WSBA

COURT RULES & PROCEDURES COMMITTEE

Meeting Agenda

June 20, 2011
9:30 a.m. to 1:00 p.m.
Washington State Bar Association
1325 Fourth Avenue – Sixth Floor
Seattle, Washington 98101

1. **Call to Order/Preliminary Matters**
   - Approval of Minutes (*see* May 16, 2011 meeting Minutes, pp. 190 - 193)
   - Chair's Report: RAP 18.13A Update
     - June 3, 2011 Subcommittee Meeting Minutes, pp. 194 – 197
     - Comments on OPD's Proposal, pp. 198 – 201
     - RAP 18.13A Subcommittee's Alternative Proposal, pp. 202 - 203
     - RAP 18.13A Subcommittee's Alternative GR 9 sheet, pp. 204 - 206

2. **Old Business**

3. **New Business/Subcommittee Assignments**

   - Subcommittee X
     - Report regarding Pro Se Defendant proposal, p. 207
     - SCJA's GR 9 Cover Sheet and Draft Rule regarding Pro Se Defendants, pp. 208 - 209
   - Infraction Rules Subcommittee
   - ESI Subcommittee
   - ER Subcommittee

4. **Other Business/Good of the Order**

5. **Adjourn**

To attend via telephone: dial access number: 1-888-346-3659; then when prompted the entry code 55419#

WSBA

COURT RULES AND PROCEDURES COMMITTEE

Meeting Minutes
May 16, 2011

Committee Chair Ken Masters called the meeting to order at 9:31 am.

Members present: Chair Ken Masters, Edwin Aralica (by phone), Lincoln Beauregard, Roy Brewer, David Bufalini (by phone), Steven Buzzard, Mario Cava, Paul Crisalli, Rebecca Engrav, Beth Fraser, Justo Gonzalez, Shawn Larsen-Bright (by phone), Jeannie Mucklestone, Bryan Page (by phone), Shannon Ragonesi, Aaron Rocke (by phone), Karl Sloan (by phone), Derek Smith, Gregory Thatcher, and Judge Blaine Gibson. Also attending were Nan Sullins (AOC Liaison), Marc Silverman (BOG Liaison, by phone), Nikole Hecklinger (SCRAP), Elizabeth Turner (WSBA Assistant General Counsel), and Anna Schmidt (WSBA Paralegal).

Minutes

The April 18, 2011meeting minutes were approved by consensus, with one correction to the spelling of Karl Tegland's name on page 172 noted by Judge Gibson.

Chair's Report

Chair Ken Masters discussed RAP 18.13A's ad hoc subcommittee, which has so far had two very productive meetings. Their next meeting is scheduled for June 3, 2011. Judge Korsmo gave the subcommittee a copy of the Court of Appeal's proposal [regarding the termination appeals issue], which hasn't yet been submitted to the Supreme Court. Thus, the next RAP 18.13A subcommittee meeting will focus on reconciling the subcommittee's version with that of the Court of Appeals. The Committee will see the amended version offered by the subcommittee before it goes to the BOG

Subcommittee Reports

Subcommittee X: Ms. Engrav reported that the matters they've been working have already been brought before the larger Committee. The Subcommittee sent out a memo regarding the "Days are Days" proposal. Ms. Engrav listed the recipients of the memo in the meeting materials [see p. 178] and asked Committee members to let her know if there is some other group who should also receive the memo. She has not yet

received any comments back, specific to the proposal, from any of the memo's recipients.

The Subcommittee has separately been reviewing the counting backwards issue, which is a problem that was flagged by earlier chairs as an issue. Problems arise partly due to the variation in county local rules.

Ms. Engrav also reported that they received a proposal from the SCJA, which gives procedures for trial court judges to follow when a pro se defendant in a trial case wants to question witnesses. The purpose of their proposed rule is to give the judges some guidance regarding constitutional issues. Ms. Engrav reported that the subcommittee has not yet had time to discuss this proposal. Ms. Turner explained that it would be difficult to send the SCJA comments before the Court's August 30 deadline. Ms. Sullins explained that the court is making this an expedited issue due to proposed legislation on this issue. Ms. Turner stated that the Committee would be able get its response to the Court by the end of September, after the September BOG meeting.

Infractions Subcommittee: Mr. Buzzard reported that they had a subcommittee meeting this morning regarding proposals, sent in by Ms. Mucklestone and hopes to have something to report by the next meeting.

