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### Racketeer Influenced and Corrupt Organizations (RICO)—Pattern Element Does Not Require Multiple Schemes. *H.J. Incorporated v. Northwestern Bell Telephone Co.*

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CIVIL PROCEDURE—ARKANSAS RULE OF CIVIL PROCEDURE 53(b)—AN END TO THE USE OF SPECIAL REFEREES IN ARKANSAS. *Hutton v. Savage*, 298 Ark. 256, 769 S.W.2d 394 (1989) and *Arkansas Department of Human Services v. Templeton*, 298 Ark. 390, 769 S.W.2d 404 (1989).

In December 1984 Arkansas Social Services requested court-ordered supervision of the home environment of the two children of Michael and Charlene Hutton of Benton County.<sup>1</sup> The juvenile court judged the children dependent-neglected,<sup>2</sup> and over the next three years, the court entered at least thirteen orders concerning the children's welfare.<sup>3</sup>

On January 20, 1987, the Arkansas Supreme Court decided in *Walker v. Arkansas Department of Human Services*<sup>4</sup> that the juvenile court system was unconstitutional.<sup>5</sup> This decision abolished the juvenile court system that county judges had administered since 1911,<sup>6</sup> and that had been revised only once, in 1975.<sup>7</sup> In response, the General Assembly, which was in regular session on the date of the *Walker*

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1. *Hutton v. Savage*, 298 Ark. 256, 258, 769 S.W.2d 394, 395 (1989).

2. A dependent-neglected child is one whose parent is unfit to properly care for the juvenile or who fails or refuses to provide care necessary for the juvenile's health and well being. ARK. CODE ANN. § 9-27-303(4) (1987).

3. 298 Ark. at 258, 769 S.W.2d at 395.

4. 291 Ark. 43, 722 S.W.2d 558 (1987). The Walkers, parents of two children who had been declared dependent-neglected by the Pulaski County Juvenile Court, appealed the loss of custody over their children. They argued that the county court's jurisdiction over juvenile matters was unconstitutional because the Arkansas Constitution did not authorize a juvenile court. *Id.* at 45, 722 S.W.2d at 559.

5. *Id.* at 47, 722 S.W.2d at 560. The court ruled that the state constitution allowed the legislature to establish only certain specified courts, such as municipal and chancery courts. The authority to create a new court lay solely in the Arkansas Constitution, and the constitution did not mention a juvenile court. In its decision, the court overruled *Ex parte King*, 141 Ark. 213, 217 S.W. 465 (1919), which upheld vesting jurisdiction over juvenile matters in the county courts. 291 Ark. at 49, 722 S.W.2d at 561.

6. The first juvenile court in the United States, the Juvenile Court of Cook County, began in 1899 in Chicago, Illinois. A national trend followed, and by 1909 nineteen more states had juvenile courts. H.H. LOU, JUVENILE COURTS IN THE UNITED STATES 19 (1972). Arkansas followed two years later and established "The Juvenile Court" in Act 215 of 1911. Act of Apr. 25, 1911, No. 215, 1911 Ark. Acts 166.

7. In 1975 the legislature adopted a new Arkansas Juvenile Code that abolished the use of referees who were not lawyers. Act of March 18, 1975, No. 451, 1975 Ark. Acts 1179 (codified at ARK. STAT. ANN. §§ 45-401 to 454 (Supp. 1985) (repealed by Act of 1989, No. 273 (codified at ARK. CODE ANN. §§ 9-27-301 to 345 (Supp. 1989))). A "grandfather" clause, however, protected those nonlawyer county judges and referees functioning as juvenile judges at the time. The Act gave unusual power to the referees by making their decisions binding on

decision, passed Act 14 of 1987<sup>8</sup> which established juvenile divisions of the existing trial courts.<sup>9</sup> The Act allowed those courts to continue using masters or referees<sup>10</sup> to hear juvenile cases.<sup>11</sup>

As a result, the Huttons' case was transferred to the Benton County Probate Court.<sup>12</sup> In May 1988 the juvenile master entered an order finding that the custody of the children should remain with the Department of Human Services (DHS). The Huttons appealed and argued that the master exceeded his authority because he had not made a recommendation to the judge but had issued the final order himself.<sup>13</sup> The supreme court accepted their argument, voided the master's order, and held that it was beyond the constitutional power of the legislature to grant judges the authority to appoint masters who could exercise the judge's full authority.<sup>14</sup> In its decision, the court also relied on Rule 53<sup>15</sup> of the Arkansas Rules of Civil Procedure (ARCP) which allows reference to a master only in exceptional circumstances.<sup>16</sup> The court upheld the right of the legislature to extend circuit and probate court jurisdiction to juvenile matters.<sup>17</sup> *Hutton v. Savage*, 298 Ark. 256, 769 S.W.2d 394 (1989).

Two weeks after the *Hutton* decision, the Arkansas Supreme Court ruled on the appeal of a youth adjudicated delinquent<sup>18</sup> by the

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the county judges who had to sign any referee decision as a decision of the county court. ARK. CODE ANN. § 9-27-310 (1987).

8. Act of Feb. 6, 1987, No. 14, 1987 Ark. Acts 24 (Act 273 of 1989 provided that Act 14 would be effective until Aug. 1, 1989, at which time Act 273, codified at ARK. CODE ANN. § 9-27-301 to 345, would go into effect).

