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10 ARIZONA SUPREME COURT

11 In the Matter of:

12 PETITION TO AMEND THE RULES
13 OF SPECIAL ACTION PROCEDURE

Supreme Court No. R-23-0055

**COMMENT TO PETITION TO
AMEND THE RULES OF
PROCEDURE FOR SPECIAL
ACTIONS**

14 Pursuant to Supreme Court Rule 28(e), I am submitting this comment to
15 address one issue of the proposed amendments to the Rules of Procedure of Special
16 Actions; namely, Rule 17(c), which requires the appellate court to issue a mandate
17 following a special action appeal. I suggest eliminating the use of a mandate in
18 special action appeals because a mandate is used to return jurisdiction to the trial
19 court, but the trial court never loses jurisdiction during a special action appeal.
20 The appellate court's order either denying special action jurisdiction or accepting
21 jurisdiction and then either granting or denying relief is sufficient to direct the trial
22 court to carry out the appellate court's ruling.

23 **INTRODUCTION**

24 I join with others in commending the Supreme Court for appointing the Task
25 Force to review and update the Rules of Procedure of Special Actions. The Task

1 Force has done yeoman's work in rewriting and modernizing the special action
2 rules. I have only one small suggestion about the proposed rule amendments,
3 which is that in a special action appeal, the case should not remain in limbo
4 between the time the court of appeals issues a decision and then later issues a
5 mandate. On average, that delay is 37 days. During that time, it is unclear whether
6 the trial court, which never loses jurisdiction, should implement the appellate
7 court's decision or wait until it issues a mandate. At the same time, a mandate is
8 not necessary because the trial court knows to implement the decision, which
9 generally ends with "we accept special action jurisdiction and grant relief."
10 Instead of holding up the case pending a mandate, the proposed rule should say the
11 decision is effective upon issuance with no reference to a mandate. In those
12 instances where a party believes it may seek further review, it should be required to
13 persuade the appellate court under equitable principles that a further stay is
14 necessary.

15 ANALYSIS

16 I. THE TRIAL COURT GENERALLY LOSES JURISDICTION WHEN 17 AN APPEAL IS FILED.

18 As a general rule, when a party appeals a final judgment, jurisdiction of the
19 case transfers from the trial court to the appellate court. *In re Marriage of Flores*
20 & *Martinez*, 231 Ariz. 18, 21, ¶ 10, 289 P.3d 946, 949 (App. 2012). Jurisdiction
21 then remains with the appellate court until it issues a mandate returning jurisdiction
22 to the trial court. *Id.* at ¶ 10 ("[A]n appellate proceeding ... does not terminate
23 until the appellate court's mandate issues."); *see also* ARCAP Rule 24(a) ("An
24 appellate court retains jurisdiction of an appeal until it issues the mandate.") This
25 procedure "avoids the risk that the trial and appellate courts could assume
jurisdiction of the same case simultaneously." *Id.* at ¶ 11.

1 A special action appeal is different because it occurs while the case remains
2 pending and active in the trial court.

3 **II. THE TRIAL COURT DOES NOT LOSE JURISDICTION OVER THE**
4 **CASE WHEN A SPECIAL ACTION IS FILED IN THE APPELLATE**
5 **COURT.**

6 Under current precedent, “[u]nlike an appeal, jurisdiction never transfers
7 from the superior court to the court of appeals in the special action context.”
8 *Coffee v. Ryan-Touhill*, 247 Ariz. 68, 71, ¶ 14, 445 P.3d 666, 669 (App. 2019).
9 This is because “[a] special action represents a separate, original proceeding where
10 an appellate court examines the action or inaction of public officials [such as a
11 superior court judge] and may issue orders (similar to a common law writ)
12 affecting future proceedings in a case.” *Id.*, cited with approval in *Bridgeman v.*
13 *Certa*, 251 Ariz. 471, 475, ¶ 10, 493 P.3d 898, 902 (App. 2021) (“the special action
is a distinct proceeding”).

14 Moreover, the appellate court’s decision in a special action proceeding,
15 which is generally in the form of a mandamus, is itself an order commanding the
16 trial court to act. *See generally Black’s Law Dictionary* (11th Ed. 2019) (Defining
17 mandamus, which it explains is Latin for “we command,” as “[a] writ issued by a
18 court to compel performance of a particular act by a lower court or a governmental
19 officer or body, usu. to correct a prior action or failure to act.”).

20 Federal courts take the position that an appellate court need not issue a
21 mandate following the issuance of a writ of mandamus because the writ itself
22 commands the lower court to act. *See e.g. Ellis v. U.S. Dist. Court for W. Dist. of*
23 *Washington (Tacoma)*, 360 F.3d 1022, 1022–23 (9th Cir. 2004) (*en banc*)
24 (“Because a writ of mandate functions as an order, we do not issue along with it a
25 ‘mandate’ in the sense of a secondary decree relinquishing jurisdiction over the

1 case to the district court.”). The Ninth Circuit further explained that “in the
2 context of an extraordinary writ such as mandamus, there is no need for us to
3 relinquish our jurisdiction to the district court because it was never deprived of
4 jurisdiction over the underlying case.” *Id.* at 1023.

5 **III. PROPOSED SPECIAL ACTION RULE 17(C) REQUIRES THE**
6 **APPELLATE COURT TO ISSUE A MANDATE FOLLOWING A**
7 **SPECIAL ACTION APPEAL.**

8 Proposed Special Action Rule 17 requires the appellate court to issue an
9 order either accepting or declining special action jurisdiction. If the court accepts
10 jurisdiction, it must also enter an order granting or denying relief. Subsection (c)
11 of Proposed Special Action Rule 17 then requires the appellate court to issue a
12 mandate as follows: “The decision will become effective when the mandate or
13 termination letter is issued unless the decision states that it is effective
14 immediately.”

