

*Ad Hoc Custody Workgroup
Minutes*

Date: August 6, 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) | ■ Brooks Gibson (telephonic) |
| ■ Thomas Alongi | ■ Judge Colleen McNally |
| ■ Sidney Buckman | ■ John Weaver |
| ■ Daniel Cartagena (telephonic) | <input type="checkbox"/> David Weinstock |
| ■ Grace Hawkins | <input type="checkbox"/> Steve Wolfson |

Participating Members Attending:

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

Staff/Admin. Support: Kay Radwanski, Lorraine Nevarez**Guests:** Kathy Sekardi, Administrative Office of the Courts; Joi Davenport, parent; Ariel Serafin, CLS intern; Amber O'Dell, Arizona State Senate; Jenny Gadow, attorney; Terry Decker, parent**Matters Considered:**I. Welcome and Announcements

Grace Hawkins called the meeting to order at 10:08 a.m. and informed the members that Judge Randall Warner has withdrawn as a participating member of the workgroup. Ms. Hawkins asked Sidney Buckman to be the moderate the August 27 meeting because she will have to participate telephonically. Ms. Hawkins noted that Kay Radwanski has replaced Susan Pickard as staff for this workgroup. Ms. Pickard is assigned to other projects, such as E-filing, that are consuming her time.

II. Minutes

- Minutes from the March 19, 2010, workgroup meeting were amended to show that Thomas Alongi was proxy for Patricia Madsen. The minutes also were amended to reflect that Ms. Madsen was absent. Kathy Sekardi advised that the rules of the Domestic Relations Committee, which authorized this workgroup, do not permit proxies.

MOTION: (By Judge McNally) To approve the March 19, 2010, minutes as amended. Motion seconded. Motion passed unanimously.

- Minutes from the May 27, 2010, workgroup meeting were approved with a noted change on page 3 that was already included in the version presented to members.

MOTION: (By Mr. Alongi) To approve the May 27, 2010, minutes as presented. Motion seconded. Motion passed unanimously.

- Minutes from the June 22, 2010, workgroup meeting were approved with the noted change on page 4 that was already included in the version presented to members.

MOTION: (By Mr. Alongi) To approve the June 22, 2010, meeting minutes as presented. Motion seconded. Motion passed unanimously.

III. Updating on Workgroup Webpage and Posting Past and Current Versions of Taskforce Sections

Dr. Bill Fabricius noted that Ms. Radwanski, Ms. Sekardi, and Ms. Pickard have been developing the [webpage](#). He specifically noted the *Documents and Reports* link that currently has the most recent version of each taskforce's sections. He thought the webpage could be used as a repository of all the versions, past and most recent, that each taskforce develops. This would allow for ease of access to all of the workgroup's ideas and would serve as a better history of its progress. He also suggested that any written substantive ideas (such as the email exchange on the issue of "primary caretaker" language) exchanged among workgroup members or received from the public also be added to the webpage, perhaps in a separate section with each identified by author's name, date, and topic. He also stressed the importance of having the workgroup's progress and development of ideas available for public review. The workgroup agreed to have the additional information available on the workgroup website.

Ms. Radwanski gave a tutorial of the workgroup webpage and credited Ms. Pickard for the webpage design.

IV. Discussion-Legislative Process

Katy Proctor, AOC legislative liaison, presented on the legislative process regarding how to approach the Legislature with a draft bill. Ms. Proctor noted that the Legislature will convene on the second Monday in January. Some suggestions Ms. Proctor provided are as follows:

- Be comfortable with the information
- Approach the Domestic Relations Committee (DRC) and other stakeholders
- Set up meetings ahead of time with legislators
- Find a sponsor for the bill
- Draft bill should be in a form that members from the Legislature can review ahead of time
- Determine if the bill will be packaged as a whole or submitted as separate pieces of legislation
- Using a strike-everything bill as a vehicle for this legislation is not recommended

Ms. Proctor reminded the workgroup that the 'drop dead' date is January. She also noted that this bill can be taken through the Arizona Judicial Council for comment.

