

1 Honorable Peter B. Swann
2 Judge, Arizona Court of Appeals
3 1501 W. Washington St.
4 Phoenix, AZ 85007

5 Honorable Paul J. McMurdie
6 Family Court Presiding Judge
7 Superior Court of Arizona, Maricopa County
8 201 W. Jefferson St.
9 Phoenix, AZ 85003
10 (602) 372-0765

11 IN THE SUPREME COURT OF THE STATE OF ARIZONA

12
13 In the Matter of) Supreme Court No. R-16-____
14)
15 PETITION TO AMEND RULE 72 OF) PETITION TO AMEND RULE 72
16 THE RULES OF FAMILY LAW) OF THE RULES OF FAMILY LAW
17 PROCEDURE) PROCEDURE
18) REQUEST FOR PERMISSION TO
19) FILE THE PETITION OUTSIDE
20) THE RULE 28 TIMELINE

21 Pursuant to Rule 28, Rules of the Supreme Court, Peter Swann, Judge of
22 the Arizona Court of Appeals and Paul McMurdie, the Presiding Judge of the
23 Family Court of the Superior Court of Arizona in Maricopa County respectfully
24 petitions this Court to adopt the attached proposed amendment to Rule 72 of the
25 Rules of Family Law Procedure. Petitioners request permission to file the petition
26 outside the Rule 28 timelines to allow the Court to consider this proposal at the
27 August 2016 Rules Agenda.

28 Rule 72 of the Rules of Family Law Procedure allows the appointment of
family law masters to assist the court in resolving issues relating to the dissolution

1 of marriages, including post-decree matters. The compensation of the family law
2 master is allocated to the parties. The petitioners’ proposed amendments to the
3 rule removes the ability of a trial court on its own motion to appoint a family law
4 master without the agreement of the parties. Further, the amendment clarifies that
5 the court may not appoint a family law master to perform the services of a
6 parenting coordinator that are defined in Ariz. R. Fam. L.P. 74. Finally, the
7 amendment clarifies that the court may not delegate to a family law master the
8 court’s judicial authority to make decisions concerning legal decision making or
9 parenting time.

10 Currently, Rule 72(A) allows for the appointment of a family law master
11 either upon stipulation and application of the parties or upon the court’s own
12 motion. If the court acts on its own to appoint a family law master—even in
13 situations where the parties do not wish to have one—it is still the parties that are
14 responsible for the compensation of the family law master. By rule, family law
15 masters must be attorneys or other professionals with specific education,
16 experience, and special expertise. The costs to the parties for a family law master
17 can be high and impose a significant economic burden upon the parties at a time
18 when parties face concurrent financial stress related to the dissolution of marriage
19 and division of assets. Parties that cannot afford or do not wish to compensate a
20 family law master should be able to rely upon the court to address issues regarding
21 their dissolution or post-decree matters without incurring additional expense. The
22 proposed amendment to Rule 72(A) would require agreement by the parties—
23 either through written stipulation or oral agreement on the record in open court—
24 before the appointment of a family law master. This amendment is consistent with
25 recent modifications to Rule 74 that likewise prohibited a court from imposing
26 parenting coordinator fees on a party without their consent.

27 Additionally, the proposed amendment to Rule 72(B) clarifies that the court
28 may not appoint a family law master to perform the duties of a parenting

1 coordinator set forth in Ariz. R. Fam. L.P. 74. A court-appointed parenting
2 coordinator has a unique and specific role in cases involving children. The role of
3 the parenting coordinator is to assist with the implementation of court orders,
4 clarify, modify, and enforce any temporary or permanent legal decision making
5 or parenting time orders, and resolve any day-to-day issues experienced by the
6 parents. Ariz. R. Fam. L.P. 74(E). The parenting coordinator observes and
7 interviews families, usually without counsel present, mediates between the
8 parties, and identifies parenting issues that may be detrimental to the welfare of a
9 child or children and reports those concerns in writing to the parties and the court.
10 Such a role is inconsistent and incompatible with a family law master who
11 performs a more adjudicative role: holding hearings, receiving evidence, taking
12 the testimony of witnesses and making recommendations to the court on how to
13 rule on certain issues in dispute. Ariz. R. Fam. L.P. 72(B).

