Tab 2

Rule 20A. Discovery in non-delinquency proceedings.

(a) Scope of discovery. The scope of discovery is governed by Utah R. Civ. P. 26(b)(1). Unless ordered by the court, no discovery obligation may be imposed upon a minor.

(b) Disclosures. Within 14 days of the answer, a party shall, without awaiting a discovery request, make reasonable efforts to provide to other parties information necessary to support its claims or defenses, unless solely for impeachment or unless the identity of a person is protected by statute, identifying the subjects of the information. The party shall inform the other party of the existence of such records.

(c) Depositions upon oral ~~examination~~questions. After the filing of the answer, a party may take the testimony of any person, including a party, by deposition upon oral ~~examination~~ question without leave of the court. ~~The attendance of witnesses may be compelled by subpoena as provided in Utah R. Civ. P. 45.~~ Depositions shall be conducted pursuant to Utah R. Civ. P. 30~~(b), (c), (d), and (g)~~. The record of the deposition shall be prepared pursuant to Utah R. Civ. P. 30~~(e) and~~ (f) except the deponent will have seven days to review the transcript or recording under Utah R. Civ. P. 30(e). The use of depositions in court proceedings shall be governed by Utah R. Civ. P. 32.

(d) Interrogatories. After the filing of the answer, interrogatories may be used pursuant to Utah R. Civ. P. 33 except all answers shall be served within 14 days after service of the interrogatories.

(e) Production of documents and things. After the filing of the answer, requests for production of documents may be used pursuant to Utah R. Civ. P. 34 except all responses shall be served within 14 days after service of the requests.

(f) Physical and mental examination of persons. Physical and mental examinations may be conducted pursuant to Utah R. Civ. P. 35.

(g) Requests for admission. Except as modified in this paragraph, requests for admission may be used pursuant to Utah R. Civ. P. 36. The matter shall be deemed admitted unless, within 14 days after service of the request, the party to whom the request is directed serves upon the requesting party a written answer or objection addressed to the matter, signed by the party or by his attorney. Upon a showing of good cause, any matter deemed admitted may be withdrawn or amended upon the court's own motion or the motion of any party. Requests for admission can be served anytime following the filing of the answer.

(h) Experts.

(h)(1) Adjudication trials. Any person who has been identified as an expert whose opinions may be presented at the adjudication trial must be disclosed by the party intending to present the witness at least ten days prior to the trial or hearing unless

modified by the court. If ordered by the court, a summary of the proposed testimony signed by the party or the party's attorney shall be filed at the same time.

(h)(2) Termination of parental rights trials. Any person who has been identified as an expert whose opinions may be presented at the termination of parental rights trial must be disclosed by the party intending to present the witness at least thirty days prior to the trial or hearing unless modified by the court. Unless an expert report has been provided, a summary of the proposed testimony signed by the party or the party's attorney shall be filed at the same time.

(h)(3) A party may not present the testimony of an expert witness without complying with this paragraph (h) unless the court determines that good cause existed for the failure to disclose or to provide the summary of proposed testimony.

(i) Protective orders. Any party or person from whom discovery is sought may request a protective order pursuant to Utah R. Civ. P. ~~26(c)~~37(b).

(j) Supplementation of responses. Parties have a duty to supplement responses and disclosures pursuant to Utah R. Civ. P. 26~~(e)~~(d).

(k) Failure to cooperate in discovery. As applicable, failure to cooperate with discovery shall be governed by Utah R. Civ. P. 37.

(l) No discovery can be taken that will interfere with the statutorily imposed time frames.

(m) Subpoenas are governed by Utah R. Civ. P. 45.

Tab 3

STATE SURVEY ON CERTIFICATION/TRANSFER HEARINGS AND RULES OF EVIDENCE

RULES OF EVIDENCE APPLY IN TRANSFER HEARINGS IN 27 STATES

Alaska, Arkansas, Colorado, Idaho, Illinois, Kansas, Louisiana, Maine, Maryland, Michigan, Mississippi, Nevada, New Jersey, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, West Virginia, Wisconsin

RULES OF EVIDENCE DO NOT APPLY IN TRANSFER HEARINGS IN 16 STATES

Alabama, Arizona, Delaware, District of Columbia, Florida, Georgia, Hawaii, Indiana, Iowa, Kentucky, Missouri, Nebraska, New Hampshire, Texas, Washington, Wyoming

7 STATES REQUIRE DIRECT FILING TO ADULT COURT

California, Connecticut, Massachusetts, Minnesota, Montana, New Mexico, New York

Alabama
Standard of Proof: probable cause that allegation is true; best interests of the child or the public. ALA. CODE § 12-15-203(b).
Rules of Evidence: do not apply to preliminary hearings in criminal cases. ALA. R. EVID. 1101(b)(3).

Alaska
Standard of Proof: preponderance of evidence. ALASKA STAT. § 47.12.100(c).
Rules of Evidence: apply, except for with regard to written reports by expert witnesses. ALASKA R. CRIM. PRO. 5.1(d).

Arizona
Standard of Proof: preponderance of evidence that probable cause exists. ARIZONA REV. STAT. § 8-327 C.
Rules of Evidence: do not apply. Probable cause may be based on substantial evidence, which may be hearsay in whole or in part. ARIZ. R. EVID. 5.4c.

Arkansas
Standard of Proof: clear and convincing evidence. ARK. CODE § 9-27-318(h)(2).
Rules of Evidence: apply. *Id.* at § 9-27-325(e)(1).

California
Standard of Proof: none. Case is automatically sent up without a hearing. CAL. WELF. & INST. § 602(b).
Rules of Evidence: apply as they would to an adult. CAL. R. EVID. 300.

