

JUDICIAL COUNCIL OF CALIFORNIA

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INVITATION TO COMMENT

SPR16-03

Title	Action Requested
Appellate Procedure: Juvenile Proceedings	Review and submit comments by June 14, 2016
Proposed Rules, Forms, Standards, or Statutes	Proposed Effective Date
Amend rules 8.400 and 8.407	January 1, 2017
Proposed by	Contact
Appellate Advisory Committee	Heather Anderson, 415-865-7691
Hon. Raymond J. Ikola, Chair	heather.anderson@jud.ca.gov

Executive Summary and Origin

To save time and costs for courts associated with requests to augment or receive copies of the record on appeal and the costs associated with preparing and transmitting supplemental clerk's and reporter's transcripts when such requests are granted, the Appellate Advisory Committee is proposing to amend: (1) the rule that identifies the proceedings governed by the juvenile appellate rules to clarify that these rules apply to appeals of orders terminating parental rights under Probate Code 1516.5; and (2) the rule that lists what must be included in the normal record in juvenile appeals to clarify that the clerk's transcript must include various notices under the Indian Child Welfare Act and to add hearings at which certain advisements are to be given to the hearings that must be included in the reporter's transcript. This proposal originated from a suggestion submitted by an attorney at one of the appellate projects that assist the Court of Appeal with appointed counsel in juvenile appeals.

Background

Rule 8.400

Chapter 5 of Title 8, Division 1 of the California Rules of Court, which is entitled "Juvenile Appeals and Writs," sets out the procedures for appeals and writ proceedings in juvenile delinquency and dependency proceedings and certain other similar proceedings. Rule 8.400 identifies the proceedings that are governed by Chapter 5. Currently, the proceedings listed in rule 8.400 include appeals from judgments or appealable orders in actions to free a child from parental custody and control under Family Code section 7800 et seq..

The proposals have not been approved by the Judicial Council and are not intended to represent the views of the council, its Rules and Projects Committee, or its Policy Coordination and Liaison Committee. These proposals are circulated for comment purposes only.

The rules in Chapter 5 differ from the rules governing other civil appeals in several important ways. Among other things, these rules specify the contents of the record on appeal, rather than requiring parties to designate the items to be included in the record, and do not include procedures for charging advance fees to parties for their copy of the record. This structure reflects statutory provisions that provide for preparing and transmitting the record without the advance payment of fees in proceedings under the Welfare and Institutions Code and under Family Code section 7800 et seq. (See Welf. & Inst. Code, § 395(a)(4); Fam. Code, § 7895(c).)

Like proceedings under Family Code section 7800 et seq., Probate Code section 1516.5 pertains to the termination of parental rights, but in the context of a probate guardianship. Section 1516.5 specifically provides that these probate proceedings may be brought in accordance with the procedures set out in Family Code section 7800 et seq.. Currently, however, rule 8.400 does not identify appeals in proceedings under Probate Code section 1516.5 as being among the proceedings governed by the juvenile appellate rules. This has caused confusion in some appeals about whether the record should be prepared and sent to counsel without the necessity of filing a designation or the advance payment of fees. As a result appellate counsel have had to prepare and file requests to have the record prepared, resulting in delay and additional costs to the courts.

Rule 8.407

Rule 8.407 sets out the content of the normal record in juvenile appeals. Subdivision (a)(4) of this rule currently requires that the clerk's transcript in these appeals include, among other things, "[an]y report or other document submitted to the court." Subdivision (b) requires that the reporter's transcript in juvenile appeals generally include the oral proceedings at any hearing that resulted in the order or judgment being appealed, but that in appeals from dispositional orders, it include the oral proceedings at the hearings on jurisdiction and disposition and any motion by the appellant that was denied in whole or in part. Under current rule 8.407(c), any party or Indian tribe that has intervened in the proceedings may apply to the superior court for inclusion of additional oral proceedings in the reporter's transcript. Under rule 8.410, either on the motion of a party or its own motion, the Court of Appeal can also order that additional items be included in the record on appeal.