14 Finally, the proposed amendment to Rule 72(B) and (G) clarifies that the
15 court may not direct a family law master to make decisions or recommendations
16 concerning legal decision making or parenting time. The court itself has the
17 obligation to make specific statutory findings under A.R.S. §25-403 as to the best
18 interests of the child in making these decisions. In *Nold v. Nold*, 232 Ariz. 270,
19 304 P.3d 1093, (App. 2013), the family court relied upon a custody evaluator’s
20 report to determine legal decision making and parenting time and made no
21 findings of its own regarding the relevant statutory factors required by A.R.S. §25-
22 403. The Court of Appeals reversed, holding that:

23 the family court delegated its obligation to independently weigh the
24 evidence in determining the children's best interests to the evaluator.
25 *See DePasquale v. Superior Court (Thrasher)*, 181 Ariz. 333, 336, 890
26 P.2d 628, 631 (App.1995). The family court “can neither delegate a
27 judicial decision to an expert witness nor abdicate its responsibility to
28 exercise independent judgment. The best interests of the child ... are
for the [family] court alone to decide.” *Id.* By using the report as the
baseline for custody, the family court delegated its judicial decision to

1 the evaluator, abdicated its responsibility to decide the best interests of
2 the children, and therefore abused its discretion.

3 *Nold at 273, 1096.*

4 It is the court that is required to determine legal decision-making and
5 parenting time. A.R.S. 25-403(A). In contested cases, the court is further required
6 to make its own specific findings on the record regarding the relevant factors and
7 the reasons for which the court's decision is in the best interest of the child. To
8 delegate these determinations to a family law master abdicates the court's judicial
9 responsibility to make these decisions.

10 For the foregoing reasons, the Petitioners respectfully request this Court
11 amend Rule 72 of the Rules of Family Law Procedure as detailed in Exhibit A to
12 require the parties agreement prior to the appointment of a family law master and
13 to clarify that family law masters may not perform the duties of parenting
14 coordinators or make decisions or recommendations regarding legal decision
15 making or parenting time.

16 Respectfully submitted this 18th day of May, 2016.

17 /s/ Paul J. McMurdie

18 Hon. Paul J. McMurdie
19 Family Court Presiding Judge
20 Superior Court of Arizona, Maricopa County

21 /s/ Peter B. Swann

22 Hon. Peter B. Swann
23 Arizona Court of Appeals

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27 Electronic copy filed with
28 the Clerk of the Supreme
Court of Arizona this 18th

day of May, 2016.

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ATTACHMENT

(new language is underlined and deletions are ~~struck through~~)

Rules of Family Law Procedure

Rule 72. Family Law Master.

A. Appointment and Compensation. Upon written stipulation by the parties and application by the parties, or on the court's own motion or oral agreement on the record in open court, the court may appoint a family law master who is an attorney or other professional with education, experience, and special expertise regarding the particular issues to be referred to the master. The compensation to be allowed to a master shall be fixed by the court. The parties may stipulate to a particular family law master and the amount of compensation, but the court must approve the family law master and compensation, and the court shall review the qualifications of the family law master prior to appointment. Compensation of the family law master shall be allocated by the court and shall be treated as a taxable cost.

B. Powers. The order of reference appointing a family law master shall specify the particular issues referred to the family law master and shall fix the time and place for beginning and closing the hearings and for filing the master's report. An appointment under this rule may not direct a master to perform services within the scope of Rule 74 or otherwise make decisions or recommendations concerning legal decision making or parenting time. Other than legal decision making and parenting time, ~~the~~ master may deal with any issues pursuant to Title 25, A.R.S., that could be presented to the assigned judge including post-decree matters. Subject to any limitations in the order, the master shall exercise the power to regulate all proceedings in every hearing before the master and to do all acts and take all measures necessary or proper for the efficient performance of the master's duties under the order. The master may require the production of evidence upon all matters embraced in the reference. The master may rule upon the admissibility of evidence, unless otherwise directed by the order of reference, and has the authority to place witnesses under oath and may examine the parties and witnesses. When a party requests, the master shall cause a record to be made of the evidence offered and excluded in the same manner and subject to the same limitations as provided in Rule 104, Arizona Rules of Evidence, for a court sitting without a jury. The cost of the

1 record shall be paid by the parties as allocated by the court and shall be a treated as
2 a taxable cost.

3 **C. through F.** [no changes]
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5 **G. Court Actions.** If no objection is filed by either party pursuant to this rule, the
6 master's report shall become an order of the court, unless the court on its own
7 motion sets a hearing upon a particular issue in the report within ten (10) days after
8 the time for filing an objection has passed. ~~If the master's report covers all issues~~
9 ~~in the case, and no objection is filed and the court does not set a hearing, the court~~
10 ~~shall enter judgment on the master's report.~~ In the event any objection(s) are filed,
11 the court may set oral argument on the objection(s), adopt the report, modify it,
12 reject it in whole or in part or may receive further evidence. The court shall hold a
13 hearing or enter an order in connection with any objection to the master's report
14 within thirty (30) days of the filing of the response or other ordered pleading to such
objection.

15 **H. through L.** [no changes]
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