Colorado
Standard of Proof: contrary to best interests of the juvenile or the public. COLO. REV. STAT. § 19-2-518.
Rules of Evidence: apply. COLO. R. EVID. 1101.

Connecticut
Standard of Proof: Case is automatically sent up without a hearing. CONN. GEN. STAT. § 46b-127.
Rules of Evidence: apply as they would to an adult.

Delaware
Standard of Proof: if the facts warrant. DEL. CODE ANN. 10, § 1010(b).
Rules of Evidence: do not apply, except for with regard to privileges. DEL. R. EVID. 1101(4)(c).

District of Columbia
Standard of Proof: preponderance of evidence. D. C. R. JUV. PROC. 109(c).
Rules of Evidence: do not apply. Material and relevant evidence is admissible. *Id.*

Florida
Standard of Proof: none stated. Question is whether child should be transferred. FLA. STAT. § 985.556.
Rules of Evidence: do not apply to juvenile proceedings. FLA. R. EVID. 90.103.

Georgia
Standard of Proof: reasonable grounds. GA. CODE. ANN. § 15-11-30.2.
Rules of Evidence: do not apply.

Hawaii
Standard of Proof: none stated, only "full investigation." HAW. REV. STAT. § 571-22.
Rules of Evidence: do not apply.

Idaho
Standard of Proof: none stated, only "full and complete investigation of the circumstances." IDAHO CODE ANN. § 20-508(5).
Rules of Evidence: apply to juvenile proceedings. IDAHO R. EVID. 101.

Illinois
Standard of Proof: probable cause unless court finds by clear and convincing evidence that juvenile is amenable to treatment and training. 705 ILL. COMP. STAT. 405/5-801.
Rules of Evidence: apply. ILL. R. EVID. 101(b)(3).

Indiana
Standard of Proof: probable cause. IND. CODE § 31-30-3.

Rules of Evidence: do not apply to preliminary juvenile matters. IND. R. EVID. 101(c).

Iowa
Standard of Proof: none stated, only "investigation." Provides for report by probation officer. IOWA CODE § 232.45(4).
Rules of Evidence: do not apply. All relevant and material evidence shall be admitted. *Id.* at § 232.45(5).

Kansas
Standard of Proof: preponderance of evidence. KAN. STAT. ANN. § 38-2347(f)(2). (This hearing may negate the need for a preliminary examination.)
Rules of Evidence: apply. KAN. R. EVID. 60-402.

Kentucky
Standard of Proof: preponderance of evidence. KY. REV. STAT. ANN. § 635.020.
Rules of Evidence: do not apply. KY. R. EVID. 1101(d)(1)(5).

Louisiana
Standard of Proof: probable cause. LA. CHILD CODE ANN. art. 305
Rules of Evidence: apply. LA. RULES OF EVID.101 and 1101.

Maine
Standard of Proof: probable cause that juvenile committed the offense, full investigation. ME. REV. STAT. ANN. tit. 15, § 6-503-3101(4.)
Rules of Evidence: apply only to the probable cause portion of the bind-over hearing. Written reports allowed, but person who made the report must be available to be cross-examined. *Id.*

Maryland
Standard of Proof: preponderance of evidence. MD. CODE ANN., CTS. & JUD. PROC. § 3-817.
Rules of Evidence: apply, since hearing is treated as an adjudication. *Id.*

Massachusetts
Standard of Proof: none. Direct file in criminal court. MASS. GEN. LAWS ch. 119 § 74.
Rules of Evidence: apply as they would to an adult.

Michigan
Standard of Proof: probable cause. MICH. COMP. LAWS § 712A.2d.
Rules of Evidence: apply just as they would to an adult. *Id.*

Minnesota
Standard of Proof: none stated. District court has original and exclusive jurisdiction over these cases. MINN. STAT. § 260B.101(2).
Rules of Evidence: apply just as they would to an adult.

Mississippi
Standard of Proof: probable cause that youth committed the offense; then, clear and convincing evidence that there are no reasonable prospects of rehabilitation. MISS. CODE ANN. § 43-23-29.
Rules of Evidence: apply as may comply with constitutional standards. *Id.* at § 21-203.

Missouri
Standard of Proof: none stated, "whether juvenile is a proper subject to be dealt with under the juvenile code and whether there are reasonable prospects of rehabilitation. MO. REV. STAT. § 211.071.
Rules of Evidence: do not apply. Court shall hear all relevant evidence. *Id.* at § 129.04.

Montana
Standard of Proof: none. Direct filed in district court.
No certification or transfer hearing. Where offenders is of certain age and certain offenses are involved, charges must be filed in district court. MONT. CODE ANN. § 41-5-204.
Rules of Evidence: apply as they would to an adult.

Nebraska
Standard of Proof: none. Prosecutor has discretion in deciding whether to file in district or juvenile court. NEB. REV. STAT. § 43-276. If filed in district court, juvenile can move to waive jurisdiction to juvenile court.
Rules of Evidence do not apply in waiver hearing. *Id.* at § 29-1816.

Nevada
Standard of Proof: child certified unless court finds that the juvenile is incompetent or the actions were the result of abuse by clear and convincing evidence. NEV. REV. STAT. § 62B-390.
Rules of Evidence: apply as they would to an adult.

New Hampshire
Standard of Proof: beyond a reasonable doubt. N.H. REV. STAT. § 169-B:17
Rules of Evidence: do not apply. N.H. R. EVID. 1101(d)(3).

New Jersey
Standard of Proof: probable cause. N.J. STAT. ANN. § 2A:4A-26.
Rules of Evidence: apply. N.J. R. EVID. 101(a)(1).