9. 1987 Ark. Acts, No. 14, § 10. This placed delinquency jurisdiction in circuit court, and dependency neglect and juveniles in need of supervision jurisdiction in probate court. The legislature also voted to place a proposed constitutional amendment on the November 1988 ballot to authorize the General Assembly to create an entirely new juvenile court system. ARK. COMM'N ON JUVENILE JUSTICE, JUVENILE COURTS IN ARKANSAS 6 (1989).

10. ARK. R. CIV. P. 53(a) states in part: "As used in this rule, the word 'master' includes a referee, an auditor, an examiner, a commissioner and an assessor."

11. 1987 Ark. Acts, No. 14, § 8. The masters no longer had the authority to issue final orders, but had to make referrals to the judges of their courts. *Id.* at § 6.

12. 298 Ark. at 258, 769 S.W.2d at 395.

13. *Id.* at 257, 769 S.W.2d at 395.

14. *Id.* at 265, 769 S.W.2d at 399.

15. ARK. R. CIV. P. 53(b) states in part: "A reference to a master shall be the exception and not the rule. . . . Except in matters of account . . . a reference shall be made only upon a showing that some exceptional condition requires it."

16. 298 Ark. at 265, 769 S.W.2d at 399.

17. *Id.* at 268, 769 S.W.2d at 400.

18. A delinquent juvenile is one who has committed an act, other than a traffic offense, which would involve the criminal laws of the state if committed by an adult. ARK. CODE ANN. § 9-27-303(2) (1987).

order of a juvenile master committing the boy to reform school.<sup>19</sup> Following *Hutton*, the court held that the juvenile referee unconstitutionally exceeded his authority by performing acts properly exercised only by the circuit judge. The court also repeated its warning against reference to a master except in exceptional circumstances.<sup>20</sup>

Two days later, the court delivered the death blow to the use of referees acting as judges.<sup>21</sup> In March 1989, the DHS sought to gain permanent custody of a dependent-neglected, abused child from her parents in Craighead County.<sup>22</sup> Craighead County Circuit Judge Templeton turned the case over to the juvenile master because of scheduling conflicts.<sup>23</sup> At the same time, there were four DHS custody cases in Benton County scheduled for review.<sup>24</sup> Circuit Judge Keith referred the cases to the juvenile referee because he would be unavailable and because the referee was most familiar with their facts and previous history.<sup>25</sup> The DHS immediately requested writs of mandamus contending that both judges, by referring the cases to special masters, had violated Rule 53 and had not followed *Hutton*.<sup>26</sup> The supreme court agreed and ruled that any attempt to use Rule 53 to justify using masters in juvenile courts was flatly contrary to law.<sup>27</sup> The immediate reaction to the decision was the discontinuation of the masters statewide,<sup>28</sup> and of one master by the State Judicial Department used in foster care cases.<sup>29</sup> *Arkansas Department of Human Services v. Templeton*, 298 Ark. 390, 769 S.W.2d 404 (1989).

There is a long tradition of using masters in courts of equity, dating back to the reign of King Henry VIII.<sup>30</sup> Early American use followed the English pattern, with courts calling upon a master (or

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19. *Collins v. State*, 298 Ark. 390, 769 S.W.2d 402 (1989).

20. *Id.*

21. *Arkansas Dep't of Human Services v. Templeton*, 298 Ark. 390, 769 S.W.2d 404 (1989).

22. *Pierce v. Yates*, No. P-JD-89-19 (Craighead County P. Ct. filed Mar. 18, 1989).

23. 298 Ark. at 392, 769 S.W.2d at 405.

24. *Lutke v. St. Pierre*, No. JP-88-20-2 (Benton County P. Ct. filed Mar. 28, 1989); *N.W. Ark. SCAN v. Jenkins*, No. JP-88-6-2 (Benton County P. Ct. filed Mar. 28, 1989); *Lutke v. Shaw*, No. JP-87-6-2 (Benton County P. Ct. filed Mar. 28, 1989); and *State v. Shaffer*, No. JP-87-90-2 (Benton County P. Ct. filed Mar. 28, 1989).

25. 298 Ark. at 392, 769 S.W.2d at 405.

26. *Id.* at 391, 769 S.W.2d at 404.

27. *Id.* at 394, 769 S.W.2d at 406.

28. Telephone interview with Alice Holcomb, Pulaski County Chancery Clerk (June 15, 1989).

29. Telephone interview with J.D. Gingerich, Executive Secretary, Arkansas Judicial Department (June 20, 1989).

30. 1 HOLDSWORTH, A HISTORY OF ENGLISH LAW 416 (7th ed. rev. 1956).

auditor, examiner, or referee, as they were variously called)<sup>31</sup> in issues involving complex or tedious fact findings, frequently in cases concerning finances.<sup>32</sup> The master traditionally assumed a noncontroversial role, confining himself to specific issues and having no judicial discretion.<sup>33</sup>

In the nineteenth century masters assumed greater responsibilities in equity proceedings in addition to that of fact finding. The master would settle pretrial disputes, take evidence, and submit findings and recommendations to the trial judge for review and determination.<sup>34</sup>

After the establishment of juvenile courts,<sup>35</sup> chancery masters were employed to serve in the *parens patriae*<sup>36</sup> function of those courts. Chancery court responsibilities traditionally included protecting the property and estates of children. The courts considered it a natural step to extend such responsibility to the protection of the interests of children themselves, who needed assistance.<sup>37</sup> Such use of masters relieved a judge of routine cases and resulted in a more consistent application of justice.<sup>38</sup> The juvenile master would be a father-figure/judge, representing both the state and the child. Proceedings would be civil, not criminal, and premised on protection, not punishment of the child.<sup>39</sup> As a result, courts throughout the United States, including Arkansas, used such masters to hear a large percentage of the cases in juvenile courts.<sup>40</sup>

A serious consequence of the expanded and more unrestricted use of masters was the abdication of power reserved to the judiciary. Due in part to the court procedures of the time, this abdication of power was prevalent in the nineteenth century, and still lingers today. Before 1913 equity cases in the federal courts were cumbersome and

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31. *Cruz v. Hauck*, 515 F.2d 322 (5th Cir. 1975). The practice was to refer to an examiner to take evidence, or to a master to make recommendations to the court. *Id.* at 328.

