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IN THE SUPREME COURT
IN AND FOR THE STATE OF ARIZONA

In the matter of: Petition to Abrogate and Replace the Rules of Procedure for Special Actions	Arizona Supreme Court No. R-23-0055 Pinal County Public Defender Comment Re: Petition to Abrogate and Replace the Rules of Procedure for Special Actions

Pursuant to Rule 28(e) of the Arizona Supreme Court Rules, the Appellate Unit of the Pinal County Public Defender respectfully submits this comment seeking clarification of whether special actions filed pursuant to A.R.S. § 36-546.01 challenging court ordered treatment qualify as a statutory appellate special action. Currently, there does not appear to be a reference to A.R.S. § 36-546.01 in the robust comment identifying statutory special actions. This oversight should be remedied.

I. Pinal County Public Defender Interest Statement

The Pinal County Public Defender provides legal defense services to indigent adults and juveniles facing criminal charges and/or mental health commitments when appointed by the Pinal County Superior Court or a Justice Court within Pinal County. Our goal is to provide superior legal representation, safeguard fundamental individual rights, and ensure equal access to the protections afforded by the United States Constitution, the Arizona Constitution, and the laws of Arizona.

The Appellate Unit of the Pinal County Public Defender's Office seeks clarification about the classification of special actions challenging court ordered treatment under A.R.S. § 36-546.01 because the speedy and just resolution of challenges to improper court ordered treatment plans is essential to safeguarding the fundamental liberty interests of those who are forced into medical treatment against their will. *See In re Jesse M.*, 217 Ariz. 74, 76, ¶ 9 (App. 2007) (recognizing that an involuntary commitment hearing is a "serious deprivation of liberty" that requires strict adherence to due process.)

II. The proposed rules should acknowledge that A.R.S. § 36-546.01 creates a statutory appellate special action over all court ordered treatment rulings.

The Supreme Court's Task Force on Rules of Procedure for Special Actions should be commended for taking on the monumental task of re-writing the Rules of Procedure for Special Actions. The current rules have caused much confusion within

the indigent defense community, and the proposed set of rules and comments do much to provide attorneys and judges with a comprehensible and reliable text to guide special action litigation. *See* Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012) (discussing Supremacy-of-Text Principle, noting that "the careful lawyer or judge trusts neither memory nor paraphrase, but examines the very words of the instrument.")

Particularly helpful is the extent to which the proposed rules go to distinguish between the different types of special actions. *See* Proposed RPSA 2 & 3. Also helpful is the plain language identifying the governing principles for when a court must or may accept jurisdiction over appellate special actions. Proposed RPSA 11. Up until now, one had to be both a student of history and an apt legal researcher to understand the mechanics of how and why appellate courts decide to accept jurisdiction over appellate special actions. The proposed rules lift much of this burden and allow lawyers and judges to rely on the text of the rules.

However, the current version omits any reference to A.R.S. § 36-546.01. Perhaps this is because there is a dearth of case law interpreting this jurisdictional statute. Yet, the language of the statute clearly falls under the ambit of the proposed rules, and it should be included in the proposed 2025 Comment to Proposed Rule 3 identifying the various types of statutory special actions.

A. A.R.S. § 36-546.01 establishes statutory appellate special actions as a form of appellate review of court ordered treatment orders.

A.R.S. § 36-546.01 provides:

> An order for court ordered treatment may be reviewed by appeal to the court of appeals as prescribed in the Arizona rules of civil procedure or by special action. Such appeal or special action shall be entitled to preference.

It is evident that the Legislature has decided to include within the limited ambit of statutory appellate special actions orders for court ordered treatment. A.R.S. § 36-546.01. Yet, A.R.S. § 36-546.01 is currently omitted from the list of (one) statutory appellate special actions identified in the 2025 Comment to Proposed Rule 3 at page 6.

Admittedly, A.R.S. § 36-546.01 does not align perfectly with the only other statutory appellate special action authorized under A.R.S. § 13-753(I) identified in the proposed comment. This is because A.R.S. § 36-546.01 authorizes two avenues for appellate review (direct appeal pursuant to the Arizona Civil Rules of Appellate Procedure or special action) whereas A.R.S. § 13-753(I) apparently only authorizes one avenue of appellate review—special action. Although a finding on intellectual disability under A.R.S. § 13-753 is not a final judgment generally subject to appeal like a court ordered treatment under A.R.S.§ 36-540, the timeline associated with court ordered treatments and the fundamental liberty interests at stake explain why

the Legislature chose to include court ordered treatments on the short list of statutory appellate special actions.

B. A.R.S. § 36-546.01 protects constitutional rights.

The Arizona Constitution protects the right of individuals to be free from disturbance in her "private affairs." Ariz. Const. art. II, § 8. This constitutional right to privacy includes the right to refuse medical treatment. *Rasmussen by Mitchell v. Fleming*, 154 Ariz. 207, 215 (1987). And the United States Supreme Court has "repeatedly recognized that that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas*, 441 U.S. 418, 425 (1979) (citing *Jackson v. Indiana,* 406 U.S. 715 (1972); *Humphrey v. Cady,* 405 U.S. 504 (1972); *In re Gault,* 387 U.S. 1 (1967); *Specht v. Patterson,* 386 U.S. 605 (1967).)

