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DISTRICT COURT REVIEW OF JUDICIAL OFFICERS IN NEW MEXICO DOMESTIC VIOLENCE AND DOMESTIC RELATIONS CASES: RETHINKING THE RULES

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I. INTRODUCTION

In New Mexico, district court judges are authorized by statute and supreme court rule to appoint judicial officers1 to perform fact-finding and other ministerial duties in an advisory capacity.2 Judicial officers provide courts with a valuable efficiency device when issues are complicated3 or dockets are over-crowded, as is often the case in New Mexico's domestic violence and domestic relations courts.4

The efficiency needs of these courts, however, must not trump the rights of parties. Constitutional due process requires that parties to a controversy have an opportunity to be heard by a judge.5 Although judicial officers are members of the New Mexico Bar who have specialized experience in the branch of law in which they perform their duties, they are not elected judges.6 Unlike judges, they are not subject to removal by preemptory challenge.7 Judicial officers are appointed to help the court determine factual and legal issues, but the core judicial decision-making function must be performed independently by a district judge.8 Accordingly, to protect the due process rights of parties, district judges must review the recommendations and proposed orders of judicial officers in a meaningful manner.9

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1. The term judicial officer, as used in this Comment, is "[a] person, usually an attorney, who serves in an appointive capacity at the pleasure of the appointing judge, and whose actions and decisions are reviewed by that judge." Examples of judicial officers include masters (such as referees, auditors, and examiners), hearing officers, and special commissioners. BLACK'S LAW DICTIONARY 1118 (Sthed. 2004); Rule 1-053 NMRA (defining masters to include referees, auditors, and examiners).

2. See, e.g., NMSA 1978, §§ 40-4B-1 to -10 (1993) (authorizing district courts to appoint child support hearing officers); id. §§ 40-13-1 to -10 (2005) (authorizing district courts to appoint domestic violence hearing officers); Rule 1-053 NMRA (authorizing district courts to appoint special masters); Rule 1-053.1 NMRA (authorizing district courts to appoint domestic violence special commissioners); Rule 1-053.2 NMRA (authorizing district courts to appoint domestic relations hearing officers).

3. See, e.g., Rule 1-053(B) NMRA (authorizing reference of complicated issues to a master).

4. See, e.g., Collins ex rel. Collins v. Tabet, 111 N.M. 391, 409, 806 P.2d 40, 58 (1991) (Baca, J., dissenting); State v. Wilson, 116 N.M. 802, 804, 867 P.2d 1184, 1186 (Ct. App. 1993); see also William P. Lynch, Problems with Court-Annexed Mandatory Arbitration: Illustrations from the New Mexico Experience, 32 N.M. L. REV. 181, 181 (2002) ("[P]erceptions that court dockets are over-crowded have led courts across the country to search for other methods of resolving disputes.").

5. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (holding that due process provides, at a minimum, notice and an opportunity to be heard); In re Topoloff, 106 F.2d 300, 302 (4th Cir. 1939) ("hearing before the judge is...inherent in that idea of due process by which all judicial proceedings should be conducted").

6. See, e.g., Rule 1-053.1(B) NMRA (requiring that a domestic violence special commissioner "be a lawyer licensed to practice law in New Mexico and who has at least three (3) years of experience in the practice of law"); Rule 1-053.2(B) NMRA (requiring that a domestic violence special commissioner "be knowledgeable in the area of domestic relations and domestic violence matters").

7. See Rule 1-088.1 NMRA; see also NMSA 1978, § 38-3-9 (1985) (providing the substantive right to excuse a judge).

8. See, e.g., Buffington v. McGorty, 2004-NMCA-092, ¶30, 96 P.3d 787, 794 (mandating procedures for judicial review that assure "that the issues have been decided by a judge vested with judicial power").

Two recent New Mexico Court of Appeals cases raised due process concerns related to district court review of the recommendations of judicial officers in domestic violence and domestic relations cases. In *Lujan v. Casados-Lujan*, the New Mexico Court of Appeals expressed "grave concern" that district courts might be "automatically" signing "stick-noted orders" prepared by domestic violence special commissioners. In *Buffington v. McGorty*, the same court held that due process requires meaningful judicial review of the recommendations of domestic relations hearing officers and mandated procedural changes to the domestic relations hearing officer system to ensure that such review occurs before district judges sign off on hearing officer recommendations.

This Comment addresses these concerns. Part II surveys the current New Mexico rules and statutes governing the appointment and review of domestic relations hearing officers and child support hearing officers in domestic relations cases and of domestic violence special commissioners in domestic violence cases. These rules and statutes, if they contain judicial review provisions at all, are unclear as to the procedures district judges should follow when reviewing the recommendations of their appointees. Part III discusses the *Lujan* and *Buffington* cases, with particular attention paid to the court of appeals' concerns and directives regarding district court review of the recommendations of judicial officers. Part IV discusses two constitutional considerations: ensuring that appointment of judicial officers does not violate the separation of powers principle and requiring that district judges follow judicial review procedures that result in meaningful review of recommendations.

Finally, this Comment recommends changes to the judicial review provisions of two New Mexico Rules of Civil Procedure and two New Mexico statutes governing judicial officers in domestic relations and domestic violence cases. These procedural changes are designed to foster meaningful district court review of the recommendations of judicial officers. They require, in most cases, an opportunity for parties to object to the recommendations of judicial officers and mandate district court review of both the officer's recommendations and the parties' objections thereto. They have been drafted to comport with recent New Mexico case law and balance the efficiency needs of district courts against the constitutional rights of parties to domestic relations and domestic violence cases.

11. *Id.* 19, 87 P.3d at 1072.
12. *Id.* 19, 87 P.3d at 1072.
15. See infra Part II.
16. See infra Part III.
17. See infra Part IV.
18. See infra Part V.
19. See infra Part IV.B.
20. See infra Part IV.B.
21. See infra Part III.
22. See infra Part IV.
II. NEW MEXICO RULES OF CIVIL PROCEDURE AND NEW MEXICO STATUTES GOVERNING THE APPOINTMENT OF JUDICIAL OFFICERS IN DOMESTIC RELATIONS AND DOMESTIC VIOLENCE CASES

In New Mexico, judicial power can only be conferred upon a person by the authority of the law. In State v. McGhee, the supreme court stated that "[i]t is the public policy of this state, as evidenced by its Constitution and laws, that regularly elected or appointed district judges shall preside over its district courts." It is generally recognized, however, that New Mexico district courts have the inherent power to appoint judicial officers, and, in fact, the authority of judges to refer evidentiary issues to special masters survived scrutiny in New Mexico case law as early as 1881. Today, in the interests of expediency and economy, judicial officers are routinely appointed in New Mexico district courts in domestic relations, domestic violence, and child support cases.

A. Domestic Relations Hearing Officers

New Mexico Rule of Civil Procedure 1-053.2 grants district courts the authority to refer selected domestic relations issues to a domestic relations hearing officer. When a district judge requires the assistance of a hearing officer, she will appoint one by order of reference, and the specific duties and authority of the officer are

24. 41 N.M. 103, 64 P.2d 825 (1937).
25. Id. at 104, 64 P.2d at 826.
26. State v. Doe, 93 N.M. 621, 624, 603 P.2d 731, 734 (Ct. App. 1979). See generally R.R. v. Swasey, 90 U.S. (23 Wall.) 405 (1874). In In re Peterson, 253 U.S. 300 (1920), the U.S. Supreme Court elaborated upon the inherent power of the federal courts to appoint special masters: "Courts have...inherent power to provide themselves with appropriate instruments required for the performance of their duties....This power includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause." Id. at 312.
27. Baca v. Barrier, 2 N.M. (Gild., E.W.S. ed.) 131 (N.M. Terr. 1881), available at 1881 WL 4062. Territorial judges had the power to order a reference to a special master in equity suits without the consent of the parties, provided the court gave only advisory effect to the master’s recommendations. See Johnson v. Gallegos, 10 N.M. 1, 60 P. 71 (1900). In Johnson, the New Mexico Supreme Court stated: "A master in chancery is an officer appointed by the court to assist it in various proceedings incidental to the progress of a cause before it...The information which he may communicate by his findings in such cases, upon the evidence presented to him, is merely advisory to the court, which it may accept and act upon, or disregard in whole or in part."
Id. at 4, 60 P. at 72.
28. See supra note 2.
29. Domestic relations, or family law, is "the body of law dealing with marriage, divorce, adoption, child custody and support, child abuse and neglect, paternity, juvenile delinquency, and other domestic-relations issues." BLACK’S LAW DICTIONARY 638 (8th ed. 2004).
30. See generally Rule 1-053.2 NMRA. Domestic relations hearing officers must be licensed to practice law in New Mexico and must have practiced for a minimum of five years. Rule 1-053.2(B) NMRA. Twenty percent of that practice must have been in family law or domestic relations matters. Id. Full-time domestic relations hearing officers devote full time to domestic relations matters and are prohibited from the private practice of law or any other employment, occupation, or business inconsistent with their position. Rule 1-053.2(E) NMRA. Part-time hearing officers are allowed to practice law as long as doing so does not interfere with their duties. Id. Domestic relations hearing officers are required to conform to Rules 21-100 through 21-500 and 21-700 of the Code of Judicial Conduct. Rule 1-053.2(F) NMRA.
31. Reference is "[a]n order sending a case to a master or referee for information or decision." BLACK’S
delineated in the order. These duties may include reviewing petitions for indigency, making recommendations on temporary restraining orders and other orders of protection, conducting hearings on the merits of petitions, and holding interim hearings and preparing recommendations on property division, child support, and custody matters in divorce cases. Performance of these duties often assists the court in carrying out the purposes of legislation, including the Domestic Relations Mediation Act, the Family Violence Protection Act, and the Child Support Hearing Officer Act.

