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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In re the Matter of: **PETITION TO AMEND RULE 74 OF THE ARIZONA RULES OF FAMILY LAW PROCEDURE.**	Supreme Court No: R-15-0006 **COMMENT TO PROPOSED AMENDMENTS TO RULE 74 REGARDING PARENTING COORDINATORS**

The undersigned, a practicing family law attorney in Maricopa County, Arizona submits the following comments opposing many of the proposed changes to ARFLP 74.

Background

I am filing this comment to the proposed changes to ARFLP 74 as I am a practicing family law attorney. I am a certified specialist in family law, a judge pro tem, a member of the Family Law Practice and Procedure Committee, a former member of the Civil Rules Committee and have been on various legislative subcommittees related to changes to Title 25.

I would concur with all areas of comments made previously by Annette Burns, Barry Brody, and from the attorneys at the Arizona Mediation Institute (Judy Wolf, Aris Gallios and Andi Paus) regarding the significant issues in the proposed revisions to ARFLP 74.

Specific Major Comments

I will focus my comments on the main areas that I feel are of significant concern as follows:

1. Section F – Fees
    a. Reallocation
    b. Retainer
2. Section H – Powers and Scope
3. Section N – Objections

Section F – Fees

The first issue with this section is that it places decision making ability with the PC as to the income of the parties. Specifically, the section states that:

> A **parenting coordinator may recommend** to or a parent may request of the court **an adjustment in allocation of fees**. Circumstances that may warrant an adjustment to the allocation of the parenting coordinator's fees include, **but are not limited to, a change in one or both parent's financial circumstances** or instances where one parent is using the parenting coordination process excessively to harass the other parent.

As a significant amount of the parenting coordinators are mental health professionals, they have no concept of what is includable under Arizona law is determining the "financial circumstances" of a party. Placing any ability to determine a parties' income in the hands of a PC is outside their scope and knowledge. Changes to PC fees due to an income change should be left solely to the Court.

The next issue with fees is the proposed limit on retainer. Beyond the argument that this is an infringement of the constitutional right to contract, the limitation is completely impractical. The reasoning for the appointment of many PCs is due to a high level of conflict.

Limiting the ability of a PC to charge a retainer would likely limit the effectiveness of the process, especially in the beginning. While the purpose of this change may be to assist lower income parties, this does not improve the process.

Section H – Powers and Scope

The next issue is the redefinition of the scope. The new version states as follows:

> A parenting coordinator can, however, make recommendations to the court regarding implementation, clarification, modification, and enforcement of any ~~temporary or permanent~~ court order regarding legal decision-making or parenting time.

While this scope is limited in the next sentence, abdication of this level of authority to a PC, given the limited safeguards, is too much authority. PCs are not trial judges, and they are not a method to circumvent a trial judge. They should not have any authority to make a recommendation on any major issues.

The Court of Appeals has repeatedly limited the authority of courts to adopt custody evaluator recommendations in cases like *Nold v. Nold*, 232 Ariz. 270 (App. 2013). In *Nold*, the trial court did not include any discussion of the statutory factors and effectively adopted a parenting time schedule proposed by the custody evaluator. The appellee, in that case, argued that the trial court's findings were sufficient because it adopted the custody evaluator's assessment of the A.R.S. § 25-403(A) factors. *Id.* The Court of Appeals found that the evaluator's report was a trial exhibit, but the record did not indicate the *family court's* specific findings about the relevant statutory factors and the reasons why its decision is in the children's best interests. *Id*. Ultimately, the Court found that the trial court abused its discretion when it entered a parenting time order without making any specific findings regarding the A.R.S. § 25-403(A) factors. It concluded that the court itself must weigh the

evidence- it cannot simply adopt a custody evaluator's report as establishing a presumptive result. *Id.*

In a more recent Court of Appeals opinion, the Appellate Court reached a similar conclusion in *Christopher K v. Markaa S.*, 223 Ariz. 297, 311 P.3d 1110 (App. 2013). In *Christopher K*, the trial court did not make independent findings pursuant to A.R.S. § 25-403, but instead "incorporated by reference" the findings that the custody evaluator made in her report. *Id* at 1113, ¶13. The Appellate Court reasoned that "by simply adopting the custody evaluator's report, the [trial] court effectively delegated the best-interests determination to the custody evaluator." *Id* at 114-115, ¶21. The Appellate Court vacated the custody order and remanded the case back to the Trial Court for a new evidentiary hearing. *Id.* The Appellate Court cited *DePasquale v. Superior Court* (Thrasher), 181 Ariz. 333, 336, 890 P.2d 628, 631 (App. 1995), which stands for the proposition that the responsibility to make the findings is the court's alone and though the Court may consider an expert's opinion, it can neither delegate a judicial decision to an expert witness nor abdicate its responsibility to exercise independent judgment. *Id.* at 1114, ¶20.

If a PC is allowed to submit a report, without a hearing, on a legal decision-making issues, which the Court simply adopts without an independent analysis, that report and order would violate *Nold* and *Christopher K.*

Section N – Objections

The most egregious proposed change to ARFLP 74 is the elimination of the requirement of a hearing if a party requests a hearing. To say this is a complete and utter due process violation is a gross understatement. Given the proposed scope of authority of the PCs, there is no question that if a party requests a hearing, then they are absolutely entitled to one.

Due process absolutely requires an ability to request a hearing. There is no equivocation on this requirement and any Rule that would suggest otherwise is facially unconstitutional.

Additionally, as state above, I believe that there are instances that the Court would be required to hold a hearing, even if neither party requests one, to ensure that the criteria of *Nold* are satisfied regarding the independent analysis.

Not to cite to myself, but I will; in 2014 the Court of Appeals ruled on *Volk v. Brame*, 235 Ariz. 462 (App. 2014) reasserting the importance of due process in family court cases. The court specifically held that shortcuts, or quick hearings do not satisfy the due process requirements guaranteed under the due process clause. And the thought that a PC order could evade a hearing is not only unconstitutional but offensive.

Other Minor Issues

Section B

I simply don't understand what the following provision actually means or does.

> Before the court appoints a parenting coordinator, the court must first give the parties the opportunity to identify a person instead of a parenting coordinator with appropriate education, experience, and expertise to whom they both agree to submit any future disputes regarding the implementation of the parenting plan or legal decision-making orders.

This is a confusing section, and potentially causes serious ramifications to all involved. Is this person a PC, and arbitrator or what is their role? What authority do they have? I understand that the intent was to allow use of clergy or other parties to help resolve disputes, but the legal ramifications are too numerous. This needs to be stricken.

Section B – Reasons to appoint PC - I see no reason to delete section B3, which allowed for the appointment of a PC when one party had mental health issues. Often PCs are used to ensure that one party is complying with mental health treatment.

Section E2 – As many parties do not know how to reappoint a PC, the PCs typically tell them how to do so and advise them that their term is expiring. Prohibiting this serves no purpose.

Dated this 22nd day of April 2015.

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By /s/ Keith Berkshire
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