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Domestic relations practitioners often are faced with evidentiary challenges when offering evidence of the wishes of the child in allocation of parental rights proceedings. This article discusses ways to address these challenges and offers specific suggestions as to vehicles for admission of otherwise inadmissible hearsay statements from children as to their custodial preferences.

The Child's Wishes in APR Proceedings: An Evidentiary Conundrum

by Joe Pickard

In contested parental responsibilities proceedings, domestic relations attorneys work to avoid inflicting unnecessary emotional harm on the children involved, while vigorously representing the interests of their clients. Forethought and planning can help ensure that admissible evidence helpful to a client's case is provided to the court in a manner that does not harm the children at the heart of the dispute. This article discusses the admissibility of specific statements of parental preference made by children in dissolution of marriage and allocation of parental rights proceedings (collectively, referred to as APR proceedings).[1]

The child's wishes as to parenting time is one statutory factor considered by courts when determining the best interests of the child in APR proceedings.[2] The recurring problem facing counsel in such cases is how to best present the child's wishes. From an evidentiary standpoint, the most direct method is through the child's own words. Some facts and circumstances might make it appropriate or necessary for the child to appear

and testify in court; however, given the potential for traumatic impact to the child and the fact that most courts disfavor child testimony in APR cases, direct testimony of the child generally is not a viable option for the domestic practitioner. If the child does not testify, the child's statements expressing the child's desire for one parent over the other is hearsay.[3] In such instances, the attorney must consider other options for presenting evidence of the child's wishes to the court. Possible vehicles for the admission of hearsay statements of the child include use of a court-appointed professional, as well as use of recognized exceptions to the hearsay rule.

The Child's Wishes in APR Cases

Recognition of the child's parental preferences in APR proceedings is long-standing and widespread. Consideration of the child's preferences in Colorado custody proceedings dates as far back as 1910, in the case of *Wilson v. Mitchell*.[4] There, during an interview with the judge, the child expressed a preference to live with his grandparents. The court sent the child to live with his mother, but noted that "[t]here are many cases reported where the court in the exercise of its authority has accepted the wish of the infant as to its custody."[5] Almost 100 years later, the message of the *Wilson* court is well-established law.

The concept of considering a child's desire with respect to custody also is recognized in other legal systems. In New Zealand, consideration of the wishes of the child is mandated by statute, which provides in pertinent part: "[A]ny view the child expresses (either directly or through a representative) must be taken into account."[6]

The Colorado Revised Statutes provide that the court take into account, among other factors, "[t]he wishes of the child if he or she is sufficiently mature to express reasoned and independent preferences as to the parenting time schedule."[7] When allowing direct testimony of a child's wishes, the court initially must answer the following questions:

1. Is the child sufficiently mature to express reasoned and independent preferences?
2. Is the statement relevant to parenting time?
3. How does the statement bear on the child's best interests?

Older children can express themselves and may testify with little or no difficulty. For example, the desires of a teenager in a custody dispute usually are not difficult to ascertain. Unfortunately, the wishes of younger or less mature children may present a bigger challenge.[8]

Although there is no legal authority precluding a child's direct testimony in APR cases, the generally accepted practice among family law practitioners and judges is to avoid, whenever possible, the direct testimony of children. To mitigate the potentially harmful effects of litigation on a child involved in parental responsibilities matters, the Bench and Bar tacitly aim to keep contact between the child and courtroom to a minimum.

In practice, the potential effect on the child, as well as local court preferences, must be considered by the attorney when determining whether to seek direct testimony of a child in APR cases. In so doing, practitioners must realize that the "wishes" of a child are not controlling,[9] but are one of many relevant factors to be considered in determining the child's "best interests."[10] The very word "wish" seems to connote the non-controlling nature of the factor. However, in a close case, it would appear that the wishes of a child of sufficient age or development might tip the scale.[11]

Child Hearsay Statements

Often, aside from having the child testify, the simplest way for the court to discover the child's wishes is for the parent to testify. A typical exchange would be similar to the following:

Q: Mrs. Smith, do you know who your daughter wants to live with?

A: Yes.

Q: How did you come upon this information?

A: I asked her?

Q: And when you asked her, what was her response?

