



Psychology and Family Law

Family Court: Fighting More Than “Fairness”

By Mark Baer, Esq. and Suzanne Lake, PsyD



The term Family Court might be seen as paradoxical by some folks, since one of its primary functions is to adjudicate the fracturing of families in the divorce process. Nevertheless, in its best sense, Family Court--as well as family law attorneys--serve the necessary purpose of attempting to fairly and reasonably facilitate decisions that the separating couple probably wouldn't be capable of doing on their own. In the majority of cases, the very process that leads to divorce involves pain, anger, alienation, and mistrust--hardly the optimal conditions for creative and fair-minded negotiation.

Whatever benign purposes Family Court is designed to accomplish, in actuality it is often terribly destructive. In some cases, the very length of time without decisions being made extends the agony of ambiguity about the settlement. Litigation reinforces the tendency to focus on fault, blame, and righteous entitlement and anger. The polarizing and adversarial attitudes naturally fostered by litigation can have disastrous effects on the parents' relationship, which in turn affects any children involved. No one denies that the costs of bringing the suit to court can be enormous, and further deplete the family's assets, which are already being sundered. The longer the proceedings go on, the greater the burden on both parties, and the smaller the net gain for anyone--except the lawyers.

Nevertheless, although the California system provides for negotiated out-of-court settlements, and an infrastructure of mediation and collaborative divorce negotiation is in place, the majority of divorces are resolved through litigation. Why is this? For one thing, many people have the misconception that without an aggressive push for what each side wants, they are likely to “get less” of what they want. For another thing, the legal system does not promote out-of-court settlements as much as it might. Certainly, attorneys are often biased--whether consciously or not--towards going to court. Court proceedings such as hearings and trials are public events, unlike out-of-court resolution processes. Rightly or wrongly, attorneys are judged more on their ability to win in court than on their ability to settle out of court. Also, family law attorneys bill for services and time, rather than on a contingency basis (since there are many reasons contingency arrangements are unsuited for family law matters). Thus, there are often powerful incentives to avoid settlement.

Subtle psychological factors are also at play in individuals' disinclination to settle without litigation. Research has isolated two strong and salient human traits in this regard. The *Self-Interest Bias* causes individuals to overestimate what they have positively contributed to a marriage, and what they deserve from a dispute resolution, while at the same time underestimating what their opponent has contributed, and thus deserves. This tends to lead divorcing parties to seek or demand benefits and rights which would seem excessive to a neutral observer, and would likely be opposed in a pre-trial settlement.

Flowing from this, there is the innate human *Expectation of Fairness*. The notion of “fairness,” however, is likely to be profoundly affected by the Self-Interest Bias. Psychological research on these traits reveals that people routinely demonstrate an egocentric bias in how much they have contributed to a collaborative task, versus a collaborator. Similarly, in a dispute individuals systematically overestimate the value of claims brought by them, while underestimating the claims of an opponent. Thus, both divorcing parties may believe that whatever settlements on the table before them are “unfair” to them, and that the only way to obtain “fairness” is to have their day in court.

In short, fueled by a righteous desire for “fairness,” divorcing spouses are lured by the illusion that a presumably impartial arbiter--a Family Court judge--will be more likely to see “fairness” their way. Unfortunately, whatever their aspirations, judges are human and have unknowable biases. Further, as one of us has written previously in this space (Baer), jurists are hampered by conflicting constraints of the law as well as personal biases, and few have had any training in positive or creative conflict resolution. Thus veteran Judge Bruce Peterson comments on the divorce system, “It is amazing to me that the American public has put up with government officials dictating the most intimate details of their lives.” He adds, “After watching this process for years, I have come to the conclusion that the time has come to consider taking divorce out of the hands of lawyers and judges... We can create a more healing process.”

In our opinion, well-trained lawyers and other mediators could and should be a large part of such a process.

Mark Baer, Esq can be reached by email at Mark@markbaeresq.com.

Dr Suzanne Lake can be reached by email at DrSuzanneLake@aim.com.