Under the Indian Child Welfare Act (ICWA) (25 U.S.C. Sec. 1901 et seq.) and related California law (see Welf. & Inst. Code, § 224 et seq.; Cal. Rules of Court, rule 5.481 et seq.), in juvenile proceedings, the trial court has an affirmative and continuing duty to inquire whether a child for whom a juvenile petition is to be, or has been, filed is or may be an Indian child and if the court knows or has reason to know that an Indian child is involved, notices must be sent to, among others, the child's Indian custodian, if any, and the child's tribe (see Welf. & Inst. Code, §§ 224.2, 224.3). The failure to comply with ICWA inquiry and notice requirements can be the basis for seeking to invalidate the trial court decision.

In the experience of committee members, the normal record on appeal in juvenile dependency cases may not always include all of the written documents or transcripts of the hearings that are needed to determine whether there was appropriate compliance with these ICWA inquiry and notice requirements. The Fourth Appellate District has a local order that requires that reporter's transcripts in dependency appeals include additional hearings, such as the detention hearing. In other Court of Appeal districts, if additional items are needed in the record, they must be requested either through an application to the superior court under rule 8.407(c) or through a motion to augment under rule 8.410. However, it takes additional time and resources for counsel to prepare and for the courts to consider such applications and motions. For those parties who are represented by appointed counsel, the time spent by counsel on such requests or motions constitutes an additional cost for the Court of Appeal. Furthermore, if the superior court or Court of Appeal routinely grant these applications or motions, it does not save trial courts any record preparation costs not to have included these hearings in the original reporter's transcript. In fact, it may actually cost trial courts more to separately prepare and transmit to the reviewing court supplemental reporter's transcripts at a later time.

The Proposal

Rule 8.400

To eliminate confusion about the record preparation process in these cases and the delay and costs associated with requests for preparation of the record, the committee is proposing that rule 8.400 be amended to also include appeals under Probate Code 1516.5 among the proceedings governed by the juvenile appellate rules.

Rule 8.407

To reduce the delay and costs associated with augmentation requests, the committee is proposing that rule 8.407(b), which identifies the hearings that must be included in the reporter's transcript as part of the normal record in juvenile appeals, be amended to require that, in juvenile dependency appeals, the following also be included in the reporter's transcript:

- The detention hearing; and
- The hearing(s) at which the child's parent(s) first appeared.

The particular hearings have been identified as those at which ICWA inquiries are likely to be conducted, and thus it is the committee's understanding that transcripts of these hearing are likely to be routinely needed in dependency appeals.

The committee is also proposing two amendments to provide clarifications about materials that should already be included in the normal record in juvenile appeals:

- Amending rule 8.407(b) to clarify that in appeals from an order terminating parental rights under Welfare and Institutions Code sections 300 et. seq., the reporter's transcript must include all section 366.26 hearings;
- Amending the advisory committee comment to 8.407(a) to clarify that the clerk's transcript must include written ICWA notices submitted to the court.

Alternatives Considered

The committee considered whether to also propose that rule 8.400 be amended to provide that appeals of actions under Family Code sections 7662–7666, relating to termination of parental rights of alleged or unknown fathers in adoption proceedings, are governed by the juvenile appellate rules. The committee decided not to include this amendment in this proposal because, unlike for proceedings under Probate Code section 1516.5, it was not clear whether the statutes contemplated that the record in these proceedings would be prepared and transmitted without the advance payment of fees. However, the committee would appreciate comments on whether appeals of actions under Family Code sections 7662–7666 should be governed by the juvenile appellate rules.

The committee also considered whether it would be preferable not to propose any amendments to rule 8.407 to add items to the normal record in juvenile appeals, but instead to leave it to each appellate district to determine whether to adopt local rules specifying any items in addition to those listed in rule 8.407 that must be included in the record in that district. Some members of the committee thought that a local rule approach would be preferable because only those districts that felt the need to require additional items would do so. While the majority of members thought a statewide rule was preferable because it would be less confusing and more efficient for appellate counsel, the committee would appreciate comments on the relative merits of the statewide rule and local rule approaches to this topic.

