

## Legal Community Safety, with a Focus on the Child Custodial Context <sup>i</sup> By Debbie Weecks.

During a bond hearing on March 27<sup>th</sup>, an inmate identified as William Green is alleged to have punched Attorney Julie Chase in the head, according to news reports out of Broward County, Florida. Mr. Green is said to have been in custody following his “*arrest for attacking an employee at a mental health facility*”<sup>1</sup> This most recent headline reminds us that the legal community’s safety and that of others who may be touched by an underlying legal case go beyond what is commonly now known as the Arizona *Jones* family law case tragedy. Sadly, the Arizona homicides were carried out by a disgruntled family law litigant. Our community mourns the loss of forensic psychiatrist Dr. Steven Pitt, paralegals Veleria Sharp and Laura Anderson, Psychologist Marshall Levine, and citizens Mary Simmons and Bryon Haywood Thomas.

The Arizona Supreme Court’s website contains its Study Committee on Domestic Violence and Mental Illness in Family Court Cases: Report and Recommendations (13 December 2018) [hereinafter the “Report and Recommendations”].<sup>2</sup> This article for The Third Annual CLE Marathon<sup>3</sup> provides some further framework of legal interpretation in custodial cases wherein violence is alleged. While supplementing the non-attorney safety suggestions at the CLE Marathon, some examination of law and rules in high-conflict cases may assist in fashioning tools to promote not only public safety generally, but the safety of every attorney, judge, court staff member, and law student in Arizona involved in high conflict family law cases.

The Report and Recommendations is a robust analysis and working paper addressing safety in domestic violence cases. The Report and Recommendations include suggestions for judicial, court personnel, and court-appointed advisor training, working with “justice partners,” and other concepts as reflected in the report’s “action item” listings. Its action items include education, collaboration, setting domestic violence treatment standards, establishing parental communication methods in adversarial family law child custodial cases, legislative changes including presumptions and funding matters, standardization for supervised parenting, and creating risk assessments. The Report and Recommendations contains an extensive chronology of the *Jones* court cases behind the tragic year 2018 homicides. Viewing

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<sup>1</sup> For the full report by NBC 6 reporter Laura Rodriguez by video broadcast, see <https://www.nbcmiami.com/news/local/Public-Defender-Punched-by-Suspect-in-Broward-Bond-Court-507722671.html>

<sup>2</sup> [https://www.azcourts.gov/Portals/84/MeetingMaterials/2018/Dec2018/TAB\\_5\\_AJC\\_DVReport.pdf?ver=2018-12-05-111638-677](https://www.azcourts.gov/Portals/84/MeetingMaterials/2018/Dec2018/TAB_5_AJC_DVReport.pdf?ver=2018-12-05-111638-677) provided courtesy Kay L. Radwanski, Arizona Supreme Court AOC, Sr. Court Policy Analyst

<sup>3</sup> this year on the 3<sup>rd</sup> & 17<sup>th</sup> of May 2019 in Phoenix, AZ. This CLE event is a collaborative effort of host National Bank of Arizona, other co-sponsors including the Sandra Day O’Connor College of Law, and the law firms of Ivan & Associates, P.C. and Essig Law, and the co-organizers including Renee Jordan and sole practitioner Attorneys Andrea Angulo-Gutiérrez, Craig Stephan, Tracy Essig, and Debbie Weecks.

the chronology, this article provides practitioners a brief guide to some of the relevant legal framework and presents other considerations paramount to safety of all players.

In Arizona, child custodial statutes may complement one another or may totally clash. For instance, whether or not domestic violence is alleged, if one is a non-parent raising a grandchild, does s/he prefer a title 8 parental severance action, a title 8 guardianship, a title 14 guardianship, or a title 25 *in loco parentis* custody action? The statutory schemes along with some court implementation encourages a filing party or counsel to decide not only the type of action to bring and when based upon which statutes and rules govern, but also based upon the forum where each lands the litigant. The above example will be governed by dramatically different rules, including those for each of the Family, Juvenile, and Probate Departments of the same Superior Court. Child custodial matters alleging domestic violence, drug or alcohol use, or otherwise casting aspersion are highly subjective and fact-specific. The allegations may cause a parent or other parental figure in a child's life to be suddenly restricted or precluded from un-interrupted meaningful contact if judicial orders are restrictive, yet may place a child and the professional and their staffs in danger if not.

