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IN THE SUPREME COURT

STATE OF ARIZONA

In the Matter of **PETITION TO AMEND RULE 74 OF THE ARIZONA RULES OF FAMILY LAW PROCEDURE.**	**Supreme Court Number R-15-0006** **COMMENT TO PROPOSED AMENDMENTS TO RULE 74, ARFLP, CONCERNING PARENTING COORDINATION**

The undersigned, an attorney in private practice and parenting coordinator in Maricopa County, Arizona, submits the following comments opposing many of the proposed changes to Rule 74, Arizona Rules of Family Law Procedure, as proposed in the Petition filed January 8, 2015.

BACKGROUND.

I am commenting on this proposed Rule change because I am an attorney with over 30 years of practice in Arizona, with at least 28 of those years primarily or exclusively in family law. I am a Fellow of the American Academy of Matrimonial Lawyers (AAML). I

am a board member and on the Executive Board of the Association of Family and Conciliation Courts (AFCC), having served on the board of that international organization since 2007. Both of those organizations promote the highest levels of practice in family law, and AFCC promulgated its Guidelines for Parenting Coordination in 2005, as part of its Parenting Coordination Task Force.

I first practiced in a role similar to parenting coordination as early as 2003, approximately three years before parenting coordination existed (under that name) in Arizona. Prior to the inception of Rule 74, I acted as a Family Court Advisor (FCA) as authorized under the Maricopa County Local Rules of Practice. Commencing in 2003, I was a member of the Supreme Court's Committee on Rules of Procedure in Domestic Relations Cases, chaired by Hon. Mark Armstrong (ret.), which created the existing Arizona Rules of Family Law Procedure. Rule 74 originated with an examination of parenting coordination rules, statutes and procedures in existence throughout the United States. I served on that Rules Committee throughout its existence, from 2003 to 2006 (ARFLP became effective on January 1, 2006), then served on the Domestic Relations Rules Review Committee from 2005-07. I am a co-author of the Arizona Family Law Rules Handbook, published by ThomsonReuters/ Westlaw, which annually updates changes to the Family Law Rules.

COMMENTS ABOUT THE PROPOSED CHANGES.

It appears that the purpose of the 2014 Workgroup regarding Rule 74 was to address litigant concerns about ***PC fees, lack of recourse/ appeal process, qualifications of PCs,***

and scope of authority. (See the Petition to Amend filed 1/8/2015, page 2) Judge Barton, chair of that Workgroup, reported that there were four to six complaints from litigants that led to the formation of the Workgroup. [Email from Judge Barton to Family Law Executive Council and American Academy of Matrimonial Lawyers, Arizona Chapter, dated December 6, 2014] If 4-6 litigants had complaints, and assuming that the estimate that there were 250 PC reports filed in 2013 is correct, then the litigant complaints represent 1.6- 2.4% of PC reports filed in 2013. The proposed changes to the Rule seem somewhat overwhelming in light of that percentage of "problems" reported.

It appears that many of the proposed changes to the Rule do not relate to any of the stated goals. For example:

1. The proposed change to Section B would add a provision allowing the parties to choose someone (such as a friend or family member) in lieu of a parenting coordinator. This is something the parties have always been able to do, and there is no explanation why such a confusing provision would be added to a Rule about parenting coordinators. This provision does not address any specific concern listed above.

2. The proposed change to Section E would allow a parenting coordinator to request his or her own reappointment, which is not the current practice. This seems contrary to some of the stated concerns.

3. The proposed change to Section F regarding fee structure will destroy the use of parenting coordination in cases that can afford that service. The proposals will tie up a parenting coordinator in administrative issues such as constantly requesting a replenishment

of the fee deposit after every two hours of work. The administrative issues in trying to request payment after every two hours of work will cause additional costs and delays to a process which is supposed to expedite action on important parenting issues.

If the underlying problem is that some cases can't afford PC fees and must go through court to have issues resolved, then the solution should be limited to those cases, but should not destroy the PC process for all other cases. If this provision regarding a two hour retainer was suggested with the assumption that "most" parenting coordination cases involve two hours of work or less, that assumption is very much mistaken.

4. The proposed change which adds a new Section H deletes some important language from the original Rule. As stated more specifically below, this proposal removes some of the parenting coordination language that was most helpful to litigants, which is language that describes the type of issues that can be handled by a parenting coordinator. There is no obvious connection between removing this language and the original litigant concerns stated above. With this change, the scope of a parenting coordinator's authority is now less apparent to litigants.

