**APPROVED**

# *Ad Hoc Custody Workgroup*
# *Minutes*

**Date: August 27, 2010** **Time: 10:00 a.m. – 1:00 p.m.** **Location: State Courts Building Conference Room 119A/B**

**Minute Takers:** Kay Radwanski, Lorraine Nevarez

**Voting Members Attending: Quorum attained**

- ■ William Fabricius, Chair (telephonic)
- ■ Thomas Alongi
- ■ Sidney Buckman
- ■ Daniel Cartagena (telephonic)
- ☐ Grace Hawkins
- ■ Brooks Gibson (telephonic)
- ■ Kendra Leiby
- ☐ Judge Colleen McNally
- ■ John Weaver
- ☐ David Weinstock
- ☐ Steve Wolfson

**Participating Members Attending:**

- ■ Bruce Cohen
- ■ Mike Espinoza
- ☐ Patrick Lacroix
- ■ Patricia Madsen
- ☐ Donnalee Sarda
- ☐ Ellen Seaborne
- ☐ Russell Smolden
- ☐ Thomas Wing
- ■ Brian Yee

**Staff/Admin. Support:** Kay Radwanski, Lorraine Nevarez

**Guests:** Kathy Sekardi, Administrative Office of the Courts; Katy Proctor, AOC; Amber O'Dell, Arizona State Senate (telephonic); Michael Springer, Public (telephonic)

**Matters Considered:**

I. Welcome and Announcements

Sidney Buckman called the meeting to order at 10:10 a.m. and welcomed the members to the Ad Hoc Custody workgroup. Mr. Buckman announced that the Steering Committee has designated Kendra Leiby as a voting member because of her regular attendance and consistent participation in workgroup meetings. He also noted that two additional taskforces have been established: (1) Third Party Rights, chaired by Honorable Bruce Cohen and (2) an unnamed taskforce comprised of Dr. William Fabricius, Daniel Cartagena, and John Weaver. This workgroup will develop case scenarios to assist the workgroup in analyzing potential problem areas in the proposed statute.

II. Minutes

- Minutes from the August 6, 2010, workgroup meeting were approved.

**MOTION**: (By Thomas Alongi) Motion to approve the August 6, 2010, minutes as presented. Motion seconded. Motion passed unanimously.

III. Brainstorming

Mr. Buckman reminded the workgroup member that the brainstorming session is used to offer suggestions or ideas to be considered for future agenda topics.

Judge Cohen asked whether the workgroup has looked at the 400 sections. He noted that these sections

could read more cohesively. Mr. Buckman agreed; however, the workgroup will have to address them at a later time. Dr. Yee noted that the Sub Law and Relocation workgroups are currently looking at some of those sections.

Michael Springer, a member of the public who is employed as a process analyst, introduced himself to the workgroup. He noted his interest in child custody. He discussed some of his concerns about conviction regarding false reporting. Specifically, Mr. Springer would like to see the workgroup address civil convictions for fraud or misrepresentation relating to domestic matters. He also suggested that an appropriate name for the unnamed task force might be the "Stress Test Taskforce." This is an industry term to test for ways a system could fail.

John Weaver asked if it would be possible to receive a complete list of domestic violence crimes in Arizona. Kay Radwanski noted that Arizona's domestic violence crimes are listed in A.R.S. § 13-3601, and she shared a list she had developed with the workgroup.

Mr. Springer suggested linking legal and ethical issues for attorneys into this statute to bring structure to the process. Mr. Alongi suggested having all the provisions regarding sanctions moved to one section. This would make it easier for people to locate the information. As a follow-up to Mr. Springer's comment, Mr. Alongi said the court should not enter custody orders based on a lawyer's possible misconduct.

Mr. Espinoza questioned whether including domestic violence issues in the custody statute is a duplication of effort if domestic violence is already contained in other statutes.

In response to a question about the deadline was for completing these revisions, Ms. Radwanski told the workgroup the target is November. Dr. Fabricius reminded the members that the legislative process and timeframes are in the August 6 minutes.

IV. Taskforce Report: Jurisdiction, Definitions, Special Circumstances (version 3) - Focus on sections 104 and 105(A)-(F)

The workgroup discussed the following Special Circumstances sections. Mr. Alongi explained the different versions online regarding the changes.

*Section 104-Mandatory Preliminary Inquiry; Special Circumstances*

Mr. Alongi explained that this section would be placed before the best interest factors in the revised statute. The taskforce envisions the statute being organized as follows: (1) Section101 - purpose of statute; (2) Section102 – jurisdiction; (3) Section103 – definitions, and (4) Section 104 - special circumstances. Section 104 lists the various special circumstances, allowing a party to easily determine whether any special circumstances apply. If no special circumstances exist, the parties would proceed to the best interest factors.

