraw shall be in writing and shall be made as soon as practicable upon the lawyer becoming aware of the grounds for withdrawal. Such notice to withdraw shall include:
   (I) That the attorney wishes to withdraw;
   (II) That the court retains jurisdiction;
   (III) That the respondent has the right to object to withdrawal;
   (IV) That a hearing will be held and withdrawal will only be allowed if the court approves;
   (V) That the respondent has the obligation to appear at all previously scheduled court dates;
   (VI) That if the request to withdraw is granted, then the respondent will have the obligation to hire other counsel, request the appointment of counsel by the court or elect to represent himself or herself;
   (VII) Of the respondent's right to object within 7 days of the date of the notice.

2) **Withdrawal With Leave of Court.** The respondent and opposing counsel shall have 7 days prior to entry of an order permitting withdrawal or such lesser time as the court may permit within which to file objections to the withdrawal. If the court denies counsel's request to withdraw, then counsel may file an *ex parte* motion requesting an in-camera

hearing in front of a new judge and detailing the reasons for why the withdrawal is necessary.

3) **Substitution Without Leave of Court.** An attorney may withdraw from a case, without leave of court, where the withdrawing attorney has complied with all outstanding orders of the court and either files a notice of withdrawal where there is active co-counsel for the party represented by the withdrawing attorney or files a substitution of counsel signed by both the withdrawing and replacement attorney. The attorney seeking to substitute shall prepare a notification certificate stating that the above notification requirements have been met and the manner by which such notification was given to the respondent, and setting forth the respondent's last known address and telephone number. The notification certificate shall be filed with the court and a copy mailed to the respondent and all other parties. The respondent and opposing counsel shall have 7 days prior to entry of an order permitting substitution or such lesser time as the court may permit within which to file objections to the substitution. After order permitting substitution, the respondent shall be notified by the substituting attorney of the effective date of the substitution

   (I) **Substitution of Appointed Counsel.** With the pre-authorization of the Office of Respondent Parents' Counsel pursuant to CJD 16-02, an appointed attorney can substitute for another appointed attorney by filing a "Notice of Substitution of Counsel by The ORPC." Such notice must have all the elements set forth for substituting counsel set forth in this rule.

(d) Termination of Representation. Counsel's appointment through the Office of Respondent Parent Counsel terminates pursuant to CJD 16-02. Termination of retained counsel ends pursuant to agreement between counsel and respondent.

Colorado Rules of Juvenile Procedure 2.3

(a) On the basis of a report that a child's or juvenile's welfare or safety may be endangered, and if the court believes action is reasonably necessary, the court may issue an ex parte order.

(b) Where the need for emergency orders arises, and the court is not in regular session, the judge or magistrate may issue such orders orally, by facsimile, or by electronic filing. Such orders shall have the same force and effect**.** Oral orders shall be followed promptly by a written order [setting out findings to support the order/factual basis supporting the order?] entered on the first regular court day thereafter. [requirement for disseminating/serving the order]

(c) Any time when a child or juvenile is subject to an emergency order of court, as herein provided, and the child or juvenile requires medical or hospital care, reasonable effort shall be made to notify the parent(s), guardian, or other legal custodian for the purpose of gaining consent for such care; provided, however, that if such consent cannot be secured and the child's or juvenile's welfare or safety so requires, the court may authorize needed medical or hospital care.

(d) (1) ***A hearing must be held within 72 hours excluding weekends and holidays to review all written Ex Parte protection or custody orders issued pursuant to C.R.S. 19-3-405 and C.R.S. 19-3-114. All parties to the case shall be given notice of the hearing in accordance with these rules.***

(2) For protection orders issued for a child who has run away from placement pursuant to C.R.S. 19-1-113 a hearing must be set in accordance with the requirements of C.R.S. 19-1-113 (4)

wallace, jennifer

From: Traci Fruhwirth
Sent: Wednesday, May 1, 2019 6:03 PM
To: wallace, jennifer
Cc: Pamela Wakefield
Subject: Re: Contempt