Implementation Requirements, Costs, and Operational Impacts

This proposal will require changes in current procedures relating to what material is included in the reporter’s transcripts in juvenile dependency cases and, in some courts, relating to the preparation of the record in appeals of orders terminating parental rights under Probate Code 1516.5. This is likely to require some additional training for court clerks and court reporters. However, as indicated above, the intent of this proposal is to reduce overall costs and increase efficiency by:

- Reducing Court of Appeal expenses for appointed counsel in juvenile dependency cases associated with preparing motions to augment;
- Reducing costs for the trial courts and Courts of Appeal in considering requests to prepare the record and motions to augment the record; and
- Reducing trial court costs associated with preparing and transmitting supplemental clerk’s and reporter’s transcripts.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?
- Should appeals of actions under Family Code sections 7662–7666, relating to termination of parental rights of alleged or unknown fathers in adoption proceedings, also be added to the list of proceedings governed by the juvenile appellate rules?
- Are transcripts of the detention hearing and of the hearing at which a child’s parent(s) first appeared routinely needed in the substantial majority of the juvenile dependency appeals? (While automatically including transcripts of these hearings in the record will reduce costs if routinely needed for appellate review in these cases, it may increase costs if they are not needed.)
- Would it be preferable for the Judicial Council to amend rule 8.407 to add the suggested items to the normal record in juvenile appeals or to have each appellate district determine whether to adopt local rules specifying any items in addition to those listed in rule 8.407 that must be included in the record in that district?

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so please quantify.
- What would the implementation requirements be for courts? For example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems.
- Would 2 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?

Attachment

Cal. Rules of Court, rules 8.400 and 8.407, at pages 6–9

Rules 8.400 and 8.407 of the California Rules of Court would be amended, effective January 1, 2017, to read:

1
2 **Title 8. Appellate Rules**
3

4 **Division 1. Rules Relating to the Supreme Court and Courts of Appeal**
5

6 **Chapter 5. Juvenile Appeals and Writs**
7

8 **Article 1. General provisions**
9

10 **Rule 8.400. Application**
11

12 The rules in this chapter govern:
13

14 (1) Appeals from judgments or appealable orders in:
15

16 (A) Cases under Welfare and Institutions Code sections 300, 601, and 602; and
17

18 (B) Actions to free a child from parental custody and control under Family Code section
19 7800 et seq. and Probate Code section 1516.5; and
20

21 (2) Writ petitions under Welfare and Institutions Code sections 366.26 and 366.28.
22
23

24 **Article 2. Appeals**
25

26 **Rule 8.407. Record on appeal**
27

28 (a) **Normal record: clerk's transcript**
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30 The clerk's transcript must contain:
31

32 (1) The petition;
33

34 (2) Any notice of hearing;
35

36 (3) All court minutes;
37

38 (4) Any report or other document submitted to the court;
39

40 (5) The jurisdictional and dispositional findings and orders;
41

42 (6) The judgment or order appealed from;
43

Rules 8.400 and 8.407 of the California Rules of Court would be amended, effective January 1, 2017, to read:

- 1 (7) Any application for rehearing;
- 2
- 3 (8) The notice of appeal and any order pursuant to the notice;
- 4
- 5 (9) Any transcript of a sound or sound-and-video recording tendered to the court under
- 6 rule 2.1040;
- 7
- 8 (10) Any application for additional record and any order on the application;
- 9
- 10 (11) Any opinion or dispositive order of a reviewing court in the same case and;
- 11
- 12 (12) Any written motion or notice of motion by any party, with supporting and opposing
- 13 memoranda and attachments, and any written opinion of the court.
- 14

15 **(b) Normal record: reporter's transcript**

16 The reporter's transcript must contain:

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- 18
- 19 (1) Except as provided in ~~(2)-(3)~~, the oral proceedings at any hearing that resulted in the
- 20 order or judgment being appealed;
- 21
- 22 (2) In appeals from dispositional orders, the oral proceedings at hearings on:
- 23
- 24 (A) Detention and at which a parent of the child made his or her initial appearance
- 25 in cases under Welfare and Institutions Code sections 300 et seq.;
- 26
- 27 ~~(A)(B)~~ Jurisdiction and disposition; and
- 28
- 29 ~~(B)(C)~~ Any motion by the appellant that was denied in whole or in part; ~~and~~
- 30
- 31 (3) The oral proceedings at all section 366.26 hearings in appeals from an order
- 32 terminating parental rights under Welfare and Institutions Code sections 300 et seq.;
- 33 and
- 34
- 35 ~~(3)(4)~~ Any oral opinion of the court.
- 36

