

*Ad Hoc Custody Workgroup
Minutes*

Date: October 8, 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**

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| ■ William Fabricius, Chair (telephonic) | ■ Kendra Leiby |
| ■ Thomas Alongi | ■ Judge Colleen McNally (telephonic) |
| ■ Sidney Buckman | ■ John Weaver |
| <input type="checkbox"/> Daniel Cartagena | <input type="checkbox"/> David Weinstock |
| ■ Grace Hawkins | <input type="checkbox"/> Steve Wolfson |
| ■ Brooks Gibson (telephonic) | |

Participating Members Attending:

- | | |
|--|--|
| <input type="checkbox"/> Bruce Cohen | <input type="checkbox"/> Ellen Seaborne |
| ■ Mike Espinoza | <input type="checkbox"/> Russell Smolden |
| <input type="checkbox"/> Patrick Lacroix | <input type="checkbox"/> Thomas Wing |
| ■ Patricia Madsen | ■ Brian Yee |
| <input type="checkbox"/> Donnalee Sarda | |

Staff/Admin Support: Kay Radwanski, Lorraine Nevarez**Guests:** Theresa Barrett, Administrative Office of the Courts; Gina Kash, Arizona State Senate; Joi Davenport, Public; Karen Duckworth, Public (telephonic); Mike McCormick, Public (telephonic)**Matters Considered:**I. Welcome and Announcements

Grace Hawkins called the meeting to order at 10:10 a.m. and welcomed the members to the Ad Hoc Custody workgroup. There were no announcements.

II. Update - Steering Committee

Dr. Bill Fabricius gave the following update: The Steering Committee met and determined that the scheduled timeframe for completing statutory revisions by November is insufficient. The committee felt it is important to make sure all stakeholders, including the public, have time to comment. Dr. Fabricius said he will prepare an interim report for the Domestic Relations Committee (DRC) for its October 15 meeting. He will ask DRC to extend the workgroup for another year, with the goal of presenting a product in October 2011. The report will discuss the workgroup's progress, include updates on the workgroup meetings, and introduce the workgroup webpage.

Meeting dates are scheduled through the end of 2010. As to future meeting dates, there was discussion of meeting on days other than Fridays. Some members are available on Fridays while others are not. Frequency and duration of meetings also was discussed, depending on whether the DRC agrees to extend the workgroup. Consensus was that if the workgroup is extended, meetings should continue with the same frequency (every three weeks) but in a shorter time period (9:30 a.m. to noon, for example), which might enable more people to participate. Dr. Fabricius will develop a tentative schedule considering Thursday and Fridays for future meetings.

Regarding outreach, it was agreed the workgroup will report outreach efforts to Kay Radwanski for publication on the workgroup webpage. Dr. Fabricius said he will write a letter to Senator Linda Gray and Representative Steve Court, DRC co-chairs, asking for direction about publicity efforts for the workgroup.

III. Membership - Voting Members

Dr. Fabricius reported a request from Senator Sylvia Allen that Mike McCormick, executive director of the American Coalition for Fathers and Children, Washington, D.C., be added as a participating member of the workgroup. Although Mr. McCormick is not an Arizona resident, he has expertise in child custody legislation. Dr. Fabricius discussed the importance of keeping the membership balanced, making sure the workgroup is comprised of experts, non-custodial parents, custodial parents, non-parents, judicial officers, males and females.

Concerns were raised that that members primarily are from Maricopa County, and the size of the workgroup must be considered so the workgroup can reach a quorum and conduct its business. Two voting members, Dr. David Weinstock and Steve Wolfson, have been unable to attend meetings, so Dr. Fabricius will contact them and find out their intentions regarding their participation. Dr. Weinstock and Mr. Wolfson are voting members of the DRC's Sub Law Workgroup and would have input on the proposal through that group. They also could become participating members of AHCW, allowing other people who have been contributing substantially to move into their places.

In September, the Steering Committee had agreed that Kendra Leiby, Arizona Coalition Against Domestic Violence, should be moved from participating member to voting member. The workgroup rules require that a majority of existing voting members must decide the question. The workgroup voted to move Kendra Leiby from participating member to voting member.

MOTION: (By Tom Alongi) Motion to approve Kendra Leiby as a voting member. Motion seconded. Motion passed unanimously.