At the request of the Chair Ms. Mucklestone gave some background to her proposals. She stated that they're based on problems she saw on a day to day basis at the court and hopes to clarify the problems there. These are civil cases. IRLJ 2.1 gives the defendant notice of what he is being charged with and who is charging him. The rule states the notice must include the officer's name and, if applicable, the number of the citing officer. Ms. Mucklestone feels it's important to state both because if the ticket isn't electronic, it's hard to read the officer's name.

IRLJ 3.1 allows the prosecuting attorney to subpoena the officer to be in court without requiring the prosecutor to give the defendant notice. Ms. Mucklestone stated that this blindsides defendants and proposes that each party must give the opposing party a copy of that subpoena. Ms. Mucklestone also suggests that the rule include a citation to the rule which requires service.

Regarding electronic tickets, under IRLJ 2.2, Ms. Mucklestone would like to shorten the time period for filing notice of the ticket. Having a 5-day time period just slows things down. She suggests the time period be returned to 2days for the electronic tickets and remain 5 days for written tickets.

Ms. Mucklestone also opined that a defendant should be served electronically only if they agree to that type of service. IRLJ 2.6, regarding scheduling of hearings, deems a traffic infraction to be admitted unless a person sends in a response within 15 days (default). Ms. Mucklestone believes something needs to be addressed with the calculation of days so that if the person physically is unable to get a response

postmarked by the 15th day (due to that day being a legal holiday, for example) then there is some leeway.

IRLJ 2.6 contains a provision allowing waiving of the pre- hearing conference according to the local rules. The problem is contested hearings are being cancelled, and prehearing conferences scheduled, without notice going out to anyone. Thus, the prehearing conference may end in a default. Ms. Mucklestone thinks notice should be given.

Ms. Mucklestone is proposing these changes to facilitate a smoother process and level the playing field. Chair Ken Masters stated that he would like to see the subcommittee clean up the language before the proposals are sent for out to stakeholders for comment. Mr. Brewer commented on the photo-ticket infractions rules. It isn't in the statute that the vehicle owner must provide information about who is driving, even though it is asked on the form to contest such tickets. Mr. Silver stated that he too had a citation and lost a copy of the ticket. Because it was electronic, the court told him it would take a few days to get it entered into the system and that he would need to call back in a few days to request the copy. Ms. Mucklestone stated that this is one of the things she's requesting be changed.

Further discussion ensued regarding the language in the proposed rules.

ESI Subcommittee: Chair Ken Masters gave an update due to Subcommittee Chair Hillary Evans' absence. . He spoke with Mr. Horowitz (ATJ Technology Subcommittee) regarding CR 34 and they came to an agreement, which was approved by our subcommittee. There is now only one issue which is outstanding, which is using either the terms "form or forms," or the term "form or formats." The subcommittee will now discuss the proposal with the ATJ Board and SCJA. If the ATJ Board itself is insistent on using the term "format," then this issue will come again before the Court Rules and Procedures Committee. Otherwise, the proposal will go before the SCJA and, if they approve of it, then it will come before this Committee for a vote before going to the BOG. Mr. Masters felt the subcommittee was close to getting all of the issues with proposed CR 34 resolved. He has heard that trial judges are very interested in this rule.

Mr. Silverman stated that this effort speaks to the notion that, even though we provide pro bono services, we need to make sure that we provide rules that can effectively be utilized by pro se parties. Mr. Silverman supports the subcommittee's effort.

ER Subcommittee: Mr. Cava stated there's no action to report on. They received materials from Subcommittee X regarding the proposed Forfeiture By Wrongdoing Rule, applied under 804(b)(6). According to Mr. Cava, the subcommittee needs to decide whether it's appropriate to address this issue again. The last time Subcommittee X looked at this proposal, the Committee decided to take no action on it. The ER Subcommittee must determine whether they should reach out to additional stakeholders.

Mr. Cava explained that Mr. Tegland's proposal last year was for Washington to adopt the language from Federal ER 804, Forfeiture By Wrongdoing, which would be an exception to the hearsay rule. This issue is complex because a defendant has a right for the victim to appear before them, and the *Mason* case (160 Wn.2d 910, 162 P.3d 396) makes it a constitutional issue. Subcommittee X decided last year not to adopt the rule. Ms. Engrav opined that it is fair to review this proposal again. Mr. Cava stated that last year's Chair wanted WAPA to be involved more in the discussion.

