Judge Joseph C. Welty
Superior Court of Arizona, Maricopa County
125 W. Washington St.
Phoenix, AZ 85003
(602) 372-2537

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of: PETITION TO ADD RULE 30 TO ARIZONA RULES OF FAMILY LAW PROCEDURE	Supreme Court No. R-22-0044 COMMENT OF THE SUPERIOR COURT IN AND FOR MARICOPA COUNTY IN OPPOSITION OF THE PETITION TO ADD RULE 30

The Presiding Judge on behalf of the judges and commissioners of the Superior Court in and for Maricopa County ("Maricopa County Superior Court" or "this Court") files the following comment pursuant to Rule 28, Arizona Rules of the Supreme Court, in opposition of Petition to Add Rule 30 to Arizona Rules of Family Law Procedure. Proposed Rule 30, titled Right of Timely Review to the Arizona Rules of Family Law Procedure, seeks to add timeframes for ruling on specific Family Department filings, as well as the right to a special action if a judicial officer has failed to rule within the timeframe.

Maricopa County Superior Court fully agrees with the statement in the proposed rule that "in every domestic relations action, the parties are entitled to the timely resolution of their disputes." This Court also supports appropriate time requirements by which judicial officers must take action on relevant filings. However, this Court has significant concerns with the addition of Rule 30 to the Arizona Rules of Family Law Procedure and believes this same goal can be achieved by including timeframes in existing rules. This comment includes many, but not all, of the concerns raised among judicial officers of the Maricopa County Superior Court to the proposed rule and offers an alternative.

1. **Proposed Rule 30 is an Overly Severe Rule that Singles Out Judicial Officers Presiding Over Family Court Cases.**

A review of the Arizona Rules of Civil Procedure, Criminal Procedure, Probate Procedure, and Juvenile Court reveals no rule directing specific timeframes for rulings with a remedy that authorizes a party to file a special action "[i]f a party determines that a judge has ignored this rule." In the opinion of this Court, court rules for every type of case should be respectful of all court participants and use consistent, objective, and neutral language. Proposed Rule 30 as drafted—and the included mandatory special action review—singles out family law cases in a unique and concerning way. This can be read to imply that judicial officers who handle family law matters deserve less respect and deference than those assigned to other types of cases; that judicial officers who handle family law matters have or would "ignore" a rule; and finally, that the litigants need a mechanism to force judicial officers who handle family law matters to timely resolve their cases. No other Arizona rule of court suggests that a litigant has the power to "determine" whether a judicial officer has fulfilled his or her duties. Similarly, no other Arizona rule of court procedure refers to ***any*** court participant—let alone a judicial officer—as "ignoring" rules. There is a high likelihood that the subjective nature of Proposed Rule 30 will empower an angry litigant to use the rule as a sword to punish a judicial officer for an adverse ruling based on a pretext of being "ignored" or "missing a deadline."

The Maricopa County Superior Court has specific concerns about each section of proposed Rule 30, as identified below, and proposes alternative modifications to existing rules to address the time requirements contained in the Rule Petition.

2. **Proposed Rule 30(a)(1) Requires Clarification and Will Likely Result in Additional Rejections of Decrees, Rather than Timely Resolution of Disputes.**

Proposed Rule 30(a)(1) provides as follows:

> ***Upon filing a consent decree*** under Rule 45 or a default decree or judgment by motion and without a hearing under Rule 44.1, the ***court must rule on the filing*** no later than twenty days.

(Emphasis added.)

The first concern is an ambiguity created by the requirements of Rules 43.1 and 45, which could cause confusion and impact the Court's ability to comply with the proposed timeframe. Rule 45 authorizes the parties to obtain a consent decree, judgment, or other order without a court hearing when both parties agree upon the terms. "To proceed with a consent decree for a dissolution of marriage, the parties must jointly ***file*** a consent decree that is substantially similar to Form 8, Rule 97." Rule 45(a)(2) (emphasis added). However, Rule 43.1(a) defines what it means to "file" documents: "The filing of documents with the court is accomplished by ***filing them with the clerk***." (Emphasis added.) In addition, Rule 43.1(e)(2) states that "[t]he clerk ***may not file*** a proposed order or proposed judgment. The clerk must accept electronically submitted proposed orders and proposed judgments; however, these electronically submitted documents must not be included in the publicly displayed court record."[1] (Emphasis added.)