IV. Brainstorming (taken out of agenda order)

Two members of the public commented during the Call to the Public:

- Karen Duckworth: Ms. Duckworth said she is a stepmother and her husband is a non-custodial parent who has joint custody and equal parenting time. She said that A.R.S. § 25-403 was a huge help for their family. Ms. Duckworth noted her appreciation for the workgroup's openness to allow public comment. She is concerned about adding too much information to the custody statute that may cause confusion. Ms. Duckworth spoke specifically of Title 13, noting it could be cross-referenced in A.R.S. § 25-403. She also suggested including language that enforces truthfulness by litigants in their responses in court and on court forms. Ms. Duckworth is interested in becoming involved in this workgroup.
- Mike McCormick: Mr. McCormick applauded the workgroup for all its continued efforts on this statute and offered his assistance as a resource. He has been involved in rewrites of statutes for different states. He has seen a trend of placing the responsibility of decision-making on the parents as much as possible. He is aware that some states are considering proposals that would establish strong criteria to ensure children's ongoing involvement with both parents, regardless of the parents' marital status. He said research strongly supports maximizing the involvement of both fit parents in the lives of their children. He noted the importance of assuring that children have the consistency and the stability of relationships and that they are able to carry that forward. He said he has been

reviewing Arizona's statute and will submit comments, recommendations, and supporting documents.

Dr. Fabricius noted the best way for public members to get involved is to look at the website, become familiar with the workgroup's progress, and bring specific suggestions to the meetings for the workgroup to discuss.

V. Minutes (taken out of agenda order)

- Minutes from the September 17, 2010, workgroup meeting were approved.

MOTION: (By Sidney Buckman) Motion to approve the September 17, 2010, minutes as presented. Motion seconded. Motion passed with one abstention.

VI. Taskforce Report: Jurisdiction, Definitions, Special Circumstances

Tom Alongi reported that the taskforce met and discussed following areas:

“False Allegations” –

- False allegations do happen; however, the problem is what to do about that in court.
- The judicial system has to be trusted to do its job, and the courtroom is a laboratory for ferreting out false allegations.
- There is a screening process for each step (police officer, prosecutor, judge, jury, etc.) in a case.
- A sanctions section would be appropriate.
- The Stress Test Taskforce could assist by pointing out specific weakness in this section for this taskforce to review.
- The entire section is based on the assumption that a domestic violence victim has proved his or her case.

Workgroup Comments-

- Should there be language regarding some type of punishment for making false allegations? Making a false allegation can be a form of domestic abuse. Where, in the custody statute, would be an appropriate place to address this issue? In response to these questions, Mr. Alongi said it would be an unnecessary expansion of the DV definition. Domestic violence is related to acts that are physical, threatening, or controlling behavior. Sanctions, such as prosecution for perjury or a suit in civil court, are available. The court can impose monetary sanctions or can jail someone for contempt if the contemptuous act occurs in the presence of the court. The custody statute may not be the place to address this issue. The workgroup has discussed not awarding custody to a parent for making false allegations. However, the goal is to focus on what is in the child's best interests, and a child may still need time with the parent, even if the parent has made a false allegation.
- There have been cases where the court has ruled that there was insufficient evidence to support the allegations or the accuser's credibility was questionable. However, the court then used those findings for making a custody decision or made a custody change because of successive false allegations. In response, Dr. Brian Yee noted that the courts at times may use ARS § 25-403(A)(6), the “friendly parent” factor (“which parent is more likely to allow the child frequent and meaningful continuing contact with the other parent”). It is not in a child's best interests to be subjected to multiple investigations and examinations to determine whether a false allegation of abuse has been made.
- A question was raised about whether a conviction of domestic violence is required first before the best interest statute is reviewed, and it was noted that the court can always consider criminal convictions.

- Even if there is a section on sanctions for false allegations, the judge still has to determine whether false allegations have been made.
- There are four different kinds of contempt – (1) direct civil contempt; (2) direct criminal contempt; (3) indirect civil contempt, and (4) indirect criminal contempt. Each has its own sanctions and required procedures in the statute.
- Sanctions can be imposed as punishment or incentives can be removed. False reporting could have consequences on primary decision making and parenting time. Sanctions on the parent could also have a detrimental effect on a child if the child’s time with the parent is restricted. Mr. Alongi provided copies of “*Domestic Violence & Our Courts*,” an article he wrote for publication in the Arizona Attorney magazine. He said he has been asked whether a domestic violence abuser can be a good parent, and the article provides references that may help answer the question. He referenced the public policy statement in New Jersey’s domestic violence statute. The policy includes language about the effects of domestic violence on children.
- Dr. Fabricius noted that there is assumption that when a parent separates from his or her spouse and engages in another relationship, domestic violence is not happening or its degree is reduced. Mr. Alongi said that identifying controlling behaviors and including them in the statute would be beneficial; however, not every act of violence is a controlling behavior. Dr. Fabricius asked whether there should be implications for parenting time if a batterer re-partners and re-batters. He said one factor for the court to consider is that the batterer may get a new partner. If there is a new DV case with the new partner, then there is clear evidence that this person is re-battering and this is a bad environment for the child. Mr. Alongi said the assumption is that the new partner will come to court. If the new partner recently testified about the batterer’s great character in the first case, that person may not want to come back to court to admit she or he was wrong. Also, should a child have to wait for another instance of abuse if there is a clear-cut case of DV with the first partner?
- Dr. Fabricius noted the list of coercive controlling behaviors presented in this section helps to distinguish and isolate an instance of domestic violence versus an ongoing pattern. Patricia Madsen said controlling behaviors should be considered because they are indicative of a person’s personality and behavior traits that could be taken to a new relationship or continue possibly with their children. Mr. Alongi said the current law does a disservice to both alleged batterers and alleged victims. It groups people who commit random acts of violence with no evidence of coercive control and labels them as domestic violence offenders. It also lets people who continuously commit acts of violence using coercive controlling behaviors off the hook. He said the workgroup has to decide how to incorporate these coercive controlling behaviors into the statute.
- Ms. Leiby noted the City of Phoenix has adopted a card system to assist first responders in distinguishing different types of domestic violence. Officers carry risk assessment cards with open-ended questions for victims. Responses to the questions help them distinguish between cases with one incident of violence and situations of continuous abuse. This system is modeled after a system used in Maryland. Ms. Leiby will forward a copy of the card to Ms. Radwanski to share with the workgroup.
- Mr. Alongi provided a copy of the *Nihiser* tax opinion (T.C. Memo. 2008-135, 2008 WL 2120983 (U.S. Tax Ct.)) in the meeting materials. Tax courts use the “innocent spouse exception” to examine whether a spouse should be alleviated of a joint marital tax obligation because of abuse, including coercive behaviors, by the other spouse. He also cited *Cesare v. Cesare*, (154 N.J. 394, 713 A.2d 390), a 1998 New Jersey case that discusses patterns of behavior and coercive control.

