

Arizona Association of Family and Conciliation Courts

Sedona Conference

January 29, 2011 Town Hall

THE FUNDAMENTAL RIGHT TO PARENT

During the 2011 AzAFCC Sedona Conference, an informal Town Hall was convened. There were approximately 180 attendees, including mental health professionals, judicial officers, court administrators, court conciliators and attorneys. After a lively 90 minute discussion, the following principles were identified in response to the referral question: *The right to direct the upbringing of one's children is both constitutionally protected and part of our basic understanding of what it means to be a parent. What are the implications of the right to parent for: 1. Judicial custody and parenting decisions? 2. Custody recommendations? 3. How and when parenting is professionally supervised? and 4. Therapies?*

The Principles

The “right to parent” is critical to all aspects of family law. Those involved in the process should consider the right to parent as part of the entire family court system. Specifically, the rights that the parents possess to direct the lives of their child are an important component of judicial custody and parenting decisions, custody recommendations, and other aspects impacting the development of an overall parenting plan.

Some aspects of parenting seem to require a greater deference to parental rights, such as decisions impacting education, medical procedures, relocation and religion. When parents are in conflict, addressing those basic parenting rights becomes even more challenging, particularly when the best interests of the child also need to be considered as part of the process.

The Court

When parents are in conflict, judges are in a very difficult position. Judges need first to make every effort to involve both parents in the process and to be proactive in having the parents resolve their issues through mediation, use of professionals or other non-judicial interventions. When this is not possible, judges need to consider and weigh the right to parent and the best interests of the child. In some instances, the court may elect to decide which *parent* is to make the decision, rather than deciding for the parties the underlying issue. However, there is a concern among many that this method of resolution--as opposed to having the judge make the decision--may create other issues between the parents by creating the impression of empowerment for one parent and marginalization for the other parent.

Some believe that the mere fact the parents are in front of the court because they could not make a joint decision may be a reason to have the court step in as it demonstrates that the parents have ceded some of their rights to the court to make parenting decisions. Others feel strongly that this does not indicate that the parents have ceded any rights. Rather, it simply means that while the two parents cannot

agree on how to handle the issue, they are turning to a neutral third party to work through the differences. Some even feel that having the court make the decision as opposed to deciding what parent makes the decision is a violation of parental rights.

When making these decisions, the court needs also to consider informed consent issues. For example, do the parents realize that decisions on some parenting issues may also implicate other custody related matters, including parenting time? Since an overall parenting plan is an amalgamation of many separate parts, critical decisions on one aspect could give rise to unintended consequences for other parts of an existing parenting plan.

The court should also consider the process for making the decision as opposed to looking solely at the content of the issue in dispute. A process that considers the method of making the decision, and consideration of the other parent, should be valued by judges and professionals involved in these matters.

For issues that do not involve legal custody, a distinction should be made between day-to-day parenting decisions (such as where to eat while the child is in the care of a parent) and those decisions that need to be weighed against the child's best interests (such as what school to attend). The parenting province should be imposed upon only in those circumstances wherein the best interests of the child will be impacted in a more significant fashion.

Court delays also have implications on parental rights and the best interests of the child. Ending the conflict in a timely fashion is therefore critical to the child's best interests.

The Professionals

Practitioners, therapists, mediators, attorneys and all others involved should educate parents about their fundamental right to parent. This education should include the admonition that submitting matters to the court may affect the exercise of an individual parent's right as a judge must consider the rights of *both* parents as well as the best interests of the child.

When making custody recommendations, there is a need to find a balance between the parents' rights and what is in the best interests of the children. The award of joint legal custody without an infrastructure for dispute resolution creates more complications when parents are in conflict about parenting issues.

When considering use of input from mental health professionals, it is important to determine from the parents how they feel about the recommendations before those recommendations are communicated to the court. Nonetheless, all relevant factors should be submitted to the court for consideration, even those that may impact the individual parenting rights. The court is in a better position to determine how parental rights should be weighed against the recommendations.

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