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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of PETITION TO AMEND RULE 72 OF THE RULES OF FAMILY LAW PROCEDURE	Supreme Court No. R-16-0037 REPLY TO COMMENT TO PETITION TO AMEND RULE 72 OF THE RULES OF FAMILY LAW PROCEDURE

This is the reply to the comment submitted by the attorney group to the Petition to Amend Rule 72 of the Arizona Rules of Family Procedure.

There are important areas of agreement between Petitioners and the authors of the comment:

- The commenters support the goal of the petition to eliminate the sua sponte appointment of special masters when neither party is amenable to their use.
- Petitioners acknowledge that there are cases in which the parties do not receive the time they desire to present evidence.

There are three main areas of disagreement between the Petitioners and the comment.

- Petitioners do not agree that the use of a special master over the objection of one of the parties in a family proceeding is appropriate. We maintain that such an appointment is inconsistent with the goal of the Arizona courts to facilitate access to justice, and submit that the courts should lack the power to require parties to spend money on

private service providers to the exclusion of their right to public justice.

- Petitioners do not agree that appointment of special masters over the objection of any party can be justified by systemic concerns over the amount of time available for evidentiary presentation. Any perception that sufficient time is lacking should be addressed by the further development of differential case management procedures, and not by the erosion of the parties' right to an inexpensive determination of issues by a duly qualified judicial officer.
- Petitioners do not agree that special masters should be permitted under any circumstances to handle issues related to legal decision making or parenting time. Such an expansion of the power of special masters would constitute an end run around the recent amendments to Rule 74, and contravene the settled legal principle that such determinations must be made independently by the family court. *See Nold v. Nold*, 232 Ariz. 270, 273-74 ¶ 14, 304 P.3d 1093, 1096-97 ¶ 14 (App. 2013).

Some key facts should help to place the main areas of disagreement in perspective.

First, we note that the cases in which special masters are even potentially economically justifiable represent a tiny percentage of the body of family law cases being handled by the superior courts in the State of Arizona. Indeed, the vast majority of litigants in family court are self-represented. For example, in Maricopa County in fiscal year 2015, both parties were unrepresented in 82.9 percent of the cases. In that same year, one person had representation in only 12.3 percent of the cases. So in Maricopa County (by far the largest consumer of special masters' services), only 4.9 percent of the cases even had dual representation. We submit that those unable to afford an attorney are usually unable to bear the cost of a special master, and certainly should not be compelled to do so. And of those few cases in which both parties have lawyers, only in a small fraction will the parties have the additional resources to spend on private service providers without serious impairment of their already-strained economic resources. We are concerned that the approach advocated by the comment would create a rule designed for a tiny *minority* of cases, the application of which in the vast *majority* of cases would impoverish litigants while denying them their right of access to public justice.

Second, Petitioners are sensitive to the comment's concern that some cases are not afforded adequate trial time. In support of their concern, the

group cites *Volk v. Brame*, 235 Ariz. 462, 333 P.3d 789 (App. 2014) (a decision authored by one of the Petitioners).[1] Though *Volk* represents an extreme example of a case in which the time for evidentiary hearing was restricted, and underscores the importance of the due process implications of overly-aggressive time limits, the court should not be left with the impression that the facts in *Volk* represent a norm in any superior court.[2]

A superior court judge in Maricopa County handles the cases that cannot be resolved by consent or on a commissioner's calendar. While not intended to be exclusive, here is a brief list of recent cases where a day or

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[1] In *Volk,* the trial court allotted fifteen minutes for a child support modification hearing at which Father's self-employment income amount was in dispute. 235 Ariz. at 465, ¶ 4. Father raised due process concerns over the time limitation and the court prohibited the parties from testifying, relying exclusively on avowals from counsel and disputed documents. *Id.* at 465–66, ¶¶ 9–11, 469 n. 6. The Court of Appeals held that "a court abuses its discretion when it adheres to rigid time limits that do not permit adequate opportunity for efficient direct testimony and cross-examination." *Id.* at 464, ¶ 1. The court went on to hold that "when the resolution of an issue before the court requires an assessment of credibility, the court must afford the parties an opportunity to present sworn oral testimony and may not rely solely on avowals of counsel." *Id.*

[2] To date, the Court of Appeals has decided twelve *Volk* claims. In seven of those cases, the Court of Appeals rejected the issue on appeal and affirmed the trial court's exercise of its discretion. *See, Erika v. Department of Child Safety,* 239 Ariz. 205 (Ct. App. 2016); *Bastian v. Endreseu,* 2015 WL 7777630 (Ct. App. Dec. 3, 2015); *Shacknai v. Shacknai,* 2015 WL 3767157 (Ct. App. Jan. 16, 2015); *Okubena v. Montag,* 2016 WL 911392 (Ct. App. Mar. 10, 2016); *Eaton v. Eaton,* 2015 WL 8167230 (Ct. App. Dec. 8, 2015); *Peart v. Gonzalez,* 2015 WL 6502702 (Ct. App. Oct. 28, 2015); *Michael v. Michael,* 2015 WL 1119708 (Ct. App. Mar. 12, 2015).

