LAW

CUSTODY

A Constant Sociological Struggle

By K. Dean Kantaras

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IT WASN'T SO MANY YEARS AGO that one parent was awarded "custody" of children in a "divorce" proceeding. What that meant, back then, was that the custodial parent had the sole right to make all of the decisions regarding the child or children. The non-custodial parent had virtually no rights and was totally dependent on the whims of the custodial parent. The only alternative was to seek relief through the courts. In many cases, the custodial parent wasn't so obviously vindictive or controlling and the courts were slow to intervene.

There was also a legal philosophy called the "tender years doctrine." It was firmly established in the law. What that meant was that a child of tender years, usually considered from birth to four or five years old, would automatically be awarded to the mother.

All things change, including the law. The legislature finally recognized that fathers were a child's parent, just as was the mother. In 1971, the statute was amended so that the father was entitled to the same consideration as the mother in a custody dispute. However, that didn't work. Because the legislature didn't say specifically that the tender years doctrine was no longer the law, courts continued to apply it. Realizing that they had not accomplished much, in 1982 the legislature added a provision to the statute which said that a father was to be given the same consideration as the mother "regardless of the age of the child." The sex of the child was not eliminated as a factor. The courts continued to use the sex of the child as a criterion in awarding custody and the result was that mothers continued to be favored. The obvious goal of the legislature was to equalize the rights of both parents to custody of their children. The courts didn't think the two amendments did that. So, in 1991, the legislature finally added a provision requiring the courts to consider the parents equally when making a custody decision regardless of the age "or sex" of the child. Finally, equality was legislated. As of now, at least in theory, fathers and mothers are given an equal opportunity when custody is decided.

But it's not custody, even though the statute still uses that term. As we've discussed in previous articles, a parent is awarded "primary residential care" of the children. They share parental responsibility. The theory is that parents should treat their children, and each other, as though they are still married. It's a good theory, but all too often it simply doesn't work. Recognizing present shortcomings, a bill has been filed in this session of the legislature. The purpose of the bill is to continue to evolve custody philosophy and practice. Terminology has changed. "Custody" would be referred to as "time sharing;" "custodial parent" and "primary residential parent" are eliminated. "Parenting time" is substituted. Visitation is eliminated, and "time sharing" with each parent is provided. A time-sharing plan or parenting plan will have to describe how the parents are going to share responsibility for the daily upbringing of the child.

The proposed new statute specifically eliminates any presumption in favor of either the father or the mother when the court is deciding on a parenting plan. These are important steps, the purpose of which is to lessen the trauma of divorce on children. Children don't deserve to be mistreated. Will the bill pass? At this writing, it's anybody's guess. The bigger question is: Why does the legislature still have to be concerned about the way people treat each other and their children?

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