Rule 1-053.2(C) provides that "[a]ll orders must be signed by a district judge before the recommendations of a domestic relations hearing officer become effective." However, the rule does not provide for the procedures by which a judge may review these recommendations. In Buffington, the New Mexico Court of Appeals mandated a number of specific procedural requirements intended to ensure meaningful judicial review of domestic relations hearing officer recommendations. The changes to Rule 1-053.2 recommended in Part V have been drafted with these requirements as a starting point.

B. Child Support Hearing Officers

Child support hearing officers carry out the purposes of the Child Support Hearing Officer Act. The Act grants these officers their authority. Child support

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LAW DICTIONARY 1306 (8th ed. 2004).
32. Rule 1-053.2(A), (C) NMRA.
33. Indigency is "[t]he state or condition of a person who lacks the means of subsistence; extreme hardship or neediness; poverty." BLACK'S LAW DICTIONARY 788 (8th ed. 2004).
34. Rule 1-053.2(C)(2) NMRA.
35. Rule 1-053.2(C)(3) NMRA.
36. Rule 1-053.2(C) NMRA.
37. Rule 1-053.2(C)(5) NMRA.
38. Id. The Domestic Relations Mediation Act allows a judicial district to establish a domestic relations mediator to provide mediation in domestic relations cases involving children. NMSA 1978, §§ 40-12-1 to -6 (2001).
40. Rule 1-053.2(C)(4) NMRA; see NMSA 1978, §§ 40-4B-1 to -10 (1993). The Child Support Hearing Officer Act provides "the personnel and procedures necessary to insure prompt and full payment by obligated parties of child support obligations for their dependent children and, where applicable, attendant spousal support obligations." Id. § 40-4B-2 (1988).
41. Rule 1-053.2(C)(8) NMRA.
43. See infra Part V.A.
44. Similar to domestic relations hearing officers, child support hearing officers are licensed attorneys with a minimum of five years of experience in the practice of law, at least twenty percent of which must have been devoted to family law or domestic relations matters. NMSA 1978, § 40-4B-4(B) (1993). They are required to devote full time to their duties and are precluded from the private practice of law or any other activity interfering with or inconsistent with their position. Id. They are required to conform to rules 21-100 through 21-500 and 21-700 of the Code of Judicial Conduct, and violation of these rules is grounds for dismissal. Id. § 40-4B-4(C).
45. Id. §§ 40-4B-1 to -10. Section 40-4B-2 provides:

The purpose of the Child Support Hearing Officer Act is to provide the personnel and procedures necessary to insure prompt and full payment by obligated parties of child support obligations for their dependent children and, where applicable, attendant spousal support obligations. It is further the purpose of the [Act] to insure that support payments are made in compliance with federal regulations governing the state's federally mandated program pursuant
hearing officers are "appointed by and serve at the pleasure of the judges" in such judicial districts as the Secretary of the New Mexico Human Services Department deems appropriate considering the case loads and case needs of the state's social security program.47

A district court may refer a matter to a child support hearing officer only when a case involves child support enforcement through the Child Support Enforcement Bureau of the Human Services Department.48 In these actions, the court may call upon the child support hearing officer to perform a variety of duties related to child support enforcement by furnishing the hearing officer with an order of reference.49 These duties include reviewing petitions to establish support obligations,50 enforcing court orders establishing support obligations,51 and recovering unpaid child support arrearages52 and post-judgment interest.53 Child support hearing officers hear actions pursuant to the Child Support Hearing Officer Act as well as those actions brought to modify existing support obligations and establish parentage under the Revised Uniform Reciprocal Enforcement of Support Act.54

The Child Support Hearing Officer Act provides for the possibility of judicial review of the hearing officer's recommendations but only at the discretion of the district judge.55 Review is not required.56 The Act provides that the hearing officer must prepare a report, including findings of fact and conclusions of law, with a proposed decision upon any matter referred to him in the order of reference.57 Within ten days of the filing of this report, the parties may file written objections with the court and serve them on the opposing parties.58 "If the district court judge wishes to review the hearing officer's [report] de novo or on the record," he or she must do so within fifteen days of the filing of objections.59 The statute provides that "[f]ailure to act by the district judge within the time allowed is deemed acceptance... to Title IV D of the federal Social Security Act requiring a state plan and program to enforce child support obligations. Such compliance will speed up the processing of cases and completion of enforcement actions, thereby reducing expenditures for aid to families with dependent children.

Id. § 40-4B-2 (1988).
46. Id.
47. Id. § 40-4B-4(A), (D) (1993).

The presiding judge...shall refer only matters...in all of those proceedings in which:
A. the [Human Services] department...is acting as the enforcing party;
B. the [Human Services] department...is acting as the representative of a custodial parent;
C. the [Human Services] department is the enforcing Title IV D party pursuant to a written request...received from...another state.

50. Id. § 40-4B-5 (1993).
51. Id.
52. Id. Arrearage is "[t]he state of being behind in the payment of a debt or the discharge of an obligation."

55. Id. § 40-4B-8(C) (1993).
56. Id.
57. Id. § 40-4B-8(A).
58. Id. § 40-4B-8(B).
59. Id. § 40-4B-8(C).
by the district court of the child support hearing officer's decision and will grant the decision the full force and effect of a district court decision." If the district judge opts to review the report and objections on the record, she shall set aside the decision of the hearing officer only if it is "(1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the record as a whole; or (3) otherwise not in accordance with the law."61

The Child Support Hearing Officer Act is unique among the statutes and rules authorizing the appointment of judicial officers in New Mexico courts because it does not require a judge's signature. The district court judge may simply ignore the report and objections; the decision of the hearing officer then becomes final. The implications of these provisions in the context of a due process analysis are detailed more fully in Part IV.64

C. Domestic Violence Special Commissioners

New Mexico Rule of Civil Procedure 1-053.165 authorizes the district courts to appoint domestic violence special commissioners.66 Domestic violence special commissioners carry out the provisions of the Family Violence Protection Act.67 Special commissioners are appointed by the chief judge in the district to handle petitions for orders of protection and motions to enforce, modify, or terminate orders of protection.68 Both the Family Violence Protection Act and Rule 1-053.1 define the fullest scope of a special commissioner's authority to include reviewing petitions, interviewing petitioners on the record, conducting hearings on the merits, and preparing recommendations to the district court.69

The judicial review provision of Rule 1-053.1 is identical to that of Rule 1-053.2: "All orders must be signed by a district judge before the recommendations... become effective."70 As with Rule 1-053.2, Rule 1-053.1 provides no further

60. Id.
61. Id.: § 40-4B-8(D).
62. Compare § 40-13-10(B) (2005) ("All orders must be signed by a district court judge before the recommendations of a domestic violence special commissioner become effective.")., with Rules 1-053.2(C), 1-053.1(C) NMRA ("All orders must be signed by a district judge before the recommendations of a special commissioner become effective.").
63. See NMSA 1978, § 40-4B-8(C) (1993) ("Failure to act by the district judge within the time allowed is deemed acceptance by the district court of the child support hearing officer's decision and will grant the decision the full force and effect of a district court decision.").
64. See infra Part IV.
65. Rule 1-053.1 NMRA.
66. A domestic violence special commissioner must be a lawyer licensed to practice law in New Mexico who has done so for at least three years and must be knowledgeable in domestic relations and domestic violence matters. NMSA 1978, § 40-13-9(B) (2005); Rule 1-053.1(B) NMRA. Domestic violence special commissioners are required to conform to Rules 21-100 through 21-500 and 21-700 of the Code of Judicial Conduct. NMSA 1978, § 40-13-9(B)(3) (2005); Rule 1-053.1(E) NMRA.
67. Rule 1-053.1(C) NMRA; see NMSA 1978, §§ 40-13-1 to -10 (2005). The New Mexico legislature amended sections 40-13-9 and 40-13-10 of the Family Violence Protection Act in 2005 to include provisions authorizing the appointment of domestic violence special commissioners. The amendments largely incorporated the provisions of Rule 1-053.1. These changes are relatively minor and are peripheral to the focus of this Article. In all substantive ways, the Act and the Rule are identical.
69. NMSA 1978, § 40-13-10 (2005); Rule 1-053.1(A), (C) NMRA.
70. Rule 1-053.1(C) NMRA.
procedural requirements for judicial review. In Lujan v. Casados-Lujan, the New Mexico Court of Appeals expressed concern that the rule's silence allows district judges to "automatically sign" the recommendations of domestic violence special commissioners without review. Furthermore, the changes to Rule 1-053.1 recommended in Part V have been drafted to ensure meaningful judicial review of special commissioner reports and parties' objections thereto.