A: She said, "I want to live with you, Mommy."

There is a recognized risk of inflicting unnecessary emotional trauma if the child were to testify in court;[12] nonetheless, a parent's testimony to this effect constitutes hearsay and may be excluded at trial on proper objection. Although the child's statements offered through a parent or other third party's testimony may be barred under the hearsay rule, there are a number of ways the court can learn of the child's preference; these are discussed below.

In Camera Interviews

One tool available to make the court aware of a child's preferences is found in CRS § 14-10-126(1), which allows the court to conduct an *in camera* interview of the child.[13] Counsel may be present during the interview, but cross-examination is prohibited, which lessens potential harm to the child.[14] Parties have no opportunity to challenge the reliability and voluntariness of the child's statements. Interviews of this kind are wholly discretionary.[15]

The practitioner should request, by way of written motion filed as soon as practicable, that the court conduct an *in camera* interview of the child. It is imperative for the attorney, even during the initial stages of case preparation, to realize that prior interviews and reports might impact a CRS § 14-10-126(1) request.[16] The court may decline a request for *in camera* review, due to the existence of other reliable sources. If another type of evidence has or can be admitted, it may be preferred over an interview with the child, regardless of its nature or timeliness.

When planning a case, it may be helpful for the attorney to consider the case from the perspective of the trial and look backward, to better evaluate whether certain evidence acquired throughout the case might be an obstacle in preventing a judge's interview from taking place at the time of the permanent orders hearing. Ultimately, collateral considerations surrounding CRS § 14-10-126(1) may dictate the use of hearsay to make the child's wishes known to the court. Accordingly, the domestic practitioner must determine how to get otherwise inadmissible hearsay statements into the record.

Parental Evaluations and Reports

CRS § 14-10-127 provides for evaluations and reports to be conducted in parental responsibilities proceedings. Formerly known as "custody evaluations," these generally now are referred to as APR evaluations. A qualified evaluator is required to examine the best interests of the child, including the child's wishes as to his or her custodian. The report contains statements that, although hearsay, are admissible. The statute provides: " [i]f the requirements of . . . this section are fulfilled, the evaluator's report may be received in evidence at the hearing."[17] Because the evaluator and any witnesses used in preparing the evaluation can be cross examined, the report is considered to be reliable, despite the hearsay contained in the report.

Court-Appointed Professionals

The statutory establishment of a Child and Family Investigator (CFI)—and its predecessor, the Special Advocate—enables the investigation and reporting of hearsay statements of the child to the court.[18] The statute provides: "The child's wishes, if expressed, *shall* be disclosed in the child and family investigator's written report, thereby mandating that the child's hearsay statements be reported to the court."[19] However, the CFI has no directive to adopt the child's preferences in the final recommendations he or

she makes to the court. The CFI may be called as a witness and questioned concerning the child's statements to eliminate concern regarding the potential unreliability of the statements.

A Child Legal Representative (CLR) is an attorney appointed by the court to serve as the legal representative of the child and to represent the child's best interests.[20] Unlike a CFI, a CLR is precluded from being called as a witness in the case. The CLR is directed to ascertain and consider the wishes of the child; however, unless such wishes serve the child's best interests as set out in CRS § 14-10-124,[21] the legal representative is not mandated by statute to report the child's wishes[22] nor required to adopt or advocate for such in any subsequent recommendations to the court or in the course of his or her advocacy. Similar to the CFI, a CLR simply must consider the wishes of the child as to custody, among a host of other considerations, when making proposals or recommendations to the court regarding the child's best interests.

Thus, as with an APR evaluator, a CFI or CLR can present a child's specific wishes for parenting time to the court. However, the considerable economic cost associated with the appointment of these professionals makes these options unavailable for many clients. In a case where the family has not elected or cannot elect to use one of these professionals, the family law practitioner must examine how to qualify the child's statement of parental preference as an exception to the hearsay rule.

Hearsay Exceptions

If a hearsay statement falls within an exception found in C.R.E. 803, falls within the catchall exception of C.R.E. 807, or is considered non-hearsay under C.R.E. 801, such statement should be admissible. The following hearsay exceptions might be available in APR cases: (1) spontaneous present sense impressions; (2) excited utterances; (3)

statements as to emotional, physical, and mental state; and (4) statements of bodily condition for diagnosis.