In Maricopa County, the majority of consent decrees are not "filed" by the parties and therefore there is no date certain against which a deadline for ruling could be measured under the proposed rule. Most consent decrees are delivered by the parties to Family Department Administration (not the Clerk of Court's office),

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[1] The only exception in Rule 43.1 is that a party may file "an unsigned proposed order or proposed judgment as an attachment or exhibit to a notice of lodging or other filing" so long as it is "directed by the court, required by rule, or done to preserve the record on appeal." Rule 43.1(e)(3).

and then sent to the Family Department judge through interoffice mail.[2] In rare instances, the parties will file a notice of lodging, which provides notice to the judicial division that the consent decree is ready for review. Because the Clerk of Court typically is not involved, there technically has been no "filing with the court" (as defined in Rule 43.1), and it will be difficult to determine exactly when the 20-day deadline for ruling begins.

The lack of filing of a consent decree can be addressed with the following modifications to Rule 45(a) with insertions shown by underscore and deletions shown by ~~strike through~~:

> (1) To obtain a consent decree for a dissolution or legal separation, the summons and petition must have been served on the respondent, or the respondent must have accepted service, at least 60 days before the parties ~~file~~ lodge the consent decree.
> (2) To proceed with a consent decree for a dissolution of marriage, the parties must jointly file a notice of lodging and include as an attachment a consent decree that is substantially similar to Form 8, Rule 97.
> (3) The assigned judge or commissioner must determine whether the parties have met the requirements for a consent decree and rule on the lodged consent decree within 20 days of the date of lodging.

The requirement that a notice of lodging be filed with the consent decree included as an attachment likely would have been of assistance in the example referenced in the Petition, when "[t]he presiding family judge could not help the Husband because the consent decree could not be located."

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2 The Maricopa County Superior Court has multiple locations throughout the County. Consent decrees and other filings are often dropped off at a location other than where the judge is located and necessitates the documents being sent via interoffice mail, which can take up to multiple days to reach the judicial division. The judicial division is unaware of the existence of the consent decree until it physically arrives in the judicial division.

The Maricopa County Superior Court is also concerned that Proposed Rule 30, as drafted, will result in the court rejecting substantially more consent decrees due to a lack of time to cure technical defects, such as failing to meet the 60-day requirement in Rule 45(a)(1), as well as the technical requirements of Rules 45(b) and (c). While rejection of the consent decree might be a "correct" result under the rules, this may be perceived by some litigants as elevating form over substance and hindering access to justice.

Rule 45(a)(1) requires that "[t]o obtain a consent decree for a dissolution or legal separation, the summons and petition must have been served on the respondent, or the respondent must have accepted service, at least 60 days before the parties file the consent decree." Many parties, especially self-represented litigants, submit a consent decree earlier than 60 days from the date that the respondent was served. Rather than reject or deny the consent decree, most judicial officers instruct staff to hold the document until the 61st day and then present it to the judicial officer for review. With a requirement to rule no later than 20 days from the date of filing, the consent decree will likely be rejected outright, requiring the parties to refile (or re-lodge) the consent decree after the 60th day.[3]

In addition, even when timely filed, judicial officers who handle family law matters do not automatically sign every consent decree received. Rule 45(a)(3) mandates that the "assigned judge or commissioner must determine whether the parties have met the requirements for a consent decree." Those requirements are set