Hi J.J. -
Pam and I did have the opportunity to discuss this. We believe that it should remain as is, because the rule includes the due process portions that should be applicable when dealing with any party who is alleged to have violated Court Orders (drinking, running away, harboring a child, failing to show for evaluations, etc.) In an emergent situation when a bench warrant needs to be issued for a child, the statute covers that. Often times, a child who is on the run hasn't necessarily violated a Court Order that rises to the level of contempt, as they may have never been advised by a Court not to run.
I hope this makes sense!
Traci

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On Apr 26, 2019, at 10:00 AM, wallace, jennifer wrote:

> Hi Pam and Traci-
>
> Happy Friday! Just following up on the contempt issue. Did you think of anything that should be changed/integrated/modified about the contempt rule?
>
> If not, the agenda item could be a short report to the committee that after consideration, things looked ok with the current rule.
>
> Thanks-
>
> J.J.

From: wallace, jennifer
Sent: Monday, April 15, 2019 3:10 PM
To: Traci Fruhwirth
Cc: Pamela Wakefield
Subject: Re: Contempt

Hi Pam & Traci-

I'm out of the office today and tomorrow. As best as I can remember, there was a suggestion at the 2/1

meeting that the committee should think about whether there was any confusion between the contempt statue and the rule. I thought Pam made the suggestion and had something specific in mind. I could be wrong!

Let Me know if this helps. Also you can look at the 2/1 minutes here; https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Committees/Rules%20of%20Juvenile%20Procedure%20Revision%20Committee/Minutes%202_1_19.pdf

Thanks! JJ

From: Traci Fruhwirth
Sent: Monday, April 15, 2019 2:14:28 PM
To: wallace, jennifer
Cc: Pamela Wakefield
Subject: Re: Contempt

Hi JJ -
In speaking with Pam about this, she does not remember specifically raising this issue with you. Can you help us both remember the concern that she may have raised, or another GAL raised, at some point?
Traci

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On Mar 15, 2019, at 4:03 PM, wallace, jennifer wrote:

> Hi Traci-
>
> I wanted to remind you that you were going to speak with Pam about contempt. This was the note from the last meeting's minutes:
>
> <image001.png>
>
> And I've attached the rule and statute that I included in today's meeting materials.
>
> Have a great weekend-
>
> J.J.
>
> <C.R.J.P. 4.5 Contempt + Statute.docx>

AGENDA ITEM IV(A)(1) NON-APPEARING PARTY RULE VS. DEFAULT

From 3/24/17 Minutes:

The committee decided that a rule on default may not be needed. No committee member could recall ever using default (as outlined in C.R.C.P. 55 and 121 § 1-14) in a D&N case. There may also be problems with using default (C.R.C.P. 4 requires the summons to provide notice that default may occur if a defendant does not respond; § 19-3-503 (content of summons) does not require similar language and respondents in D&N cases are not required to file responses). Although committee members acknowledged that sometimes participants use the word "default" to describe adjudication for a non-appearing party, the process used appears to be on the merits rather than a procedural default as contemplated by the C.R.C.P. Sheri will check with GALs, Ruchi will check with RPC, David will check with county attorneys, and J.J.will check with the courts to see if any jurisdiction uses a true default process. The committee anticipates substituting a rule for "Adjudication for Nonappearing Parties" instead of default.

From 8/4/17 Minutes:

David Ayraud opened by explaining the highlights of the two rules. He indicated that these rules generated the most discussion out of all the rules. The subcommittee surveyed various jurisdictions to get an idea of how they handled non-appearing parties. He said 40% of jurisdictions use default for non-appearing parties; 40% have a short hearing with sworn testimony; and 20% used a variety of other methods. He also said that the subcommittee did not develop a clear preference between the two rules.

The committee began with the default rule:

- If default will be allowed by rule, the rules need summons language advising and giving respondents notice that default can be entered against them. Because the rule currently does not require responsive pleadings, see C.R.J.P. 4.1(a), summons language may need to advise respondents who "fail to defend" that default may be entered against them. The summons language should account for two scenarios: (a) non-appearing respondents who appear once or twice and then leave; and (2) non-appearing respondents who never appear.
- The rule sets out a two-step process (similar to, but not the same as, C.R.C.P. 55): (1) entering default against the non-defending party; and (2) entering the adjudication.
- RPC likes that the rule provides a process to set aside a default. A process to set aside a default provides a way to cure notice problems. RPC generally prefers this rule to the alternative because of this one process. There was a discussion of trying to do a hybrid rule using the non-appearing respondent rule and then adding an element to set it aside, but David Ayraud thought the hybrid would only be possible for incompetent or minor respondents. The committee also discussed taking setting aside default out of this rule and drafting a separate, independent rule with a process for setting aside an adjudication (not just an adjudication entered by default).
- GALs expressed concerned that this rule (and the ability to set aside an adjudication generally), may delay permanency.

