

Substantive Law Workgroup
Steve Wolfson, Chairperson

Court Procedures Workgroup
Dr. Brian Yee, Chairperson

DOMESTIC RELATIONS COMMITTEE

Agenda

November 23, 2011

10:00 – Noon

Arizona State Courts Building

1501 W. Washington St., Conference Room 345 A/B

Phoenix, Arizona 85007

1. Welcome and Announcements.....*Chairman Steve Wolfson*
Chairman Dr. Brian Yee

**2. Discuss and review “yellow” version of custody rewrite
along with other comments***Chairmen*

Action Item/Vote: _____

3. Call to the Public.....*Chairmen*

This is the time for the public to comment. Members of the workgroup may not discuss items that are not specifically identified on the agenda. Therefore, pursuant to A.R.S. § 38-431.01(H), action taken as a result of public comment will be limited to directing staff to study the matter, responding to any criticism, or scheduling the matter for further consideration and decision at a later date.

4. Adjourn - Next Meeting: TBD

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1 “Coercive control” refers to a clear pattern of exceptionally controlling and
2 psychologically destructive behaviors inflicted by one parent against another.
3 With regard to these behaviors, the court shall consider their frequency, the
4 passage of time since their last occurrence, whether the offending parent used
5 more than one of them in combination to worsen their effect, the emotional
6 harm they inflicted on the victim and any minor children, the degree to which
7 they influenced the household’s daily life, whether a history of physical violence
8 contributed to their influence, and the extent to which they were instead
9 attributable to some other consideration. In particular, the court shall consider:

10 (a) Emotionally abusive conduct solely intended to demean, degrade or
11 humiliate the victim;

12 (b) Unreasonable restriction of the victim’s lawful activities, malicious
13 damage to the victim’s financial credit or employment prospects, or
14 nonconsensual appropriation of the victim’s identity for an illegitimate
15 purpose;

16 (c) Attempted or threatened suicide, or injury or threats to other
17 persons or household pets, as a means of coercing the victim’s compliance with
18 the offender’s wishes;

19 (d) Unreasonable threats to withhold or conceal children as a means of
20 coercing the victim’s compliance with the offender’s wishes, or using a child to
21 facilitate criminal conduct against the victim;

22 (e) Impeding the victim’s attempt to report criminal behavior to law
23 enforcement, medical personnel or other third parties by force, duress or
24 coercion;

25 (f) Eavesdropping on the victim’s private Internet activities, telephone
26 conversations or other communications without consent or legitimate purpose; or

27 (g) Other exceptionally controlling behavior consistent with the conduct
28 illustrated in this definition, or that society would recognize as a violation of the
29 victim’s legal or fundamental human rights.

- 1 **i. Title:** OMNIBUS TITLE 25, CHAPTER 4 PROPOSAL (“BLUE”)
2
3 **ii. Primary Editor:** Tom Alongi
4 Senior Staff Attorney, Family Law Unit
5 Community Legal Services
6
7 **iii. Version:** N° 1 (with comments)
8
9 **iv. Draft Date:** November 14, 2011

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CHAPTER 4
MINOR CHILDREN: PARENTAL DECISION-MAKING,
PARENTING TIME & RELOCATION

Article 1. GENERAL PROVISIONS

§ 25-401. Policy regarding parental decision-making and parenting time

Comment [TPA1]: This section is designed to emphasize the purpose of 2010 SB 1314.

The State of Arizona finds that, absent evidence to the contrary, it serves a child's best interests when both legal parents:

- A. Share parental decision-making concerning their child;
- B. Have substantial, frequent, meaningful and continuing parenting time with their child;
and
- C. Develop a mutually agreeable parental decision-making and parenting time plan.

§ 25-402. Jurisdiction

A. Before conducting any proceeding concerning parental decision-making or parenting time, including any proceeding scheduled to decide the custody or visitation of a non-parent, a court in this State must first confirm its authority to do so to the exclusion of any other State, Native American tribe or foreign nation by complying with the Uniform Child Custody Jurisdiction and Enforcement Act, Parental Kidnapping Prevention Act, and any applicable international treaty concerning the wrongful abduction or removal of children.

Comment [TPA2]: This addition serves as an important reminder to new judges, inexperienced attorneys and laypeople alike that certain federal and state laws may altogether prevent the family court from making a desired PDM or parenting time decision.

B. The following persons may request parental decision-making or parenting time under the following circumstances:

- 1. A parent, in any proceeding for marital dissolution, legal separation, paternity, annulment or modification of an earlier decree;
- 2. A person other than a parent, by filing a petition for third-party rights under Section 25-470 in the county in which the child permanently resides.

§ 25-403. Definitions; general application

In this article, unless the context otherwise requires:

- 1. *"In loco parentis"* means a person who has been treated as a parent by the child and who has formed a meaningful parental relationship with the child for a substantial period of time.

1 2. “Legal parent” means a biological or adoptive parent whose parental rights have not been
2 terminated. A person whose paternity has not been established under Section 25-812 or 25-814
3 is not a legal parent.

4 3. “Parental decision-making” refers to a parent’s legal right and responsibility to make
5 major life decisions affecting the health, welfare and education of a child, including, for
6 example, schooling, religion, daycare, medical treatment, counseling, commitment to alternative
7 long-term facilities, authorizing powers of attorney, granting or refusing parental consent where
8 legally required, entitlement to notifications from third parties on behalf of the child,
9 employment, enlistment in the Armed Forces, passports, licensing and certifications, and blood
10 donation. For purposes of interpreting or applying any international treaty, federal law, uniform
11 code or other state statute, “parental decision-making” shall mean the same as “legal custody.”

12 (a) “Shared parental decision-making” means that both parents equally share the
13 burdens and benefits of decision-making authority, and exercise it with mutual consent.

14 (b) “Final parental decision-making” means that one parent ultimately exercises the
15 authority described in this section, but must reasonably consult with the other before doing so.

16 (c) “Sole parental decision-making” means that one parent exclusively exercises the
17 authority described in this section, and is not required to consult with the other before doing so.

18 4. “Parenting time” refers to a parent’s physical access to a child at specified times. It
19 includes providing the child with food, clothing and shelter, and actively participating in the
20 child’s activities in a positive manner, while the child remains in that parent’s care. It also
21 involves making routine decisions about a child’s daily care that do not contradict major
22 decisions made by a parent who has been granted parental decision-making authority.

23 5. “Visitation” means the same as parenting time when exercised by someone other than a
24 legal parent.

25 § 25-404. Special definitions; domestic violence and child abuse

26 In this article, unless the context otherwise requires:

27 1. “Child abuse” means any of the following acts, where the relationship between the parent
28 and victim qualifies under Section 13-3601(A)(5):

29 (a) Failure to provide food, clothing and shelter to a minor child, or neglect of a minor
30 child’s physical health, psychological condition or personal hygiene, to such an extent that it
31 substantially risks the child’s welfare;

32 (b) Physically assaultive behavior against a minor child;

33 (c) Any form of sexual misconduct with a minor child; or

Comment [TPA3]: This section informs other States and Nations that, for purposes of applying the UCCJEA or PKPA to our decrees, PDM is the functional equivalent of “custody” – a term still used by the majority of other jurisdictions.

Comment [TPA4]: Absent a debilitating circumstance such as mental illness, substance abuse, past abandonment, child neglect or family violence, this outcome will be the ultimate goal in the vast majority of cases.

Comment [TPA5]: This option is ideal for situations where a parent may not be suitable for making major decisions for a child (see examples directly above), but should still receive the dignity and respect of informed consultation before the PDM parent makes his/her final decisions.

Comment [TPA6]: This last option is meant to be exceedingly rare, and used only in situations where the non-PDM parent is utterly absent from the picture (e.g. imprisoned or missing), or so disabled, abusive or controlling that consultation by the PDM would serve no function or perhaps even be counter-productive.

Comment [TPA7]: The original proposal defined “child abuse” by directing the reader to a series of criminal statutes in Title 13 – a sometimes lengthy and aggravating process. Although this revised definition does still use ARS 13-3601 to set the parameters for the parent-child relationship, the remainder defines abuse itself with clear language, right here in Chapter 4, that most will understand. It includes neglect of basic survival needs, physical assault, molestation, and clearly harmful psychological abuse.

