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Chair's Column

An Expression of Gratitude and an Outline of the Year to Come

By Derek M. Freed

It was my honor to be sworn in as the Chair of the Family Law Section of the New Jersey State Bar Association on May 19, 2022.

I believe that what makes our section great is the affection that we have for each other. We're a special group who enjoys each other's company. I think that is in large part from dealing with matrimonial law, day-in and day-out. We have all had tough cases and even tougher clients. We each have "war stories" that range from sad, to hilarious, to outright absurd. We have a shared experience. In a sense, we are a family.

We are there for each other in good times and in bad. When each of my children were born, I received calls and texts not only from my biological family, but from my FLEC family as well. And with every text I received, I was reminded why I joined this group. It is not just the retreats, or the symposium panels. It is because I know that we care about each other and while we may have different viewpoints, we believe in civility, compassion, advocacy, and integrity.

Our Immediate Past Chair, Robin Bogan, epitomizes those exact characteristics: civility, compassion, advocacy, and integrity. She is the best of the best. I first got to know Robin when we worked on the College Contribution subcommittee together. I enjoyed working with her right from the start. It was clear she knew the law, but she was also interested in everyone else's thoughts and perspectives. She was a leader, but she wanted collaboration.

We solidified our friendship at Stephanie Hagan's retreat in the Bahamas. I was the incoming Secretary and was stepping into Robin's role. During that retreat, Robin let me ask her at least 500 questions about what was involved with being an officer of the section. Look-

ing back, at least 493 of the 500 questions were pointless or irrelevant. But, of course, Robin answered all of my questions, the whole time telling me not to worry. Things would be fine. If I needed anything I could call her.

In her year as chair, Robin planned one of the best symposiums in recent memory. She ran the monthly meetings efficiently, while also welcoming discussion on important topics. She also literally brought the section back together. It started in the fall when we all got together in person with the Tischler Award dinner for Paris Eliades and Pat McShane. It continued when we got together to drink wine and listen to music at the holiday party. It culminated with our first retreat since 2019.

Everyone who attended Robin's retreat in March in Marco Island appreciated being together again and that was thanks to Robin's incredible work and her leadership. I know that she would be quick to correct me and give praise to the many other people who assisted her. And she is right that the retreat requires a large group of people working together. We are lucky to have our friends at the State Bar helping us, as well as the support of all of our sponsors, and all of our fellow attorneys. But, we cannot forget that Robin helped us to reconnect and did everything she could to make the experience special for everyone.

Robin has worked tirelessly on behalf of the section. She has led us with her intelligence, her empathy, her integrity, and her compassion. She is a voice of inclusion. We are a better section for having her as our Chair.

I would like to recognize my fellow officers, Megan Murray, Jeffrey Fiorello, Cheryl Connors, and now Christine Fitzgerald. I am confident that together, we will always do our best, and will work as hard as we can on behalf of the section to ensure that it remains vibrant and active in the years to come.

I have set several goals for my year as Chair of the Family Law Section. My first goal is to work to restore the concept of collegiality to the practice of family law. While the saying may be that actions speak louder than words, I would like to add a second part to that expression, which is that thoughtful words can inspire thoughtful actions.

I do not believe that I am alone in my observation that during recent years, I have seen collegiality and professional courtesy diminishing. Legal arguments seem to mirror political arguments, with cheap shots taken, outrageous claims asserted, alternative facts presented, and irrelevant personal attacks made. Email and video-conferencing seem to have accelerated this conduct. After all, it is much easier to insult someone you've never met in person. This behavior is damaging to our profession and the law.

Our bylaws tell us that the first two purposes of the Bar Association are to "maintain the honor and dignity of the profession of the law" as well as "to cultivate social relations among its members." Personal attacks and discourteous behavior run contrary to these stated purposes. We should not tolerate such conduct, nor should we engage in it or indulge it.

In my experience, the members of our section stand for courtesy and professionalism. Let me give you a few examples. When I was a young attorney, I had a case with Mark Mayrides as my adversary. My client owned restricted stock units, and I was trying to draft a coverture fraction to distribute the options. The only problem was that I had inadvertently reversed two numbers and my formula gave Mark's client an increasing number of shares as time went on, instead of a decreasing number. When he received my letter with this reversed coverture fraction, Mark could have just accepted it. Instead, he called me and suggested that I may want to look at my numbers again. He knew that ultimately, we would have both realized the error, so why not resolve it now? And he was right. The experience showed me that being an ethical, professional family law attorney meant extending courtesy to your adversary.

