

Changes to the California Rules of Court effective July 1, 2010

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When your bag of summer beach reading runs low, the avid legal reader should consider the new rules of court that took effect on July 1, 2010. We hope this digest version will alert the reader to the changes and invite a full reading.

Intercounty Probation Transfer Procedures

It's a brand new day with new rules for intercounty probation transfers. Rule 4.530 defines the original or sending court as the "transferring court" and the proposed new supervising county as the "receiving court." (Rule 4.530(b).) Transfer requires a formal motion in the transferring court. (Rule 4.530(c).) The motion is to be initiated by the probation officer of the transferring county. If the probation officer refuses a written request to file the motion, the refusal must be provided within 30 days of the request. (Rule 4.530(d)(2).) If there is a refusal, or the 30 day expires without a decision from the probation officer, the party may bring the motion and provide notice to numerous parties, including the presiding judge of the receiving court. The procedure includes provision for comment and factors to be considered. (Rule 4.530(e)&(f).) The rule provides that the transferring court is responsible for setting restitution before transfer. The receiving court must accept the entire jurisdiction over the case and the entire court file, except exhibits, is to be transferred within two weeks. (Rule 4.530(g).)

Criminal Protective Orders and Firearm Relinquishment

Criminal protective orders pursuant to Penal Code section 136.2 and probation orders under Penal Code section 1203.0097, subdivision (a)(2) involving a crime of domestic violence require relinquishment of firearms. There is a new rule with a set of procedures to assure that firearms are relinquished. The Mandatory Judicial Council form CR-160, Criminal Protective Order - Domestic Violence, includes an order in bold type that the defendant "must surrender to local law enforcement or sell to a licensed gun dealer any

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firearm owned or subject to his or her immediate possession or control within 24 hours after service of this order and must file a receipt with the court showing compliance with this order within 48 hours of receiving this order." (Rule 4.700, Advisory Committee Comment.) The rule provides for a defendant to have an opportunity to present evidence to refute an allegation that he or she owns any firearms. (Rule 4.700(c)(2).) Interestingly, at a review hearing to determine whether a defendant has complied with the relinquishment condition, the burden of proof is on the prosecution. (Rule 4.700(d)(3).)

Tribal Customary Adoption

Tribal customary adoption rules have been adopted and are now integrated with rules 5.502 through 5.740. The termination of parental rights, which frees a child from birth parents so that they can then be adopted, is contrary to many tribes' cultural beliefs. The process is considered oppressive and is associated with historical practices like forced assimilation which was destructive to native cultures. Though tribes have not believed in terminating parental rights, adoptions have been a part of tribal practices through custom and ceremony.

Thus, rule 5.502(35) provides:

"Tribal customary adoption" means adoption by and through the tribal custom, traditions, or law of an Indian child's tribe as defined in Welfare and Institutions Code section 366.24 and to which a juvenile court may give full faith and credit under 366.26(a)(2). Termination of parental rights is not required to effect a tribal customary adoption.

The assurance of tribal involvement starts earlier in the case. At the disposition hearing, the court is required to consider the case plan and find that the social worker has solicited and integrated into the case plan the input of the parties, including "consultation with the child's tribe on whether tribal customary adoption as defined in section 366.24 is an appropriate permanent plan for the child if reunification is unsuccessful." (Rule

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5.690(c)(2)(A).) The court is to find that the agency consulted with the tribe and the tribe was actively involved in the development of the case plan, or the court must order the agency to consult with the tribe, unless the court finds that the tribe was unable, unavailable, or unwilling to participate. (Rule 5.708(g).) Consultation with the tribe and consideration of tribal customary adoption is included in review hearings. (Rules 5.715(b)(5), 5.720(b)(4), 5.722(b)(3).) When it comes to permanent planning, if the court determines with the concurrence of the tribe that customary tribal adoption is the appropriate permanent plan for the child, then the case is governed by Welfare and Institutions Code section 366.24. (Rule 5.725(d)(1).) If there has been an order for tribal customary adoption and, after continuances to allow for that to take place, the tribe does not file the tribal customary adoption order, then the court has a procedure for selecting a new permanent plan. (Rule 5.725(e)(4).)

The Advisory Committee Comment following rule 5.730 notes that Family Code section 8600.5 exempts tribal customary adoption from various provisions that apply to adoptions in general. It dispenses with the need for the consent of a child over the age of 12. For all children over 4 years of age, the attorney for the child must determine the child's wishes and advise the court. (Welf. & Inst. Code sec. 317, subd. (e).) The Bureau of Indian Affairs also recognizes the preference of an Indian child "when of sufficient age" is important in making an effective placement. Therefore, while the child over age 12 need not consent, the child's wishes are an important and appropriate factor to be considered.

