Judge Robert Brooks on Behalf of the Undersigned Judicial Officers
Arizona Superior Court Judge, Maricopa County, Family Department
301 W. Jefferson St.
Phoenix, AZ 85003

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:	)	Supreme Court
	)	No. R-23-007
PETITION TO AMEND RULES 44.1(c),	)	
45(c), 78(g), AND 91.3, ARIZONA RULES OF	)	**COMMENT**
FAMILY LAW PROCEDURE	)	

The undersigned Arizona Superior Court Judicial Officers in Maricopa County submit this comment pursuant to Rule 28, Arizona Rules of the Supreme Court, in opposition to R-23-0007, a Petition to Amend Rules 44.1(c), 45(c), 78(g), and 91.3, which requires the Superior Court to issue a newly created "educational order." The proposed rule infringes on Arizona's robust system of separation of powers, contains unenforceable orders, requires the trial court to make findings without evidence, and increases litigation. We encourage the Arizona Supreme Court to revisit the emergency adoption of R-23-0007, repeal the order, and submit the issue of a potential education order to a task force.

Each day we make hard decisions about the breakdown of families. We agree with the petition that orders which are clear and specific serve children's best interest. We also recognize that—sadly—parents occasionally weaponize the orders we write. Each of us has presided over matters that involve education and have seen the types of issues R-23-0007 identifies: parents expecting schools to interpret the parenting plan, negative effects on the children, and misapprehension as to a school's responsibility. We agree with and respect the spirit of the proposed education order to help provide clarity to dissolving families that minimizes conflict and disruption in children's lives.

We share the concerns filed by the State Bar of Arizona on April 27, 2023, however, which was drafted after study by the State Bar's Family Law Practice and Procedure Committee, that many of the provisions are unclear. We have, unfortunately, already seen this lack of specificity affect litigation in our courtrooms and cause increased litigation and tension, instead of the hoped for clarity and cohesion.

In addition to the concerns that the State Bar of Arizona has already raised, we provide the additional comments for the Supreme Court's consideration about why an education order is not the appropriate solution in every case:

General Infirmities.

1. *Separation of Powers.* A.R.S. § 25-403.02(C)(1) requires that every parenting plan include "[e]ach parent's rights and responsibilities for the personal care of the child and for decisions in areas such as education, health care and religious training." The legislature has not required a separate order, outside of the parenting plan, that provides additional orders concerning education (or health care or religious training.) The proposed rule creates additional rights and duties that amount to public policy declarations. "The declaration of public policy is primarily a legislative function though courts have authority to declare a public policy which already exists and to base its decisions upon that ground, but in absence of a legislative declaration before courts are justified in declaring existence of public policy it should be so thoroughly established as a state of public mind so united and so definite and fixed that its existence is not subject to any substantial doubt." *Ray v. Tucson Medical Center*, 72 Ariz. 22, 36 (1951). Further, while the Supreme Court has exclusive power to govern procedural matters in Arizona Courts, it cannot "enlarge or diminish substantive rights created by statute." *Marianne N. v. Dep't of Ch. Safety*, 243 Ariz. 53, 56 (2017) *citing* Ariz. Const. Art. 6, § 5(5). Many of the proposed orders, such as drop-off and pick-up, emergency contact information, access to school grounds, attendance at parent-teacher conferences, and curriculum review create new rights and responsibilities; often rights and responsibilities that no one has asked the court to grant or resolve.

2. *Delegation of Findings*. The proposed rule requires the trial court not only to issue the orders contained in the proposed education order, but also requires the trial court to find that "[i]t furthers the best interests of the minor child(ren) for this Court to enter the following school-specific order that reflects relevant portions under the Parenting Plan." This requirement has two flaws. First, the amended rules provide no factors for the trial court to consider when making such a finding. Second, we can find no other rule that mandates a trial court make a finding without evidence or any authority for such a required finding. The legislative branch has provided courts with numerous factors in A.R.S. § 25-403 to determine the best interests of children. What if, in applying those factors, the trial court found that it was not in a child's best interests to issue an education order in substantial conformity with forms 19 or 20? Since the implementation of the proposed rule, the undersigned have presided over trials that required the issuance of the education order. Few, if any, have provided any evidence to support a best interest finding. Without specific factors for the trial court to consider, the amended rule and proposed orders require the trial court to make findings and issue orders based on information and evidence not presented to the court during an evidentiary hearing.

