Keith Berkshire, 024107
BERKSHIRE LAW OFFICE, PLLC
5050 N. 40th Street, Suite 340
Phoenix, AZ 85018
Office: (602) 396-7668
Fax: (602) 396-7697
Keith@BerkshireLawOffice.com

IN THE SUPREME COURT OF THE STATE OF ARIZONA

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

The changes encompassed in the Amended Petition are a significant departure from the prior language, and also drastically differ from other areas of law such as special masters.[1]

[1] I also do believe that the idea of allowing PCs only by stipulation is a bad one, but understand the constitutional arguments made by Judge Swann. The issue is the interplay between that and the lack of court time in counties like Maricopa County. If a party cannot get a PC appointed to help, and it takes 6 months to get into an enforcement hearing, there are no adequate remedies available in high conflict cases.

Parenting Coordinators are now un-appealable arbitrators

The main issue that I have with the changes to the PC Rule is that it makes PC's into arbitrators, with no judicial oversight on their orders. While most of the scope of their powers may seem small, it still gives them more power without review than is currently in place. And given that most of the public comments on the PC rule relate to allegations of PC abuse, taking away the judicial review of PC's doesn't seem to comply with one of the purposes of amending the rule.

As an example only, the new PC scope can include the choice of schools. In *Jordan v. Rea*, 221 Ariz. 581 (App. 2009), the Court of Appeals found that in choosing schools, the application of the A.R.S. § 24-403(A) factors apply. This means that a PC would have the ability to apply the 403(A) factors with no oversight after making a decision. This allows the PC to make a type of custody order without oversight. This exact type of situation has been held as error in cases like *Nold v. Nold*, 232 Ariz. 270 (App. 2013), *Christopher K v. Markaa S.*, 223 Ariz. 297 (App. 2013) and *DePasquale v. Superior Court*, 181 Ariz. 333, 336 (App. 1995) where the Court adopted expert reports on parenting issues without other findings.

While binding arbitration may seem like a way to ease court dockets, there is little precedent for making any area of family law subject to binding arbitration. Arizona Courts have always taken a position of requiring approval to the trial court in family law matters. The Arizona Supreme Court in *Wick*, and the Court of Appeals in *Sharp*, both held that parties have the right to dispute all resolutions in family law matters, including those done by consent. *Wick v. Wick*, 107 Ariz. 382, 384 (1971); *Sharp v. Sharp*, 179 Ariz. 205, 211 (App. 1994). In both cases, a party challenged a consensual marital settlement agreement. And in both cases

the appellate court held that the trial court was required to determine if the agreements were "not unfair" before entry of the agreements as orders of the court. *Wick*, 107 Ariz. at 385; *Sharp*, 179 Ariz. at 210.

One of the most prestigious national family-law organizations, the American Academy of Matrimonial Lawyers, also supports appealable arbitration. Indeed, Section 123(9) of their model arbitration act provides that if "the parties contract in an agreement to arbitrate for judicial review of errors of law in the award, the court shall vacate the award if the arbitrators have committed an error of law prejudicing a party's rights." American Academy of Matrimonial Lawyers, *Model Family Law Arbitration Act* § 123(9) (2005).

The ability to arbitrate with substantive judicial review is in harmony with Arizona's policy outlined in *Wick* and *Sharp* for judicial involvement in determining any resolution's fairness. The *Model Family Law Arbitration Act* further notes that any decision related to custody or support should be appealable even without an agreement for appellate rights. Section 123(7) of the Act provides that "the court determines that the award for child support or child custody is not in the best interest of the child. The burden of proof at a hearing under this subdivision is on the party seeking to vacate the arbitrator's award."

Conclusion

I believe that the Court should continue to allow hearings, and judicial oversight of all PC rulings, and amend the rule accordingly.

Dated this 12th day of June 2015.

BERKSHIRE LAW OFFICE, PLLC

By /s/ Keith Berkshire
Keith Berkshire