

INFORMAL CUSTODY TRIAL: A Child-Focused Alternative

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Idaho law requires the determination of child custody based upon the best interests of minor children, Idaho Code § 32-717. Traditional adversarial trials often focus on past bad acts of the parents and offer the trier of fact little evidence regarding a prospective custody order which will serve the best interests of the affected children. In many cases these traditional trials substantially increase the level of conflict between the parents, which is contrary to the best interests of the minor children. The Informal Custody Trial (ICT) is one alternative process intended to produce a more child-focused custody determinations. The ICT was developed through a pilot project of the Children and families in the Courts Committee in the First Judicial District beginning in 2004.

Attempts to expand the use of the model beyond the First Judicial District have been slowed as many judges and attorneys were uncomfortable using a trial process which was not expressly authorized by statute or court rule. In 2008 the Supreme Court issued Idaho Rule of Civil Procedure 16(p) which authorizes the ICT as an alternative to traditional trials of child custody cases. The full text of the rule is reproduced at the end of this article. The goal of the ICT is to better serve the best interests of minor children in child custody cases while minimizing the conflict between the parents of those children. This is consistent with the mission statement of the Children and the Families in the Courts Committee which is, "To Promote Respectful, Collaborative and Timely Problem Solving of all Family Court Cases."

If the ICT model is used correctly it increases the ability of the parents to co-parent and to cooperate in raising their children when the parents are no longer together. For further information regarding the development and implementation of the ICT rule, See *The Advocate*, official publication of the Idaho State Bar, Vol. 52; issue No. 1, pages 14-17. The author thanks the Advocate staff and the Idaho State Bar for their consent to reproduce parts of that article here.

This article will outline the procedures for trying a case under the ICT model and will offer insights into how to screen cases and parties to determine if the ICT model is appropriate. There will also be some practice pointers from the author and from attorneys experienced in the model.

What is an ICT:

The ICT is a voluntary alternative trial process which can only be used with the consent of the parties, counsel, and the court. Rule 16(p). At its simplest and ICT is a child custody trial conducted where the parties have waived the application of the rules of evidence and the normal question and answer manner of trial. Without the rules of

evidence parties can testify to matters that normally would be excluded by the rules of evidence. It is then critical that the court understand that some of the evidence in the record would have been **exclude** as unreliable under the rules of evidence. The court must then weigh the reliability of such evidence and determine what, if any weight to give to it. For example, just because evidence such as hearsay **comes in (is admitted?)** does not mean the court will give it much weight. Just because the plaintiff puts in a dozen character reference letters from his or her family does not mean the court will find the evidence to be probative.

Because the parties are waiving a substantial right it is very important that the parties be required to execute and file the Supreme Court approved waiver and consent forms. Those forms are reproduced at the end of this article and can be found on the Idaho Supreme Court website, www.Isc.idaho.gov, under rules and forms. The rule also requires monitoring of the use of the model. If the form consent and waivers are filed ISTARS keeps track of the cases so statistical and survey data can be collected. The use of the approved waiver and consent forms also assures that the parties consent to the process will be determined to be voluntary and informed.

The ICT trial is conducted on the record as follows:

1. Any expert reports are admitted and each party is allowed to cross-examine the expert in the normal question and answer format, but without the rules of evidence.
2. The Plaintiff is sworn and is allowed to address the court in narrative form regarding wishes for custody. This testimony is usually given from counsel table. During this process the party may introduce any exhibits.
3. Defendant then puts on his or her case in chief in the same fashion.
4. Each party is then afforded a chance to offer rebuttal testimony.
5. The parties or counsel then argue.
6. The court takes the matter under advisement.

The process itself is simple as the list above shows. However there are many considerations that must be made. First, it is critical that the parties be allowed to talk themselves out. Due process requires that they be fully heard. Therefore, time limits should not be imposed. Counsel are not allowed to question witnesses. Therefore it is important that the court allow counsel to quietly talk to their clients, exchange notes with their clients, and take recesses during testimony. This allows counsel to provide necessary input into the case. Counsel should also be asked by the court after their client finishes testifying if there are any other subjects the attorney wants the court to inquire about.

The focus of the testimony should be on what the party wants for a custody schedule, why they want that schedule, why it is in the best interests of the affected children, and how it protects the other parent's right to have a meaningful parental relationship with the children. The last point above is critical as it forces the party to look

at the issue from the other parent's perspective. When the witnesses stray from that focus the court should politely redirect them, *e.g.* "Mr. X that historical event is interesting and I know it is important to you, but what I have to decide is what is best for your children in the future. Could you please help me in looking toward the future and how we can best serve your children's needs?"