Comments/Questions from workgroup members:

Mike Espinoza suggested that the workgroup talk to both Senate and House members to avoid introduction of opposing bills. Mr. Buckman noted that there are other powerful stakeholders in the state, not only the legislators. Judge McNally asked whether the workgroup could get support from the legislature to format the draft bill for the legislative review. Ms. Proctor proposed that the workgroup consider asking Senator Linda Gray, chair of the DRC, to "open a folder." This would allow the Legislative Council to put the material into the legislative form and have it reviewed by Leg. Council attorneys. She noted that having Senator Gray 'open a folder' does not mean she will sponsor the bill. By opening a folder, Leg. Council can prepare a draft and add revisions. The workgroup could then request an "intro set" (the draft prepared by Leg. Council). The intro set would then be circulated among legislators to obtain sponsorship signatures.

V. Brainstorming

Ms. Hawkins began with the Call to the Public. She reminded the public that the scope of the Ad Hoc Custody Workgroup is limited to child custody, and the workgroup has no authority regarding any other

issue. The workgroup will make a record of the comments, study the matter, or schedule the matter for further consideration and decision at a later date. Ms. Hawkins also noted that each speaker is limited to two minutes.

Two people spoke during the Call to the Public. Their comments are as follows:

- Jenny Gadow, family law practitioner, commented on issues concerning special circumstances (referencing proposed revisions to ARS § 25-403.03, 25-403.04, and 25-403.05). Ms. Gadow noted there would be logistical problems when presenting to the court, particularly under the time constraints of a one-hour temporary orders hearing, to include discussion of special circumstances at the same time. One attorney may be focusing argument on special circumstances, while the opposing attorney wants to present best interests of the child arguments. She suggested the workgroup consider a mechanism in the initial pleadings that would establish another time for presenting special circumstances if they apply to the case.
- Joi Davenport, parent, suggested to the workgroup that the same language in the intimate partners section (new Section 105) regarding the emotional, physical, and psychological aspects of abuse also be included in the child abuse section.

VI. 25-401; Jurisdiction (Taskforce: Thomas Alongi, Sidney Buckman, Judge Colleen McNally) Version 1.

Judge McNally presented a proposed new Section 102 titled Jurisdiction to replace ARS § 25-401. She noted that the new section does not contain substantial changes. Additions include references to the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA) and the Parental Kidnapping Prevention Act (PKPA). The addition of the references will make it easier for readers to find these federal laws.

Mr. Alongi will change the phrase “decision-making responsibility” to “parental decision-making.” This change is a reflection of the May 27, 2010, minutes where the workgroup agreed on the new term for legal custody.

MOTION: (By Mr. Alongi) Motion to adopt proposed section 102 with the understanding of the term “decision-making responsibility” to be changed as noted. Motion seconded.

Judge Bruce Cohen noted that in the first paragraph discussing visitation by a non-parent, there is no reference on how to initiate action by a non-parent, such as a grandparent seeking visitation. He said that Section 102(B)(2) does not contain in its structure the triggering authority for that type of action.

Mr. Alongi withdrew his motion so the taskforce can clarify the language further, and the vote was tabled.

The distinction between “parenting time” and “visitation” also was noted. Mr. Alongi said the use of these terms is deliberate, with parents having parenting time with their children and other persons having visitation. Ms. Hawkins explained that parents are not visitors in their children’s lives, and that is the reason for the distinction.

VII. Decision Tree (Taskforce: Thomas Alongi, Sidney Buckman, Judge Colleen McNally) Version 1. [NOTE: This taskforce will henceforth be called the Jurisdiction, Definitions, and Special Circumstances Taskforce and will also include Brooks Gibson]

The workgroup discussed the following Special Circumstances sections.

Section 104-Mandatory Preliminary Inquiry: Special Circumstances

Judge McNally explained that the special circumstances sections that follow ARS § 25-403 (best interest) in the current statute would be placed before the best interest factors (proposed Section 110) in the revised

statute and would provide direction for analysis. The taskforce envisions that parties would indicate at the beginning of the case whether special circumstances do or do not exist in their case. If there are no special circumstances, the analysis would begin at Section 110. If any do exist, the analysis would begin in the relevant special circumstances section. She noted that the new special circumstances analysis will have the same effect on custody as it currently does, but these sections will help the judge and the parties narrow the options early in the case. In some cases, special circumstances will prohibit an award of parental decision-making and parenting time. The effect on court time will have to be evaluated, but some special circumstances, such as convictions, can be easily proven by court records and will not consume much time.

Section 109-Conflicting Presumptions or Mandatory Rules

New Section 109 moves toward presumptions. Judge McNally said the taskforce wants to provide a clear model for situations where both parties have special circumstances and neither qualifies for decision-making responsibility. The proposal currently has two options, and the taskforce is inviting additional suggestions. The task group is seeking language that is flexible and provides direction on the process.

