

A Shift to Promote Equal Parenting in Child Custody Proceedings?

An analysis of Arizona's new custody law

By Debbie Weecks

Embedded in child custody proceedings is a new legislative goal; increasing parenting time. Significant changes of substance are many.

1. Foundation of Parental Rights. Parenting is a fundamental constitutional right,¹ and the year 2010 Parents' Bill of Rights declared further as a fundamental right "[t]he liberty of parents to direct the upbringing, education, health care and mental health of their children..." (A.R.S. 1-602.A.; -601.A.). That legislation primarily addressed interference by governmental agencies. However, also in year 2010, the legislature mandated as *public policy* that:

"absent evidence to the contrary, it is in a child's best interest:

- 1. to have substantial, frequent, meaningful and continuing parenting time with both parents.*
- 2. to have both parents participate in decision-making about the child."*

A.R.S. 25-103.B. What was subtle then, in the *marital* section of the statutes, is obvious now as affecting every non-intact family's custodial proceeding.

2. Family Law -- Custody Battles?. The philosophy expressed in section 103.B. underlies the legislation effective from and after December 31, 2012 [Sen.Bill 1127, House Engrossed; ch.309].

2.1.The Domestic Relations Committee. The DRC is a result of enabling statute A.R.S. 25-323.02. In late 2008, the DRC assigned an *Ad Hoc* Custody Workgroup to explore reform of the custody statutes. In lengthy proceedings inviting interested stakeholders to speak, the Workgroup explored many possible changes to child custody proceedings, including inserting custodial factors such as "coercive control" and "intimate partner violence." The Workgroup's last minutes are from March 2011.

2.2.No More "Custody" Label. Judges will no longer award "legal custody" or "physical custody" or "primary caregiver." Rather, parents and others will be awarded "legal decision-making" status or either parenting or visitation time. The changes do not correspond with the domestic violence statutes nor the family rules, but there was a pending petition to address inconsistencies (R-12-0031) and this author expects further we will see further fine-tuning to synchronize rules and any new law.

2.3.Substantive Changes. Aside from wording, some of the imminent change may be impactful. Good, bad, or indifferent, here are this author's preliminary observations.

¹ See *Troxel v. Granville*, 530 U.S. 57 (U.S. S.Ct. 2000)(fourteenth amendment due process in context of parental rights to curtail grandparent visitation).

2.3.A. The Effects of Alcohol and Drug Abuse. The Workgroup apparently did not intend to expand the substance of the rebuttable presumption against custody, but such effect may result. In conversation recently with the chair of the Workgroup, William V. Fabricius, Ph.D. indicated that this greater expansion was not much debated.

Regardless, common sense won the day here. The legal presumption had been limited in that it was only deemed contrary to custodianship when a parent was actually convicted on a DUI or drug offense. The statutory standard did not apply to other alcohol abuse nor to either of DUI or drug offenses when no convictions resulted within the preceding year. The rebuttable presumption is now applicable to all drug or alcohol abuse, in addition to the prior conviction language.

2.3.B. Decision-Making. Much of title 25 chapter 4 numbering contains new text and topics. The new legislation contains these critical changes:

The new statutes contain a **pre-requirement** to any proceeding of a jurisdictional finding to the "exclusion" of other jurisdictions nationally and internationally.

Legal decision-making, sole or joint, replaces the designation of "custody" and for "parenting time" replaces "visitation" when the parties are in fact the parents themselves. Dr. Fabricius elaborated that the true intention was to define that it is in a child's best interest to maximize parental involvement in both decision-making and parenting time. (A.R.S. 25-403.01.A.)

There will be **required proposed parenting time plans** (A.R.S. 25-403.02) if no agreements are reached. In addition to certain of the usual points most parenting plans include already, plans when there is not stipulation will be required to address a "practical" schedule, the "location and responsibility for transportation" of exchanges of the child, and an actual plan with methods and frequency for parental communications with each other.

The decision-making and parenting time standards remain "**best interests of the child**," but are **re-designed**. For instance, children are not a party to the proceedings. The new standard gives voice to the child of suitable age and discretion; not necessarily otherwise. Perhaps now only an interview will be needed, rather than more expansive roles to determine younger children's preferences, possibly reducing greatly expensive third-party appointees ascertaining younger children's desires; sometimes whimsical based upon age.

2.3.C. Relocation. Advanced relocation notice is removed when parenting time is supervised.

2.3.D. Third Parties. Rather than guardianships, title 25 has provided an oft-more desirable custodial and visitation proceeding for non-parents. The law will provide mechanism for those *in loco parentis* of a child without two married parents to seek custody (now, decision-making and placement of the child) and visitation. (A.R.S. 25-402;-409). Regarding non-parental actions, *see Egan v. Fridlund-Horne, Hochmuth* (real party in interest)(Div.One April 2012)(non-biological parent gay partner's *in loco parentis* action following break-up).

2.3.E. Remedial and Punitive Measures. As a sanction for knowingly presenting a false claim or knowingly denying a true claim or for discovery violations, the trial court now has **legislative authority** not

only to award fees but also to award sanctions for economic loss, to "modify legal decision-making or parenting time" if in a child's best interest, and to engage in contempt proceedings (A.R.S. 25-415). Dr. Fabricius explained the hope that the sanctions would provide litigation deterrents, such as in a child abuse allegation, from falsely denying a matter in the family law proceeding.