5. The proposed change which adds new Section K will require the parenting coordinator to notify the court when speaking with or obtaining documents from third parties. This notice requirement adds additional expense for the parties by requiring a notice to the Court. This requirement, and its additional cost, seems contrary to the stated litigant concerns.

6. The proposed change which adds new Section L could be construed as

leaving a parenting coordinator's report entirely out of the court file. This provision will cause additional confusion and cost to the parties, because necessary provisions of the parties' Parenting Plans will not be readily available to the parents, their counsel, parenting coordinators, or the Court.

7. New Section N. The proposal in this section actually REMOVES the (now existing) sentence requiring the court to set a hearing on objections to PC recommendations. This is contrary to the concern that litigants feel they don't have adequate recourse or an appeal process from PC recommendations. The language which is to be removed states "The judicial officer shall set a hearing if requested." That sentence preserves due process for the parties by establishing judicial review of a recommendation done by a quasi-judicial officer, the parenting coordinator. Removal of this hearing requirement is directly contrary to the stated litigant complaints regarding "lack of recourse/ appeals process for litigants".

DEALING WITH THE REAL PROBLEM: THE COST OF PARENTING COORDINATION.

The cost of PC services is truly problematic, and something that can be addressed in some ways by a Rule change, but most changes will have to come from judicial education. I receive far too many appointments where it's clear to me at the outset that the parties cannot afford the cost of a PC (either my fees or those of someone who charges less). I realize, however, that some of the issues being referred to a PC may not be critical to a child's well-being, but are more parent-focused: changes to a holiday schedule, a request

for longer vacation times, what day of the week vacation may start, who has the child for the first day of school. It is possible that the appointment of a parenting coordinator in those parent-focused cases reflects the Court's feeling that if the parties want more specificity or a routine modification of their parenting plan, and can't agree on changes, then payment to a PC is required. This approach leaves the Court's calendar more open to address critical issues that directly affect a child's best interests.

The real problem with parenting coordination fees arises when some cases are referred to a parenting coordinator for critical issues of supervised visitation, parent substance abuse, and children's medical conditions. If such a case is referred to a parenting coordinator and it is clear to me that the parents cannot afford PC services, I file a report with the Court asking that the Court cancel the PC appointment and allow the parties to proceed directly to Court with the problem. This is a more reasonable resolution than wholesale changes to the Rule which will make each and every PC appointment an administrative nightmare for the parties and the PC.

A simple way of dealing with many of the listed problems with parenting coordination would be to change Rule 74 to reflect that a parenting coordinator can be initially appointed in only two circumstances: (1) upon stipulation of the parties; or (2) after a finding by the Court that the parents' conflict has demonstrably harmed the children, together with a finding that all parties can afford parenting coordination services.

GENERAL COMMENT ON RESTYLING CHANGES

The change of "parties" to "parents", throughout this Rule is incorrect. Parenting

coordination cases can include non-parents who have *in loco parentis* status with a child. The Petition states that the purpose of this change is to "clarify that the parenting coordination process' intended use is for cases involving parents, not in cases brought by grandparents and other third parties", but that statement is not supported by the reality of family court and Arizona statutes (specifically ARS 25-§409). Grandparent visitation and *in loco parentis* orders directly affect children, and there is no reason that persons other than parents who want the service should not have access to parenting coordination to assist with implementation of their orders.

SPECIFIC COMMENTS ON EACH PROPOSED CHANGE.

Section A. "Determination of Need for PC and Appointment". No comments to proposed changes.

B. "Appointment of a Parenting Coordinator". The addition of the last sentence to this Section, allowing the parties to "identify a person instead of a parenting coordinator" will cause confusion. (This was demonstrated at the Arizona Judicial Council meeting on December 11, 2014, when even Council members who are professionals did not understand the provision.) If a person is selected by the parents "instead of a parenting coordinator", then that person is not a parenting coordinator, and reference to a non-PC selection in this Rule only confuses. The reference is so vague as to be without meaning and it will cause additional problems for the parties. Parties have always, without this change, been able to appoint a person (family member, mediator, clergy, friend, or the like), to assist them in resolving their disputes. The Rule states that this (non-parenting coordinator) person will

have "appropriate education, experience and expertise" without specifying what that is; it does not appear to be the same qualifications or expertise as required for a parenting coordinator.