Judge Gibson asked if the Committee has received a copy of the SCJA's comment letter regarding CR 4.11 (the witness recording rule, which this Committee drafted and which was approved by the BOG for submission to the Court; the proposed rule was published for comment). The SCJA voted to take no position on the rule but did comment. They were concerned that such a rule might be abused by pro se defendants. There are many comments on this rule. The Chair pointed out that many people are entrenched in this issue, and Ms. Turner stated she anticipates the Court will be asking this committee to respond to the comments.

The meeting adjourned at 10:15 a.m.

WSBA

AD HOC RAP 18.13A SUBCOMMITTEE

Proposed Meeting Minutes
June 3, 2011

Ken Masters called the meeting to order at 12:10 p.m.

Attending: Ken Masters, Judge Susan J. Craighead, Kirsten Haugen, Sheila Huber (ATG), Mark Demaray, Rebecca Engrav, Sean Flynn (joined close to end), Deane Minor (by telephone), and Commissioner Eric Watness.

Minutes of April 14, 2011 Meeting

The Subcommittee agreed by consensus to amend the April 14, 2011 meeting minutes to reflect the changes submitted by various members.

Chair's Report

Mr. Masters reported that the Supreme Court has graciously extended the deadline by which it needs comments until September 30, 2011. However, given the Board of Governors' meeting schedule and the WSBA Court Rules & Procedures Committee's meeting schedule, the Subcommittee still needs to finish its work now.

Draft WSBA Comments on OPD Proposal

Prior to the meeting, Mr. Masters circulated a draft version of comments on OPD's original proposal. Once approved by this Subcommittee, the full WSBA Court Rules & Procedures Committee, and the Board of Governors, these comments will be submitted to the Supreme Court. Also prior to the meeting, Ms. Huber circulated suggested edits to those draft comments. The Subcommittee discussed and adopted Ms. Huber's edits, with the modifications and additions discussed below.

Ms. Huber noted that notice should be given of adoption, not appeal (see page 3).

The Subcommittee answered several questions from Commissioner Watness, to familiarize him with the issues and proposals and various options on the table.

The Subcommittee discussed adoptions under RCW 26.33 at some length. These adoptions do not raise the same concerns as those occurring after dependencies. Everyone with an interest in the child is aware of what is going on and already has the

information they need to be able to move for a stay, if desired. Ms. Huber noted that she had thought RAP 18.13A did not apply to RCW 26.33 appeals anyway. She thought it only applied to RCW 13.34 proceedings. Judge Craighead agreed. After discussion, the Subcommittee decided to add "under RCW 13.34" twice in section (a) of its proposed amended RAP 18.13A to explain that this rule and the appeal procedure within it, including the stay provisions currently under discussion, do not apply to RCW 26.33 proceedings. The Subcommittee agreed to modify language in the draft comments on the OPD proposal in light of this clarified approach.

After further discussion and agreement on other edits to clarify intent, the Subcommittee approved by consensus the draft comments in the form attached as **Exhibit A** to these minutes.

Subcommittee's Alternative Proposal

The Subcommittee reviewed its proposed alternative to OPD's proposal. As noted above, the Subcommittee decided to add to the proposal some additional language for RAP 18.13A(a), to clarify that the entire rule applies only to appeals from terminations "under RCW 13.34."

Commissioner Watness raised a question whether under the proposed rule, caretakers of the child will receive service. Caretakers are generally not parties to the appeal. Mr. Masters asked whether the language "anyone appointed to represent the interests of the child" is broad enough to include caretakers, and Commissioner Watness agreed it is. Commissioner Watness expressed the view that the rule should put no burden on prospective adoptive parents. The Subcommittee agreed that its proposed alternative does not do that.

The Subcommittee reviewed the draft form notice of intent, prepared by Ms. Huber, and thought it looked fine.

Court of Appeals' Alternative Proposal

The Subcommittee then discussed the separate alternative proposal developed by the Court of Appeals. This proposal is structured as a revised version of the OPD's original proposal. Mr. Masters explained that the Court of Appeals developed this on its own, without first seeing the alternative version prepared by this Subcommittee.

Several members of the Subcommittee expressed confusion about the portion of the Court of Appeals' alternative proposal that would amend section (b) of RAP 18.13A. The State is the custodian of the child, and the State is a party to the appeal. It does not make sense for there to be a rule requiring the State to give notice of the appeal to itself. Some wondered if the intent is to reach an entity other than the custodian, such as the caretaker, or prospective adoptive parents, or foster parents. Others responded that if so, the language is not well-drafted to accomplish this, and further these

categories of people do not have a right to take any action in response to the appeal, so it is unclear what benefit notice would provide.

