

**STATE BAR ASSOCIATION OF NORTH DAKOTA
Custody And Visitation Task Force**

**REPORT TO THE JUDICIAL PROCESS COMMITTEE
JUNE 24, 2008**

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Good afternoon, I am Sherry Mills Moore, the chair of the Custody and Visitation Task Force. This is the group that has worked over the past nine months. The Task Force was formed because SBAND made a commitment in the last session to study custody and visitation in this state and consider what could be improved. It is comprised of judges, legislators, lawyers and lay persons. The Task Force reviewed practices in other states with an eye towards what does and does not seem to work well in our own state. We met with proponents of the failed Initiated Measure #3 as well those circulating a proposed new custody measure to meet with us. We then tackled the issues that we thought most in need of work, or perhaps most amenable to repair. The proposals were approved by the Board of Governor's of the State Bar Association of North Dakota. We ask you to submit it to the 2009 Legislature as an interim committee bill. Here is what it does.

SECTION 1.

(Page 1)

In this section, §14-05-22 is amended by making technical changes so the language conforms to the new terminology.

Subsections 3 and 4 and 5 (Page 2, lines 1-25). The language in these subsections is deleted from this section and moved to Section 4 (Page 4, lines 33-35 & Page 5, lines 1-22).

SECTION 2.

(Page 2)

In this section, §14-05-23 is amended by making technical changes so the language conforms to the new terminology. There is a typographical error on page 2, line 35, "and" should be deleted and replaced with "an".

SECTION 3.

(Page 3)

In this section, §14-09-05.1 is amended by making technical changes so the language conforms to the new terminology.

SECTION 4.

(Page 4)

The following **five** new sections are added to chapter 14-09. These sections provide much of the substantive and procedural changes contemplated by the Task Force.

I. Definitions

(Page 4, lines 11-22).

The definitions are included to flesh out the later sections. Although seemingly self-explanatory, they serve to delineate the rights and responsibilities of parents to their children. The following explains each definition and provides examples of what falls within the definition.

Decision making responsibility is the thinking part of parenting. Currently, this would be included in the term *joint legal custody*. Examples would be to decide whether or not a child is held back to repeat a grade, to go forward with a medical procedure, or which school the child goes to. It does not involve how much child support a parent would pay, nor does it override a division of parenting time between parents.

Parental rights and responsibilities is the umbrella term in that it covers all rights and responsibilities a parent has under this chapter as related to custody.

Parenting plan is the written plan parents submit to the court outlining how they are going to go forward in the future with regard to their child. The details of what should be included in a parenting plan and the interaction between the parents and the court are included in a later section.

Parenting schedule is the time when the child would be with each parent. Under current terminology this would spell out the terms of visitation.

Residential responsibility is the obligation to provide a home for the child.

Primary residential responsibility is the parent with more than 50% of the residential responsibility. This would in essence be equivalent under current terminology to the parent who has physical custody.

II. Parental rights and responsibilities – Best interests and welfare of child. (Page 4, lines 25 – 35 & Page 5, lines 1 - 22).

Subsection 1 consolidates four prior code sections, NDCC §§14-09-04, 14-09-05, 14-09-06 and 14-09-06.1. Section 12 of the bill draft repeals these sections.

The existing sections gave power to the court to allocate custody of children according to the children's best interest and recognized that with regard to custody mothers and fathers are to be treated equally. The existing sections distinguished between children of married and unmarried parents, and were duplicative and confusing. Rather than continuing to distinguish between children on the basis of their parent's marital status, these have been consolidated and clarified. These particular changes are not substantive nor intended to modify current case law.

Subsections 2, 3, and 4 were moved from §14-05-22 and changes were made to reflect the new terminology.

III. Parenting Plans – Contents
(Page 5, lines 24 – 35 & Page 6, lines 1- 10)

This section establishes the substance and process for parenting plans. Currently this is done, to some extent, by proposals or agreements submitted to the court. This new section guides parents in developing **parenting plans** which delineate how they are going to handle their children in the future when they do not live together. Parenting plans explain when the children are going to be with each parent and how the parents are going to make decisions about their children.

Subsection 1 requires parents to develop and file the plan with the court. If they are unable to agree, the court will establish a plan based on the best interest of the child.

Subsection 2 establishes the minimum terms to be covered in the parenting plan. These include decision-making responsibility, information sharing and

access, legal residence, residential responsibility and parenting schedule, transportation and exchange of the child, procedure for review and adjustment and methods of resolving disputes.

Paragraph a - Decision-making responsibility is defined in the definition section and has its own section which is discussed below. The parenting plan will need to identify how decisions are going to be made. This means that the parents have to state which parent is going to make decisions, or how they are going to make them together. They may allocate decision-making differently for major decisions or routine decisions, but both need to be addressed. A major decision would be whether a child gets braces. A routine decision would be what time the child goes to bed. Typically, routine decisions are left to the parent who has the child at the time the decision needs to be made. Major decisions are either allocated to one parent or shared in some fashion.