- Smaller jurisdictions like the default rule because it's hard to marshal resources for even a short evidentiary hearing for the large number of non-appearing respondents.
- The draft rule says that the affidavit for adjudication by default may be executed by the attorney for the petitioner. This is different from C.R.C.P. 121 § 1-14(1)(d), which requires a person with knowledge of the damages and the basis therefore and forbids the attorney from doing the affidavit. The subcommittee drafted the rule to allow for attorney affidavit because of smaller jurisdictions. A suggestion was made to add "with the permission of the court" at the end of the sentence to allow the court to decide if the attorney affidavit is sufficient or if a caseworker or other person with knowledge is required.
- If the committee goes with the default rule, the pre-adjudication subcommittee should think about the following issues: (1) appropriate advisement that default is possible; (2) right to counsel; (3) notice issues to ensure actual notice (for example, child support units might have a good address for a parent from a IV-D order, but the child welfare unit might say that they can't find the parent).

The committee then turned to the non-appearing respondent rule:

- This rule calls for a short evidentiary hearing (sometimes called "an offer of proof," but really it is an evidentiary hearing).
- This rule allows for cross-examination (unlike default)-it's an opportunity to test the evidence.
- The committee liked that this kind of adjudication was based on evidence (not a failure to appear or defend), so it would be harder to undo later, which is good for children's permanency and consistent with the Children's Code.
- But even under this rule, lack of proper notice might justify setting aside the adjudication (the committee emphasized again how important providing notice is in keeping the case on track). Thus, a separate rule on setting aside an adjudication could be helpful. A committee member pointed out that C.R.C.P. 60(b), which is currently applicable to D&N cases, already provides a mechanism to set aside an adjudication. He also noted that magistrates, who frequently hear D&N cases, cannot rule on C.R.C.P. 60(b) motions. The subcommittee should think about complexities added by the C.R.M., § 19-1-108, and case law on magistrates. Research assistance through the library is available if it is needed in exploring this issue.
- RPC raised concerns about this rule's application when there is a criminal case going on.
- The committee agreed that there is a need for a streamlined process of some sort.
- If the committee goes with the non-appearing respondent rule, the pre-adjudication subcommittee should think about whether there should be appointed counsel in every case (even when no one appears), which might provide a safety valve.
- Judge Ashby encouraged committee members to talk to their colleagues about the two proposed rules to get a sense if there is a preference.

From 2/1/19 Meeting Minutes:

The committee members agreed that default in a dependency and neglect case is not a best practice and no members of the committee used it. One member mentioned that even under the civil rules default requires evidence, so the member did not see default

being more useful or easier than the non-appearing party rule. Committee members did not want to encourage use of default and felt that adopting a default rule would encourage it. One committee member noted that not having a default rule would not preclude parties from using default. Another member felt that the default procedure had no benefit in a dependency and neglect case. David Ayraud, co-chair of the adjudication subcommittee that drafted these rules, mentioned that some counties do use default. Default has also been addressed in case law.

The committee decided to frame the issue for a yes/no decision: Does the committee want to recommend to the supreme court that the default procedure be available in dependency and neglect cases? The chair asked members to reach out to stakeholders and practitioners for feedback on using default procedures in the expectation that a final yes/no decision will be made at the March meeting.

Adjudication Rule 4.2.6 Default *(revised 6/15/2017)*
(Alternative to Adjudication for Non-Appearing Respondent)

(a) **Entry.** When a respondent has failed to appear or has failed to defend in a dependency or neglect action, the court may enter his or her default. A respondent fails to appear in the action if, after being duly served with process, he or she does not appear before the court, in person or through counsel, at the date and time stated in the summons. A respondent fails to defend in the action if, after being duly served with process, he or she fails or refuses to admit or deny the allegations contained in the petition.