The Subcommittee then discussed the rest of the Court of Appeals' proposal to determine if there are any concepts or wording in it that differ from the Subcommittee's alternative proposal and, if so, consider whether to add them to the Subcommittee's alternative proposal. In large part, since the Court of Appeals based its proposal on the original OPD proposal, it is not directly relevant, since the Subcommittee's alternative proposal takes a very different approach. However, members of the Subcommittee identified and discussed a few substantive differences:

- The Court of Appeals' proposal specifies that the trigger is a "timely" notice of appeal. The Subcommittee discussed and agreed this addition is unnecessary for several reasons: (1) most notices of appeal are timely; (2) when a notice of appeal is not timely, the appeal is usually dismissed relatively quickly anyway; (3) but conversely, there may be situations when the court allows more lenience for an appeal raising serious constitutional issues, and the process of evaluating motions for stay should not require the court to also consider appellate jurisdiction issues; and (4) the Subcommittee's alternative proposal already specifies that the trigger is a termination being "under review," which connotes a valid appeal.
- The Court of Appeals' proposal includes appeals under RCW 26.33. As discussed above, the Subcommittee decided to exclude RCW 26.33 appeals entirely.
- The Subcommittee discussed the Court of Appeals' use of the words "but only" when describing the scope of the stay. Commissioner Watness asked whether under this rule, it would be possible to stay other parts of the order of termination so that the State could provide services to the parent during the pendency of the appeal. Ms. Huber responded that possibly could happen, but it would occur under regular stay rules, not this rule. Mr. Masters queried whether if this rule says "but only," would someone argue that it forecloses use of regular stay rules to obtain services for a parent while the case is on appeal? The Subcommittee concluded that it is fine for this rule to be focused on stays for one reason only, and allow other rules to apply to motions to stay made for other reasons. The Subcommittee agreed by consensus to change its alternative proposal to add "but only" in the sentence regarding the scope of the stay. Mr. Minor suggested replacing "to the extent" with "the portion of the order" in the same sentence in the Subcommittee's alternative proposal. Mr. Masters prefers "to the extent." The majority of the Subcommittee decided to leave "to the extent."
- The Subcommittee liked the Court of Appeals' last sentence regarding the end point for the stay. The Subcommittee agreed by consensus to remove the language "pending further order of the appellate court" from

the Subcommittee's alternative proposal and instead add at the end the last sentence used by the Court of Appeals.

Subcommittee's Alternative Proposal – Final Version

After the changes described in the two prior sections above, the alternative proposed amendment to RAP 18.13A agreed to by consensus by the Subcommittee is as shown in **Exhibit B** to these minutes.

Draft GR 9 for Subcommittee's Alternative Proposal

The Subcommittee then discussed the draft GR 9 for the Subcommittee's alternative proposal, which Mr. Masters had circulated before the meeting. Ms. Huber had circulated suggested edits to it prior to the meeting. The Subcommittee discussed Ms. Huber's suggested edits. The Subcommittee also discussed suggested edits to the GR 9 circulated by Mr. Flynn prior to the meeting. The Subcommittee agreed that less information about RCW 26.33 adoptions is necessary in light of the Subcommittee's exclusion of RCW 26.33 appeals from the scope of its proposed amendment to RAP 18.13A. Mr. Masters asked Mr. Demaray to revise and shorten the background section. The Subcommittee also reviewed each section of the GR 9, in light of the changes made to the Subcommittee's alternative proposed rule amendment, and made further edits and revisions. The Subcommittee agreed by consensus on revised language for the draft GR 9 attached as **Exhibit C** to these minutes (including Mr. Demaray's shortened version of the Adoption Statute section).

Adjournment

The meeting adjourned at 2:15 p.m.

WSBA

Office of the General Counsel

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To: President, President-Elect, Immediate Past President, and Board of Governors

From: WSBA Court Rules & Procedures Committee; Ken Masters, Chair
Elizabeth A. Turner, Assistant General Counsel

Re: Comment on OPD's Proposed RAP 18.13A(k)

Date: June 13, 2011

ACTION REQUESTED:

Approval of Committee's recommended response to OPD's expedited RAP 18.13.A(k) proposal, pending for consideration by the Supreme Court Rules Committee on October 10, 2011.

The Supreme Court requested our response, and has generously extended the deadline for a response to September 30, 2011.