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[3] This also impacts the summary consent decree process, in which the parties can submit "all required final settlement documents, including their written agreements and proposed decree" at "the time of the filing of the combined petition and response, or at any time within sixty days after the date of filing." *See* A.R.S. § 25-314.01; Ariz. R. Fam. L. P 44.1. If the Court is required to rule within 20 days of receiving these documents, the majority of these summary consent decrees will be rejected for being submitted early, even though the early submission to the Court is authorized by statute.

forth in Rules 45(b) (consent decrees, judgments, and orders generally) and 45(c) (when children are involved). Many parties file consent decrees that do not meet the technical requirements of Rules 45(b) and (c). By way of example: self-represented litigants may fail to complete required portions of a consent decree form; an attorney may fail to include a child support worksheet or the required explanation for any deviation in the child support amount; or a document preparer's template may include outdated language or may not properly address allegations of domestic violence.

Rather than reject outright a consent decree with technical defects, most judicial officers who handle family law matters currently will either issue a minute entry that requests that the parties cure the defects within a specified timeframe (*e.g.*, 14-21 days) and/or will set a status conference to address any concerns. With a requirement to rule no later than 20 days from the date of filing (or lodging), the judicial officer is more likely to reject outright a consent decree for technical defects and require that it be refiled (or re-lodged).

The Court is also required to determine whether the agreed upon division of property and debt is unfair, as well as determine that the legal decision-making and parenting time agreed upon by the parties is in the child's best interests. *See e.g.* A.R.S. § 25-317(B), *Buckholtz v Buckholtz*, 246 Ariz. 126 (2019). This can impact a mandatory timeframe for ruling. For example, when a submitted decree awards all property to one party and all debt to the other party, the Court is likely to want more information from the parties to ensure this is not unfair, or set a hearing to hear from the parties. It is unlikely these issues will be resolved within 20 days.

Proposed Rule 30(a)(1) is also contrary to the default decree process. When a party submits a Rule 44.1 default decree requesting a default judgment without a hearing, the submitted decree is often deficient and requires correction by the petitioner. The current practice is to allow the petitioner an opportunity to correct, rather than a ruling that rejects the decree. The majority of default decrees in

Maricopa County are issued based on default hearings under Rule 44.2. For those cases, a hearing is required before a judicial officer can issue a ruling and those hearings are often continued due to defects in the submitted decrees. The Court cannot issue the decree until a hearing has taken place. As a result, many default decrees will be rejected. At a minimum, as to default decrees by hearings, the time to rule should begin from the date of the hearing.[4]

To ameliorate the concern that many decrees would be rejected outright for technical defects, the language could be amended to require judicial officers to "take action" (versus "ruling") on the lodged consent decree. This allows the judicial officer discretion to appropriately manage the case and ensure timely and fair resolution.

In addition to the proposed language changes above, the Maricopa County Superior Court suggests that appropriate timeframes to "take action" on consent and default decrees should be added to the rules governing decrees—*i.e.*, Rules 44.1, 44.2, 45, and 45.1—instead of being set forth in a separate rule.

3. Proposed Rule 30(a)(2) Eliminates the Court's Authority to Deny Temporary Orders after an Evidentiary Hearing and Needs Clarification that the Time to Rule is from an "Evidentiary Hearing."

Proposed Rule 30(a)(2) provides as follows:

> After a hearing on temporary orders under Rules 47 [temporary orders], 47.1 [simplified child support orders], or 47.2 [motions for post-decree temporary legal decision-making, parenting time or child support orders], the court must issue the temporary orders within twenty days.

The proposed rule references a "hearing" generically. However, the existing rules cited in the above provision reference an "evidentiary hearing." The Maricopa

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[4] In Maricopa County, the default decrees by hearing are generally issued on the day of the hearing unless the hearing is reset or continued to correct the documents submitted by the petitioner.

County Superior Court proposes the timeframe begins from the "evidentiary hearing." In addition, the proposed rule indicates that "the court ***must issue*** temporary orders." (Emphasis added.) This eliminates the Court's ability to deny temporary orders when temporary orders are unnecessary or inappropriate. The Maricopa County Superior Court proposes alternative language that "the court must rule on the motion for temporary orders within twenty days."