1 (d) Severe psychological abuse of a minor child resulting in demonstrable emotional harm.

2 2. “Coercive control” refers to a clear pattern of exceptionally controlling and
3 psychologically destructive behaviors inflicted by one parent against another. With regard to
4 these behaviors, the court shall consider their frequency, the passage of time since their last
5 occurrence, whether the offending parent used more than one of them in combination to worsen
6 their effect, the emotional harm they inflicted on the victim and any minor children, the degree to
7 which they influenced the household’s daily life, whether a history of physical violence
8 contributed to their influence, and the extent to which they were instead attributable to some
9 other consideration. In particular, the court shall consider:

10 (a) Emotionally abusive conduct solely intended to demean, degrade or humiliate the
11 victim;

12 (b) Unreasonable restriction of the victim’s lawful activities, malicious damage to the
13 victim’s financial credit or employment prospects, or nonconsensual appropriation of the
14 victim’s identity for an illegitimate purpose;

15 (c) Attempted or threatened suicide, or injury or threats to other persons or household
16 pets, as a means of coercing the victim’s compliance with the offender’s wishes;

17 (d) Unreasonable threats to withhold or conceal children as a means of coercing the
18 victim’s compliance with the offender’s wishes, or using a child to facilitate criminal conduct
19 against the victim;

20 (e) Impeding the victim’s attempt to report criminal behavior to law enforcement,
21 medical personnel or other third parties by force, duress or coercion;

22 (f) Eavesdropping on the victim’s private Internet activities, telephone conversations or
23 other communications without consent or legitimate purpose; or

24 (g) Other exceptionally controlling behavior consistent with the conduct illustrated in
25 this definition, or that society would recognize as a violation of the victim’s legal or fundamental
26 human rights.

27 3. “Conviction” means any criminal conviction resulting from: (a) a guilty verdict entered
28 by a judge or jury; and (b) any formal plea entered by a defendant regardless of the form of that
29 plea.

Comment [TPA8]: This definition is carefully restricted to examples of severely controlling behavior that transcend more common instances where a parent’s behavior is merely annoying, obnoxious or unkind. In addition to evaluating proof of the behavior itself, and as a shield against improper use of this new section, the court must consider a number of factors associated with the behavior, including – quite importantly – whether it was motivated by some concern other than control.

“Coercive control” later appears within the definition of domestic violence. See New Subsection 5 directly below.

Comment [TPA9]:

Comment [TPA10]: This is intended to include pleas of guilty, *nolo contendere* (“no contest”) and plea bargaining under *North Carolina v. Alford*.

1 4. “Deferred prosecution” and “diversion” mean any program offered by a criminal court
2 or government agency through which an alleged offender avoids criminal prosecution by
3 agreeing to pay a fine, participate in counseling, or perform other remedial tasks in exchange for
4 dismissal of one or more pending charges or a promise by the state not to proceed with a
5 complaint or indictment.

6 5. “Domestic violence” means any of the following behaviors when inflicted by one parent
7 against the other:

8 (a) Physical or sexual violence, or any threat to commit the same;

9 (b) Conduct that places the victim in reasonable fear of bodily harm, irrespective of
10 whether physical contact or injury results;

11 (c) Coercive control, as defined in this section;

12 (d) Stalking, harassment, kidnapping or unlawful imprisonment, as those behaviors are
13 defined in Article 13 of the Arizona Revised Statutes; or

14 (e) Violation of a domestic violence protective order.

15 This definition does not include any defensive behavior that would be legally justified under
16 Sections 13-404 through -408.

17 6. “Offender treatment program” means an individual or group treatment program for
18 domestic violence offenders that:

19 (a) emphasizes personal responsibility;

20 (b) clearly identifies domestic violence as a means of asserting power and control over
21 another individual;

22 (c) does not primarily or exclusively focus on anger or stress management, impulse
23 control, conflict resolution or communication skills;

24 (d) does not involve the participation or presence of other family members, including the
25 victim or children; and

26 (e) preserves records establishing an offender’s participation, contribution and progress
27 toward rehabilitation, irrespective of whether a given session involves individual treatment or
28 group therapy including multiple offenders.

Comment [TPA11]: The definition of domestic violence was tightened to focus on behaviors that would more likely endanger the physical safety or emotional welfare of children, and leaves other forms of misconduct for the court’s more generic consideration in New 25-420(A)(6). So, just as an example, acts of criminal trespass or disorderly conduct might still warrant criminal prosecution and scrutiny by the family court under the general “best interests” test, but they would not trigger the heightened standards implicated by the domestic violence described here.

Comment [TPA12]: This addition recognizes the growing attention that coercive control and its pervasive impact on families has received in the social science, academic and legal community. Although usually part and parcel of a domestically violent relationship, it also constitutes a separate condition deserving of independent consideration. For this reason, although it falls within the definition of domestic violence, it does not require proof of threats, physical violence or other misconduct as a precondition to its consideration by the court. By informal consensus of the DRC Sub Law/Ct. Proc. WG, this is a preferred departure from earlier versions of the new custody proposal (including the Ad Hoc Custody WG’s final draft in March 2011), which contemplated evaluation of coercive control only in the context of rebutting the presumption against an award of PDM to an already-proven DV offender.

Some opponents of this proposal have contended that this concept is more appropriately reserved for judicial training. But such a remedy – without more – does not suffice for several reasons. First, insertion into the statute firmly announces a community expectation and also educates the state bar and general public. Judicial training does neither. Second, in order for training to prove effective, the judge in question must understand and accept its premise and incorporate it into his/her rulings. Not every judge may do so, and without any constraint imposed by state law, an aggrieved victim has no meaningful, appellate recourse to repair a bad or even dangerous ruling. Lastly, the absence of coercive control language in the statute gives free rein to batterers and their attorneys to improperly argue that the psychologically destructive behavior contemplated by this new proposal is not “relevant” to parenting concerns. This is misguided advocacy at its worst (and frequently replicated by critics who still inexplicably claim that inimate partner vi... [1])

Comment [TPA13]: Current law does not define “batterer prevention program,” as that term appears in ARS 25-403.03(E)(2) and (F)(3). As a result, courts have frequently accepted proof of “anger management” or “couples” counseling as acceptable substitutes – which is inappropriate for DV offenders. See, e.g., *Navigating Custody & Visitation Evaluations in Cases with Domestic Violence: A Judge’s Guide* at 26 (NCJFCJ/SJI 2006). This new section incorporates – almost verbatim – existing Ariz. Admin. Code Title 9, Ch. 20, Sec. 1101(A)(2)(b) ... with the exception of 6(e), which was added to prevent proven batterers from circumventing their obligation to proven meaningful rehabilitation with more than a mere certificate of completion.

1 **Article 2. PARENTING PLANS**

2
3 **§ 25-410. Shared Parental Decision-Making and Parenting Time**

4 Consistent with the child’s physical and emotional well-being, the court shall adopt a
5 parenting plan that provides for both parents to share parental decision-making concerning their
6 child, and that maximizes each parent’s parenting time. The court shall not prefer one parent
7 over the other due to the sex of either parent or the child.

8 **§ 25-411. Proposed Plans**

9 **A.** If a child’s parents cannot agree to a plan for parental decision-making or parenting time,
10 each parent must submit to the court a detailed, proposed parenting plan. The court may
11 consider other factors not raised by the parties in order to best promote and protect the emotional
12 and physical health of the child.

13 **B.** Absent agreement of the parties, a parenting plan should include the following items:

- 14 1. A designation of the parental decision-making plan as either shared, final or sole, as
15 defined in Section 403(3).
- 16 2. Each parent’s additional rights and responsibilities for parental decision-making.
- 17 3. A plan for communicating with each other about the child, including methods and
18 frequency.
- 19 4. A detailed parenting time schedule, including holidays and school vacations.
- 20 5. A plan for child exchanges, including location and responsibility for transportation.
- 21 6. In shared parental decision-making plans, a procedure by which the parents can
22 resolve disputes over proposed changes or alleged violations, which may include the use of
23 conciliation services or private mediation.
- 24 7. A procedure for periodic review of the plan.
- 25 8. A statement that each party has read, understands and will abide by the notification
26 requirements of Section 25-422(H), pertaining to access of sex offenders to a child.