The pending issues addressed here are as follows:

(a) whether the WSBA can and should support OPD's proposed RAP 18.13A amendment?

(**Rules Committee Recommendation: support in principle, but do not support current proposed language**); and

(b) whether the WSBA should recommend an alternative to the OPD proposal?

(**Rules Committee Recommendation: yes; *see* attached Alternative Proposal**).

PRELIMINARY BACKGROUND:

The Office of Public Defense has obtained expedited Supreme Court Rules Committee review of its proposed amendment to RAP 18.13A, a rule governing Accelerated Review of Juvenile Dependency Disposition Orders and Orders Terminating Parental Rights, adopted in 2008.

This matter has been quite pressing. The Supreme Court issued a decision in October 2010, reversing a termination of parental rights, where the child had already been adopted for some time. This had been a rare occurrence until now.

By around December, however, OPD felt that it needed to do something because at least five other similar cases might be in the pipeline.

In January, the Legislature reacted by proposing new legislation that would create a temporary automatic stay of all termination orders, potentially depriving the courts of any discretion in the matter. The Bill (SB 5597) died in the Senate, but all concerned believe the Legislature will act if the Court does not.

OPD went straight to the Supreme Court with an urgent request to expedite a RAP in hopes of preempting (to some degree) legislative action that may infringe (to some degree) on the Court's prerogative to establish judicial procedures for stays and other remedies. We (the WSBA Rules Committee) were finally looped in by February, with an April 30 deadline.

We formed an *ad hoc* RAP 18.13A(k) subcommittee to carefully discuss the options. The following volunteers' tireless efforts have been exemplary and invaluable:

King County Superior Court Judge Susan Craighead (who chaired the Task Force that created RAP 18.13A);

King County Superior Court Commissioner Eric Watness;

Sean Flynn (OPD);

AAG Sheila Huber;

Snohomish County Children's Advocate, Kirsten Haugen;

and representatives of the private bar very familiar with these issues,

Mark Demaray,

Deane Minor,
Reagan Rasnic.

RESPONSE TO OPD PROPOSAL:

As an initial matter, the Committee wishes to express its deep gratitude to OPD for taking the laboring oar and moving this issue to the forefront, in the Supreme Court and in our Committee. Their initial efforts are excellent, and nothing we say here should be taken as a disparagement of their outstanding leadership on this issue. We also greatly appreciate OPD's willingness to participate in our *ad hoc* subcommittee in an engaged and supportive fashion. Of course, **OPD's generous participation in our process should not be taken as a retreat – in any sense – from their original proposal**. To the extent that OPD wishes to agree or disagree with our comments and suggestions, they are free to do so independently.

For background information on the adoption process, please see our proposed GR 9 cover sheet.

We have several serious concerns with OPD's original proposal. The OPD proposal focuses not on the custodian's consent to the adoption – the crucial step in the process – but rather on giving notice of an appeal. It unnecessarily focuses solely on RCW 26.33, rather than the terminating order entered under RCW 13.34. It improperly focuses on the "State or supervising agency," omitting other possible custodians. It incorrectly assumes that certain actors always have notice of the filing of the adoption petition. It also improperly expects an appellate court may impose a stay on its own motion, which the appellate courts are naturally reticent to do.

PROPOSED AMENDMENTS TO RULE:

To address these concerns, we propose an alternative version. *See* GR 9 & WSBA RAP 18.13A Proposal. We make these suggestions after studying the Court of Appeals' draft suggested changes to OPD's proposal, and in consultation with them. Our proposal focuses on the key step in the process, the delivery of the custodian's consent to the adoption to the prospective adoptive parents. It covers all types of custodians involved in RCW 13.34 dependencies and terminations. It ensures that the crucial actors will have notice of an appeal in all cases. It also leaves the appellate court with discretion to impose or lift a stay at any point it deems appropriate, in response to an appropriate motion.

CONCLUSION:

The Committee wishes to thank the Board of Governors for its consistent attention and its deep concern about this pressing and important issue. We also appreciate its patience with our careful and extensive efforts to achieve the best possible solution. We have reached out to the foremost experts in this area, and we believe that they have

come up with excellent solutions. Of course, it will be up to the Supreme Court Rules Committee to decide the appropriate course of action in the last analysis. But the Board's guidance is as welcome as it is invaluable.

ATTACHMENTS:

a. WSBA'S Proposed RAP 18.13A amendments and GR9 cover sheet.
b. Request for response from the Supreme Court.
c. Draft response.
d. Draft Amended proposed RAP 18.13A from OPD.

