

*Ad Hoc Custody Workgroup
Minutes*

Date: September 17, 2010

Time: 10:00 a.m. – 1:00 p.m.

Location: State Courts Building
Conference Room 230**Minute Takers:** Kay Radwanski, Lorraine Nevarez**Voting Members Attending: Quorum attained**

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

Participating Members Attending:

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

Staff/Admin Support: Kay Radwanski, Lorraine Nevarez**Guests:** Theresa Barrett, Administrative Office of the Courts; Amber O'Dell, Arizona State Senate; Joi Davenport, Public; Michael Springer, 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. Minutes

- Minutes from the August 27, 2010, workgroup meeting were approved.
- MOTION:** (By Kendra Leiby) Motion to approve the August 27, 2010, minutes as presented. Motion seconded. Motion passed unanimously.

III. Brainstorming

The timeline for presenting a draft to the legislature before the January session was discussed. Ms. Hawkins noted that the proposal would have to be circulated to many stakeholders such as the State Bar of Arizona, counties, judges, and the public so everyone has time to comment. Dr. Bill Fabricius noted that the draft must be completed by November, and the timeline has been published in previous minutes. He suggested having the taskforces provide an estimate of how much time they need to complete their sections. The workgroup also must decide what other sections need to be reviewed. Ms. Hawkins suggested the Steering Committee meet to determine the timeline. Kay Radwanski will schedule a meeting for the Steering Committee.

John Weaver read a news report about a San Diego man who committed suicide outside a courthouse. He

suggested having the workgroup research information regarding male suicides after divorce. Dr. Fabricius noted that there has been a lot of research on elevated health risks from divorced fathers. He said the workgroup can take this into consideration.

Michael Springer, a public member, elaborated on suicide research. He said Harvard Medical Institute has done extensive research regarding the effects on children who do not have their fathers around. Mr. Springer said he would forward the information to Ms. Radwanski for distribution to the workgroup.

IV. Discussion: Efforts to Inform the Public

Dr. Fabricius reported that Judge David Gass had contacted him regarding the workgroup and its progress with the statute. This prompted a discussion about whether the workgroup is doing its part to inform others about work being done. Theresa Barrett noted that the Domestic Relations Committee, chaired by Senator Linda Gray, has responsibility to determine the different avenues for publicity because it authorized the workgroup. Amber O'Dell, legislative staff, said bill information is posted to the legislative website. She noted that Senator Sylvia Allen also is interested in this process. Dr. Fabricius proposed asking Senator Gray for ideas to create awareness of the workgroup, allowing people the opportunity to get involved or provide comments.

Judge Bruce Cohen suggested ways for making stakeholders aware of the workgroup: the AOC website has a list serve of all the family court judges, the Maricopa County Bar Family Law Section has a newsletter, and Maricopa County Superior Court has a list of mental health providers. Ms. O'Dell said she could speak with Senator Allen about some of her constituents who might be interested in this topic.

It was agreed that Dr. Fabricius, as workgroup chair, will contact Senator Gray about publicity. Ms. O'Dell suggested Karen Winfield, assistant to Senator Gray, be copied on the email.

V. Taskforce Report: Jurisdiction, Definitions, Special Circumstances (Version 4)

Sid Buckman reported that Dr. Brian Yee had a concern regarding defining all coercive behavior as domestic violence. Dr. Yee wanted to make sure that it was understood that not all coercion is domestic violence.

Dr. Fabricius suggested a line-by-line review of each section, and members were able to cover sections 101, 102, and part of 103.

Section 101- Public Policy

Ms. Hawkins suggested deleting the letter *A* at the beginning of the first paragraph since there is not a *B* that follows. The policy statement in this section is not verbatim from the existing language in statute. Ms. Hawkins noted that the taskforce changes reflect the concerns of the workgroup regarding issues of family violence but also including shared decision-making and regular contact with both parents.

Mr. Buckman suggested adding back the phrase "strong families." Dr. Fabricius said the original statute discussed family values and then SB1314 added parenting time and parental decision-making. The Best Interests Taskforce took the language from SB1314 and placed it into the Best Interests section. Dr. Fabricius suggested that it may not need to be included in both sections. Mr. Buckman said if the workgroup is focusing on public policy in Arizona, then including language regarding strong family values is important. Ms. Hawkins noted that adding a phrase about strong family values would help set the tone of the section.

