

COMMISSION ON CHILD CUSTODY DECISION-MAKING

MINUTES

Commission Meeting

October 8, 2014 ° 9:00 a.m. – 5:00 p.m.

Location: The Judiciary Education and Conference Center
2011 C/D Commerce Park Drive, Annapolis, Maryland 21401

Commissioners in Attendance:

Honorable Cynthia Callahan, Chair
Renee Bronfein Ades, Esq.
Honorable Shannon E. Avery
Delegate Kathleen M. Dumais
Dorothy J. Lennig, Esq.
David L. Levy, Esq.
Delegate Susan K. McComas
Carlton Munson, Ph.D., LCSW-C
Kathleen A. Nardella, Esq., LCSW-C
Laure Anne Ruth, Esq.
Master Richard J. Sandy
Keith N. Schizik, Esq.
Vernon Wallace, Jr.
Lauren Young, Esq.

Department of Family Administration Staff:

Connie Kratovil-Lavelle, Esq.
Michael Dunston
Christine Feddersen
Sarah R. Kaplan, Esq.
Maria Nick
David Shultie, Esq.
Joseph Warren
Pen Whewell

Interpreters:

Elizabeth McPherson, Spanish
Carrie Quigley, ASL

Public Attendance:

Gerald Loiacono, Esq.
Kelly O'Connor
David W. Smith, Sr.

Judge Cynthia Callahan opened the meeting.

Review of Minutes

The minutes of the September 8, 2014 Commission meeting were adopted with one amendment on page 3, under recommendations of the Identifying and Eliminating Bias Committee, replacing “The statute should specifically state that gender is not applicable to custody proceedings” with “The statute should specifically state that the sex of the parent and the child are irrelevant to a custody proceeding”.

REVIEW OF REPORTS FROM COMMITTEES

The chair described the agenda for the day and the materials that were to be reviewed by commission members, noting that the materials did not include a draft report from the Statutory Considerations Committee. The Chair explained that the day’s discussions would impact any final draft statute. The Chair noted that commission members had been provided with written summaries, reports, or recommendations from each of the committees.

Overlap Issues and Overlap Recommendations

The commission members reviewed a document entitled “Overlap Issues”. The document summarized those issues that were addressed by multiple committees and for which multiple committees rendered recommendations either in committee reports or in committee deliberations. Commission members discussed recommendations related to each overlap issue and identified “overlap recommendations”, those recommendations that multiple committees made independent of the others, based on their individual research and conclusions. The members concluded there was consensus in numerous areas. (see attachment A, “Overlap/Joint Recommendations”).

It was noted that there are recommendations from the various committees for which there is not consensus.

ADR Committee Report and Recommendations

The members reviewed the report and recommendations from the ADR Committee. Committee co-chairs, Kathleen Nardella and Delegate Susan McComas, explained the committee’s rationale for each recommendation. Dr. Carlton Munson, chair of the Literature Review Committee, provided information on research his committee conducted related to ADR issues and provided to the ADR Committee for their deliberations.

Discussion followed and the recommendations were revised. (See attachment B, “Recommendations Based on Committee Research and Reports”).

Domestic Violence Committee Recommendations

The members reviewed the report and recommendations from the Domestic Violence Committee. Committee chair, Dorothy Lennig, explained the committee's rationale for each recommendation.

Dr. Carlton Munson, chair of the Literature Review Committee, provided information on research his committee conducted related to domestic violence issues and provided to the Domestic Violence Committee for their deliberations.

Discussion followed and the recommendations were revised. (See attachment B, "Recommendations Based on Committee Research and Reports").

Court Process Committee Recommendations

The members reviewed the report and recommendations from the Court Processes Committee. Committee chair, Master Richard Sandy, explained the committee's rationale for each recommendation.

Dr. Carlton Munson, chair of the Literature Review Committee, provided information on research his committee conducted related to court process issues and provided to the Court Process Committee for their deliberations.

Discussion followed and the recommendations were revised. (See attachment B, "Recommendations Based on Committee Research and Reports").

Identifying and Eliminating Bias Committee Recommendations

The members reviewed the report and recommendations from the Identifying and Eliminating Bias Committee. Committee co-chairs, Vernon Wallace and Lauren Young, explained the committee's rationale for each recommendation.

Dr. Carlton Munson, chair of the Literature Review Committee, provided information on research his committee conducted related to bias issues and provided to the Identifying and Eliminating Bias Committee for their deliberations.

Discussion followed and the recommendations were revised. (See attachment B, "Recommendations Based on Committee Research and Reports").