New Mexico
Standard of Proof: none. Direct filed in adult court. N.M. STAT. § 31-18-15.3.
Rules of Evidence: apply as they would in an adult case. N.M. R. EVID. 11-1101.

New York
Standard of Proof: none. Direct filed in adult court. N.Y. CRIM. PROC. LAW § 725.
Rules of Evidence: have not been codified, so it is unclear which, if any, apply.

North Carolina
Standard of Proof: probable cause. N.C. GEN. STAT. § 7B-2200.

Rules of Evidence: apply. N.C. R. EVID. 1101.

Ohio
Standard of Proof: probable cause. OHIO REV. CODE ANN. § 2151.12.
Rules of Evidence: apply, since no exception provided.

Oklahoma
Standard of Proof: clear and convincing evidence. OKLA. STAT. tit. 10A, § 2-2-403.
Rules of Evidence: apply, since no exception provided.

Oregon
Standard of Proof: preponderance of evidence. OR. REV. STAT. § 419C.349
Rules of Evidence: apply. *Id.* at § 40.020, rule 102.

Pennsylvania
Standard of Proof: prima facie evidence that juvenile committed act, then preponderance of evidence that transfer serves the public interest. 237 PA. CONS. STAT. § 394.
Rules of Evidence: apply to juvenile proceedings. 225 PA. CONS. STAT. § 101.

Rhode Island
Standard of Proof: preponderance of evidence. R.I. GEN. LAWS § 14-1-7.1.
Rules of Evidence: apply to juvenile proceedings.

South Carolina
Standard of Proof: none stated, "best interests of the child or the public." S.C. CODE ANN. § 63-19-1210.
Rules of Evidence: apply, since no exception for this type of hearing. S.C. R. EVID. 1101(d)(3).

South Dakota
Standard of Proof: none stated, "whether it is contrary to best interest of the child and the public to retain jurisdiction." S. D. CODIFIED LAWS § 26-11-4.
Rules of Evidence: apply generally to delinquency proceedings, exception only for dispositional hearings. *Id.* at § 19-9-14.

Tennessee
Standard of Proof: reasonable grounds. TENN. CODE. ANN. § 37-1-134(4).
Rules of Evidence: apply, except with regard to documentary proof of ownership and written reports of expert witnesses. TENN. R. JUV. PROC. 24(3)(b); TENN. R. CRIM. PRO. 5.1.

Texas
Standard of Proof: probable cause and welfare of community. TEX. FAM. CODE ANN. § 54.02(a)(3).
Rules of Evidence: do not apply. *Id.* at 54.02(e).

Utah

Standard of Proof: probable cause that crime was committed; preponderance of evidence regarding retaining jurisdiction. UTAH CODE ANN. § 78A-6-703.
Rules of Evidence: apply. UTAH R. JUV. PROC. 23(a)(3).

Vermont
Standard of Proof: probable cause; then public safety and interests of the community. VT. STAT. ANN. tit. 33, § 5204(c).
Rules of Evidence: apply generally to delinquency proceedings and no exception provided for transfer hearing. VT. R. EVID. 1101.

Virginia
Standard of Proof: probable cause that offense was committed, then preponderance of evidence regarding retaining jurisdiction. VA. CODE ANN. § 16.1-269.1.
Rules of Evidence: apply, as hearing is a preliminary hearing under Virginia law. VA. R. EVID. 2:1101.

Washington
Standard of Proof: none stated, "best interest of the juvenile or public." WASH. REV. CODE. § 13.40.110.
Rules of Evidence: do not apply in juvenile court hearings on declining jurisdiction. WASH. R. EVID. 1101(c)(3).

West Virginia
Standard of Proof: probable cause that juvenile committed the offense, then clear and convincing evidence to transfer. W. VA. CODE ANN. § 49-5-10.
Rules of Evidence: apply to portion of hearing dealing with evidence of the charged offense. Court has discretion to admit reliable evidence regarding personal factors. W. VA. R. JUV. PROC. 20(e)(6).

Wisconsin
Standard of Proof: clear and convincing. WIS. STAT. ANN. § 938.18.
Rules of Evidence: apply with limited exceptions. *Id.* at § 970.03.

Wyoming
Standard of Proof: proper reason for transfer. WYO. STAT. ANN. § 14-6-237.
Rules of Evidence: do not apply. WYO. R. EVID. 1101(b)(3).

NOTE: Survey includes only statutes and court rules. For case law information *see* Jenny E. Carroll, *Rethinking the Constitutional Criminal Procedure of Juvenile Transfer Hearings: Apprendi, Adult Punishment, and Adult Process*, 61 Hastings L.J. 175, fn. 80 (2009):

> Courts in many states have explicitly held that evidentiary rules, specifically hearsay rules, do not apply in juvenile transfer proceedings. See, e.g., O.M. v. State, 595 So. 2d 514, 516 (Ala. Crim. App. 1991); In re Appeal in Pima County, 546 P.2d 23, 25 (Ariz. Ct. App. 1976); People