27 **C.** The parties may agree to any level of shared or sole parental decision-making without
28 regard to the distribution of parenting time. The degree of parenting time exercised by each
29 parent does not affect parental decision-making.

Comment [TPA14]: This was altered from earlier proposals to accommodate amicable families that do not require this level of detail.

1 **Article 3. COURT PROCEEDINGS**

2
3 **§ 25-420. Best interests of child; domestic violence and child abuse**

4 **A.** The court shall determine both parental decision-making and parenting time in
5 accordance with the best interests of the child. The court shall consider all factors relevant to the
6 child’s physical safety and emotional welfare, including:

- 7 1. Whether a parent has committed domestic violence or child abuse.
- 8 2. The historical, current and potential relationship between the parent and the child.
- 9 3. The child’s adjustment to home, school and community.
- 10 4. The interaction and relationship between the child and the child’s siblings and any
11 other person who may significantly affect the child’s best interests.
- 12 5. The mental health and physical condition of the child, parents and any other person
13 present in the child’s household.
- 14 6. The criminal, delinquent or otherwise harmful behavior of the child, parents and any
15 other person present in either parent’s household.
- 16 7. The child’s own viewpoint and wishes, if possessed of suitable age and maturity,
17 along with the basis for those wishes.
- 18 8. Whether one parent is more likely to encourage the child’s relationship with the other,
19 and respect parental decision-making rules. This factor does not apply if the court determines
20 that a parent is acting in good faith to protect the child from witnessing or suffering an act of
21 domestic violence or child abuse.
- 22 9. The practicality of any proposed or agreed parenting plan.
- 23 10. Whether a parent has complied with the educational program prescribed in Sections
24 25-351 through -353.

Comment [TPA15]: As explained above, “domestic violence” here includes the new concept of coercive control. See New 25-404(5).

Comment [TPA16]: This replaces existing ARS 25-403.04 and -403.05, along with their associated (and potentially conflicting) presumptions.

25 **B.** The court shall not award unrestricted parenting time or any level of parental decision-
26 making to a parent who has inflicted domestic violence or child abuse, unless the court finds
27 from clear and convincing evidence that other statutory factors listed in Subsection (A)
28 substantially outweigh the act of violence or abuse. When determining the relative strength of
29 competing factors, the court shall consider all of the following:

- 30 1. The extent to which the offending parent inflicted domestic violence or child abuse
31 against some other person in the past, or has recently done so with a new partner or child, and
32 whether that parent has already received related counseling on past occasions.

Comment [TPA17]: This replaces existing ARS 25-403.03(A) (absolute ban on joint custody) and 25-403.03(D) (rebuttable presumption concerning “an act” of domestic violence) in favor of a simpler law that accomplishes essentially the same result. Rather than lead (often pro se) litigants through a labyrinth of rebuttable presumptions, the new section more directly provides that the court shall not award PDM or parenting time to a proven domestic or child abuser unless the other “best interests” factors substantially outweigh that abuse.

1 2. In cases of mutual domestic violence not amounting to legal justification, as defined in
2 Sections 13-404 through -408, the motivation of each parent for the violence, the level of force
3 used by each parent, and their respective injuries.

Comment [TPA18]: This section replaces that aspect of existing ARS 25-403.03(D) that enabled even seriously violent offenders to dodge the legal presumption so long as s/he could truthfully allege that the other party made physical contact, too.

4 3. Whether the offending parent continues to minimize or deny responsibility for the
5 history of domestic violence or child abuse, or blame it on unrelated issues.

6 4. Whether the offending parent failed to disclose information to the other party required
7 by Rules 49(B)(2), (3) and (4) of the Arizona Rules of Family Law Procedure, or ignored
8 reasonable discovery requests for records related to domestic violence or child abuse.

Comment [TPA19]: This new section is designed to give meaning to Ariz. Fam. L. P. 49, which is routinely ignored by offenders (who don't want to surrender that information) and just as often overlooked by victims (who don't realize that they had the right to receive this mandatory disclosure all along). It heightens public awareness of the purpose served by mutual disclosure, and discourages disclosure violations by attorneys who may be aware of lapses in their clients' offender treatment program, but do not share that information under the outdated model of "zealous" (versus "honorable") advocacy.

9 5. In cases involving domestic violence, whether the offending parent has completed an
10 offender treatment program, as defined in Section 25-404(8), and has also disclosed and
11 submitted into evidence a complete set of treatment records proving an acceptable level of
12 productive participation in the rehabilitation process. A certificate of completion alone does not
13 prove rehabilitation.

14 6. The passage of time since the last act of domestic violence or child abuse, and reasons
15 for the absence of renewed misconduct.

16 C. When conducting the analysis described in Subsection (B), the court shall always
17 consider a history of domestic violence or child abuse as contrary to the best interests of the
18 child, irrespective of whether a child personally witnessed a particular event.

Comment [TPA20]: This addition silences the fiction that a child can't be hurt by violence that s/he did not personally see.

19 **§ 25-421. Parenting time; restrictions and special considerations**

20 A. If a parent does not appear suitable for unrestricted parenting time based on evidence
21 presented at trial, the court shall then place conditions on parenting time that best protect the
22 child and the other parent from further harm. With respect to the restricted parent, the court may
23 do any of the following:

Comment [TPA21]: This language applies only to domestic violence cases under current law, but has been expanded to all circumstances as there is no reason to give domestic violence special treatment in this context.

24 1. Order child exchanges to occur in a specified, safe setting.

25 2. Order that a person or agency specified by the court must supervise parenting time. If
26 the court allows a family or household member or other person to supervise the restricted
27 parent's parenting time, the court shall establish conditions that this supervisor must follow.
28 When deciding whom to select, the court shall also consider the supervisor's ability to physically
29 intervene in an emergency, willingness to promptly report a problem to the court or other
30 appropriate authorities, and readiness to appear in future proceedings and testify truthfully about
31 that supervisor's observations and actions.

Comment [TPA22]: This was added to encourage the parties to make realistic nominations for individuals who could supervise parenting time.

32 3. Order the completion of an offender treatment program, as defined by Section 25-
33 404(8), or any other counseling the court considers necessary.

- 1 4. Order abstention from or possession of alcohol or controlled substances during
- 2 parenting time, and at any other time the court deems appropriate.
- 3 5. Order the payment of costs associated with supervised parenting time.
- 4 6. Prohibit overnight parenting time.
- 5 7. Require the posting of a cash bond from the offending parent to assure the child's safe
- 6 return to the other parent.
- 7 8. Order that the address of the child and other parent remain confidential.
- 8 9. Restrict or forbid access to, or possession of, firearms or ammunition.
- 9 10. Suspend parenting time for a prescribed period.
- 10 11. Suspend parenting time indefinitely, pending a change in circumstances and a
- 11 modification petition from the offending parent.
- 12 12. Impose any other condition that the court determines is necessary to protect the child,
- 13 the other parent, and any other family or household member.

14 **B.** When deciding whether to grant parenting time to a parent who has inflicted domestic
 15 violence or child abuse, the court shall specifically contemplate whether that parent's access to a
 16 child will:

- 17 1. Expose the child to poor role-modeling as the child grows older and begins to develop
- 18 his or her own intimate relationships, irrespective of whether the offending parent poses a direct
- 19 physical risk to the child; or
- 20 2. Endanger the child's safety due to the child's physical proximity to new, potential acts
- 21 of violence by the parent against a new partner or other child.

22 **§ 25-422. Domestic violence; miscellaneous provisions; sex offender notification**

23 **A.** A criminal conviction for an act of domestic violence shall constitute adequate proof of
 24 domestic violence under Section 25-420(A)(1). No person so convicted may claim in
 25 proceedings under this chapter that the crime of conviction did not occur. However, either party
 26 may introduce evidence of facts related to the incident to show that other considerations in
 27 Section 25-420(A) outweigh the importance of the conviction, or to prove that the offender's
 28 conduct was actually worse than the conviction suggests. Nothing in this subsection prevents an
 29 alleged victim from proving domestic violence by means other than a criminal conviction.