In five cases, the Court of Appeals remanded the case in light of *Volk. See, Murray v. Murray,* 249 Ariz. 174 (Ct. App. 2016) (in making best interest findings for children, court must consider evidence not argument); *Roth v. Meek,* 2014 WL 7172223 (Ct. App. Dec., 16, 2014); *Mortensen v. Mortensen,* 2016 WL321196 (Ct. App. Jun. 9, 2016) (error not to grant continuance and force party to use affidavit instead of testimony); *Krenzen v. Katz,* 2015 WL 631453 (Ct. App. Feb. 12, 2015) (trial court's time restriction impaired party's ability to respond to two issues); *Thompson v. Vangal,* 2015 WL 8168318 (Ct. App. Dec. 8, 2015). In three of the five cases that warranted reversal the trial court action preceded the August 28, 2014 opinion date of *Volk. See, Mortensen* (trial court ruling November 27, 2013), *Krenzen* (hearing November 4, 2013), and *Roth* (ruling July 11, 2013). Given the thousands of family law cases resolved after the *Volk* decision, it can hardly be said that the two remaining cases represent that the trial bench has ignored the *Volk* decision resulting in "multiple cases being remanded back to the trial court."

more was given to litigants to present their case. See, *Elio v. Flanagan*, FC2010-051045 (4 days, dates not available as case is sealed); *Noble v. Noble*, FC2013-001272 (3 days 6/6/, 6/8, 6/9/2016); *Williams v. Williams*, FN2013-051684 (6/27, 6/28, 6/29/2016); *Herter v. Herter,* FC2013-092298 (3 days 2/26, 2/29, 3/1/16); *Prouty v. Hughes and Prouty v. Kafka,* FC2012-053300 and FC2012-094898 (3 days 1/12, 1/13, 1/15/2016); *Levine v. Levine,* FC2014-002546 (3 days 3/28, 3/29, 3/30/16); *Bowe v. Vogel*, FC2014-001952 (3 days 4/19, 4/20, 4/29/16); *Tani v. Tani*, FC2012-094832 (2 days 9/28, 9/29/15), *Kadiyala v. Vemulapalli*, FC2014-095577 (2 days 10/7, 11/9/15); *Askari v. Askari,* FC2013-004222 (2 days 1/6, 1/7/2016); *Perez v. Perez*, FC2013-007512 (2 days 1/6, 2/6/16); *Broom v. Rogers*, FC2014-094378 (1 day 4/28/16)*; Hermling v Hermling*, FC2014-006516 (1 day 5/23/2016); *Lang v. Lang*, FC2013-090787 (1 day 2/11/16); *Edmonson v. Bradshaw,* FC2001-009100 (1 day 7/29/15); *Whipple v. Mattice*, FC2014-052405 (1 day 8/17/15); *O'Connor v. O'Connor*, FC2012-093245 (1 day 4/25/16); *Baldwin v. Baldwin,* FN2015-002466 (1 day 1/5/16); *Andrus v. Andrus*, FC2014-000420 (1 day 12/15/15); *Grossman v. Grossman*, FC2012-003376 (1 day 12/8/15); *McIntyre v. McIntyre*, FC2014-001316 (1 day 7/15/15); Zech v. Zech, FN2014-000888 (1 day 7/9/15); *Monte v. Bertsch*, DR2000-000598 (1 day, 6/1/15); *Schreiner v. Schreiner*, FC2014-004798 (1 day 3/21/16); *Engstrom v. McCarthy*, FC2014-053640 (1 day 6/27/16); *Gerdes v. Branstrator*, FC2014-054126 (1 day 4/1/16); *Madoski v. Madoski* FC2014-091961 (1 day 09/16/15); *Jackman v. McCann,* FC2014-096241 (1 day, 01/07/16); *Wiscombe v. Wiscombe*, FC2015-091785 (1 day 02/02/16); *Flynn v. Brown,* FC2010-092975 (1 day 03/01/16); and *Smith v. Smith,* FC2012-090788 (1 day 03/07/16); *Hill v. Hill,* FN2012-052777 (1 day 1/26/2016); *Rosaci v. Rosaci,* FC2014-055022 (1 day 1/19/2016); *Levine v. Levine,* FC2014-055022 (1 day 1/14/2016).

Petitioners do not disagree with the group's perception that family court judges face a heavy workload. For example in May 2016, the Maricopa County Superior Court received 5,018 new petitions (2,937 new filings, 2081 post-degree petitions). Yet, with sound management practices and controlling the time on the courts' calendar, the family department was able to meet this Court's time standards in nearly every category. (See exhibit No. 1) Though Petitioners support the development of a differentiated case management approach that would allow even more time for presentation of evidence in cases that require it, we disagree with group's

premise that time constraints can or should be addressed by the appointment of special masters in cases where one party objects.