37 **(c) Application in superior court for addition to normal record**

- 38
- 39 (1) Any party or Indian tribe that has intervened in the proceedings may apply to the
- 40 superior court for inclusion of any oral proceedings in the reporter's transcript.
- 41
- 42 (2) An application for additional record must describe the material to be included and
- 43 explain how it may be useful in the appeal.
- 44

Rules 8.400 and 8.407 of the California Rules of Court would be amended, effective January 1, 2017, to read:

- 1 (3) The application must be filed in the superior court with the notice of appeal or as
2 soon thereafter as possible, and will be treated as denied if it is filed after the record
3 is sent to the reviewing court.
- 4
- 5 (4) The clerk must immediately present the application to the trial judge.
- 6
- 7 (5) Within five days after the application is filed, the judge must order that the record
8 include as much of the additional material as the judge finds proper to fully present
9 the points raised by the applicant. Denial of the application does not preclude a
10 motion in the reviewing court for augmentation under rule 8.155.
- 11
- 12 (6) If the judge does not rule on the application within the time prescribed by (5), the
13 requested material—other than exhibits—must be included in the clerk’s transcript or
14 the reporter’s transcript without a court order.
- 15
- 16 (7) The clerk must immediately notify the reporter if additions to the reporter’s
17 transcript are required under (5) or (6).
- 18

19 **(d) Agreed or settled statement**

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21 To proceed by agreed or settled statement, the parties must comply with rule 8.344 or
22 8.346, as applicable.

23
24 **(e) Transmitting exhibits**

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26 Exhibits that were admitted in evidence, refused, or lodged may be transmitted to the
27 reviewing court as provided in rule 8.224.

28
29 **Advisory Committee Comment**

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31 Rules 8.45–8.47 address the appropriate handling of sealed or confidential records that must be included
32 in the record on appeal. Examples of confidential records include records of proceedings closed to
33 inspection by court order under *People v. Marsden* (1970) 2 Cal.3d 118 and in-camera proceedings on a
34 confidential informant.

35
36 **Subdivision (a)(4).** The documents that must be included in the clerk’s transcript under this provision
37 include all inquiries regarding a child under the Indian Child Welfare Act (*Indian Child Inquiry*
38 *Attachment* [form ICWA-010(A)]], any *Parental Notification of Indian Status* (form ICWA-020), any
39 *Notice of Child Custody Proceeding for Indian Child* (form ICWA-030) sent to an Indian tribe, any
40 signed return receipts for the mailing of form ICWA-030, and any responses to form ICWA-030 from an
41 Indian tribe.

42
43 **Subdivision (b).** Subdivision (b)(1) provides that only the reporter’s transcript of a hearing that resulted
44 in the order being appealed must be included in the normal record. This provision is intended to achieve
45 consistent record requirements in all appeals of cases under Welfare and Institutions Code section 300,
46 601, or 602 and to reduce the delays and expense caused by transcribing proceedings not necessary to the
47 appeal.

Rules 8.400 and 8.407 of the California Rules of Court would be amended, effective January 1, 2017, to read:

1 Subdivision (b)(2)(~~A~~)(B) recognizes that findings made in a jurisdictional hearing are not separately
2 appealable and can be challenged only in an appeal from the ensuing dispositional order. The rule
3 therefore specifically provides that a reporter's transcript of jurisdictional proceedings must be included
4 in the normal record on appeal from a dispositional order.

5
6 Subdivision (b)(2)(~~B~~)(C) specifies that the oral proceedings on any motion by the appellant that was
7 denied in whole or in part must be included in the normal record on appeal from a disposition order.
8 Rulings on such motions usually have some impact on either the jurisdictional findings or the subsequent
9 disposition order. Routine inclusion of these proceedings in the record will promote expeditious
10 resolution of appeals of cases under Welfare and Institutions Code section 300, 601, or 602.

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12