WSBA

AD HOC RAP 18.13A SUBCOMMITTEE

RAP 18.13A ALTERNATIVE PROPOSAL
(noting changes in response to COA proposal)

The RAP 18.13A Ad Hoc Subcommittee's Alternative Proposal

RULE 18.13A

(a) Generally. Juvenile dependency disposition orders and orders terminating parental rights under RCW 13.34 may be reviewed by a commissioner on the merits by accelerated review as provided in this rule. Review from other orders entered in juvenile dependency and termination actions are not subject to this rule. The provisions of this rule supersede all other provisions of the Rules of Appellate Procedure to the contrary, and this rule shall be construed so that appeals from juvenile dependency disposition orders and orders terminating parental rights under RCW 13.34 shall be heard as expeditiously as possible.

(b) – (j) unchanged

(k) Termination Appeals-Notice of Intent to Deliver Consent to Adoption. When an order terminating parental rights is under review, the department of social and health services or supervising agency having the right to consent to an adoption should serve a written notice of its intent to deliver consent to adoption. The notice of intent should specify the intended delivery date, and should be served on all parties to the appeal and on anyone appointed to represent the interests of the child, no fewer than thirty (30) days before the intended delivery date. A copy of the notice of intent and a proof of service should be filed in the appellate court.

After service of the notice of intent, any party may move the court in which the appeal is pending to stay the order terminating parental rights, but only to the extent it authorized consent to adoption, pending further order of the appellate court. The department or supervising agency should not deliver its consent to adoption if any party seeks a stay before the intended delivery date, pending a ruling on the motion. The appellate court will hear the motion for stay on an expedited basis. Any stay of enforcement shall terminate upon issuance of the mandate as provided in rule 12.5, unless otherwise directed by the appellate court.

FORM 15D. NOTICE OF INTENT TO DELIVER CONSENT TO ADOPTION

NO. _____

(SUPREME COURT or COURT OF APPEALS, DIVISION __)
OF THE STATE OF WASHINGTON

IN RE DEPENDENCY OF: A.B.C., A Minor Child.	NOTICE OF INTENT TO DELIVER CONSENT TO ADOPTION

TO: (Names of persons entitled to notice and their attorneys. See RAP 18.13A(k)).

Respondent, (Department of Social and Health Services, name of supervising agency), hereby gives notice that it intends to deliver a consent to the adoption of the above named child to prospective adoptive parents on the _____day of _____, 20___.

Dated this ____ day of _____, 20___.

_____
Signature
(Name of attorney)
Washington State Bar Association
membership number
Attorney for Respondent

GR 9 COVER SHEET

WSBA's Suggested Rule Change
RAP 18.13A

PURPOSE: The WSBA suggests changes to the Rules of Appellate Procedure, RAP 18.13A, Accelerated Review of Juvenile Dependency Disposition Orders and Orders Terminating Parental Rights. These changes would require the Department of Social and Health Services (department) or other supervising agency having the right to consent to an adoption to serve a notice of intent to deliver its consent to an adoption on all parties to any termination appeal, and to file a copy in the appellate court in which the appeal is pending. This proposal is an alternative to a proposal from OPD currently under consideration by the Supreme Court Rules Committee.

The primary purpose of these suggested changes is to protect (a) children's right to stability and permanency, and (b) the appellate courts' responsibility to provide effective review of a termination order while an adoption proceeding is pending. Currently, if an adoption is filed while a termination order is under review, the adoption may be finalized before the termination appeal is decided. If the appeal is reversed after the adoption is finalized, the reversal could require vacation of the adoption, disrupting the permanency established by the adoption. Alternatively, if the appellate court's reversal were held to be moot, then the trial court could uphold the adoption order, undermining the appellate court's termination reversal. Either way, the child's permanency is threatened.

BACKGROUND

Adoptions are comprised of a three-part process under the applicable RCWs:

1) The out-of-home placement or relinquishment phase;
2) the termination of parental rights phase; and
3) the granting of the adoption itself, making the child becomes for all legal purposes the issue and heir of the adopting parent.

There is a difference between adoption orders entered under RCW 13.34 (dependency statute) on one hand, and RCW 26.33 (adoption statute) on the other. Particularly important here, RCW 26.33 contains a notice provision so that parents appealing the involuntary termination of parental rights would be aware of any hearing to finalize the adoption, but RCW 13.34 does not contain this provision. RCW 13.34 does contain a provision that allows parents whose rights have been terminated to seek a stay of a termination order, but the statute lacks a requirement of notice of an adoption proceeding to the appellant parent in a termination appeal.