While another Rule might specify that this is an alternative to the appointment of a parenting coordinator (perhaps Rule 67, concerning other dispute resolution processes), the inclusion of this sentence in Rule 74 will give litigants the false impression that this "other person" has the same qualifications or authority, or is bound by the same limitations as a PC, which is not the case.

It is noted that this proposed change does not address any of the specific litigant concerns stated in the Petition, which were: PC fees, lack of recourse/ appeal process, qualifications of PCs, and scope of authority.

C. "Selection of a Parenting Coordinator". No comments to proposed changes.

D. "Persons Who May Serve as Parenting Coordinators". No comments to proposed changes.

E. "Term of Service". The proposed language in subsection E(2) "Reappointment" seems contradictory, as it first states "The parenting coordinator may contact the court in writing to request reappointment . . . ", and this contact to the court "must be sent to each parent or counsel." This is followed with the restriction that "a parenting coordinator must not contact a parent to seek or suggest reappointment." It would seem that by contacting the court to request reappointment and copying that request to the parent, the parenting coordinator is contacting the parent to "seek or suggest reappointment." It is the opinion

of this writer that it is not appropriate for a parenting coordinator to request his or her own reappointment from the court. It should be the prerogative of the parties to either agree to reappointment, in which case the parenting coordinator could file a stipulation for them; or if only one of the parties wants reappointment, the party requesting it should be required to file the request with the court. It does not seem consistent with neutrality for a parenting coordinator to be essentially self-sustaining by requesting reappointment directly from the court, absent agreement of the parties.

It is noted that this proposed change does not address any of the specific litigant concerns stated in the Petition, which were: PC fees, lack of recourse/ appeal process, qualifications of PCs, and scope of authority.

F. "Fees"

F(1) No comments to proposed changes.

F(2). "Adjustment to Allocation of Fees". The changes to this Section are very serious and create a situation which inappropriately (and I believe accidentally) delegates judicial authority to unqualified persons. It also gives each party substantial power to thwart the parenting coordination process by giving a disgruntled party a second bite at the apple on an issue (ability to pay) which was already resolved by the court.

This Section, as re-written, states that the parenting coordinator may recommend an adjustment to the court's allocation of fees, but this language does NOT include a phrase such as "based on conduct of a party or misuse or overuse of the PC's services." It brings the issue of "ability to pay" squarely to the parenting coordinator's doorstep, which is an

incorrect delegation of judicial authority.

The current parenting coordination order of appointment (Maricopa County) makes it clear that a parenting coordinator can only recommend an allocation of fees which is different than the percentage allocation set by the Court if the parenting coordinator "determine(s) that one of the parties is using his/ her services unnecessarily and is thereby causing greater expense for the other party as the result thereof."

The original percentage allocation of fees set by the court is presumably based on the court's knowledge of the parties' financial circumstances, perhaps even after a full evidentiary hearing. The proposed change to this section creates a new situation: a parenting coordinator can now recommend a change to the allocation of fees based on income, assets, and financial ability of the parties --- things that are not within the personal knowledge of the parenting coordinator and which cannot easily be ascertained by the parenting coordinator. Many parenting coordinators are not attorneys. Non-attorney parenting coordinators have no legal basis (such as the definition of "income" used in support calculations) to determine what might legally constitute "financial resources" for purposes of this Section. Due process is violated by charging the allocation of fees based on financial circumstances of the parties to a parenting coordinator.

Even a parenting coordinator who is an attorney does not easily have information about the parties' financial circumstances. It is very, very common for a party to ask the parenting coordinator to change what the court has allocated in fees because "I can't afford it." If the parenting coordinator appointment process has been handled correctly, the court

has already considered the issue of ability to pay, and that issue should not be immediately re-addressed by the parenting coordinator. Under the Rule's current language, the parenting coordinator always refers the issue of ability to pay back to the court, where due process can be preserved.

If a new, large area of dispute --- each party's financial circumstances and ability to pay ---- is now delegated to the parenting coordinator, much of the money expended by the parties to resolve a parenting time issue will be used to re-hash financial issues already heard by the court. The result will be more expense to the parties with no resolution to the parenting issues.

