



WSBA

COURT RULES AND PROCEDURES COMMITTEE

Meeting Minutes June 20, 2011

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

Members present: Chair Ken Masters, Peter Banks (by phone), Roy Brewer; Steven Buzzard, Mario Cava, Paul Crisalli, Rebecca Engrav, Hillary Evans, Beth Fraser, Justo Gonzalez, Shawn Larsen-Bright, Jeannie Mucklestone, Bryan Page (by phone), Derek Smith, Ann Summers, David Triewweiler, Judge Kevin Korsmo (by phone), Judge Anne Harper, and Judge Blaine Gibson. Also attending were Sean Flynn (OPD), 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 May 16, 2011 meeting minutes were approved by consensus, with the correction of a few typos and a request by Ms. Engrav that the first paragraph on page 193 reflect that she opined it is up to the ER Subcommittee to decide whether it's appropriate to review the Forfeiture by Wrongdoing rule again.

Chair's Report

The Chair reported that Ms. Sullins (AOC Liaison) sent an email to him regarding the Supreme Court publishing for comment a number of new rules and adopting several amendments to the MARs the Committee had previously proposed. There were also a number of RPC's sent to the Court by the RPC Committee that members may want to review.

Old Business: There was no old business to discuss.

New Business: RAP 18.13A proposal. The Chair reported to the Committee that there were edits made to the GR 9 cover sheet [page 206 of the materials], which were emailed to Committee members just prior to the meeting. These edits were typographical errors and not substantive. The Chair directed the Committee to the June 13, 2011 Minutes of the RAP 18.13A Ad Hoc Subcommittee meeting [page 194]. The bullet points are the Subcommittee's discussion of the Court of Appeals proposal and

what they disagreed with regarding that proposal. The Subcommittee's proposed response to OPD's proposal was also included [page 198], which references the Subcommittee's alternative proposal. The Subcommittee is proposing to tell the BOG that the Committee supports OPD's proposal in principle, but recommends different language. The proposed comment also lists those who participated in the Ad Hoc Subcommittee. The heart of the Ad Hoc Subcommittee's concerns is stated at page 200 in the paragraph beginning "We have several serious concerns with OPD's proposal." The key distinction between the Ad Hoc Subcommittee's proposal and OPD's proposal is that the focus is the state agency's delivery of the consent to adoption.

The Subcommittee's alternative proposal [page 202] only applies to RCW 13.34, and not to RCW 26.33. They adopted some of the Court of Appeals language, including: "...but only to the extent that it authorizes adoption." This makes it clear they're focusing on the consent to adopt. Also, "...unless otherwise lifted by the appellate court..." This allows the appellate court to lift the stay if they feel it would be appropriate to do so. "See form 15(d)" was inadvertently omitted, but should also appear at the very bottom of the amended rule. A draft notice form was also included [p. 203].

The GR 9 cover sheet [pp. 204 – 206] discusses the communication problems that exist, which drive this proposed amendment. The motion from the Ad Hoc Subcommittee is to adopt the Comments/Response to OPD's proposal [page 198 to 201] and to adopt the Ad Hoc Subcommittee's proposed GR 9 cover sheet and amended rule.

Discussion: Judge Buzzard pointed out a typographical error on page 204 (remove "becomes"). Mr. Crisalli questioned whether the name and address of the prospective adoptive parents would appear on the certificate of service. The chair stated it possibly would. Mr. Crisalli questioned whether the addresses in the proof of service could be put under seal by the judge's discretion. The Chair stated that that issue may need to be addressed. Judge Gibson suggested some formatting changes. Ms. Engrav suggested using the phrase "motion to stay" versus "motion for stay," and remembered that the subcommittee had wanted to end the first sentence of the third paragraph after "authorized consent for adoption (deleting the rest of the sentence). The chair accepted these as friendly amendments. Mr. Silverman questioned, in paragraph (k), whether it was more appropriate to use "shall" instead of "should." The Chair pointed out that "should" is correct under the RAP's and reminded the Committee that there were a few typographical errors that were corrected and emailed out to immediately prior to this meeting [see page 206].

Judge Korsmo questioned that the language in the Ad Hoc Subcommittee's rule removes the requirement of a notice of appeal sent to parties. His concern is, how does the custodian of the child know there is an appeal going on? The Chair pointed out that the state sends out a letter conveying that information to whoever has custody of the child. The Subcommittee had consensus that the agency who gives consent knows when an appeal has been filed and decided to focus on the notice of delivering consent,

rather than the notice of the appeal. Thus, this is why they didn't adopt the language from the Court of Appeals proposal. Judge Korsmo stated their concern is when there is another parent, who isn't the custodial parent, who appeals while a child is being adopted with the consent of the custodial parent. The Chair pointed out that that is an adoption under RCW 26.33, in which there is a statute requiring that notice is given. Judge Korsmo stated that the other concern is the absence of a timely appeal requirement and that it's not uncommon for a parent whose rights have been terminated to file repeated appeals. The Chair stated that their rule focuses mainly on giving notice of delivery of consent. Regarding the Court of Appeals proposal, the Subcommittee couldn't think of a time when the state wouldn't know that an appeal is pending.

