Terry B Decker
5120 E Hampton Ave, #1023
Mesa, AZ 85206
t.manndu@gmail.com
480 352-5294

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

Terry B Decker submits this comment to R-15-0006 May 20, 2015 Amendment.

Scope of Comment

The commenter uses the format presented by Appeals Court Judge Peter Swann, Judge Sally Duncan, and William Klain, Esq, with thanks.

This comment supplies the actual verbiage with with the purpose of saving the committee the considerable effort involved in crafting legalese that does the job and no more with a minimum of loopholes. This comment is limited to those few but poignant issues that raise

1. access to justice,
2. judicial oversight,
3. disconnect between the court, law enforcement, and professional oversight boards,
4. due process concerns,
5. the explicit threats commonly made by the most influential of PCs under which the parties are continually taxed. These PCs are certain of their invincibility within the family court culture which Judge Swann so adroitly describes in general terms. One reason is that they are the greatest thread of continuity that exists within the family court. All of

the judges cycle out of the family court. These PCs do not perceive any oversight or limitations on their conduct.

under both the current and proposed rules. It is recognized 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 and ensure that all of the protections accorded to the citizens of Arizona by statute and professional oversight entities are insured.

The most poignant, but not the only, shortfall is the lack of criminal or conduct constraints of any kind for PCs. The court has unknowingly created a womb where gathered are a host that delights in committing the most pernicious and malignant acts. The PCs know this and it is commonplace for them to threaten the parents at the beginning and throughout their tenure.

A concern exists that the parents are going feel forced to sign away their rights of appeal when they agree to a family counselor(PC), without knowing that they are doing so. The "gatekeeping function" that Judge Swann refers to with the legislative amendment is still in effect literally with the Board of Behavioral Health and effectively with the Board of Psychological Examiners and law enforcement even after the amending legislation goes into effect. The culture that Judge Swann speaks of is deeply imbedded and extends beyond the boundaries of the family court. Given this state of affairs it seems reasonable to think it incumbent upon the court to definitively correct the situation. The AFCC guidelines require "quasi-judicial immunity," not full immunity. So, again, there is a disparity in what constitutes full immunity between the community at large and that definition proposed by the committee. This issue will be addressed in full in that section.

For clarity, this comment tracks the May 20, 2015 proposed amendments to Rule 74 on a subsection-by-subsection basis.

Comments

Overall: The term Parenting Coordinator should be abolished and replaced with "Family Counselor." The term Parenting Coordinator is militant and precludes coverage by insurance. The conciliation representative on the committee, Judge Swann, and others in the committee have raised the issue of money. Judge Swann said the amount due from the parent should be de minimus. It seems that a worthwhile goal is to deescalate conflict in every way possible including the language of Rule 74. One goal, which Judge Barton and Judge Swann pointed out, and I agree with strongly, is to contrast a soft, therapeutic, and positive family counselor of Rule 74 with the sole alternative of the Court changing custodial rights and decision making roles. The form letter to the parents need to clearly communicate this.

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. I recommend that the court reject paragraph 3 in its entirety, and amend the rule to state, **"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. This agreement of the parents should not be construed to affect in any way the rights of the parents to due process or appeal."**

Judge Swann presents his concerns, partially, in the following, "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."

The primary role that the family counselor, FC, should have is the trained and therapeutic de-escalation of conflict in a number of ways that are an integral part of any social worker/psychotherapist tool kit. In instances where the parents cannot agree, the family counselor is empowered to make decisions that have a clear positive, therapeutic option. Where the FC cannot see a clear logical benefit for one party or the other he/she shall flip a coin or have a parent flip a coin and have the other parent call it. If the calling parent calls it correctly, that parent's choice is implemented. Otherwise the other parent's choice will prevail."

Judge Swann presents a part of a solution that bears on the above section, "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."