III. RECENT NEW MEXICO CASE LAW CONCERNING DISTRICT COURT REVIEW OF JUDICIAL OFFICERS IN DOMESTIC RELATIONS AND DOMESTIC VIOLENCE CASES

In Lujan v. Casados-Lujan and Buffington v. McGorty, the New Mexico Court of Appeals raised and addressed concerns regarding domestic relations hearing officers, domestic violence special commissioners, and child support hearing officers in New Mexico district courts. These cases underscore the importance of meaningful judicial review of the recommendations of judicial officers.

A. Lujan v. Casados-Lujan

The Lujan case offers insight into New Mexico's domestic violence procedures. On February 7, 2002, Darlene Lujan filed a petition in New Mexico district court against her ex-husband's new wife, Julie Casados-Lujan, requesting an order of protection from domestic abuse on behalf of her fourteen-year-old son. Citing a dozen specific examples of "verbal abuse and belittlement," Lujan's petition alleged that she feared that the physical abuse of her son would soon follow. A district court judge signed a temporary order of protection the same day and ordered a hearing before a domestic violence special commissioner on whether an extended order would be entered.

At the hearing, which took place two weeks later, the special commissioner granted Lujan an extended order of protection. When Casados-Lujan requested an opportunity to object, the special commissioner correctly told her that Rule 1-053.1 does not allow for any period of objection. The special commissioner added that if a period of ten days were allowed for objection, "everyone would be dead" by the time the extended order was entered.

71. Compare Rule 1-053.1(C) NMRA, with Rule 1-053.2(C) NMRA.
73. Id. ¶ 19, 87 P.3d at 1072. This concern is discussed more fully in Part III.A, infra.
74. See infra Part V.C.
75. 2004-NMCA-036, 87 P.3d 1067.
76. 2004-NMCA-092, 96 P.3d 787.
78. Id. ¶ 2, 87 P.3d at 1068.
79. Id.
80. Id. ¶ 3, 87 P.3d at 1069.
81. Id. ¶ 4, 87 P.3d at 1069.
82. See generally Rule 1-053.1 NMRA.
83. Lujan, 2004-NMCA-036, ¶ 4, 87 P.3d at 1069.
Casados-Lujan raised several issues on appeal. Chief among these issues, she argued that the New Mexico domestic violence special commissioner system constitutes an impermissible delegation of judicial authority. In her brief, Casados-Lujan described an arrangement whereby the domestic violence special commissioner performs all of the decision-making functions of a district court judge, with the judge then rubber-stamping the orders with little or no review:

The process works like this: A claimant comes to court and fills out a petition. The petition is then reviewed by the hearing officer, who in turn makes a recommendation to the district court judge to sign off on a temporary ex parte order of protection. The temporary order of protection is literally walked across the hallway to the district judge’s office and handed to the district judge. The page for signature is stick noted so that the judge knows where to sign. The judge just signs it. A hearing is then scheduled.

At the hearing, the hearing officer takes sworn testimony. The hearing officer rules on objections. At the end of the hearing, the hearing officer writes up recommendations. The recommendations are presented ex parte to the district court judge for approval. There is no opportunity to voice any objections to the recommendations proposed by the hearing officer. The judge does not listen to the hearing tapes. The order is walked over to the district court judge with the signature page stick noted. The judge automatically signs it.

As Casados-Lujan described the domestic violence special commissioner system, the commissioner’s recommendations were being granted the full force and effect of a judicial decree without meaningful judicial review. Casados-Lujan argued that without full and independent district court review of the special commissioner’s recommendation, the court was cloaking commissioners in judges’ robes for purposes of judicial decision making. Essentially, without proper review, the special commissioners perform the core decision-making function of a judge.

The court of appeals did not rule on this claim. The court found nothing in the record, the transcript of the hearing, or any exhibits that supported her recitation, nor did the court find any evidence of “stick notes on any of the orders in the record proper.” The court found that “[t]he order of protection here was signed by the district judge, and nothing in the record showed that the judge did not inform herself as to everything she needed to know in order to understand and intelligently

84. Id. ¶ 5–22, 87 P.3d at 1069–73. These issues were (1) whether Lujan’s representation of her son amounted to the unauthorized practice of law, (2) whether the statements made to Lujan’s son rose to the level of domestic abuse, (3) whether the special commissioner displayed bias and impartiality at the hearing, and (4) whether the New Mexico domestic violence special commissioner system represents an impermissible delegation of judicial authority.
85. Id. ¶ 16–21, 87 P.3d at 1071–72; see infra Part IV.A.
86. Id. ¶ 16, 87 P.3d at 1071.
87. Id.
88. Id.
89. Id.
90. Id. ¶ 20, 87 P.3d at 1072.
91. Id. ¶ 17, 87 P.3d at 1071.
rule on [Casados-Lujan's] contentions."  The court affirmed Lujan's extended order of protection.  Then, in dicta, the court of appeals discussed Casados-Lujan's recitation "in view of the fact that this is not the only case that will raise issues of the sort raised here." The court was "unable to find a case that would approve of a procedure" such as the one Casados-Lujan described and expressed "grave concern if, as alleged..., district court judges are presented with 'stick noted orders' that they 'automatically' sign." The court left it at that, however, because no procedural error had been properly preserved at trial.

Despite the court's concern, nothing in the holding of Lujan necessarily required a reconsideration of Rule 1-053.1 or the domestic violence special commissioner system at that time. Although the court hinted at the need for reform, it was not until a year later, in Buffington v. McGorty, that the court would discuss the need for procedural changes regarding judicial review of the recommendations of judicial officers.

B. Buffington v. McGorty

The Buffington case evolved out of the 1985 divorce of James McGorty and Sandra de Castro Buffington. In that proceeding, the parties stipulated to the custody and child support of their daughter and to the division of their property. The couple parted ways and, for fourteen years, shared custody of their daughter. In 1999, Buffington filed a motion for enforcement of the child support stipulation included in the 1985 divorce decree plus attorney fees and costs. An oral hearing to determine child support arrearages before a domestic relations hearing officer was held on September 12, 2001.

Buffington's motion requested child support payments in addition to payments McGorty had made for their daughter's schooling and alleged that McGorty failed to pay the required child support, health insurance, and health expenses incurred on behalf of their daughter. McGorty denied owing child support and alleged that

92. Id. ¶ 21, 87 P.3d at 1072.
93. Id. ¶ 24, 87 P.3d at 1073.
94. Id. ¶ 19, 87 P.3d at 1072.
95. Id.
96. Id.
97. Id. ¶ 20, 87 P.3d at 1072 ("Bedrock principles of appellate law dictate that matters not of record present no issue for review,...there is a presumption of regularity in the proceedings below, and...error must be clearly demonstrated.") (citations omitted).
99. Id. ¶ 2, 96 P.3d at 788.
100. Id.
101. Id. ¶ 3–12, 96 P.3d at 788–91.
102. Id. ¶ 3, 96 P.3d at 789.
103. See supra note 52.
104. Buffington, 2004-NMCA-092, ¶ 8, 96 P.3d at 790. Two things are worth noting about the September 12, 2001, date of the hearing: (1) the September 11, 2001, attacks on the World Trade Center and the Pentagon had taken place the day before, and most Americans were still reeling from the shock of that event; and (2) it was the hearing officer's last day on the job.
105. Id. ¶ 11, 96 P.3d at 790.
106. Id. ¶ 7, 96 P.3d at 789.
any money he might owe Buffington was more than offset by money he claimed was owed him under the property division stipulation.\textsuperscript{107} When McGorty raised this offset defense before the hearing officer, however, the hearing officer "suggested she had neither the time nor inclination to hear" it.\textsuperscript{108} She told McGorty that she would take limited questions on the issue and would decide later if she would give his defense any consideration.\textsuperscript{109}

The hearing officer filed her report on February 15, 2002, five months after the September 12, 2001 hearing.\textsuperscript{110} She recommended that the court enter a judgment against McGorty for child support arrears.\textsuperscript{111} She did not use the formula for determining child support outlined in the 1985 stipulation, finding it "impossible to use."\textsuperscript{112} She allowed only partial credit for expenses McGorty paid while the couple's daughter was in boarding school, and she did not address McGorty's offset defense.\textsuperscript{113}

Although New Mexico Rule of Civil Procedure 1-053.2 does not provide for a period for parties to file objections, the hearing officer advised the parties that they had ten days to file written objections to her report and stated that, if no objections were received by the due date, her report and decision would be made an order of the district court.\textsuperscript{114} McGorty filed timely objections to the hearing officer's report, challenging her failure to adopt the child support calculation set out in the stipulation and requesting a hearing on his offset defense.\textsuperscript{115} A hearing on McGorty's objections was scheduled for May 16, 2002.\textsuperscript{116}