“Coercive Control” –

- Added an introductory sentence to clarify “given behaviors” and to avoid having to continuously use the phrase “intentionally, without good cause...”

Workgroup Comments-

- Mr. Espinoza said he had a concern about the introduction, specifically whether people who have protective orders rely on this language to get into properties because they left something behind. Mr. Alongi said, no, it will be useful only where domestic violence has been proven to the court. The purpose is to demonstrate that the listed behaviors are indicators of domestic violence. However, the court needs to be aware that these behaviors do not always constitute domestic violence.
- Mr. Alongi noted the phrase “Promote strong families and family values” has been added to Section 101, Public Policy. He also included the changes suggested at the last meeting in Section 102, Jurisdiction. Mr. Espinoza asked whether Section 101 is intended to replace SB 1314. Mr. Alongi said the language in SB 1314 is not located in the custody statute (Title 25, Chapter 4).¹ Proposed subsections A, C, and D have the same message as SB 1314, while subsection B is new. Mr. Espinoza suggested including language about the child’s best interests.
- Ms Hawkins suggested using another word, such as “joint,” in place of “shared.” Sometimes people have negative connotations about the word “shared” because of the emotions attached to it. She suggested that members who have additional ideas about specific language should submit them to Ms. Radwanski to share with the rest of the workgroup.
- Ms. Leiby brought a list of all batterer intervention programs that have been approved by the Arizona Department of Health Services, Division of Behavioral Health Services, and will share it with interested members.

VII. Taskforce Report: Criteria for Best Interests (Version 7)

The taskforce’s report was tabled because of technical difficulties with the telephone system.

VIII. Taskforce Report: Stress Test

The Stress Test Taskforce has not met and had no report.

IX. Next Meeting

Friday, October 29, 2010

10:00 a.m. – 1:00 p.m.

Conference Room 119A/B

Arizona State Courts Building

- Mr. Buckman will facilitate the next meeting as Ms. Hawkins will be unable to attend. Neither Ms. Hawkins nor Mr. Buckman are able to attend the November 19 meeting, so Mr. Alongi will facilitate it.
- Dr. Fabricius said that Dr. Weinstock had responded to his email during the meeting and is willing to be reclassified a participating member.
- The workgroup voted to move Dr. Yee from participating member to voting member and David Weinstock from voting member to participating member.

¹ The public policy statement in SB 1314 can be found in Title 25, Chapter 1.

MOTION: (By Tom Alongi) Motion to approve Dr. Yee as a voting member and Dr. Weinstock as participating member. Motion seconded. Motion passed unanimously.

Mr. Espinoza asked to have the topic of temporary orders placed on the next agenda. He said he will provide a copy of Oklahoma's policy to Ms. Radwanski for distribution to the workgroup.² Mr. Alongi suggested creating a Temporary Orders Taskforce, and Dr. Fabricius asked Mr. Espinoza to chair it. John Weaver and Mr. Gibson also volunteered for the taskforce, and Mr. Espinoza will contact Judge Bruce Cohen to find out whether he also will participate on it.

The meeting adjourned at 12:46 p.m.

Votes Taken:

- ✓Reclassify Kendra Leiby as a voting member – unanimously approved
- ✓Minutes – September 17, 2010 – unanimously approved
- ✓Reclassify Dr. Brian Yee as a voting member and Dr. David Weinstock as a participating member – unanimously approved

² A copy of the Oklahoma policy was forwarded to the workgroup by Ms. Radwanski as part of an email dated September 7, 2010.