

MOMMIE DEAREST: WHAT'S GENDER BIAS GOT TO DO WITH IT

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We encounter bias at all phases of our cases and practice too. To begin with, there is primacy bias - the concept of improperly leaning toward the position of the litigant who presents first. After that there is confirmatory bias, which is improperly leaning toward consistency with prior conclusions. Finally, there is recency bias, the tendency to give extra weight to the last thing that is said. Bias is a prejudice in favor of or against one thing, person or group compared with another, in a way that is generally considered to be unfair. Bias comes in various forms: conscious and unconscious, personal and generic, cultural, social and political. Everyone has biases despite admonitions to avoid them. Human resource administrators and admissions directors are watched carefully to see that they do not make their selections, promotions or eliminations in a biased manner. Judges are supposed to render opinions free of bias, as are mental health professionals who do custody evaluations. Certain types of bias are actionable, others are objectionable and some, perhaps, are justifiable. Take gender bias.

In matrimonial cases, the perception of gender bias runs high particularly among litigants. In nearly all custody cases, for example, a father is pitted against a mother and one of them prevails. Since the contest, in its simplest form, relates to which one is the more appropriate (i.e. "better") parent, the loser is not likely to acknowledge the wisdom of the decision and will look to place blame elsewhere - possibly on the mental health professionals, the attorneys or the judiciary. Gender bias in custody cases is a common complaint, with unsuccessful fathers claiming that mothers receive preferential treatment.¹ In financial issues and domestic violence litigation, the gender bias claim is frequently heard, but goes in both directions.

While the gender bias complaint may often sound like sour grapes, there is evidence indicating that bias exists among those who are called upon to assist in making custody determinations. (Because mental health professionals pride themselves on following the scientific method they perform studies of nearly everything in their realm.) A number of studies demonstrate what we believe to be obvious, that gender bias plays a role in the recommendations that are made by professionals.²

¹ Gender Bias Against Fathers in Custody? The Important Difference Between Outcome and Process, 18 VtL. Rev 215 (1993).

² See, e.g. Dutton, D.G., Hamel, J. and Aaronson, J. The gender paradigm in Family Court process: Rebalancing the scales of justice from biased social science. *Journal of Child Custody* (2010); Bradshaw, ER and Hinds, RW. The impact of client and evaluator gender on custody evaluations. *Family and Conciliation Courts Review* (1997).

Bias in mental health professionals is to be expected and there is a recognized means for bringing it out and dealing with it during the litigation process: that is through cross-examination.³ Experienced litigators are trained in finding and exposing these biases which go to the weight of the evidence.⁴ Judicial bias is something else again.

The Judicial Code of Conduct prohibits biased determinations. Even the appearance of impropriety is considered a reason to reverse a decision. On the other hand, in custody cases the role of gender preference and pre-conceptions regarding parenting roles is a factor that cannot be ignored. Up until now, in matrimonial cases, unlike cases in all other areas of the law, fifty percent of the litigants are men and the other fifty percent are women. Interestingly, although not surprisingly, a higher number of women practice in this area over other areas⁵ and more female judges seem to gravitate to the assignment to a matrimonial part than do men. It was reported that the Director of the Women in Government and Civil Society at the University of Albany opined that in order to “exercise meaningful influence on the cultural norms which stereotype women’s roles”, it would be necessary for one-third of the judges to be women.⁶ If that is true, what is the result when the New York Court of Appeals has 3 women out of 7 and at the *nisi prius* level the majority of the judges are women.⁷ Does the statement suggest that there was a previous gender bias against women, and now there may be a countervailing bias going the other way?

³ In the absence of pre-trial discovery, the presentation of a bias claim must await the trial, which in most cases, is after the harm has been done by the report’s issuance.