Following this second hearing, the district court entered its final order, granting the hearing officer's recommendations the full force and effect of a district court decision and ordering McGorty to pay Buffington child support arrears in the sum recommended by the hearing officer.\textsuperscript{117} The district court did not address McGorty's objections, holding that it lacked jurisdiction to do so under the Child Support Hearing Officer Act because the court did not review the hearing officer's decision within the required fifteen-day period following filing of objections.\textsuperscript{118}

\textsuperscript{107} Id. \textsuperscript{12}, 96 P.3d at 790.
\textsuperscript{108} Id.
\textsuperscript{109} Id. The hearing officer said:
I'm going to allow you to ask some questions... [I]t seems to me...that an issue of a loss on a piece of property could get fairly complicated...I am going to allow you to ask some questions about it. I'm going to reserve ruling on whether I have to give him any credit for anything assuming I find anything to give him credit for but...I don't want to have to deal with a lot of complicated issues contesting the loss of what...essentially sounds like a business arrangement.
\textsuperscript{110} Id. \textsuperscript{13}, 96 P.3d at 790.
\textsuperscript{111} Id.
\textsuperscript{112} Id.
\textsuperscript{113} Id.
\textsuperscript{114} Id. \textsuperscript{14}, 96 P.3d at 791.
\textsuperscript{115} Buffington also filed objections to the report on March 1, 2002. Id. \textsuperscript{15}, 96 P.3d at 791.
\textsuperscript{116} Id. \textsuperscript{16}, 96 P.3d at 791. Prior to the May 16, 2002 hearing, the district court filed an order stating that objections were filed, the record was reviewed, and the objections were noted. The court ordered recommitment of the child custody and visitation issues to the hearing officer for de novo review. It then set aside this order pending the May 16 hearing. This order was never entered. Id.
\textsuperscript{117} Id. \textsuperscript{17}, 96 P.3d at 791.
\textsuperscript{118} Id. Section 40-4B-8(C) of the Child Support Hearing Officer Act provides:
If the district court judge wishes to review the hearing officer's decision...he shall take
McGorty filed a motion to set aside the district court's judgment. He argued that the hearing officer at the September 12, 2001, hearing was not a child support hearing officer acting under the Child Support Hearing Officer Act, but instead was a domestic relations hearing officer operating under Rule 1-053.2, "and therefore the time limitations of the Act do not apply to [the hearing officer's] recommendations." The district court held its ground and denied the motion, reiterating that it lacked jurisdiction under the Child Support Hearing Officer Act to review the recommendations of the hearing officer after fifteen days.

McGorty appealed and the New Mexico Court of Appeals reversed the district court, holding that the hearing officer at the September 12, 2001, hearing was appointed as a domestic relations hearing officer under Rule 1-053.2(C)(7), to "prepare recommendations to the district court regarding...child support...matters," and not as a child support hearing officer under the Child Support Hearing Officer Act. The court held that it is only appropriate for a district court to refer a child support dispute to a child support hearing officer under the Child Support Hearing Officer Act in "cases involving child support enforcement through the Child Support Enforcement Bureau of the Human Services Department." The court reasoned that, if the Bureau is not involved, as it was not in this case, reference to a child support hearing officer is not appropriate. Instead, it is appropriate to appoint a domestic relations hearing officer under New Mexico Rule of Civil Procedure 1-053.2.

The court then examined the domestic relations hearing officer system in light of constitutional due process requirements. Addressing the same issues raised but never reached in *Lujan*, the court specified a set of procedures to ensure that district

action...within fifteen days after the objections are filed. Failure to act by the district judge within the time allowed is deemed acceptance by the district court of the child support hearing officer's decision and will grant the decision the full force and effect of a district court decision.


120. *Id.* ¶¶ 18–20, 96 P.3d at 791–92. McGorty also argued that, if the Child Support Hearing Officer Act did apply, the order must be set aside under New Mexico Rule of Civil Procedure 1-060(B)(1), which provides, "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect." Rule 1-060(B)(1) NMRA. This argument also failed.

121. *Id.* ¶ 17, 96 P.3d at 791.

122. New Mexico Rule of Civil Procedure 1-053.2(C)(7) provides, "A domestic relations hearing officer may...prepare recommendations to the district court regarding allocation of income and expenses, child support and custody matters." Rule 1-053.2(C)(7) NMRA.


124. *Id.* ¶ 26, 96 P.3d at 793; *see also supra* note 47 and accompanying text.

125. The court of appeals noted that this is exactly what the district court seemed to have done in *Buffington*. The hearing officer and the district court both seemed to understand that the hearing officer was working as a domestic relations hearing officer. *Buffington*, 2004-NMCA-092, ¶ 25, 96 P.3d at 793. The hearing officer identified herself as a domestic relations hearing officer in her report to the district court. *Id.* The parties were informed of the same. *Id.* Both the notice and amended notice of hearing informed the parties that "this matter will come before [a] Domestic Relations Hearing Officer" and McGorty and Buffington were served notice upon filing of the hearing officer's report, which identified her as a domestic relations hearing officer. *Id.* Furthermore, both parties apparently read the report because they submitted timely objections responding to it. *Id.*

126. *Id.* ¶ 30, 96 P.3d at 794.
The court judges do not "automatically" enter the recommendations of their domestic relations hearing officers as a final order without meaningful judicial review.\textsuperscript{127}

The court held that it is fundamental to the due process concept of opportunity to be heard "that the parties be given an opportunity to submit objections to a hearing officer's report and recommendations."\textsuperscript{128} The court mandated a ten-day period for parties to object to hearing officer recommendations.\textsuperscript{129} The district judge must then "hold a hearing on the merits of the issues before the court, including the hearing officer's recommendations and the parties' objections thereto."\textsuperscript{130} The court did not specify whether this hearing must be oral or on the record but instead allowed for flexibility: "The nature of the hearing and review to be conducted by the district court will depend upon the nature of the objections being considered."\textsuperscript{131}

The court of appeals held that, after the required hearing, a district court may "adopt the hearing officer's recommendations, modify the recommendations, reject in whole or in part the recommendations, or receive further evidence or recommit the matter to the hearing officer with instructions."\textsuperscript{132} The district judge, however, must produce a record of the hearing demonstrating that "the court in fact considered the objections and established the basis for the court's decision."\textsuperscript{133} The court wrote:

> In this way, the parties are assured that the issues have been decided by a judge vested with judicial power and an appropriate record is made to allow for appellate review of the district court's decision. The hearing officer assists the district court in determining the factual and legal issues, and the core judicial function is independently performed by the district judge. This procedure is implicit in the requirement of the Rule that "[a]ll orders must be signed by a district judge before the recommendations of a domestic relations hearing officer become effective."\textsuperscript{134}

Accordingly, the appeals court reversed the order of the district court and remanded with instructions to the district court to "conduct a hearing, consider the objections of the parties to the hearing officer's report, rule on those objections, and establish a basis for the district court's actions."\textsuperscript{135}

This holding mandates changes to New Mexico's domestic relations hearing officer system, and the court's due process concerns compel a re-examination of New Mexico's procedures for district court review of the recommendations of judicial officers in all domestic relations and domestic violence cases. Such a reconsideration must balance two prevailing constitutional concerns against the efficiency needs of the court: appointment of judicial officers must not violate the separation of powers principle,\textsuperscript{136} and district court review of the recommendations

\textsuperscript{127} Id. ¶ 24, 96 P.3d at 792.
\textsuperscript{128} Id. ¶ 30, 96 P.3d at 794.
\textsuperscript{129} Id.
\textsuperscript{130} Id. ¶ 31, 96 P.3d at 794.
\textsuperscript{131} Id.
\textsuperscript{132} Id.
\textsuperscript{133} Id.
\textsuperscript{134} Id. (alteration in original).
\textsuperscript{135} Id. ¶ 32, 96 P.3d at 794.
\textsuperscript{136} See infra Part IV.A.
of judicial officers must be meaningful in order to comport with procedural due process.\textsuperscript{137}

IV. CONSTITUTIONAL CONSIDERATIONS RELATED TO DISTRICT COURT REVIEW OF JUDICIAL OFFICERS IN DOMESTIC RELATIONS AND DOMESTIC VIOLENCE CASES

The State of New Mexico has a legitimate interest in allocating its judicial resources efficiently and promoting the proper administration of its judicial system.\textsuperscript{138} The power to appoint judicial officers is integral to the efficient operation of New Mexico district courts.\textsuperscript{139} However, \textit{Lujan} and \textit{Buffington} seem to suggest that when efficiency trumps, and judicial review of the recommendations of non-judges is lacking, the rights of parties are put at risk. Because fundamental liberty interests are implicated in domestic violence and domestic relations cases, New Mexico should take great care not to curtail the rights of parties in favor of efficient management of its district court dockets.\textsuperscript{140} Therefore, the following reconsideration of the rules and statutes governing judicial review of domestic relations hearing officers, domestic violence special commissioners, and child support hearing officers balances the efficiency needs of courts against the constitutional rights of parties.\textsuperscript{141}

A survey of New Mexico case law reveals that two constitutional considerations are paramount in the context of judicial review of the recommendations of judicial officers. First, the rule or statute governing a particular delegation of fact-finding authority to a judicial officer must not violate the separation of powers principle embodied in article III, section 1 of the New Mexico Constitution by improperly delegating decision-making authority to a non-judge.\textsuperscript{142} The final decision-making

\textsuperscript{137} \textit{See infra} Part IV.B.