32. Brazil, *Referring Discovery Tasks to Special Masters: Is Rule 53 a Source of Authority and Restrictions?*, 1983 AMER. B. FOUND. RES. J. 143, 150 (1983).

33. *Id.* at 151.

34. Rubin, *Between Recommendations and Orders: The Limbo Status of Juvenile Court Referees*, 27 CRIME & DELINQ. 317, 320 (1981).

35. *See supra* note 6.

36. *Parens patriae* describes the state's role of guardianship of persons under legal disability. BLACK'S LAW DICTIONARY 1003 (5th ed. 1979).

37. Rubin, *supra* note 34, at 320-21.

38. *Id.*

39. ARK. COMM'N ON JUVENILE JUSTICE, *supra* note 9, at 3.

40. For examples of the use of referees in selected jurisdictions in the United States, see Rubin, *supra* note 34, at 319.

protracted.<sup>41</sup> Procedure consisted of a highly ritualized and lengthy series of evidentiary events<sup>42</sup> directed at building a record sufficient to allow the court to enter a judgment at a final hearing.<sup>43</sup> These evidentiary events were so involved that judges often took no part in them. Masters presided almost exclusively over the tedious process of developing the evidentiary record.<sup>44</sup> This produced a record so comprehensive that the court's "final hearing" frequently was no more than a brief review of the work done and conclusions already drawn.<sup>45</sup>

The situation was similar in state courts. A judge could easily forego his review of the master's work and leave all decision making to the master.<sup>46</sup> Many judges did exactly that.<sup>47</sup> To many, this casual approach to the use of masters was not only contrary to the spirit of judicial administration, but an infringement on the right of a party to be heard by a fully competent magistrate. After a hearing by a referee, parties often feared an inadequate or perfunctory review by the judge, if there was any review at all.<sup>48</sup>

As early as 1889, the United States Supreme Court acknowledged the abdication of judicial power caused by the use of masters.<sup>49</sup> Though the use (or misuse) of masters may raise constitutional questions, the Supreme Court has consistently rejected this line of argument. In *Kimberly v. Arms*<sup>50</sup> the Court held that a master's findings were presumed correct. In *Crowell v. Benson*<sup>51</sup> the Court refused to hold that "determinations of fact in constitutional courts shall be made by judges."<sup>52</sup>

Before the rules of procedure took effect, many courts relied on their "inherent power" to delegate certain powers to others. In 1920

41. Brazil, *supra* note 32, at 151.

42. *Id.* at 152. These included taking testimony from witnesses and parties, responding to interrogatories, and producing documents.

43. *Id.* at 151.

44. *Id.* at 152.

45. *Id.*

46. *Id.* at 151.

47. U.S. Senior Judge Hubert L. Will of Chicago reminisced "[i]n my young days every circuit and county judge had a special master appointed, and it wasn't even necessary to hold hearings on his final recommendation." The result, Will said, was to "relieve[ed] the judge of his burden and make the master some money." Strasser, *On Orders from the Court*, 13 *STUDENT LAWYER*, Jan. 1985, at 24, 26.

48. Rubin, *supra* note 34, at 332.

49. *Kimberly v. Arms*, 129 U.S. 512 (1889). "[A court] cannot . . . abdicate its duty to determine by its own judgment the controversy presented, and devolve that duty on any of its officers." *Id.* at 524.

50. 129 U.S. 512 (1889).

51. 285 U.S. 22 (1932).

52. *Id.* at 51.

the Supreme Court affirmed this exercise of inherent power in *Ex parte Peterson*.<sup>53</sup> A trial court appointed a master to help the court organize a case at law involving some 700 different items of account.<sup>54</sup> Writing for the Court, Justice Brandeis acknowledged that the trial court had no statutory power to appoint the master.<sup>55</sup> He then stated that, absent legislation to the contrary, courts have an inherent power "to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties. . . ."<sup>56</sup> The Court ruled that the inherent power to "invoke such aid is the same whether the court sits in equity or at law."<sup>57</sup> State courts in Ohio<sup>58</sup> and New Mexico<sup>59</sup> have also upheld the inherent power doctrine.

Cases challenging the use of masters have been made on three grounds: reference without constitutional authority, abdication of judicial power, or abuse of Rule 53. Challenges to masters in Arkansas generally have relied on the first ground. In a 1931 case, a taxpayer challenged the quorum court's authority to appoint a master.<sup>60</sup> The Arkansas Supreme Court found that the master, although nominally only an advisor to the quorum court, was in fact functioning as a deputy probate judge. The state constitution, said the court, did not authorize a second probate judgeship.<sup>61</sup>

In 1948 heirs contesting a will<sup>62</sup> asserted that Act 448 of 1941,<sup>63</sup> which authorized a Referee in Probate to admit wills to probate, was contrary to the state constitution.<sup>64</sup> Section 4 of Act 448 provided that, absent a petition for review, the order of the Referee in Probate

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53. 253 U.S. 300 (1920).