Next Meeting

The chair, Judge Cynthia Callahan, announced the commission's next and likely final meeting will be held in Annapolis on:

- November 12, 2014 – Full day meeting from 9:00 a.m. – 5:00 p.m.

Adjournment

Judge Callahan adjourned the meeting.

Attachment A - Revised

OVERLAP/JOINT RECOMMENDATIONS

November 12, 2014

Commission on Child Custody Decision-Making

1. **Judicial Training:** all committees supported increased judicial training as a guiding principle; training topics should include childrens' developmental needs, the role of parents in lives of their children, domestic violence, disability issues, implicit and explicit bias, alternative dispute resolution methods, including mediation, collaborative law and neutral facilitation, and predictable attorney's fees.
2. **Mediation in Domestic Violence Cases:** there was consensus that mediation should not occur in cases of domestic violence; consensus that this be a guiding principle.
3. **Mediation Following Child Custody Evaluation Report:** there was consensus, as a guiding principle, that mediation occur following the report and that the custody evaluator should not function as a mediator or facilitator for determining child access.
4. **Parenting Plans:** there was consensus that parties should be required to submit parenting plans as part of the pretrial process.
5. **Expedited process:** there was consensus that a process should be developed for expedited hearings, including emergency hearings; that criteria needs to be defined for an expedited hearing; that a uniformed process needs to be developed via the Rules Committee.
6. **Anti-discrimination:** there was consensus that custody decision-making process and Maryland statutes should be compliant with federal law, including the amendments to the Americans with Disabilities Act; consensus that whenever possible court forms, instructions and rules should use gender neutral terms.
7. **Family Court:** all committees recommended the creation of a family court, recognizing that will require further study and investigation.
8. **Civil Right to Counsel:** there was consensus that there should be a civil right to counsel for parents in custody cases.
9. **Alternative Dispute Resolution:** there was consensus that additional alternative dispute resolution processes should be incorporated into case management systems; that parties should be uniformly be provided opportunities for ADR, including mediation, facilitation and collaborative law.

Attachment B - Revised

RECOMMENDATIONS BASED ON THE RESEARCH AND REPORTS FROM COMMITTEES

November 12, 2014
Commission on Child Custody Decision-Making

ALTERNATIVE DISPUTE RESOLUTION (ADR)

1. A uniform model for referral to and case management of mediation should be utilized across the State of Maryland to the extent possible given the range in the sizes of the jurisdictions.
2. Parents should be encouraged to demonstrate, at a minimum, a good faith effort to resolve “emergency” situations in family cases before the merits of these issues are considered by a judge or master, except for victims of domestic violence.
3. Standards for mediation training should be established and only staff or contractual mediators who have completed this training should be utilized for court-ordered mediations in family cases.
4. Fees for mediation should be reasonable and should be assessed on a sliding scale basis with community mediation centers presented as an option.
5. Fee waivers should be available for court-ordered mediations in those cases where the cost of mediation would otherwise be financially burdensome.
6. The date for the required mediation in a custody case should be established at the time of the scheduling conference or otherwise have an identifiable date by which the mediation is to happen.
7. The Maryland Rules should be revised to include reference to collaborative law as a form of ADR.
8. Collaborative law should be referenced on all court forms that list ADR options, such as the Case Information Form; collaborative law should be described on all educational materials provided by the Court to separating and divorcing parents.
9. There should be status conferences at least every three (3) months for all custody cases in which a stay is entered to permit a collaborative law process.
10. There should be more consistency in the manner in which settlement conferences and facilitation sessions are conducted across the State of Maryland and the accessibility of these services should be more uniform throughout the State.
11. The Administrative Office of the Courts (AOC) should consider implementing a Pilot Early Neutral Evaluation (ENE) program in family cases and assess the effectiveness of this ADR approach formally from the onset.
12. Settlement conferences, facilitation sessions and co-parenting classes should be utilized to educate parents about the benefits of ADR approaches.

13. A media campaign using current technology, such as the internet and smartphone apps, should be undertaken to educate the public about ADR alternatives to litigation including, but not limited to, mediation, collaborative law, settlement conferences, facilitation sessions and, possibly, Early Neutral Evaluation (ENE).
14. Court waiting areas and websites should be utilized to educate the public about ADR approaches through videos and informational brochures.
15. Judges, masters and other court personnel should receive training that equips them to become advocates for the broader use of ADR, particularly mediation and collaborative law.
16. Each jurisdiction should have a designated professional who provides information to pro se parties regarding ADR alternatives such as mediation, collaborative law, settlement conferences, facilitation sessions and possibly Early Neutral Evaluation.
17. Supervised visitation should be added to the list of services that the Family Divisions may provide under Maryland Rule 16-204.
18. Co-parenting classes should ordinarily be scheduled before mediation and should have a parenting plan component.
19. Maryland should require parents to file parenting plans, possibly with the pretrial statement.
20. The AOC website should provide educational materials to assist pro se parties with the drafting of parenting plans.