v. Superior Court, 173 Cal. Rptr. 788, 793-96 (Ct. App. 1981); Drotzur v. State, 372 So. 2d 515, 516 (Fla. Dist. Ct. App. 1979); In re R.B., 448 S.E.2d 690, 691 (Ga. 1994); In re Dinson, 574 P.2d 119, 123-24 (Haw. 1978), overruled on other grounds by State v. Sanders, 76 P.3d 569, 571 (Haw. 2003); State v. Christensen, 603 P.2d 586, 589 (Idaho 1979); People v. Taylor, 391 N.E.2d 366, 372 (Ill. 1979); Clemons v. State, 317 N.E.2d 859, 863-67 (Ind. 1974); State v. Wright, 456 N.W.2d 661, 664 (Iowa 1990); Hazell v. State, 277 A.2d 639, 644 (Md. Ct. Spec. App. 1971); Commonwealth v. Watson, 447 N.E.2d 1182, 1185 (Mass. 1983); People v. Williams, 314 N.W.2d 769, 771-72 (Mich. Ct. App. 1981); In re Welfare of T.D.S., 289 N.W.2d 137, 140-41 (Minn. 1980); In re Three Minors, 684 P.2d 1121, 1124 (Nev. 1984) (noting, however, that hearsay evidence could not serve as the sole basis for transfer), disapproved on other grounds by In re William S., 132 P.2d 1015, 1021 & n.23 (Nev. 2006); State ex rel. A.T., 584 A.2d 861, 863 (N.J. Super. Ct. App. Div. 1991); State ex rel. B.G., 589 A.2d 637, 640 (N.J. Super. Ct. App. Div. 1991); People v. Giaccio, 96 N.Y.S.2d 912, 917-18 (Sup. Ct. 1950); Blore v. C.N., 301 N.W.2d 636, 640-41 (N.D. 1981); State v. Carmichael, 298 N.E.2d 568, 571-73 (Ohio 1973); C.G.H. v. State, 580 P.2d 523, 527 (Okla. Crim. App. 1978); In re Fox, 625 P.2d 163, 165 (Or. Ct. App. 1981); State v. Strickland, 532 S.W.2d 912, 919-20 (Tenn. 1975); G.R.L. v. State, 581 S.W.2d 536, 538 (Tex. Civ. App. 1979); State v. D.M.Z., 830 P.2d 314, 316-17 (Utah Ct. App. 1992); In re Harbert, 538 P.2d 1212, 1217 (Wash. 1975) (en banc); State v. Piche, 442 P.2d 632, 635 (Wash. 1968); In re E.H., 276 S.E.2d 557, 565 (W. Va. 1981); P.A.K. v. State, 350 N.W.2d 677, 685 (Wis. 1984). But see W.T.J. v. State, 665 So. 2d 1019, 1023 (Ala. Crim. App. 1995) (disallowing hearsay if it is the sole basis of the transfer); In re Stephfon W., 442 S.E.2d 717, 721 (W. Va. 1994) (holding that hearsay evidence cannot serve as the sole basis for transfer); Comer v. Tom A.M., 403 S.E.2d 182, 188 (W. Va. 1991) (same). Federal courts have followed suit in some jurisdictions, including the U.S. Virgin Islands, see Virgin Islands ex rel. A.M., 34 F.3d 153, 160-62 (3d Cir. 1994), Texas, see United States v. Doe, 871 F.2d 1248, 1255-56 (5th Cir. 1989), the District of Columbia, see United States v. H.S., 717 F. Supp. 911, 913 (D.D.C. 1989), rev'd on other grounds by In re Sealed Case (Juvenile Transfer), 893 F.2d 363, 370 (1990), and Oregon, see United States v. E.K., 471 F. Supp. 924, 929-30, 935 (D. Or. 1979).

Tab 4

Rule 23. Hearing to waive jurisdiction and certify under Section 78A-6-703; bind over to district court.

(a)(1) Upon the filing of a criminal indictment or information and motion to waive jurisdiction under Section 78A-6-703, the court shall order that a full investigation of the minor's social history and background be made by the court's probation department.

(a)(2) The investigation may include, but shall not be limited to: the minor's delinquency history, the minor's response to rehabilitative and correctional efforts; the minor's educational history, social history and status; a psychological evaluation and assessment, and any other matter ordered by the court.

(a)(3) A report of the investigation shall be prepared and made available to the parties or to counsel, if represented, and to the minor's parent, guardian or custodian, as early as feasible but in any case at least 48 hours prior to the hearing. Written reports and other materials relating to the minor's mental, physical, educational and social history and other relevant information are governed by the Rules of Evidence. The court may require, and shall require if requested by a party, that any person preparing the report or materials be present for direct and cross examination.

(b)(1) After a finding of probable cause in accordance with Rule 22, the court shall hear evidence and determine whether it would be contrary to the best interests of the minor or of the public for the court to retain jurisdiction. The state has the burden to prove by a preponderance of the evidence the factors required in Section 78A-6-703 to be considered by the court.

(b)(2) At the conclusion of the state's case, the minor may testify under oath, call witnesses, and present evidence on the factors required by Section 78A-6-703 to be considered by the court. The minor may cross-examine adverse witnesses.

(c) The court shall make findings on each factor for which evidence is presented. If the motion to waive jurisdiction and certify is granted, the court shall indicate which factor or factors were relied upon as a basis for the decision. If the court finds by a preponderance of the evidence that it would be contrary to the best interests of the minor or of the public for the court to retain jurisdiction, the court shall enter an order directing the minor to answer the charges in district court.

(d)(1) Upon entry of an order directing the minor to answer the charges in district court, the court shall comply with the requirements of Title 77, Chapter 20, Bail. By issuance of a warrant of arrest or continuance of an existing warrant, the court may order the minor committed to jail in accordance with Section 62A-7-201. ~~The court may order the minor held in a detention center or released in accordance with Rule 9.~~ The court shall enter the appropriate written order.

(d)(2) The clerk of the juvenile court shall transmit to the clerk of the district court all pleadings in and records made of the proceedings in the juvenile court.

(d)(3) The jurisdiction of the court shall terminate as provided by statute.

