Child-Centered Litigation? An Alternative Approach

By Rachel Catt

I practiced family law in San Francisco, California (and surrounding counties) from 2002-2014. I have been practicing here in Colorado since. In that time, I have made several observations about how children in Colorado are treated differently than their California counterparts in a divorce context.

In some ways, Colorado is advanced. For example, California still refers to "sole or joint custody" which includes "legal custody" and "physical custody," not "parental responsibilities," "parenting time," and "decision making."

Both jurisdictions use a best interest approach. Colorado, of course, defines "best interest" neatly in C.R.S. 14-10-124. In the California code, the statutory definition of best interests is scattered in different sections. California Family Code §3011 explains that in evaluating best interests, the Court shall consider the health, safety, and welfare of the child; any history of abuse; the nature and amount of contact with both parents; the habitual or continual use or abuse of drugs and alcohol; etc.

A later code section explains an aspect of best interests by describing the order of preference for granting custody. The first and best choice is "both parents jointly… or to either parent. In making an order granting custody to either parent, the court shall consider, among other factors, which parent is more likely to allow the child frequent and continuing contact with the noncustodial parent." This section also makes clear that "immigration status of a parent… shall not disqualify the parent… from receiving custody" Finally, "in cases where a child has more than two parents, the court shall allocate custody and visitation among the parents based on the best interest of the child." Ca. Fam. Code (a)-(c).

The wishes of the child are discussed at Ca. Fam. Code §3042. As in Colorado, "if a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody or visitation, the court shall consider, and give due weight to, the wishes of the child in making an order granting or modifying custody or visitation." However, unlike Colorado, the statute goes on to say that **"**If the child is 14 years of age or older and wishes to address the court regarding custody or visitation, the child shall be permitted to do so, unless the court determines that doing so is not in the child's best interests."

Other than the possibility of having more than two legal parents, and the presumption of addressing the court at age 14, there is little substantive difference in a best interest analysis in Colorado or California. The Colorado factors are more conveniently located, but rifling through the California code and case law reveals that the analysis is virtually the same.

What disturbs me in Colorado is the practice of mingling the best interests of children with their parent's money in divorces. I always find myself squeamish in mediations and permanent orders hearings where best interests, pensions, debts, and maintenance are laid out neatly on the same table – all available for sale or trade. I believe that this process demeans and damages children, and forces parties and lawyers into the dirty business of trading away our children's best interests for financial gain. We all believe that we don't do it, that we find a way to keep the children's best interests first, but we don't. You would notice it if you were able to stop practicing that way.

There is a way to clean this up. The San Francisco system works well and accomplishes this. You will think this system is cumbersome, time consuming and expensive, but having practiced this way for twelve years, I can promise you that it is not. I can also tell you it is better for kids.

Essentially, APR issues are decided *prior to* and *completely separately from* property division and spousal maintenance. Kids and money are dealt with in different processes, on completely different tracks. The kid issues are decided almost in a vacuum. The only thing anyone in the room is thinking about is what those children need. Granted, in California, as here, more overnights for the payor translates to less child support, but there are no specific numbers to work with because maintenance has not been set. Other than that, financial considerations are set aside when considering APR issues.

This is how it works. First, if you want a child custody or financial order, you must ask for one. They are not issued automatically. Matters involving both child custody issues *and* financial issues will be set for *separate hearings*.[1]

Unless otherwise ordered by the Court, all parties, except those that have attended four private mediation sessions within the prior year, must participate in mediation before the Court will hear the matter.[2] Custody mediation is offered for free at the courthouse, or parties can select a private mediator.

If the custody dispute cannot be resolved at mediation, the parties proceed to the contested hearing. The result of the hearing can be either temporary or permanent orders. In my experience, most temporary orders (mediated or court ordered) were simply converted to permanent orders when the dissolution was completed. In fact, often even that did not happen and the temporary orders= became the de facto permanent orders. The words "temporary" and "permanent" had little legal meaning outside of a relocation context.

Meanwhile, the parties prepare and exchange their financial disclosures, propound formal and informal discovery, retain joint experts, and conduct depositions (just like in Colorado). Upon completion of their own disclosures, either party may file an "At-Issue Memorandum" which tells the Court that their disclosures are finished, and they are prepared to proceed.[3] The case is set for a Status Conference. At the Status Conference, the court resolves discovery issues and sets the case for a follow-up Status Conference or the Mandatory Settlement Conference.[4] *Mandatory Settlement Conferences are not intended to address custody, visitation, parenting time, or domestic violence issues*[5]. Mandatory Settlement Conferences are held at the courthouse and are facilitated by two attorneys who are Certified Family Law Specialists. Prior to the conference, the parties provide a Mandatory Settlement Conference Statement which is very similar to a JTMC.[6] If the case does not settle, the unresolved issues proceed to trial.[7]

What I like about this system is that the issues involving children are almost always resolved well before the Mandatory Settlement Conference and trial on financial issues. The children's needs are addressed

[1] Local Rules of Court for the San Francisco Superior Court (LRSF) Rule 11.7
[2] LRSF 11.7.C(2)
[3] LRSF 11.10.B.
[4] LRSF 11.10.E.
[5] LRSF 11.11.A.
[6] LRSF 11.11.E.
[7] LRSF 11.10.J.

with clear heads, not clouded by financial fear and pressure. The approach allows parents to bring their best selves to the table, focusing only on the needs of their children. This produces the best possible outcomes for children.

From time to time, in Colorado, I run across practitioners who will agree to settle all issues regarding children before addressing property division and spousal maintenance. I always appreciate that. I wish we did it more often.