3. *Unenforceable Provisions*. A recent article in the Arizona Attorney Magazine rightfully notes that the education order can only "guide" schools. Izzo, Norma C., and Wohlgemuth, Karen, New Family Law Education Order Answers School Pleas, *Arizona Attorney Magazine* (March 2024). The order itself reflects the "guiding" nature of the order. Yet the order regularly requires the schools to act, for example: prohibiting the school from using the parenting plan to restrict access or requiring the school to keep provided contact information. While much of the order seeks to clarify or "guide," it is not clear what happens if the education order is not followed. What if a school does not permit both parents to attend a parent-teacher conference or any of the myriad of newly created rights? The Supreme Court should not create an unenforceable order. We are further concerned that

while attempting to "guide" the school, the order may leave schools believing that they are required to take certain actions or have been granted particular powers, resulting in actions that are *ultra vires*.

4. *"Substantial Conformity."* The proposed rule requires the trial court to issue the newly created order in "substantial conformity" with forms 19 and 20, as applicable. What renders an order in "substantial conformity" is unclear. Must each order contain a provision as to the ten items in form 19? What if the trial court finds that a provision is appropriate but that the particular provision should be the opposite as the one proposed by the relevant form? The legislative branch has provided the trial court with numerous findings and orders it must enter but does not tell the trial court what those findings and orders must be on substantive grounds. This proposed order does. Without an authorizing statute or a rule that contains specific factors and necessary findings, the trial court is left without guidance on whether the education order it ultimately issues substantially conforms. Further, by requiring "substantial conformity" this order essentially removes the trial court's fact-finding jurisdiction and moves it to the Administrative Office of the Courts.

Particular Infirmities

1. *Special Services*. Paragraph 4 of Form 19 provides that "[a]n evaluation as to the minor child(ren)'s eligibility for special services shall proceed so long as at least one parent consents." Unfortunately, one of the most frequent grounds for high conflict litigation is what services, if any, are appropriate for a child. This provision would allow one parent to start an evaluation for special services over the objection of the other parent, even where the parents share joint legal decision-making authority, without any "presumptive" or "final" say.

2. *Parenting Time and Child Pick-Up*. Paragraph 5 provides that "[e]ach parent may pick up the minor child(ren)…" We appreciate the intent of this paragraph is to reduce schools being forced to police parents' parenting time. In cases where an education order is likely to be most applicable, however, we fear that this provision will cause more conflict than resolution. Many of us have had high conflict cases where a parent will attach to a single errant sentence to justify clearly inappropriate actions. We can easily foresee a situation where a parent picks up a child from school when it is not their parenting time and justifies that action based on this provision.

3. *Referencing the Parenting Plan*. One objective of the education order is to reduce a school's need to refer to lengthy and complicated parenting plans. We believe the education order requirement replaces one lengthy and complicated order with another, and does not obviate the need to refer to parenting plans. By statute, the parenting plan must contain orders regarding education. As noted in the proposed order, where there is conflict in the parenting plan and education order, the parenting plan controls. The impetus for the creation of the education order was an "uptick in time and energy spent on disputes with parents regarding parenting plan requirements." *Id.* at 15. Many of the provisions in the education order remain "subject…[to the] provisions set forth in the Parenting plan…" The creation of this order does not eliminate the likelihood that a school will be asked to interpret a parenting plan; it is only likely to introduce conflicts and inconsistencies that the school will be asked to further interpret.

4. *Section 10 "Future Litigation."* Section 10 requires the parties to make their "best efforts" regarding various evidentiary and testimonial decisions. While we appreciate that this section is mitigated by its aspirational nature, it still appears to run afoul of ARFLP 2(a) (specifically allowing a party to invoke the Arizona Rules of Evidence) and 8(c) (outlining the process to seek a virtual witness.) We believe it is improper for the trial court to order parties to make their "best efforts" to waive their already-created litigation rights. Further, in our proceedings we regularly have medical professionals, therapists, psychologists, and other professionals testify. It is not clear why the trial court should order one class of witnesses be potentially exempt from court rules while others are not.

