

Page Printed From:

<https://www.law.com/texaslawyer/2022/12/05/bias-in-family-law-and-what-to-do-about-it/>

NOT FOR REPRINT

Bias in Family Law and What To Do About It

Most of us, along with our judges, mediators and custody evaluators, don't think we have biases and prejudices that affect our judgment. We are wrong.

December 05, 2022 at 11:00 AM

By Susan Myres | December 05, 2022 at 11:00 AM

I learned a lesson years ago. A client returned for a modification in a custody agreement. He seemed anxious and I asked, "What are you worried about?" He said, "I think the judge will decide I'm a terrorist because of the way I look." His wife, who had been Muslim, had decided she was no longer Muslim and wanted to have primary parenting. Knowing the judge, I sensed my client had a right to be concerned. We decided to hit the presumed bias by asking in court examination, "What are you most concerned about right now?" We settled the case before we could try it.

Most of us, along with our judges, mediators and custody evaluators, don't think we have biases and prejudices that affect our judgment. We are wrong, however.

A wise person once said, "You never get people to think differently by telling them they are wrong." Tell me I'm *wrong* and I am likely to become more entrenched in my ill-formed, preconceived thinking.

So what do we do? I have been practicing family law for over 40 years in the Houston area. I believe our family law judges are sincere adjudicators who are trying their best to do the right thing, to issue sound rulings that are fair to both parties in a divorce and provide for the best interests of any children involved in a case. But all of us, to a greater or lesser degree, cannot avoid being influenced by the culture in which we grew up, by the traditions and beliefs of our family, by whether we were raised in a wealthy home, a comfortable, middle-class home, or in an atmosphere of persistent economic struggle, and by whether our families encouraged and supported us or left us to fight our battles alone.

This means we arrive at any conflict with certain baked-in, often unconscious reactions to the parties in a dispute. As family lawyers, we, perhaps more than lawyers in other kinds of practices, deal with a broad variety of clients from different walks of life. This means we have to confront our own implicit biases, too. But our preconceived notions about people are not always as obvious as the well-known and common biases based on race or gender or gender orientation, immigration status, or religion.

When we examine the issue closely, we find that we may be biased against a wide variety of other kinds of human conditions—against older people, for instance, or against the disabled or against litigants who are overweight. Interestingly, “Project Implicit” bias testing data indicates that implicit bias against people who are overweight may be the most persistent of the common biases. (“Project Implicit” was founded by prominent psychologists at Harvard University, the University of Washington and the University of Virginia to educate the public about bias and to collect data about bias on the internet.)

Because of family experiences growing up, a judge (or a lawyer) may overreact to people who raise their voices or, on the other hand, to people who are so timid they can barely be heard. Maybe we are quick to misjudge a party who clearly pinches pennies or one who spends liberally. We may decide on first meeting that one is “a miser” or the other is “a spendthrift.”

Many of you are familiar with the influential book by Daniel Kahneman, *Thinking Fast and Slow*, which describes our two ways of thinking. The “Fast” way involves what we might call “snap judgments.” “Fast” thinking probably saved the lives of many of our long-ago ancestors because they learned to react quickly to dangerous situations. We’ve also all probably known someone who agonizes at length over even minor decisions. Being stuck in “Slow” thinking can be an uncomfortable way to live.

But sometimes a slower, more thoughtful, analytical method of thinking is required to avoid making serious mistakes. And there are situations—such as those we encounter often in family law—in which snap judgments can have very harmful effects. Snap judgments about people or groups of people are among the most potentially harmful.

So what do we do? To begin with, we learn to distrust “gut reactions” to new clients that may not be fair. As experienced family lawyers, we have seen many situations, and sometimes we feel we can identify someone who is likely to be a troublesome or unreliable or incompatible client immediately. But we always need to check in with ourselves and ask ourselves, am I being fair? Should I have a second or third meeting and get to know this particular individual a little bit more before I make that judgment. (On the other hand, if a potential client tells you right away that he or she is looking for a “barracuda,” and you know you have no desire to be a barracuda, it probably isn’t going to work out! Some snap judgments are justified.)

But what about a *judge’s* “gut reactions” to certain kinds of clients? How can you disarm unfair prejudices, particularly the implicit ones? One approach is the one I mentioned at the beginning of this article: Give the judge an opportunity early on to see your client as a whole person, not a cardboard representation of whatever trait tends to bother him or her. Give your client a chance to talk about his or her concerns, values and sincere love for the children in the case, if there are any. Practice this with your client ahead of time, encouraging the client to be calm, straightforward, and serious. Make it impossible for the judge to dismiss your client as a “type.”

It’s a truism in life that when we meet and get to know *individuals*, we become less inclined to dismiss members of certain groups as all of a kind because we know from personal experience that they are not. Let the judge meet your client as a fully rounded individual, not a vague member of a class. It may not only help your case, but help that particular judge to be less inclined to jump to conclusions about people.

Susan Myres is a board-certified family law attorney at Myres & Associates. She has been practicing in Houston for over 40 years and has served in leadership positions locally, statewide and nationally. She is a past president of the American Academy of Matrimonial Lawyers (AAML).

NOT FOR REPRINT

Copyright © 2022 ALM Global, LLC. All Rights Reserved.