The Family Law Section

COMMENTATOR

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Holiday Issue

Comparing a Lawyer's and a Judge's Thoughts on Proving a Parenting Case

By Judge R. Thomas Corbin, Ft. Myers

Recently a lawyer provided me with an outline of what he thought should be proven under the factors in Florida's "shared parenting" statute (§ 61.13(3)[1] Florida Statutes 1997). When I read over the lawyer's outline, I was struck by how differently I look at a parenting case from the way the lawyer looked at it.

In general, the lawyer's ideas about the proof relevant to a parenting case focused on two questions: (1) which parent was closer to the children emotionally, and (2) which parent had spent more time taking direct care of the children before separation? This focus assumes the standard for deciding a parenting case is: "Which parent is emotionally closer to the children and which parent possesses superior skills and knowledge derived from taking care of the children?" But this is not the standard. The standard is the "best interests of the children" considering all of the factors in § 61.13 (3), not just the emotional closeness of the parent to the children and the skills and knowledge of a parent derived from taking care of the children. This evidence is relevant to some of the factors in the statute, but the law requires the judge to consider all of the factors.

The lawyer's proof needs to include a focus on the best interests of the children as defined by the Florida Statute. Every judge with whom I have talked concerning a parenting case either has a copy of § 61.13(3) taped to his or her bench or has a highlighted and underlined copy in a notebook on the bench. The judges are waiting to hear proof under all of the factors in the statute. A lawyer who ignores the statute will fall short. The lawyer should also prove that his or her client can carry out the public policy of the state: "**It is the public policy of this state to assure that each minor child has frequent and continuing contact with both parents after the parents separate or the marriage of the parties is dissolved and to encourage parents to share the rights and responsibilities, and joys, of childrearing.**"[2]

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Chair's Comments

Examining the Threat Posed to the Profession by Ancillary Business Operation

By Jane Estreicher, St. Petersburg

At the Leadership Conference that the Section Officers attended in Tallahassee in July, I became familiar with one of the most significant issues that will confront the entire Bar - ANCILLARY BUSINESSES. Florida's position will dramatically impact the way we all practice in the future, or rather whether we survive as self-employed professionals or whether we will have a profession at all.

The United States Constitution provides for a separation of powers and the federal government thus functions within a system of checks and balances. The Judiciary operates independently of the other branches of government, and we, as lawyers, are under the control of the judicial branch. This is also the very reason why lawyers maintain their independence free from interference from ownership by other businesses or professions.

Other countries do not embody the same separation of powers, however, and lawyers are often controlled by other business entities, such as accounting firms. Accounting firms have been the main employer of lawyers. Notwithstanding, with the expansion of financial services now provided by banks, other financial institutions and companies, such as American Express, will take over and become providers of legal services outside of the United States.

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In short, the public policy is (1) share the children's time and (2) make joint decisions concerning the children. The legislature believes that if this public policy is carried out the best interests of the children will be served. Note that the legislature has declared the children have the right of contact with both parents. Nowhere in Chapter 61 does it state that the parents have a right of contact with the children when the parents separate or divorce. The law is concerned with the best interests of the children, not the best interests of the parents.

Some lawyers and most parents mistakenly think the issue in a parenting case is "custody" and that a parent might "lose" custody of the children during a divorce.[3] Unfortunately, the words "custody" and "visitation" are in the statute but the issue is not winning or losing custody. A parent can lose his or her parental rights only in a juvenile dependency or adoption action. In dissolution cases, the parties are the parents and they already have custody of their children. Section 61.13 requires "shared parenting." In the statutes of some states, this concept is referred to as "joint custody." In Florida it is defined as follows:

> 'Shared parental responsibility' means a court-ordered relationship in which both parents retain full parental rights and responsibilities with respect to their child and in which both parents confer with each other so that major decisions affecting the welfare of the child will be determined jointly.[4]