Rule 72 and Rule 74

Petitioners disagree with the group that special masters can be appointed to deal with Legal Decision Making and Parenting Time issues. A.R.S. § 25–403.B explicitly requires that "the court shall make specific findings on the record about all relevant factors and the reasons for which the decision is in the best interests of the child." The rationale for why this requirement exists is not only to aid an appellate court, but also to "aid[] all parties and the family court in determining the best interests of the child or children both currently and in the future." *Reid v. Reid*, 222 Ariz. 204, 209, 213 P.3d 353, 358 (App. 2009). As cited in the Petition to Amend Rule 72, this obligation requires "the family court ... to independently weigh the evidence in determining the children's best interests." *Nold v. Nold*, 232 Ariz. 270, 273-74 ¶ 14, 304 P.3d 1093, 1096-97 ¶ 14 (App. 2013). The Court in *Nold* held

> The family court 'can neither delegate a judicial decision to an expert witness nor abdicate its responsibility to exercise independent judgment. The best interests of the child . . . are for the [family] court alone to decide.'

Nold; supra; citing DePasquale v. Superior Court (Thrasher), 181 Ariz. 333, 336, 890 P.2d 628, 631 (App.1995).

If the trial court cannot abdicate its responsibility to exercise independent judgment regarding parenting time and legal decision making, it logically follows that a referral of those duties to a special master is not authorized even by stipulation. This Court in amending Rule 74 implicitly recognized that such responsibility cannot be referred to a non-judicial officer by stipulation. See Rule 74.h, Ariz.R.Fam.Pro. (prohibiting a parenting coordinator from addressing legal decision making or substantially changing parenting time).

To avoid the conflict with the statute, the comment proposes that after a special master rules on issues of parenting time and legal decision making, that the trial court shall review those findings *de novo*. Such a procedure would simply make the special master hearing a costly dry run for the main event before the trial court. As the *Volk* court noted, to make the best interest determination, the trial court may not simply rely on affidavits. To independently assess the credibility of the evidence regarding the best interest of the children, the trial court assesses the credibility of each

witness. This can be done only by presenting the evidence to the trial court in a hearing. A referral to a special master would only expand the cost of litigation; it would *lengthen* the time to resolution without lessening the burden on the family court judge.

One might ask why Petitioners take this position in the face of the long history of Rule 53 in the civil arena in federal and state courts. The answer is clear. Family cases are unlike civil cases in that there is no right to a jury – most determinations in family court go to ultimate issues in the case. Though federal courts do not handle any family law matters, the federal courts of appeal have held that substitution of a special master for the court on ultimate issues is impermissible when even one party objects. *See In re Bituminous Coal Operators' Ass'n, Inc.*, 949 F.2d 1165, 1169 (D.C. Cir. 1991) (R.B. Ginsburg, J.) ("it is the function of the district judge, in a non-jury civil case, to decide dispositive issues of fact and law genuinely disputed by the parties. The judge may not impose on the parties, over the objection of at least one of them, a magistrate or master as "a surrogate judge" to try the controversy and determine liability."); *Stauble v. Warrob, Inc.*, 977 F.2d 690, 691 (1st Cir. 1992) ("referring fundamental issues of liability to a master for adjudication, over objection, is impermissible."). The functions that the comment would seek to have masters perform over objection are closely analogous to those prohibited in federal courts.

Respectfully submitted this 4th day of August, 2016.

/s/ Janet E. Barton, for

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/s/ Janet E. Barton, for

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Exhibit 1

SUPERIOR COURT OF ARIZONA IN MARICOPA COUNTY

Age of Terminated Family Court Cases vs. Standards

	May 2016	April 2016	March 2016	Superior Court Goals
PRE Decree Cases Terminated	From the date of filing to the date of disposition by entry of judgment/decree or order.			
within 6 months (180 days)	**77.4%**	74.4%	74.2%	75% [A]
within 9 months (270 days)	**91.2%**	89.9%	89.7%	90% [A]
within 12 months (365 days)	**96.2%**	95.4%	95.2%	98% [A]
POST Decree Petitions Terminated	From the date of filing a post-decree petition to the date of disposition by entry of judgment or order.			
within 6 months (180 days)	**77.5%**	78.1%	77.9%	50% [B]
within 9 months (270 days)	**88.9%**	91.1%	90.0%	90% [B]
within 12 months (365 days)	**95.5%**	95.9%	95.4%	98% [B]
Protection Orders Terminated	From the date the petition for protective order is filed to the date the protective order is issued or denied.			
within 1 day	**80.0%**	94.9%	88.1%	98% [B]
within 10 days	**82.8%**	98.9%	90.4%	90% [B]
within 30 days	**84.1%**	99.8%	91.4%	98% [B]

[A] Arizona Supreme Court (Trial Court) Time Standards for family case processing as of Nov 5, 2014.

[B] Time Standards provisionally approved by Committee on Arizona Case Processing Standards.