Mr. Cartagena inquired whether this must be in statute or instead could be a procedural rule. Mr. Alongi noted that procedural rules are approved by the Supreme Court and are designed to assist the orderly process of a presentation of a case. If the goal is to instruct courts on how to evaluate custody cases, then the language needs to be in statute.

Mr. Cartagena asked if the taskforce is going to rewrite other sections (such as Title 13, the criminal code) that already address these issues and have Section 104 refer to those sections. Mr. Alongi said there is no plan to touch Title 13. The taskforce is simply reorganizing the information within the same section. If no allegations of special circumstances are made, there is no expectation that the court would explore them. If the petition does contain allegations, the court ought to explore them. Mr. Cartagena noted the importance of

the reorganization; however, he suggested adding language that would explain how to bypass sections that do not apply.

Mr. Buckman summarized the discussion that special circumstances already exist in statute. The taskforce is trying to clarify what people may need to consider when reading this section. However, if special circumstances do not apply, then they can move on. Mr. Espinoza asked whether litigants can be surveyed beforehand. Patricia Madsen said there are several points in the case, such as the initial pleading, the resolution statement, and the pretrial statement, where the parties can make allegations. With the statute's current organizational structure, the court could go through the best interest factors and then get into special circumstances that would trump the previous best interests analysis. With the proposed reorganization, the court could get any special circumstances issues out of the way first.

*Section 105-Intimate Partner Violence and Child Abuse*

Mr. Alongi explained that paragraph A includes language from the *National Council of Juvenile Family Court Judges* definition for domestic violence. A.R.S. 25- 403.03 subsections B includes additional language regarding if a child witnessed a particular act of violence. The taskforce included this language to acknowledge the growing research that children are affected by domestic violence whether they witness it, hear it, or see the aftermath of the violent acts.

While addressing subsection C, the taskforce discussed the *Hurd* case (Court of Appeals, Div. One, October 2009), in which the court held that a finding of "significant domestic violence" or a "history of significant domestic violence" precludes an award of joint custody. However, it is up to the judge to define the word "significant." Mr. Alongi said this is how courts today get around subsection A. The taskforce discussed three options to address the issue of creating uniformity without taking away judicial discretion. Alternatives are to (1) leave the statute as currently written, (2) define which acts of domestic violence are significant, or (3) do away with the idea of absolutely banning an award of parental decision-making under certain circumstances. The taskforce put option two in the current version of Subsection C. The taskforce is not convinced of only option two. The taskforce was trying to think about different types of conduct that would constitute not allowing the parent to exercise decision making for a child. Subsection C(1)(2) would replace what is in 25-403.03(a). Mr. Alongi noted this is another value judgment. The taskforce would like suggestions. This was the taskforce first edit of this subsection.

Mr. Cartagena asked what the term "deferred prosecutions" means. Mr. Alongi said prosecutors may define it differently, but it generally is another term for diversion. When someone is charged with an offense, the prosecutor is not willing to dismiss it because he or she believes the defendant committed the crime; however, the prosecutor is willing to let the charges be dismissed if the person does certain things such as attend domestic violence classes or pay a fine. A stipulation is required.

Mr. Cartagena said he is concerned about a person choosing this option because it may be financially better for him or her without realizing the effects it can have on a child custody case. A person could strategically choose diversion instead of seeking exoneration to save on the costs of defending the case. Mr. Alongi said criminal defense attorneys have a duty to advise their clients about the repercussions of pleading guilty or being deferred.

Mr. Espinoza asked whether the word "shall not" should be changed to the word "may not" in Subsection C. He also asked what would happen if both parents are convicted of a felony. Mr. Alongi said the whole point of subsection C is to determine whether certain kinds of conduct will constitute not giving a parent custody. Conviction of a crime requires intervention by a county attorney or a prosecutor. Someone else has to be convinced that the defendant committed a wrong. A victim making an allegation must have convinced the

police and a prosecutor that harm was done. He said the system has to be able to rely on a criminal conviction, where the case was proved beyond a reasonable doubt. The conviction itself is proof.

Judge Cohen said he was concerned subsection C(2) might have the potential for abuse. He suggested including language referencing patterns of behavior. Mr. Alongi said the taskforce will look at C(1) and (2) again. They could think about eliminating C(2), raise the bar, and tighten the timeframe. Regarding the phrase "any level of parental decision-making," he said the taskforce discussed the idea of having three levels of legal custody: (1) shared, (2) sole, and (3) exclusive decision-making. However, the taskforce decided against the three levels.

