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OFFICE OF THE ATTORNEY GENERAL



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October 5, 2005

Judge Stephen A. Van Dyke
Second District Juvenile Court
447 W. 675 North
P.O. Box 325
Farmington, Utah 84025

Re: Review of URJP 34(e) by the Supreme Court's Advisory Committee on the Rules of Juvenile Procedure

Dear Judge Van Dyke:

The Supreme Court's Advisory Committee on the Rules of Juvenile Procedure received a request from Brent Johnson that the Committee review your input regarding Rule 34(e). After some discussion at one meeting, Judge Larry Steele graciously agreed to seek more detail from you so that we might better understand the issues. We received your additional input and engaged in a lengthy discussion. By way of background, our committee is made up of juvenile court judges, defense attorneys, State prosecutors – both for delinquency and child welfare cases, Guardians Ad Litem, and attorneys from the private sector. I am writing to report the committee's discussions on this topic.

Your request was that the pertinent portion of the rule -- which provides that "allegations not specifically denied shall be deemed admitted" -- should allow the judge discretion as to whether to deem the allegations admitted, rather than to mandate it. There appear to be three areas of concern. First, your letter discusses the heavy consequences of the "34(e) plea" in light of the fact that it is not an admission and no evidence is taken. Second, you are regularly receiving motions to withdraw the plea from defendants who successfully defend the criminal action and then claim the 34(e) plea was coerced, was not voluntary or was a result of poor counsel. Third, when services are ordered after a 34(e) plea, the defendant is in the position to deny responsibility in therapy which stymies therapy and progress on the service plan.

In discussing the first area, you seem to be troubled by the possibility that the plea could be used in criminal cases because the rule does not prevent it. Given that the "plea" under 34(e) is actually a refusal to admit or deny the allegations, the plea itself could not be used as an "admission" of anything. An admission could certainly be used under any burden of proof – from preponderance to beyond a reasonable doubt – but this type of "plea" is not an admission. The findings that result from the 34(e) plea also cannot be used in criminal court due to the findings being made under a lower burden of proof. You also expressed concern about the heavy consequences of the plea, given that it is not an admission and no evidence is taken. We understand the concern, but feel that the defendant appears to have several options: deny the petition and go to trial, admit the petition, or enter a 34(e) plea neither admitting or denying the petition. We also note that a similar plea exists in the criminal arena where the consequences are equally as heavy.

As to the second area of concern, our committee believes that it is extremely important for the attorneys and/or the court to inquire into, and make findings about, the defendant's understanding and voluntariness on the record when entering into a 34(e) plea. Also, apparently these motions are being filed with regularity after a defendant is acquitted in criminal court and they are time consuming. These issues are essentially resolved by the Court of Appeals' unpublished decision in State ex rel. S.T., 2004 UT App 240 (unpublished memorandum decision, July 15, 2004). The Court stated that, even assuming the motion was timely filed, "his argument that, since he was acquitted of criminal charges, it would be an injustice to allow the plea entered pursuant to rule 34(e) of the Utah Rules of Juvenile Procedure to stand is unpersuasive. The argument overlooks the fact that a different burden of proof exists in a criminal trial than in a juvenile adjudication. Therefore, the fact that he was subsequently acquitted in trial does not necessarily presume that the adjudication cannot be sustained."

The final concern is that a defendant who enters the 34(e) plea is then in a position to deny responsibility which derails therapy and progress on the service plan, resulting in lengthier proceedings and possibly termination of parental rights. Again, the committee understands the concern, but discussed the fact that this scenario is indicative of a flaw in the individual, rather than the law.