30 **B.** Evidence that a parent previously consented to deferred prosecution or diversion from
 31 criminal charges for an act of domestic violence shall constitute adequate proof that such parent
 32 committed the act or acts alleged in the deferred complaint. Nothing in this subsection prevents

Comment [TPA23]: Even our current law requires a proven DV offender to demonstrate that s/he will not endanger a child or significantly impair the child's emotional development. See ARS 25-403.03(F). Unfortunately, that rule is often overlooked or ignored, and at other times, the courts tacitly shift the burden to victims to demonstrate how the award of parenting time to their abusers would harm a child – even though existing state law requires nothing of the kind. This modification would identify the outcomes that most deeply concern our community in the context of parenting time.

Comment [TPA24]: Critics have complained that a diversion should not be used as an admission in custody proceedings, and argued that some criminal defendants accept diversion who still maintain their innocence and want to avoid the risk of conviction. The complaint is unwarranted. Most (if not) all diversion programs are not designed for defendants who protest their innocence; they are offered to candidates who wish to accept responsibility for their misconduct and agree to complete certain tasks (e.g. payment of a fine and/or attendance at a treatment program) as a *quid pro quo* for eventual dismissal. Indeed, many diversion programs require an admission of guilt as a predicate for receiving diversion in the first place. This is true in other jurisdictions as well. See, e.g., *Abad v. Cozza*, 128 Wash.2d 575, 911 P.2d 376 (1996) (construing RCWA 10.05.010 to identify deferred prosecution as a vehicle for admitting guilt and making amends in return for avoidance of conviction).

Irrespective of those considerations, it is plainly unfair to punish a victim (who had no legal control over the prosecution of the original criminal case) by essentially requiring him/her to resurrect a cold case many years old at a new custody hearing simply because the abuser now wishes to deny culpability for an incident in which s/he eagerly accepted the benefits that flowed from diversion.

Nor does AZ law lack precedent for holding individuals accountable for misconduct in subsequent civil proceedings even where they entered some plea other than "guilty." For example, Arizona civil asset seizure and forfeiture act allows government attorneys to use *nolo contendere* pleas to the same effect as true admissions to prevent civil defendants from evading civil responsibility for their past misconduct. See ARS 13-4310(C).

By way of analogy, it is also perhaps worth noting that criminal defendants who accept diversion are generally prohibited from later suing in civil court for "malicious prosecution" (despite the lack of a conviction) because a pretrial diversion is not considered a termination of the underlying criminal case in their "favor." See, e.g., *Gilles v. Davis*, 427 F.3d 197, 210-11 (3rd Cir. 2005), citing *Roesch v. Otarola*, 980 F.2d 850, 853 (2nd Cir. 1992), and *Taylor v. Gregg*, 36 F.3d 453, 455-56 (5th Cir. 1994).

1 either parent from introducing additional evidence related to the event in question in support of
2 that parent’s case.

3 C. No judgment or dismissal resulting from collateral protective order proceedings under
4 Section 13-3602(I) shall be considered conclusive evidence that domestic violence did or did not
5 occur.

Comment [TPA25]: This addition is designed to prevent either party from abusing the DVPO process, which uses a different legal standard for issuing a DVPO and involves an expedited calendar that may prevent the parties from fully developing their cases.

6 D. A parent’s residency in a shelter for victims of domestic violence shall not constitute
7 grounds for denying that parent any degree of decision-making authority or parenting time. For
8 purposes of this section, “shelter” means any facility meeting the definitions of Sections 36-
9 3001(6) and 36-3005.

Comment [TPA26]: This amendment directly targets the occasional practice of attorneys and judges alike who criticize DV victims for failing to report their ordeals and escape their abusers when assaults occur, but then punish them in custody court if they take precisely that step by fleeing into a shelter.

10 E. The court shall not order joint counseling between the victim and a perpetrator of
11 domestic violence under any circumstances. The court may provide a victim with written
12 information about available community resources related to domestic violence.

13 F. The court shall not approve a parenting plan that requires a domestic violence victim to
14 personally supervise the offender’s parenting time, unless the victim consents to such an
15 arrangement. The court shall also refrain from factoring a victim’s refusal to supervise the
16 offender’s parenting time into its decision about any aspect of the parenting plan.

Comment [TPA27]: Although infrequent and seemingly counterintuitive, occasions have arisen where the family courts (or opposing parties) have asked victims to supervise their own abusers’ parenting time as a way of finding a “middle ground” between supervision by a third party and no supervision at all. While rare, the practice is senseless and dangerous, and fundamentally misses the point of why supervision was necessary in the first place.

17 G. A victim of domestic violence may opt out of alternative dispute resolution (‘ADR’)
18 ordered under Rule 67 or 68 of Arizona Rules of Family Law Procedure, but only to the extent
19 that a suggested ADR procedure would require the parents to meet and confer in person. The
20 court shall notify both parties of this right before requiring their participation in the ADR
21 process. As used in this subsection only, “victim of domestic violence” means: (1) a party who
22 has acquired a protective order against the other parent pursuant to Section 13-3602; (2) a party
23 who was previously determined by a civil or family court to have suffered domestic violence by
24 the other parent; (3) a party who was the named victim in a criminal case that resulted in the
25 conviction, diversion or deferred prosecution of the other parent for an act of domestic violence;
26 or (4) a party who is currently the named victim in a pending criminal case against the other
27 parent for an act of domestic violence.

Comment [TPA28]: This clause emphasizes the point that an alleged victim cannot veto the entire ADR process. S/he can opt out only to the extent that the process in question would require face-to-face negotiations.

Comment [TPA29]: This subsection alone has a more restrictive definition of “victim of domestic violence” that requires the pendency or past completion of judicial proceedings that would corroborate (at least to some extent) the ADR objector’s status as a true victim. Without it, any party to a family law case could dodge face-to-face ADR simply by stating “I’m a victim of domestic violence.”

28 H. A child’s parent or custodian must immediately notify the other parent or custodian if the
29 parent or custodian knows that a convicted or registered sex offender or a person who has been
30 convicted of a dangerous crime against children, as defined in Section 13-705(P)(1), may have
31 access to the child. The parent or custodian must provide notice by first-class mail, return receipt
32 requested, or by electronic means to an electronic mail address that the recipient provided to the
33 parent or custodian for notification purposes, or by some other means of communication
34 approved by the court.

1 I. The court may request or order the services of the Division of Children and Family
2 Services in the Department of Economic Security if it believes that a child may be the victim of
3 abuse or neglect as defined in Section 8-201.

4 **§ 25-423. Judicial findings**

5 After any evidentiary hearing involving parental decision-making, parenting time, or
6 visitation by a third party, the court shall make specific findings on the record, or in its written
7 order, concerning all relevant factors in Sections 25-420(A) and (B). The court shall also
8 provide specific findings to justify any decision to grant parental decision-making or unrestricted
9 parenting time to a parent who has inflicted domestic violence or child abuse. Those findings
10 shall identify which competing statutory factors outweighed the significance of the offending
11 parent's violence or abuse, and shall also thoroughly explain why the court determined that those
12 competing factors were more relevant to the child's best interests.

Comment [TPA30]: This section is designed to ensure that, if the court decides to override the general prohibition against handing PDM or parenting time to a proven domestic or child abuser, it at least clearly articulates its reasons for doing so. Current law already requires judges to make these findings concerning the "best interests" factors listed in ARS 25-403(A)(1)-(11). See ARS 25-403(B). This amendment would simply extend that requirement to any finding that a proven abuser should, for whatever reason, still exercise PDM or parenting time.

13 **Article 4. TEMPORARY ORDERS**

14 **§ 25-430. Motion; form and contents; hearing**

15 A party to a proceeding still pending under this chapter may file a motion for temporary
16 orders concerning parental decision-making, parenting time or relocation. This motion must be
17 verified or supported by affidavit, and must explain in detail the basis for the request. The court
18 may enter temporary orders under the same standards provided in this chapter for final orders
19 upon fair notice and an opportunity to be heard, or, if there is no objection, solely on the basis of
20 the motion and response.