Judge Gibson questioned whether the prospective adoptive parents get notice of the appeal under the proposed rule. The Chair explained that the Attorney General notifies adopted parents when an appeal occurs through a case worker. Ms. Engrav explained that the state would know the prospective adopted parents if they're about ready to deliver consent. Thus, this rule doesn't require notice of the appeal to the prospective adoptive parents. Ms. Engrav also reviewed an earlier scrubbing of RAP 18.13A. She stated that the goal of this earlier amendment was to get the appeal started quickly, and the Subcommittee at that time felt the rule would apply to RCW 26.33 adoptions. The current Ad Hoc Subcommittee proposal rule limits this rule to RCW 13.34 proceedings, focusing judicial resources on 13.34 adoptions. Mr. Crisalli questioned who is covered by the language "appointed to the best interests of the child." The Chair explained they wanted to capture anyone who was ordered by the court to protect the child's interests, and that the phrase was broadly written.

Sean Flynn (OPD) thanked everyone for their work and began by commenting on Judge Korsmo's concern regarding the language being removed from subsection (b). He stated there is currently an issue in the Court of Appeals where one parent's rights have been terminated under 13.34, but not the other. What stops one parent from consenting to adoption under 26.33. That was an issue OPD hadn't discussed. The Chair stated that the statute provides a provision that notice must be given in that situation. Mr. Flynn felt the proposed rule does go to the same concern, simply shifting the procedure to when the stay occurs to the consent being delivered (instead of to the final adoption). As long as that's an effective way of doing it, then it serves the same purpose. Thus, he has nothing to add to this proposal.

Regarding Mr. Crisalli's comment to subparagraph (k), Judge Buzzard suggested to broaden the rule by using the phrase "anyone representing the interests of the child," versus using the term "appointed." Judge Buzzard suggested that an individual may be retained as opposed to being appointed, and that someone who was retained should receive notice, too. The Chair explained that the Subcommittee felt quite strongly that they wanted to limit it to those appointed by a court.

The Chair recapped the motion as being to approve the materials at pages 194 through 201, as is; on page 202, change (k) to take out "thirty" and two parens. In the next paragraph, delete "pending further order of the appellate court". Motion passed

unanimously. The Chair will send out a clean copy of the rule tomorrow and is happy to further discuss this with anyone who asks.

Subcommittee Reports

Subcommittee X: Ms. Engrav reported on the SCJA's proposed Pro Se rule (CrR 3.1), sent to the Committee for comments. Subcommittee X felt it important to understand the context in which this proposed rule may have arisen. There was a relatively bad sexual assault case in King County Superior Court where an individual was so anxious about testifying that she became suicidal and ended up on the roof of the court house for several hours. Subcommittee X questioned whether this rule is really needed, as there are statutes and case law that already address this issue. Under current case law, judges have discretion to control the questioning of a witness by pro se defendants. Subcommittee X was also concerned with the language and how it may affect an individual's constitutional rights. Although there may be a need for trial judges to know what discretions they have, the question is whether there is really a need for this rule.

Ms. Summers, a member of the Subcommittee, stated her concern was that the rule made it sound as if placing these restrictions on the pro se defendant was very permissive when, in fact, such restrictions can only be done in very extreme circumstances. Her concern is that the rule doesn't trigger the Sixth Amendment concerns that must also be carefully balanced in such a situation. The Subcommittee's motion is to draft a letter opposing the proposed amendment, based on the bullet points listed in their report [page 207].

Mr. Trieweiler opined that the proposed amendment is a response to a particular incident, that it may be politically driven, and violates constitutional rights. Judges already have the ability to control the manner of questioning a witness. He opined that this is more "victim centered" versus a process-centered reaction. Mr. Trieweiler suggested Committee members are cognizant that such rule would take away the right to confrontation and make the system less fair. He strongly opposes this suggestion. Judge Gibson stated that you cannot take away a person's constitutional rights with a court rule, but agreed that the rule has the possibility of encouraging judges to make mistakes by following this rule. Several Committee members voiced their agreement with Mr. Trieweiler's opinion.

The Chair pointed to out to Committee members that, if they approve the Subcommittee's proposal, Subcommittee X will be drafting a letter (structured on the bullet points in their report on page 207 of the materials) that will be sent to the BOG without being brought before the Committee again due to timing of the BOG meeting. Mr. Trieweiler suggested, as a friendly amendment, simply stating in the letter that the Committee is not in favor of the rule and removing "as proposed." Ms. Engrav accepted that amendment, and will move the last bullet point to the first bullet point. The motion passed unanimously.

Infractions: Mr. Buzzard stated the Infractions Subcommittee met this morning and that Ms. Mucklestone provided some clarification to the suggested amendments she had submitted. The Subcommittee will meet again before the next Committee meeting. They will keep Ms. Turner informed about any possible proposals to be brought before the Committee at the next meeting.

ESI Subcommittee: The Chair reported that he worked with Mr. Horowitz to get the Subcommittee's proposal before the SCJA and they are receiving comments from the SCJA representatives. So far, the response appears positive. Next, they will bring the Subcommittee's proposal before the ATJ Board.

ER Subcommittee: Mr. Cava reported the ER Subcommittee met on May 25 and discussed whether to reconsider the proposed Forfeiture By Wrongdoing and Authentication of Email rules. The Subcommittee decided to take up the Forfeiture By Wrongdoing Rule. Stakeholders have been sent a letter by email inviting them to participate in a June 22 Subcommittee meeting regarding the proposal. The Subcommittee has also put together research regarding authentication of emails and collected information from stakeholders. There doesn't appear to be a model rule regarding email authentication that they can look to for guidance. The Subcommittee will bring proposals to the next meeting for review by the Committee.

Ms. Turner reminded members that the next meeting is scheduled for July 18, 2011.

The meeting adjourned at 10:40 a.m.