The statute requires the judge to order shared parenting unless it would be detrimental to the children to do so.'Therefore, "shared parenting" means (1) sharing the children's time and (2) making joint decisions together concerning the children. Neither parent can dictate to the other, least of all the primary residential parent. When parents separate, both parents have an affirmative duty to foster a relationship between the children and the other parent.[5] It would perhaps be a good thing if the words "custody" and "visitation" were removed entirely from Chapter 61, and were replaced with terms consistent with the concept of shared parenting. "Custody" implies "possession" and "ownership" and this idea is directly opposed to the concept of shared parenting. Parents must share; they do not possess. Also, children do not "visit" with one parent. Prisoners have "visitation" time. With shared parenting, children spend time with both parents and both parents play an equal role in shared parenting. The children may live part of the time in each parent's home. If the children live most of the time at one parent's house, because this is in the children's best interests, that does not give that parent any greater "right" to make decisions concerning the children. On the contrary, it gives that parent a greater obligation to promote the children to the other parent, simply because the children are with him or her most of the time.

The lawyer's approach assumes a "good parent" is a parent who loves and cares for the children. So far so good, but what else constitutes a "good parent?" For instance, if a parent has been substantially involved with the children, knows a great deal about them and is very close to them, but is unable to separate himself or herself from the children sufficiently to allow them to develop a free and easy relationship with the other parent, is that parent a "good parent?" Is that parent acting in the children's best interest or in the parent's selfish interest? A child's genes come one-half from each parent; a child is one-half mother and one-half father; a child wants to be with both parents; a child wants to love both parents. A child is dependent on his or her parents for everything. What if one of the child's parents does not help the child have a relationship with the other parent? Worse, what if one of the child's parents is angry and hostile toward the other parent and denigrates and runs down the other parent to the child? This attack on the absent parent is an attack on the child and convinces the child that he or she is as inadequate as the parent under attack. The child's developing personality needs a healthy relationship with both parents, without interference from either parent. Further, the child requires the help of both parents to establish and maintain a relationship with both parents. Even if that parent has been very involved with the child before separation and is better able to care for the child, how is it in the child's best interest to live most of the time with a parent who does not help the child develop a relationship with the other parent? Clearly, it is not. In short, when the proof assumes that caring for the child is all there is to a parenting case and stops short of demonstrating a parent is capable of sharing the child, the case for making that parent the primary residential parent may fail.

The lawyer's approach to the case is also a projection of the feelings of his or her client. Rage, anger, and rejection of the other spouse are a normal part of separation and divorce. Also, the parents want to cling to the children as the last vestige of their ideal of a family, which is now destroyed. Sharing the children is the last thing many parents want to do and is something many of them are unable to do. Many parents in divorce cases equate sharing with losing. It is easy for a lawyer to be drawn into the client's perceptions and to see the client's agenda as the interests to be advanced, rather than the interests of the child. However, this is not good lawyering. By giving voice to the client's anger and hostility, the lawyer may be losing the case for the client. There are three sides in every parenting case, the child's point of view being the third side. The judge views the case from the child's point of view. The battling parents are often blind to the child's perspective. The pursuit to "win" the children, like the pursuit to "win" some property or alimony, is an effort to vindicate a party's agenda, not an effort to promote the best interests of the children. Children are not a prize to be "won;" they are a responsibility to be borne.

When lawyers project their clients' emotions into the litigation, the process is turned into an extension of the parties' hostilities for each other, not a search for the best interests of the child. Further, the children know their parents are fighting, in court and out of court. Parents who testify that the children are unaware of arguments and disputes between the couple or are unaffected by the parents' anger and hostility

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are demonstrating their ignorance to the court. Conflict between the parents, in an intact marriage or during or after a divorce, is, to quote one court, "intolerable" for the children.[7]