(b) **Adjudication After Default.** After entry of default, a party entitled to an adjudication due to the default of a respondent may apply to the court therefor by filing a motion and any supporting documentation in accordance with this rule. The following documents must be submitted with a motion for adjudication by default: (1) The original summons showing valid service on the particular respondent; (2) an affidavit stating facts sufficient to show that venue of the action is proper; (3) an affidavit stating facts sufficient to show that the particular respondent is not a minor, an incompetent person, or in the military service; (4) an affidavit stating facts sufficient to show that the court has jurisdiction to make a child-custody determination in accordance with the Uniform Child-custody Jurisdiction and Enforcement Act (UCCJEA), Title 14, Article 13, Section 2, Colorado Revised Statutes; and (5) a proposed form of order for adjudication by default. Affidavits may be executed by the attorney for the petitioner on the basis of reasonable inquiry with the permission of the court?. Affidavits may be combined or submitted separately. If further documentation, proof, or hearing is required, the court shall notify the parties.

(c) **Proceedings.** A court may conduct such hearing or hearings as it deems necessary and proper to determine an application for adjudication by default. A court is not required to conduct a hearing on an application for adjudication by default if all necessary prerequisites for adjudication by default are shown by the motion and supporting documentation. If the court determines that a hearing is required, the court shall set the motion for hearing and

petitioner shall serve written notice of the application for adjudication by default on all parties and their attorneys of record, if any, at least seven days prior to the hearing.

(d) **Military Status.** If the respondent against whom adjudication by default is sought is in the military service, or his or her military status cannot be shown, the court shall require such additional evidence or proceeding as will protect the interests of such party in accordance with the Service Member Civil Relief Act (SMCRA), 50 USC § 520, including the appointment of an attorney when necessary.

(e) **Minors and Incompetent Persons.** Adjudication by default shall not be entered against a respondent who is a minor or an incompetent person unless that party is represented in the action by a parent, guardian, legal custodian, or guardian ad litem.

(f) **Adjudication.** Before adjudication by default is entered the court shall be satisfied that it has jurisdiction over the parties and the subject matter of the action, venue of the action is proper, and the respondent against whom adjudication by default is being sought has failed to appear or has failed to defend in the action.

(g) **Adjudication on Alternative Service**. Service of process by publication, mail, personal service out of the state, or any other means authorized by C.R.S. 19-3-503 shall not preclude adjudication by default.

(h) **Setting Aside Default.** For good cause shown the court may set aside an entry of default. If adjudication by default has been entered, a court may set aside the adjudication in accordance with Rule 60(b) of the Colorado Rules of Civil Procedure.

Comment: *Default is a separate step from entry of adjudication. It permits the court to enter a finding of default, but delay the entry of adjudication upon default if appropriate. For example, if one parent may be in default after proper service, but the other parent has not been served yet. The Court may determine it wants to wait to enter adjudication on the defaulting parent until the other parent is served. The rule is also written broadly enough to permit a guardian ad litem, in addition to the county attorney, to apply for adjudication by default.*

Adjudication Rule 4.2.6 Adjudication On Non-Appearing or Non-Defending Respondent (Alternative to Default)

(a) **Entry.** When a respondent has failed to appear or has failed to defend in a dependency or neglect action, the court may enter adjudication upon evidence submitted pursuant to this rule. A respondent fails to appear in the action if, after being duly served with process, he or she does not appear before the court, in person or through counsel, at the date and time stated in the summons. A respondent fails to defend in the action if, after being duly served with process, he or she fails or refuses to admit or deny the allegations contained in the petition at the date and time set forth in the summons or as ordered by the court. A party seeking an adjudication for a non-appearing or non-defending respondent may request adjudication be entered either upon written or verbal motion to the court, with supporting evidence in accordance with this rule.

(b) **Supporting Documentation.** If the motion is requested in writing, the motion may include an affidavit stating facts sufficient to support at least one of the allegations contained in the petition. Affidavits may be executed by the attorney for the petitioner on the basis of reasonable inquiry. Affidavits may be combined or submitted separately. If no affidavits are submitted or further documentation, proof, or hearing is required, the court shall notify the parties.

(c) **Testimony.** If the motion is requested verbally or a hearing is conducted on a written motion, the moving party shall present witness testimony or other appropriate evidence stating facts sufficient to support at least one of the allegations contained in the petition. Testimony may be presented through a proffer of testimony by the attorney, which is then adopted under oath as the sworn testimony of the witness. If such process is used, the testimony may be relied upon as if the witness directly testified.

