



WSBA

COURT RULES AND PROCEDURES COMMITTEE

Meeting Minutes April 18, 2011

Committee Chair Ken Masters called the meeting to order at 9:34 am.

Members present: Chair Ken Masters, Edwin Aralica (by phone), Peter S. Banks, Roy Brewer, Steve Buzzard, Mario Cava, Paul Crisalli, Rebecca Engrav (by phone), Hillary Evans (by phone), Beth Fraser, Paul Henderson (by phone), Jeannie Mucklestone (by phone), Bryan Page (by phone), Shannon Ragonesi (by phone), Aaron Rocke (by phone), Ann Summers, David Triweiler, Judge Kevin Korsmo (by phone) and Judge Blaine Gibson. Also attending were Nikole Hecklinger (SCRAP), Marc Silverman (by phone, BOG Liaison), Nan Sullins (AOC Liaison), Mike Wampold (by phone), Elizabeth Turner (WSBA Assistant General Counsel) and Anna Schmidt (WSBA Paralegal).

Minutes

The March 21, 2011 meeting minutes, as amended by Elizabeth Turner, Judge Gibson, Mr. Crisalli, and Chair Ken Masters, were approved by consensus.

Chair's Report

RAP 18.13A Ad Hoc Subcommittee: Supplemental meeting materials, containing this subcommittee's alternative proposal to OPD's proposal, were emailed out and copied for this meeting. This subcommittee has met one more time since the meeting for which minutes are included in today's meeting materials. According to Mr. Masters, it is extremely likely the Supreme Court will extend the comment period for OPD's proposal regarding RAP 18.13A until August. Thus, the Subcommittee will be able to have at least one more meeting, and Mr. Masters then will bring their comments and final alternative proposal (including a GR 9 cover sheet) before this Committee. Mr. Masters is currently trying to vet the Subcommittee's alternative proposal to the Court of Appeals. The Subcommittee will recommend that the Supreme Court not adopt OPD's proposal. The key issue is that there are about 1,000 terminations per year, from which about 200 are appealed. The Subcommittee wants to make sure the cases that need to be stayed are identified and stopped. The consensus in the committee is to stay the consent by DSHS from being delivered versus the staying the adoption. DSHS, or the Supervising Agency, would give the parents a 30-day notice to stay the consent. The supervising agency cannot deliver the consent once the stay has been filed. The

Subcommittee would like the Court of Appeals to hear the appeal on an expedited basis, which is something Mr. Masters needs to discuss with Judge Korsmo. Mr. Masters reminded the committee that there were already two cases where the termination was reversed after the children involved had been adopted out. The urgency is that the legislature introduced a bill regarding this issue, which was later dropped. Thus, the pressure to rush this proposal has slowed down a little, but isn't completely gone because not only do we anticipate new bills being introduced but there are still cases pending in the court system.

Judge Korsmo stated the Court of Appeals has also crafted its own proposal. They ran into the problem of a private adoption having been completed after a father's rights had been terminated. The termination was then appealed and reversed three years later. Judge Korsmo doesn't believe a rule can correct all the possible problems in the system. Mr. Silverman questioned whether the Subcommittee's intent is to draft a rule speaking to DSHS, and pointed out that this issue may need to be addressed in adoptions in general. Mr. Masters explained that, in an earlier proposal, the Subcommittee used the term "custodian," which was later changed to DSHS or supervising agency. However, a broader term may be necessary. Mr. Buzzard agreed and also stated that, in line three, the word "should" may more properly be "shall." Mr. Masters explained that this would not be consistent with the wording of the RAPs. Mr. Buzzard asked whether a copy should be sent to the Superior Court instead of Court of Appeals and suggested eliminating, in the second paragraph, line 2, the phrase "to the extent that it authorizes adoption..."

Judge Gibson voiced his concerns that the rush to deal with a bad situation in a particular case may create other problems. He hasn't seen an analysis of the current situation and what the situation would be if such a rule were adopted. Judge Gibson thinks it's important for the Committee to understand the entire process of a termination case. After a termination case has come to completion, two or three years have passed and the natural parents have been given many opportunities during that time to correct their abuses. He's not sure if staying a case will necessarily improve anything. Plus, the subcommittee is making an assumption that the court will be able to identify where a termination will get reversed. Appellate courts are likely to end up staying all the cases. There will either be an overabundance of caution, or there may be an inability for judges to recognize those cases where they really should issue a stay. Is the rare case where a termination will be appealed and reversed worth affecting all the cases?

Mr. Masters explained that the Subcommittee is made up of both state and private civil practitioners, who work with the adopting parents, so that all aspects of the situation can be explored. Mr. Masters explained that in the vast majority of the cases, the appeal will be over before the consent to adoption is given to the adopting parents. Also, the proposed rule by the Subcommittee would allow commissioners to stay the termination until they're able to read the merits briefs, and allow commissioners to lift the stay at any time or accelerate particular cases if necessary. Mr. Masters spoke to a commissioner at Division I and would like to speak to Judge Korsmo about the alternative proposal.

The termination process will be better explained to the Committee in the GR 9 that accompanies the alternative proposal.