A parent who can see and say nothing good about the other parent may find it impossible to promote the other parent to the children and to facilitate that parent's relationship with the children. Is there nothing worthwhile in the other parent? Of course, in cases where it would be detrimental to the children to be with a parent or have that parent share in parenting decisions, the faults of that parent must be proven. But the campaign to prove the other parent's behavior is detrimental to the children should be carefully considered before being launched. If such a detriment to the children is not proven, the effort itself may prove the party launching the campaign cannot carry out the public policy. Such a parent would pose the greater detriment to the children because of his or her irrational hostility and hatred for the other parent. Good lawyering requires attorneys to determine if there is a basis in fact for their client's perception of detriment to the children and to dissuade the client from the attempt if there is no factual basis. An attorney would be wise to direct the client to counseling to deal with anger and hostility. Anger and hostility for the other parent will surely damage the children and the judge will duly note the anger and hostility in making a parenting decision. In short, lawyers and clients need to carefully count the costs of a campaign for sole parental responsibility and how their client's attitude toward the other parent will impact the judge's decision. Sometimes it is not what is said but how it is said that impresses the judge. Further, if the campaign is to be designated the primary residential parent, lawyers and their clients must understand what shared parenting means and that the primary residential parent has the burden of carrying out shared parenting. If the proof does not demonstrate an ability to do this, all other things being equal, the judge should not designate that parent as the primary residential parent.

If the parents are angry and hostile toward each other, one parent may see the damage and he or she may take the children to counseling. In doing so, the parent is ignoring that the parents, not the children, need counseling. The parents need to learn how to deal with their anger and how to stop the cycles of dysfunction that brought them to a divorce in the first place and how to stop denigrating each other and start cooperating and raising their children jointly. When the parents' anger subsides and their cooperation increases the children usually recover. Of course, in some cases, the children may need counseling, sometimes just to assure them that they are not the reason their parents are breaking up, but the decision to take the children to counseling is a significant parenting decision that the parents must make jointly and neither parent can make alone. Again, the law requires joint decision making. A parent making a unilateral decision to take the children to counseling, without consulting the other parent or seeking an order from the court, demonstrates a disrespect for the law and an inability to share parenting of the children. If the parents cannot agree, then the court will decide what is in the children's best interests.

Therefore, the law's definition of a "better parent" is a parent ready, willing and able to promote the other parent to the child and to facilitate a relationship between the other parent and the child, and ready, willing and able to make joint decisions with the other parent concerning the child, as well as a parent who loves and cares for the children. That is the parent this judge is seeking. The interests of the children, and the policy of the state, are promoted by presenting a plan for sharing the children as well as a plan for caring for the children. The better parent will present and carry out a plan for sharing the children and sharing decision making concerning the children. The lawyer's proof does not follow the factors in the statute. The law wants the children to have a relationship with both parents and the primary residential parent should be the parent who is better able to accomplish this goal, all other factors being equal.

Understanding these thoughts and that § 61.13 requires the court to order "shared parenting" what is the evidence a judge thinks relevant to a parenting case? First, the questions to be answered must be stated. The questions are: (1) Where will the children be day to day during the week and during the year? and (2) Did the parties plead for shared parenting, sole parental responsibility, or split parental responsibility?[8] If pleaded for and proven at trial, the court can tailor parental responsibilities by giving one parent sole authority over some areas, say education, but not over others, say medical care.[9] If the court grants sole parental responsibility to one parent, the court may or may not award parenting time to the other parent.[10] All of these variations must be specifically pleaded and proven before the court can order these. Here are some questions to consider in analyzing a parenting case:

1. ***"The parent who is more likely to allow the child frequent and continuing contact with the nonresidential parent."***

1.1. Nearly all lawyers ignore this factor in a parenting case and present no evidence at all of the likelihood that their client will allow the child frequent and continuing contact with the other parent. Probably they do so because most parents in a parenting case cannot imagine anything worse than having to promote the other parent to the children and having to arrange and carry out a plan for putting the children in frequent and continuing contact with the other parent. They have decided to divorce the other parent and they expect the children to do likewise, ignoring that if the children do so they will suffer severe psychological damage. It is odd that many lawyers buy into their client's feelings and fail to teach their clients what the judge will be looking for to decide this case. The legislature regards a determination of the parent who is more likely to allow the child frequent and continuing contact with the other parent as the number one factor a judge must consider in deciding a parenting case. Lawyers should advise their clients on the law and should not allow the client's emotions to decide the client's conduct or the proof presented to the court. The tenth factor below

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