54. *Id.* at 306-07.

55. *Id.* at 309.

56. *Id.* at 312.

57. *Id.* at 314.

58. McCann v. Maxwell, 173 Ohio St. 282, 189 N.E.2d 143 (1963). The Ohio Supreme Court relied on *Peterson* to justify appointments of master commissioners to hear and prepare findings and conclusions of law.

59. *State v. Doe*, 93 N.M. 621, 603 P.2d 731 (Ct. App. 1979). An appeals court held that a Children's Court rule requiring prior supreme court approval for the appointment of a special master limited the inherent power of a district court to make such appointments, and quoted *Peterson* in its decision. *Id.* at 624, 603 P.2d at 734.

60. *Rose v. Brickhouse*, 182 Ark. 1105, 34 S.W.2d 472 (1931).

61. *Id.* at 1109, 34 S.W.2d at 474.

62. *Jansen v. Blissenbach*, 214 Ark. 755, 217 S.W.2d 849 (1949).

63. Act of April 3, 1941, No. 448, 1941 Ark. Acts 1298 (codified at ARK. STAT. ANN. §§ 22-508 to 511 (1947)).

64. ARK. CONST., art. VII, § 34 states in part that "[T]he Judge of the court having jurisdiction in matters of equity shall be the judge of the court of probate, and have . . . exclusive original jurisdiction in matters relative to the probate of wills . . . ."

“shall become final as if performed by the Chancellor.”<sup>65</sup> The court ruled that the effect of allowing a referee’s order to become final, even by default, created a second or deputy judge.<sup>66</sup> Because article VII provided for only one probate judge, the legislature could not constitutionally grant such power to a referee.<sup>67</sup>

In 1975 a Washington County mother appealed a juvenile referee’s custody decision,<sup>68</sup> asserting that the appointment of the referee was an unconstitutional delegation of judicial power and that the creation of the juvenile court was also unconstitutional.<sup>69</sup> The supreme court relied on *Ex parte King* (which *Walker* would overrule) to uphold the creation of the juvenile court.<sup>70</sup> Because a lawfully created court appointed him, the referee, though irregularly and possibly unconstitutionally appointed, was a de facto officer whose acts were as binding on the public as those of a de jure officer.<sup>71</sup>

The appointment of masters has also been challenged in other jurisdictions. Courts in Delaware,<sup>72</sup> Indiana,<sup>73</sup> and West Virginia<sup>74</sup> concluded that such appointments were an improper legislative grant of judicial power. The highest courts in Nevada<sup>75</sup> and Colorado<sup>76</sup>

65. ARK. STAT. ANN. § 22-511 (1947).

66. 214 Ark. at 760, 217 S.W.2d at 850.

67. *Id.*

68. *Fortin v. Parrish*, 258 Ark. 277, 524 S.W.2d 236 (1975), *overruled*, 298 Ark. 256, 769 S.W.2d 394 (1988).

69. *Id.* at 279, 524 S.W.2d at 237.

70. *Id.* at 283, 524 S.W.2d at 240; (citing *Ex parte King*, 141 Ark. 213, 217 S.W.2d 465 (1919)).

71. 258 Ark. at 287, 524 S.W.2d at 242.

72. *A.L.W. v. J.L.W.*, 416 A.2d 708 (Del. 1980). The Delaware Supreme Court held that the state law giving a family court master authority to enter a final order binding the court was an impermissible delegation of judicial power. *Id.* at 711.

73. *State ex rel Smith v. Starke Cir. Ct.*, 275 Ind. 483, 417 N.E.2d 1115 (1981). The Indiana Supreme Court rejected the creation of master commissioners who could exercise full jurisdiction over probate, civil and criminal matters if so empowered by a judge of their court. The court said that the authority to make binding orders was one of the essential elements of judicial power. It was impermissible to grant a master, who is only an instrumentality to inform and assist the court, the power to make binding orders. *Id.* at 494, 417 N.E.2d at 1121.

74. *Starcher v. Crabtree*, 348 S.E.2d 293 (W. Va. 1986). The West Virginia Supreme Court held unconstitutional the state legislature’s attempt to divest the circuit courts of all original jurisdiction in divorce and other family matters and place the jurisdiction in the hands of a newly created family law master. *Id.* at 295.

75. *Russell v. Thompson*, 96 Nev. 830, 619 P.2d 537 (1980). The supreme court said that where “the trial court made a general reference of nearly all of the contested issues, giving the master the authority to decide substantially all issues in the case, as well as be the fact finder, the trial court’s function has been reduced to that of a reviewing court.” *Id.* at 834, 619 P.2d at 539. The court also scolded the judge. “[T]his type of blanket delegation approaches an unallowable abdication by a jurist of his constitutional responsibilities and duties.” *Id.*

76. *Gelfond v. Dist. Ct.*, 2d Judicial Dist., 180 Colo. 95, 504 P.2d 673 (1972). In a di-



harshly denounced appointments of special masters by trial courts as an abdication of judicial power.