15 Proposed Special Action Rule 10(a) incorporates ARCAP, which, in turn,
16 requires the appellate court to issue the mandate. ARCAP 24(b). Subsection (a) of
17 ARCAP 24 provides that “the appellate court retains jurisdiction of an appeal until
18 it issues the mandate.” The mandate is to issue 30 days after the decision if no
19 petition for review is filed, or 15 days after a petition for review is denied.
20 ARCAP 24(b).

21 Thus, the proposed Special Action Rules for appellate special actions require
22 the trial court to wait for a mandate, which presumes that jurisdiction is exclusively
23 with the appellate court, and which is not issued until all further appeal times have
24 lapsed, to carry out a higher court’s decision that has already been issued in a case
25 over which the trial court continues to have jurisdiction. The problem with this is
that it needlessly sows confusion and delays the pending case in the trial court.

1 In reviewing special action appeals where I have been the respondent judge,
2 and where no petition for review is filed, the court of appeals issues the mandate
3 37 days, on average, after it issues its decision. When a petition for review is filed
4 and the Supreme Court does not grant review, the time between the Court of
5 Appeals decision on the special action and the issuance of its mandate stretches
6 well over 100 days. While that does not seem like a long period of time, it can
7 delay things substantially in time sensitive matters.¹

8 As the Wright and Miller treatise explains, there is often no reason to issue
9 an order implementing a decision in a mandamus action because the trial court is
10 expected to follow the higher court's decision. § 3932.2 Extraordinary Writ
11 Review—Procedural Incidents, 16 Fed. Prac. & Proc. Juris. (3d ed.) (“The
12 generally relaxed approach to choosing the form of the writ issued extends to the
13 decision whether to actually issue a writ once it has been determined that a writ
14 might appropriately issue. Perhaps the most obvious reason for withholding actual
15 issuance of a writ is acquiescence by the trial court in the position adopted by the
16 court of appeals.”).

17 The proposed rule requiring the issuance of a mandate impedes what should
18 happen naturally, which is that upon receiving the appellate court's special action
19 decision, the trial court either issues an order implementing the decision, or sets a
20

21 ¹ For example, a dependency adjudication hearing must be completed within
22 90 days after service of the dependency petition, a termination adjudication hearing
23 must commence 90 days after the permanency hearing, trial of an in custody
24 criminal defendant must commence 150 days after arraignment, while trial of an
25 out of custody defendant must commence 180 days after arraignment. Dependency and criminal cases make up roughly one-half of all cases in the superior court. There are no doubt many more examples of short deadlines in other cases filed in the superior court.

1 hearing to discuss with the parties on how to implement the decision.

2 **IV. RATHER THAN ISSUING A MANDATE, THE APPELLATE**
3 **COURT CAN USE ITS STAY AUTHORITY TO MANAGE THE**
4 **CASE WHILE FURTHER APPEAL TIMES REMAIN OPEN.**

5 Under current precedent, when a special action is filed, the appellate court
6 manages the relationship between itself and the trial court through the use of stay.
7 *Coffee v. Ryan-Touhill*, 247 Ariz. at 72, ¶ 15 (“[U]nless the appellate court issues a
8 stay, the superior court may proceed in the underlying action during a special
9 action. And even when a stay is entered, the superior court is only limited in its
10 actions by the express language of the stay order. Although the superior court must
11 comply with such orders, it does not lose jurisdiction as it would when an appeal is
12 commenced.”). As a practical matter, the trial judge generally enters a stay when
13 an appellate special action is filed, so the case is stayed while it is before the
14 appellate court. The only problem with this practice is the issue of when the trial
15 court should dissolve it—once the appellate court has entered its decision—or once
16 the appellate court issues a mandate.

17 Proposed Special Action Rule 15(h) is consistent with current precedent in
18 that it allows the appellate court to issue a stay when an appellate special action is
19 filed: “Unless the reviewing court issues a stay, the court from which special
20 action relief is sought retains jurisdiction over the case, including those matters as
21 to which relief is sought.” Therefore, the proposed rule allows the appellate court
22 to continue a stay after it issues its decision if it believes its decision should not be
23 carried into effect immediately.

24 Continuing the stay following a special action decision should be based on
25 equitable principals weighing the need to implement the decision immediately
versus a reasonable belief that the special action decision will be amended or

1 reversed following a motion for reconsideration or higher court action.

2 **CONCLUSION**

3 Based on the foregoing, I respectfully recommend that proposed Special
4 Action Rule 17(c) be amended as follows (deletions shown as ~~strike~~throughs and
5 additions shown as underlined):

6 **(c) Effectiveness of Decision.** The decision will become effective
7 ~~when the mandate or termination letter is issued unless the decision~~
8 ~~states that it is effective~~ immediately unless further stayed by the
9 court.

10 The clean version of my suggested amendment to proposed Special Action
11 Rule 17(c) is as follows:

12 **(c) Effectiveness of Decision.** The decision will become effective
13 immediately unless further stayed by the court.

14 Also, if the Court adopts this proposed change, it will have to amend the
15 language of proposed Rule 18(b), which mentions the issuance of a mandate. I
16 suggest striking proposed Rule 18(b)(2) and then having (b)(1) moved up into (b).

17 RESPECTFULLY SUBMITTED this 3rd day of April, 2024.

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19 /s/ D. Douglas Metcalf

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22 In and for Pima County
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