21 **§ 25-431. Conversion from dissolution or legal separation**

22 If a proceeding for dissolution of marriage or legal separation is dismissed, any associated
23 temporary order is also vacated unless a parent or third-party custodian asks the court to maintain
24 the proceeding under this chapter and the court finds, after a hearing, that the parents'
25 circumstances and the best interests of the child require a parental decision-making or parenting
26 time decree.

27 **§ 25-432. Expiration of temporary order**

28 If a parental decision-making or parenting time case is dismissed prior to issuance of a final
29 decree, any associated temporary order expires with it.

1 **Article 5. MODIFICATION**

2
3 **§ 25-440. Preliminary duty; alternative dispute resolution**

4 Except as permitted by Section 25-442, if two parents already share parental decision-making
5 by prior court order, each must consult with the other about child-related decisions, and attempt
6 to resolve disputes outside of court through conciliation services or private mediation, before
7 seeking formal judicial intervention.

8 **§ 25-441. Petition to modify parental decision-making; procedure; waiting period**

9 **A.** A parent may petition the court to modify a parental decision-making decree upon a
10 showing that the existing decree no longer serves the child’s best interests. Such an applicant
11 must follow the requirements of Rule 91(D) of the Arizona Rules of Family Law Procedure.

12 **B.** To modify any type of parental decision-making decree, a parent shall submit a verified
13 petition setting forth detailed facts supporting the request, and shall give notice, together with a
14 copy of the petition and any supporting affidavit, to other parties to the proceeding, who may
15 object by filing a verified response with or without supporting affidavits. The court shall
16 summarily deny the petition unless it finds that adequate cause for hearing the motion is
17 established by the pleadings, in which case it shall set a date for hearing on why the requested
18 modification should not be granted.

19 **C.** Except as permitted by Section 25-442, no person may petition to modify an existing
20 parental decision-making decree earlier than one year after its issuance.

21 **§ 25-442. Petition to modify parental decision-making; exceptions to waiting period**

22 **A.** The court may permit the early modification of an existing, parental decision-making
23 decree at any time if the petition establishes either:

24 1. The child’s present environment may seriously endanger the child’s physical or
25 emotional health; or

26 2. A person who currently exercises any degree of parental decision-making or parenting
27 time has committed a new act of domestic violence or child abuse since entry of the existing
28 decree.

29 **B.** In addition to filing the petition permitted in Subsection (A), if a parent who normally
30 exercises parenting time or shared parental decision-making is criminally charged with acts that
31 also meet the definition of child abuse in Section 404(1), the other parent may file a motion for
32 an expedited modification hearing. Pending that hearing, the court may temporarily suspend the
33 criminal defendant’s parenting time or parental decision-making authority.

1 C. A parent may petition to modify a decree granting shared or final parental decision-
2 making based on the failure of the other parent to comply with its provisions at any time after six
3 months following its issuance.

4 **§ 25-443. Petition to modify or clarify parenting time**

5 The court may modify or clarify an order granting or denying parenting time whenever it
6 would serve the best interests of the child, but the court shall not restrict parenting time unless
7 necessitated by application of Sections 25-420 and 421. A parent who seeks to modify or clarify
8 parenting time must follow the requirements of Rule 91(F) of the Arizona Rules of Family Law
9 Procedure.

10 **§ 25-444. Military parents**

11 A. Except as otherwise provided in this section, if a parent is a member of the United States
12 armed forces, the court shall consider the terms of that parent’s military family care plan to
13 determine what is in the child’s best interest during the custodial parent’s military deployment.

14 B. If the parent with whom a child resides a majority of the time receives temporary duty,
15 deployment, activation or mobilization orders from the United States military that involve
16 moving a substantial distance away from that parent’s residence, a court shall not enter a final
17 order modifying parental decision-making or parenting time until 90 days after the deployment
18 ends, unless a modification is agreed to by the deploying parent.

19 C. The court shall not consider a parent’s absence caused by deployment or mobilization, or
20 the potential for future deployment or mobilization, as the sole factor supporting a real,
21 substantial and unanticipated change in circumstances pursuant to this section.

22 D. On petition of a deploying or nondeploying, mobilizing or absent military parent, and
23 after notice and an opportunity to be heard, the court shall enter a temporary order modifying
24 parental decision-making or parenting time during a period of deployment or mobilization if both
25 of the following are established:

26 1. A military parent who possesses some degree of parental decision-making or
27 parenting time pursuant to an existing court order has received notice from military leadership
28 that the military parent will deploy or mobilize in the near future; and

29 2. The deployment or mobilization would have a material effect on the military parent’s
30 ability to exercise parental decision-making or parenting time.

31 E. On motion of a deploying parent, if reasonable advance notice is given and good cause is
32 shown, the court shall allow that parent to present testimony and evidence by electronic means
33 with respect to any litigation instituted pursuant to this section if the deployment of that parent
34 has a material effect on that parent’s ability to appear in person at a scheduled hearing. For the

Comment [TPA31]: This new section removes large portions of existing ARS 25-411 that are now mixed in with general modification rules that apply to everyone, and dedicates it solely to military families for easy reference and identification in the statute.

1 purposes of this subsection, “electronic means” includes communication by telephone or video
2 teleconference.

3 **F.** The court shall hear petitions for modification occasioned by deployment or mobilization
4 of a military parent as expeditiously as possible.

5 **G.** If a military parent receives military temporary duty, deployment, activation or
6 mobilization orders that involve moving a substantial distance away from the military parent’s
7 residence, or that otherwise have a material effect on the military parent’s ability to exercise
8 parenting time, at the request of the military parent and for the duration of the military parent’s
9 absence, the court may delegate the military parent’s parenting time, or a portion of that time, to
10 a child’s family member, including a stepparent, or to another person who is not the child’s
11 parent but who has a close and substantial relationship to the minor child, if the court determines
12 that is in the child’s best interest. The court shall not allow the delegation of parenting time to a
13 person who would be subject to limitations on parenting time. The parties shall attempt to
14 resolve disputes regarding delegation of parenting time through the dispute resolution process
15 specified in their parenting plan, unless excused by the court for good cause shown. A court
16 order pursuant to this subsection does not establish separate rights to parenting time for a person
17 other than a parent.

18 **H.** All temporary modification orders pursuant to this section shall include a specific
19 transition schedule to facilitate a return to the predeployment order within 10 days after the
20 deployment ends, taking into consideration the child’s best interests.

21 **I.** Any modification decree entered because of prospective or actual military deployment
22 outside of the continental United States of a parent who exercises parental decision-making or
23 parenting time shall specifically reference the deployment and include provisions governing the
24 care of the minor child after the deployment ends. After the deployment ends, either parent may
25 file a petition with the court to modify the decree in compliance with Section 25-441. The court
26 shall hold a hearing or conference on the petition within 30 days after the petition is filed.

27 **J.** The clerk of the court shall not charge a filing fee or other associated cost for any pleading
28 occasioned by prospective or actual deployment or mobilization of a military parent.

29

1 **Article 6. RELOCATION**

2
3 **§ 25-450. Relocation of child; application**

4 Title 25, Article 6, shall apply to relocations by a person who intends to continue
5 exercising court ordered parenting time with a child while this state retains exclusive and
6 continuing jurisdiction over the child pursuant to Title 25, Chapter 8. It shall not apply to a
7 relocation already authorized by the court or a notarized agreement within the preceding 12
8 months, or when the nonmoving parent already resides out of state.

9 **§ 25-451. Relocation of child; no judicial review**

Comment [TPA32]: New 25-451 is designed to preserve the right of a parent to relocate without consent or court order in limited circumstances.

10 **A.** Subject to notification provisions of Section 25-470, any parent living in Arizona may
11 relocate with a child without advance consent of the other parent, or a court order, so long as all
12 of the following are true:

- 13 1. The relocation does not extend more than 20 miles beyond the moving parent’s
14 current residence or leave this state;
- 15 2. The relocation does not alter the child’s school enrollment, unless the moving
16 parent has final or sole parental decision-making concerning educational issues; and
- 17 3. The relocation does not alter the current child access schedule.