The widespread popularity of masters was partly because early rules of equity placed no restrictions on their use.<sup>77</sup> However, by the early 1900s there was a growing dissatisfaction with all aspects of equity procedure. A reform movement proposed the *Rules of Practice for the Courts of Equity of the United States* in 1912 which resulted in substantial changes in procedure.<sup>78</sup> The rules prohibited judges from routinely referring to masters, forced judges to take more responsibility at trial, and reduced the role of masters in equity proceedings.<sup>79</sup> An amendment to the Equity Rules in 1912 introduced the concept of "exceptional condition."<sup>80</sup> In 1938 Federal Rule of Civil Procedure 53 consolidated various equity rules including the "exceptional condition" requirement.<sup>81</sup> The present federal rule is substantially the same as the 1938 rule.<sup>82</sup>

Rule 53 says nothing about what qualifies as an "exceptional condition."<sup>83</sup> The vagueness of the term would allow "abundant, if not infinite, flexibility and room for interpretation."<sup>84</sup> Courts guided by this open-ended language have generally interpreted the "exceptional condition" criterion on an ad hoc basis.<sup>85</sup> For example, until 1957 courts were split over the question of whether crowded court calendars qualified as "exceptional conditions."<sup>86</sup>

The Supreme Court settled this issue in 1957 in the seminal Rule 53 decision, *La Buy v. Howes Leather Co.*<sup>87</sup> In *La Buy* a trial judge

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voiced case, the supreme court pointedly castigated the trial judge for abdication of duties: "The trial court's order . . . in effect delegated the decision making, as well as the fact finding, function to the Master. In doing so, the judge abdicated his constitutional responsibilities and duties." *Id.* at 100, 504 P.2d at 675.

77. *Cruz v. Hauck*, 515 F.2d 322, 329 (5th Cir. 1975) (citing Equity R. 73-88, 42 U.S. (1 How.) lxiv-lxvii (1842)).

78. For examples of changes in equity rules, see Brazil, *supra* note 32, at 153.

79. *Id.*

80. *Id.* (citing Equity R. 59, 226 U.S. 666 (1912)).

81. Brazil, *supra* note 32, at 153.

82. *Id.* Rule 53 states in part that "in actions to be tried without a jury . . . a reference [to a master] shall be made only upon a showing that some *exceptional condition* requires it." FED. R. CIV. P. 53(b) (emphasis added).

83. See Wald, "Some Exceptional Condition"—*The Anatomy of a Decision Under Federal Rule of Civil Procedure 53(b)*, 62 ST. JOHN'S L. REV. 405, 406 (1988).

84. Brakel, *Special Masters in Institutional Litigation*, 1979 AM. B. FOUND. RES. J. 543, 550 (1979).

85. Kaufman, *Masters in the Federal Courts: Rule 53*, 58 COLUM. L. REV. 452, 455 (1958).

86. *Id.*

87. 352 U.S. 249 (1957).

referred two consolidated antitrust cases to a master over the objections of the litigants. He did so on the grounds of an "extremely congested calendar" and "exception [sic] conditions."<sup>88</sup> The Supreme Court affirmed a grant of mandamus to vacate the references.<sup>89</sup> The Court rejected congested dockets, extended trials, and complexity of issues of fact and law as exceptional conditions warranting reference to a master.<sup>90</sup> The Court, in fact, declared that complexity of issues was "an impelling reason for trial before a regular, experienced trial judge rather than before a temporary substitute appointed on an ad hoc basis and ordinarily not experienced in judicial work."<sup>91</sup>

While rejecting certain circumstances as exceptional, the Court nevertheless made no mention of what it would consider as "exceptional conditions" under Rule 53. However, implicit in its decision was the requirement to rigidly apply Rule 53 and to view nonjury references with disfavor.<sup>92</sup>

Arkansas first relied on *La Buy* in *State v. Nelson*.<sup>93</sup> In a taxpayer's suit against several oil companies for conspiracy to fix prices,<sup>94</sup> the Pulaski County Chancery Court appointed a special master against the litigants' wishes.<sup>95</sup> The supreme court held that the trial court's order was unauthorized and that length of trial, complexity, and calendar congestion would not be grounds in Arkansas for "the virtual displacement of the court by a special master."<sup>96</sup>

In 1988 the supreme court heard *Gipson v. Brown*,<sup>97</sup> an intrachurch financial dispute in which the trial court had appointed a special master. While the refusing to interfere absent fraud or collusion, in "purely ecclesiastical matters,"<sup>98</sup> the court did address the reference to a special master, holding that *Nelson* and ARCP 53(b) forbid such use without a showing of some exceptional condition.<sup>99</sup>

Other jurisdictions have also grappled with the difficulties in interpreting the "exceptional condition" required of Rule 53. Courts in

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88. *Id.* at 253.

89. *Id.* at 260.

90. *Id.* at 259.

91. *Id.*

92. Kaufman, *supra* note 85, at 456.

93. 246 Ark. 210, 438 S.W.2d 33 (1969).

94. *Id.* at 212-13, 438 S.W.2d at 36.

95. *Id.* at 218-19, 438 S.W.2d at 40.

96. *Id.* at 219, 221, 438 S.W.2d at 40.

97. 295 Ark. 371, 749 S.W.2d 297 (1988).

98. *Id.* at 376, 749 S.W.2d at 299.

99. *Id.*

Iowa,<sup>100</sup> Colorado,<sup>101</sup> and Nevada<sup>102</sup> have all opted for a narrow interpretation of what qualifies as an "exceptional condition."

