

WEDNESDAY, MAY 22, 2024

PERSPECTIVE

Custody should work for everyone

By Mary Lou Byrne

When families split up, everything they possessed or created becomes subject to a legal post-mortem. Like a body dissected and analyzed during an autopsy, the remains of the marriage are laid out on a table and picked over by legal professionals. A family law bench officer will review the parties' assets and financial records to determine how they should be allocated in the post-marriage world. The court may also make important determinations about non-monetary aspects of the marriage, most importantly custody arrangements for the children.

Unlike financial assets such as real estate and bank accounts, children cannot easily be slotted into spreadsheets and assigned numerical values. Bench officers may be able to make sound and binding decisions about monetary assets, but they are often woefully ill-equipped to effectively manage the dynamics of custody and visitation for disintegrating families. Especially when families have older children, any judicial custody and visitation orders may ultimately be worth less than the paper on which they're printed. It is in the area of custody and visitation, more than any other area of family law, that mediation can be an invaluable dispute-resolution tool.

Custody law

The goals behind judicial custody and visitation decisions are laudable. According to California Family



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Code Section 3020, public policy favors providing children with "frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, or ended their relationship." The parents are encouraged to "share the rights and responsibilities of child rearing" unless such contact would not be in the best interests of the child. It's a stark departure from past times, when women presumptively carried the larger burden of child-rearing. In today's world, the ideal model is a 50-50 split.

Assuming both parents are willing and capable, this should be achievable. What could be better

for a child than spending quality time with both parents? For toddlers and young children, parents can coordinate drop-off and pick-up times in a way that is least disruptive to everyone's schedules. The result may not be to-the-minute equal, but if it creates roughly comparable sharing of time with the children, everyone benefits.

Older children

Family law courts are tasked with making decisions for those who cannot resolve these issues on their own. Infants and young children are clearly incapable of making custody and visitation choices for themselves, but when the minor

in question is a tween or teen with friends, activities, and possibly a driver's license, the court ignores the wishes of the "child" at its peril.

That "child" may have absolutely no interest in spending significant time with the father who left home to start a new family, or with the mother whose idea of parenting is nothing but a constant stream of criticism. Even with a custody and visitation order in place, what is a parent to do when faced with such a recalcitrant offspring? Do you strap that pre-adult into your car and haul them off to a place they don't want to be? Even if such a thing were possible, it is certainly not desirable.

Yes, a bench officer can talk

with these minors about the rationale behind the orders, but it will be only talk. For an older child who is alienated from the parent, realistically there can be no forced visitation. Any contact will be on that teen's terms or not at all.

Courts may order custody and visitation, but ultimately it is the parents who must implement any such order. What happens when a teen with agency and angst refuses to go to the other house? How do ex-spouses navigate challenging calendars? In the real world, the court's plan may well be dead on arrival. In the worst-case scenario, this leads to more litigation and more disruption for everyone involved.

Mediating custody

Parents know better than courts what is going on in their kids' lives and brains. They also know their own calendars and schedules far better than the judge. If they can fashion a plan that reflects what is happening in their world, they can and should have the final say about where and when their kids spend time with each of them.

Courts can address money issues with relative ease, but all too often they do not have the time or resources to resolve complicated custody issues. Even a third-par-

ty custody evaluation, a tool often used by the courts, can at best provide only a snapshot of very complicated ongoing family dynamics, and at worst can lead to the court's relying on incomplete or incorrect information. Parties should be able to structure custody and visitation based on the ongoing realities of their lives, including the challenging dynamics of relationships with their teenagers. Mediation is the best path toward resolving these extremely complex issues.

Of course, the first step to a successful custody mediation is for the warring parents to put down their legal weapons and focus on what is best for everyone involved, and counsel should do their level best to encourage this even in the bitterest cases. Divorcing or separating spouses who come to mediation with the mutual goal of creating a workable post-split relationship with their children can achieve success far beyond what any court could hope to achieve. The agreements the parties reach together will stand the test of time because they reflect mutual understandings - about their lives and their children's lives.

Instead of being set in stone these agreements can be tweaked and nuanced to address unusual circumstances such as geographic

challenges, sports participation, or special academic or medical needs. For example, in one recent case the parents of a disabled child agreed to let the child stay in the marital home while the parents took turns moving in and out to spend their custodial time with her. In another case, one parent's professional obligations were so unpredictable that any court-ordered schedule would have been rendered instantly obsolete. However, in mediation the parents were able to come up with a mechanism for dealing with this highly volatile work schedule in a way that worked for everyone concerned and still allowed that parent substantial custody time. In still a third case, it was mutually decided that the teenager would be better off spending most of his custody time with a non-parent relative, with visitation time with both parents. In each of these situations, everyone involved recognized the evolving nature of relationships and worked to accommodate the feelings and fickleness of the children and teens.

Children of divorce and separation - at all ages - are already dealing with substantial trauma. Rather than forcing older children to comply with arbitrary plans dictated by a court of law, mediated agreements provide the best

opportunity to create a workable custody and visitation framework by thoughtfully and flexibly addressing their unique issues and concerns.

Commissioner Mary Lou Byrne (ret.) is a neutral with Alternative Resolution Centers. She served almost 19 years on the Los Angeles Superior Court bench, where she presided over cases involving family law, criminal law, restraining orders, infractions, and unlawful detainers. As a bench officer she put her mediation skills to work, settling cases involving all aspects of family law as well as civil harassment and criminal matters, in her own court as well as those assigned to other judicial officers.