18 **B.** No parent may relocate under Subsection (A) more than once every three years if the
19 additional move within three years would increase the distance from either parent’s residence as
20 it existed when the current parenting plan was adopted or court-ordered.

Comment [TPA33]: This section guards against serial (or “chain”) relocations that would subvert the purpose of New 25-451.

21 **C.** Subject to the notification provisions of Section 25-470, any parent already living
22 outside of Arizona may relocate with a child without advance consent of the other parent, or a
23 court order, any number of times so long as both of the following are true:

- 24 1. The relocation does not alter the other parent’s access schedule under any
25 existing, long-distance parenting plan; and
- 26 2. The relocation does not alter the child’s school enrollment unless the
27 relocating parent has final or sole parental decision-making concerning educational
28 issues.

29 **D.** A parent who unilaterally relocates under this section shall assume sole responsibility
30 for any increased expense associated with conducting child exchanges from the new location,
31 and also ensure uninterrupted compliance with the existing parenting plan.

1 **§ 25-452. Relocation of child; formal notice; right to object; procedure**

2 **A.** A parent whose proposed change in residence does not qualify for relocation under
3 Section 25-451 must file a formal notice in the superior court, and serve the same on the
4 nonmoving parent, at least 40 days before the proposed relocation. The clerk shall not assess any
5 fee for this initial notice.

6 **B.** The relocating parent may serve notice described in Subsection (A) by some method
7 approved under Rule 41 or 42 of the Arizona Rules of Family Law Procedure, including:

8 1. formal service to that individual personally, or by leaving a copy of the notice
9 at that individual's residence with some person of suitable age and discretion who lives
10 there as well, either of which must be performed by a registered process server or
11 sheriff's deputy;

12 2. certified mailing, where the nonmoving parent has personally signed the
13 receipt for delivery, or

14 3. a voluntary acceptance of service by sworn affidavit of the nonmoving parent
15 under Rule 40(F) of the Arizona Rules of Family Law Procedure.

16 **C.** The notice described in Subsection (A) must include, at minimum:

17 1. The anticipated date of relocation;

18 2. The proposed new address, unless protected under Section 25-470;

19 3. The reason for the relocation;

20 4. A detailed description of how this relocation will affect any existing parenting
21 plan and the child's school enrollment, if applicable, and the measures the relocating
22 parent is willing to take to minimize disruption to the existing parenting plan; and

23 5. The following warning:

24 You have received notice from the other parent regarding a change of
25 residence of the child or children. Arizona law gives you the right to
26 object to the move if you believe that it will not serve the child's best
27 interests. If you object to the relocation, you must file a notice with the
28 superior court within twenty (20) days after you receive this notice
29 unless you are exempted by federal law governing individuals actively
30 serving in the U.S. Armed Forces. There is no fee for filing this
31 objection.

32

1 AT MINIMUM, YOUR NOTICE MUST INCLUDE a detailed reason for the
2 objection, and why you think the relocation will not serve the child's
3 best interests. It must also specifically address any offer made by the
4 relocating parent to minimize the disruption to the existing parenting
5 plan, and why you think those measures will not be adequate. If you fail
6 to provide this information, the court may summarily approve the
7 relocation without further hearing.

8 **D.** The nonmoving parent may object to the proposed relocation by filing an answering
9 notice in the superior court at any time within 20 days after service of the moving parent's initial
10 notice, unless that time is extended by operation of the Servicemembers Civil Relief Act of 2003
11 and amendments thereto (50 U.S.C. §§ 501, et seq.). At minimum, the nonmoving parent must
12 provide detailed reasons for the objection, and also explain why remedial measures offered by
13 the relocating parent do not suffice to serve the child's best interests. The clerk shall not assess
14 any fee for this initial notice.

15 **E.** If the nonmoving parent files a timely objection, the child may not be relocated absent
16 a court order or agreement of the parties that meets the requirements of Rule 69 of the Arizona
17 Rules of Family Law Procedure.

18 **F.** If the nonmoving parent has filed a timely objection to a proposed relocation, the
19 clerk shall forward the parties' respective notices to the assigned judge on an expedited basis for
20 preliminary review. The court may then do any of the following:

- 21 1. temporarily refuse any relocation and direct the moving parent to file a verified
22 petition for relocation under Rule 91(E) of the Arizona Rules of Family Law Procedure;
- 23 2. temporarily permit the relocation on the condition that the moving parent file a
24 verified petition for relocation under Rule 91(E) of the Arizona Rules of Family Law
25 Procedure to permit a future hearing on the merits of that petition; or
- 26 3. summarily permit the relocation without further judicial review.

27 **G.** Any nonmoving parent who wishes to object to the proposed relocation after 20 days
28 have expired from initial service must file a verified petition to prevent relocation under Rule
29 91(E) of the Arizona Rules of Family Law Procedure. The nonmoving parent shall give notice
30 of this objection, together with a copy of the verified petition, to the relocating parent, who may
31 file an optional response. The petition to prevent relocation shall set forth detailed facts that
32 support the objection, including a full explanation for why the objection is late. The court shall
33 summarily deny this petition unless it finds that adequate cause for hearing the objection is
34 established in the pleadings, in which case the court shall set a date for hearing on the merits of
35 the relocation.

1 **§ 25-453. Relocation of child; judicial proceedings**

2 **A.** The court shall determine whether to allow the moving parent to relocate the child in
3 accordance with the child’s best interests. To the extent practicable, the court shall also make
4 appropriate arrangements to ensure the continuation of a meaningful relationship between the
5 child and both parents. When evaluating the child’s best interests, the court shall consider all
6 relevant factors, including:

7 1. The factors prescribed under Section 25-420(A);

8 2. Whether the relocation is being made or opposed in good faith, and not to
9 hinder or frustrate the relationship between the child and other parent, or the other
10 parent’s right of access to the child;

11 3. The degree to which the relocation will directly or indirectly benefit the child.

12 4. The likelihood that the parent with whom the child would reside after
13 relocation will comply with parenting time orders;

14 5. Whether relocation will allow a realistic opportunity for parenting time with
15 each parent;

16 6. The extent to which moving, or not moving, will affect the emotional, physical
17 or developmental needs of the child; and

18 7. The motives of the parents, and validity of reasons given, for seeking or
19 opposing the relocation, including the extent to which either parent may intend to gain a
20 financial advantage regarding a continuing child support obligation;

21 **B.** The court shall not deviate from a provision of any parenting plan or other written
22 agreement by which the parents already agreed to allow or prohibit relocation of the child unless
23 the parent who seeks a deviation proves, by clear and convincing evidence, that the plan or
24 agreement no longer serves the child’s best interest.

25 **C.** Except as provided in Subsection (D), the parent who seeks to relocate the child shall
26 bear the burden of proving, by a preponderance of evidence, that the proposed relocation serves
27 those best interests.

28 **D.** If the nonmoving parent does not file a verified petition to prevent the relocation until
29 more than 40 days after receiving the initial notice from the moving parent, and the relocation
30 has already occurred, then the nonmoving parent shall bear the burden of proving, by a
31 preponderance of evidence, that the relocation did not serve the child’s best interests. When
32 deciding the final merits of relocation under these circumstances, and in addition to evaluating
33 the factors described in Section 25-453(A), the court shall also consider: (1) the lapse of time
34 and justification for delay in filing the objection; (2) the financial expense of any relocation that

Comment [TPA34]: This is the only instance in which the nonmoving parent would have the burden of proving anything, and is confined to situations where that parent’s delay and complete inaction for an unreasonable period of time induced the moving parent to believe that the relocation could go forward without complaint. Under such circumstances, the objecting parent should have to establish why the entire relocation process (which has already transpired) should now be unraveled after the fact.

1 has already occurred; (3) the economic hardship potentially sustained by the moving parent if the
2 court rescinds the relocation and orders the return of the child; and (4) the degree to which the
3 child has already settled in a new environment. The court shall not order the return of the
4 relocating parent with the child while the final evidentiary hearing of an untimely objection
5 governed by this subsection is still pending.

6 E. Neither Article 5 of this chapter nor Rule 91(D) of the Arizona Rules of Family
7 Procedure shall apply to child relocation proceedings under this section.