Second, I was fortunate enough to join FLEC during Chuck Vuotto's year as Chair. I remember going to my first meeting at the Law Center. I remember Chuck inviting me to be on the Arbitration subcommittee, which he was chairing. I didn't really know what being on a subcommittee entailed. I received an email from Chuck that we would have a dinner meeting to talk about our goals, and to talk about doing some drafting. I met Chuck, Amy Shimalla, and Bea Kandell for dinner. We went through our goals for the year ahead. Even though each had far more experience than I did, Chuck, Amy, and Bea wanted to actually discuss arbitration as peers and colleagues. From the first moment at the meeting, I was treated as an equal. That set the tone for my involvement at FLEC. And I thank Chuck, Bea, and Amy for their generosity and their indulgence.

That level of respect and collegiality has been my experience throughout every involvement that I have had with the section. As we all know, part of being on FLEC means writing for the *New Jersey Family Lawyer*. I remember driving to the offices of Greenbaum Rowe and sitting

in the conference room, watching Chuck Vuotto, Brian Schwartz, Lee Hymerling, Mark Sobel, and so many more talk about the recent decisions, what was happening with the law, and how important it was that we discuss it in the *New Jersey Family Lawyer.*

A short time later, Brian Schwartz asked me to work on a special issue of the *Family Lawyer* that he was editing about the state of family law, best practices, and how we could work to improve the system. He wanted me to write an article, which I did. Every time I needed help, Brian was there to give me encouragement. He was there to tell me what was good about my article, and, what sections needed improvement. This was a great experience for me. Brian helped me not only with the article, but also got me to start thinking about bigger ideas. It was Brian's professionalism and collegiality that made that possible.

Fast forward a few years. Jeralyn Lawrence is chair of the section. She appointed me to be on the subcommittee on college contributions with Robin Bogan. After the first FLEC meeting, Jeralyn spoke with us. She wanted our thoughts. Over the course of the next year, Jeralyn provided insights on what it meant to find a sponsor for a bill, what was possible, what was practical, and how to think about family law in a totally new way. She empowered us. It was her professionalism on display.

I provide these examples because I believe that professionalism and collegiality are two keys that can unlock relationships with other attorneys. They can inspire young attorneys to continue with the practice. Professionalism and collegiality will benefit lawyers, individually, our section, as a whole, and the entire practice. I am hopeful that we, as a section, can inspire those around us by exhibiting the same high standards and courtesy that we have always shown. We will lead by example.

In addition to working to restore collegiality, I have several other goals. One of our goals per our bylaws is to promote and protect the concept of "family" in all of its various forms. As lawyers, we are constantly working to understand the evolution of the family, so that we can more appropriately understand, address, advise, and represent our clients. But it goes beyond our clients. We work to more fully understand one another and the different perspectives that each of us brings to our interactions.

A group benefits with increased participation from its membership. A group also benefits from diverse perspectives. Understanding our differences leads to strength. Toward that end, I will be expanding the Diversity, Equity, and Inclusion subcommittee into a task force. I want our section to continue to be at the forefront of the discussion on diversity, equity, and inclusion that has been ongoing. This discussion may be difficult at times and provoke strong feelings, but I believe that it will be healthy for our section and improve the practice of Family Law in New Jersey. As long as disagreements are debated respectfully and professionally, we will all benefit. Most importantly, this is a necessary conversation. As I said, thoughtful words can inspire thoughtful actions. We owe each other and the families that we impact in our capacity as professionals to more fully understand one another and to ensure that everyone is treated with respect.

I want to empower this task force to work with lawyers and non-lawyers alike to examine the different aspects of our practice and make sure that they are reflective of where a modern progressive society should be. I want to ensure that everyone's voices are being heard in all facets of matrimonial law. I want to ensure that sensitivity is shown to all groups. That there is training and education for all of us. That we are not only striving to find the right answers, but that we are also understanding the correct questions to ask.

Next, societies are judged on how they treat those in need during difficult times. These last several years have been incredibly difficult on our children. They have had to adapt very quickly. They have had to stop going to school and learn from home. They have had to keep a distance from one another and isolate. They have had to face death and illness and deal with it. They have had to deal with parents who have lost their jobs in a matter of days. Now, inflation has spiked, and families are having to find ways to earn more money, or go without certain items. None of us with children are immune to these issues. As family lawyers, we need to keep the welfare of the children at the forefront of our minds.

