Hon. Peter B. Swann
Arizona Court of Appeals, Div. 1
1501 W. Washington
Phoenix, AZ 85007
(602) 542-5305
pswann@appeals.az.gov

Hon. Sally S. Duncan
Arizona Superior Court, Maricopa County
201 W. Jefferson
Phoenix, AZ 85003
(602) 506-9042
duncans@superiorcourt.maricopa.gov

William G. Klain (015851)
Lang & Klain, P.C.
8767 E. Via de Commercio, Suite 102
Scottsdale, AZ 85258
(480) 947-1911

IN THE SUPREME COURT

STATE OF ARIZONA

In the Matter of:

PETITION TO AMEND RULE 74 OF THE RULES OF FAMILY LAW PROCEDURE	)))))	Supreme Court Number R-15-0006

Judge Peter B. Swann, Judge Sally S. Duncan and William G. Klain, Esq. jointly submit this comment to R-15-0006.

Scope of Comment

The Workgroup has undertaken an important and difficult task, and we support many of the proposed revisions to Rule 74. This comment is limited to those few issues that raise access to justice and due process concerns under both the current and proposed rules. We recognize that the Workgroup's proposed revisions attempt to mitigate some existing due process pitfalls, but respectfully submit that the revised Rule must go further to ensure that the courts afford the full measure of equal justice to which Arizonans are entitled when exercising the fundamental constitutional right to parent.

For clarity, this comment tracks the proposed amendments to Rule 74 on a subsection-by-subsection basis.

Comments

Subsection A: No comment.

Subsection B: The proposed revision to this section raises the most significant threat to access to justice and due process in the petition. **We recommend that the court reject paragraph 2 in its entirety, and amend the rule to state that appointment of a parenting coordinator is appropriate only when the parents agree to the appointment or when the services of the parenting coordinator can be provided by the court with no more than *de minimis* cost to the parents.**

At the outset, we note our recognition that parenting coordinators can provide helpful services in some family court cases. Both Judges Swann and Duncan served on the Maricopa County Superior Court family bench, and we appreciate the crushing load that the calendar presents. The fact remains, however, that decisions concerning the rights of the parties must ultimately be made by the courts according to the powers granted them by statute. In cases in which the parties elect to employ an alternative dispute resolution mechanism (such as parenting coordinators), they should of course be free to do so. But when the parties do not agree to alternative dispute resolution, an order that forces them to pay a private provider as a replacement for, or precondition to, access to the courts presents a palpable threat to the Supreme Court's goal of providing access to justice for all. [1]

By way of background, it is important to note an existing clash between the statutory framework that governs family cases and segments of the culture of family law.

[1] Recent amendments to the Arizona Rules of Civil Procedure embody a strong preference for ADR before a trial is set. But the Civil Rules do not empower the courts to require civil litigants – even well-heeled civil litigants – to employ private mediators. *See* Ariz. R. Civ. P 16.1. Instead, the court retains the power to require the parties to engage in settlement discussions before a private mediator (if they choose) or a court-provided settlement conference officer. We think this approach is the correct one, and family court litigants should enjoy no less protection against compelled expenditures of money than civil litigants.

Though the court has broad discretion to decide the issues in family cases, there are only two essential decisions concerning children that it is empowered to decide: Under A.R.S. § 25-403 and 25-403.01, the court must assign legal decision-making authority. And under A.R.S. § 25-403.02, the court must either approve or fashion a parenting plan. The court's authority begins and ends with these two orders – a child of unmarried parents does not become the court's de facto ward. The court has power to enforce and modify these orders, but nothing in the statutory scheme transforms the court into a "super parent" with the authority, expertise or resources to micromanage parenting decisions. This statutory scheme makes sense – the court assigns legal rights among parents, and the parents make the decisions concerning their children. By restricting itself to the modest role created by statute, the court avoids exaggerating the difference between children with married parents and children with single parents.

Unfortunately, we have observed the emergence of a culture in family court in which this limited role of the court is often forgotten. Many parents and attorneys, and even some judges, take the view that any disagreement among parents concerning their children is suitable fodder for judicial intervention. This culture misapprehends the law and presents the courts with a task that their limited resources cannot handle. Again, the court allocates decision-making among the *parents* – it cannot resolve every issue upon which the parents disagree.

As the "super parent" view of family court has become more prevalent, so has the use of parenting coordinators. Family court judges are understandably overwhelmed by repeated requests to resolve disputes over day-to-day issues, and parenting coordinators are an attractive solution, at least for those who wish to pay hundreds of dollars per hour for such services.[2] Similarly, the court may recommend that the parties employ a parenting coordinator to serve as a consulting resource to help avoid conflict.

