

Divorce Mediators Should Not Interview the Children

By Fred Silberberg

The victims of our system of divorce are the children. They are put into situations over which they have no control, and the decisions that are made in this divorce process have long-term ramifications. Protecting children should be one of our main goals in the family law arena. This, however, is not the case statewide. In some counties, children as young as 6 are dragged to the courthouse and thrown into a court-sponsored process that is intended to do nothing

more than speed up the processing of family law cases.

time, the amount devoted to interviewing the children amounts to no more than a few minutes. If we think about this procedure from the child's perspective, it is quite intimidating. First, the parents usually tell the child that he or she will have to come to court, which is where a decision is going to be made as to how much time the child will spend with mommy or daddy. That is frightening enough to a child whose world is shaken by the split-up of the parents. Then, the child is told that someone might ask the child questions

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Despite a statutorily imposed mediation privilege, Family Code Section 3180 gives a Family Court Services mediator the right to interview a child in the course of a mediation if the mediator deems it necessary.

Why must a child be brought into the mediation process that is supposed to be a confidential resolution of disputes between parents? In some counties, such as Ventura, children 6 or older are required to attend mediation at the courthouse any time there is a disagreement over custody. This practice seems to fly in the face of the mediation privilege as set forth in Family Code Section 3177 and Evidence Code Sections 1119 and 1121.

The goal of mediation is to provide a means for parents to resolve custody disputes before they escalate. The presumption is that everyone, including the children, is best served if the dispute is settled and both of the parents have had input into the decision-making process. Children are better off if they are shielded from custody litigation. It is also less costly and traumatic to put an end to a dispute sooner, rather than after months of litigation. In a general sense, this seems logical.

All of this sounds good in theory, but in certain courthouses, the policy is not only resolving disputes before they get to the judge but also deterring parents from getting to the judge by using strong-arm tactics to discourage a parent from proceeding with a custody dispute. This policy of strongly urging parents to settle fails to acknowledge that, in some cases, calling on a court to make a custody decision is appropriate. The policy is flawed in that one of the tactics used to force a resolution is directly involving the very children that the system is intended to protect.

In counties that employ this tactic, children 6 and older are required to be brought to the courthouse for mediation. Rather than shielding children from a process involving decisions that should be made by adults, they are placed right into the middle of that process. Further, the mediator can interview the children and will do so if the parents do not reach an agreement. In these counties, the entire mediation process is on a schedule of two hours and fifteen minutes; of that

about mommy and daddy to help in the decision-making process that will determine where the child will live. This explanation alone places a great burden on the child, who now thinks that what he or she says could affect the outcome.

To assume that parents involved in this process would not talk to a child in advance of the mediation is, quite frankly, to give some parents too much credit. Another factor in the process employed by these counties virtually insures that parents will talk to their children before the interview. In these counties, if no agreement is reached during mediation, the mediator will make a custody recommendation. If not accepted by both parties, that recommendation will result in the mediator being called to testify in court about his or her recommendation. Given that what the mediator decides is critical to the outcome, it should not be surprising to learn that some parents would prompt, or even grill, their children into saying certain things to the mediator.

The policy behind this process — to keep parents away from the courtroom so that the system does not have to devote resources to custody litigation — has to change. These counties need to recognize that legitimate issues concern children and that family court exists to address those issues. We should not discourage parents from seeking help from the court where it is appropriate to do so.

Most important, we have to change this policy so that children are kept out of direct involvement in the process as much as possible, not thrown into the middle of it. Some of our court administrators and presiding judges need to remember that their goal is not to put family law cases through the system with minimal use of judicial resources. Their goal is to do what is best for the children. The welfare of children should not be sacrificed in the interest of judicial economy.

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