The court should also be attentive to how the respective parties present their cases. Some people just do a better job of presenting their positions. When a party is not good at volunteering evidence the court needs, the court will have to ask more questions. In the ICT model the court can inquire any time it feels the necessary evidence on a point is lacking. The court should also inquire regarding any of the Idaho Code §32-717 factors the parties has not addressed and as to any child support calculation data that is lacking. Self-represented parties usually need more prompting from the court.

The best practice is to let parties testify from counsel tables so they can comfortably have eye contact with the judge and the other party. This seems to put the witnesses at ease and creates a collaborative **almost conversational** atmosphere. One of the observations of the survey referenced in the Advocate article is that parties leave the ICT with the feeling they have been able to tell the judge what they want and they have been fully heard without undue interruption. Allowing testimony from counsel table promotes that perception.

Counsel need to prepare their clients for ICT testimony. There needs to be extensive consultation before the trial with strategy and testimony development regarding the prospective child's best interests focus of the testimony. The prospective focus seems simple, but it changes the whole focus of the case to positive child-centered problem solving. The author has watched several attorneys using the ICT over a relatively long period of time and has seen the subtle, but profound change in focus and tactics. I see these same lawyers coming to a tradition trial and asking their client, "What custody schedule do you want? Why do want that schedule? Why is that schedule in the best interests of your children? How does that schedule protect the other parent's right to have a meaningful parental relationship with the children?"

The author recommends that an attorney first start the ICT process by watching a self-represented case and then by trying a case using the model where the other party is self-represented. The author has a recording of an early ICT and will make a copy for anyone who asks and who sends him a blank CD. There is also a transcript of that proceeding that can be made available upon tender of postage and copy costs. The model is particularly well suited to move away cases because the outcome is so important and because the parties often cannot resolve these cases short of a trial.

Benefits of ICT:

As compared to a traditional trial an ICT model offers the following benefits to the affected children:

1. Parents are able to lessen their conflict because much of the testimony is child focused.
2. The self-represented parents are able to effectively present a case.
3. Costs are reduced as an ICT takes about two hours as opposed to days.
4. The wishes of children are more easily introduced.
5. Reduced animosity between the parents gives the parents an opportunity to leave the ICT with an improved capacity to co-parent and with a better understanding of the other parent's legitimate parenting needs and concerns.
6. Relocation cases can be efficiently tried.
7. Since less trial time is required these cases can usually be tried sooner.
8. These factors together protect the children, lessen parental conflict, preserve family assets for family needs, and improve child wellbeing.

(Advocate, vol. #52; Page14)

Parents are also potentially benefit from the ICT as follows:

1. Parents avoid the trauma of testimony about the other parties' perceptions of their failings.
2. Parents have the potential to see the child custody case from the other parent's perspective.
3. Parents can be heard in a conversational way without the frustrations of question and answer testimony, especially on cross-examination.
4. Costs of litigation and delay are substantially reduced.
5. Parents are encouraged to focus on the needs and best interests of their children instead of their own hurt feelings.

The court also benefits from the process in several ways:

1. The court can re-focus the parties to present evidence that relates clearly to the best interests of the children and the statutory factors. This type of evidence is far more useful to the court than is the usual history of the parents' conflict and negative feelings for each other.
2. The court has a better record from which to make sound findings of fact and conclusions of law.
3. Substantially shorter trials make better use of the court's time. This allows cases to be completed closer to time standards.
4. The parties' perception of the judiciary is improved as the ICT is often seen by the litigants as an attempt by the judge to help the litigants and their children.

5. Implementation of the ICT places Idaho courts in the forefront of innovation and service to families and children in the courts.
(Advocate, vol. #52; Page14)

Screening:

Cases need to be carefully screened for appropriateness for the ICT model. The model is generally not appropriate for cases involving special needs children, allegations of sexual or physical abuse, substance abuse, or domestic battery. In any case where one of the parties seems to have a strong power of intimidation over the other party the model is problematic. Counsel needs to carefully screen cases with their clients for these issues. Since the rule of evidence do not apply either party may say anything they want about the opposing party subject only to risks of a perjury or contempt proceeding. If there are serious concerns about the opposing parties' willingness to lie about substantial and material issues, counsel should only go forward with an ICT with extreme caution. The model is not suited to trial of property and debt, contested paternity, or fault divorce issues. Those matters can be bifurcated for a trial following the ICT.