Statements as to Then-Existing Conditions

The most commonly used hearsay exception in APR cases is found at C.R.E. 803(3),[23] which provides:

> Then Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of the declarant's will.[24]

Colorado has no case law discussing the use of C.R.E. 803(3) in the context of a custody proceeding.[25] However, its use in other jurisdictions suggest that there is nothing preventing its use in such cases.

Excited Utterances

C.R.E. 803(2), the excited utterance exception, also may qualify an otherwise excluded statement as admissible. Consider a situation where the child declares, "Oh Daddy, I want to live with you!" Whether this statement falls under the excited utterance exception relies on the event that triggered the response. For example, a statement made immediately after a frightening or dangerous situation is more likely to be admissible under this exception than a statement made after receiving a gift from the parent.

The Catch-All Hearsay Exception

The lesser-used, "catch-all" hearsay exception is found at C.R.E. 807. If no specific hearsay exception applies to a statement and there is no other way to get the statement admitted, this may be the last available option for the practitioner. C.R.E. 807, in pertinent part, provides:

> A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

New Mexico recently has permitted hearsay to be admitted under this exception in dependency and neglect matters.[26]

Because C.R.E. 807 requires advance notice, it may affect the interim behaviors of the parents. As with *in camera* interviews of the child conducted by the court, the use of a statement under this exception may affect case procedure and strategy.

Non-Hearsay

If the child's statement is considered "non-hearsay" under C.R.E. 801, it would be admissible. However, because such statements must be made either by a witness testifying at trial or by a party to the action, there may not be much practical application. Arguably, a situation may arise where one party makes a statement against interest under

C.R.E. 801 that includes some child hearsay. "Non-hearsay" also may include statements of a child tendered to the court for purposes other than to prove the truth of the matter asserted.

Statements Surrounding Abuse or Neglect

If a child's statements are related to abuse or neglect, they may be admissible pursuant to CRS § 13-25-129.[27] The legislature has determined that greater evidentiary weight should be accorded a child's statement based on its subject matter.

Criminal practitioners will be aware of the avenues of admissible hearsay in child abuse cases. However, other practitioners may not be as familiar with this statutory exception. CRS § 13-25-129(1) provides, in pertinent part:

> [A]n out-of-court statement by a child . . . describing any act of child abuse . . . to which the child declarant was subjected or which the child declarant witnessed, not otherwise admissible by a statute or court rule which provides an exception to the objection of hearsay, is admissible in evidence in any criminal, delinquency, or civil proceedings in which a child is a victim of child abuse. . . .

Therefore, allegations of child abuse are admissible in domestic actions, provided the other procedural requirements of CRS § 13-25-129 are met.

Although this allows for statements of abuse to be admitted into evidence, making it easier to prosecute child abusers, one unanticipated collateral effect has been that abuse allegations have become the "atomic bomb" of custody disputes. It is relatively simple to introduce child hearsay statements regarding alleged abuse; such statements have the concomitant tactical advantage over testimonial evidence and cannot be confronted nor cross-examined at trial. In addition, collateral criminal or dependency and neglect charges may result, with the attendant emotional and financial fallout.

If a child who has made an allegation of abuse makes other statements about preferences for custody, or even positive statements about parental care, such statements are not permitted by way of this statutory exception, and therefore constitute inadmissible hearsay. In other words, the admissibility of a child's statement of this kind often is based on the child's chosen subject matter. Under this statute, if a child says "Daddy hit me," the statement is admissible; if the child says "I love Daddy and want to be with him," the statement is inadmissible hearsay.

Conclusion

Domestic practitioners should understand and take advantage of the myriad ways of informing the court of the child's wishes as to his or her custodian. However, difficulties may arise when the parties do not have the funds for a parental rights evaluation or a CFI, if the judge declines to interview the child, or if the child does not want the experience of being interviewed by a stranger. Hearsay exceptions are only infrequently available in APR cases.