Dependency Statute

In a dependency under RCW 13.34, a child is generally removed from a parent's custody on an involuntary basis. A process then begins that in most cases requires that services are offered to assist parents in remedying the conditions that caused the removal with a goal of trying to reunify the family.

At some point in time that varies depending on the circumstances, the focus changes from reunification to another permanent plan, and the process to terminate parental rights is initiated. This typically takes from one to two years after a child has entered state care. Unless a parent voluntarily agrees to termination and signs a consent, a fact-finding hearing is held and, if sufficient grounds are found, an order terminating parental rights is entered.

After the termination order is entered, the department or other supervising agency is granted permanent custody of the child and given the authority to place the child for adoption and to consent to an adoption. In a typical case, that is accomplished within a few months, and the prospective adoptive parents may hire private counsel to help process an adoption. The department or other supervising agency retains custody of the child until the adoption is finalized.

Adoption Statute

Adoptions must be filed in Superior Court under RCW 26.33 and a petition for adoption is prepared and filed with all proper documentation, including documents that verify termination of parental rights has occurred in the Juvenile Court pursuant to RCW 13.34. The required reports also verify the adoptive family is a good placement resource for the child, and a hearing on that adoption petition can be set within a few weeks and a Final Decree of Adoption entered by the superior court. There can be a few delays in this process, but typically counsel for the adoptive parents can process the adoption and have the final hearing set and completed within a few weeks of getting documents from the department or private agency working with the department.

In a RCW 26.33 adoption where there was no dependency, if a parent has not agreed to termination of parental rights (*e.g.*, a step-parent adoption where the mother is retaining her rights but wants her new husband or partner to adopt her child) a petition for termination of the non-consenting parent's parental rights is filed in superior court.

Importantly, notice of the filing of a termination petition and of a hearing on that petition must be given to the parent. Also unlike a RCW 13.34 proceeding, no state services are offered or required under RCW 26.33. But RCW 26.33 does mandate that counsel be appointed for a parent who requests it and cannot afford counsel. The statutory grounds for termination of parental rights must be proven by clear, cogent and convincing evidence and the burden of proof is on the petitioning party.

There can be a number of varied circumstances and fact patterns in RCW 26.33 adoption cases. But once a case gets to the point of a fact finding or trial, it is basically similar to any other civil trial process.

COMMUNICATION PROBLEMS

There are roughly 1,000 terminations a year, out of which about 200 are appealed. In some cases, an appeal can last several years. The reversal rate remains very low. There is a question whether reversal of an order terminating parental rights automatically voids a final adoption. It is not entirely clear how the trial courts have handled these situations on remand, and there may be some inconsistency on the issue across the state.

Communication among all the players throughout these three phases is a big problem. The Attorney General's office has developed a letter with information notifying the case worker when an appeal has been filed. Use of this letter has perhaps been inconsistent in the past, but it is sent out consistently now. But the state or supervising agency does not always know when adoption proceedings have been initiated. Parents appealing termination orders are not entitled to receive notice of an adoption regardless of whether the termination order is on appeal. The prospective adoptive parent may not know that an appeal from a termination order has been filed.

If the department or other supervising agency does not give its consent, the adoption process cannot go forward. Thus, we believe that staying the consent to adoption in proper cases would prevent the harms that most people are concerned about here: reversing a parental termination after the adoption has been completed, leaving everyone's rights in question, with the child's stability and permanency hanging in the balance.

To address these concerns, we propose an alternative version to OPD's pending proposal. *See* WSBA RAP 18.13A Proposal. We make these suggestions after studying the Court of Appeals' draft suggested changes to OPD's proposal, and in consultation with them. Our proposal focuses on the key step in the process, the custodian's consent to the adoption. It covers all types of adoptions, and all types of custodians. It ensures that the crucial actors will have notice of an appeal in all cases. It also leaves the appellate court with discretion to impose or lift a stay at any point it deems appropriate, in response to an appropriate motion.