Information sharing and access refers to how each parent is going to be able to communicate with the child and learn what is going on in the child's life. Currently the parents each have specific access rights under § 14-09-28. These rights are included in the section entitled Parental Rights and Responsibilities. Certainly parents can address additional communication methods in their parenting plans.

Legal residence of a child for school attendance settles the issue of where the child will go to school.

One of the most significant terms of the parenting plan will be when the child is with each parent. Residential responsibility and parenting responsibility address this issue. Under the plan they will decide how to manage holidays, weekends, weekdays, and summers. Under existing law, this is referred to as the custody and visitation schedule.

Transportation and exchange of the child is self explanatory. The safety provision is included to address concerns of domestic violence.

Parenting plans will cover an extended time period during which life change is inevitable. Procedure for review and adjustment of the plan describes how parents will address changes that arise in the future.

Under the current system when parties have trouble agreeing to changes the most common solution is to go back to court. Under the proposed bill parents will agree to how they are going to try to resolve disputes. Those methods may include mediation or talking to a professional – counselor, minister. It does not eliminate the option of going to court.

IV. Decision-making responsibility.
(Page 6, lines 12 – 29)

This new section provides guidance to the court regarding the decision-making process. Generally, the court must accept the parent's decision-making agreement unless the court makes written findings that the agreement is not in the best interest of the children. If the parents do not agree, the court allocates the decision-making authority based on the child's best interest. Either way, if the decision-making is shared in some respect, the allocation must address a method of dispute resolution if the parent's do not agree. For example, the allocation may say if the parents do not agree, dad will decide. Or, it may say, if they do not agree, they will work with a third party to resolve the dispute.

Existing law specifically addresses issues of domestic violence and custody. Nothing in this proposed new law is meant to in any way change the way present law deals with domestic violence. The new section requires that domestic violence be considered in the allocation of decision-making responsibility. Because domestic violence can impact the dynamic of parental interaction, this new provision requires specific findings to support a joint-decision making order. This section also requires the court to consider the child's best interest as well as safety of the parents and children.

V. Parental Rights and Responsibilities
(Page 6, lines 31-34 & Page 7, lines 1 – 21)

Currently NDCC § 14-09-28 addresses parental rights and responsibilities. Those provisions have been moved to this section. Section 12 repeals the current statute.

SECTION 5.
(Page 7)

This section amends §14-09-06.2 which deals with the best interest of the children. While maintaining the general structure of the best interest analysis and most of the substance, several factors were clarified and new factors were added. In addition, changes were made so the language conforms to the new terminology.

In **paragraph (1) subsection (a)** language was added at the end to focus the court's inquiry on the ability of the parents to provide nurture, love, affection and guidance.

Paragraph (b) language was re-written to focus the court's inquiry on the ability of the parents to provide adequate food, clothing, shelter, medical care and a safe environment.

Paragraph (c) language was re-written to focus the court's inquiry on the ability of the parents to provide for the child's present and future developmental needs.

Existing factors in **paragraphs (d) and (e)** deal with the stability of the child's environment both from a historical perspective, as well as projecting into the future. The language in the two existing paragraphs is confusing.

The proposed language in paragraph (d) combines and clarifies the concepts embodied in existing paragraphs (d) and (e). Proposed paragraph (d) requires the court to look at the sufficiency and stability of each parent's home environment, the length of time the child has lived in each home and the desirability of maintaining continuity in the child's home and community. The amendments are not intended to eliminate the court's ability to consider the permanence of the family unit, a consideration embodied in existing paragraph (e). This factor also now codifies the impact of the extended family, something the court has long done in considering a child's best interest.

New **paragraph (e)** adds a factor to best interest analysis dealing with the ability and willingness of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child. This factor was added because both parents are important to a child. This is language used by many other states and recognizes the need of a child to be close to both parents taking into consideration the practical reality of two parents raising a child when they do not live together.

The amendments to **paragraphs (f) and (g)** narrow the court's inquiry to the impact on the child of the moral fitness and mental and physical health of the parents. At times this has been interpreted by the parties as a means of punishing the other parent for conduct which did not affect the child.

Under **paragraph (h)** the court looks to the child's record in the home school and community. The new language clarifies that the court should also consider the potential effect of a change.

The amendments to **paragraph (i)** deal with the preference of a child. The preference of a child has always had a place in custody decisions. A change to the language is being recommended because too many young children are dragged into court by a parent and pressured to choose between parents. The

proposal would give a child's preference substantial weight, but only if the court finds the child is sufficiently mature to make a sound judgment. So important is the maturity of the child to the preference that the burden of proof must be met by clear and convincing evidence. The court also shall consider whether the preference is based on undesirable or improper influence. The proposal is not intended to bring more children into court, but rather to keep children out of a no-win situation.