(e) If the court finds probable cause to believe that a felony has been committed and that the minor committed it but does not find that it would be contrary to the best interests of the minor or of the public for the court to retain jurisdiction, the court shall proceed upon the information as if it were a petition. The court may order the minor held in a detention center or released in accordance with Rule 9.

Rule 23A. Hearing on conditions of Section 78A-6-702; bind over to district court.

(a) If a criminal indictment under Section 78A-6-702 alleges the commission of a felony, the court shall, upon the request of the minor, hear evidence and determine whether the conditions of paragraph (c) exist.

(b) If a criminal information under Section 78A-6-702 alleges the commission of a felony, after a finding of probable cause in accordance with Rule 22, the court shall hear evidence and determine whether the conditions of paragraph (c) exist.

(c) The minor shall have the burden of going forward as to the existence of the following conditions as provided by Section 78A-6-702:

(c)(1) the minor has not been previously adjudicated delinquent for an offense involving the use of a dangerous weapon which would be a felony if committed by an adult;

(c)(2) that if the offense was committed with one or more other persons, the minor appears to have a lesser degree of culpability than the codefendants; and

(c)(3) that the minor's role in the offense was not committed in a violent, aggressive, or premeditated manner.

(d) At the conclusion of the minor's case, the state may call witnesses and present evidence on the conditions required by Section 78A-6-702. The minor may cross-examine adverse witnesses.

(e) If the court does not find by clear and convincing evidence that the conditions required by Section78A-6-702 are present, the court shall enter an order directing the minor to answer the charges in district court.

(f)(1) Upon entry of an order directing the minor to answer the charges in district court, the court shall comply with the requirements of Title 77, Chapter 20, Bail. By issuance of a warrant of arrest or continuance of an existing warrant, the court may order the minor committed to jail in accordance with Section 62A-7-201. ~~The court may order the minor held in a detention center or released in accordance with Rule 9.~~ The court shall enter the appropriate written order.

(f)(2) The clerk of the juvenile court shall transmit to the clerk of the district court all pleadings in and records made of the proceedings in the juvenile court.

(f)(3) The jurisdiction of the court shall terminate as provided by statute.

(g) If the court finds probable cause to believe that a felony has been committed and that the minor committed it and also finds that all of the conditions of Section 78A-6-702 are present, the court shall proceed upon the information

as if it were a petition. The court may order the minor held in a detention center or released in accordance with Rule 9.

Tab 5

IN THE UTAH COURT OF APPEALS

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Sean Barnett,	)	AMENDED OPINION[1]
	)	
Petitioner and Appellee,	)	Case No. 20100562-CA
	)	
v.	)	FILED
	)	(January 6, 2012)
Polly Adams,	)	
	)	2012 UT App 6
Respondent and Appellant.	)	

Third District Juvenile, Salt Lake Department, 1036546
The Honorable Andrew A. Valdez

Attorneys: Mary Rutledge, Payson, for Appellant
Ezekiel R. Dumke IV, Salt Lake City, for Appellee
Martha Pierce, Salt Lake City, Guardian ad Litem

Before Judges Davis, McHugh, and Thorne.

DAVIS, Presiding Judge:

¶1 Polly Adams (Mother) appeals the juvenile court's grant of Sean Barnett's (Father) child protective order petition. We dismiss the appeal because the issues are moot.

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1. This Amended Opinion replaces the Opinion in Case No. 20100562-CA issued on December 1, 2011.

BACKGROUND

¶2 Mother and Father are the parents of J.B. (Child). The two parents were never married to each other. Mother was awarded primary custody of Child in a paternity case in 2004. Father filed a child protective order petition in the juvenile court on May 26, 2010, based upon Child's statements to both Father and Child's school principal that Mother beat him the previous night and "had been hitting him for a long time." The juvenile court granted an ex parte protective order, which gave Father temporary custody of Child, and set a hearing on the petition for June 10, 2010. *See generally* Utah Code Ann. § 78B-7-203(1) (Supp. 2011) ("If an ex parte order is granted, the court shall schedule a hearing within 20 days after the ex parte determination."). Throughout the June 10 hearing, the juvenile court posed questions to each party's counsel and at times interrupted counsel as they answered. For instance, Mother's objections were often interrupted before her counsel could articulate the reasons behind the objection. Her objections were primarily on hearsay grounds, arguing that the statements in Father's protective order petition, the guardian ad litem's (GAL) statements pertaining to her interview with Child, and the report created by the Division of Child and Family Services (DCFS) constituted inadmissible hearsay. Toward the end of the proceeding, Mother's counsel repeated these objections, stating, "[T]here is no testimony other than . . . hearsay . . . ." The juvenile court summarily overruled the objections, agreeing with the GAL that the hearing was "dispositional in nature and the rules of juvenile procedure permit hearsay testimony [in dispositional proceedings]." The juvenile court found that Child was "in imminent danger of abuse" and concluded that it was "not safe [for him] to return home without instituting some form of protective supervision services or a safety plan." The juvenile court granted Father's petition in a Final Protective Order against Mother (the protective order). The protective order provided that Child be "placed in the temporary custody of [Father]," authorized supervised visitation for Mother, and ordered DCFS "to provide protective supervision services to the child" and "to establish a safety plan [for Mother and Father to] follow."[2] The protective order was to expire "150 days from the date of the order," or on or around November 10, 2010. Mother filed an appeal from the protective order on July 8, 2010.

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[2]The protective order also ordered the parties to participate in family counseling.

ISSUE AND STANDARD OF REVIEW

¶3 Mother appeals the protective order, arguing that the evidence supporting it consisted entirely of hearsay statements that the juvenile court erred in admitting, that the protective order was against the clear weight of the admissible evidence, and that Mother's due process rights were violated because the juvenile court assumed Father's burden of proof by actively questioning the witnesses.