(d) **Proceedings.** A court may conduct such hearing or hearings as it deems necessary and proper to determine a motion for adjudication for a non-appearing or non-defending respondent. A court is not required to conduct a hearing if all necessary prerequisites for adjudication are shown by the motion and supporting documentation.

(e) **Adjudication.** Before adjudication for a non-appearing or non-defending respondent is entered the court shall be satisfied that it has jurisdiction over the parties and the subject matter of the action, and venue of the action is proper.

(f) **Alternative Service**. Service of process by publication, mail, personal service out of the state, or any other means authorized by C.R.S. 19-3-503 shall not preclude adjudication on a non-appearing or non-defending Respondent.

Separate Rule for Setting Aside Adjudication?

wallace, jennifer

From: David Ayraud <
Sent: Monday, March 11, 2019 8:38 AM
To: wallace, jennifer; Ruchi Kapoor
Subject: Juvenile Rule on Respondent Parent Counsel

J.J.,

This may be better addressed through the CJD, but at the appellate training on Friday there was some discussion about Respondent Parent Counsel and when their appointment ends. It may be helpful to add to the agenda (not necessarily this week, but in the future) a discussion on whether it's appropriate to outline by Rule when RPC trial counsel's appointment ends. Actually, the more I think about it, this should probably be addressed as a broader issue of when does a D&N end? I don't know how many counties file a motion to terminate a case, but I get the sense that most D&N's just sort of "stop" after an APR or Adoption (post-termination), but otherwise there doesn't seem to be a formal ending to cases.

I've copied Ruchi since the initial comment was aimed at her Office, but now I really think it's a "how do D&N's end" issue.

Thanks,

David

LARIMER COUNTY

David Ayraud
Senior County Attorney

County Attorney's Office

| www.larimer.org

NOTE: This bill has been prepared for the signatures of the appropriate legislative officers and the Governor. To determine whether the Governor has signed the bill or taken other action on it, please consult the legislative status sheet, the legislative history, or the Session Laws.

An Act

HOUSE BILL 19-1232

BY REPRESENTATIVE(S) Gonzales-Gutierrez and Catlin, Arndt, Bird, Buckner, Duran, Esgar, Exum, Froelich, Herod, Hooton, Jackson, Jaquez Lewis, Kennedy, Lontine, McCluskie, McLachlan, Michaelson Jenet, Roberts, Singer, Sirota, Snyder, Tipper, Titone, Valdez A., Valdez D., Weissman, Will, Wilson, Becker, Benavidez, Buentello, Coleman, Cutter, Gray, Kipp, Melton;
also SENATOR(S) Coram and Rodriguez, Cooke, Court, Crowder, Fields, Ginal, Gonzales, Priola, Tate, Todd, Williams A.

CONCERNING THE ALIGNMENT OF COMPLIANCE WITH THE FEDERAL "INDIAN CHILD WELFARE ACT".

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. Legislative declaration. The general assembly finds that the bureau of Indian affairs in the United States department of the interior published updated regulations regarding the implementation of the federal "Indian Child Welfare Act" (ICWA) in 2016, codified at 25 CFR 23. The general assembly therefore declares that it is a matter of statewide importance to align Colorado's statute with the updated ICWA regulations to ensure continuing compliance with federal law.

Capital letters or bold & italic numbers indicate new material added to existing law; dashes through words or numbers indicate deletions from existing law and such material is not part of the act.

SECTION 2. In Colorado Revised Statutes, **amend** 19-1-126 as follows:

19-1-126. Compliance with the federal "Indian Child Welfare Act". (1) ~~Commencing thirty days after May 30, 2002,~~ IN EACH CASE FILED PURSUANT TO THIS TITLE 19 THAT CONSTITUTES A CHILD CUSTODY PROCEEDING, AS DEFINED IN THE FEDERAL "INDIAN CHILD WELFARE ACT", 25 U.S.C. SEC. 1901, ET SEQ., AND THEREFORE TO WHICH THE TERMS OF THE FEDERAL "INDIAN CHILD WELFARE ACT", 25 U.S.C. SEC. 1901, ET SEQ., APPLY, THE COURT AND EACH PARTY TO THE PROCEEDING SHALL COMPLY WITH THE FEDERAL IMPLEMENTING REGULATIONS, AND ANY MODIFICATIONS THEREOF, OF THE FEDERAL "INDIAN CHILD WELFARE ACT", 25 U.S.C. SEC. 1901, ET SEQ., LOCATED IN 25 CFR 23, WHICH OUTLINE THE MINIMUM FEDERAL STANDARDS GOVERNING THE IMPLEMENTATION OF THE "INDIAN CHILD WELFARE ACT" TO ENSURE THE STATUTE IS APPLIED IN COLORADO CONSISTENT WITH THE ACT'S EXPRESS LANGUAGE, CONGRESS'S INTENT IN ENACTING THE STATUTE, AND TO PROMOTE THE STABILITY AND SECURITY OF INDIAN CHILDREN, TRIBES, AND FAMILIES. In each ~~case~~ CHILD-CUSTODY PROCEEDING filed pursuant to this ~~title~~ TITLE 19 to which the terms of the federal "Indian Child Welfare Act", 25 U.S.C. sec. 1901, et seq., apply: ~~including but not limited to certain juvenile delinquency proceedings, dependency or neglect proceedings, termination of parental rights proceedings, and pre-adoptive and adoption proceedings, the petitioning or filing party shall:~~

(a) (I) ~~Make continuing~~ THE COURT SHALL MAKE inquiries to determine whether the child who is the subject of the proceeding is an Indian child, and, if so, shall determine the identity of the Indian child's tribe. IN DETERMINING THE INDIAN CHILD'S TRIBE:

(A) THE COURT SHALL ASK EACH PARTICIPANT IN AN EMERGENCY OR VOLUNTARY OR INVOLUNTARY CHILD-CUSTODY PROCEEDING WHETHER THE PARTICIPANT KNOWS OR HAS REASON TO KNOW THAT THE CHILD IS AN INDIAN CHILD. THE INQUIRY IS TO BE MADE AT THE COMMENCEMENT OF THE PROCEEDING, AND ALL RESPONSES MUST BE ON THE RECORD. THE COURT SHALL INSTRUCT THE PARTICIPANTS TO INFORM THE COURT IF ANY PARTICIPANT SUBSEQUENTLY RECEIVES INFORMATION THAT PROVIDES REASON TO KNOW THE CHILD IS AN INDIAN CHILD.

(B) ANY PARTY TO THE PROCEEDING SHALL DISCLOSE ANY

INFORMATION INDICATING THAT THE CHILD IS AN INDIAN CHILD OR PROVIDE AN IDENTIFICATION CARD INDICATING MEMBERSHIP IN A TRIBE TO THE PETITIONING AND FILING PARTIES AND THE COURT IN A TIMELY MANNER. THE COURT SHALL ORDER THE PARTY TO PROVIDE THE INFORMATION NO LATER THAN SEVEN BUSINESS DAYS AFTER THE DATE OF THE HEARING OR PRIOR TO THE NEXT HEARING ON THE MATTER, WHICHEVER OCCURS FIRST. THE INFORMATION SHOULD BE FILED WITH THE COURT AND PROVIDED TO THE COUNTY DEPARTMENT OF HUMAN OR SOCIAL SERVICES AND EACH PARTY NO LATER THAN SEVEN BUSINESS DAYS AFTER THE DATE OF THE HEARING.

(II) THE COURT, UPON CONDUCTING THE INQUIRY DESCRIBED IN SUBSECTION (1)(a) OF THIS SECTION, HAS REASON TO KNOW THAT A CHILD IS AN INDIAN CHILD IF:

(A) ANY PARTICIPANT IN THE CHILD-CUSTODY PROCEEDING, OFFICER OF THE COURT INVOLVED IN THE CHILD-CUSTODY PROCEEDING, INDIAN TRIBE, INDIAN ORGANIZATION, OR AGENCY INFORMS THE COURT THAT THE CHILD IS AN INDIAN CHILD;

(B) ANY PARTICIPANT IN THE CHILD-CUSTODY PROCEEDING, OFFICER OF THE COURT INVOLVED IN THE CHILD-CUSTODY PROCEEDING, INDIAN TRIBE, INDIAN ORGANIZATION, OR AGENCY INFORMS THE COURT THAT IT HAS DISCOVERED INFORMATION INDICATING THAT THE CHILD IS AN INDIAN CHILD;