In comparing the current statute and the proposed language, Mr. Alongi said Subsection D is similar to A.R.S. § 25-403.03(D). Subsection D discusses domestic violence behaviors and reasons custody may not be given. Subsection D addresses what to do if domestic violence does happen in a custody case. In current law, Sections 1, 2, and 3 explain what constitutes an act of domestic violence. This section was moved in the proposed definitions section. The taskforce also added the words child abuse. He said the current statute does not address what to do with people who commit child abuse. The current statute does provide a list of what an offending parent can do to show the judge he or she is still capable of having custody. The principle is the same in the proposed language, but the difference is that the court needs to consider aggravating factors before giving custody to a proven offender.

The taskforce did not make further changes to Subsection E. Subsection F has significant changes, including a list of factors the court should consider where domestic violence has been proven. The taskforce made an effort to capture the motivation of the domestic violence in Subsection F. The goal was to list different controlling coercive behaviors that the court should consider.

Judge Cohen suggested that Subsection F should be viewed before Subsection D. Mr. Alongi noted that the current law does not discuss controlling coercive behaviors, and that needs to be fixed. One of the problems of putting Subsection F is making coercive behaviors relevant in every single case. Controlling behaviors do not necessarily come from domestic violence cases. Judge Cohen also noted at the very end of Subsection D, the word "victim" should be clarified since the word child abuse had been added.

Mr. Espinoza asked whether acts of animal abuse in A.R.S. § 13-3601 would apply in the custody statute. Kendra Leiby said the animal abuse section of the domestic violence statute only deals with intimate partner relationships.

Mr. Espinoza asked how long a person could lose child custody, noting that the proposed language says 10 years. Mr. Alongi said that the 10-year period refers to the age of the conviction that triggers the absolute bar on parental decision-making – not the period of time for which a parent is prevented from exercising that authority once the family court trial has concluded. That period is comparable to the time frame used for defining certain historical felonies for purposes of criminal sentencing. He noted, however, that the 10-year period is a value judgment and could be considered either too long or too short.

Judge Cohen said parties do come back to court to modify custody after a finding of domestic violence because their circumstances have changed. Mr. Alongi said the taskforce should also review section 411, regarding circumstances for modification.

Dr. Yee noted that coercive control does not always mean domestic violence. However, it could be a reason the court decides not to award custody to a parent.

V. Taskforce Report: Third Party Rights (version 1) - Taken out of agenda order

Judge Cohen said there were no substantive changes to A.R.S. §§ 25-409 and 25-415. He took the existing language and reformatted it to read more cohesively. He structured the two sections as follows:

A. *In Loco Parentis* Custody
B. Presumption
C. Visitation by Third Party
D. Notice
E. Factors
F. Limitations
G. Filing of Action
H. Termination
I. Definitions

Judge Cohen said he also thought changes were needed in section 102 to avoid conflicting language. He suggested removing the language "if a child is not in the physical care of one of the child's parents" in section 102(b). He also noted removing the word "prior" in section 102(B)(1)(b). This way there is no inconsistency between the sections.

Ms. Madsen asked if this section now requires a grandparent requesting grandparent visitation to have been found *in loco parentis*. Judge Cohen said no. Mr. Buckman said he liked the idea of combining both sections as long as they capture the concepts of both statutes. Dr. Yee explained that these sections were not combined 10 or 11 years ago because the *in loco parentis* language existed before the grandparent's rights were established. Judge Cohen acknowledged Ms. Madsen inquiries and suggested changing the title of the section to help clarify those issues. The title could change to "*In Loco Parentis* Custody, Grandparents and Third-Party Visitation" or "Custody and Visitation by Non-Parents."

VI. Taskforce Report: Criteria for Best Interests (version 6)

Dr. Fabricius explained the changes to this section. The taskforce removed sections C(8) and C(9) as agreed upon at the last meeting and dealt with it in sections 104 and 105. The taskforce addressed whether a parent who makes a false allegation should lose parenting time as it actually takes time away from the child. The taskforce felt there should be other sanctions than limiting parenting time or parental decision-making. The taskforce also removed the word "safety" from the phrase "physical safety and emotional well-being" in subsections C and D.

One major change the taskforce made was to subsection C(7), specifically the phrase "including whether one parent performed a disproportionate amount of care." Discussion about this change is reflected in the August 6 minutes. Dr. Fabricius noted the taskforce took into consideration all the suggestions for rewording, but after much discussion, they decided to remove the phrase completely. Instead, they used a simple statement and placed it as number 7 in A.R.S. § 25-403.02, Parenting Time. The goal was not to have the courts try to determine which parent was the primary parent. However, the taskforce wanted the court to consider whether a parent has been involved in the child's life.