June 12, 2011

TO: WSBA Court Rules & Procedures Committee

FROM: Rebecca S. Engrav, Subcommittee X

RE: **Subcommittee X Report – SCJA Proposal re Pro Se Defendants**

The Supreme Court has asked for our comments on the Superior Court Judges' Association's proposed amendment to CrR 3.1 regarding the court's ability to control or limit a pro se criminal defendant's questioning of witnesses in certain circumstances. The proposed GR 9 sheet and amendment are in the materials from the May meeting, at pages 181-182. Subcommittee X met and discussed and proposes that we respond with a letter making these points:

- We believe the proposed rule either restates current law or, to the extent it does not, is likely subject to constitutional attack.

- This is an area controlled by several important rights that are not based in court rules: defendant's constitutional right to represent him or herself (with certain limitations), defendant's right to confront witnesses, the court's inherent ability to control the courtroom, and victim's rights (although not specifically recognized in the constitution).

- Under current case law, judges already have the ability to control questioning of a witness by a pro se defendant, subject to constitutional limitations. For example, precedent indicates that in certain circumstances it is permissible for a court to appoint stand-by counsel to question a witness using questions prepared by the pro se defendant.

- We are concerned that the proposed rule either gives judges no new guidance and authority than they already have under the constitution, or conversely, that it could lead a court to enter an order that on the facts of the case would not be constitutionally justified. We think it likely that this rule would lead to litigation and challenges by the defendant in any case in which it was relied upon.

- We are not in favor of the rule as proposed. We think there could be utility in a more limited rule that notes courts' ability to appoint stand-by counsel to question a witness in appropriate circumstances. In addition, given the rights at stake, if a rule is to be considered we think it should not be done in an expedited fashion. It needs to be considered in a full process with input from both sides of the criminal bar, as well as victim rights groups. (We also think the structure and wording of the rule could be improved, if it were to be adopted.)

Action Requested: Vote to approve comments as above.

GR 9 COVER SHEET

Suggested Amended CrR 3.1 Right to and Assignment of Lawyer

(1) Name of Proponent: Superior Court Judges' Association

(2) Spokesperson: To be determined.

(3) Purpose: The proposed amendment is designed to balance the rights of the defendant against the rights of witnesses in criminal cases. Persons accused of crimes have a federal and state constitutional right to the assistance of counsel for their defense. The Supreme Court of the United States has held that defendants also have the right to waive representation by counsel and to represent themselves regardless of the crime charged. When a defendant waives the right to counsel, witnesses are then subject to questioning by the defendant.

The right to appear pro se exists to affirm the dignity and autonomy of the defendant and to allow the presentation of what may be the defendant's best possible defense. Courts have held that the right to self-representation is not infringed when the defendant has a fair chance to present his or her case in the defendant's own way and to make his or her voice heard. The right to self-representation is not an absolute right and courts have required the assistance of standby counsel in some situations. In addition, courts are entitled to control the mode of witness interrogation to more effectively ascertain the truth and to protect the witness from harassment or undue embarrassment to the extent the defendant's rights are not violated.

A defendant generally has the right under the Sixth Amendment to demand the physical presence at trial of accusatory witnesses. Courts have held that this right is also not absolute and that in some cases, the defendant's right to face-to-face confrontation may be outweighed where necessary to further an important public policy and only where the reliability of the testimony is otherwise assured. The Washington State Supreme Court has held that the state's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court.

The amendment confirms the court's authority to control the courtroom, and in cases in which the court has determined in a hearing outside the presence of the jury that a defendant may not question a witness without restriction gives the court a non-exclusive list of means of moving the case forward in a manner that is fair to both the defendant and witnesses.

(4) Hearing: A hearing is recommended.

(5) Expedited Consideration: Expedited consideration is requested.

(g) Pro Se Defendants

(1) When a defendant has waived his or her right to counsel, the court, on a motion by the prosecuting attorney, on its own initiative, or at the request of a witness, and for good cause shown, may restrict the manner and means by which a defendant questions a witness.

(2) Good cause is shown when the court finds by substantial evidence, in a hearing conducted outside the presence of the jury, that requiring the witness to be questioned by the defendant without restriction will cause that individual to suffer serious emotional or mental distress that will prevent the witness from reasonably communicating at the trial.

(3) The court shall state on the record the basis for good cause.

(4) When the court does not permit the pro se defendant to question a witness without restriction, the court may impose reasonable procedures including but not limited to:

(i) requiring questioning by the defendant of the witness using remote audio-visual means when authorized by law;

(ii) allowing stand-by counsel to question the witness with the agreement of the defendant,.

Nothing herein precludes a court from using other means to control the courtroom including but not limited to prohibiting the defendant from approaching the witness during questioning and requiring the defendant to remain seated during questioning of the witness.