The following language should therefore be appended, "**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. This will be included in the form letter provided to both parents. All attorneys of the parents have a duty to provide this information to their clients.**"

Flipping a coin may seem very un-judicial but it has the benefit of eliminating the perception of bias by anyone. Further it has the deep psychological effect of tending to change the perspective of everyone involved in the process. This hopefully includes the perception of the parenting process by the parents. If this is achieved by only a small portion of the participants, the change is worth it, as there is no down side. It has the potential for being very effective at encouraging the parents to work harder at parenting.

Judge Swann asserts that family court often exaggerates the difference between children with married parents and those with single parents. We should strive to minimize that difference as it is not possible to eliminate it. See the following quotations.

Judge Swann states "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." Court appointees and their conduct constitutes a large component of the culture that clashes with statute. Judge Swann states, "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." The commenter asks the committee to craft Rule 74 modestly and with a purpose of helping the family. Any help for the family is by definition help for the children because as the famous anthropologist, Margaret Meade, asserted; along with every anthropologist of her time, that every culture in the history of mankind has the institution of family with the sole purpose of rearing and education of children.

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."

Subsection C: Item number 1 should be deleted in its entirety. Attorneys are not trained in family therapy or child psychology. A family counselor with training in that field has a tool kit for helping families in a constructive way that no attorney can bring to the families aid. They have no training in this field. It could be said they are trained to promote conflict. This is no abrogation of attorneys. The profession has an honored place in society. The perception of people is a significant thing. It seems the primary goal of everything in family law should be the diminution of conflict. No one seems to argue that conflict is destructive of the children in these families. Therefore the commenter prays that

Subsection D: Number 1 should be deleted. Attorneys are not trained in family dynamics, therapy, and child psychology. By definition attorneys are trained for conflict and perceive and are perceived that way. In the same way that the words "suppress conflict" was seen as militant, the inclusion of attorneys as a family counselor, conducting family

therapy, educating parents in dealing with their demons is contraindicated. They are not trained to provide a therapeutic intervention. In addition their inclusion may exclude the use of health insurance by the parents. This is a very big financial issue for a great number of families. We all want to get the best results for children coming out of this system as we can. That cannot be done by attorneys in the case of FCs.

D.6 This should be removed in its entirety and replaced with "**a person agreed upon by the parties as a third party decider of issues that cannot be agreed upon by the parties.**"

Subsection E.5 Discharge: Second sentence amended to:

If just one parent wishes to discharge the parenting coordinator, that parent must file a motion with the court that establishes good cause for the discharge. The court will grant an expedited hearing for said purpose.

Last sentence deleted.

Subsection F: No comment

Subsection G: No Comment.

Subsection H: A paragraph 4 should be added as follows:

> **4. All conferences shall be recorded. All interactions with children shall be videotaped. Said recording copies shall be shared with each parent at the end of sessions. Failure to do so shall result in a fine of $2,000, half payable to the court, the other half divided equally between the parents per occurrence.**

There is no need for the court or any other party to rely on testimony of various people when today's technology makes it unnecessary. There will be a minimum of court time and attorney's fees charged when the event can be witnessed again by all. The mere presence of such documentation will save the court a great deal of time and effort, as well as the parties. It is a protection for an ethical FC. Any complaints to the board can be made short and certain shrift of, and, again, false complaints will be all but eliminated.

Subsection I: Subsection H.4 will vindicate any recommendation made by an FC. All uncertainty shall thereby be set aside and the witnessing of the events in question will make evaluation by third parties more sure and time efficient. Issues that need be addressed will be confined to whether the actions by whomever are proper and not determining what the actions were.

Subsection J: paragraph 3 should be added as follows:

3. Any decision or communication by the FC to the court must be filed by the court. If the contents are of such nature that public revelation will be harmful, the filing can be sealed.

Subsection K: The following should be added to the first paragraph.

No *sua ponte* appointments of family counselors by the court are permitted.