Section 107-Dangerous Crimes Against Children

The taskforce is also trying to include language in new Section 107 regarding a parent's obligation to give the other parent notice of the child's potential contact with sex offenders. The Legislature added this obligation recently to ARS § 25-403.05.

Section 110-Best Interests of the Child

The task group is also requesting comments about a proposed introductory paragraph to Section 110. Comments can be sent to Ms. Radwanski or can be made at the next workgroup meeting.

Section 105-Intimate Partner Violence and Child Abuse

Mr. Alongi reported that the language in the most recent version has not changed since it was introduced at the June 22, 2010, meeting.

During this discussion, members revisited the topic of the proposed "decision tree" structure. Mr. Alongi noted that the special circumstance of domestic violence is already part of the current statutory scheme but is buried in it. He said situations exist now where each attorney comes to court with different goals, one wanting to address special circumstances and the other best interests. Attorneys have to calculate this possibility into their presentations and have to contend with time constraints. He said that time alone is not a reason to avoid re-structuring these provisions. Mr. Espinoza suggested that the policy statement in ARS § 25-103 be kept in mind. Judge McNally said all of the special circumstances provisions, except for jurisdiction, are evidence to the contrary of ARS § 25-103, and the goal is to define this more clearly. Judge Cohen asked whether the structural change is a question of formatting or substance. He acknowledged that the special circumstances issues are already in statute but get lost. He said it makes sense that these issues are kept together and clearly stated. Mr. Alongi said the taskforce was not given the responsibility of drafting additional language that would emphasize the public policy statement in A.R.S. § 25-103, which is why it does not appear in the text currently before the workgroup. However, he added that he had independently prepared a section – suitable for insertion before *Jurisdiction* – that would accomplish this goal, and would forward it to Bill and Grace in time for the next meeting.

Regarding intimate partner violence, Mr. Alongi said it is important to include language in the statute that would help people recognize the different forms of domestic violence. He noted that not all domestic violence is equal. The current statute (ARS § 25-403.03, regarding "significant" domestic violence) makes no effort to help determine the motivation for domestic violence. Does the degree of domestic violence matter? The court should be able to consider controlling behavior as domestic violence. Coercive control is an insidious form of domestic violence and is dangerous to children. Domestic violence does not always result in physical violence. Section 105 provides a list of 18 routinely appearing controlling behaviors that

constitute domestic violence. This list was pulled from various sources. The court should recognize coercive control as a cluster of behaviors, not as single factors. While 18 factors are a lot, the hearsay rule has 25 exceptions. Mr. Alongi said the stakes are high enough to spell out these factors. He noted that it is difficult to argue verbal abuse in court, and the goal is to assist the court in recognizing the difference between people who simply do not get along and those in coercive controlling situations.

Judge McNally noted that the *Wingspread Report* refers to the broad spectrum of different types of domestic violence. Inclusion of the coercive control language provides education for everyone. She noted that sometimes people do not even recognize they are in a domestic violence situation, do not tell the court, and end up hurt or killed.

Judge Cohen had concerns about section 105(J), which would prohibit parenting conferences and ADR services between the victim and the perpetrator. He said this does not give the victim any alternatives to address the perpetrator except in a courtroom, which can be intimidating. Dr. Yee noted that the provision, as written, would cause a victim to lose the right to resolution. Mr. Buckman said this does not preclude ADR, which can be conducted through caucusing. Mr. Alongi noted the victim can waive the prohibition but said he supports this language because he has had victims tell him that ADR was not helpful and they were made to feel unreasonable and foolish for not reaching an agreement with the other party. Judge Cohen acknowledged that some of these concerns might be a training issue for mediators. Mediation can be helpful, and special arrangements, such as conferencing, can be made. He suggested changing the word from “shall” to “may” in section 105(J).

Ms. Hawkins noted that the Arizona Rules of Family Law Procedure (ARFLP) already include a waiver of ADR. She said that in Pima County Superior Court, each party meets separately with the mediator before beginning a session. The mediator continues to assess the situation throughout the session. She said any attempt by a mediator to force a party to agree goes against the rules of neutral mediation. Parties in mediation are ordered to attend the mediation, but are not ordered to reach agreement. She said there are many well-trained mediators and many screening tools. She said mediators do not want people to feel victimized. She said there are methods that can be employed, such as putting the parties in separate rooms or having them attend mediation on different dates and time that can help parties resolve their differences while still maintaining the safety and comfort of the parties. She had concerns about the last sentence regarding only proceeding into mediation following inquiry in open court. Judge McNally said the task group will consider members’ comments and will come back with another version for workgroup review.