¶4 Before addressing Mother's arguments, however, we must be satisfied that the issues raised are not moot or that an exception to the mootness doctrine applies.[3] A case is deemed moot "[i]f the requested judicial relief cannot affect the rights of the litigants." *H.U.F. v. W.P.W.*, 2009 UT 10, ¶ 21, 203 P.3d 943 (alteration in original) (internal quotation marks omitted). "Because mootness is a matter of judicial policy, the ultimate determination of whether to address an issue that is technically moot rests in the discretion of this court." *In re C.D.*, 2010 UT 66, ¶ 13, 245 P.3d 724 (internal quotation marks omitted). In addition,

> [t]he function of appellate courts, like that of courts generally, is not to give opinions on merely abstract or theoretical matters, but only to decide actual controversies injuriously affecting the rights of some party to the litigation, and it has been held that questions or cases which have become moot or academic are not a proper subject to review.

McRae v. Jackson, 526 P.2d 1190, 1191 (Utah 1974) (internal quotation marks omitted).

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[3]The GAL argues that the protective order does not constitute a final, appealable order because it has been consolidated with a paternity modification proceeding that is pending, and has possibly been completed, in the district court. Because another panel of this court denied the GAL's motion to supplement the record, the record presented on appeal does not contain any information for us to verify this assertion—not even an order from the juvenile court transferring the case to the district court or a case number to confirm that there is in fact an active proceeding in the district court dealing with issues relevant to this appeal. Accordingly, we do not address the GAL's finality argument.

ANALYSIS

¶5 Here, the protective order against Mother "presumably expired by its own terms," *Burkett v. Schwendiman*, 773 P.2d 42, 44 (Utah 1989) (mem.), on or around November 10, 2010, and there is no information in the record to indicate it was continued in effect. Consequently, reversal of the juvenile court's grant of the protective order cannot affect Mother's rights because the protective order, and the orders and conditions contained therein, should have expired roughly one year ago. Thus, the issues presented on appeal are moot.

I. Collateral Consequences Exception to Mootness

¶6 Mother argues that we should nonetheless review her mooted claims because the doctrine of collateral consequences applies.[4] We disagree.

¶7 "Where collateral legal consequences may result from an adverse decision, courts have generally held an issue not moot and rendered a decision on the merits." *In re Giles*, 657 P.2d 285, 286 (Utah 1982) (citing *Carafas v. LaVallee*, 391 U.S. 234 (1968)); *see also Putman v. Kennedy*, 900 A.2d 1256, 1261 (Conn. 2006) ("[T]he court may retain jurisdiction when a litigant shows that there is a reasonable possibility that prejudicial collateral consequences will occur . . . ." (omission in original) (internal quotation marks omitted)). This exception to mootness is generally applied in criminal cases. *See In re Giles*, 657 P.2d at 286 ("The doctrine of collateral legal consequences is chiefly applied in criminal cases where the absence or presence of those consequences may determine a criminal's chance of rehabilitation or recidivism." (citing *Sibron v. New York*, 392 U.S. 40 (1968))); *see also Sibron*, 392 U.S. at 57 ("[A] criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction."); *Gardiner v. York*, 2010 UT App 108, ¶ 33, 233 P.3d 500 (same), *cert. denied*, 238 P.3d 443 (Utah 2010). Accordingly, the examples of collateral consequences that preclude a case from mootness are relatively limited. *See, e.g., In re Giles*, 657 P.2d at 286-87 (applying the collateral consequences exception "to patients of mental hospitals who face . . . deprivations of liberty [similar to prisoners] and whose commitment and hospitalization must stand scrutiny on the merits when

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[4]We denied the GAL's first motion to dismiss Mother's appeal on mootness grounds and requested that the parties brief, "along with all other relevant issues, . . . the mootness argument raised by the [GAL] and the issue of whether any potential collateral consequences preclude dismissal on mootness grounds."

challenged"); *Duran v. Morris*, 635 P.2d 43, 45 (Utah 1981) (listing possible collateral consequences in the criminal law context).

¶8 However, one commonality among the applications of the collateral consequences doctrine is the need for the consequences complained of to be more than merely speculative. *See, e.g., Spencer v. Kemna*, 523 U.S. 1, 14 (1998) (holding that "a possibility rather than a certainty or even a probability" of suffering a collateral consequence is insufficient to overcome mootness); *Fratis v. Ortiz*, 190 F. App'x 686, 688 (10th Cir. 2006) (applying *Spencer*, 523 U.S. at 14, and holding that collateral consequences must be shown, not presumed); *State v. Moore*, 2009 UT App 128, ¶ 17, 210 P.3d 967 (explaining that collateral consequences "will not [be] presume[d]" when a party has failed to show that the consequences complained of are "actual[and] adverse"). Thus, a litigant must show that the collateral consequences complained of are not merely hypothetical or possible but that they are probable and represent actual and adverse consequences. *See Spencer*, 523 U.S. at 14; *Moore*, 2009 UT App 128, ¶ 17; *cf. Putman*, 900 A.2d at 1261-62 (noting that Connecticut recognizes a diverse array of collateral consequences, "includ[ing] harm to a defendant's reputation as a result of the judgment at issue," and that a "litigant must show that there is a reasonable possibility that prejudicial collateral consequences will occur . . . by more than mere conjecture, but need not demonstrate that these consequences are more probable than not").