(C) THE CHILD WHO IS THE SUBJECT OF THE CHILD-CUSTODY PROCEEDING GIVES THE COURT REASON TO KNOW HE OR SHE IS AN INDIAN CHILD;

(D) THE COURT IS INFORMED THAT THE DOMICILE OR RESIDENCE OF THE CHILD, THE CHILD'S PARENT, OR THE CHILD'S INDIAN CUSTODIAN IS ON A RESERVATION OR IN AN ALASKA NATIVE VILLAGE;

(E) THE COURT IS INFORMED THAT THE CHILD IS OR HAS BEEN A WARD OF A TRIBAL COURT, AS DEFINED IN 25 U.S.C. SEC. 1903; OR

(F) THE COURT IS INFORMED THAT THE CHILD OR THE CHILD'S PARENT POSSESSES AN IDENTIFICATION CARD INDICATING MEMBERSHIP IN AN INDIAN TRIBE.

(b) If the ~~petitioning or filing party~~ COURT knows or has reason to ~~believe~~ KNOW, AS DEFINED IN SUBSECTION (1)(a)(II) OF THIS SECTION, that the child who is the subject of the proceeding is an Indian child, THE PETITIONING OR FILING PARTY SHALL send notice by registered OR CERTIFIED mail, return receipt requested, to the ~~parent or Indian custodian~~ PARENT OR PARENTS, THE INDIAN CUSTODIAN OR INDIAN CUSTODIANS of ~~such~~ THE child AND to the tribal agent of the Indian child's tribe as designated in ~~title 25 of the code of federal regulations, part 23~~ 25 CFR 23, or, if ~~such agent has not been designated, to the highest-elected or highest-appointed official of the Indian child's tribe, to the highest-elected or highest-appointed tribal judge of the Indian child's tribe, and to the social service department of the Indian child's tribe; and~~ THERE IS NO DESIGNATED TRIBAL AGENT, THE PETITIONING OR FILING PARTY SHALL CONTACT THE TRIBE TO BE DIRECTED TO THE APPROPRIATE OFFICE OR INDIVIDUAL. IN PROVIDING NOTICE, THE COURT AND EACH PARTY SHALL COMPLY WITH 25 CFR 23.111.

(c) ~~Disclose~~ THE PETITIONING OR FILING PARTY SHALL DISCLOSE in the complaint, petition, or other commencing pleading filed with the court that the child who is the subject of the proceeding is an Indian child and the identity of the Indian child's tribe or what efforts the petitioning or filing party has made in determining whether the child is an Indian child. If the child who is the subject of the proceeding is determined to be an Indian child, the petitioning or filing party shall further identify what reasonable efforts have been made to send notice to the persons identified in ~~paragraph (b) of this subsection (1)~~ SUBSECTION (1)(b) OF THIS SECTION. The postal receipts indicating that notice was properly sent by ~~such~~ THE petitioning or filing party to the parent or Indian custodian of the Indian child and to the Indian child's tribe ~~shall~~ MUST be attached to the complaint, petition, or other commencing pleading filed with the court; except that, if notification has not been perfected at the time the initial complaint, petition, or other commencing pleading is filed with the court or if the postal receipts have not been received back from the post office, the petitioning or filing party shall ~~identify such circumstances to the court and shall thereafter~~ file the postal receipts with the court. ~~within ten days after the filing of the complaint, petition, or other commencing pleading~~ ANY RESPONSES SENT BY THE TRIBAL AGENTS TO THE PETITIONING OR FILING PARTY, THE COUNTY DEPARTMENT OF HUMAN OR SOCIAL SERVICES, OR THE COURT MUST BE DISTRIBUTED TO THE PARTIES AND DEPOSITED WITH THE COURT.