In *Hutton v. Savage*<sup>103</sup> the Arkansas Supreme Court faced the question of reference to a master without constitutional authority. The Huttons had argued that the juvenile master acted in excess of the powers granted to him and that jurisdiction over dependent neglected juveniles was not a constitutionally permissible function of the probate courts.<sup>104</sup>

Writing for the majority, Chief Justice Jack Holt, Jr.,<sup>105</sup> agreed that the juvenile master had exceeded his authority.<sup>106</sup> The fundamental issue was whether the probate court had the right to vest in a master the power to preside over all juvenile cases. The supreme court concluded that legislation permitting such use of masters in juvenile matters contravened the delegation of judicial powers and duties allowed by the Arkansas Constitution. As such, it was an unauthorized grant of legislative authority.<sup>107</sup>

The court then addressed the permissible use of special masters, even though none of the parties to the suit raised the issue at trial.<sup>108</sup> The court noted that section 6 of Act 14 of 1987 provided that the referee shall submit recommendations to the judges and that only the judge, not the referee, had the authority to issue a final order.<sup>109</sup>

With that as a background, the court finely scrutinized the master's order and the court record in *Hutton*. Nowhere did the

100. *Iowa Pub. Serv. Co. v. Sioux City*, 252 Iowa 380, 382, 107 N.W.2d 109, 110 (1961). A trial court appointed a master in a utility rate case on the grounds that such cases were extremely complicated and involved extensive testimony. The supreme court held that the complex issues and length of trial did not constitute exceptional conditions requiring a reference. *Id.* at 387, 107 N.W.2d at 113.

101. *Gelfond v. Dist. Ct.*, 2d Judicial Dist., 180 Colo. 95, 504 P.2d 673 (1972). *See also supra* note 76 and accompanying text. A trial court made a reference in a pending divorce because of complex issues concerning the parties' property and assets. One party appealed and suggested that the court reject the reference to a master because "*La Buy* (*La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957)) [is] a complete answer to all of the arguments advanced by the respondents." 180 Colo. at 99, 504 P.2d at 674. The court agreed saying that "[t]he rule is made absolute." *Id.* at 103, 504 P.2d at 677.

102. *Russell v. Thompson*, 96 Nev. 830, 619 P.2d 537 (1980). *See also supra* note 75 and accompanying text. The supreme court rejected congestion, complex issues, and lengthy trials as exceptional conditions. 96 Nev. at 835-36, 619 P.2d at 540.

103. 298 Ark. 256, 769 S.W.2d 394 (1989).

104. *Id.* at 257, 769 S.W.2d at 394-95.

105. *Id.* at 256, 769 S.W.2d at 394.

106. *Id.* at 257, 769 S.W.2d at 395.

107. *Id.* at 258, 769 S.W.2d at 395.

108. *Id.* at 260, 769 S.W.2d at 396.

109. *Id.*

master's order specify that the probate judge shall issue final orders and that the referee lacked authority to issue a final order.<sup>110</sup> The case record revealed that, except for the first hearing's order, there was no other record of the master's "recommendations" to the probate judge.<sup>111</sup> Upon inspection of the language of the order to determine whether the judge had reviewed the order signed by the master, or only co-signed the master's order without appropriate review, the supreme court concluded that the final order was indeed that of the master and not that of the judge.<sup>112</sup>

The court then considered the propriety of the legislature granting judges the power to appoint masters possessing the same authority and powers of those judges. In *Jansen v. Blissenbach*<sup>113</sup> the court had ruled unconstitutional a statute<sup>114</sup> that allowed a probate referee's order to become final absent a petition for review.<sup>115</sup> The statute had created, in effect, a deputy probate judge, contrary to the constitutional provision for sole jurisdiction in one judge.<sup>116</sup>

The court stressed that its ruling in *Jansen* was equally applicable to Act 14 of 1987. Act 14 provided that a referee or master should have all the authority and power as the appointing judge might grant, except that the referee or master could not issue final orders.<sup>117</sup> The net effect, even if unintended, was to create substitute judges contrary to the provision in the constitution<sup>118</sup> that the judge of the probate court shall try all issues of law and fact. The court declared section 6 of Act 14 of 1987 unconstitutional, and extended it to circuit courts as well.<sup>119</sup>

Under what circumstances then should matters be referred to special masters? Relying on *State v. Nelson*,<sup>120</sup> the court reaffirmed that a lengthy trial, complex issues or calendar congestion were not grounds for a reference to a master.<sup>121</sup> The court noted that Justice Hickman, in his concurrence in *Walker* said that "referees and mas-

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110. *Id.* at 261, 769 S.W.2d at 396.

111. *Id.*

112. *Id.* at 262, 769 S.W.2d at 397.

113. 214 Ark. 755, 217 S.W.2d 849 (1949). *See supra* notes 62-67 and accompanying text.

114. Act of April 3, 1941, No. 448, 1941 Ark. Acts 1298 (codified at ARK. STAT. ANN. §§ 22-508 to 511 (1947)). *See supra* note 63 and accompanying text.

115. 214 Ark. at 760, 217 S.W.2d at 851.

116. *Id.*

117. Act of Feb. 6, 1987, No. 14, 1987 Ark. Acts 24 (in effect until Aug. 1, 1989).

118. ARK. CONST., art. VII, § 34.

119. 298 Ark. at 264, 769 S.W.2d at 398.

120. 246 Ark. 210, 438 S.W.2d 33 (1969). *See supra* notes 93-96 and accompanying text.