¶9 Assuming without deciding that the collateral consequences doctrine ought to apply in this civil context, Mother's alleged collateral consequences are merely speculative. Specifically, Mother argues that "the juvenile court's erroneous adjudication of child abuse" in the protective order prompted Father to file a petition to modify the Order of Paternity, which resulted in Mother losing primary physical custody of Child. Additionally, Mother asserts that as a result of this adjudication of abuse she "is now listed on the management information system [MIS], which listing legally impairs her right to foster a child, adopt a child, or work with children."[5]

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[5]Utah Code section 62A-4a-1003 requires DCFS to maintain a management information system that contains information regarding the complete history of each child involved in a child welfare case. *See* Utah Code Ann. § 62A-4a-1003(2) (2011). Among other things, a child welfare case history filed in the MIS should include "a record of all reports of abuse or neglect received by the division with regard to that child's parent[or] parents" and indicate the status and findings of those reports. *Id.* § 62A-4a-1003(2)(e). This case history is "exclusively for the purposes of foster parent

(continued...)

Mother, however, does not claim that she has attempted or even plans to exercise "her right to foster a child, adopt a child, or work with children" or that being listed in the MIS actually impaired her ability to pursue any of these things.[6] She has simply listed potential legal impairments that generally impact a person listed in the MIS, not injuries that she has actually suffered or will even likely suffer based on a pending application to foster, adopt, or work with children, or even based on any expressed intent by Mother to pursue a foster placement, adoption, or occupation with children.[7] Thus, assuming that the collateral consequences doctrine ought to apply in this instance, "the hypothetical impact" of Mother's listing in the MIS "does not create a collateral legal

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[5](...continued)
licensure and monitoring." *Id.* § 62A-4a-1003(2). Additionally, "[w]ith regard to all child protective services cases, the [MIS] shall: (a) monitor the compliance of each case with . . . [DCFS] rule and policy . . . and (b) include [identifying information] of the alleged perpetrator . . . ." *Id.* § 62A-4a-1003(4). The information in the MIS is accessible within DCFS "upon the approval of the executive director, on a need-to-know basis," *id.* § 62A-4a-1003(5), and may be accessible to a limited number of other individuals under certain circumstances, *see id.* § 62A-4a-1003(6) (noting that DCFS may allow "its contract providers, court clerks . . . , and the Office of the Guardian Ad Litem to have limited access to the [MIS]"); *id.* § 62A-4a-1006 (recognizing that the Licensing Information System, a subsection of the MIS, is accessible outside DCFS, but only for limited purposes and by specific organizations); *see also Devlin v. Smalley*, 4 F. Supp. 2d 1315, 1323 (D. Utah 1998) (mem.) ("A few provisions in the Utah Administrative Code require the Office of Licensing to use the [MIS] database to screen applicants for licensure, but the provisions do not mandate that the Office of Licensing take any particular action with respect to the application as a result. The point of the database, as the statute itself indicates, is to facilitate the sharing of information between departments within [the Department of Human Services].").

[6]Mother provides no evidence to substantiate her assertion that she is now listed in the MIS. For purposes of this appeal, we assume that her assertion is accurate.

[7]In fact, the record indicates that most of Mother's work experience has been in administrative settings, in the food service industry, and in mortgage lending. Notably absent from the record is any indication that Mother has ever held a position working with children.

consequence that prevents the conclusion that [Mother]'s claim is moot."[8] *See Moore*, 2009 UT App 128, ¶ 14; *see also Spencer*, 523 U.S. at 14. When a party has not shown the existence of "actual, adverse collateral consequences[,] . . . we will not presume that such collateral consequences exist." *Moore*, 2009 UT App 128, ¶ 17 (footnote omitted). Assuming, without deciding, that the collateral consequences doctrine applies in this civil context, we conclude that collateral consequences do not exist here, and therefore the exception does not preclude dismissal of Mother's appeal on mootness grounds.

II. Public Interest Exception to Mootness

¶10 In addition to the collateral consequences exception, we may review a technically moot claim if we determine that the public interest exception applies. *See In re C.D.*, 2010 UT 66, ¶ 13, 245 P.3d 724. Retention of a mooted case should occur "only under exceptional circumstances and where the public interest clearly appears." *McRae v. Jackson*, 526 P.2d 1190, 1191 (Utah 1974). "'The public interest exception to the mootness doctrine arises when the case [1] presents an issue that affects the public interest, [2] is likely to recur, and [3] because of the brief time that any one litigant is affected, is capable of evading review.'" *In re C.D.*, 2010 UT 66, ¶ 13 (alterations in original) (additional internal quotation marks omitted) (quoting *Ellis v. Swensen*, 2000 UT 101, ¶ 26, 16 P.3d 1233). The exception requires satisfaction of all three prongs, as evidenced by the use of the word "and" in the case law establishing the exception. *See id.* ¶¶ 13-15 (using "and" to link the three prongs of the public interest exception together and dismissing a mooted claim that satisfied the first two requirements of the exception but did not satisfy the third requirement).

¶11 Here, the primary issues are whether the protective order was supported by sufficient evidence and whether the hearing was conducted in a proper, constitutional, manner. Subsidiary to Mother's evidentiary challenge is her assertion that hearsay evidence was improperly admitted and relied on by the juvenile court. Regarding the sufficiency challenge, we do not believe the specific factual arguments challenging the basis upon which this particular protective order was granted "present[] an issue that affects the public interest," *see id.* ¶ 13 (internal quotation marks omitted). Indeed,

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[8]Additionally, the GAL asserts that since filing this appeal, Mother has voluntarily relinquished her parental rights in a district court proceeding. Although the record provided on appeal does not indicate whether Mother has actually voluntarily relinquished her parental rights, if she has, such a result further undermines Mother's collateral consequences argument.