8 Article 7. SANCTIONS

9 § 25-460. Litigation misconduct; mandatory sanctions; costs and attorney fees

11 The court shall sanction a litigant for costs and reasonable attorney fees incurred by an
12 adverse party if the court finds, by clear and convincing evidence, that the litigant has done any
13 one or more of the following:

Comment [TPA35]: This imposes a higher burden of proof in order to prevent a “chilling effect” on legitimate claims made by true victims.

14 A. Presented a material claim under Section 25-420(A) with full knowledge that the
15 claim was false;

Comment [TPA36]: This governs all claims about a party’s alleged conduct or condition – and not just concerning domestic violence or child abuse.

16 B. Accused an adverse party of making a false, material claim under Section 25-420(A) |
17 with full knowledge that the claim was actually true;

Comment [TPA37]: *Id.*

18 C. Relocated a child in violation of state law or a court-ordered parenting plan, unless the
19 court determines that the relocation was necessitated by an unavoidable emergency that
20 threatened serious injury or death to the child or relocating parent, and that no local, residential
21 resources were reasonably available as an alternative to relocation;

22 D. Contested the proposed relocation of a child without good cause;

23 E. Adopted clearly unreasonable settlement positions without basis in law or fact, unless
24 the party urged a good faith and nonfrivolous argument to extend, modify or reverse existing
25 law;

Comment [TPA38]: This complements ARS 25-324(A), which allows (but does not require) the court to allocate attorney fees based on the reasonableness of the parties’ positions in marital dissolution cases.

26 F. Sought modification of an existing, parental decision-making or parenting time decree
27 solely to vex or harass the other parent; or

28 G. Violated a court order compelling disclosure or discovery under Rule 65 of the
29 Arizona Rules of Family Law Procedure, unless the court finds that the failure to obey the order
30 was substantially justified, or that other circumstances make an award of expenses unjust.

1 **§ 25-461. Litigation misconduct; discretionary sanctions**

2 If the court makes a finding against any litigant under Section 25-460, it may also:

3 A. Impose additional financial sanctions on behalf of an aggrieved party who can
4 demonstrate economic loss directly attributable to the litigant's misconduct;

5 B. Institute civil contempt proceedings on its own initiative, or by petition of the
6 aggrieved parent, with proper notice and an opportunity to be heard; or

7 C. Modify parental decision-making or parenting time, if that modification would also
8 serve the best interests of the child.

9 **§ 25-462. Litigation misconduct; supplemental**

10 Imposition of sanctions under this article shall not prevent the court from awarding costs and
11 attorney fees, or imposing other sanctions, if authorized elsewhere by state or federal law.

12 **Article 8. RECORDS**

13
14 **§ 25-470. Access to records**

15 A. Unless otherwise provided by court order or law, on reasonable request both parents
16 are entitled to have equal access to documents and other information concerning the child's
17 education and physical, mental, moral and emotional health including medical, school, police,
18 court and other records directly from the custodian of the records or from the other parent.

19 B. A person who does not comply with a reasonable request shall reimburse the
20 requesting parent for court costs and attorney fees incurred by that parent to force compliance
21 with this section.

22 C. A parent who attempts to restrict the release of documents or information by the
23 custodian without a prior court order is subject to appropriate legal sanctions.

24 **§ 25-471. Mandatory notifications; change of address**

25 A. The legal parents of a child shall exchange their current residential addresses and
26 telephone numbers. They shall also promptly continue to do so as changes occur, but in no event
27 later than seven days after such a change. Any third party granted legal custody of a child, or
28 visitation with that child, shall do the same with respect to both legal parents. The court may
29 consider a failure to comply with this notification requirement when evaluating any proposed
30 modification of parental decision-making or parenting time.

31 B. Subsection (A) shall not apply to any person who has been exempted from the
32 notification requirement by written agreement of the parties or a court order, or who resides in a
33 domestic violence shelter, as defined by Sections 36-3001(6) and 36-3005. It shall also not

1 apply to any person who awaits a ruling from the court on a request for a protected address under
2 Rule 7 of the Arizona Rules of Family Law Procedure. If no pending case exists at the time of a
3 proposed change of residence, a relocating parent may initiate an original petition in the superior
4 court to protect that address using the same procedure and criteria established in Rule 7 of the
5 Arizona Rules of Family Law Procedure.

6 **Article 9. THIRD PARTIES**

7
8 **§ 25-480. Third-party rights; decision-making and visitation by grandparents [SUBJECT**
9 **TO JUDGE COHEN'S SUGGESTED EDIT]**

10 **A.** Consistent with Section 402(B)(2), a person other than a legal parent may petition the
11 superior court for decision-making authority over a child. The court shall summarily deny a
12 petition unless it finds that the petitioner has established that all of the following are true in the
13 initial pleading:

- 14 1. The person filing the petition stands in loco parentis to the child.
- 15 2. It would be significantly detrimental to the child to remain, or be placed in the care of,
16 either legal parent who wishes to keep or acquire parental decision-making.
- 17 3. A court of competent jurisdiction has not entered or approved an order concerning
18 parental decision-making within one year before the person filed a petition pursuant to this
19 section, unless there is reason to believe the child's present environment may seriously endanger
20 the child's physical, mental, moral or emotional health.
- 21 4. One of the following applies:
 - 22 (a) One of the legal parents is deceased.
 - 23 (b) The child's legal parents are not married to each other at the time the petition
24 is filed.
 - 25 (c) There is a pending proceeding for dissolution of marriage or for legal
26 separation of the legal parents at the time the petition is filed.

27 **B.** If a person other than a child's legal parent is seeking decision-making authority
28 concerning that child, the court must presume that it serves the child's best interests to award
29 decision-making to a legal parent because of the physical, psychological and emotional needs of
30 the child to be reared by a legal parent. A third party may rebut this presumption only with proof
31 by clear and convincing evidence that awarding parental decision-making to a legal parent is not
32 consistent with the child's best interests.

33

1 **C.** Consistent with Section 25-402(B)(2), a person other than a legal parent may also petition
2 the superior court for visitation with a child. The superior court may grant visitation rights
3 during the child’s minority on a finding that the visitation is in the child’s best interests and that
4 any of the following is true:

5 1. One of the legal parents is deceased or has been missing at least three months. For the
6 purposes of this paragraph, a parent is considered to be missing if the parent's location is
7 unknown, and the parent has been reported as missing to a law enforcement agency.

8 2. The child was born out of wedlock and the child's legal parents are not married to each
9 other at the time the petition is filed.

10 3. For grandparent or great-grandparent visitation, the marriage of the parents of the
11 child has been dissolved for at least three months.

12 4. For in loco parentis visitation, there is a pending proceeding for dissolution of
13 marriage or for legal separation of the legal parents at the time the petition is filed.

14 **D.** Any petition filed under Subsection (A) or (C) shall be verified, or supported by affidavit,
15 and include detailed facts supporting the petitioner’s claim. The petitioner shall also provide
16 notice of this proceeding, including a copy of the petition itself and any affidavits or other
17 attachments, and serve the notice consistent with Arizona Rules of Family Law Procedure to all
18 of the following:

19 1. The child’s legal parents.

20 2. A third party who already possesses decision-making authority over the child or
21 visitation rights.

22 3. The child’s guardian or guardian ad litem.

23 4. A person or agency that already possesses physical custody of the child, or claims
24 decision-making authority or visitation rights concerning the child.

25 5. Any other person or agency that has previously appeared in the action.

26 **E.** When deciding whether to grant visitation to a third party, the court shall give special
27 weight to the legal parents’ opinion of what serves their child’s best interests, and then consider
28 all relevant factors, including:

29 1. The historical relationship, if any, between the child and the person seeking visitation.

30 2. The motivation of the requesting party seeking visitation.

31 3. The motivation of the person objecting to visitation.

1 4. The quantity of visitation time requested and the potential adverse impact that
2 visitation will have on the child’s customary activities.

3 5. If one or both of the child’s parents are deceased, the benefit in maintaining an
4 extended family relationship.

5 **F.** If logistically possible and appropriate, the court shall order visitation by a grandparent or
6 great-grandparent to occur when the child is residing or spending time with the parent through
7 whom the grandparent or great-grandparent claims a right of access to the child.