\textsuperscript{139} \textit{See, e.g.,} Thompson v. Ruidoso-Sunland, 105 N.M. 487, 490, 734 P.2d 267, 270 (1987) (stating that an appellate advisory panel was named to assist the court “because this court...does not have sufficient personnel to expeditiously handle its caseload”).


\textsuperscript{141} This balancing approach is utilized by New Mexico courts in other civil contexts. \textit{See, e.g.,} Shovelín v. Cent. N.M. Elec. Coop., Inc., 115 N.M. 293, 850 P.2d 996 (1993) (balancing constitutional rights, including due process, against judicial efficiency in the context of the preclusive effect of administrative agency decisions); Berry v. Fed. Kemper Life Assurance Co., 2004-NMCA-116, \textsection 47, 99 P.3d 1166, 1181 (noting that, in the context of class actions, “courts should strive to achieve a reasonable balance between judicial convenience and the rights of the parties”).

\textsuperscript{142} The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted....

function must be reserved to a judge vested with judicial authority. Accordingly, rules and statutes that provide for appointment of judicial officers must require district judges to review all recommendations and sign all proposed orders.

Second, the procedures by which the judge reviews the judicial officer’s recommendations and signs them, granting them the full force and effect of a district court order, must guarantee that judicial review is meaningful. Procedural due process requires, at a minimum, that parties to a civil matter are given proper notice of claims against them and that they are provided an opportunity to be heard by a judge. District court review of judicial officers implicates the latter requirement. According to the court in Buffington, the opportunity to be heard principle requires (1) an opportunity for the parties to object to the judicial officer’s recommendations, (2) a hearing by the district court on the judicial officer’s recommendation and any objections raised thereto, and (3) the production of a record for appellate review that reflects the court’s reasoning in making its final determination.

This Comment adopts this holding as the starting point for drafting new procedures governing district court review of judicial officers in domestic relations and domestic violence cases. Additionally, however, the competing interests of the courts and the parties are balanced according to the principles of Mathews v. Eldridge. The resulting changes recommended in Part V of this Comment therefore comport with the holding of Buffington, meet constitutional requirements, and balance interests.

A. Improper Delegation of Judicial Authority

Article VI, section 1 of the New Mexico Constitution vests judicial power in the judiciary alone. Article III, section 1 provides for the separation of judicial,
legislative, and executive power. However, it is well understood that the separation of powers principle does not prohibit every exercise of judicial function by non-judges. New Mexico courts have held that article III, section 1 should not be considered an absolute bar to performance by one of the three branches of some functions performed by the other two branches or to delegation of some of the functions of one of the branches to another entity. The interests protected by the separation of powers doctrine are best furthered by ensuring that adequate checks exist to keep the branches free from the control or coercive influence of the others. Although the legislature may delegate some judicial functions to judicial officers, the exercise of these powers should be guided by the principle that the essential attributes of judicial power remain with the judiciary. The same principle applies when the delegation of judicial power has been authorized by the judiciary itself, via court rule or other device.

New Mexico has defined the “essence of judicial power” as “the final authority to render and enforce a judgment.” Judicial review of the recommendations of judicial officers allows a robed judge to be the final authority rendering and enforcing the judgment. This principle requires that judges have an opportunity to review the recommendations of judicial officers. The test is simple and well-established: if a district court judge signs the final order of the court, no judicial power has been impermissibly delegated. The core decision-making function has been performed by a judge, not a judicial officer. The changes proposed herein ensure that the rules and statutes governing the use of judicial officers in domestic violence and domestic relations cases in New Mexico district courts do not violate this constitutional principle.
B. Due Process Requires Meaningful Review of the Recommendations of Judicial Officers

As the appellant’s description of the domestic violence special commissioner system in Lujan suggests, a judge’s signature alone does not necessarily guarantee meaningful review. Neither cursory review nor “automatic” approval of the recommendations of judicial officers pass constitutional muster. Procedural due process requires that the steps the district court judge follows in reviewing the judicial officer’s recommendations result in meaningful judicial review.

This issue begs the question of what constitutes meaningful review. Due process is not a technical conception with a fixed content unrelated to time, place, and circumstance. It is a flexible concept whose substance depends on the circumstances of a particular case but whose essence is the right to be heard at a meaningful time and in a meaningful manner. Therefore, the judicial review procedures appropriate in domestic relations and domestic violence cases must take into account the interests, both public and private, at stake in these cases.

In Mathews v. Eldridge, the U.S. Supreme Court established three factors to be used in determining whether a given set of procedures meets procedural due process requirements. First, the court weighs the private interest that will be affected by the official action. Parties to domestic relations and domestic violence cases require prompt disposition of their disputes because personal safety, child support payments, and other critical liberty and property interests are implicated.

Second, the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute safeguards must be weighed. The risk of erroneous deprivation in these cases was

166. Lujan v. Casados-Lujan, 2004-NMCA-036, ¶ 16, 87 P.3d 1067, 1071; see supra Part III.A.
168. Lujan, 2004-NMCA-036, ¶ 19, 87 P.3d at 1072 ("We have been unable to find a case that would approve of a procedure such as Respondent describes [in which judges rubber-stamp orders recommended by domestic violence special commissioners]").
169. See, e.g., Buffington v. McGorty, 2004-NMSC-092, ¶ 31, 96 P.3d 787, 794 (holding that three procedures are required in the domestic relations hearing officer system: an opportunity for the parties to object, a hearing on the recommendations and the objections thereto, and a written record that establishes the basis for the court’s decision).
170. In Harrell, the court held that in the context of legislatively created arbitrators, due process requires that parties...be offered meaningful review of the arbitrator’s decision. In order for review...to be meaningful, the court must determine whether the litigant received a fair hearing before an impartial tribunal, whether the decision is supported by substantial evidence, and whether the decision is in accordance with the law.
171. Mathews, 424 U.S. at 319 (1976); see also Harrell, 118 N.M. at 479–80, 882 P.2d at 519–21 (applying Mathews factors in a procedural due process analysis of compulsory arbitration).
172. Mathews, 424 U.S. at 335; Harrell, 118 N.M. at 478, 882 P.2d at 519.
173. See supra note 140. At this point, it is important to note the distinction between domestic relations cases, which most often involve the redistribution of money and property, and domestic violence cases, where personal safety is at risk. Because of the differences, the recommendations below address judicial review in the domestic relations context separately from judicial review in the domestic violence context.
established in *Lujan* and *Buffington*: absent meaningful review of judicial officer recommendations, parties may potentially be deprived of their opportunity to be heard by a judge. Further safeguards requiring thorough district court review prevent an unconstitutional adjudication of private rights by non-judges.

Finally, the court takes into account the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. The government’s interest in these cases is clear: appointment of judicial officers fosters the efficient management of overcrowded domestic relations and domestic violence dockets. Consequently, the procedures required should provide district court judges with flexibility and should not unduly burden them with superfluous process and unnecessary work. Each of these factors is taken into account in the recommendations below.

V. RECOMMENDED CHANGES TO THE JUDICIAL REVIEW PROVISIONS OF THE SUPREME COURT RULES AND LEGISLATIVE STATUTES GOVERNING THE APPOINTMENT OF JUDICIAL OFFICERS IN DOMESTIC RELATIONS AND DOMESTIC VIOLENCE CASES IN NEW MEXICO DISTRICT COURTS

The New Mexico Supreme Court Rules Committee is currently considering revisions to Rule 1-053.2 that comport with the holding of *Buffington*. The Rules Committee is also considering changes to Rule 1-053.1, partly as a result of the concerns raised in *Lujan*. This Part recommends appropriate changes to the judicial review provision of these two rules, with reference to the separation of powers and procedural due process considerations described above. Furthermore, changes to the Family Violence Protection Act and the Child Support Hearing Officer Act are recommended that will bring these Acts into line with the rules of the court.

A. Domestic Relations Hearing Officers: Rule 1-053.2

Rule 1-053.2 does not violate the impermissible delegation principle. It guarantees that judicial authority is not impermissibly delegated to a domestic

176. *Id.*
179. See supra Part IV.
181. *Id.* §§ 40-4B-1 to -10 (1993).
182. In New Mexico, facial conflicts between procedural rules and legislative statutes are resolved in favor of the court rule. Substantive law is the domain of the legislature; procedural rules are propagated by the judiciary. See *Ammerman v. Hubbard Broad.*, Inc., 89 N.M. 307, 551 P.2d 1354 (1976); see also *Albuquerque Rape Crisis Ctr. v. Blackmer*, 2005-NMSC-032, 120 P.3d 820. Rules 1-053.1 and 1-053.2 are rules of procedure and therefore trump conflicting provisions of, respectively, the Family Violence Protection Act or the Child Support Hearing Officer Act. When amending Rules 1-053.1 and 1-053.2, the New Mexico Supreme Court has the option of using its *Ammerman* power to amend the rules to explicitly subsume the Family Violence Protection Act and the Child Support Hearing Officer Act under the rules, rendering any procedural provisions contained in the Acts moot. In the alternative, the legislature may amend the statutes voluntarily to bring them in line with amended rules 1-053.1 and 1-053.2.
183. See supra Part IV.A.
relations hearing officer by requiring that all orders must be signed by a district judge before the recommendations of a domestic relations hearing officer become effective. The rule does not, however, guarantee meaningful review; it contains no procedures for judicial review whatsoever.