One of the ways I believe that as a section we can help ensure that the needs of the children are being met is to start the process of reviewing the Child Support Guidelines and their underpinnings. Are the guidelines ensuring that children are being financially supported to the fullest extent possible? Laptops, computers, tablets, and cell phones are no longer an option or an extravagance. They are a necessity. High speed internet is required for schooling. More and more of our schools are being forced to charge activity fees to parents whose children participate in sports and other school-related activities. Municipal sports camps are no longer $25. They're $250 or more.

If you heat your home with natural gas, costs are skyrocketing. If you drive your children to their activities, to school, or to playdates, it costs you much more than it did a few years ago. I want to make sure that children who receive their financial support because of the Child Support Guidelines are not disadvantaged versus the children of intact families. This year, we will begin a long-needed critical reevaluation of the guidelines. Sheryl Seiden will be leading this committee. There is no better advocate for children than Sheryl. I know she will do an amazing job investigating and addressing this crucial issue.

Next, an additional goal is to address the staggering number judicial vacancies and to help the Court with the logjam that has been created. It is imperative that we talk about this issue and continue to focus on it throughout the course of the next year. We need to keep a spotlight on this problem and its impact not only on the practice of law, but also on the families that are seeking justice and fairness through the court system.

These are a few of my goals this year. There are many more. I believe that we can accomplish them together. Robin Bogan started the process of bringing us back together. I will do my best to continue that process. I am asking that we work together and continue the process of reconnecting in Scottsdale, Arizona, at the 2023 family law retreat. We can see where we've come and talk about how we continue to progress and move forward as a group. As colleagues.

As the Chair of the section this year, I will try to do my best. I thank you for the opportunity that you've given me. I look forward to working with all of you. I wish you all happiness, peace, and good health in the years ahead. ■

Inside this issue

Executive Editor's Column

Bias in Business Valuators: A Real-World Issue, but are There Real-World Solutions?

By Ronald G. Lieberman

Your client needs to retain an expert for evaluation of a business during the divorce litigation. An experienced practitioner knows expert testimony on that topic will be valuable to the judge. But how are you going to get around the issue of a judge believing the expert witness to be biased, with the expert being deemed a "hired gun?" Is there a way of getting around the "hired gun" perception that the judge may have?

You cannot delude yourself into thinking judges are unaware that experts in valuation cases are influenced by the interests of the party who retained them, even if that expert tries to come across as disinterested. Experts become that way by knowing what information to obtain, generating ideas, and using experience. But that filtering could come at the cost of ignoring otherwise useful information.[1] That viewpoint of bias comes from scholars who studied bias in business valuators. The risk is real and may negatively impact the credibility of your client's business valuator. So, let us explore the issue and any potential solutions available.

The Problem

Before we go any further, should we be concerned about a bias or biases of expert witnesses? Yes. Biases can reduce the accuracy of the expert opinion, cause an unfounded outcome, and even undermine faith in our judicial system.[2] Biases can cascade from an expert to other experts and even then to legal professionals.[3] One expert opined there were seven different sources of bias, arising from the case or experience or human nature: (1) case evidence; (2) reference materials; (3) irrelevant case information; (4) base rate expectations; (5) organizational factors; (6) training and motivation; and (7) cognitive architecture and the brain.[4]

There have been scholarly studies exploring whether a business valuator is biased in favor of the party who hired them. Not surprisingly, there was bias shown. For example, one study determined the valuation reached by an expert coincided with the interest of the party who hired that valuator.[5] The data used in that article showed the experts in public firms' valuations "may be driven to comply with the wishes of the party to the transaction (buyer or seller) that commissioned the valuation."[6] In situations with private business valuations, the findings on bias were not much better, because the expert exhibited "possible favoritism" in favor of the party commissioning the valuation.[7] The scholars determined in valuations of private firms there were more "experts' compliance with the interest of the commission of the valuation" than in valuations of public firms.[8] One of the same scholars, Dan Elnathan, previously recognized financial analysts were partial to those who hired them.[9]

A recent study ("the Broekema study") found "engagement bias" in professionals who were assigned to perform evaluations on behalf of a buyer or seller.[10] That study endeavored to determine "what causes differences in valuation outcomes?"[11] The focus of that study was "the potential influence cognitive biases might have on business valuations and the evaluations thereof."[12] The researchers said there were "numerous studies" previously examined biases in decision-making, but no study had reviewed "the potential influence of cognitive biases in business valuation…."[13]