Moreover, any timeframe for issuing a ruling on temporary orders should be included in rules specifically related to temporary orders (*i.e.*, Rules 47, 47.1, and 47.2), instead of being set forth in a separate rule.

4. Proposed Rule 30(a)(3) Conflicts with the Court's Obligation of Initial Review of Petitions under Rule 91 and Fails to Identify Which Served Document Triggers the Time for a Hearing.

Proposed Rule 30(a)(3) provides as follows:

> Upon petitioning to enforce legal decision-making and parenting time under Rule 91.5 and A.R.S. § 25-414, the court ***must hold a hearing or conference*** within 25 days of service and rule on the petition no later than twenty days after the hearing.

(Emphasis added.) The requirement to hold a hearing in every case is contrary to the Court's obligation in Rule 91 to conduct an initial review of the petition and reject (with leave to amend) any petition that fails to state a claim upon which relief may be granted.

In addition, proposed Rule 30(a)(3) requires "the court must hold a hearing or conference ***within 25 days of service***" (emphasis added), but does not identify the document required to be served to trigger the 25-day deadline (*i.e.*, the petition or the order to appear). Some parties serve a Rule 91 petition immediately after filing, but other parties wait for the court to issue an order to appear and then serve the Rule 91 petition and order to appear together. In either event, the court has no control over when a party will be able to serve either the petition or the order to

appear. In addition, the court often receives belated notice of the date that service occurred. Given the workload in the Family Department and the limited number of available times for evidentiary hearings, the date of service is an ineffective and unworkable trigger date for the court to take action on an expedited basis.

In addition, in many cases, attorneys request that the Court hold a hearing on a Petition to Enforce Parenting Time or Legal Decision Making at the same time as a trial on a pending Petition to Modify Legal Decision Making and/or Parenting Time. The evidence often overlaps and consolidating the petitions for trial saves the parties from expending extra attorney fees and in some case, may be a better use of judicial resources. The proposed rule would foreclose this option.

The Maricopa County Superior Court believes the above issues may be resolved by adding a subsection to Rule 91.5, similar to the current provision in Rule 47, that places time limits for holding time-sensitive hearings. Specifically, Rule 47 has a 60-day deadline by which the court must **set** (versus hold) an evidentiary hearing, with exceptions if the moving party waives the requirement or the court finds extraordinary circumstances exist that make the court unable to schedule the hearing within 60 days of the motion being filed. The following subsections, or something similar, could be added to Rule 91.5:

> **(c) Scheduling.** For any Rule 91.5 petition that states grounds upon which relief may be granted, the court must set an evidentiary hearing on a date not later than 60 days after the petition is filed unless (1) the moving party waives the requirement for a hearing within 60 days; or (2) extraordinary circumstances exist, and the court is not able to schedule the hearing within 60 days after the petition is filed, and the court makes a finding on the record regarding the cause of the delay.
> **(d) Ruling.** The court must rule on a Rule 91.5 petition no later than 20 days after the evidentiary hearing.

5. Proposed Rule 30(a)(4) Lacks Clarity, is Inconsistent, and Includes an Unrealistic Deadline.

Proposed Rule 30(a)(4) provides as follows: "Upon delivery of a stipulated motion to the assigned judge, the court must rule on the stipulation within seven court days." However, there is no definition of "upon delivery" or "stipulated motion" in the Arizona Rules of Family Law Procedure.

The phrase "upon delivery" lacks clarity. It is difficult to establish the date of "delivery" to an assigned judicial officer when documents are eFiled, mailed, emailed, and hand-delivered to the court (but not always sent to or immediately received by the assigned judicial officers or their staff). Presumably this is why other rules of court do not use "delivery" to the court as a deadline trigger date. A more definitive trigger date would be the date of filing, with a realistic deadline for the court to act on the filing.

