

# Psychology and Family Law

## Judicial Bias in Family Court

By Mark Baer, Esq.



It is generally agreed that a person involved in a lawsuit has the right to have their case decided by a judge who is capable of applying the law in a fair and objective manner. In fact, according to the California Code of Judicial Ethics, "A judge

shall perform judicial duties without bias or prejudice."

To that end, a retired judicial officer has commented, "...Judges are trained to be sensitive to problems of bias." He continued, however, stating, "...One does not undergo an instantaneous transformation from whatever one may have thought or believed as an attorney just by being sworn in as a judge or commissioner."

Kenneth Cloke, a noted expert in conflict resolution, adds that in fact, "[t]here is no such thing as genuine neutrality when it comes to conflict. Everyone has had conflict experiences that have shifted his or her perceptions, attitudes, and expectations... Nor are there any genuine neutrals in courts, including judges, CEO's, managers, and human resources representatives, all of whom have biases and points of view... Judges have the most intractable bias of all: the bias of believing they are without bias." [emphasis added]

With the divorce rate as high as it is, virtually everyone has been touched in some way by divorce, or custody and support issues. And if you took a poll of all those who have been through the system, you would likely find that nearly everyone felt that the decisions rendered in their case had in some way been unfair--i.e., they received too little, had to give up too much, were not given due consideration, etc. Psychologists and other mental health professionals routinely hear such laments from people who have suffered or been outright traumatized by the actions of the court in their very personal lives. And while it would be misleading to say that all of these were caused by judicial biases, it is unfortunately accurate to conclude that many of them were.

Despite ethical exhortations to objectivity, it's fair to say that each and every judicial officer in family law court has personal biases. Attorneys therefore try to determine whether the judge assigned to a particular case is biased for or against their clients. They select custody evaluators they hope are biased in favor of their clients. The same exact case might have incredibly different results from one

judge's court to the next. Bias impacts the judge's factual findings, which is the great discretion they are given, and how they opt to apply the law. Opportunity for bias exists in no other area of law to this extent. No amount of bias elimination training can educate a judge to forget about their life experiences, assumptions, personal beliefs, and opinions. Thus, I do not think anyone can argue or dispute the fact that judicial bias in family law litigation is a serious concern.

On a Monday, an expert witness could be testifying on behalf of a husband before a judge who is known to be biased against husbands, and she will notice that the judge pays very little attention to her testimony (i.e., because the judge was inclined to rule in favor of the wife regardless). That same expert witness can return to the same courtroom on Tuesday, on a completely different case, and notice that the same judge will pay very close attention to her testimony this time, because now she happens to be the expert for the wife in the case (i.e., because the judge wants to understand the testimony that will allow him to rule in favor of the wife). In short, if a lawyer happens to have a case before a judicial officer who is intrinsically biased in his client's favor, the outcome is almost certain, and it would take a pretty inept attorney to botch such a case. Thus, the most effective family law litigators are those who are best able to take advantage of the inherent flaws in the system for the benefit of their clients.

Given the essential defects in the litigation system, people need to remember they have the alternative of resolving their family law matter through mediation, or collaborative divorce. By their very nature, these systems do not rely on the inherently-biased decision making processes of a single person. Otherwise, to those who simply default to the court system, I must regretfully say, "let the buyer beware."

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