MEDIATING CUSTODY DISPUTES

By Franklin R. Garfield

Mediating custody disputes challenges a neutral for many reasons. Among them: The parties have strong feelings about their children. The vast majority of parents state unequivocally that "their children are the most important things in the world to them." Unlike the laws that govern the disposition of the parties' community property and support, there is nothing in the statutes or the appellate cases that tells the parties how to co-parent their children; specifically, how those children should go back and forth between two households.

Both parties are all in favor of a schedule that is in the children's best interest. However, they often have differences of opinion with respect to the parameters of that schedule. Especially if she has been the primary care giver, Mom may emphasize the importance of the children having a home base. Of course, Mom invariably says that Dad can see the children whenever he wants. Dad is unwilling to be marginalized; he typically demands an equal timeshare.

So how can a mediator provide the parties with the authoritative information and guidance they need to resolve that issue?

First, the law does provide a starting point. According to Section 3020(b) of the *California Family Code,* both parents are entitled to frequent and continuing contact with their children as a matter of public policy.

Second, there are a limited number of ways that children can go back and forth between two households. For older children, Mondays and Tuesdays and alternating weekends with one parent and Wednesdays and Thursdays and alternating weekends with the other parent (2-2-5-5 for short) works well, although teenagers sometimes prefer to alternate weeks. Neither of those schedules works well for very young children who need more frequent contact with both parents.

Third, there is no age at which a child is legally entitled to resolve the issue. As a practical matter, however, the older the child, the more likely the child is to insist on a schedule that works for him or her. Teenagers in particular want it the way they want it.

Fourth, providing the parties with a comprehensive parenting plan facilitates agreement. On the one hand, a comprehensive parenting plan that covers vacations, holidays and other special days and incorporates a parental code of conduct does not address the schedule of physical custody during the school year. On the other hand, it does help the parties see how close they are to being done instead of becoming discouraged by an apparent impasse. The prospect of being done, which is often a shared goal, provides an additional incentive to agree on a schedule.

Fifth, the alternative to a compromise that both parties can live with is protracted litigation that is prohibitively expensive. Since most judges are wholly uninterested in scheduling a trial to adjudicate a schedule of physical custody, the process begins with the appointment of a child custody evaluator pursuant to Section 730 of the *California Evidence Code*. That evaluation may involve meeting with the parties and their children, observing each party with the children separately, administering tests to the parties, and interviewing doctors, teachers, relatives, neighbors, child care providers and any other individuals with information relevant to the evaluation. Commonly referred to as a Section 730 examination, the procedure is governed by Section 3111 of the *California Family Code* and Rule 5.220 of the *California Rules of Court*. A comprehensive evaluation can cost $50,000 or more. If the issue is litigated through trial, the parties may expect professional fees to exceed $100,000.

Compromise is the mediator's stock in trade. Assume a situation in which Mom believes that a 70-30 parenting plan reflects the reality of the parties' situation and Dad is adamant that he will settle for nothing less than 50-50. The obvious compromise is a schedule of physical custody that results in a 60-40 division.

If Dad ends up with the right to physical custody every other weekend from Friday afternoon to Monday morning (extended 24 hours if Monday is a legal holiday) and one additional night each week, the custodial percentages are approximately 65-35. If the parties divide physical custody equally during Spring break and Winter break, and Dad has the additional right to take the children on vacation for up to three weeks a year during their Summer vacation, the custodial percentages get very close to 60-40. The parties could also increase Dad's custodial time during the Summer when the children are out of school and the need for a home base is less acute.

A compromise often enables the parties to resolve the issue, especially if they have an opportunity to give it a try for some period of time before making final decisions. Dad often realizes that he spends plenty of time with his children, and Mom often realizes she benefits from getting a break.

If the parties cannot agree on a temporary schedule of physical custody, the Court will order one. In contrast to 50 years ago, when mothers were widely considered the primary custodial parent, today a judge is much more likely to order a 50-50 division of physical custody pending settlement or trial. This prospect increases the pressure on the parties to compromise.

In all but the most intractable cases – for example, when there are legitimate questions as to one party's fitness as a parent – custody disputes can be successfully mediated. This does not involve searching for a "creative solution" that fully satisfies both parties. Although a mediator should be an agent of hopefulness, he or she must also be an agent of reality. Creative solutions are elusive. As a practical matter, the goal is a schedule of physical custody that both parties can live with. Achieving that goal requires the parties to understand that there is no realistic alternative to a compromise.

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