(2) ~~In any of the cases identified in subsection (1) of this section in~~

~~which the initial complaint, petition, or other commencing pleading does not disclose whether the child who is the subject of the proceeding is an Indian child, the court shall inquire of the parties at the first hearing whether the child is an Indian child and, if so, whether the parties have complied with the procedural requirements set forth in the federal "Indian Child Welfare Act", 25 U.S.C. sec. 1901, et seq.~~ IF THERE IS REASON TO KNOW THE CHILD IS AN INDIAN CHILD BUT THE COURT DOES NOT HAVE SUFFICIENT EVIDENCE TO DETERMINE THAT THE CHILD IS OR IS NOT AN INDIAN CHILD, THE COURT SHALL:

(a) CONFIRM, BY WAY OF A REPORT, DECLARATION, OR TESTIMONY INCLUDED IN THE RECORD, THAT THE PETITIONING OR FILING PARTY USED DUE DILIGENCE TO IDENTIFY AND WORK WITH ALL OF THE TRIBES OF WHICH THERE IS REASON TO KNOW THE CHILD MAY BE A MEMBER, OR ELIGIBLE FOR MEMBERSHIP, TO VERIFY WHETHER THE CHILD IS IN FACT A MEMBER, OR A BIOLOGICAL PARENT IS A MEMBER AND THE CHILD IS ELIGIBLE FOR MEMBERSHIP; AND

(b) TREAT THE CHILD AS AN INDIAN CHILD, UNLESS AND UNTIL IT IS DETERMINED ON THE RECORD THAT THE CHILD DOES NOT MEET THE DEFINITION OF AN INDIAN CHILD.

(3) ~~The state department of human services and the county departments of human or social services are encouraged to work cooperatively in the sharing of information that any of such agencies obtains or receives concerning any federally recognized tribal entities existing outside the state of Colorado, including but not limited to information about the appropriate person from a tribal entity to contact with the notice prescribed by this section~~ IF THE COURT RECEIVES INFORMATION THAT THE CHILD MAY HAVE INDIAN HERITAGE BUT DOES NOT HAVE SUFFICIENT INFORMATION TO DETERMINE THAT THERE IS REASON TO KNOW THAT THE CHILD IS AN INDIAN CHILD PURSUANT TO SUBSECTION (1)(a)(II) OF THIS SECTION, THE COURT SHALL DIRECT THE PETITIONING OR FILING PARTY TO EXERCISE DUE DILIGENCE IN GATHERING ADDITIONAL INFORMATION THAT WOULD ASSIST THE COURT IN DETERMINING WHETHER THERE IS REASON TO KNOW THAT THE CHILD IS AN INDIAN CHILD. THE COURT SHALL DIRECT THE PETITIONING OR FILING PARTY TO MAKE A RECORD OF THE EFFORT TAKEN TO DETERMINE WHETHER OR NOT THERE IS REASON TO KNOW THAT THE CHILD IS AN INDIAN CHILD.

~~(4) (a) In any of the cases identified in subsection (1) of this section involving an Indian child, in determining whether to transfer such a case to a tribal court, the court is encouraged to consider the following guidelines:~~

~~(I) The court may find that good cause exists to deny a transfer of the proceeding to the tribal court if the Indian child's tribe does not have a tribal court; or~~

~~(II) The court may find that good cause exists to deny a transfer of the proceeding to the tribal court if:~~

~~(A) Either of the Indian child's parents objects to such a transfer; or~~

~~(B) The proceeding was at an advanced stage when the petition to transfer the proceeding to the tribal court was received from the Indian child's tribe and the petitioning party did not file the petition to transfer to the tribal court promptly after receiving the notice of hearing.~~

~~(b) The burden of proof under this subsection (4) shall be on the party opposing a transfer of the case~~ IF THE COURT FINDS THAT THE CHILD IS AN INDIAN CHILD, THE COURT SHALL ENSURE COMPLIANCE WITH THE REQUIREMENTS OF THE FEDERAL "INDIAN CHILD WELFARE ACT", 25 U.S.C. SEC. 1901, ET SEQ.

SECTION 3. Safety clause. The general assembly hereby finds,

determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

KC Becker SPEAKER OF THE HOUSE OF REPRESENTATIVES	Leroy M. Garcia PRESIDENT OF THE SENATE
Marilyn Eddins CHIEF CLERK OF THE HOUSE OF REPRESENTATIVES	Cindi L. Markwell SECRETARY OF THE SENATE

APPROVED_____
(Date and Time)

_____
Jared S. Polis
GOVERNOR OF THE STATE OF COLORADO