121. 298 Ark. at 264-65, 769 S.W.2d at 398.

ters are simply substitutes for the judge, and there is no place in any judicial system for permanent substitutes for judges."<sup>122</sup> Moreover, Rule 53 of the Arkansas Rules of Civil Procedure expressly requires some exceptional condition to justify a reference.<sup>123</sup>

The court then specifically overruled *Fortin v. Parrish* to the extent that it was inconsistent with *Hutton*.<sup>124</sup> In *Fortin* the court held that a juvenile master would be considered a de facto judicial officer whose acts are binding even though his title might originate in legislation found unconstitutional.<sup>125</sup> The court ruled that the remaining parts of Act 14 were complete and capable of execution and were not affected by the decision.<sup>126</sup>

The court noted that, in *Walker*,<sup>127</sup> it ruled the former "Juvenile Court" unconstitutional. The court said that in response to *Walker*, the legislature passed Act 14 of 1987 establishing juvenile divisions of the circuit and probate courts.<sup>128</sup> The Arkansas Constitution provides that the probate courts have such power as is specified or which is "hereafter prescribed by law."<sup>129</sup> The court said that the new legislation<sup>130</sup> was in accord with the constitutional power of the legislature to extend the courts and, therefore, that jurisdiction was proper in the probate court.<sup>131</sup>

In his dissent Justice Steele Hays addressed both the constitutionality and the special master issue. "A cardinal rule of appeal and error"<sup>132</sup> is that a court ought not to decide a constitutional question sua sponte when the points were not first presented at the trial. The justice noted that in at least three instances, the court declined to consider constitutional issues not presented by the litigants at the trial level.<sup>133</sup>

Justice Hays then raised the question of waiver of objection. The

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122. *Id.* at 265, 796 S.W.2d at 399 (citing 291 Ark. at 54, 722 S.W.2d at 564 (Hickman, J., concurring)).

123. Ark. R. Civ. P. 53(b).

124. *Id.*, 796 S.W.2d at 399. See *Fortin v. Parrish*, 258 Ark. 277, 524 S.W.2d 236 (1975), overruled, 298 Ark. 256, 769 S.W.2d 394 (1988). See also *supra* notes 68-71 and accompanying text.

125. 258 Ark. at 283-87, 524 S.W.2d at 239-42.

126. *Id.* at 266, 769 S.W.2d at 399.

127. 291 Ark. 43, 722 S.W.2d 558 (1987).

128. 298 Ark. at 267, 769 S.W.2d at 400.

129. ARK. CONST., art. VII, § 34.

130. See ARK. CODE ANN. § 28-1-104 (1987) as to the probate courts and § 16-10-126 (1987) as to chancery and circuit courts.

131. 298 Ark. at 268, 769 S.W.2d at 400.

132. *Id.* at 269, 769 S.W.2d at 401 (Hays, J., dissenting).

133. *Id.*

master had signed eighteen orders over the four years. At no time until the appeal did the appellants object to or complain about the use of the master.<sup>134</sup> Justice Hays said that the courts should have observed the general rule that the objection is waived when an objection to a master is not made on a timely basis.<sup>135</sup>

Justice Hays' last objection went to the finality of the master's order. The question should have been the judge's subjective recognition that the judge alone gave finality to the case. Justice Hays saw no indication that the probate judge did not fully concur in the referee's findings. It was important to Justice Hays that a final order should not turn on who drafted it, but on who "reviews, approves, and signs the order."<sup>136</sup> The justice concluded his dissent with the observation that permanent masters are the best suited for juvenile court work, and that he would have affirmed the probate judges' orders.<sup>137</sup>

A short time later, the court decided the *Templeton*<sup>138</sup> case, in which the Arkansas Department of Human Services (DHS) sought a writ of mandamus to compel two probate judges to hear certain juvenile cases. Craighead County Circuit Court Judge Templeton appointed a master "due to scheduling and other conflicts."<sup>139</sup> Benton County Circuit Court Judge Keith appointed a master because he was unavailable and the master had previous experience and was familiar with the juvenile cases before the bar.<sup>140</sup> The DHS contended that these actions were impermissible violations of Rule 53 and of the directives of the *Hutton* decision.<sup>141</sup> The supreme court agreed with the DHS.

Justice Tom Glaze delivered the majority opinion. The court pointed out that it had just ruled in *Hutton* that the probate court's use of a master went beyond its jurisdiction and that any reference to a master should be the exception, not the rule. Furthermore, the ruling on the use of masters was in keeping with what it had already decided in *Collins*, *Gipson* and *Nelson*.<sup>142</sup>

The court said that it could understand some confusion, given the long tradition of county court control over juvenile cases. None-

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134. *Id.* at 270, 769 S.W.2d at 401 (Hays, J., dissenting).

135. *Id.*

136. *Id.* at 271, 769 S.W.2d at 402 (Hays, J., dissenting).

137. "The ongoing demands of following the progress of a family involving dependent-neglected children through rehabilitative regimens are far better suited to a master. . . ." *Id.*

138. *Ark. Dep't of Human Services v. Templeton*, 298 Ark. 390, 769 S.W.2d 404 (1989).

139. *Id.* at 392, 769 S.W.2d at 405.

140. *Id.*

141. *Id.* at 391, 769 S.W.2d at 404.