"[t]he issues of which the courts frequently retain jurisdiction because of the public interest involved, although the immediate issues may have become moot, are class actions, questions of constitutional interpretation, issues as to the validity or construction of a statute, or the propriety of administrative rulings." *McRae*, 526 P.2d at 1191; *see also Ellis*, 2000 UT 101, ¶ 28 (determining that a mooted claim that does "not involve a class action, a question of constitutional interpretation, or an issue as to the validity or construction of a statute . . . does not present an issue that affects the public interest"). Mother's challenge to the factual basis of the protective order does not fall within any of those categories, and we are unconvinced that the issue otherwise presents an "exceptional circumstance[] . . . where the public interest clearly appears," *see McRae*, 526 P.2d at 1191. Accordingly, Mother's evidentiary claims fail to meet the public interest exception to mootness.[9] *Cf. Mortenson v. Turley*, 2009 UT App 67U, para. 5 n.3 (mem.) (noting that the public interest exception did not apply to a party's mooted appeal of the juvenile court's dismissal of a child protective order petition because the "factual determination" underlying the denial of the petition did not "fall[] within the exception to the mootness doctrine").

¶12 Similarly, we are not convinced that Mother's constitutional challenge satisfies the recurrence prong of the public interest exception. The Child Protective Order statute, *see generally* Utah Code Ann. §§ 78B-7-201 to -207 (2008 & Supp. 2011), and the Rules of Juvenile Procedure provide substantial guidance to the juvenile court regarding the manner in which child protective order proceedings ought to be conducted. Even if the juvenile court deviated from these procedures in the instant case, we are not convinced that the same issue "is likely to recur in a similar manner," *see Anderson v. Taylor*, 2006 UT 79, ¶ 10, 149 P.3d 352 (framing the recurrence prong of the public interest exception to involve the determination of whether a claim "is likely to recur in a *similar* manner" (emphasis added)). Accordingly, Mother's due process argument is also dismissed.[10]

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[9]To the extent the statutory framework and the Rules of Juvenile Procedure are unclear as to the general applicability of the Rules of Evidence in matters like this, such uncertainty is best resolved by the legislature or relevant rule-making authority. This opinion should not be construed as passing judgment on whether the juvenile court, under the facts and circumstances of this case, properly admitted and relied on hearsay evidence.

[10]Additionally, Mother admits that her due process challenge was not preserved, thus requiring us to overcome another layer of "exceptional circumstances" in order to

(continued...)

CONCLUSION

¶13 Mother's challenges on appeal are moot. The collateral consequences exception and the public interest exception to the mootness doctrine do not apply. As a result, we dismiss the appeal.

James Z. Davis,
Presiding Judge

¶14 WE CONCUR:

Carolyn B. McHugh,
Associate Presiding Judge

William A. Thorne Jr., Judge

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[10](...continued)
review the issue. *See State v. Irwin*, 924 P.2d 5, 7-8 (Utah Ct. App. 1996) (noting that the preservation rule "bar[s a party] from raising [an issue] for the first time on appeal" but that one exception to the preservation rule is the "concept of exceptional circumstances," which "is not so much a precise doctrine, which may be analyzed in terms of fixed elements, as it is a descriptive term used to memorialize an appellate court's judgment that even though an issue was not raised below and even though the plain error doctrine does not apply, unique procedural circumstances nonetheless permit consideration of the merits of the issue on appeal"). Thus, we do not address Mother's due process challenge, and this opinion should not be construed as containing any ruling as to whether the juvenile court acted properly by interjecting questions and interrupting the parties throughout the termination petition hearing.

on which they may still be held in detention. After discussion, a motion was passed to revise URJP 23 and 23A to reposition the language in question as detailed below.	
Action Item:	Katie Gregory to make the revisions and send them to Tim Shea to initiate the public comment period.
A motion was made in the following two parts: 1) to remove the second to the last sentence in URJP 23(d)(1) and insert it at the end of subparagraph 23(e); and 2) to remove the second to the last sentence in URJP 23A(f)(1) and add the sentence to the end of 23A(g).	By: Judge Lindsley Second: Paul Wake
Approval	× Unanimous □ Vote: # In Favor_____ # Opposed _____

AGENDA TOPIC

IV. Impact of Civil Discovery Rules on the URJP	[PRESENTER] ALAN SEVISION
Alan Sevision was unable to attend the meeting, but distributed a handout outlining changes to the Utah Rules of Civil Procedure and their potential affect on the URJP. The memo contained a table comparing the new URCP with proposed revisions to corresponding provisions of the URJP. The memo noted that many of the URCP changes were simply renumbering of rules or paragraphs. Judge Lindsley made a motion to incorporate the proposed changes in Alan Sevison's memo. After discussion the committee determined it would like additional time to review the proposed changes and Judge Lindsley withdrew her motion.	
Action Item:	Members will review the memo further and return at the next meeting to take action on the proposed changes.

AGENDA TOPIC

V. Rule 29A Concerns	[PRESENTER] PAM VICKREY
Pam Vickrey discussed an additional issue which arose after the committee revised Rule 29A last year. Rule 29A(1) was amended to bring it into compliance with the *Crawford* decision. However, Ms. Vickrey noted that in rare situations, the rule may still be applied in a manner that could be deemed unconstitutional by violating rights to confrontation of the witness. The rule requires "the child is available to testify and to be cross-examined at trial, either in person or as provided by law, or the child is unavailable to testify at trial, but the minor had a previous opportunity to cross-examine the child concerning the recorded statement, such that the minor's rights of confrontation are not violated." In some juvenile court cases, the parties cannot comply with the rule because no method exists for prior cross examination of the child victim. After discussion, the committee agreed to continue monitoring the rule and any related cases or appellate rulings.	