Dependency and Delinquency Changes

There are changes which are simply stylistic. Cases that were referred to as "dependency and delinquency" are now "cases under Welfare and Institutions Code sections 300, 601, and 602. (See rule 8.400(a)(1)(A).) Appellate rules about "cases" are now specifically referred to as "appeals." (Rule 8.412(b)(1) and (c).)

Rule 5.585 has been revised and the rules governing review of judgments and orders in cases under Welfare and Institutions Code section 300, 601, or 602 have been removed from the Juvenile Rules to their own section in the Appellate Rules beginning at rule 8.400. Rule 5.600, which contained the writ procedures for orders setting hearings under section 366.26, is completely stricken.

Other changes have been slight. What was once found in rules 5.590 and 5.595 about notification of appeal and writ review are unified under rule 5.585. If there has been a contested hearing on an issue of fact or law and a child is found to be described by Welfare and Institutions Code section 300, 601, or 602, then the court must advise, orally or in writing, the child if of sufficient age and the parent or guardian of the right to appeal *if there is a right to appeal*. (Rule 5.585(a).) If the court orders a hearing under Welfare and Institutions Code section 366.26, the court must advise all parties and, if present, the child's parent, guardian or adult relative, that if the party wishes to preserve any right to review on appeal of the order setting the hearing, then the party is required to seek an extraordinary writ by filing form JV-820 or other notice of intent to file a writ petition and a petition in form JV-825 or other petition for extraordinary writ. (Rule 5.585(b).) The rule provides for oral notice to those present and for the mailing of advisement within one day. (Rule 5.585(b)(1)-(3).) The rule was changed from 24 hours to one day. (Rule 5.585(b)(2).)

Rule 5.595 is now devoted to stays pending appeal. The court must not stay an order or judgment pending an appeal unless suitable provision is made for the maintenance, care, and custody of the child. (Rule 5.595, see also rule 8.404.)

There has been a break up. Confidentiality has moved out of rule 8.400 and now has its own separate number. Rule 8.401 addresses only confidentiality. While it seems to have

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acquired more importance, the substance of the rule is precisely the same. The lack of substantive change is puzzling. The appellate courts increasingly have used only first and last initials for the names of minors in the interest of confidentiality. The rule remains that all filed documents, court orders and opinions must use the first name and last initial to protect anonymity. Only if the first name is "unusual or other circumstances would defeat the objective of anonymity" the party's initials may be used. (Rule 8.401(a)(2).) Some clerk's offices have resorted to the use of only initials. *Adoption of O.M.* (2008) 169 Cal.App.4th 672, 675, fn. 1 noted the change was in accordance with an "informal recommendation of the Reporter of Decisions." *In re Edward S.* (2009) 173 Cal.App.4th 387, 392, fn. 1 suggests that first names are appropriate if they are within the most common 1000 on the Social Security website.

Rule 8.403 covers the right to appellate counsel as well as special prerequisites for appeal. There is a right to appointed counsel for appeal under Welfare and Institutions Code section 601 and 602. If the court determines that the parent or guardian can afford, but has not retained counsel for the child, the court must appoint counsel for the child at the expense of the parent or guardian. (Rule 8.403(a).) Any judgment order or decree setting a hearing under Welfare and Institutions Code section 366.26 may be reviewed on appeal only if the procedures for notice of the right to pursue a writ has been given and the petition for a writ was summarily denied or otherwise not decided on the merits. (Rule 8.403(b)(1).) Further the reviewing court may appoint counsel to represent an indigent child, parent or guardian and rule 5.661 governs the responsibilities of the child's counsel with respect to appeal. (Rule 8.403(b)(2) & (3).)

A child's notice of appeal in a Welfare and Institutions Code section 300 appeal must be authorized by the child or the child's CAPTA guardian ad litem. (Rule 8.405(a)(1).) The appellant or the appellant's attorney must sign the notice of appeal. (Rule 8.405(a)(2).) Rule 8.405(b) then goes on to outline the clerk's duties upon the filing of the notice of

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appeal.

Rule 8.406 provides for the time limits for a normal appeal, a cross-appeal, for constructive filing when a notice of appeal has been mailed from a custodial institution, the procedure for receipt of a late notice of appeal, and a premature notice.

The normal record on appeal and the application for additional record are described in Rule 8.407. The Advisory Committee Comment notes that only the reporter's transcript of a hearing that resulted in the order being appealed must be included in the normal record and that the provision is to achieve consistent record requirements in all appeals of cases under Welfare and Institutions Code section 300, 601 and 602 to reduce delays and expense caused by transcribing proceedings not necessary to the appeal. (I don't think I need this.)