The Committee discussed various consequences of changing "shall" to "may" to allow the court discretion in whether to deem the allegations admitted. The committee felt that Rule 34(e) is a negotiating tool that loses its effectiveness if the rule is changed to "may." Many parties want to go forward and get the services they need without admitting certain actions that might result in criminal action. If the "shall" is changed to "may" there is no incentive to negotiate aggressively if the parties' agreements will not be honored by the court. In fact, one of the committee members felt that there would be no way to reach agreement without knowing

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what the judge would deem admitted. The committee felt that changing "shall" to "may" would undermine the usefulness of the rule entirely given that the parties would still have to go to trial. One defense attorney was concerned that the case could be out of compliance with the statutory time deadlines if parties reached agreements at mediation and cancelled the adjudication trial, only to find out that the judge would not accept a 34(e) plea or deem the allegations admitted. Several members of the committee noted that the rule is highly favored by counsel for parents.

As you can probably gather, the Committee decided not to make a change to the rule at this time. However, the Committee expressed its willingness to receive input regarding continuing concerns about this rule or any others. Thank you for your valuable input on this issue. Do not hesitate to contact the Committee again should you so desire.

Very truly yours,



Carol L. C. Verdoia
Assistant Attorney General
Chair, Supreme Court's Advisory Committee
On the Rules of Juvenile Procedure

cc: Katie Gregory
URJP Committee

Thanks,
Carol

>>> Rob Parrish 12/9/2005 1:48 PM >>>
Carol -

After much wailing and gnashing of teeth among virtually all the parties in Second District over the application and meaning of Rule 34(e), and based upon a particular case where a 34(e) plea by a parent was admitted by a District Court Judge as an "admission" by that parent in the criminal case, I'm recommending that the language of the Rule be changed. I understand you're the chair of the Rules of Juvenile Procedure committee, and so this is just a preliminary inquiry to see whether you think this should come before the committee.

The Rule reads in part that, "Allegations not specifically denied by a respondent shall be **deemed admitted**." It's that last part that causes the problem, and may even raise constitutional issues if the lack of a clear denial can later be used against a parent in a criminal case. That at least raises the spectre of denial of the privilege against self-incrimination, since parents are not warned in juvenile court proceedings that anything they don't clearly and specifically deny might be used against them in criminal court as an "admission."

The practical problem is that parents now don't want to risk that possibility, so they don't want to enter a 'neither admit nor deny' plea in child protection cases. I think there is a reason in some cases to allow such a "no contest" outcome, although it's probably overused since failure to admit there's a problem can be such a barrier to successful services in a child protection case.

What I would propose is that the last sentence of the Rule be changed to read: "Allegations not specifically denied by a respondent **may be found true by the court.**" I'm sure some might suggest if we're going to change this, that allegations not specifically denied "shall" be found true by the court, but I'm concerned a little about that, too, since failure to deny shouldn't automatically result in the finding and the juvenile court judge should have some discretion to require a proffer of the evidence, documentary evidence supporting the factual finding, or even brief testimony to justify the finding.

Let me know if you think this is worth pursuing, if you think so, I'd be glad to come and present to the committee.

Thanks,
Rob

Shall .

Katie Gregory - Search Warrants

From: Bruce Thomas
To: Katie Gregory
Date: 11/28/05 4:45PM
Subject: Search Warrants

Katie

At last months TCE Meeting Third District generated a question regarding search warrants in juvenile court.

We had an issue arise here regarding a request for a copy of an original search warrant which was not in the file.

In researching the matter we could find no rule or procedure for issuance of search warrant in juvenile court.

I ask the TCE's if any of the district had a procedure. None did.

It was suggested that I contact Tim Shea to discuss the feasibility of a rule for juvenile court search warrants.

Tim indicated that he was not sure if a rule was necessary, but suggested that I contact you as you are staff for juvenile rules. You ask for an email to forward to Carol for January's agenda.