F(3) "Time of Payment." The reference to a parenting coordinator taking a "retainer" is incorrect, according to the State Bar of Arizona. The State Bar has gone to great efforts to use the correct nomenclature for fees paid in advance, and that terminology is "advance fee deposits". If the Rule intends only to refer to a true "retainer", which is the acceptance of funds which will NOT be applied towards current billings but which will be held until the end of the representation, then the proposed new language is not harmful. But if the intent is to cover advance fees which are paid at the outset of PC services and then applied to current fees as they are incurred, then the term "retainer" is not correct.

The State Bar defines "retainer" as follows: *"A retainer is not for legal services and is not an advanced fee. It only secures your availability for the client. Few lawyers use a true retainer and instead require an advanced fee, which they mistakenly refer to as a "retainer."* http://www.azbar.org/professionaldevelopment/lomap/forms, "Sample Fee

Agreements - Definitions", visited on 1/30/2015.

The most common form for a parenting coordinator fee arrangement is an "advance fee deposit." The State Bar of Arizona defines that as follows: *"Advanced Fees. An advanced fee is an amount paid to a lawyer in contemplation of future services that will be earned at an agreed-upon basis, whether hourly or flat. Any amount paid to a lawyer in contemplation of future services is an advanced fee regardless of what the fee is called. An advanced fee must be deposited into the client trust account."* http://www.azbar.org/professionaldevelopment/lomap/forms, "Sample Fee Agreements - Definitions", visited on 1/30/2015.

As stated above, an attorney parenting coordinator is required to deposit an “advance fee” into a client trust account, where the money remains until it is earned. Non-attorney parenting coordinators are not under the requirement to maintain a trust account, but the money still does not belong to the parenting coordinator until it is earned. A future Rule change may want to consider whether all parenting coordinators, including non-attorneys, should be required to maintain a trust account for protection of the clients.

The proposed Rule's requirement that a parenting coordinator may require a “retainer” only in an amount which is two times the parenting coordinator's hourly fees is a significant and substantive problem. While the Arizona Judicial Council was told on December 11, 2014 that this provision would not apply to parenting coordination appointments which are done by stipulation of the parties, no such limitation appears in the wording of the proposed changes. (The Meeting Materials posted on the AJC website in

advance of the December 11, 2014 meeting did not include the proposed Amendment regarding a limitation on “retainers”, so there was no opportunity to review that language prior to that meeting in order to make comments.)

This proposal which may limit the advance fee deposit which may be required by a parenting coordinator reflects a basic misunderstanding of how the parenting coordinator process works. The proposal may be based on a mistaken assumption that parenting coordination work can be completed in two hours or less. This is incorrect. While two hours of parenting coordinator time may be sufficient to address one, very simple parenting issue between the parents (such as resolution of a single Thanksgiving schedule), that very limited situation is not the typical parenting coordination case. In my experience, as described above, the most common parenting coordination case will present with six to twelve, or more, distinct issues to be addressed. As a rule, some of those issues can be dealt with somewhat summarily, as the parties often do not significantly disagree and can be quickly brought to resolution on those issues with some education and communication. Normally, a number of issues will require more information and discussion between the parties. Those additional issues (the not-so-quickly-resolved ones) could require speaking with third parties such as school officials, medical providers, or coaches; review of other documents such as medical records, school records, testing results or past communications; and may require additional meetings with the parties either separately or together.

The requirement that only two hours of parenting coordination work can be paid in advance leads to a situation where the parenting coordinator could collect that money, meet

with each party (either two separate meetings or one joint meeting), and will then likely have used up the two hours of time. No additional information will have been reviewed, and the parties will have no resolution to their issues. At that point, the parenting coordinator would be required to request an additional two hours of money, and if one of the parties has decided that he or she wants to delay or subvert the process, that party can effectively halt the process by refusing to pay. The parties will have wasted two hours of parenting coordinator expense, with no result.

G. "Confidentiality". No comments to proposed changes.

New Section H. "Power and Scope of Appointment." The language deleted from the proposed Rule is some of the most important language, from a litigant's standpoint, in the entire Rule. Its deletion from the body of the Rule is a mistake which is detrimental to the parties. That language describes some of the most common day-to-day issues which can be handled by a parenting coordinator. The language which should not be deleted is: "By way of example only, the PC may make recommendations on day-to-day issues experienced by the parties such as exchanges, holiday scheduling, discipline, health issues, school and extracurricular activities, choice of schools, and managing problematic behaviors by the parents or child(ren)."