Augmenting and correcting the record in the reviewing court has simply moved over to a separately numbered rule 8.410. Any templates or sample motions should be updated to reflect the new rule numbers.

Abandoning the appeal has become slightly simpler or more complicated, depending on the context. An abandonment must be authorized by the appellant, but it can be signed by either the appellant or the appellant's attorney of record. (Rule 8.411(a).) A child appellant in a Welfare and Institutions Code section 300 appeal may authorize the abandonment, or if the child is not capable of giving authorization, then by the child's CAPTA guardian ad litem. (Rule 8.411(a).) The Advisory Committee Comment notes that this is consistent with the Supreme Court's ruling in *In re Joziah Z.* (2005) 36 Cal.4th 664.

What is in a name? "Cases" are now specifically referred to as "appeals." (Rule

8.412(b)(1) and (c).)

Rule 8.416 has provided special experimental rules for dependency appeals from Orange, Imperial and San Diego Counties. Those rules may now apply to other superior courts when the court and the District Court of Appeal with jurisdiction to hear appeals from that court have adopted local rules providing that rule 8.416 will govern. (Rule 8.416(a)(1)(B)(ii).) These are the “fast-track” rules that apply to appeals from termination of parental rights. This allows for more expeditious appellate review for those counties and appellate courts who want to accelerate the appellate process.

The notice of intent to file a writ petition to review an order setting a hearing under Welfare and Institutions Code section 366.26 no longer must be signed by the party intending to file the petition. The notice must be authorized by the party and must be signed by the party or the attorney of record for that party. (Rule 8.450(e)(3).) Once the notice of intent is filed the clerk is to immediately mail a notice to a growing list of parties and siblings. (Rule 8.450(f).) Once notice was required to any person who has been declared a de facto parent. The language has been modified so the notice is only given to a person *currently* awarded de facto parent status by the juvenile court. (Rule 8.450(f)(1)(F).) Notice involving an Indian child is to be sent to the Indian custodian, the tribe of the child, or the Bureau of Indian Affairs, as required under Welfare and Institutions Code section 224.2. (Rule 8.450(f)(1)(J).) Just as the list has grown of parties to be served with a notice, the petitioner must serve a copy of the petition on a similar list. (Rule 8.452(c)(1).)

In addition to the rules governing augmentation and correction, a party must attach a copy of any document or transcript that the party wants added to the record, with the pages numbered consecutively, and if the party cannot attach a copy of the matter to be

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added, the party must identify it as required under rules 8.122 and 8.130. (Rule 8.452(e)(3) & (4).)

Rule 8.454 and 8.456 relating to notice of intention to file a writ petition under Welfare and Institutions Code section 366.28 to review an order designating a specific placement of a dependent child after terminal of parental rights has changes which parallel those in 8.450 and 8.452 for a writ petition from the setting of a Welfare and Institutions Code section 366.26 hearing.

Deferred Entry of Judgment

Rule 5.800 provides court rules to carry out the procedures for Deferred Entry of Judgment (DEJ) found in Welfare and Institutions Code section 790. The elements of the statute which provide for a child alleged to have committed at least one felony offense are repeated in the rule. (Rule 5.800(a)(1)-(6).) The significant change comes in the procedures for consideration. The prosecutor's duty to review the file and the filing of a determination of eligibility, form JV-750, has been given its own subdivision. Reference to the prosecutor and the child's attorney are stricken from rule 5.800(b)(2). This clarifies that it is the court's role to determine that the child is eligible and suitable for DEJ and would derive benefit from the education, treatment, and rehabilitation efforts of DEJ. (Rule 5.800(b)(2).) The DEJ determination results in probation with conditions that now specifically include school attendance requirements and restitution. (Rule 5.800(f)(4)(E) & (F).)

E-Filing

E-filing is the wave of the future. Rules 8.70-8.80 provide for an e-filing pilot project in the Second Appellate District.

One Unified Rule for Documents from Custodial Institutions

Throughout the appellate rules there are references to the receipt of a notice of appeal or other document from a custodial institution. Many of those rules are stricken. (Rules 8.308(e), 8.400(f), 8.406, 8.450(e)(5), 8.480(a).) Rule 8.25(b)(5) provides that receipt of a document by mail from an inmate or a patient in a custodial institution, after the period for filing has expired but the envelope shows that the document was mailed or delivered to custodial officials for mailing within the period for filing the document, then it is deemed timely. The clerk is to retain the envelope in the case file.