I would be happy to come to discuss the specific case.

bt

From: Rob Parrish
To: Carol Verdoia
Date: 12/12/05 12:53PM
Subject: Re: Rule 34(e) URJP

Thanks for sending the information on the prior discussions on Rule 34(e). It sounds like Judge Van Dyke and Judge Steele were approaching the issue in a little different light than my focus, but there are a lot of similar concerns being expressed. I don't agree with that part of the letter sent to Judge Van Dyke which says that a 34(e) plea couldn't be used in criminal court as an admission, since apparently it already has in one 2nd District case and the theory was that even though the parent neither admits nor denies the allegation, they were told it would be "deemed admitted" and so that operates as a tacit admission. That would be sort of like an adoptive admission where someone says something that is an admission and someone else stands by and doesn't deny it, although their silence operates as an admission as to that second person. I prosecuted a case in my prior life where a criminal defendant's buddy made a threat to a witness in the presence of the defendant and since the defendant didn't deny the threat or repudiate what was said, he was found to have committed the witness tampering.

Here's a behind-the-scenes question for you: Do you think I should re-open the discussion with Judge Van Dyke and then approach the Committee again? Or would it be better just to make my own pitch and let the Judges weigh-in with their own concerns? I'm thinking the latter is less awkward on both sides. I could come to the January 6th meeting at noon, if you can put this on the agenda and if you think what I'm saying merits additional consideration.

thanks

>>> Carol Verdoia 12/09/05 03:54PM >>>

Hi Rob-

I'm always open to any issue coming before the committee -- I don't like to act as a barrier or to screen out any issues based upon my own views. As the chair, I am a non-voting member, and I would rather have the committee engage in a full discussion of issues that others believe have merit.

Having said that, you should know that Judge Van Dyke brought this issue to our attention a few months ago, and the committee discussed it and sent a response. I will attach that response here, and will forward Judge Van Dyke's presentation of the issue if it is still in my email directory. It may be that you have more to add, or that we should take another crack at it. I did tell Judge Van Dyke that we were open to further discussion on the issue. I am especially open to hearing more from you, because I trust your analytical skills and experience. After you have read the letter and email, let me know what you think. We have a meeting set for January 6th at noon in Salt Lake. We could easily put you on the agenda because we have a pretty light one that day. If that doesn't work for you, we could schedule it down the road.

Thanks,
Carol

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Carol -

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Let me know if you think this is worth pursuing, if you think so, I'd be glad to come and present to the committee.

Thanks,
Rob

MEMORANDUM

To: URJP Committee
From: Katie Gregory
Date: February 3, 2006
Subject: Options for Revision of URJP 34(e)

The three options are:

- 1. Leave URJP 34(e) in its current form;**
- 2. Change “deemed admitted” to “deemed true” in the last line of URJP 34(e);**
- 3. Substitute “allegations not specifically denied by a respondent may be found true by the court.”**

Existing Language of URJP 34(e):

- (e) A respondent may answer by admitting or denying the specific allegations of the petition, or by declining to admit or deny the allegations. Allegations not specifically denied by a respondent shall be deemed admitted.**

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Rule 37. Child protective orders.

Rules Text

(a) Child protective order proceedings are governed by Section 78-3h-101 et seq. Protective order proceedings may be commenced as an independent action by filing a petition. Any interested person may file a petition for a protective order on behalf of a child as provided by statute ~~who has been abused, sexually abused, neglected, or abandoned or is in imminent danger of being abused, sexually abused, neglected, or abandoned.~~ The petitioner shall first make a referral to the division. If an immediate ex parte protective order is requested pending a hearing, the petition or an accompanying affidavit shall set forth the facts constituting good cause for issuance of the ex parte order.

(b) If the petitioner is the agent of a public or private agency, including a law enforcement agency, the petition shall set forth the agent's title and the name of the agency that the petitioner represents.

(c) Petitions for protective orders by a public agency shall not be accepted by the clerk unless reviewed and approved by the attorney for the public agency, whose office shall represent the petitioner in such cases.

(d) The petitioner, if a private person or agency, and the respondent may be represented by retained counsel. Counsel may be appointed by the court for an indigent respondent who is a parent, guardian or custodian of the child alleged to be abused or threatened with abuse. If the court finds in the hearing that the allegations of the petition have been established, the court may assess petitioner's costs and attorney fees against the respondent. If the court finds that the petition is without merit, the respondent's costs and attorneys fees may be assessed against petitioner.