Danny Cartagena asked how Section 109 would relate to situations of mutual violence. Judge McNally said this is one of the concerns about Section 109 as there may be situations where both parents have special circumstances. The court may have to conduct a balancing test. She said the taskforce has struggled with the statutory requirements for Section 109 and welcomes members’ comments. Mr. Alongi said Section 109 affects cases with special circumstances where each party has failed to overcome a presumption. Judge Cohen had concerns about current cases with events that would disqualify a parent from having custody. He said it is important to know how the parties’ history will reflect the future so a plan can be developed. He said he supported the coercive control language because it shows a pattern, but he has concerns about the disqualification. Mr. Alongi said Section 109 still needs more work.

Mr. Espinoza asked what the effect would be if a party obtained a protective order (PO) *ex parte* and used it to claim domestic violence in a custody case. Mr. Alongi said that in his experience, he has not seen Family Court judges rely on orders of protection in custody cases. Judge Cohen noted that many defendants do not contest protective orders. Mr. Alongi said protective orders can be issued if a person alleges that domestic “has or may occur.” This would not necessarily lead to a finding of domestic violence if the allegation is that harm “may” occur, especially if the PO was not contested. The workgroup agreed that language should be included to assist the court in determining how to consider a PO in a custody situation.

Ms. Hawkins proposed that the word “agency” in section 105(H) (regarding conditions on parenting time if a parent fails to overcome a special circumstances presumption) be removed. Some people cannot afford to have an agency supervise their parenting time so they may rely on family or other people. Also, supervised parenting time is intended to be temporary and language should be included to direct people on what to do when it is no longer necessary. Mr. Alongi said “agency” was being used broadly and included anyone acting as an agent for another. Members also discussed whether the court’s authority to place conditions on parenting time should be mandatory or discretionary (phrased as “shall” or “may”) and whether the term “indefinitely” should be deleted from subsection (H)(10). Mr. Alongi said the term “indefinitely” was included so that the court’s hands are not tied when a parent’s behavior is extreme. By allowing conditions to exist indefinitely, the court puts the burden on the offender to make behavioral changes and then to request modification of the parenting plan. Judge Cohen noted similar procedures have been used in the drug context, where in the future, the offender would have to petition the court for a change and would have the burden of proof. Judge Cohen noted that the same remedies could apply to other special circumstances sections. The taskforce will continue to work on the language.

It was noted that Section 105(H) has a typo. The reference should direct the person back to subsection G. Also firearms should be included in subsection (H)(4).

Dr. Fabricius noted that in Section 105, subsections D, E, and F refer only to parental decision-making while subsection H refers to parenting time. Mr. Alongi said that Section 105(H) replaces ARS § 25-403.03(F), 105(C) replaces § 25-403.03(A), and 105(D), (E), and (F) replace § 25-403.03(D) and (E).

In concluding discussion of this section, Mr. Alongi said he had tried to contact Judge Bill Brotherton concerning the original discussions about A.R.S. § 25-403(A)(11) when Judge Brotherton was still a legislator and belonged to the committee that debated this bill. The statute refers to a conviction of an act of false reporting or child abuse or neglect and is one of the current best interests factors. Mr. Alongi indicated that he left a voice message at chambers inviting Judge Brotherton to join the workgroup at a future meeting or, alternatively, explain the function of the amendment to him so he could pass it along to the workgroup for consideration. Mr. Alongi was unsuccessful in reaching Judge Brotherton, but he will keep trying. Mr. Alongi also introduced Ariel Serafin, Community Legal Services intern, to explain research she has done on California’s custody laws regarding false reports of child abuse and neglect and sexual abuse of a child. She said the California law provides for a monetary penalty for a false report of abuse or neglect while a parent who is convicted for making a false report of sexual assault may have his or her access to the child limited. If the conviction for false reporting occurs after custody and parenting time orders have been entered, the court must re-open the case and reconsider its order.