DOMESTIC VIOLENCE

21. Judicial training should be mandatory and ongoing and should include training regarding factors related to the best interest of the child, traumatic impact on children who witness domestic violence, dynamics of domestic violence, recognizing the factors of lethality assessment, but not using as a threshold test for the granting of a protective order, impact of substance abuse and addiction of parents on children, and considering and ordering all appropriate relief.
22. The Family Violence Council should develop protocols for gradual and safe ways to reintroduce children to an abusive parent in protective order litigation, create a list of resources for families and create a comprehensive, statewide resource listings/provide representation for pro se litigants
23. The Domestic Violence Resource Manual should include information on what is appropriate to order, including counseling for children, counseling for the abusive parent (abuser intervention programs), third-party supervision, supervised exchange facilities, and graduated access schedules for abusive parents.
24. The Judiciary should develop ways to provide information about the protective order process to unrepresented litigants (e.g. Judges should develop a way to provide appropriate information to unrepresented litigants without providing legal advice, brochures, videos).
25. The General Assembly should consider a "Civil Gideon" Rule requiring counsel be available for low income parties in protective order proceedings where custody is an issue.

26. Custody Evaluators should be subject to standards that include extensive training in the area of domestic violence and should be required to comply with professional standards for education and continuing education.
27. The Judiciary should create a mechanism to incorporate a child's voice into the custody proceeding in a less onerous way than appointing a Best Interest Attorney and should utilize a list of appropriate questions to ask children if judges are to speak to the children.
28. The subcommittee recommends that an expedited procedural process be made available at the circuit court level within 30 days of filing. This remedy would be available to either party by filing the request within a 10 day period. The Committee is ***in no way suggesting*** that Judges in Protective Order proceedings should refrain from making custody and visitation determinations in domestic violence proceedings on the grounds that another jurist may be more equipped to do so in a subsequent, expedited custody proceeding

COURT PROCESS

29. DHR, Office of Child Support Enforcement (OSCE) and the Judiciary should provide increased co-parenting support by making information and assistance available, including providing information on filing for custody.
30. OSCE should promote alternative dispute resolution in the process as well as the development of parenting plans.
31. Improved case coordination, particularly in cases involving paternity and child support issues: the Judiciary should consolidate, or at a minimum, better coordinate the handling of multiple family law cases involving the same family to better match the delivery of services to litigants in divorce cases with litigants who are not married.
32. Lawmakers should revisit some of the legal provisions surrounding paternity and the separation of families through mechanisms other than divorce.
33. Updated laws concerning adoption: lawmakers should consider issues surrounding adoption for same sex and never married couples, including second parent adoptions.
34. Updated laws concerning paternity in modern family arrangements: Lawmakers should update laws and processes surrounding the establishment of parentage to account for modern family arrangements, such as artificial reproductive techniques and collaborative reproduction.
35. Creation of a court-based co-parenting pilot project: the Judiciary should create a pilot project aimed at encouraging co-parenting and reaching sustainable agreements between the parties. Other jurisdictions have successful programs
36. An executive branch agency should create a program similar to CourtWatch that would periodically attend and observe proceedings, in an objective and unbiased manner, to monitor judicial conduct in line with principles emphasized during orientation and training.
37. The Judiciary should create or adopt a civil custody order to be entered at the conclusion of a CINA case in which there has been an award of custody. This would

allow the court, and others, to have access to the order on Maryland Judiciary Case Search or other electronic case records repositories.