The court in Buffington required three procedural devices to ensure that a judge’s signature guarantees full and independent judicial review: opportunity for parties to object to the recommendations, a required district court hearing on the hearing officer’s recommendations and the parties’ objections thereto, and the production of a record for appellate review that provides a basis for the district judge’s decision. New Mexico Rule 1-053.2 should be amended to comport with this mandate in a manner that balances the state’s efficiency needs against the due process rights of parties.

1. Time Limit for Submission of Hearing Officer Recommendations and Opportunity for Parties to Object

The hearing officer in Buffington submitted her report and recommendations a full five months after the hearing. This was allowable because Rule 1-053.2 provides no time limit for submission. To protect the parties’ interests in prompt disposition of their fundamental property and liberty rights, and to foster judicial efficiency, a domestic relations hearing officer should be required to submit recommendations in a more timely manner. This period should allow the hearing officer time to file a thorough report without unduly prolonging the proceedings. This Comment recommends the following addition to Rule 1-053.2:

Within thirty (30) days after the hearing, the hearing officer shall file with the court a proposed order, including proposed findings and conclusions, and shall serve each of the parties with a copy together with a notice that objections may be filed within ten (10) days after service of the proposed order.

Furthermore, the court in Buffington held that parties should have an opportunity to object to the report and recommendations of a domestic relations hearing officer. The court presumed that the ten-day period provided in special master proceedings under New Mexico Rule 1-053 is adequate. To foster efficient review of the objections, the rule should require that the objecting party state specifically which portions of the hearing officer’s report she is objecting to and why. This will prevent the losing party from filing a blanket objection to the hearing officer’s report that will require a time-consuming (yet unnecessary) de novo review.

184. Rule 1-053.2(C) NMRA.
185. See generally Rule 1-053.2 NMRA.
186. See supra note 128 and accompanying text.
187. See supra note 130 and accompanying text.
188. See supra note 133 and accompanying text.
189. See supra Part IV.
191. See generally Rule 1-053.2 NMRA.
192. Buffington, 2004-NMCA-092, ¶ 30, 96 P.3d at 794 ("The parties here were given ten days to file objections. We assume this is adequate.").
193. Id.
by the district court. In the interest of efficiency, the district court should be required to review only disputed portions of the hearing officer’s report.

The following provision is recommended:

Objections shall be filed with the court and served upon the other parties within ten (10) days after being served with notice of the filing of the report and recommendations of the domestic relations hearing officer. The objections shall set forth the specific portions of the proposed order to which objection is taken.

2. District Court Review of the Recommendations and Objections

Rule 1-053.2 should then require the district court judge to hold a hearing on the disputed portions of the hearing officer’s recommendations. The court in Buffington granted district judges broad flexibility in determining how to proceed with this hearing, stating that “[t]he nature of the hearing and review to be conducted by the district court will depend upon the nature of the objections being considered.” The court’s lack of specificity allows district court judges flexibility but invites future due process challenges to the domestic relations hearing officer system because judges will review recommendations on a discretionary, case-by-case basis. For this reason, New Mexico Rule 1-053.2 should be specific.

True de novo review of hearing officer recommendations and objections raises efficiency concerns and therefore must not be required in all circumstances. A survey of New Mexico rules and statutes that use the term “de novo” reveals it to mean “trial anew.” Consequently, if de novo review of the hearing officer’s report is required, the purpose of having a domestic relations hearing officer is largely undermined. Parties may raise frivolous objections in order to get a rehearing before a district court judge. Efforts will be duplicated, efficiency will be severely compromised, and costs will soar. Meanwhile, the near-term interests of the parties are ignored; during the period required for de novo review, custodial parents may not receive much-needed child support, no income allocation payments would be made by parties in arrears, and minor children could find themselves in the midst of a tug-of-war.

Review of the record, which requires the district judge to review the transcript, the hearing officer’s recommendations, and the parties’ objections and take additional evidence and oral argument at her discretion, strikes a better balance...
between due process considerations and judicial efficiency. If no objections are filed, the following provision is recommended:

If no objections are filed, the district court judge shall review the proposed order and shall determine whether to: (a) make the proposed order final by signing and entering it as submitted by the hearing officer, (b) enter a different order, or (c) request the hearing officer to conduct further proceedings.

If objections are filed, Buffington requires that a hearing be held. Rule 1-053.2 should specify a time period for scheduling this hearing. For the sake of efficiency, this Comment suggests a twenty-day period. The following provision is recommended:

If a party files timely objections to the proposed order, the court shall conduct a hearing on the objections within twenty (20) days of the filing of objections. The court shall conduct a hearing appropriate and sufficient to resolve the matters specifically objected to. The court shall make an independent determination of matters specifically objected to. The hearing shall be on the record unless the court determines that additional testimony will aid in the resolution of the matters objected to.

3. The Appropriate Record for Appellate Review

The court of appeals in Buffington recognized the district court’s autonomy to decide how to proceed following a hearing. The following options should be included in Rule 1-053.2:

After the hearing, the court may make the proposed order final by signing it and entering it as submitted by the hearing officer, modify the proposed order with regard to the parties' objections, reject in whole or in part the proposed order, receive further evidence, or recommit the matter to the hearing officer with instructions.

The court of appeals further required that the record reflect the district judge's reasoning and provide a basis for appellate review. The record should establish that the final determination was that of the judge, not the hearing officer. Unfortunately, the opinion in Buffington did not define the necessary scope of the record for appellate review. New Mexico Rule of Civil Procedure 1-052, however, governs findings and conclusions in non-jury trials and provides a flexible model. Rule 1-052 requires that the court shall enter findings of fact and conclusions of law when a party makes a request within ten days of the court's

200. This form of review provides greater district court deference to the findings of the judicial officer. Review of the record requires the district judge to review the transcript of the hearing and the report and recommendations of the judicial officer and take additional testimony if necessary.
201. See supra note 130 and accompanying text.
203. Id. ¶ 32, 96 P.3d at 794.
204. See Mora v. Martinez, 80 N.M. 88, 88–90, 451 P.2d 992, 993–94 (1969) (stating that the purpose of requiring the court to file findings of fact and conclusions of law is to place on the record the basis of the decision of the district court and require care on the part of the judge in consideration and adjudication of the facts).
205. See Buffington, 2004-NMCA-092, ¶ 31, 96 P.3d at 794.
206. Rule 1-052 NMRA.
decision.\textsuperscript{207} Any party planning to appeal the district court’s ruling will request that findings and conclusions be entered and will file requested findings of fact and conclusions of law.\textsuperscript{208} Rule 1-052 also allows for submission of amended or supplemental findings and conclusions within the ten-day period.\textsuperscript{209} Furthermore, Rule 1-052 also allows parties ten days to move for the court to amend their findings and conclusions.\textsuperscript{210}

Because efficiency is a concern, the procedures governing the entry of findings and conclusions by a district judge reviewing a domestic relations case should be flexible. Rule 1-052 allows this flexibility: if no party plans to appeal, no findings and conclusions need be entered. The case is over. No extra work is required of the judge. If a party intends to appeal, the findings and conclusions will provide sufficient record.\textsuperscript{211} Either way, judicial review of the domestic relations hearing officer’s decision will be performed with an eye to the possibility that findings and conclusions might be required, providing district judges incentive to fully review the hearing officer’s recommendations. Accordingly, the following provision is recommended: “After the hearing, if required to enter findings and conclusions under Rule 1-052, the court shall enter the final order, which will include final findings and conclusions.”

4. Full Recommended Judicial Review Provisions for Rule 1-053.2

Complete recommended Rule 1-053.2 judicial review provisions read as follows:

\textbf{AUTHORITY}

The district court shall review any proposed order of a domestic relations hearing officer. The proposed order shall not become effective until signed by a district court judge.

(1) Proposed order. Within thirty (30) days after the hearing, the hearing officer shall file with the court a proposed order, including proposed findings and conclusions, and shall serve each of the parties with a copy together with a notice that objections may be filed within ten (10) days after service of the proposed order.

(2) Objections. Objections shall be filed with the court and served upon the other parties within ten (10) days after being served with notice of the filing of the report and recommendations of the domestic relations hearing officer. The objections shall set forth the specific portions of the proposed order to which objection is taken.

\textbf{DISTRICT COURT REVIEW OF PROPOSED ORDER AND OBJECTIONS}

(1) No objections filed. The hearing officer’s report shall not become effective until signed by a district court judge. If no objections are filed, the district court judge shall review the proposed order and shall determine whether to:

(a) make the proposed order final by signing and entering it as submitted by the hearing officer;

(b) enter a different order; or

\textsuperscript{207} Rule 1-052(B) NMRA.