In an ICT child support issues can be tried using **the form** income verification affidavits, and child support calculations **form** from the child support guidelines supported by brief testimony as necessary. However, if there are complex issues related to determining income of one or more of the parties for child support calculations the child support issue should also be tried in the traditional manner.

For screening purposes the attorney needs to carefully inquire of his or her client regarding any issues that clearly need to be developed through direct and cross-examination. Where confrontation and credibility are expected to weigh heavily in the case, the case is probably not proper for the ICT model.

Limitation on scope of appeals:

The scope of any appeal is severely limited under the ICT. Section B of the form waiver provides as follows:

“My rights on appeal are extremely limited. I understand that if I appeal, the court will be reviewing a transcript of the hearing and I will not be able to challenge any of the documents or testimony that was considered during the Informal Custody trial process. The only issue on appeal will be whether the court abused its discretion in reaching its findings and conclusions and it is unlikely an appeal will result in a different result.”

This issue should be carefully discussed with the client before the consent is executed and filed.

The Bar Perspective:

The author asked several attorneys who have used the ICT extensively to provide some insights into the ICT from the perspective of counsel. Casey Wall of Walker and Wall and Jennifer Brumley of Amendola and Doty have responded. A summary of their comments are generally as follows:

- Different judges try these cases differently. It is important to meet with the judge in advance to determine how the case will proceed.
- If a client has important evidence they want to present **that could that would** be excluded, ICT may be a good idea.
- Some people will fear public speaking to the point they cannot present their case well in an ICT.
- The ICT saves money.
- The ICT offers an opportunity to prove the wishes of children as to custody.
- Client preparation is critical.
- ICT saves third party witnesses from coming to court.
- Clients feel as if they are heard by the judge.

Conclusion:

ICT is a new voluntary process for trying child custody cases which is cost effective and which focuses evidence on the best interests of minor children. The model encourages parents to cooperate for the benefit of their children. It is important to prepare clients and to screen cases for appropriateness of the ICT model. The ICT model is not the right approach for some cases and families. The ICT model promotes respectful, collaborative and timely problem solving of child custody cases.

About the Author

Judge Simpson graduated from California State University, Chico with honors in 1981 with dual majors in Geography and Political Science. He graduated *magna cum laude* from Gonzaga University School of Law in 1984, and was admitted to the Idaho State Bar that year. He is also a member of the Idaho Federal District Bar and the United States Supreme Court bar. At Gonzaga he was a Thomas More Scholar. Judge Simpson practiced law for 16 years in Wallace, Idaho in the firm of Hull, Branstetter, and Simpson, Chartered. In 2000 he was appointed as a Magistrate Judge in Kootenai County in 2000 and has served in that capacity since. Judge Simpson currently serves on the Idaho Supreme Court's Legislative Review Committee and is the Chairman of the Idaho Supreme Court's Children and Families in the Courts Committee. He was the 2008 recipient of the Family Law Section of the Idaho State Bar's Award of Distinction for 2008.

The Informal Custody Trial (ICT) Rule 16(p):

Informal Custody Trial.

(1) An Informal Custody Trial is an optional alternative trial procedure that is voluntarily agreed to by the parties, counsel and the court to try child custody and child support issues. The model requires that the application of the Idaho Rules of Evidence and the normal question and answer manner of trial be waived.

Once the waiver is obtained the matter proceeds to trial by consent as follows:

- a. The moving party is allowed to speak to the court under oath as to his or her desires as to child custody and child support determination. The party is not questioned by counsel, but may be questioned by the court to develop evidence required by the Idaho Child Support Guidelines and child custody evidence required by Idaho Code § 32-717.
- b. The court then asks counsel for that party, if any, if there are any other areas the attorney wants the court to inquire about. If there are any, the court does so.
- c. The process is then repeated for the other party.
- d. If there is a Guardian ad Litem or other expert, the expert's report is entered into evidence as the court's exhibit. If either party desires, the expert is sworn and subjected to questioning by counsel, parties or the court.
- e. The parties may present any documents they want the court to consider. The court shall determine what weight, if any, to give each document. The court may order the record to be supplemented.
- f. The parties are then offered the opportunity to respond briefly to the comments of the other party.
- g. Counsel or self-represented parties are offered the opportunity to make legal argument.
- h. At the conclusion of the case, the court will make a decision.