8 **G.** A grandparent or great-grandparent seeking visitation rights under this section shall
9 petition in the same action in which the family court previously decided parental decision-
10 making and parenting time, or if no such case ever existed, by separate petition in the county of
11 the child’s home state, as defined by Section 25-1002(7).

12 **H.** All visitation rights granted under this section automatically terminate if the child has
13 been adopted or placed for adoption. If the child is removed from an adoptive placement, the
14 court may reinstate the visitation rights. This subsection does not apply to the adoption of the
15 child by the spouse of a natural parent if the natural parent remarries.

16
17 **ARTICLE 10. MISCELLANEOUS**

18
19 25-490. [formerly A.R.S. 25-407] Statutory Priority
20 25-491. [formerly A.R.S. 25-410] Agency Supervision
21 25-492. [formerly A.R.S. 25-403.07] Identification of Primary Caretaker
22 25-493. [formerly A.R.S. 25-403.08] Fees & Resources
23 25-494. [formerly A.R.S. 25-405] Child Interviews by Court & Professional Assistance
24 25-495. [formerly A.R.S. 25-406] Investigations & Reports
25 25-496. [formerly A.R.S. 25-412] Child Support & Parenting Time Fund
26 25-497. [formerly A.R.S. 25-413] Domestic Relations Education & Mediation Fund

This addition recognizes the growing attention that coercive control and its pervasive impact on families has received in the social science, academic and legal community. Although usually part and parcel of a domestically violent relationship, it also constitutes a separate condition deserving of independent consideration. For this reason, although it falls within the definition of domestic violence, it does not require proof of threats, physical violence or other misconduct as a precondition to its consideration by the court. By informal consensus of the DRC Sub Law/Ct. Proc. WG, this is a preferred departure from earlier versions of the new custody proposal (including the Ad Hoc Custody WG's final draft in March 2011), which contemplated evaluation of coercive control only in the context of rebutting the presumption against an award of PDM to an already-proven DV offender.

Some opponents of this proposal have contended that this concept is more appropriately reserved for judicial training. But such a remedy – without more – does not suffice for several reasons. First, insertion into the statute firmly announces a community expectation and also educates the state bar and general public. Judicial training does neither. Second, in order for training to prove effective, the judge in question must understand and accept its premise and incorporate it into his/her rulings. Not every judge may do so, and without any constraint imposed by state law, an aggrieved victim has no meaningful, appellate recourse to repair a bad or even dangerous ruling. Lastly, the absence of coercive control language in the statute gives free rein to batterers and their attorneys to improperly argue that the psychologically destructive behavior contemplated by this new proposal is not “relevant” to parenting concerns. This is misguided advocacy at its worst (and frequently replicated by critics who still inexplicably claim that intimate partner violence itself has nothing to do with kids). It is one thing for an attorney to vigorously defend against an allegation s/he believes untrue. It is a different proposition altogether to risk the safety and welfare of children by exploiting an opposing party's or new judge's unfamiliarity with coercive control.

I attended a CLE at which Dean Christoffel presented issues concerning the proposed changes to A.R.S. §25-403. I see the working draft that came out of your meeting dated 11-10-11. However, one issue that has been kind of omitted is 25-403(A)(10). It seems kind of silly in most cases to be weighing coercion/duress in obtaining an agreement concerning custody. In fact, that's what the majority of the cases seek, namely, a custody order. There are seldom actual agreements. However, this section would have a lot of meaning and serve the courts and children very well if it were changed to read: "The nature and extent of coercion or duress used by a parent in implementing an arrangement regarding *legal decision making or parenting time*." My reasoning is:

1. What we usually see is either mother or father has removed themselves from the home and sometimes an order of protection is obtained.
2. The parent that keeps the children will dictate to the other what their parenting time will be. (no agreements).
3. This doesn't really fit in Section (7) because the controlling parent has allowed parenting time and the evidence devolves into what is "frequent and meaningful continuing contact." The courts can't say that the parent hasn't been allowing meaningful and continuing without finding unreasonableness. That just doesn't happen.
4. The section you've proposed, #9 seems to be more about the DV aspects of "controlling behavior" rather than about legal decision making and parenting time and would likely be limited in application to the pre-decree parenting time imposed by one parent against the other.
5. If Section 10 were changed to include "implementing an arrangement", that moves it from agreements to whatever was in place.
6. If a person were unreasonable in denying a fair and appropriate parenting arrangement, *pendent lite*, then the court could weigh that behavior in the new Section 10.
7. There really isn't much that directly applies to these early parenting denials or unreasonable plans. In fact, they are usually asserted by the opposition under the willingness to allow frequent and meaningful continuing contact with little affect. By time of trial, the other side is either committed to "(he/she) is so evil it should be supervised only. . ." or "here's a reasonable plan. . ."
8. The changing of just those few words would allow this section to actually have meaning. Currently, when there has been no agreement exacted through coercion or duress, the applicability of this section is gone. Because the actual existence of "an agreement" is so rare (they are disputing the parenting time/custody at hearing or trial), how often can a judge really use the current section?

So, comments on the proposed changes: I agree that the removal of the "custody" language would serve all participants' needs. By specifically directing everyone to think about "legal decision making or parenting time," we will eliminate the adherence to the labels of "sole" and "joint" and be able to move straight to the "best interests of the children." I think the wording changes are good.

I don't see a problem with the "coercive control" issues. In fact, that's somewhat like why I think Section 10 should be changed. Although it isn't really a violent "coercive control" that is applied, when a parent is excluded from seeing their children except

SL/CP Workgroup

November 23, 2011

Comment submitted by Brian Kimminau

under the rules set by the other parent, that can hurt the children **and the parent it is imposed upon**. Changing the wording of Section 10 would directly address that situation rather than forcing litigants to try and fit it under Section 7 or your proposed Section 9. Lastly, this is a situation we see in at least half the cases in the early stages. One parent seems to take the kids and then use them against the other. Since it is so common, why not address it clearly?

Memorandum

To: SL/CP Workgroup

From: Amanda Moy (480) 628-9295

Date: November 21, 2011

Re: Public Comment

I am writing to provide my support for the changes to the Arizona Rules of Family Law Procedure, specifically 25-401 and 25-409. I whole heartedly support third party rights for visitation. I believe it is important public policy for third parties, especially relatives, to be able to petition for visitation. I am happy to help you bring about these important changes for the families of Arizona. Please let me know if there is anything I can do to assist you, please feel free to contact me at the number above. Below are a few suggested revisions for you to consider. Thank you for your time and consideration.

25-401.b. The following persons may request legal decision-making, parenting time or visitation under the following circumstances.

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25-409. Third party rights

A. Pursuant to section 25-401, subsection b, paragraph 2, a person other than a legal parent may petition the superior court for legal decision making authority or placement of the child. The court shall summarily deny a petition unless it finds that the petitioner's initial pleading establishes that all of the following are true:

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1. The person filing the petition stands in loco parentis to the child.
2. It would be significantly detrimental to the child to remain, or be placed in the care of, either legal parent who wishes to keep or acquire legal decision making.
3. A court of competent jurisdiction has not entered or approved an order concerning legal decision making or parenting time within one year before the person filed a petition pursuant to this section, unless there is reason to believe

the child's present environment may seriously endanger the child's physical, mental, moral or emotional health.

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4. One of the following applies:

(a) One of the legal parents is deceased.

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(b) The child's legal parents are not married to each other at the time the petition is filed.

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(c) A proceeding for dissolution of marriage or for legal separation of the legal parents is pending at the time the petition is filed.

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B. Notwithstanding subsection a of this section, it is a rebuttable presumption that awarding legal decision making to a legal parent serves the child's best interests because of the physical, psychological and emotional needs of the child to be reared by a legal parent. A third party may rebut this presumption only with proof showing by clear and convincing evidence that awarding legal decision making to a legal parent is not consistent with the child's best interests.

C. Pursuant to section 25-401, subsection b, paragraph 2, a person other than a legal parent may petition the superior court for visitation with a child. The superior court may grant visitation rights during the child's minority on a finding that the visitation is in the child's best interests and that any of the following is true:

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