\textsuperscript{208} Id.

\textsuperscript{209} Rule 1-052(C) NMRA.

\textsuperscript{210} Rule 1-052(D) NMRA.

\textsuperscript{211} See supra note 133 and accompanying text.
(c) request the hearing officer to conduct further proceedings.
(2) Objections filed. If a party files timely objections to the proposed order, the court shall conduct a hearing on the objections within twenty (20) days of filing of the objections.
(3) Hearing on objections.
(a) The court shall conduct a hearing appropriate and sufficient to resolve the matters specifically objected to.
(b) The court shall make an independent determination of matters specifically objected to.
(c) The hearing shall be on the record unless the court determines that additional testimony will aid in the resolution of the matters objected to.
(d) After the hearing, the court may:
(i) make the proposed order final by signing it and entering it as submitted by the hearing officer;
(ii) modify the proposed order with regard to the parties' objections;
(iii) reject in whole or in part the proposed order;
(iv) receive further evidence; or
(v) recommit the matter to the hearing officer with instructions.
(e) After the hearing, if required to enter findings and conclusions under Rule 1-052, the court shall enter the final order, which will include final findings and conclusions.

B. Child Support Hearing Officers: The Child Support Hearing Officer Act

The Child Support Hearing Officer Act does not require judicial review of a child support hearing officer's recommendation. The Act therefore violates the separation of powers principle and impermissibly delegates judicial decision-making authority to child support hearing officers. The judge need not sign an order; the recommendations of the hearing officer are automatically granted force of law after fifteen days. A busy court may overlook the recommendations of the child-support hearing officer, and, in fifteen days, the recommendations are granted the full force and effect of a district court decision.

Separation of powers principles require that the New Mexico legislature amend the Act to require, at a minimum, a judge's signature on all orders. Additionally, to ensure that judicial review is meaningful, the legislature should amend the Act to include the procedures outlined above for Rule 1-053.2. Alternatively, the New Mexico Supreme Court may use its Ammerman power to amend Rule 1-053.2 to indicate that the rule shall govern the appointment and review of child support hearing officers.

District judges should decline to appoint child support hearing officers under the Act until it has been amended or has been superseded by Ammerman amendments to Rule 1-053.2. District courts should instead appoint domestic relations hearing

212. See supra Part III.B.
213. See supra Part IV.A.
214. See supra Part III.B.
215. See supra Part III.B.
216. See supra Part IV.A.
217. See supra Part V.B.4.
218. See supra note 181.
officers to hear child support disputes, with the mandate that they follow the procedures of Rule 1-053.2 rather than those of the Child Support Hearing Officer Act. This will temporarily alleviate the confusion demonstrated in Buffington until the Act has either been redrafted in a constitutional manner or subsumed by Rule 1-053.2.

C. Domestic Violence Special Commissioners: Rule 1-053.1 and the Family Violence Protection Act

Neither the Family Violence Protection Act nor Rule 1-053.1 violates the impermissible delegation principle. Both the statute and the rule require that all orders must be signed by a district judge before the recommendations of a special commissioner become effective. As discussed above, this provision ensures that both the Family Violence Protection Act and Rule 1-053.1 do not improperly delegate judicial authority to special commissioners. Neither the Act nor Rule 1-053.1, however, details the procedures district courts must follow to ensure meaningful review. Appropriate judicial review provisions are suggested below.

Domestic violence special commissioners hear petitions for two general types of orders of protection: ex parte temporary orders of protection and extended orders of protection. Each type of hearing is discussed in turn below, and appropriate procedures for objection, district court review, and production of a sufficient record for appellate review are recommended for each type of order.

1. Temporary Orders of Protection

A temporary order of protection may be obtained in New Mexico by a party who establishes that he or she fears immediate physical injury from a related party. A party who makes reasonable allegations of impending physical abuse will leave the hearing with an order of protection in hand, without notice to the accused party. Depending on the substance of the order, the party against whom the order has been entered is then enjoined from abusing or contacting the petitioner and may be deprived of access to any minor child in common with the petitioner. As a result, alleged perpetrators may temporarily be deprived of their homes, families, reputations, and wealth. These are substantial private interests to surrender, even temporarily, based on an allegation without notice.

219. See supra Part IV.A.
220. NMSA 1978, § 40-13-10(B) (2005) ("All orders must be signed by a district judge before the recommendations of a domestic violence special commissioner become effective."); Rule 1-053.1(C) NMRA ("All orders must be signed by a district judge before the recommendations of a domestic violence special commissioner become effective.").
221. NMSA 1978, § 40-13-4(A) (1987) provides:
   Upon the filing of a petition for order of protection, the court shall...immediately grant an ex parte temporary order of protection without bond, if there is probable cause from the specific facts shown by the affidavit or by the petition to give the judge reason to believe that an act of domestic abuse has occurred.
222. Form 4-963 NMRA.
224. Martin, supra note 139.
226. Id.
However, with few exceptions state courts have held that this system satisfies due process requirements under the *Mathews v. Eldridge* balancing test.\(^{227}\) On the balance, the private interests of the parties are roughly equivalent: one party requires protection of a fundamental liberty interest,\(^{228}\) the other faces possible temporary deprivation of a property interest. There is also a substantial government interest, in that "the general public has an extraordinary interest in a society free from violence, especially where vulnerable persons are at risk."\(^{229}\)

Furthermore, there is a secondary government interest in efficient management of crowded family court dockets.\(^{230}\) In some judicial districts, domestic violence hearings for ex parte orders of protection are scheduled back-to-back, allowing for a maximum of a half-hour each, and a domestic violence special commissioner might hear as many as twenty to thirty petitions in a single day.\(^{231}\) Consequently, the pressure on domestic violence special commissioners in New Mexico to rule swiftly on petitions for ex parte orders of protection and to promptly issue these orders should not further be compounded by onerous judicial review requirements.

That said, the due process rights of parties must also be taken into account.\(^{232}\) The Family Violence Protection Act\(^{233}\) provides for a number of procedures that mitigate due process concerns. Upon district court issuance of a temporary order of protection, notice is immediately served on the alleged perpetrator of the abuse.\(^{234}\) A hearing is scheduled within ten days on the question of whether an extended order should be issued.\(^{235}\) If an ex parte temporary order is not granted, the parties are served notice and a hearing is held within seventy-two hours.\(^{236}\) These procedures effectively balance efficiency concerns against the due process rights of the parties. As illustrated in the *Lujan* case, however, neither the rule nor the Act guarantees any review of temporary orders proposed by special commissioners.\(^{237}\) Thus, limited judicial review procedures for temporary orders of protection are recommended below.

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227. *See supra* Part IV(B); New Mexico Rule of Civil Procedure 1-066, which authorizes district courts to grant temporary restraining orders without written or oral notice, has been held to satisfy due process requirements because particular procedural protections are built into the system: the ex parte restraining order must be made by a judge, and the order must define the injury and demonstrate that the injury is irreparable. *See Torres v. First State Bank of Sierra County*, 588 F.2d 1322, 1324 (10th Cir. 1978). Furthermore, the temporary order expires by its own terms and motions for dissolution by the opposing party are handled expeditiously. *Id.* Similar protections for adverse parties must also be provided in the domestic violence context.

228. *Martin*, *supra* note 139.


231. This is true in New Mexico’s Second Judicial District. Conversation with New Mexico District Court Judge Nan Nash, Dec. 16, 2005.

232. *See supra* Part IV.B.


234. *Id.* § 40-13-4(B) (1987).

235. *Id.* § 40-13-4(C).

236. *Id.* § 40-13-4(D).

237. *See id.* §§ 40-13-1 to -10 (2005); Rule 1-053.1 NMRA. *See generally supra* Part III.B.
a. Opportunity for Opposing Party to Object to a Domestic Violence Hearing Officer’s Proposed Temporary Order of Protection

The nature of an ex parte hearing is such that the opposing party is not present and is only made aware of the hearing afterward.\(^2\)\(^3\)\(^8\) No opportunity for objection can be provided without undermining the purpose of an ex parte order of protection. Of course, the district court has the option of denying the petition for an ex parte order and may schedule a hearing for an extended order within ten days, giving notice to the opposing party.\(^2\)\(^3\)\(^9\) Regardless, given the circumstances surrounding issuance of an ex parte temporary order of protection, no opportunity for objection can realistically be provided.

b. Meaningful District Court Review of a Proposed Temporary Order of Protection

Because this system does not allow for objection by the absent party, it is of heightened importance that district court judges heed the *Lujan* proviso against “automatic” rubber-stamping and carefully review proposed ex parte temporary orders. Domestic violence special commissioners hearing petitions for temporary orders of protection are required to complete Form 4-963, the standard simplified temporary order prohibiting domestic abuse.\(^2\)\(^4\)\(^0\) The special commissioner then presents this form to the district judge as a proposed order, along with the party’s sworn affidavit.\(^2\)\(^4\)\(^1\)

In order to guarantee meaningful review, Rule 1-053.1 should mandate district court review on the record by adopting the following provision:

The commissioner shall promptly submit a proposed ex parte temporary order of protection pursuant to Form #4-963 to the district court judge at the conclusion of proceedings. The judge shall review the proposed order and shall determine whether to: make the proposed order final by signing and entering it as submitted by the commissioner; enter a different order; or request the commissioner to conduct further proceedings.

c. The Appropriate Record for Subsequent Review

Temporary orders are not immediately appealable, and Form 4-963 does not require specific findings of fact.\(^2\)\(^4\)\(^2\) Typically, however, after a temporary order has been issued, a hearing is scheduled for an extended order of protection. The petition and sworn affidavit of the party seeking the order, read in concert with the completed form, provide a record for later review at this subsequent hearing.