Daniel Cartagena asked the reason for revisiting this section since it was passed last year. Judge Colleen

McNally said the purpose was to try to improve upon it as it was a last-minute change to SB1314 during the legislative session. Judge Cohen said that applying the rules of statutory construction, if a change is made, then there is a legal basis to say that the change was made with intent. He noted that eliminating a term could mean it was no longer intended to be a policy. He suggested rephrasing or tweaking the language in this section if it can be improved, but do as little as necessary to it. The taskforce will take the suggestions back for revision.

Section 102- Jurisdiction

Dr. Fabricius suggested subsection B(1)(b) should also include language about parental decision-making and parenting time. Other workgroup members agreed. Ms. Hawkins asked whether in B(2) the word “legal” should appear before the word “custody.” Judge Cohen noted that this also deals with third-party rights, and § 25-415 allows for a non-parent to ask for custody of a child without a threshold finding as required by a dependency case filed in Juvenile Court. He suggested changing the phrase to read “by filing the petition for third party rights pursuant to” and then citing the new statutory reference.

Mr. Buckman suggested changing the language to “resides or found in” at the end of section B(2). There were no other comments or suggestions for this section.

Section 103 – Definitions

“Batterer’s intervention program” (BIP) – discussion on this term included:

- Some counties may have difficulty finding intervention programs that include all the aspects included in the definition. Some counties lack such services.
- The definition explains the difference between anger management and batterer’s intervention, which are different concepts. Some counties may have both types of programs. There should be no suggestion that anger management is appropriate in the context of this statute.
- Batterer intervention programs operate independently of the courts and the requirements listed in the definition are widely accepted in most BIPs. BIPs that do not meet the criteria are not likely to receive funding.
- Mike Espinoza said the meaning of “control” as used in the definition was unclear. Ms. Madsen said the purpose of the defining a BIP is not to identify who a batterer is but to specify what a BIP should teach.

“Child abuse” –

- The term “victim” in this definition means a child.
- Dr. Fabricius asked whether interfering with judicial proceedings (ARS § 13-2810), included in this definition, is “child abuse.” Judge Cohen noted that a person could violate an Order of Protection that includes a child as a protected person. He said many inferences would have to be made to reach the conclusion that such a violation is child abuse.

“Coercive control” –

- Should a reference to “false allegations” be contained in this section?
- Much research has been done on coercive control, and it can be used to support the definition.
- The [Wingspread Report](#) will be shared with the workgroup. At the Wingspread conference, groups with differing viewpoints about domestic violence came together, held discussions, and issued a report. The report is viewed as a progressive work because it took various viewpoints and created consensus.
- Coercive control is a pattern of behavior and often is of more concern than violence without pattern. Most times, there will be a pattern of behavior, but sometimes there can be one serious incident. Once one severe incident has occurred, the threat of it happening again becomes part of coercive control.
- Judge Cohen suggested more specific language in subsection 3: “All relevant factors should be considered, including whether the offender ...”

- The motivation behind eavesdropping (subsection 3(h)) and entering onto the victim's residential property (subsection 3(j)) should be considered in determining whether the behavior is coercive control. It was suggested that the term "into" be used instead of "onto the property."
- For subsection 3(m), Judge Cohen suggested adding "without good cause" to the language regarding forbidding or preventing the victim from making decisions.
- The workgroup discussed whether judges are adequately trained on coercive control. When there is no hard evidence of injury, the issue of coercive control should be explored to look at the parties' behavior. People who are effective at coercive control are often more difficult to identify because they are good at hiding the behavior. Coercive control may be tied to parental decision-making. One party may use the child as a means to get at the other party. If the parties have shared parental decision-making and one is engaged in coercive control of the other, the court should look at whether shared parental decision-making is appropriate. An alleged offender could be using coercive control every time a decision has to be made about the child. The court should look at behavior and determine whether there is a pattern that would make it difficult for parents to make decisions together.
- How would someone determine whether one party prevented the other from pursuing an education or a career?
- Are subsections 3(q) (especially dangerous forms of physical violence against the victim) and 3(r) (any form of physical violence against a pregnant victim) redundant?

VI. Taskforce Report: Criteria for Best Interests (Version 7) (taken out of order)

Dr. Fabricius noted changes that had been made in version 7 based on discussion at the September 17, 2010, meeting. Because of time constraints, he asked members to review the changes and bring any suggestions to the October 8, 2010, meeting.