⁴ Several excellent articles on this subject have been written by Timothy Tippins for the New York Law Journal. *See, e.g. Timothy Tippins, Custody Evaluations, Part IV - Full Disclosure Critical, 1/15/2004 N.Y.L.J. 3, col. 1.* Notably, Timothy Tippins has extensive first-hand experience in cross-examining forensics. *See, e.g., Matter of W.J.*, 8 Misc.3d 1012(A) at *10, 801 N.Y.S.2d 782 (Fam. Ct. N.Y. 2005)(“A particular feature of this case is that Dr. Herman was extensively cross-examined by Timothy Tippins, a prominent critic of forensic methodology.”). Such cross-examination assists Courts in determining what weight (if any) to afford the forensic evaluation. *See, e.g., Oliver A v Christina A*, 9 Misc.3d 1104(A) at *19, 806 N.Y.S.2d 446 (Sup. Ct. Suffolk Co. 2005)(Regarding the testimony of the expert witness presented by the mother – the party displeased with the forensic report– the Court noted “that this type of testimony in response to a neutral forensic evaluation that clearly favors the adverse party is both relevant and material and bears directly upon the weight to be afforded the neutral forensic psychologist’s report, findings, testimony and recommendations.”)(Emphasis added).

⁵ The most recent statistics for membership in the Family Law Section of the New York State Bar Association indicate that 47% of its membership is female, compared with women constituting 34% of the general membership.

⁶ 2/1/2010 NYLJ (Col. 2)

⁷ The overwhelming majority of Family Court Judges are women.

Following the resignation of Justice David Souter, President Obama stated that he was seeking someone on the Supreme Court who understood “how our laws affect the daily realities of peoples lives” and indicated that “empathy” was “an essential ingredient for arriving at just decisions and outcomes.”⁸ Although Justice Sonia Sotomayer refused to state during her confirmation hearings that empathy was a quality she utilized in her decision making, it is certainly one that matrimonial judges are called upon to utilize every day. Empathy is “understanding and identifying with people’s hopes and struggles.”⁹ It differs from bias. Empathy is not precluded by the Code of Judicial Conduct; bias is.

The ABA Model Code of Judicial Conduct dictates that “[a] judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials or others subject to the judge’s direction and control to do so.”¹⁰

In the commentary to the section of the Code it states: “A judge who manifests bias or prejudice in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Examples of manifestations of bias or prejudice include but are not limited to epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics. Even facial expressions and body language can convey to parties and lawyers in the proceeding, jurors, the media, and others an appearance of bias or prejudice. A judge must avoid conduct that may reasonably be perceived as prejudiced or biased.”¹¹

That there is gender bias at play in financial determinations can be demonstrated from an analysis of the cases, comparing results where the facts are similar, but the results are different based only on gender. There is little controversy over the proposition that men will be treated differently from women when they make claims for economic relief. Husbands who come before the courts seeking support from their more successful wives do not receive as sympathetic responses as when the reverse is true. This is also true in terms of equitable distribution awards, where, on similar facts, women will receive a greater share of their

⁸ Robert Gibbs, White House Press Secretary, Press Briefing (May 1, 2009).

⁹ *Id.*

¹⁰ Rule 2.3(A) and 2.3(B) of the ABA Model Code of Judicial Conduct (2007).

¹¹ Comment to Rule 2.3 of the ABA Model Code of Judicial Conduct (2007).

Husband's property or have to give up less of theirs.¹² However, just because there is gender bias does not mean that the result is unfair or wrong. In case after case where gender bias is evident, the results are upheld nevertheless upon appeal because there are independent facts in the record which support the determination notwithstanding the admonition concerning the appearance of impropriety.

Gender bias in custody cases clearly exists, but awareness that it plays a part usually does not appear from reading the cases.¹³ In the first place, judicial decisions are written in order to explain and justify the result. It is extremely rare that a biased judge would set forth in a decision statements reflecting that bias. Awareness is largely anecdotal - those who practice in the area come to know which judges and which mental health professionals favor women or have pre-conceived notions as to parenting roles defined by gender.

Although the tender years doctrine was supposedly cast aside more than thirty years ago, everyone knows with a wink wink, that it still exists. Men are often advised that they should not pursue custody cases where very young children are involved, and even in those few situations where fathers have the temerity to stake custodial claims, only a small percentage prevail. Many fathers are forced to litigate beyond the original custody decision to maintain parental rights and meaningful access to children. Gender bias clearly exists, but that is likely because most people would agree that "very young children are better off with their mothers." That statement is clearly biased. However, it must be recognized that there is a difference between mothers and fathers and that difference can either be ignored or taken into consideration. Elimination of the difference is not within the province of the legal system nor is it currently possible through medicine, science or magic. Historically, gender was taken into consideration, for the most part to deny women their equal rights. With the coming of the equal rights movement and second wave feminism, came goals of gender equality, which brought us Orr v. Orr¹⁴ and the theory that gender should play no role in legal determinations.