VIII. 25-403; Criteria for Best Interests (Taskforce: Bill Fabricius, Grace Hawkins) Version 5

Dr. Fabricius continued discussion regarding conviction for false reporting of child abuse or neglect that would be (C)(8) under the new statute (subsection (C)(10) in the current statute).

Dr. Fabricius asked if a parent intentionally makes a false report against the other parent, would it be in the child’s best interests to lose time with that parent? He said this subsection may need to be somewhere in the statute but questioned whether subsection (C)(8) is the right place. John Weaver responded saying it should be a factor. Mr. Alongi cited Hays v. Gama, 205 Ariz. 99 (2003), in which a parent was assessed economic sanctions for disregarding a court order but a therapist’s testimony and notes were allowed because they were relevant to the best interests question. He noted that California law requires a person who falsely accuses the other parent to pay a stiff financial price as a consequence. Mr. Espinoza said children could suffer if a parent is afraid to make a report. He felt it should not be a factor. Judge Cohen said it is important to see what is going on beneath the surface. If the parent’s purpose is to estrange the child from the other parent, subsection (C)(6) should be considered. He felt the underlying motivation for making the report is

more important than the falsity of the report. He said (C)(6) – who will facilitate the child’s relationship with the other parent – is more important. He agreed that the act of false reporting is a problem, regardless of whether the parent has been convicted of it, when the allegations are not true.

Ms. Hawkins asked whether this issue could be dealt with in another section, which led to discussion of whether a section on sanctions should be created. Mr. Espinoza noted that SB 1314 contained a section on sanctions, which could be combined with other sanctions. In response to Mr. Weaver’s question, Judge Cohen said he does not know what percentage of cases have false allegations. He said in some cases, law enforcement has proved that a person made false allegations and other cases include allegations that are clearly false. The difficult cases are in the middle, where a person may have correct facts but has reached a wrong conclusion.

Judge McNally pointed out that the proposed 25-403(D) embodies the public policy concept in SB 1314. Judge Cohen agreed that 25-403(A) to (D) carry out the SB 1314 notion. The policy is clear without ignoring other concerns, he noted. Mr. Alongi suggested that the workgroup consider adding the public policy language at the beginning of the statute, before jurisdiction. Ms. Hawkins and Dr. Fabricius will review it in their taskforce.

Dr. Fabricius asked the workgroup to think about whether the second sentence of subsection (C)(6) and subsection (C)(9) are now out of place because of the new Sections 104 and 105. Judge Cohen and Mr. Alongi favored retaining the second sentence of (C)(6). There seemed to be consensus that (C)(9) should be removed because it will have already been dealt with in Section 105.

Dr. Fabricius noted that given that (D) directs the court to be consistent with the child’s “physical safety and emotional well-being,” and that the court determines that by way of considering the factors in (C)., that we should label those factors as “relevant to the child’s physical safety and emotional well-being.” Judge Cohen suggested the phrase in both (C) and (D) be simplified to “physical and emotional well-being,”

Dr. Fabricius also pointed out the removal of the word “primary” from (C)(7). Judge Cohen asked whether the new language would change the practical meaning. Dr. Fabricius said the current statute wants the court to determine a primary caregiver based on past behavior, but the new statute would move away from looking at the past and look at past, present, and future. Mr. Cartagena asked about terms that quantify, such as “disproportionate amount of care.” Dr. Fabricius said the intent is to look at cases where a parent has been minimally involved in the child’s life – where the care has been disproportionate or severely lacking. Judge McNally said there may be a better word than “disproportionate,” but the goal is avoid cases where parties argue that providing 51% of the care makes that parent the primary caregiver. Mr. Alongi said the courts are good at differentiating between parents simply dividing labor and total noninvolvement. Judge Cohen said it is important to look at the historic involvement in the care and raising of the child and the impact on future care as well as whether the parents have demonstrated the ability to meet the day-to-day needs of the child. Judge Cohen said (C)(7) can be interpreted to mean attachment, day-to-day care, and historical involvement, and suggested some re-wording.

Dr. Fabricius asked the workgroup if they thought (C)(3), (4), and (5) (relating to interactions with other people and adjustment to home, school, and community) overlapped. Should they each be clarified on what they are specifically focusing on? Ms. Hawkins agreed adding some additional language would be helpful. The workgroup decided to table this issue for the next meeting due to the time.

Ms Hawkins said the steering committee should meet to discuss the feasibility of timelines. Ms. Radwanski will be sending out the meeting notice.

The meeting adjourned at 1:02 pm.