The Broekema study provided a history lesson of sorts on the effects of heuristics (mental shortcuts) and biases present "particularly in situations characterized by high degrees of complexity and uncertainty."[14] Examples of those situations included "financial decisions" and "investment strategies."[15] The Broekema study went on to investigate two forms of biases, one called "the anchoring and adjustment bias, which entails the tendency to use an initial piece of information as an anchor and subsequent adjust insufficiently away from that (largely irrelevant) anchor" and the other called "engagement bias which

entails the possibility that valuators (or any professional for that matter) are affected by their clients' interests."[16]

Anchor bias has been defined as a cognitive bias that causes people to rely too heavily on the first piece of information they are given about a topic..[17] The Broekema study discussed the anchor bias as "pos[ing] a particularly great risk in the context of business valuation, as valuators are frequently confronted with numerical estimates of a company's value that may serve as an anchor and subsequently bias the valuator's own estimates."[18] Those anchors can work against the valuator by "affect[ing] their judgment, ultimately risking poor and costly financial decisions."[19] There was some hope regarding anchor bias because "some research [] suggests professionals in settings that are familiar to them rely less on anchors in their judgment."[20] No doubt, a business valuator is going to be familiar with the setting of a business valuation. Regardless, "based on the robustness of the anchoring bias and its presence in a variety of domains, [the Broekema researchers] suspect that valuators are affected in their judgments by the anchoring bias."[21]

The Broekema study then moved on to the engagement bias which it defined to be a bias where "business valuators (or any professionals for that matter) are (consciously or unconsciously) affected in their judgments such that these favor their clients' interests…."[22] The researchers recognized the "fierce" competition between professionals to obtain and to retain clients so it was "not usual" for the professionals "to achieve their clients' satisfaction…."[23] The researchers then stated with engagement bias "the possibility exists that clients' interests are somehow factored into business valuations at the expense of focusing solely on valuation theories and the principles of the profession."[24] While the Broekema study acknowledged "there is no empirical evidence for the existence of engagement bias in the important context of business valuation," however "there is reason to believe that professionals weigh their clients' interest at the expense of their professional judgment."[25]

To make matters even more interesting, the researchers cited studies revealing "the theory of motivated reasoning, which in essences entails that people can be unconsciously motivated to arrive at a certain conclusion, all the while being under the illusion of acting objectively."[26] As a result, the expert you hire for your client may think they are being objective, while being "unconsciously motivated" to arrive a result they think would be advantageous to your client. That situation would occur because after an outcome is determined, "people will subsequently interpret and analyze information in a way that is consistent with this desired outcome, particularly when the situation at hand is rather ambiguous and thus allows for multiple interpretations."[27] So, if your client has an outcome in mind for the business valuation, the theory holds that if the valuation is ambiguous and can be interpreted in different ways, the valuator will act in a manner consistent with that outcome. There is no doubt, of course, that business valuations are not an "exact science."[28] Thus, there will be room for different experts to reach different conclusions on the same or similar data.

The conclusion reached by the Broekema study was valuators have both anchoring bias and engagement bias with such evidence being "robust."[29] The valuators who participated in the study did not self-report any bias, thus leading to the conclusion "these biases operate largely in an unconscious fashion and that the participants rationalized their intuitions regarding the company's value post-hoc."[30]

The Solutions (Maybe)

Now we know from the various studies that when you retain an expert for your client, a prudent practitioner will be prepared for the judge or even opposing counsel to state that your expert has anchoring bias and engagement bias, thus calling into question the efficacy of your expert's report. Of course, "those in glass houses shouldn't throw stones," so you can use that same line of argument on opposing counsel's expert. Great. How does that dueling line of argument help your client? It will not. Is there a way of getting out in front of the biases? Perhaps.

One can foresee a judge exercising the court's prerogative under *Rule* 5:3-3 to have the parties retain a court-appointed expert. But that retention deprives you of the ability to have free-flowing, unilateral conversations with the court-appointed expert because you need both attorneys available to speak with the court-appointed expert on the issues. If that court-appointed expert is in addition to each party's experts, the costs to the parties will be very high on expert fees alone. Moreover, a court-appointed expert comes cloaked in the judicial robe, making an assault on their report and determinations a difficult proposition.