In addition, the proposed subsection language is internally inconsistent, referring to both a "stipulated motion" and a "stipulation." There are no other references to a "stipulated motion" in the Arizona Rules of Family Law Procedure. Instead, the rules use the phrases "written stipulation" (*see, e.g.,* Rules 43.1 and 60); "stipulate in writing" (*see, e.g.,* Rules 12 & 72); the parties' "stipulation" (*see, e.g.,* Rules 46, 78.1, 83 & 91) or "an agreement between the parties" (*see, e.g.,* Rule 69). For consistency, the term "stipulation" should be used.

The requirement that the court must rule on all stipulations within seven court days is nearly impossible with eFiled documents, which may not be processed by the clerk of court or appear in the assigned judicial officer's eFile queue for up to three days (and in some cases, more than seven days) from the date of filing. The judicial officers and their staff have no control over when eFiled documents are available to the judicial officers. The result is that the assigned judicial officer

would have little time to rule on a written stipulation or the written stipulation may appear in the queue more than seven days after it was filed.

In addition, there are times when the majority of the Court is unavailable, such as during the annual judicial conference. Individual judicial officers and their division staff also need the ability to participate in new judge orientation(s), attend rotation or other trainings, and take holidays and vacations without checking eFile or the mail each day for non-emergency stipulations. Additionally, newly-appointed judicial officers or newly-rotated judicial officers may have difficulty meeting a seven-day deadline for addressing non-emergency matters while these judicial officers become acquainted with their new calendars.

As with consent decrees, the Court does not simply sign every stipulation. The agreement of the parties alone is not sufficient to approve any stipulation as a court order. For stipulations involving the allocation of property, the Court must ensure that the allocation is not unfair. For stipulations involving legal decision-making and/or parenting time, the Court must determine that the agreement is in the best interests of the child[ren]. *See, e.g.*, A.R.S. § 25-317(B). Moreover, some stipulations include provisions for which the Court does not have authority, such as a visitation schedule for the family pet or a parenting time schedule for a child who is over the age of 18. Other stipulations include provisions that improperly delegate the Court's authority, such as a protective order that authorizes the parties to decide when a courtroom is closed during testimony. Some stipulations require more time than others, and a seven-day deadline is impracticable, given the Court's hearing schedule.

Given the eFile volume and reality that there are periods of time when judicial officers and their staff are out of the office, 21 calendar days from the date of filing is a more realistic and more easily measured time requirement. Alternatively, if the shorter 14 calendar days deadline is used, litigants should be required by rule to provide the assigned judicial officer courtesy copies of all written stipulations and proposed orders upon filing. As with the other rules discussed above, for the convenience of the court and the parties, deadlines for ruling on written stipulations should be included in the affected rule, *e.g.*, Rule 43.1, which addresses the filing of written stipulations.

Below are two alternative modifications to Rule 43.1(e)(5)(A). The first is a 21-day option; the second is 14-day option, with an added requirement that a courtesy copy be emailed or hand-delivered to the judicial officer to account for processing delays.

> **21-Day Option**: All written stipulations must be accompanied by a proposed order. Except as otherwise provided in these rules, the court must rule on any written stipulation within twenty-one days of the stipulation being filed with an accompanying proposed order. If the proposed order is signed and entered, no minute entry need issue.
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> **14-Day Option**: All written stipulations must be accompanied by a proposed order, **with a courtesy copy of the stipulation and proposed order emailed or hand-delivered to the assigned judge.** Except as otherwise provided in these rules, the court must rule on any written stipulation within **fourteen days** of the stipulation being filed with an accompanying proposed order **and delivered to the assigned judge**. If the proposed order is signed and entered, no minute entry need issue.

6. **Review by Special Action is Already Authorized by Rule and Mandatory Special Action Jurisdiction is Contrary to Other Rules.**

Proposed Rule 30(b) provides as follows:

> If a party determines that a judge has ignored this rule, the party may petition for special action to enforce the rules. The court of appeals must accept jurisdiction of a special action petition on these rules.