### **I. Exploring the Choices – Child Custodial Actions Alleging Domestic Violence.**

Marital dissolution and paternity cases typically fall under title 25 and are commonly called “family law cases” because title 25 cases are assigned to judicial officers within the Family Department of the Superior Court. A family law court case begins with a preliminary injunction. The preliminary injunction is statutory in nature<sup>4</sup> and is essentially a temporary restraining order to curtail bad behaviors and lay out ground rules about leaving the state with the children, hiding community assets in marital dissolutions, and the like. The preliminary injunction applies to most litigants at the start of the initial title 25 case, effective against petitioners upon filing and upon respondents upon service. In a typical court progression, on day 61 an attorney can submit a finalized marital dissolution or separation consent decree or have sought entry of a default decree in which “permanent” (until modified) orders enter. The wait time does not apply to paternity cases. Or, following the Arizona Rules of Family Law Procedure<sup>5</sup> one may request “temporary” (*pendente lite*) orders such as through Rules 47 (47.2 for post-decree custodial orders) and 48; the former with notice and the latter without. The Court *may* schedule an evidentiary hearing but customarily, judicial officers and their staff set these matters to a conference first. As an attorney, you will tell your client that the reality is that the Rule 48 *ex parte* application could be denied and set to an event with notice; but a month later, still no temporary hearing potentially.

Within title 25, when fashioning parenting plans, we are guided by this principal:

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<sup>4</sup> A.R.S. § 25-315 in marital dissolution, legal separation, and annulment cases; -808 in paternity cases.

<sup>5</sup> Now as set forth in Admin Order R-17-0054 (30 August 2008, effective 01 January 2019).

“Consistent with the child's best interests in section 25-403 and sections 25-403.03, 25-403.04 and 25-403.05, the court shall adopt a parenting plan that provides for both parents to share legal decision-making regarding their child and that maximizes their respective parenting time. The court shall not prefer a parent's proposed plan because of the parent's or child's gender.” A.R.S. §25-403.02.B. (Parenting plans)

Respectively, those sections would be briefly described as the best interests’ of the child *criteria* (-403) and presumptions in cases alleging domestic violence and child abuse (-.03), substance abuse (-.04), and sexual offense and murder (-.05).

## II. Domestic Violence Presumptions in a Title 25 Family Law Case.

Within a family department title 25 case, there is a rebuttable presumption against awarding a parent “joint legal decision-making” in §25-403.03.A and a rebuttable presumption against awarding sole or joint legal decision-making “[i]f the court determines that a parent who is seeking sole or joint legal decision-making has committed an act of domestic violence..” in subsection D. The former is premised upon “a finding of the existence of **significant** domestic violence **pursuant to section 13-3601** or if the court finds by a preponderance of the evidence that there has been a significant history of domestic violence.” The latter is premised upon a single act of domestic violence against the other parent.

### II.1 Title 25 Family Law Custodial Presumptions Applying Title 13’s Criteria.

A.R.S. §25-403.03’s presumptions could be more precise. The family law title 25 legislation differentiates between “legal decision-making” and “parenting time.” A preferable restriction could be to tailor presumptions to parenting time, although that is addressed in terms of supervision, whether by family, a paid provider, or “therapeutic” supervision by a trained professional.<sup>6</sup> Secondly, title 13 is the criminal code. Its section -3601 defines domestic violence, whereas -3602 *et seq* addresses issuance and upholding of *ex parte* orders of protection. No where in section 3601 did the legislature differentiate what domestic violence is considered “significant” as opposed to not significant. In fact, *any* violation of the enumerated statutes is