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238. An ex parte proceeding is defined as “[a] proceeding in which not all parties are present or given the opportunity to be heard.” BLACK’S LAW DICTIONARY 1241 (8th ed. 2004).
240. Form 4-963 NMRA.
242. *See generally* Form 4-963 NMRA.
2. Extended Orders of Protection

Hearings on extended orders of protection are less hurried affairs than those on temporary orders of protection and are thus more amenable to judicial review. The procedural changes suggested with regard to Rule 1-053.2 above may be made to Rule 1-053.1 with only minor modification made to protect the safety of the party seeking an extended order.

a. Opportunity for Parties to Object to a Domestic Violence Special Commissioner’s Proposed Extended Order of Protection

Hearings on extended orders for protection take place after the petitioner has already been granted a temporary order of protection or following the district court’s determination that a temporary order is not necessary. Therefore, imposition of a required period for the special commissioner to submit her recommendations and a subsequent period for parties to object raises few efficiency concerns. The following provision is recommended:

Within thirty (30) days after a hearing on all matters besides ex parte orders, the commissioner shall file with the court a proposed order, including proposed findings and conclusions, pursuant to Form #4-963 and shall serve each of the parties with a copy together with a notice that objections may be filed within ten (10) days after service of the proposed order. Objections shall be filed with the court and served upon the other parties and shall set forth the specific portions of the proposed order to which objection is taken.

In order to protect the petitioner during the judicial review period, however, Rule 1-053.1 should specify that any temporary order of protection remains in effect until the court issues its ruling on the extended order. The following provision should be added to Rule 1-053.1: “An ex parte order of protection signed by the district court shall remain in effect during the pendency of any proceeding seeking to amend, modify or terminate the order.” This provision tempers the fear voiced by the special commissioner in Lujan. A party in danger of physical abuse will be protected during the time period during which the judge is considering the recommendations and objections, fully and independently reviewing their merits, and producing a record for appellate review.

243. See, e.g., Lujan v. Casados-Lujan, 2004-NMCA-036, ¶ 2-4, 87 P.3d 1067, 1069 (noting that the hearing on Lujan’s extended order of protection “was... before a special commissioner [for three hours] on February 21, ending after 5:00 p.m.” and featured testimony by an expert witness).

244. Differences between the changes recommended herein to Rule 1-053.2 and those recommended to Rule 1-053.1 are due to the fact that the liberty interests at stake in domestic violence proceedings (which in many cases can mean the difference between life and death) differ from the property interests at stake in the domestic relations context (which are no less important, but do not involve the risk of physical harm). See supra note 171 and accompanying text.

245. Lujan, 2004-NMCA-036, ¶ 4, 87 P.3d at 1069 (“In ten days ‘everyone would be dead.’”).
b. Judicial Review of a Domestic Violence Special Commissioner’s Recommended Extended Order of Protection

As with Rule 1-053.2, efficiency concerns require that flexibility be built into the judicial review requirements of Rule 1-053.1. The standard of review should depend on whether objections are filed. The following provision is recommended if no objections are filed:

The commissioner’s proposed order shall not become effective until signed by a district court judge. If no objections are filed, the district court judge shall review the proposed order and shall determine whether to: make the proposed order final by signing and entering it as submitted by the commissioner; enter a different order; or request the commissioner to conduct further proceedings.

If objections are filed, the court should conduct a hearing on the recommended order and objections thereto within a reasonable time period following filing of objections. Like Rule 1-053.2, Rule 1-053.1 need not specify the nature of the hearing, and the judge should be granted the full flexibility suggested by the court in Buffington. A de novo hearing, however, is once again unnecessary in light of efficiency concerns. Review of the record provides greater balance. The following provision is recommended:

If a party files timely objections to the proposed order, the court shall conduct a hearing on the objections within twenty (20) days of filing of the objections. The hearing shall be appropriate and sufficient to resolve the matters specifically objected to. The court shall make an independent determination of matters specifically objected to. The hearing shall be on the record unless the court determines that additional testimony will aid in the resolution of the matters objected to.

Finally, once the district judge has reached an independent determination, the following provision should govern:

After the hearing, the court may: make the proposed order final by signing it and entering it as submitted by the commissioner; modify the proposed order with regard to the parties’ objections; reject in whole or in part the proposed order; receive further evidence; or recommit the matter to the commissioner with instructions.

c. The Appropriate Record for Appellate Review

As recommended for Rule 1-053.2 above, the district judge should be required to enter findings and conclusions consistent with Rule 1-052: “After the hearing, if required to enter findings and conclusions under Rule 1-052, the court shall enter the final order, which will include final findings and conclusions.”

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246. See supra Part V.B.3.
247. See supra Part V.B.3.
248. See supra Part V.A.3.
3. Full Recommended Judicial Review Provisions for Rule 1-053.1 and the Family Violence Protection Act

Recommended judicial review provisions for Rule 1-053.1 and the Domestic Violence Special Commissioner sections of the Family Violence Protection Act read as follows:

**AUTHORITY**

The district court shall review any proposed order of a commissioner. The proposed order shall not become effective until signed by a district court judge.

(1) Temporary orders. The commissioner shall promptly submit a proposed ex parte temporary order of protection pursuant to Form #4-963 to the district court judge at the conclusion of proceedings. The judge shall review the proposed order and shall determine whether to:

(a) make the proposed order final by signing and entering it as submitted by the commissioner;
(b) enter a different order; or
(c) request the commissioner to conduct further proceedings.

(d) An ex parte order of protection signed by the district court shall remain in effect during the pendency of any proceeding seeking to amend, modify, or terminate the order.

(2) Extended orders. Within thirty (30) days after a hearing on all matters besides ex parte orders, the commissioner shall file with the court a proposed order, including proposed findings and conclusions, pursuant to Form #4-963 and shall serve each of the parties with a copy together with a notice that objections may be filed within ten (10) days after service of the proposed order.

(3) Objections. Objections shall be filed with the court and served upon the other parties and shall set forth the specific portions of the proposed order to which objection is taken.

**DISTRICT COURT REVIEW OF PROPOSED ORDER AND OBJECTIONS**

(1) No objections filed. The commissioner’s proposed order shall not become effective until signed by a district court judge. If no objections are filed, the district court judge shall review the proposed order and shall determine whether to:

(a) make the proposed order final by signing and entering it as submitted by the commissioner;
(b) enter a different order; or
(c) request the commissioner to conduct further proceedings.

(2) Objections filed. If a party files timely objections to the proposed order, the court shall conduct a hearing on the objections within twenty (20) days of filing of the objections.

(3) Hearing on Objections.

(a) The court shall conduct a hearing appropriate and sufficient to resolve the matters specifically objected to.
(b) The court shall make an independent determination of matters specifically objected to.
(c) The hearing shall be on the record unless the court determines that additional testimony will aid in the resolution of the matters objected to.
(d) After the hearing, the court may:

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(i) make the proposed order final by signing it and entering it as submitted by the commissioner;
(ii) modify the proposed order with regard to the parties' objections;
(iii) reject in whole or in part the proposed order;
(iv) receive further evidence; or
(v) recommit the matter to the commissioner with instructions.
(e) After the hearing, if required to enter findings and conclusions under Rule 1-052, the court shall enter the final order, which will include final findings and conclusions.

VI. CONCLUSION

Judicial officers play a critical role in the efficient management of New Mexico's judiciary. Efficiency, however, should not come at the expense of the constitutional rights of parties. Constitutional checks are necessary to ensure that the parties' right to be heard by a judge is not unduly curtailed. Judicial decision-making authority may not be impermissibly delegated to non-judges, and the procedures governing district court review of the recommendations of judicial officers must guarantee that such review is meaningful.

As suggested in recent New Mexico case law, the rules and statutes governing the appointment and district court review of judicial officers in domestic relations and domestic violence cases in New Mexico district courts do not consistently meet constitutional requirements. The changes recommended in this Comment were drafted to ensure that the rules and statutes governing the appointment of judicial officers in New Mexico domestic relations and domestic violence cases meet constitutional requirements and balance the state's interest in the efficient management of its dockets with the due process rights of parties.

250. See supra Part ILA–C.
251. See supra Part IV.A–B.
252. See supra Part IV.A–B.
253. See supra Part III.
254. See supra Part V.