Mr. Espinoza said the new language -- "potential future relationships between the parent and the child" -- assumes that the situations will relatively stay the same. He asked how new relationships will affect the different situations. Mr. Buckman agreed that dynamics of the relationships do change when a person remarries. However, considering how a parent can provide for the child now and in the near future is the best approach. Dr. Yee said the proposed language is an improvement from the current language, which emphasized only the historical relationship.

Dr. Fabricius addressed the next change suggested by Judge Cohen regarding separation of factors for parenting time and decision-making. The current statute already has an implicit separate set of factors that are not in any particular order, so the taskforce revamped A.R.S. § 25-403.

The taskforce addressed that if a parent does not have a parenting time plan, then paragraph B directs the parents to A.R.S. § 25-403.01, which provides a list of factors to consider for constructing parenting plans. The taskforce made some wording changes to the list of factors, and Dr. Fabricius gave an overview of them. The taskforce added a new factor regarding child exchanges, which now is number 3. Numbers 6 and 7 explain that joint parental decision-making does not mean equal parenting time.

The taskforce also made changes to A.R.S. § 25-403.03.The current statute is focused on helping the court understand joint legal custody. The taskforce focused on when is it permissible to order joint legal custody. The taskforce did not change a lot of the language but streamlined it.

Mr. Espinoza asked whether the court compares competing parenting plans or chooses one over the other. Dr. Fabricius said A.R.S. § 25-403(C) is deliberately vague and leaves the decision to the courts.

Mr. Alongi asked whether the taskforce foresees creating a version with a list of factors for the court to consider in parental decision-making. Dr. Fabricius said this concern is referenced in A.R.S. § 25-403.03(B).

Mr. Buckman asked about use of the term "private counseling" in A.R.S. § 25-403.01(4) instead of the word "mediation." Dr. Fabricius said the taskforce used the term in the current statute. Mr. Buckman suggested changing the wording to "private mediation," and Dr. Fabricius said the taskforce will make that change.

Regarding A.R.S. § 25-403.02(8), Mr. Alongi suggested the language "Whether a parent has completed the parent information program required by A.R.S. § 25-351" instead of referring to the chapter and article. Dr. Fabricius noted the change.

Judge Cohen offered a few suggestions for the following sections:

- A.R.S. § 25-403.01(A)(2) - insert the word a "detail" before the word "schedule";
- Subsection 4 - insert language for the method of communication between the parents; and
- A.R.S. § 25-403.02 – re-order of the subsections to read 7, 5, 4, 3, 2, 6, 1, and 8.

Dr. Fabricius said the taskforce would make the changes.

Ms. Madsen asked whether reorganizing the subsections would necessitate double findings on all these factors. Judge Cohen said A.R.S. § 25-403.03(B) could address that issue by adding the word "relevant" before the word "factors." Dr. Fabricius asked whether the workgroup wanted to inform the court of which ones those are. Most of these factors deal only with parenting time. However, a few deal with decision-making. Parental decision-making is about how the parents are communicating. Parenting time is about the relationship between the child and the parent. He said it might be difficult to carve out which factors are dually relevant. Mr. Alongi suggested keeping these concepts separate without multiple findings.

The workgroup suggested striking A.R.S. § 25-403.03(5), as it is duplicative of A.R.S. § 25-403.02(8), and add the word "relevant" in paragraph B ("the court shall consider the *relevant* factors prescribed …").

Judge Cohen also suggested clarifying numbers 2 and 3 by considering the words "willingness" with the word "abilities." Dr. Fabricius said the taskforce will rework the language. Dr. Fabricius asked what the

court does when there is lack of agreement between the parents. Judge Cohen said the reason for number 1 in this section is to state that agreements as to custody are not binding on the court. Even if parents have an agreement, the agreement is not binding on the court. The court may adopt the parents' agreement but is not required to do so. If number 1 changes to the basis for each parent's position about parental decision-making, then number 2 can address if it is reasonable.

Mr. Espinoza suggested adding more clarification to A.R.S. § 25-403.02(2), providing more definition regarding maturity. Dr. Fabricius said that some states have laws that allow adolescents of a specific age to have more input. Dr. Yee said the issue was discussed at length by the Domestic Relations Committee, which did not propose a specific age. The court already has discretion to interview children. Judge Cohen suggested adding the word "if appropriate" in the beginning of the sentence and to consider adding language to address those factors that influences those wishes. Dr. Fabricius said the taskforce will take all these points into consideration.

Mr. Cartagena asked whether Mr. Alongi could add language to A.R.S. § 25-403 to explain coercive controlling behaviors. This discussion was tabled for the next meeting.

VII. Next Meeting

Friday, September 17, 2010
10:00 a.m. – 1:00 p.m.
Conference Room 119A/B
Arizona State Courts Building

The meeting adjourned at 1:00 p.m.