

Custody System Divided

Family Codes Push for Equal Access to Kids But Make That Hard to Achieve

By Fred Silberberg

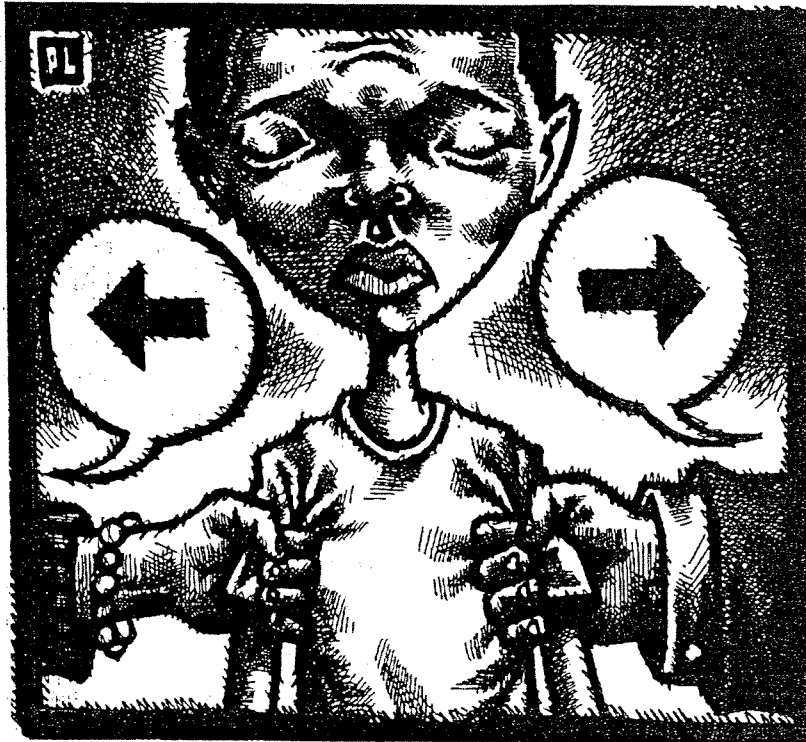
The legal standards by which today's custodial arrangements are derived have their roots in law created over 40 years ago. Society has changed dramatically since that time, and psychological studies have demonstrated that children are capable of bonding with more than one individual, even from the time of birth. Studies also have shown that children benefit by bonding with more than one individual. We constantly talk in public circles about the detrimental effects upon children of having an absentee parent and the social ills that result therefrom. We talk about the need for male and female role models. Yet, when a parent tries to step up to the plate, he or she frequently is shunned solely based on an archaic legal standard.

If the law truly is flexible and if the goal is to protect the best interests of children, then we must eliminate a standard which creates quite the opposite scenario: the need to prove a change in circumstances that requires the modification of an existing schedule.

This will not open the floodgates of custody litigation, nor would abolishment of the standard subject children to ongoing shifts in their living arrangements. We can retain the "best interests" standard in order to insure that changes are not inappropriate or constant. If a court is given a complete picture of the family and the issues, an appropriate custody arrangement still can be fashioned that would serve the children in the best way possible. By abolishing this absurd requirement we would benefit numerous children like Johnnie and Susie who are kept away from their fathers simply because fathers can't overcome the change-in-circumstances rule. The time for a change is long overdue.

For instance, the year is 1995. Johnny and Susie are 1 and 3 when their parents separate and divorce. Their mother, Sharon, has primary custody of them and their father, William, has visitation consisting of a midweek dinner and Saturday from 5 p.m. to Sunday at 5 p.m. every other weekend. The order specifies some other limited times for the children to be with their father.

It is now 2001. Johnny and Susie are now 7 and 9. The custody schedule is exactly the same. In the six years that have passed since the court made an order at trial in regard to this, virtually nothing has changed in the lives of the children's



parents. William lives in the same house he moved to right after separation. Sharon lives in the same home she received in the divorce. Neither parent has remarried. The only thing that has changed is that the children are older and both are enrolled in school. The school that they attend is in the same neighborhood that they have thus far grown up in.

William doesn't want to be a "visiting dad" any longer. He didn't want to be a visiting dad when the parties separated, but the court decided that due to William's work commitments and the fact that Sharon had stayed home with the children, their best interests favored this schedule. However, the children are now older and he would like to establish a close relationship with them, which he cannot do with the minimal amount of time that he is entitled to. As it is, the children are not bonded to their father. It isn't as though William is a bad father; it is simply the fact that throughout the lives of these children they have looked to their mother for most everything because they haven't been with their father all that much.

William has asked Sharon to modify the schedule but she won't agree. When it comes to working out arrangements for the children, these two parents cannot get along, and Sharon will not relinquish even the smallest amount of control over the

children in favor of William. For lack of a better term, these children are her "security blanket."

Under existing custody law, William has a significant hurdle to overcome if he is going to have anything close to equal time with his children. William has to prove that there has been a change in circumstances such that it would be in the children's best interests to modify the schedule that now exists. California case law overwhelmingly disfavors changes in custodial arrangements between parents.

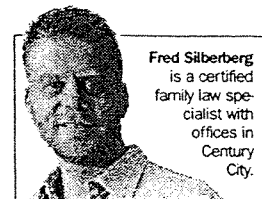
The theory here is that it is unsettling to children if there are changes in their schedules. The theory that led to the original custody arrangement to begin with is that children typically bond to one particular caretaker. However, these theories no longer hold credibility in light of numerous psychological studies. California law needs to be changed to reflect current thinking in this area if we are to truly serve the best interests of the children of California.

The particular example above is, of course, fictitious. However, it is a fact pattern that is not all that uncommon in our courts. It would seem to be a matter of common sense that the children would be better off with both parents. In fact, we have inconsistent policies in California in that we have a statute which says that the policy of the law favors "frequent and continuing contact with both parents" under Family

Code 3020, yet at the same time a change in circumstances is required to modify custody arrangements.

Although I don't advocate that children's living arrangements be constantly changing or modified on the simple whim of either parent, at the same time we must consider the fact existing law does make changes too difficult to obtain. It is not appropriate to prevent a child from having a close ongoing relationship with another parent simply because the child never had that opportunity before and no change in circumstances can be shown.

It is not appropriate to keep a fit parent, who could provide much-needed guidance and influence to his or her children, away from those children simply because he or she cannot overcome a sometimes insurmountable legal hurdle. The effect of this policy does not protect a child's best interests, it does just the opposite. Moreover, it sends a message to children that one parent is favored over another, and that single-parent households are the socially acceptable norm.



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