Upon those certain false claim/denial and discovery violations, the court itself actually may now "institute" a "civil contempt proceeding" *sua sponte*. Who shall present evidence to support such contempt citation? How does this play in to the one year statute of limitations on contempt (A.R.S. 12-865) when the court is not monitoring actively compliance with its orders yet when the court will be the moving party?

Traditionally, civil contempt has been a mechanism for parties to seek redress, wherein the contemnor "holds the jailhouse keys" with known requirements to purge the contempt. "*With regard to contempt cases, the proceeding and remedy are for civil contempt if the punishment is remedial and for the complainant's benefit. But if for criminal contempt, the sentence is punitive, to vindicate the court's authority.*" *Hicks v. Feiock*, 48 U.S. 624, syllabus (1988) [(child support case); See pgs.631-39 for detailed discussion and multiple cites therein].

This author sees a major change of legislative direction. Arguably, the new statute authorizes the court to advocate by instituting proceedings which are traditionally party-driven. For historical discussion, see also *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 442 (1911)(violation of an injunction to prevent continued boycotting; imprisonment in civil contempt to coerce the behavior or act ordered and refused).

It is unclear what appropriate purges might be related to raising or accusing of raising false claims, nor what remedy will provide an appropriate purge if the court is the complainant. In a given case, this could properly lead to analysis of whether a court-driven contempt proceeding is civil or criminal in nature and whether the right to counsel and a jury trial attach. [cf A.R.S. 25-407 denying jury trial rights to A.R.S.'s contempt sections 12-862;-863. For further reading on jury trials, see also *Arizona Attorney* (April 2010)].

Will there be fee awards against a contemnor if the court is the moving party? Can there be a fee award based upon prevailing rates if successfully defended by counsel whose services are offered *pro bono*, or if the non-contemnor retains counsel responding as a party to a court's *sua sponte* action? [For discussion on awarding fees in the *pro bono* context, see *Thompson v. Corry*, 1 CA-CV 11-0729 (Div. One 15 November 2012).]

3. Anticipated Litigation and Conclusions. Are there likely future areas of litigation? We might anticipate upcoming question if courts initiate contempt proceedings. But, too, there remain wider, yet un-addressed custodial areas of critical import involving children of same gender parents or of unmarried/divorcing parents.

For instance:

- Reconciling "significant" domestic violence in custody and protective order proceedings;
- Addressing lawfully married couples with children whose marriages are void in Arizona.

- At a recent seminar² Chief Justice Feldman (ret.) discussed equal protection arguments interpreting the Defense of Marriage Act (1 USC 7), while Professor Paul Bender opined that the Arizona statute is violative of the Full Faith and Credit clause. Attorney Robert McWhirter raised "choice of law" questions. In this regard, after the preliminary drafting of the instant article you are reading, there was an exciting announcement. In particular, on December 7, the United States Supreme Court granted certiorari on this in *Hollingsworth v. Perry*, (case #12-307) originating out of California's Proposition 8 (revoking that right which had already been permitted, contrasted with ARS 25-101 which is unchanged in that same sex marriage is deemed "void and prohibited") and also on the DOMA case, *U.S. v. Windsor* (case #12-307).

Overall, regarding the new laws that are now in effect since Jan. 1, 2013, this author would conclude that Arizona's legislative purpose to increase parenting time is laudable. The goal appears to be discouraging those adults who terminate their relationships from needlessly interrupting their children's significant, meaningful, and continued bonds.

Note from the author: A special thanks to Dr. Fabricius and Judge (ret. Now AOC) Mark W. Armstrong for their editing remarks.

Weecks practices in many areas, including custody, and intends this brief guide as a practice tool. This article does not represent any view or endorsement of the courts wherein Weecks serves as judge pro tem.

(See charts on pages 5 and 6)

² "U.S. Supreme Court Review" (October 2012, sponsored by the State Bar and city of Peoria)

Custody Factors & Fees

Typically, a custody factor included subjective "nature and extent of coercion or duress used by a parent in obtaining an agreement regarding custody." (ARS 25-403.8)

Fees could and still may be awarded based upon the parties' respective financial positions and also for a petition for not filing in good faith, not being grounded in fact or law, or for "an improper purpose, such as to harass the other party, to cause an unnecessary delay or to increase the cost of litigation to the other party." (ARS 25-324)

Additional Remedial and Punitive Provisions?

In addition to 25-324, the factors to determine the children's best interest include the above-cited provision clarifying the 403.8 factor (now 403.7) to: "*[w]hether one parent intentionally misled the court to cause an unnecessary delay, to increase the cost of litigation or to persuade the court to give a legal decision-making or a parenting time preference to that parent.*"

New Sanctions for LITIGATION MISCONDUCT

(ARS 25-415):

Mandatory fee/cost awards:

- » false claim with knowledge
- » accusation of an untrue false claim knowing the claim is true
- » violation of discovery order
- » violation of discovery rule 65. *Unclear*: Rule 65 (motion to compel) also includes failures to disclose

Optional:

- » restitution
- » *sua sponte* civil contempt, in addition to party-driven petitions