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<sup>6</sup> A.R.S. §25-403.01.D. addresses supervised parenting time. Parenting is a fundamental constitutional right. See the 2010 Parents' Bill of Rights (A.R.S. §§1-602.A.; -601.A.); *Troxel v. Granville*, 530 U.S. 57 (U.S. S.Ct. 2000, plurality opinion) (fourteenth amendment due process in context of parental rights to curtail grandparent visitation). There are several key title 25 Arizona appellate cases recently regarding restricting parental access to children. Important recent Arizona case law on parenting restrictions in family law cases includes *Nicaise v. Sundaram* (Nicaise I), 244 Ariz. 272 (App. 2018), vacated in part, Nicaise II, 245 Ariz. 566 [narrow exception when “the child’s physical health would be endangered or the child’s emotional development would be significantly impaired” under A.R.S. §25-410(A) to otherwise unshared legal authority in sole legal decision-making]; *Paul E. v. Courtney F.* (Paul I), 244 Ariz. 46 (App. 2018), vacated in part at S.Crt. CV-18-0111-PR, 25 April 2019 [*de novo* review of A.R.S. §25-410(A) incl. ‘ “specific limitation” does not have to be a “prohibit[ion]” rather than a “directive.” ‘ ¶23, but “must be necessary to prevent the child’s physical endangerment or significant emotional impairment” *id.*; not affecting A.R.S. §25-403.02(C)(2) permitting the court to resolve a matter in a parenting plan *impasse*. ¶26].

considered domestic violence under Arizona's title 13 and makes the alleged victim eligible for an order of protection. Typically thereunder a judge looks back one year, but that is not necessarily the only relevant time period under consideration.<sup>7</sup>

Domestic violence in title 13 means any violation of the enumerated statutory sections when there is a requisite relationship. Relationships include ever having lived together, spouses, children in common, dating relationships, and some familial relationships. The reader will need to review the definitions as to relationships but also, as to domestic violence offenses. In general terms the sections for which violation is deemed domestic violence when the requisite relationship is present includes “*any act that is a dangerous crime against children as defined in section 13-705*” and homicides (-1102, -1103, -1104, -1105), endangerment, threatening, intimidating, and assault (-1201, -1202, -1203, -1204), custodial interference, unlawful imprisonment, and kidnapping (-1302, -1303, and -1304), sexual assault (-1406), unlawful distribution of images (-1425), criminal trespass (-1502, -1503, -1504), criminal damage (-1602), interference with judicial proceedings (-2810), disorderly conduct including fighting, violent, or seriously disruptive behavior, making unreasonable noise, using abusive or offensive language or gestures in a manner likely to provoke immediate physical retaliation, and recklessly handling, displaying, or discharging a deadly weapon or dangerous instrument. (-2904.A. 1,2,3, or 6), cruel neglect, abandonment, and mistreatment of animals (-2910.A.8 or 9), intentional prevention of interference with use of a phone by another person in an emergency (-2915), use of electronic communications to terrify, intimidate, threaten, or harass (-2916), harassment (-2921, -2921.01) stalking (-2923), surreptitious photographing, videotaping, filming, or digitally recording or viewing (-3019), aggravated domestic violence (-3601.02), and child or vulnerable adult abuse and emotional abuse (-3623).

## II.1 Family Law Custodial Presumptions under Title 25's Other Criteria.

Alternatively, under the presumption that applies when the determination is that there was an act of domestic violence against the other parent,

“a person commits an act of domestic violence if that person does any of the following:

1. Intentionally, knowingly or recklessly causes or attempts to cause sexual assault or serious physical injury.
2. Places a person in reasonable apprehension of imminent serious physical injury to *any* person.
3. Engages in a pattern of behavior for which a court may issue an *ex parte* order to protect the other parent who is seeking child custody or to protect the child and the child's siblings.” [*italic added*]

As the reader will note, there are several possibilities of what one must allege or not, and what must be proven or not, and by whom (non-parents seeking custody?); then of course, question of whether an applicable presumption is successfully rebutted.