Paragraphs (j) and (m) are amended by making technical changes so the language conforms to the new terminology.

SECTIONS 6 AND 7.

(Pages 9 – 11)

In these sections, §§14-09-06.3 and 14-09-06.4 are amended by making technical changes so the language conforms to the new terminology. In addition, currently if a party cannot pay for a custody investigator or guardian ad item, the court can order the county to do so, but it is not always clear which county should pay.

Under the proposal, the county in which the child resides at the time the action is commenced would pay. Section 7 of the submitted draft has a typographical error in the title. It should read, as follows: "*Appointment of guardian ad litem or child custody investigator in proceeding involving parental rights and responsibilities – Immunity.*"

SECTION 8.

(Page 11)

In this section, §14-09-06.6 is amended by making technical changes so the language conforms to the new terminology.

One other change is made for purposes of clarification of process, but was inadvertently not underlined on the draft. On page 12, lines 9 and 10, language was added to clarify that a hearing is not to be set in a modification of primary residential responsibility case until after a court makes a finding of a primary facie case. Currently, courts, on occasion, set the hearing first which defeats the purpose of having a screening process by the court before the parties have to undergo the emotional and financial expense of a full blown hearing.

SECTION 9

(Page 13)

In this section, §14-09-07 is amended by making technical changes so the language conforms to the new terminology.

This section of the law governs parents who want to move their children out of state. To deal with parents who have equal parenting time with their children, the North Dakota Supreme Court in **Maynard v. McNett**, 2006 ND 36, 710 N.W.2d 369, established that these parents must also have the primary residential parenting time modified in order to move. This statute change simply codifies that decision.

SECTION 10.

(Page 14)

In light of the many instances in which “*custody*” and “*visitation*” are used in the code, and to avoid amending all those sections, this catchall section is proposed. Where the terms “*custody*” and “*visitation*” are used elsewhere in the code, they will be defined by the new terminology.

SECTION 11.

(Page 14)

Section 11 creates a new Chapter 14-09.2 which establishes a parenting coordinator program. Interpreting and applying parenting time orders is a frequent hotbed for dispute between parents. Most parents are able to work through this but some high-conflict families simply cannot without the assistance of the court. Because access to the court is not as swift as some problems need, and the high cost of the court process, the problems remain unresolved, or involves repeated court appearances. This means that the children of these families live in a nearly constant state of tension between their parents. Other states have dealt with this by the use of parenting coordinators.

§14-09-.2-01 defines a parenting coordinator as a neutral person who helps to resolve parenting time disputes. The section also sets out the duties of a parenting coordinator. These include assessing whether that has been a violation of an exiting order, resolving one-time or ongoing disputes, facilitating negotiations and if necessary making a decision to resolve the dispute.

§14-09.2-02 sets out the procedure to appoint a parenting coordinator.

§14-09.2-03 directs the Supreme Court to establish qualifications of the parenting coordinators and make a roster available to the public.

§14-09.2-04 establishes the timeframes for the work of the parenting coordinator.

§14-09.2-05 outlines the procedure for allocating the fees of the parenting coordinator between the parties. If the parties cannot pay for the coordinator, there is no provision in this proposal for the state or county to pick up the cost.

§14-09.2-06 deals with confidentiality. Just as with mediation, to encourage an open discussion by the parties trying to resolve the disputes, parties need to know that what they say will not be presented to the court. The only limitations on that arise with respect to matters which are mandated to be disclosed, such as abuse of a child. In addition, under the fee paying structure, a parenting coordinator could advise the court about bad faith of one of the parents.

§14-09.2-07. As with other arms of the court, parenting coordinators would be granted immunity from civil suit for ordinary negligence.

§14-09.2-08. This section delineates how the parenting coordinator's appointment is modified or ended.

SECTION 12

(Page 17)

This section repeals 14-09-04, 14-09-05, 14-09-06 and 14-09-06.1 because they are consolidated into subsection 1 of the new section entitled **Parental rights and responsibilities – Best interests and welfare of child** located on page 4.

NDCC 14-09-28 is repealed because it is incorporated in Section 4 - **Parental Rights and Responsibilities**, page 6, line 31 – 34 and on page 7, lines 1 - 21.

Conclusion

This completes my testimony about the changes that we are recommending. I want to thank you for giving us the opportunity to present these to you today. If you have any questions I am here to answer them. If any arise in the future feel free to contact SBAND through Bill Neumann at 255-1404 or bill@sband.org , or me at 222-4777 or by email to sherry@millsmoorelaw.com. Thank you.