Yet many of the decisions that parenting coordinators are asked to make fall outside the statutory powers of the court. The question whether the 4th of July should be spent with a specific parent is an appropriate question relating to the drafting, interpretation or enforcement of a parenting plan. A question regarding religious training may raise legitimate issues concerning the allocation of legal decision-making authority. But disputes over whether a child should attend prom, dye her hair green, or the choice between karate instruction on Tuesdays and trumpet lessons on Thursdays are not appropriate subjects of judicial decisions. So how can the court delegate to private providers authority it does not have in the first instance? Rule 74 should not implicitly or explicitly authorize such an expansion of the judicial role.

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[2] In Maricopa County, the fees for parenting coordinators range from $150.00 per hour to $400.00 per hour. Such rates are beyond the means of most pro per litigants, and the means even of those with above-average incomes.

https://www.superiorcourt.maricopa.gov/SuperiorCourt/FamilyCourt/Rosters/BehavioralHealth/pickBhp.aspx?location=II

Instead, those parents unable to make joint decisions should be reminded that joint legal-decision-making may be in jeopardy, or the court may need to modify a parenting plan to conform to the best interests of a child. These are judicial decisions to be made based on evidence presented in court, and the bench should resist the temptation to farm such decisions out to quasi-judicial officers. Indeed, because A.R.S. § 25-403 *et seq.* require the court to make its own express findings of fact, it is often more efficient to avoid the expense of parenting coordinators and hear the evidence that will permit the required findings in the first instance.

To be sure, parents are free to employ private persons to serve as arbitrators of any dispute they choose. But it is not the proper role of courts to force parents to pay for *any* decisions – least of all those decisions the courts cannot legally make.

We therefore submit that if courts adhere to their limited statutory roles, the apparent need for parenting coordinators would be significantly reduced.

Whatever role the Supreme Court chooses to define for parenting coordinators, we strongly recommend that the court prohibit so-called *sua sponte* appointments of parenting coordinators.

The access-to-justice ramifications of *sua sponte* appointments are placed in sharp relief by the following standard provision, which appears frequently in parenting coordinator appointments in Maricopa County: [3]

> **IT IS FURTHER ORDERED** that before either party will be allowed to file any petitions regarding parenting time or enforcement of the Court's various parenting orders, the parties shall first consult with the Parenting Coordinator, unless there is an emergency related to the child's health, safety, and welfare. If the issue cannot be resolved with the help of the Parenting Coordinator, the party who wants to file the motion/petition shall file a separate certification that he or she has consulted with the Parenting Coordinator, the date the consultation was made, and the outcome of the consultation. Any motion/petition filed without this separate certification will be automatically denied.

[3] The quoted language was taken from the October 2, 2013 Minute Entry in FC2012-091034. Its substantial equivalent appears in many other such orders, and illustrates the conflict between culture and law discussed above.

Under this language, a litigant who cannot afford the sometimes hefty fees of the parenting coordinator she did not agree to employ has no access to the courts at all. This is the antithesis of access to justice.

The amendments proposed by the Workgroup in subsection F.1 attempt to mitigate the risk of denial of access to the courts by requiring that the court first determine that the parents "can afford" the services of the parenting coordinator. In our view, this well-intentioned amendment is inadequate. First, the standard -- whether a parent "can afford" a parenting coordinator – is too vague and subjective to permit consistent application or meaningful review. Second, the information that the court usually has available to it, while sufficient to assess a parent's basic financial condition, is usually insufficiently detailed to determine what the parent can truly "afford."[4] Third, we question whether the court has (or even should have) the power to determine what parents will spend based on its subjective impression of what they can afford. It would be unthinkable to order a pro per litigant to hire a certain lawyer the court thinks she can afford. On what basis, then, can the court order a litigant to hire a certain lawyer, psychologist or other parenting coordinator – let alone as a precondition of *access* to the courts?

The Supreme Judicial Court of Massachusetts recently answered this question in *Bower v. Bournay-Bower,* 469 Mass. 690, 707 (2014): "[A] judge may not require the parties to use the services of the parent coordinator if the order would require one or both parents to pay for the services without his or her consent." The court's holding could not be less ambiguous, and we think the Arizona Supreme Court should embrace it. The *Bower* court based its decision on Article 11 of the Massachusetts Declaration of Rights, which provides:

> Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.

Arizona does not have a similar constitutional provision. But we suggest that the provision captures the ethos of the Arizona courts, and that as a matter of principle and policy this Court should offer the citizens of Arizona no less than the guarantees of Article 11 in the exercise of its rulemaking function.

In addition to the state constitution, principles of due process and access to justice bore on the *Bower* court's concern with the scope of parenting coordinators' authority:

[4] When calculating child support, for example, the court obtains basic data to answer specifically-prescribed questions. The resulting award is often completely unrelated to the amount a parent can "afford," but is nonetheless a correct application of the guidelines.