A child's statement regarding his or her preference of custodian is important evidence in an APR case. The current state of affairs for the Colorado family law practitioner requires evaluating the most appropriate way for such evidence to be received by the court. Recognized procedures for admitting hearsay exist, including the APR evaluation report and the CFI, but generally are available only to parties of substantial financial means. It is unclear whether Colorado law eventually will consider child hearsay statements concerning their wishes as to a custodian as a recognized exception to the hearsay rule. Meanwhile, it is prudent for the domestic law practitioner to carefully consider the specific evidentiary foundation needed for a child's statements to be admissible in APR proceedings.

NOTES

1. Allocation of parental rights (APR) proceedings are civil in nature. The admissibility of child testimony in criminal proceedings is beyond the scope of this article.

2. CRS § 14-10-124(1.5)(a)(II).

3. Hearsay is defined as "a statement other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." C.R.E. 801(c).

4. *Wilson v. Mitchell*, 111 P. 21 (Colo. 1910).

5. *Id.* at 30.

6. The New Zealand Care of Children Act of 2004, (I)(6)(2)(b) (2004).

7. CRS § 14-10-124(1.5)(a)(II).

8. *In re Marriage of Hartley*, 886 P.2d 665 (Colo. 1995).

9. 27C *C.J.S. Divorce* § 1001 2005.

10. 19 Colo. Prac., Family Law & Practice § 28.27 (1999).

11. *In re Marriage of Jensen*, 351 P.2d 387 (Colo.1960) (child expressed preference for his father, and trial court's order to change custody to father was upheld on appeal).

12. *See* 71 ALR 5th 637 (1999) Validity, Construction, and Application of Child Hearsay Statutes (discussing emotional harm as a basis for legislative action concerning admissibility of child hearsay in child sexual abuse cases).

13. CRS § 14-10-126(1).

14. *In re Agner*, 659 P.2d 53 (Colo.App. 1982).

15. *In re Marriage of Davis*, 602 P.2d 904 (Colo.App. 1979).

16. *In re Custody of C.J.S.*, 37 P.3d 479 (Colo.App. 2001).

17. CRS § 14-10-127(2).

18. CRS § 14-10-116.5.

19. CRS § 14-10-116.5(2) (emphasis added).

20. CRS § 14-10-116.

21. CRS § 14-10-116(2).

22. *Id.*

23. A good discussion of the C.R.E. 803(3) "present sense" exception is found in *In re Marriage of Arnold*, 734 N.E.2d 837 (Ohio App. 1999) (testimony of witnesses regarding child's double hearsay statements inadmissible, but testimony of witnesses to child's statements that he "is afraid" and "was getting nervous" admissible). *See also*, *In re Marriage of Betts*, 3 473 P.2d 403 (Wash.App. 1970) (child's extrajudicial statements expressing fear and dislike of father were not inadmissible hearsay for purposes of custody proceeding, where such were not admitted for truth but to show mental state of the child at the time of the custody proceedings).

24. *See generally* Admissibility of evidence of declarant's then-existing mental, emotional, or physical condition, under Rule 803(3) of Uniform Rules of

Evidence and similar formulations, 57 A.L.R. 5th 141; Admissibility of Statement Under Rule 807 of Federal Rules of Evidence, Providing for Admissibility of Hearsay Statement Not Covered by Specific Exception, 173 A.L.R. Fed. 1.

25. C.R.E. 803 has been mentioned in custody proceedings in other states, but not extensively litigated in reported decisions. *See In re Marriage of Yates*, 971 P.2d 1249 (unpublished disposition, June 18, 1998); *Ochs v. Martinez*, 789 S.W.2d 949 (Tex.App. 1990); *Ferrell v. Ferrell*, 1986 WL 3252 (Ohio App. 1986).

26. *In re Pamela A.G.*, No. 29018, New Mexico Supreme Court (April 2006). The National Association of Children filed an *amicus* brief in this case, urging the Court to admit child hearsay under the residual hearsay exception, enacted in New Mexico as Rule 11-804 B (5) NMRA.

27. *See, e.g.*, *In the Matter of Jacqueline B. and Peter K.*, 796 N.Y.S.2d 518 (Family Court, N.Y. 2005) (child statements excluded in contempt proceeding as inadmissible hearsay because they were not statements of abuse).