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<sup>7</sup> See Arizona Rules of Protective Order Proceedings, Rule 23.E.

### III. Seeking an Order of Protection.

If both parents are deemed to have engaged in domestic violence, the presumption in the family law case will not apply.<sup>8</sup> Consider that if a family law case is pending, the litigant may seek either of a title 25 venue following a Rule 48 family law *ex parte* application procedure as to any number of divorce or paternity issues or may seek a title 13 order of protection. A commissioner who is not the assigned judge will make the preliminary determination to grant a protective order. Another option if the litigant perceives that it's a proverbial "race to the courthouse door" is to seek a protective order for him/herself and the children in a limited jurisdiction court rather than to file the family court case. No harm, no foul. If it's granted, there's an immediate order without notice that takes effect upon service.

### IV. Mental Health Commitment Orders

The Report & Recommendation regarding child custodial cases includes "*Learn about types of mental health treatment options and how to recognize signs of mental illness and develop an awareness that a parent's mental illness does not necessarily endanger the child.*" Report & Recommendation Summary.

On occasion, a family member or friend may recognize a mental health impairment and may be an agent nominated under powers of attorney duly executed, such that s/he may attempt to handle the family member's affairs and including using a Mental Health Care Power of Attorney to seek mental health treatment.<sup>9</sup> Alternatively, the family member or friend may seek guardianship or conservatorship over a loved one or his/her affairs by way of judicial order.

In the case of a potential danger to self or others there is a statute that permits involuntary commitment if "*as a result of the examination and investigation of the application for emergency admission, that there is reasonable cause to believe that the person, as a result of a mental disorder, is a danger to self or others, and that during the time necessary to complete the prepetition screening procedures set forth in sections 36-520 and 36-521 the person is likely without immediate hospitalization to suffer serious physical harm or serious illness or to inflict serious physical harm on another person.*" A.R.S. §36-526.A. (Emergency admission...) Without consent, alternatives to admission may be implemented or a petition may be filed in the Mental Health Department of the Superior Court. As with title 8 dependency and termination of parental rights proceedings where parents and children are appointed counsel, so too is the title 36 Potentially Protected Person (PPP or "ward") provided counsel.<sup>10</sup>

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<sup>8</sup> A.R.S. §25-403.03.D. rebuttable presumption when D.V. is against the other parent

<sup>9</sup> See generally A.R.S. §36-3221 (Health Care POA); -3281 (Mental Health Care POA)

<sup>10</sup> Cf title 25 family law case (no right of appointment of counsel). Cf, too, title 14 (potential appointment of court-contracted counsel to a minor in a guardianship; always an appointment of counsel to a potentially protected adult. By further point of comparison, if a title 14 PPP adult has savings, then the court will usually order that any appointed fiduciary from that proceeding pay the contracted appointed counsel at regular billable rates from the PPP's funds).

## V. Permanent Injunctive Orders, Effectively

Strategically speaking, a protective order under titles 12 (injunctions against harassment including workplace injunctions) and 13 (order of protection, *supra*) is an immediate way to stop communication for up to a year. If children are joined on the orders, those orders act as a bar to contacts except for any provisions permitted in the order specifically (telephonically, e-mail, and so on). Contrarily, if a defendant is actually charged and convicted with a title 13 domestic violence charge, whether by a change of plea or trial, terms of sentencing could include a permanent “no contact” type of order. Only in the most extreme circumstance would one anticipate such permanent order and specifically as to a child. Were such instance within the realm of possibility, there is at least a great likelihood that other proceedings are involved outside family law’s title 25; for instance, a dependency action by the State under title 8 or a severance action to terminate parental rights.