(2) Consent and waiver. The consent to and waiver to the Informal Custody Trial shall be given verbally on the record under oath or in writing on a form adopted by the Supreme Court.

The Informal Custody Trial (ICT) Waiver Form:

**IN THE DISTRICT COURT OF COURTDISTRICT JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF _____ COUNTY
MAGISTRATE'S DIVISION**

_____) Case No: _____
 PETITIONER,)
) WAIVER OF THE RULES OF
) EVIDENCE FOR INFORMAL
_____)) CUSTODY
 RESPONDENT.)
_____)

I consent to proceed as follows:

Section A: My Rights

- **I have been told I should discuss the Informal Custody Trial process with my lawyer. I have had the chance to discuss the Informal Custody Trial Process with a lawyer or I have decided not to discuss the process with a lawyer.**
- **I waive the normal question and answer manner of trial and I agree the court may ask me questions about the case.**
- **I agree to waive the rules of evidence in this Informal Custody Trial. Therefore:**
 - **The other party can submit any document or physical evidence he or she wishes into the record.**
 - **The other party can tell the court anything he or she feels is relevant.**

Section B: Voluntary Acknowledgement

- **I understand the following:**
 - **My participation in this Informal Custody Trial process is strictly voluntary, and that no one can force me to agree to this process.**
 - **Documents, physical evidence, and testimony will be admitted during the Informal Custody Trial process, and the court will determine what weight will be given to the evidence.**

- **My rights on an appeal are extremely limited. I understand that, if I appeal, the court will be reviewing a transcript of the hearing and I will not be able to challenge any of the documents or testimony that was considered during the Informal Custody Trial Process. The only issue on appeal will be whether the court abused its discretion in reaching its findings and conclusions and it is unlikely an appeal will result in a different outcome.**
- **I have told my lawyer (if I have one), all the details of my situation or I have considered all the facts I believe the other person will testify to about me, whether true or not.**
- **I give this matter to the court freely and voluntarily to make a decision on the terms of child custody and child support.**
- **I am confident I understand the Informal Custody Trial process.**
- **I have not been threatened or promised anything for agreeing to this Informal Custody Trial process.**

Dated this day of _____.

Printed Name

Signature

ICT Waiver Form:

IN THE DISTRICT COURT OF COURTDISTRICT JUDICIAL DISTRICT

**OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF _____ COUNTY
MAGISTRATE'S DIVISION**

_____)	Case No: _____
PETITIONER,)	
)	ISTARS ROA CODE: CICT1
)	
_____)	CONSENT TO INFORMAL CUSTODY
RESPONDENT.)	TRIAL
_____)	

I consent to proceed as follows:

- 1. The person bringing the action before the court presents their case first, under oath. The person is not questioned by lawyers, but may be questioned by the court to develop evidence required by the Idaho Child Support Guidelines and child custody evidence required by Idaho Code 32-717.**
- 2. The court asks the lawyer, if any or the moving party if there are any other items to be discussed.**
- 3. The process is then repeated for the other person.**
- 4. If there is a guardian ad litem or other expert, the expert's report is entered into evidence as the court's exhibit. If either party or the court desires, the expert may be questioned under oath.**
- 5. The parties present any documents they want the court to consider.**
- 6. Next, the parties may present testimony and documents to contradict or oppose the other party's testimony.**
- 7. The lawyers involved or self-represented parties are given the opportunity to make legal argument.**
- 8. The court will make a decision.**

I consent to submit the following information to the Court:

- The names of my children and their ages.**

- **The current parenting arrangement, (i.e. when the children are with each parent).**
- **What I want for a custody schedule, (i.e. what days, holidays, etc. I want the children with me).**
- **The reasons I want this schedule.**
- **Why my proposed schedule protects the best interests of the children.**
- **How my schedule makes certain the other parent will also have a significant and meaningful opportunity to parent.**
- **My gross income.**
- **Whether I provide health insurance for the children, and if so, what it costs.**
- **The medical co-payments and deductibles for the children.**
- **The amount of support I pay for the support of other children I have with another person.**

I have had the opportunity to ask the court about the Informal Custody Trial process. In order to minimize the negative effects of the parent's separation, I agree to have the court decide the child custody and child support issues in this case.

Dated this day of _____.

Signature

Printed Name