> Here, the nature of the authority granted to the parent coordinator in the order of appointment, combined with the procedural requirements in the order, *including the limits on the parents' right to file an action in court*, and the limits on judicial review of the parent coordinator's decisions, raise significant due process concerns, implicating, among other rights, those guaranteed by art. 11 of the Massachusetts Declaration of Rights. Therefore, these due process concerns assist us in identifying the outer limits of a judge's inherent authority to refer parties to a parent coordinator.

Id. at 701 (emphasis added).

In many ways, the services of a parenting coordinator are akin to arbitration. Arizona has a system of compulsory arbitration in civil cases, but the parties are not required to pay for the arbitrator, and they enjoy an automatic right to *de novo* review in the Superior Court. We think that individuals faced with infringement on their fundamental constitutional right to parent should face no more financial burden, and no more restriction on their access to the courts, than civil litigants.

At the federal level, courts have been mindful of the burdens that even contractual arbitration can place upon litigants. In *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1469 (D.C. Cir. 1997), the plaintiff's employment contract provided for compulsory arbitration in the event of a dispute and required him to pay the arbitrator's fees, ranging from $500 to $1,000 per day. The court held "it is unacceptable to require Cole to pay arbitrators' fees, because such fees are unlike anything that he would have to pay to pursue his statutory claims in court." *Id*. at 484. The court reasoned that "[a]rbitration will occur in this case only because it has been mandated by the employer as a condition of employment. Absent this requirement, the employee would be free to pursue his claims in court without having to pay for the services of a judge. In such a circumstance—where arbitration has been imposed by the employer and occurs only at the option of the employer—arbitrators' fees should be borne solely by the employer." Id. at 1484-85.

Similarly, in *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 654 (6th Cir. 2003), plaintiff was required to sign an agreement as part of the application process for her job requiring arbitration in all disputes arising out of her employment. The agreement required each party to pay one-half of the costs of arbitration following the issuance of an arbitration award, including the hourly fees and expenses of the arbitrator. The Sixth Circuit held that if "the splitting or sharing of the costs of the arbitral forum under a particular arbitration agreement effectively prevents the vindication of a plaintiff's statutory rights, those rights cannot be subject to mandatory arbitration under that agreement." *Id*. at 658.

Here, the scheme in ARFLP 74 that permits courts to impose the costs of private service providers on parents is similarly unacceptable. The parties would otherwise be free to pursue their claims in court without having to pay for the services of a judge, and

parenting coordinator's fees are, to many, so prohibitively expensive that they effectively prevent the vindication of a parent's right to the care, custody and control of his or her children. *See Christy A. v. Arizona Dept. of Econ. Sec*., 217 Ariz. 299, 306, ¶ 22 (App. 2007) ("[p]arents have a fundamental interest in the care, custody, and control of their children, which interest is protected by the due process clause . . . .").[5]

For these reasons, we recommend that the Court amend Rule 74 to prohibit *sua sponte* appointment of parenting coordinators.

Subsection C: So long as the parents agree to the *appointment* of a parenting coordinator, we support the notion that the court may have a role to play in selecting the individual provider when the parties cannot agree.

Subsection D: No Comment.

Subsection E: The parties should be able to agree to discharge a parenting coordinator.

Subsection F: No Comment to paragraph 1. Paragraph 2 should be deleted for the reasons discussed above. If the parties agree to the appointment of a parenting coordinator, paragraph 3 becomes unnecessary.

Subsection G: No Comment.

Subsection H: No Comment.

Subsection I: No Comment.

Subsection J: Appears missing.

Subsection K: This provision would present a grave risk of unwarranted expense if *sua sponte* appointments were allowed. So long as the appointment is voluntary, we offer no comment on the proposed change.

Subsection L: This provision, read literally, would exclude the parenting coordinator's reports from the record, and thereby defeat appellate review. The provision should be clarified to ensure that the case record available for appeal is complete.

Subsection M: No Comment.

[5] We note that in Pima and Pinal Counties, parenting coordination services are sometimes provided by the court at a nominal fee to the parties. We endorse this model. But when public resources are inadequate to provide the services, the parties should not be forced to pay private providers rates equivalent to those paid to private attorneys.

Subsection N: We propose that any action by the court on a parenting coordinator's report that substantially impacts existing court orders, or denies a request for a substantial change in existing court orders, should trigger a mandatory hearing upon request by either party.

Subsection O: No Comment.

Subsection P: We recommend the use of the term "civil immunity" rather than "immunity."

Subsection Q: No Comment.

Subsection R: No Comment.

The Workgroup's comment should be amended to remove references to the court's gatekeeping function regarding complaints against licensed psychologists in view of recent legislative amendments to A.R.S. § 32-2081(B).

RESPECTFULLY SUBMITTED
April 27, 2015

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Hon. Peter B. Swann

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Hon. Sally Schneider Duncan

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William G. Klain, Esq.