## VI. Prohibited Possessors of Firearms and Ammunition

Gun right proponents may advocate to be permitted to carry firearms. Authoritative sources frequently cited in the ongoing public debate about limitations to those rights include *District of Columbia v. Heller*, 554 U.S. 570 (2008) (fundamental right); 14th Amend. U.S. Consti. (due process); and Art.2 Sec.4 Ariz. Consti. (due process).

An officer with probable cause for a domestic violence arrest may confiscate a firearm that is “in plain view” or found with consent to search “*if the officer reasonably believes that the firearm would expose the victim or another person in the household to a risk of serious bodily injury or death.*” See A.R.S. §13-3601.C. Further, an order of protection may prohibit possession, receipt, and purchase of firearms and ammunition by its terms if the judge finds a “credible threat” to the physical safety of a petitioner or others who are specifically named at the *ex parte* application stage. A.R.S. §13-3602.G.4; Arizona Rules of Protective Order Proceedings, Rule 23. See also Domestic Violence & Prohibited Firearm Possessors (Weecks, Arizona Attorney, October 2009)<sup>11</sup>

Once there is a hearing following issuance of an order of protection, if the order is upheld whether or not it contained an initial prohibition on possession, receipt, or purchase of firearms, the Brady Act may apply and may prevent lawful possession or purchase of firearms for the duration of the order of protection. See Brady Handgun Violence Protection Activities 18 U.S.C. §§922 (d)(8), (g)(8).

If there is an intimidate partner or child status, a Notice to Sheriff of Positive Brady Indicator could be generated by the court. In the case of a domestic violence crime and conviction, the prohibited possessor status is often a permanent bar. See *generally* Lautenberg Amendment to Gun Control Act of 1968, 18 U.S.C. §§ 922(d)(9), (g)(9). See also *Savord v. Morton*, 235 Ariz. 256 (Div.One 2014) (limiting the scope of

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<sup>11</sup> [http://www.myazbar.org/AZAttorney/PDF\\_Articles/1009DVguns.pdf](http://www.myazbar.org/AZAttorney/PDF_Articles/1009DVguns.pdf)

hearing based upon the application); A.R.S. §13-3602(G)(4). The Lautenberg prohibition is able to be removed upon set aside of a conviction. See *generally* A.R.S. §13-907 (Setting aside judgment of convicted person on discharge; application; release from disabilities; firearm possession; exceptions); A.R.S. §13-925 (Restoration of right to possess a firearm).

## VII. Legal Community Safety

Which takes us to tragedies such as that which struck our legal community nearly a year ago. The Report & Recommendation reveals that specific perpetrator's domestic violence arrest and involuntary commitment. In the family law case that followed, according to the Report & Recommendation, the victim applied for four separate orders of protection over four years and privately paid \$34,000 for the mental health study of the perpetrator related to their child custody case. The perpetrator was a prohibited possessor of firearms during a period of probation following his change of plea and resulting conviction for a domestic violence offense. He was resident for some time at mental health facilities (Magellan UPC to Desert Vista Behavioral Health.) He was granted therapeutic supervised parenting time. The late Dr. Steven Pitt, one of the victims ultimately, had done a risk assessment related to the underlying child custodial matter in that case.

It is probably a fair statement that Bench and Bar expect court orders to be followed. But sadly, in the world of unsafe work places, domestic violence, or other locations with people under stress, we must recognize that some protective orders may be disregarded. Conviction for IJP (interference with judicial process, *i.e.*, knowingly violating a judicial order) or a finding after-the-fact of contempt of court for failure to obey an order may be too little, too late. Other protective steps should be proactively implemented.

Cameras can capture personal information on documents and images. Publication or other circulation of some documentation and sometimes of people or conversation can be compromising of confidentiality and privacy, but in the context of today's theme, can place litigants, Bench, Bar, victims, and children at risk.