38. Enforcement of orders and expedited process: the courts should develop a process for scheduling expedited matters in either 7 days or 30 days. In cases of emergency, the court should provide a hearing within seven days; in non-emergency cases, where lack of court action may result in damage to the parent-child relationship or eventual harm to the child, the court should provide a hearing within 30 days.
39. Standard for emergency relief: matters appropriate for emergency relief should include cases where there is a “substantial risk of imminent harm to a child”, approximating the standard set in *Kalman v. Fuste*. This harm should have occurred or will happen 14 days within the time of filing the petition. Matters appropriate for emergency relief could include:
 - a. Serious physical, emotional or harm to the child
 - b. Removal of financial support that causes actual harm to a child (ie: disconnection of utilities)
 - c. Imminent removal of a child from the court’s jurisdiction
 - d. Other matters the court finds appropriate.
40. Standard for non-emergency expedited relief: matters appropriate for expedited relief may include:
 - a. Complete denial of access to minor children
 - b. Complete cessation of financial support to a dependent spouse or minor child
 - c. Imminent and major disruption of continued compulsory education for a minor child (which may include a transfer of the minor child to a new school without consent of both parents)
 - d. Non-imminent removal of a minor child from the state
 - e. Other matters the court finds appropriate.
41. Process for seeking expedited relief: petitioners seeking expedited *pendente lite* relief must file a form, under oath. The request must be made as part of an underlying complaint for custody. The form should be developed by the Judiciary and be uniform statewide. Once filed, the request will be reviewed by a Judge or Master, who can make a decision based on the facts presented or schedule a hearing on the matter. The court should respond to the petitioner as soon as possible with an answer to the petition.
42. Ex Parte relief: if the court grants ex parte relief, the Maryland Rules of Procedure should govern . .
43. Availability of DCM Plans: each court should integrate their specific process for expedited relief into DCM plans. These plans should be available on the court website and available for inspection in the clerk’s office. The process adopted by each court should be fully explained in the plan. This could aid self-represented litigants and practitioners who appear in multiple jurisdictions.
44. Parenting Plans: a parenting plan form should be adopted statewide. Parties in a custody case should be required to file a parenting plan as part of a pretrial statement if an agreement has not been reached through other means.

45. Mediation following custody evaluation report: mediation should be made available to parties following the presentation of a custody evaluation report. Optimally, mediation would not occur that day but mediation would be made available before the trial date.
46. Maryland should have a stand-alone and unified Family Court for the uniform delivery of services and effective case management. This top down approach would allow the court to better address the unique needs of Maryland families.

IDENTIFYING & ELIMINATING BIAS

47. Md. Code Ann. Family-Law § 9-107, uses offensive language to describe people with disabilities and may contribute to bias against parents with disabilities. The statutory language should be rewritten to define “disability” in a manner consistent with the federal Americans with Disabilities Act, as follows:
 - “disability” means a physical or mental impairment that substantially limits one or more of the major life activities of an individual, a record of such impairment, or being regarded as having such an impairment.
48. This definition must be broadly interpreted, consistent with the ADA Amendments Act of 2008.
49. The custody decision making statute should require the articulation of the nexus between parental disability and best interests of the child, and codify the burden of proof in order to prevent bias from being a determinant in child custody decisions. The statute should clarify that in order to consider a parent’s disability as a factor in deciding the best interest of the child, the court must find by preponderance of the evidence that the parent’s disability poses a substantial risk of harm to the health or safety of the child, and such determination must be reflected in the court’s record and in the findings of fact and conclusions of law. If another parent asserts that a person’s disability renders them incapable of providing for the best interests of the child, that party bears the burden of proof. The same standard should apply to third party litigants.
50. Whenever possible, statutes, rules, court forms and instructions should use gender neutral terms.
51. The law should provide for appointment of counsel, including representation paid for by the state, pro bono services and limited representation, when an unrepresented individual with a disability is financially unable to retain counsel in a custody matter; and is opposed by a party who has counsel.
52. The Judiciary should determine a reasonable accommodations process to enable the court to appoint counsel, as needed, for a person whose disability interferes with their ability to have meaningful access to the court process. The court may request that the individual provide documentation from a health care professional justifying the need for counsel based on their knowledge of the individual and the individual’s disability
53. The legal community needs to address means for providing counsel for unrepresented parents in custody matters, including providing counsel paid for by the state, pro bono services, limited representation and alternative dispute resolution.

54. All family court professionals should receive training on a regular basis on parents with disabilities and their children.
55. As many litigants in custody matters appear to believe that trial judges make custody decisions in a way that reflects gender bias, judicial education should address explicit and implicit bias.
56. Parents should have more access to alternative dispute resolution and mediation to resolve custody disputes, where appropriate.
57. Community education should encourage parents to be involved in the lives of their children.
58. Where the parents have disparate incomes and economic resources, courts should make adequate and predictable awards of attorney's fees to the lower-income parent. This recommendation could be accomplished either through statutory or rule change.
59. The downward adjustment of child support in cases of shared physical custody needs to be further investigated, particularly in cases where the child's principal household lacks adequate resources.
60. Further investigation of Child Support guidelines should be conducted to determine whether the guidelines should provide a sufficient self-support set-aside for each parent.
61. Further investigation should be conducted of child support administrative practices, including imputation of income, to ensure that low-income parents are not required to pay more child support than is reasonable.