Given the constitutional dimensions involved, it is unsurprising that the Legislature explicitly authorized the quickest appellate review possible to those ordered to undergo court ordered treatment. The private interest at stake—liberty—is high. And the risk of an erroneous deprivation of liberty justifies additional procedural safeguards—statutory appeal via special action—that justify the expenditure of additional government resources to process expedited review via special action. *See Mathews v. Eldridge,* 424 U.S. 319, 335 (1976) (outlining due process test for procedures that may result in the deprivation of a fundamental right.)

C. The Legislature has concluded that appellate review is inadequate.

Lastly, although expedited, appellate review "as prescribed in the Arizona rules of civil procedure" may often prove to be inadequate to remedy an unlawful commitment. A.R.S. § 36-546.01 By the time a case is put at issue via the procedures outlined in the Arizona Rules of Civil Appellate Procedure, nearly 6 months may have lapsed from the date of the lower court's order for court ordered treatment. *See* ARCAP 11-15 (providing timelines for transfer, notices, and briefs.) Unsurprisingly, by the time appellate relief is obtained in some cases, the court ordered treatment has expired and the case becomes moot. *See Matter of Commitment of Alleged Mentally Disordered Pers.*, 181 Ariz. 290, 292 (1995) (recognizing mootness due to expiration of 180-day involuntary commitment period.)

By including A.R.S. § 36-546.01 in the short list of statutory appellate special actions identified in the proposed 2025 Comment to Rule 3, confusion can be avoided and due process protected. Confusion currently exists due to the analysis of A.R.S. § 36-546.01 set forth in *Elizabeth W. v. Georgini*, 230 Ariz. 527, 528, ¶ 5 (App. 2012). In *Elizabeth W.*, Division Two of the Court of Appeals briefly examined A.R.S. § 36-546.01 and suggested that the statute triggered jurisdictional principles inapplicable to statutory appellate special actions. Thus, *Elizabeth W.* asserted that jurisdiction was discretionary, dependent on whether the ruling below

was final versus interlocutory, and asked whether the issue presented was of statewide importance or purely legal. *Elizabeth W.*, 230 Ariz. at 528, ¶ 5.

Elizabeth W., however failed to account for the plain language in A.R.S. § 36-546.01 clearly establishing a statutory appellate special action.

D. More confusion, delay, and irreversible harm will ensue unless the Comment is amended.

The Task Force's Petition goes a long way to alleviate the confusion in engendered by *Elizabeth W.'s* application of general special action jurisdictional principles to statutory appellate special actions by unpacking and categorizing the various types of special actions. But, by excluding A.R.S. § 36-546.01 from the list of statutory appellate special actions, the proposed rules and comments may perpetuate unnecessary delay for those seeking appellate relief from the denial of a fundamental liberty interest involving court ordered treatment.

Quick and decisive appellate review is necessary, and A.R.S. § 36-546.01 provides it via a statutory appellate special action. The forced use of antipsychotic medications "alter the chemical balance of the brain, change the way a patient thinks," and "have the capacity to severely and even permanently affect an individual's ability to think and communicate." Emily C. Lieberman, *Forced Medication and the Need to Protect the Rights of the Mentally Ill Criminal Defendant*, 5 Cardozo Pub. L. Pol'y & Ethics J. 479, 494 (2007) (quoting *Washington v. Harper*, 494 U.S. 210, 214 (1990) and

Bee v. Greaves, 744 F.2d 1387, 1394 (10th Cir. 1984).) Severe side effects, including involuntary spasms of the body, tongue, throat and eyes, akathesia, neuroleptic malignant syndrome, and tardive dyskinesia are prevalent in patients treated with antipsychotic drugs. *Harper*, 494 U.S. at 229-230.

Presumably, the Legislature was aware of the important constitutional issues at stake when it created a rare statutory appellate special action in passing A.R.S. § 36-546.01 in 1974,[1] just four years after the adoption of the Rules of Procedure for Special Actions. *See* Petition at 2 (establishing that the existing special action rules were adopted on January 01, 1970.) The new rules should, at a minimum, ensure that A.R.S. § 36-546.01 does not continue to be overlooked as a statutory appellate special action.

III. Conclusion

The right to refuse medical treatment is one enshrined under Article 2, Section 8 of the Arizona Constitution. The right to adequate due process protections, including speedy and reliable appellate review, for those ordered to be medically treated against their will is well-established. The Arizona Legislature has deemed appellate review of court ordered treatment to be important enough to warrant statutory special actions under A.R.S. § 36-546.01. Therefore, any change to the rules of special actions that purports to include a comment delineating the rare

[1] *See* A.R.S. § 36-577 (1974).

instances by which the Legislature has authorized a statutory appellate special action should explicitly include A.R.S. § 36-546.01.

Respectfully submitted this 30th day of April, 2024

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