142. *Id.* at 392, 769 S.W.2d at 405.

theless, full-fledged courts were now hearing juvenile matters, and those courts are all subject to the Arkansas Rules of Civil Procedure.<sup>143</sup> The court noted that Rule 53(b) specifically provides that only some exceptional condition justifies a reference. Personal unavailability or a docket conflict are not such exceptions.<sup>144</sup> The court said that judges have remedies in such situations. Arkansas law provides for temporary assignment of judges,<sup>145</sup> and the Arkansas Constitution provides for temporary replacement of a judge.<sup>146</sup> Because courts handling juvenile matters can avail themselves of the same relief that general jurisdiction courts have always used, there is no justification for employing a master.<sup>147</sup>

The court found that the actions of the two judges were clearly unauthorized and that their justifications were not exceptional conditions under Rule 53. It therefore quashed the orders of appointment and the orders issued by the masters.<sup>148</sup> The court expressed confidence in the ability of judges now serving to overcome any problems that arise and asserted that no doubts should remain. The use of masters is "now contrary to law," and "has been laid to rest by [the] decision."<sup>149</sup>

Justice Steele Hays, who dissented in *Hutton*, concurred somewhat grudgingly. He noted that he still had not changed his view that masters should be acceptable in juvenile cases, but saw nothing to be gained by holding on to a view that could no longer prevail.<sup>150</sup>

Justice John Purtle, part of the majority in *Hutton*, now dissented. He agreed that the legislature could not give a judge the power to appoint another person a judge, but had no inkling that the court would use *Hutton* to abolish special masters altogether.<sup>151</sup> Saying that the majority was too rigid, Justice Purtle argued that if the court created Rule 53 it could amend it as well. He said that cases of dependent-neglected children should have constituted such an exceptional condition, and that trial courts should be left some discretion in carrying out the law.<sup>152</sup>

In restricting the use of masters, Arkansas has done so abruptly,

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143. *Id.* at 392-93, 769 S.W.2d at 405.

144. *Id.*

145. ARK. CODE ANN. § 16-10-101 (1987).

146. ARK. CONST., art. VII, §§ 21 and 22.

147. 298 Ark. at 393, 769 S.W.2d at 405.

148. *Id.* at 393, 769 S.W.2d at 406.

149. *Id.* at 394, 769 S.W.2d at 406.

150. *Id.* (Hays, J., concurring).

151. *Id.* at 394-95, 769 S.W.2d at 406 (Purtle, J., dissenting).

152. *Id.* at 395, 769 S.W.2d at 406-07.

in the space of only two years. Before *Walker* in 1987, juvenile masters were de facto judges because the court was obliged to accept their findings.<sup>153</sup> Act 14 then reined in masters by requiring judicial review of their findings. Only two years later, however, the supreme court abolished the use of masters in juvenile cases in *Hutton*, and then effectively ended the use of masters in any situation with its decision in *Templeton*. Yet, in none of these decisions did the court define what it would consider as exceptional conditions justifying a reference. Although the court claimed that it was closing the door on masters because it was simply following the letter of the law in Rule 53(b), and following the supreme court decision in *La Buy*,<sup>154</sup> it need not have done so.

The use of masters is, in fact, a wholly local question. Where a state's courts allow to tolerate more delegation of judicial powers, there has been no restriction on the use of masters beyond that in the particular order appointing a master. In Alaska, for example, the restrictive language in the civil procedure rules which limits the use of referees was purposely omitted.<sup>155</sup> In South Carolina, free reference is allowed,<sup>156</sup> and the referee has the power of the judge.<sup>157</sup>

Even in states where Rule 53 does provide for exceptional conditions, the court may not consider the rule paramount. An Indiana court of appeals held that a statutory grant to appoint a master superseded the Rule 53(b) restriction on the use of masters.<sup>158</sup> In Mississippi the supreme court refused to scrutinize the "exceptional conditions" criteria a trial court used.<sup>159</sup>

And, even though Arkansas has "laid the matter to rest,"<sup>160</sup> there still will be situations where the corpse refuses to stay buried. In civil commitment situations in Arkansas, it is extremely difficult to

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153. See *supra* note 7.

154. *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957); see *supra* notes 87-91 and accompanying text.

155. *Dean v. Firor*, 681 P.2d 321 (Alaska 1984).

156. S.C. R. Civ. P. 53(b). "[T]he court may . . . direct a reference of all or any of the issues, whether of fact or law."

157. *Id.* at 53(c). "Subject to the . . . limitations . . . in the order, the master has and shall exercise the power of the court sitting without a jury. . . ."

158. *Kruse v. Kruse*, 464 N.E.2d 934 (Ind. Ct. App. 1984). "[W]hen a master commissioner is properly appointed according to the statute [IND. CODE ANN. § 33-4-1-75.1(b) (Burns 1985)] . . . T[rial] R[ule] 53 does not apply." *Id.* at 937.

159. *Massey v. Massey*, 475 So. 2d 802 (Miss. 1985). Ruling on an appeal from a divorce proceeding held before a master, the supreme court said "we will not assume that a trial judge of this state would issue an order of reference without some exceptional condition requiring it." *Id.* at 806.

160. 298 Ark. at 394, 769 S.W.2d at 406.



have a probable cause hearing before a probate judge, bring a person to the State Hospital for evaluation, and obtain a ruling within the statutory time limit allowed for such hearings. Until *Templeton*, the courts had used a master under standing orders to conduct all hearings.<sup>161</sup> Now, the initial filing must be before the county probate judge, but each case is handled on an "exceptional condition" basis to allow a master to make findings and recommendations to be submitted to the court.<sup>162</sup> Unless the state supreme court, prompted either by another appeal or by the cries of standing judges overwhelmed by their caseloads, chooses to define or explain "exceptional conditions," courts in Arkansas, like those in states such as Colorado and Nevada, will not be able to use masters except in the traditional matters of account always permitted by Rule 53.

*Richard E. Olszewski*

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161. Weintraub, *State Court Systems May Feel Effects*, Ark. Gaz., Mar. 21, 1989, at A5, col. 1.

162. Telephone interview with J.D. Gingerich, Executive Secretary, Arkansas Judicial Department (June 20, 1989).