There are court rules and sometimes judicial orders about not recording or not broadcasting. For example, there is a local case wherein it was reported that the State took custody of three children when the parents failed to follow a doctor's orders to take an unvaccinated ill child to the hospital. Judge Timothy J. Ryan permitted the press to be present but not to broadcast certain information.<sup>12</sup> A free press is vital in a democracy. "Court auditors" are making the news seeking to report on court cases which they might wish to monitor and about which they wish to report. Court rules or judicial orders sometimes do restrain or limit who is present or what may be repeated,

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<sup>12</sup> Watch at <https://www.azcentral.com/story/news/local/arizona-child-welfare/2019/04/21/chandler-feverish-child-case-judge-restricts-press-from-publishing-warns-public/3527075002/>

or how and when proceedings might be broadcasted. Not only are the rules geared towards preserving records for appeal. In today's social media world, we should recognize that certain Rules of the Supreme Court (particularly Rule 122, Use of Recording Devices in a Courtroom; Rule 122.1, Use of Portable Electronic Devices in a Courthouse) are being challenged. There are real needs for building and courtroom security at all facilities.

We as attorneys and judges are in the public eye. We must obey our respective ethics' codes. For attorneys, our ethics' codes encompass confidentiality with exceptions for duties or permission to warn others of prospective harms, for example, "*to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm*" Rules of Prof'l Conduct, E.R.1.6(b) (Confidentiality of Information); see also subsection (d) (other permissible disclosure reasons). Our duties include not using tactics without "substantial purpose other than to embarrass, delay, or burden" others. E.R. 4.4. (Respect for Rights of Others).

Family law cases create their own challenges, since no two families fit the same mold. Personalities and issues will *always* vary. Choosing the correct path to obtain court remedies when there is danger is not necessarily clear. The levels of allegation and threat vary from mundane and idle to bullying, and ultimately in the rare case, threatening. Bench and Bar should be alert. Domestic violence hotlines and shelters discuss "safety plans." Safety plans are practical considerations such as changing passwords, keeping calendars that state names, addresses, and telephone numbers of outings (so for attorneys, of anticipated client-related events) which calendars someone trusted with confidential information can access, taking self-defense classes or a form of martial arts, having a daily check-in system and secret word that the call-in partner must hear to know the caller is safe, and for some perhaps there is a desire to carry firearms – alas, not likely in a courthouse.

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<sup>i</sup> Attorney Debbie Weecks © 26-28 April 2019. The Law Office of Debbie Weecks (Post Office Box #1731, Sun City, AZ 85372-1731), telephone 623-933-4877, [www.weeckslaw.com](http://www.weeckslaw.com) Ms. Weecks is an attorney in private practice. (This article does not represent the view or endorsement of the Court wherein Ms. Weecks serves as a Judge *Pro Tempore*.) In the spirit of collegiality and promotion of high quality, free, educational programming, Ms. Weecks has been honored to co-organize the Annual CLE Marathon annually. This article was prepared in response to the request of a colleague to craft an article outlining some of the legal cites and current issues surrounding attorney safety matters, with a focus on family law cites and concerns.

Ms. Weecks thanks the amazing team members who make this annual event a huge success. Thanks in particular to the presenters of the "Today's New Reality – Firm Safety" CLE (Attorneys Shari Capra and Elizabeth Feldman, Sgt. Hugh Lockerby, & Sande Roberts, MA), her co-organizers (Mrs. Renee Jordan of The Essig Law Firm, Attorneys Tracy Essig, Andrea L. Angulo Gutiérrez, & Craig Stephan, and Ms. Tracy Ward of National Bank of Arizona<sup>®</sup>) and the sponsors (Mr. Christopher Marohn and the ASU Sandra Day O'Connor College of Law, Essig Law, Attorney Florin Ivan and Ivan & Associates, P.C., National Bank of Arizona<sup>®</sup>, and of course, The Solo and Small Firms Private Listserv and its Association of Sole Practitioners and Small Firms of Arizona, [www.spsfaz.org](http://www.spsfaz.org) ).