VII. Taskforce: Third-Party Rights (Version 1)

- On motion by Dr. Fabricius and second by Mr. Weaver, voting members unanimously agreed that the title for this section should be "Third-Party Rights." Other suggested titles were "*In Loco Parentis* Custody, Grandparents and Third-Party Visitation" and "Custody and Visitation by Non-Parents."
- For consistency, the title should be carried over to the Jurisdiction section (new section 102).
- In subsection A, "child custody proceeding" should be changed to mirror language in the Jurisdiction section. However, the language in new section 102 does not specify the type of proceeding.
- Subsection A(2) was revised to read (changes underlined): "It would be significantly detrimental to the child to remain or be placed in the care of either of the child's living legal parents who wish to retain or obtain parental decision making and parenting time."
- A suggestion was made to revise Subsection F to avoid confusion. Visitation for grandparents should be carved out from the parenting time designated for the parent related to the grandparents. Grandparent visitation is not generally an issue that affects temporary orders. Certain threshold decisions, based on federal and state case law, must be met before determining grandparent visitation. The proposed change reads: "If logistically possible and appropriate, the court shall order visitation by a grandparent or great-grandparent to occur when the child is residing or spending time with the parent through whom the grandparent or great-grandparent claims a right of access to the child. ~~If a parent is unable to have the child reside or spend time with that parent, the court shall order visitation by a grandparent or great-grandparent to occur when that parent would have had that opportunity.~~"
- Regarding the reference to "separate action," in subsection G, such action could be a petition for custody or a petition for grandparent visitation. The petition for custody could apply if, for example, a child's parents were missing or deceased and a third party had filed for custody of the child.

VIII. Taskforce Report: Stress Test (taken out of order)

- The taskforce asked for clarity on a conceptual question and agreed that the question required more thought. The question is: Should the goal of “protection of the victim (parent)” be separated from “best interests of the child”?
 - Mr. Weaver said that domestic violence is interwoven in the code in a way that makes it impossible to separate it from custody. Judge Cohen noted that there are two components: parental decision-making and parenting time. Parental decision-making is about the relationship between the parents relative to their responsibilities for the child, and domestic violence issues are central to that determination. For parenting time, consideration of domestic violence issues are important but in a different context. The context is how a child could be affected by the domestic violence. Has the child witnessed DV behaviors? Will the child learn from those behaviors if they continue? If DV defined the relationship between the parents but not between the parents and the child, it may have less relevance. The distinction is that there are separate factors and different dynamics between parental decision-making and parenting time.
 - Dr. Fabricius noted that there has been a lot of research on the beneficial effects of parental decision-making. It is hard to separate out how much of the benefit is due to shared parenting time. There is good evidence that joint legal custody has beneficial effects on the child. To the extent joint legal custody is denied, there should be a concern about the negative effects on the child. He suggested on a cautionary note that even joint legal custody can create unintended consequences for a child. Ms. Hawkins said that in the day-to-day workings of cases she sees, there are cases with joint legal custody but parents continue to fight and argue and engage the child in the dispute (by asking the child to carry messages back and forth, for example). It is not in a child’s best interests to be caught in the middle between the parents. Dr. Fabricius noted that one alternative is to order split decision-making (e.g., one parent decides education and the other chooses religion). Judge Cohen said domestic violence may be a major factor in parenting time, and that is why context is important. The case must be assessed on two levels: (1) parental decision-making – the dynamic between parents, and (2) parenting time – how the child is affected.
- What if a parent lies about coercive control behaviors by the other? Can some of these behaviors occur in the absence of any physical evidence? How does a court evaluate such allegations? Bill Eddy (High Conflict Institute) does training on how to deal with high conflict personality types who are prone to lie in family court. Dr. Fabricius asked whether the workgroup should get input on the intimate partner violence sections from Mr. Eddy and other experts, such as Janet Johnston and Joan Kelly. Members agreed that it might be helpful to have experts review all of the sections. Mr. Buckman suggested that one way to get their input would be to direct them to the website, where they can review the documents, and ask them to submit comments.

IX. Next Meeting

Friday, October 8, 2010

10:00 a.m. – 1:00 p.m.

Conference Room 119A/B

Arizona State Courts Building

The meeting adjourned at 12:55 p.m.

Votes Taken:

✓Minutes – August 27, 2010 – unanimously approved

✓Title – “Third-Party Rights” – unanimously approved