A researcher, judge, and professor explored the issue of bias in expert witnesses (albeit in the criminal justice setting) and offered several potential recommendations "to increase and improve the contributions expert made

to the courts."[31] Those recommendations included: (1) offer judges "education about the use and limitation of expert evidence"; (2) "best practices and standard operating procedures that strengthen expert evidence" by potentially blinding the expert from receipt of contextual information or having two experts work on the report, one who has the contextual information and the other one who does not; (3) "documentation that details the experts' work;" and (4) offering training to experts on cognitive bias.[32]

Specifically, in the family law arena, it is unlikely a practitioner will encounter a business valuator who works consistently for one side (e.g., owner spouse or non-owner spouse). So, a judge is likely to perceive expert witnesses as less biased if they have testified often enough for both sides of cases. Also, it is extremely unlikely that an expert would have a personal stake in the content of the case. So, how would a practitioner try to convince a judge of a bias on the part of an expert witness? Perhaps it works best to think of the anchoring bias and engagement bias spheres. A practitioner can go after the first information supplied (anchoring bias) to the expert or loyalty to the hiring party (engagement bias). Those lines of examination are in addition to inquiring whether the expert carried out an independent investigation or onsite visit; carried out witness interviews; asked for documentation that was verified as accurate and complete; had appropriate time to produce an opinion; received information from both sides as opposed to the hiring party; was aware of all key facts in the case; made assumptions grounded in fact; accurately considered and applied all three approaches (income, asset, and market); and accepted other probable outcomes when questioned.

Given all the information about the types of biases and sources of biases, the practitioner can be forgiven for wondering if any expert will have any value to a judge. Factfinders are already biased against experts in general.[33] The answer still will be "yes" about value of an expert's testimony, given the esoteric nature of business valuations. But the practitioner can seek to get in front of the issue of bias by asking the expert to have a colleague review the work without knowing which side (i.e., the owning or non-owning spouse) has retained the expert, and have the expert detail the items reviewed in the report, being sure to be able to answer questions why information was not considered. It would be useful to the practitioner to find experts who worked for both sides in the past, meaning the owning and non-owning spouses and have been qualified in the past as court-appointed experts. Finally, the expert should find classes which educate them about anchoring bias and engagement bias to be aware of the signs. ■

Endnotes

1. Itiel E. Dror, *The Paradox of Human Expertise: Why Experts Get It Wrong*, The Paradoxical Brain 177 (Narinder Kapur ed., 2011).
2. David E. Bernstein, *Expert Witnesses, Adversarial Bias, and the (Partial) Failure of the Daubert Revolution,* 93 Iowa L. Rev. 451 (2008)
3. Itiel Dror, et al., *The Bias Snowball and the Bias Cascade Effects: Two Distinct Biases That May Impact Forensic Decision Making*, 62 J. Forensic Sc. 832 (2017).
4. Itiel Dror, *Human Expert Performance in Forensic Decision Making: Seven Different Sources of Bias*, 49 Australian J. of Forensic Sc. 541 (2017).
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6. *Id.* at p. 404.
7. *Id.* at p. 405.
8. *Id.* at p. 407.
9. *See* Dan Elnathan, et al., *On the Added Value of Firm Valuation by Financial Experts*, 4 Int' J. Bus. & Mgmt. 70, 71 (2009).
10. Marc J.R. Broekema, et al., *Are Business Valuators Biased? A Psychological Perspective on the Causes of Valuation Disputes*, 23 J. Behav. Fin. 23,34 (2022)
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14. *Ibid.*
15. *Ibid.*
16. *Id.* at 25.
17. Teovanović P. *Individual Differences in Anchoring Effect: Evidence for the Role of Insufficient Adjustment*. Eur J Psychol., Volume 15(1), 8-24 (2019).
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22. *Ibid.*
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26. *Ibid.*
27. *Ibid.*
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29. Broekema, 23 J. Behav. Fin., *supra*, at 34, 38.
30. *Id.* at 38.
31. Dror, McCormack and Epstein, *Cognitive Bias and Its Impact on Expert Witnesses and the Court*, The Judges' Journal, Volume 54, Number 4, 8-14 (Fall 2015).
32. *Id.* at p. 11-12.
33. Harrison, Jeffrey L, *Reconceptualizing the Expert Witness: Social Costs, Current Controls and Proposed Responses*, 18 Yale J. on Reg. 253 (2001)

Should the FD Docket be Eliminated for All but Summary and Consent Proceedings?

By Charles F. Vuotto, Jr., Jeralyn Lawrence, Jeffrey M. Fiorello, Carmen Diaz and Debra E. Guston

This column will address the Supreme Court *Report and Recommendations on the Judiciary Special Committee on the Non-Dissolution Docket*.[1] In its 2021 Action Plan for Ensuring Equal Justice, the Court committed to critically reexamine the Family Non-Dissolution docket. This docket type involves cases concerning children, family relationships and responsibilities where there is no divorce filed. The committee was specifically charged with reviewing operation, procedures, and protocols to enhance procedural fairness and eliminate the potential for systemic disparities in outcomes.