(e) If an ex parte order has been issued, the hearing must be held within 20 days excluding Saturdays, Sundays and legal holidays.

Rules History

History: Amended effective April 1, 1999; November 1, 2003.

Rules Annotations

Amendment Notes. - The 2003 amendment added the first and fourth sentences and rewrote the third sentence in Subdivision (a) and deleted "unless the respondent stipulates to a longer period of time" at the end of Subdivision (e).

RECIPE FOR A SEARCH WARRANT

1. There must be probable cause to believe that a child is being ill-treated in violation of Utah law and that there is no less intrusive way to assure the safety of the child. These facts need to be articulated in the affidavit or sworn testimony.
2. The request for the warrant must be accompanied by sworn testimony or affidavit particularly describing the person or place to be searched, the person or evidence to be seized. (An address is insufficient, the affidavit and warrant must contain a physical description of both the location to be searched and the person or property to be seized).
3. The warrant is to be executed in the day time unless the affidavit establishes a reason to perform the search at night. If a night time search is needed (for example to locate a mistreated child while the child and custodian are asleep) the warrant needs to state that it can be executed at night.
4. The warrant must be executed within ten days of issuance.
5. Complete the affidavit, motion, warrant and return.
6. Present the documents to the judge for issuance.
7. Deliver the documents to law enforcement. Law enforcement needs the original warrant and one copy. The copy is left at the location which is searched.
8. When the search is completed, law enforcement must note on the return any evidence seized (most likely a description of a child placed in shelter), then file the sworn return with the court.
9. The original warrant is also returned to the court. If the warrant is not executed within the ten day limit, the original must be returned to the court as "not executed."
10. The code sections which deal with issuance of search warrants are §§77-12-201 et.seq. and §78-38-106.

Katie Gregory - Re: URJP-Should we meet?

From: Brent Bartholomew
To: Katie Gregory
Date: 12/30/05 10:26AM
Subject: Re: URJP-Should we meet?
CC: Carol Verdoia

I will be coming to the meeting, but I need to know what time it will be and what room it will be held. Another matter I want to discuss is Rule 52. It does not mention the 15-day appeal period for child welfare cases, at least my copy of the 2005 Utah Court Rules Annotated does not.

My presentation will last no longer than 2 minutes, but I am sure others will want to say something.

Brent

>>> Katie Gregory 12/30/05 10:15AM >>>

Brent,

I'm putting together the agenda for next Friday's URJP meeting (Jan. 6) and noticed that you had an agenda item from some time ago--would you still like to address the notice by publication on TPR issue with the URJP committee? If so, will you be able to come to next Friday meeting and how much time should I allow?

Katie

>>> Brent Bartholomew 11/01/05 11:20AM >>>

I think we could postpone the meeting until December. I do, however, have one item to add to the agenda: Notice by publication for cases involving termination of parental rights. To protect the children's identity, I believe the children should be identified by their initials, as in appellate court cases, when notice is published.

Let me know what you decide about the next time we will meet.

Brent Bartholomew

>>> Katie Gregory 11/01/05 10:18AM >>>

URJP Members:

Carol Verdoia and I have been debating whether to go forward with the URJP meeting scheduled for this Friday, November 4 from noon until 2:00 p.m. Our dilemma is that we currently have only one matter for discussion--relating to a minor clean up in URJP 37 on Protective Orders. We hate to cancel the meeting since we have not met since June, but also hate to have many of you drive long distances for such a minor discussion.

We decided to ask all of you if you have agenda items that could fill out the meeting. If not, I will email you and cancel the meeting. Please email any agenda items to me by Wednesday morning, Nov. 2nd.

Thanks!!!

Katie Gregory
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 Phone: (801) 578-3929
 Fax: (801) 578-3843
 Email: katieg@email.utcourts.gov