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THE RECORDER

FAMILY LAW

The right of first refusal

A carefully drafted clause in a custodial agreement can increase cooperation between parents and better serve the child's interests

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Family Law

In the business world, the right of first refusal is a contractual right that gives its holder the option to enter into a business transaction with the owner of something, before the owner is entitled to enter into that transaction with a third party. This concept is also commonly found in child custody agreements between parents when negotiating the terms of a shared timeshare agreement involving the minor children. The more hotly contested the custody matter, the more likely the parties will conflict over the right of first refusal language.

Absent any threat to a child's health, safety or welfare, California public policy favors custody arrangements that provide children with "frequent and continuous" contact with both parents. There is a long-standing presumption that joint custody is in the best interests of a minor child. Joint custody means joint physical and joint legal custody. Whereas, joint legal custody denotes both parents' right to make decisions relating to the health, education and welfare of a child; joint physical custody is defined as each parent having "significant periods" of physical custody.

The right of first refusal is a court-ordered right, usually negotiated in an agreement between the parties, granting a noncustodial parent an option to care for the child or children during the custodial parent's designated time, when the custodial parent is otherwise unavailable, instead of placing that child into the care of a third-party provider. It is a nuance, a provision within an agreement to share joint custody that parties may choose to spend thousands of dollars litigating.

Sounds simple enough, right? Sharing is one of the first things that we learned as children. The concept is easy: to allow another to use or enjoy something that you possess. "I'll give you this, if you give me that." In highly contested custody cases, this concept becomes more synonymous with a shrewdly maneuvered match of tug-of-war. Suddenly, one party is forced to share their most treasured and valuable possession, their children, with an ex, a person, who for all intents and purposes, is no longer a trusted or valued partner. Whatever the reason, this predicament often places two people at ends with one another, fighting so hard not to lose control, that they lose sight of the general principles that guide good judgments.

In general, there is an understanding that the direct care of a parent takes precedence over any other third-party care, such as day care, friends or even other family members. So, what happens when one parent works and the other parent stays at home? Is the stay-at-home parent entitled to more custodial time, thus direct care of the children, because the other parent is working and otherwise unavailable? Does a right of first refusal encompass any and all times that a parent is unavailable, including hours of employment? Working parents will be happy to know that the answer to this question should be "no."

The California Supreme Court, in the *Marriage of Burchard,* 42 Cal.3d 531 (1986), unanimously held that the courts must not presume that a working mother is a less satisfactory parent or less fully committed to the care of her child. The trial court erroneously granted custody to the father on the grounds that he was in a better position to care for the child because his new wife was home during the day, while the mother would have to rely on babysitters and day care centers while she worked. The court found that it is not proper to base an award of custody on the notion that a working parent is *ipso facto* a less satisfactory parent.

In 2003, the court has extended the *Burchard* rationale to a working father, in the *Marriage of Loyd,* 106 Cal.App 4th 754, when it held that it was an abuse of discretion for the trial court

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to order a change in physical custody to the mother based on the fact that she was a full-time homemaker, while the father was employed and would have to put the children in day care during his custodial time.

In 1986, when *Burchard* was decided, more than 50 percent of mothers and almost 80 percent of divorced mothers were in the workforce. As of the 2007 U.S. Census Bureau Report, 79.5 percent of custodial mothers are in the workforce and 90 percent of custodial fathers are in the workforce, so this is an issue that divorced families will continue to deal with going forward.

Decades ago, there was a clear statutory bias or preference for maternal custody of children. This preference has evolved over time. Now, the primary concern for the courts is the best interest of the child. The shift of gender bias is perhaps best reflected in the *Marriage of Carney,* 24 Cal.3d 725 (1979), a case involving a father who was in a wheelchair and unable to engage in "normal physical activities," with his son. The trial court awarded custody to the mother on the grounds that the father's handicap rendered him unable to have a normal relationship with his son. The Supreme Court found that the ability of a parent "to love" outweighs a custodial parent's "ability to do" physical parenting. The court went on to state that the essence of parenting lies in the ethical, emotional and intellectual guidance that a parent gives to the child throughout the formative years and beyond.

The court vigorously protects a parent's right to custody or visitation with their children. If a parent keeps, withholds or conceals a child, maliciously depriving the other parent of her visitation rights, that parent may be found guilty of a misdemeanor or felony. The consequences are very serious.

This same rationale is applied to the right of first refusal in a custody agreement. The intent of such a clause is to maximize both parent's custodial time with the children. It is not uncommon for nonworking parents to insist on a right of first refusal during a working parent's custodial time, on the grounds that it is better for a parent to directly care for the child than a nonparent, such as a grandparent, step-parent or day care provider. Working parents often fight this option as an interference or interruption on their custodial time with the children. Case law has established that the courts must look at the best interests of the child. Each case is different, but it is not proper to base such a request on the premise that one parent's care is per se inferior because of her status as a working parent.

Much in the same way that love outweighs the ability to do things, a working parent's custodial time with a child is not limited to the actual time that he or she spends with the child. Part of parenting involves routines, schedules and extracurricular activities. Furthermore, there is no question that third parties also play a very important role in the lives of our children. Many grandparents and stepparents play a quasiparental role in providing a child's physical and emotional needs on a daily basis. This is not to say that third parties should take preference over a parent. Part of parenting, however, involves all of those things and people guide the experience of life.

Like in business agreements, a properly drafted right of first refusal clause in custody cases should include all relevant terms such as duration, offer and acceptance, exceptions, time period, transferability, etc., based on the appropriate age of the child. If drafted properly, such a clause can actually increase cooperation and trust between parents, which will benefit the children as they see their parents working together cooperatively. In contrast, a poorly drafted provision will lead to ambiguity and may ultimately present one party with an opportunity to interfere with the other parent's custodial time with the children.

Therein is the conundrum — while the intent is to maximize time for the benefit of the children, parties often see the request as a relinquishment of "their" time. One parent suspects the other is setting up a case for a modification of increased time and is reluctant to offer the option, and so on and so forth. Regardless if you are involved in a highly contested custody battle or not, it is best to carefully prepare, look forward and incorporate a detailed right of first refusal clause in your custody agreement.

Children are the greatest gift of all — societies most valued commodity. As such, clients as parents should recognize the value in sharing and be prepared to protect it. As George Bernard Shaw aptly said, "If you have an apple and I have an apple, and we exchange apples then you and I will still each have one apple. But if you have an idea and I have an idea, and we exchange these ideas, then each of us will have two ideas." If both parents work together to share their time when they are not available, it will only increase cooperation and trust between the two, which is a win for the children.