5. The State Bar of Arizona's comment outlines other questions and concerns. We agree with many of them. While some of those questions were addressed after the State Bar's comments, many remain.

Judicial Resources

At any time, the Family Division in Maricopa County has nearly 20,000 active pre- and post-decree cases. Over 80% of these cases involve children. The adoption of this rule as applicable in every case produces increased strain on an overworked system. 65% of our cases involve self-represented parents. In many cases, those parents are already struggling in their communication, frustrated with the other parent, and emotionally hurt. They often struggle to agree on a wide range of issues. The education order introduces more issues for them to litigate over and will require the court to set more and lengthier evidentiary hearings. This will cause all matters to be heard in a less timely fashion. If parental conflict requiring school intervention is increasing, they still represent a small minority of cases. We believe judicial resources are better devoted to the cases with educational conflict than to education orders in the vast majority of cases in which parents are able to co-parent without incident.

Unintended Consequences

Most cases in the family division resolve amicably. However, there are a core group of cases that have large dockets, and regular and ongoing litigation. These are the cases that strain judicial resources. These cases often involve "modifications" over the most minute differences. This new parenting order will unquestionably become a weapon for heightened litigation. Indeed, one judicial officer recently shared that they have already received a motion for reconsideration regarding the form education order. Further, most cases are between unrepresented parties. Despite their best efforts and the resources available through the Administrative Office of the Courts and the various county law libraries, these parties still struggle to fill out various forms and orders. Adding a new order will only introduce additional conflicts and confusion for these self-represented litigants. The creation of a new order, which contains more provisions than many parties' amicably settled parenting plan, also creates new issues for parties to fight over, find missteps in, and file contempt proceedings over.

Recommendations

1. The Supreme Court should vacate its prior order amending the Arizona Rules of Family Procedure on an emergency basis.

2. The Supreme Court should appoint a task force of the Family Court Improvement Committee to study whether a separate education order is appropriate in all cases or a particular subset of cases, and to examine other ways in which to address the issue. The task force should include representatives from the education community. This committee could propose rule modifications that would outline factors for the trial court to consider when determining the appropriateness of an education order and the contents of that education order. This would allow any order, if appropriate, to be tailored to the specific needs of the family before the trial court.

3. For all the reasons above, we do not believe that a modification of the current rule to change the wording from "must" to "may" will be sufficient. Even if the rule provided the trial court discretion on when to order the proposed order, the issues about the substantive provisions would remain.

4. We suggest that the task force or committee appointed to further study this matter consider incorporating any education orders to within the parenting plan, instead of creating a separate order. This will reduce the confusion to self-represented litigants by reducing the number of orders they must prepare, eliminate conflicting provisions, and still provide a clear document for parents to provide to schools, if appropriate. This portion of the parenting plan could be formatted on a separate, detachable page, which would help parents present only the necessary information to the school without them having to disclose other potential findings a trial court made.

Conclusion

We agree with all the concerns that resulted in the creation of the proposed education order. Schools should not be in the business of informally adjudicating parenting disputes. Schools should not have to use their limited resources to help families navigate a contentious separation or divorce. We laud the efforts of the group that took the initiative to work towards remedying educational disputes. For the reasons above, however, we believe that more work is to be done and that the Arizona Supreme Court should not pass the proposed rule as currently drafted.

Signatures

/s/ Lori Ash
Hon. Lori Ash

/s/ Stasy Avelar
Hon. Stasy Avelar

/s/ Robert Brooks
Hon. Robert Brooks

/s/ Michelle Carson
Hon. Michelle Carson

/s/ Quintin Cushner
Hon. Quintin Cushner

/s/ Jim Drake
Hon. Jim Drake

/s/ Monica Edelstein
Hon. Monica Edelstein

/s/ Jim Knapp
Hon. Jim Knapp

/s/ Julie Mata
Hon. Julie Mata

/s/ Keith Miller
Hon. Keith Miller

/s/ Colleen O'Donnell-Smith
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/s/ Patricia Starr
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/s/ Randy Warner
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/s/ Cassie Woo
Hon. Cassie Woo