Judge Swann states, "For these reasons, we recommend that the Court amend Rule 74 to prohibit *sua sponte* appointment of parenting coordinators" and "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: The statute of limitations should be removed. There should be no statute of limitations arbitrarily applied to a family counselor (PC) who exceeds his/her authority. Certainly ten business days appears to make it virtually impossible for Pro Per litigants to file an objection, especially given that mail time is involved and, and in addition, mail may not be read immediately or a person may be on assignment for work or on vacation, etc. This could be seen as actively denying the right to appeal or making an appeal substantially more difficult as it would now add consideration of the viability of the Rule 74 constraints on access to the court.

Subsection M: 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 as referred to by Judge Swann.

The following wording should be added, "**A mandatory expedited hearing will be triggered at the request of either party when malfeasance has been claimed on the part of the FC.**"

Subsection O: This should be removed in its entirety. It should be replaced with:

"**The family counselor has civil immunity only as it relates to the duties consistent with the appointment order. There is no immunity as it relates to violations of criminal or ethics violations. The court will report any possible violations of law or ethics by the family counselor as required by 17A A.R.S. Sup.Ct.Rules, Rule 81, Code of Jud.Conduct, Rule 2.15 including Comments 1 and 2. The Court will make it clear to the entity governing the family counselor that it expects a thorough investigation regardless of the relationship with the court or the family counselor. Criminal violations shall be reported to the county attorney or appropriate authority governing prosecution of criminal matters with clear instructions to not consider the judicial relationship in their response to the matter.**"

The culture of family court referred to by Judge Schwann extends far beyond the family court environs. For example there is no chance that any action will be taken, even for the

grossest of violations, by the AZ Board of Psychological Examiners without Judicial intervention to disrupt the culture that works to prevent it. There is no chance that the county attorney will pursue or look at a case against a court appointed person. This is history and fact. It seems incumbent on the Court to actively work to prevent the disabling of oversight agencies and associated harm to society that is being inflicted in its name. There are examples in previous comments by this commentor.

Judge Schwann recommended "We recommend the use of the term "civil immunity" rather than "immunity."" This should not extend to civil liability born of criminal acts or professional misconduct.

In summary, the interpretations by law enforcement and governing bodies regarding the term "judicial immunity" contradicts the definition as stated by Judge Barton in committee. These interpretations disable any oversight of any court appointees even after the amendments to A.R.S. § 32-2081(B) referred to by Judge Swann. It should be noted that the cause and creator of the "judicial gateway" function that was done away with by the aforesaid amendment was Dr. Wienstock, a PC.

It appears that the AZ Board of Behavioral Health is still under the stricture of "judicial gatekeeping." One only has to visit their website to confirm this. One could easily think that it is incumbent upon the family court to actively work to redress this oversight in the interim before the legislature corrects this oversight. This can be done with appropriate wording in Rule 74.

Judge Swann stated, "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)."

To be clear: There was no oversight **prior** to inception of the "court's gatekeeping function" other than to require the judicial appointee to make some copies and show up for a gratuitous hearing. If a "high conflict" case allows the PC to lie to the court then there are no constraints upon a PC. PCs are appointed specifically for high conflict cases. See previous comments by author. The "family court culture" referred to by Judge Swann extends far beyond the bounds of the family court to all supervisory agencies, including law enforcement. It is assumed that was done by the agents of the court without the court's permission. This is exemplary of the damage that can be done to society by those functioning without over sight of the court or clear boundaries levied upon them.

Effective date: This should be changed to:

Effective date. This rule applies to any appointment or reappointment of a parenting coordinator that occurs on or after the effective date which should be as early as possible given the damage being done to children and families, the due process issues of current practice, current lack of oversight, appeals issues, and behavioral concerns by current practice.

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).

Forms:

The form letter to the parents falsely represents the FC as a cheaper alternative. It may be if Rule 74 is amended to cause that to be true. In any event the final version of Rule 74 needs to be realized before updating of the associated forms can be accomplished.