Judge Gibson opined that, in every case where parents are appealing the termination, there would always be a motion to stay. Mr. Masters said that they have heard differently from OPD. Ms. Hecklinger also disagreed, explaining that many parents, even those appealing the termination, will not file a motion to stay. She explained that in many cases, the attorney doesn't have a client (they cannot contact them) and her office will not file an appeal in those cases. Discussion ensued regarding whether the attorneys who represent parents in termination cases would file a motion to stay.

Ms. Fraser stated that, even though this rule would only affect a small percentage of termination cases, it affects public policy. Knowing an adoption could be reversed and the child could be removed may have a chilling effect on those willing to go through the adoption process. Mr. Masters explained that the private practitioners in the Subcommittee all stated that when they know a termination appeal is ongoing, they advise their clients (the potential adoptive parents) to hold off on completing the adoption process.

Mr. Buzzard asked what "expedite" means in the rule. Mr. Masters explained that it means whatever the appellate court commissioner feels is an appropriate expedited process in a given case. Ms. Hecklinger stated that there are times when there is a lot of stress on the potential adoptive parent, but they're not willing to just dump a child because an appeal is pending. Mr. Triewiler opined that there is a tremendous due process issue here. Ms. Summers asked if there is any process by which the Supreme Court would expedite their review. Mr. Masters stated that 18.13A includes such a process, but it doesn't address the current issue. Discussion ensued regarding the termination, consent, and appeals' processes.

Mr. Silverman was struck by the fact that, in the vast majority of these cases, the parents are not even involved. He wonders if counsel could file a statement regarding the status of their clients (whether they're even involved) in order for the court to differentiate when parents are involved or not. Mr. Masters pointed out that filing such a statement might create a conflict of interest for counsel and put the lawyer in a difficult (if not impossible) position. Mr. Cava was concerned that the declaration would cause the lawyer to waive confidences and voiced the same concerns. Judge Gibson pointed out that, in dependency cases, you deal with parents who often fade in and out of the matter. However, he thought Mr. Silverman's suggestion was good and suggested that the natural parents be required to sign the motion to stay. Mr. Masters will take this suggestion back to the Subcommittee.

Ms. Engrav agreed with Judge Gibson's assumption that a motion to stay will occur in every case and opined that two hundred cases is not a huge volume. Ms. Engrav likes how limited the Subcommittee's rule is, leaving the judge a lot of room for interpretation. Ms. Engrav opined that the important thing is to make sure everyone has information at a point in time where they can do something about it.

Mr. Masters reminded Committee members that a new bill by the legislature could be created if the courts do not act; thus, they may not have the luxury of choosing not to act. The bill that dropped created an automatic 30-day stay in every case. Mr. Buzzard questioned whether the commissioner at the Court of Appeals would know if the parents' rights were terminated due to a default hearing. Mr. Masters explained that, under RAP 18.13, the entire record of the termination matter would be transferred to the Court of Appeals.

This matter will come back to the Committee in future meetings.

Subcommittee Reports

Evidence Rules (ER) Subcommittee: Chair Mario Cava provided an update to ER 501. The Subcommittee recommends and proposes striking references to case law, and instead referring to the statute.

Spousal privilege, ER 501(f), would be amended so that it is consistent with statutory provisions, which now refer to spouse or domestic partner. Also, Mr. Cava made a friendly amendment because the last statute cited in ER 501(f) is not accurate. It should be changed to 26.21.275(8). Mr. Buzzard seconded this amendment.

Mr. Masters asked for discussion, but there was no discussion. The motion was declared adopted by consensus.

There was also an invitation for comment sent to Carl Tegland. His response was sent back the day of the subcommittee meeting, and included two issues to be addressed by the committee. The first issue, in ER 501, involves authentication of email. Should more stringent requirements be placed on emails when they're authenticated because they're so easily modified? The Subcommittee is discussing whether it might be appropriate to submit an illustration. The Subcommittee isn't proposing the committee take any action on Mr. Tegland's suggestions at this time because they haven't had time to vet them.

The second issue involves hearsay statements. The Subcommittee hasn't yet fully examined the rule but suggests that the issue be submitted to stakeholders for comment. This would include WACTL, WAPA, etc. The Subcommittee will continue to work on these issues and bring them to a future meeting. Ms. Engrav will send to Mr. Cava (and Mr. Silverman) some materials as they worked on some of these same issues last year and received some comments.

Subcommittee X: Ms. Engrav reported they're continuing to move forward on reaching out to stakeholders to see if there is any interest in the "Days Are Days" proposals and (separately) on the issue of counting backwards.

ESI Subcommittee: Mr. Masters stated that since Ms. Evans last met with Mr. Horowitz, he too has spoken with him. He thinks they're very close on coming to an agreed proposal and will have a conversation with Ms. Evans about this after this meeting.

Infractions: Judge Buzzard stated there is nothing new regarding their Subcommittee. Ms. Mucklestone states that she had submitted some proposed changes to Judge Buzzard, and copied everyone to the Subcommittee, regarding rules 2.1, 2.2 and 3.1. She is also working on proposed changes to 6.6. She will resend the proposed changes.

The meeting adjourned at 10:39am.