¹² For instance, where one spouse contributes minimally to the attainment of the other spouse's enhanced earning capacity, the portion of same awarded to a non-titled wife tends to be greater than that awarded to a non-titled husband. See, e.g., Schiffmacher v Schiffmacher, 21 A.D.3d 1386, 801 N.Y.S.2d 848 (4th Dept. 2005)(The Appellate Division, Forth Department held that, in light of the wife's "modest contributions" to the husband's attainment of his master's degree in business administration, the trial court should have awarded the wife "only 20%" of the value of the husband's enhanced earning capacity)(Emphasis added) as compared with Cabeche v Cabeche, 10 A.D.3d 441, 780 N.Y.S.2d 909 (2nd Dept. 2004)(After noting the husband's "de minimus" assistance to the wife in obtaining her license as a registered nurse, the Appellate Division, Second Department held that the trial court properly concluded that the Husband was not entitled to *any* share of the wife's enhanced earning capacity.)

¹³ See, e.g. Susan Beth Jacobs, The Hidden Gender Bias Behind "The Best Interest of the Child" Standard in Custody Decisions, 13 Ga. St. U. L. Rev. 845 (June 1997).

¹⁴ Orr v Orr, 440 U.S.268, 99 S.Ct. 1102 (1979).

While it may be true that gender plays no role, things that have to do with gender play a major role - a distinction without a difference. Thus, the American Law Institute has proposed that contested custody cases should be determined based on an approximation theory, first determining how much time each parent spent with a child pre-separation, and then allowing custodial responsibility in that same proportion. Joint custody would be available only when past care-giving had been exercised approximately equally. If the approximation rule were adapted, we would most frequently be looking to the primary caregiver to become the sole custodial parent, a throw-back to the "psychological parent" doctrine suggested by Goldstein, Freud and Solnit in 1973.¹⁵ While only West Virginia has enacted the approximation standard, many states utilize the concept as an important factor in custody determinations and that factor is, in effect a bias toward mother custody.

Nevertheless, the admission of bias is not the same as the admission of fault or wrongdoing. For example, qualities which are clearly identified as feminine are ones that the general population, including custody evaluators, consider positive in making custody decisions: qualities such as warmth, understanding, patience and compassion. While men can have these "feminine" qualities, such qualities are more closely identified with women while masculine qualities such as assertiveness, ambition and discipline are less associated with good parenting.¹⁶

In one of the most famous gender bias cases, Young v. Hector,¹⁷ an architect father decided to become a stay at home dad when his high powered attorney wife was offered a position with a firm in Florida. The mother was awarded custody and the father liberal visitation after an en banc re-determination of the father's successful appeal. The majority of the en banc District Court of Appeal of Florida stated that the standard of review was whether the lower court abused its discretion and found that there was evidence in the record to support the award of custody to the mother. Specifically, the Court found that there was evidence indicating that the mother was "the more economically stable of the two parents," that the mother had been "a constant factor and dominant influence in the children's lives," and that she had a "superior ability" to control her anger around the children.¹⁸ The dissent wrote that there was no question but that gender bias was the reason for the decision and that in the reverse scenario, a father attorney "would have been virtually laughed out of court."¹⁹

¹⁵ Joseph Goldstein, Anna Freud & Albert J. Solnit, *Beyond the Best Interests of the Child* (1973).

¹⁶ See, BEM Sex Role Inventory for a list of the masculine and feminine adjectives.

¹⁷ *Young v Hector*, 740 So.2d 1153, 23 Fla. L. Weekly D1529 (Fla. Dist. Ct. App. 1998).

¹⁸ *Id.* at 1162-63.

¹⁹ *Id.* At 1173.

We are left with the awareness that gender bias is with us, that it is not always actionable, or even objectionable, but even when it is, it will be extremely difficult to convince appellate judges that determinations made on that basis should be reversed.

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