This language was just amended in September 2014 to add one additional area --- school choice --- showing that the Court in the past has felt that this language is important. That fairly comprehensive list covers many of the most common issues, and it has been helpful to parties to see concrete examples. This list was, in part, added to the "Parenting

Coordinator Workgroup Comments" at the end of the proposed Rule, but adding language to a comment is not as helpful as inclusion of this language in the Rule itself. There are certain Thomson/ West publications which do not publish Comments to the Rules, which means this language will not appear at all in some publications.

It is noted that this proposed change is actually contrary to one of the specific litigant concerns stated in the Petition, which was PC scope of authority.

New Section I. No comments to proposed changes.

New Section K. "Additional Authority of PC". The new language requiring the parenting coordinator to notify the parties if the parenting coordinator will be speaking with or obtaining documents from third parties is a good idea. The requirement that the *court* be notified of those contacts is unnecessary and adds expense. It's doubtful that the court cares or needs to be notified of this fact. Notifying the court will require a filing to the court, usually titled a Parenting Coordinator Report. (Parenting Coordinators do not email the court.) The filing of this additional report will cause additional expense to the parties. A simple notice to the parties of third parties to be consulted can be done by email. If a formal Report to the Court must be prepared every time a parenting coordinator speaks with a doctor or counselor, there will be a charge to the parties, and this extra charge is a waste of their money.

It is noted that this proposed change is actually contrary to one of the specific litigant concerns stated in the Petition, PC fees.

New Section L "Report". It's difficult to determine what the changes to this Section

are proposing. The last sentence, stating that a "must not" file a report with the Clerk of Court, seems logical, because most parenting coordinator reports are awaiting entry by the Judge as a final Order. After a report is entered as an Order, the Judge files the Report with the Clerk of Court. If the intent of this Section is, however, that even a Judge will not file a parenting coordinator report with the Clerk of Court, after its entry as a court order, then the proposal is a mistake that will cost the parties money. When a parenting coordinator report is entered as an Order, that Order must be available in the court file for use by the parents, the court, and most importantly the parties.

It is noted that this proposed change does not address any of the specific litigant concerns stated in the Petition, which were: PC fees, lack of recourse/ appeal process, qualifications of PCs, and scope of authority.

New Section M "Court Action". No comments on proposed changes.

New Section N "Objection" The proposal that the court shall no longer be required to set a hearing on a party's objection to a parenting coordinator report is a denial of due process and directly contrary to litigants' complaints that they need better recourse from parenting coordinator report.

It is noted that this proposed change is actually contrary to one of the specific litigant concerns stated in the Petition, that of lack of recourse/ appeal process.

New Section O "Action on Objection". No comments on proposed changes.

New Section P "Immunity" No comments on proposed change.

New Section Q "Parent Grievance" No comments on proposed changes.

New Section R "Applicability" No comments on proposed changes.

Parenting Coordinator Workgroup Comments. The comment "Primary to any financial obligations are child support and spousal maintenance" does not make sense. Defining "financial circumstances" in the Comments to this Rule does not provide a parenting coordinator, particularly a non-attorney parenting coordinator, with enough of a legal basis to determine financial circumstances of the parties.

The terms "binding temporary change" and "binding temporary decision" have been added to the Rule without sufficient explanation. Combining these new definitions with the deletion of a litigant's right to a hearing on a parenting coordinator's recommendations is a denial of due process rights.

CONCLUSION

The suggested changes to Rule 74 do not, in most cases, address any of the specific litigant concerns raised in the four to six litigant complaints which led to the Workgroup's formation. In several instances, the suggested changes to Rule 74 are directly contrary to litigant concerns. Changes and updates to Rule 74 are undoubtedly necessary, as the Rule will soon be ten years old. Changes should be suggested after thorough review by a full committee comprised of professionals actually involved in parenting coordination, and the process should include a thorough review of parenting coordination statutes and rules in effect in other jurisdictions, research on parenting coordination which has become available in the last 10-12 years, and the AFCC Guidelines for Parenting Coordination. The piecemeal changes which are offered in the pending Petition do not adequately address the

problem areas and will cause a multitude of unintended consequences, if passed in current form.

RESPECTFULLY SUBMITTED this 10th day of March, 2015.

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