Under Arizona's existing Rules of Procedure for Special Action, any person with standing may file a special action to address the question of "[w]hether [a judge] has failed to exercise discretion which he has a duty to exercise; or to perform a duty required by law as to which he has no discretion."[5] Ariz. R. P. Spec. Act. 3(a). But "a special action requests extraordinary relief, and acceptance of jurisdiction of a special action is highly discretionary with the court to which the application is made." *Id.*, Editor's Comment. A plaintiff in a special action "must always carry the burden of persuasion as to discretionary factors." *Id.*

Proposed Rule 30(b), however, is contrary to the Rule 3(a) of the Arizona Rules of Special Action, and strips the special action of its "extraordinary nature" by mandating that the court of appeals review a judicial officer's compliance with the certain family law time requirements anytime a litigant believes "a judge has ignored" them. No other rule of court procedure subjects a trial court judge's action (or alleged inaction) to automatic appellate scrutiny, with no notice to the judicial officer and no opportunity to cure.[6] No other rule of court procedure provides for mandatory special action jurisdiction based on the litigant's subjective determination that "a judge has ignored [a] rule," without meeting the burden of persuasion that the judicial officer failed to perform his or her duties.

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[5] Based on this rule, any party can file a special action if a judge fails to perform his or her obligations and the Court of Appeals has discretion as to whether to accept jurisdiction.

[6] Allowing a special action prior to an attempt to informally resolve the issue, such as a filed request for ruling, is contrary to how the rules address other perceived inactions, such as the requirement of a certificate of good faith consultation prior to filing a motion to compel.

In addition, proposed Rule 30(b) raises many questions. The special action will be alleging inaction of a judicial officer. However, a responsive pleading is generally not appropriate on behalf of a judicial officer in a special action. *See Hurles v. Superior Court*, 174 Ariz. 331 (App. 1993). If the Court of Appeals determines that a response is appropriate on behalf of a judicial officer, will the Attorney General's office, who generally represents the Court, be filing responses on behalf of judicial officers? Whether the judicial officer failed to act within the timeframe will be a question of fact; will the court of appeals be holding an evidentiary hearing to determine the facts? If a hearing is held, the judge and litigant will be put in an adversarial position; will this require the judge to then recuse from the case due to the appearance of bias? This proposed rule creates more questions than it answers.

The impetus for the Rule Petition was an unspecified number of "complaints from the public about delays by family court judges on stipulated or uncontested actions." The Rule Petition cites to four known examples "of why the rule is required," two of which involved judicial officer inaction on stipulated or uncontested actions and two of which involved delayed decisions on temporary orders. A better solution to these problems would be to work with the individual judicial officers who are alleged to have made delayed decisions, rather than to create a subjective right of action which may be used by a litigant to vent anger at a judicial officer who may have appropriately ruled against that party. This broad-based and oppressive approach is not needed when surgical precision (*i.e.*, working with the known violators) might fix the identified problems.

As the Rule Petition notes, Rules 43.1, 44.1, 45, 47, 47.1, 47.2, 48, and 91.5 do not currently include time requirements for rulings. If time requirements were added to the specific rules, judicial officers would be required to follow them pursuant to Rule 1.1 of the Code of Judicial Conduct, which requires a judicial officer to comply with the law—which "encompasses court rules as well as

ordinances, regulations, statutes, constitutional provisions, and decisional law." To the extent a litigant asserts a judicial officer has failed to comply with his or her duty to timely rule based on a timeframe in a rule, the litigant currently has the ability to file a discretionary special action. No additional rule is needed. In addition, the litigant retains the ability to file a complaint with the Arizona Commission on Judicial Conduct.

Based on the above, the Superior Court in Maricopa County opposes the Petition to add Rule 30 as drafted and requests consideration of including appropriate timeframes within existing rules, as identified above.

Respectfully submitted this 19th day of April, 2023.

Honorable Joseph C. Welty
Presiding Judge
Superior Court of Arizona in and for
Maricopa County

Electronic copy filed with
The Clerk of the Arizona Supreme Court
This 19th day of April, 2023