There is no question that significant work went into the preparation of this report. The members of the bench and bar who served on this committee should be commended for their efforts. This column will first outline the major recommendations made within the report and then address whether there is a more expedient and simpler approach to making FD practice consistent with the due process protections found in FM rules and the Constitution of the State of New Jersey.

The major recommendations contained within the Supreme Court committee's report are detailed below:

Recommendation One

Amend Rule 5:4-4, to require the court to: (a) serve all non-dissolution documents filed by the initiating party on the non-filing party, and (b) serve any responsive documents on the initiating party. In addition, provide an option for the parties to use "Email Service" for the exchange of documentation beyond initial service.

Recommendation Two

Non-Dissolution materials and forms should be available in all high demand languages the Judiciary currently provides as well as Hindi.

Recommendation Three

Provide educational materials for non-dissolution litigants that inform them of court processes and expectations (i.e., burden of proof regarding best interest factors, change of circumstances, complex track, legal custody vs. physical custody, intra-state and removal considerations, and sample parenting time/culturally inclusive holiday schedules). This information should be available to the public in all available formats including educational seminars in the Offices of the Ombudsman and on the Judiciary website.

Recommendation Four

Develop non-dissolution educational materials for judges such as a bench card with factors to be considered when determining whether a case is complex. The information on bench cards should be the same as the information offered to litigants.

Recommendation Five

Develop sample custody and parenting time/visitation interrogatories that would be available (not mandatory) to the public and modifiable for individual use.

Recommendation Six

Amend Rule 5:8 to require non-dissolution litigants to participate in the Non-Dissolution Education Program and a subsequent consent conference prior to their first hearing before a judge as set forth in Directive #2-20, Family – Non-Dissolution (FD) Education Program (EP), January 3, 2020.

Recommendation Seven

Amend Rule 5:4-3(b) to allow the non-filing party to file a responsive pleading. Create a timeframe to file a responsive pleading and a timeframe to reply to the responsive pleading. Develop sample forms.

Recommendation Eight

Revise the Non-Dissolution Complex Case

Management Order form to reflect that:

1. the FD Case Management Order ("FD CMO") was entered at the initial hearing,
2. the reason(s) the court has deemed the case complex,
3. the appointment of a Guardian ad litem for the child(ren), if necessary, and
4. the appointment of counsel the child(ren), if necessary.

Recommendation Nine

Cases designated as complex should be relieved of the 90-day resolution expectation.

Recommendation Ten

Amend Rule 5:6A and Appendix IX-A, paragraph 28, to require that the child support guidelines worksheet be included/distributed with all child support orders/Uniform Summary Support Orders (USSO).

Recommendation Eleven

Review the Financial Statement for Summary Support Actions to require the information on each line item of the Child Support Guidelines Worksheets."

Recommendation Twelve

Amend Rule 5:5-3 to create a process comparable to the dissolution process outlined in Rule 5:5-4(a)(4), where a party seeking a modification of support must file a current Family Part Case Information Statement along with the prior Family Part Case Information Statement to enable the judge to determine whether there is a substantial change in circumstances warranting a modification of support.

Recommendation Thirteen

Add the following three questions to the Non-Dissolution Verified Complaint form.

1. Is there a history of domestic violence between you and the other party named in this complaint?
2. Have you ever filed for a temporary restraining order and/or filed a domestic violence criminal complaint against the other person named in the complaint?
3. Do you have an existing/active temporary or final restraining order against the other person named in this complaint?[2]

Discussion

The authors question why we continue to have a significantly different set of rules, procedures and forms for FD matters as compared to those handled by the FM docket. In fact, it is our understanding that in other states there is no such other docket.

As the report indicates, the issues that are addressed in an FD matter can be identical (and very often are) to those that are raised in an FM matter other than the dissolution of a marriage. The report states, *"[T]he welfare of children is paramount whether the parents are married, divorced or never-married." J.G. v. J.H., 457 N.J. Super. 365 368 (App. Div. 2019). While practically speaking the FD docket focuses on the named parties in matters, the fact is that children are at the center of FD actions."* The report also states, ""*The recommendations presented in this report include systemic and operational enhancements. They seek to resolve inequities between similarly situated couples in the FD and FM dockets where the only material difference in most cases is the marital status of the parties. Considering the fundamentals of both procedural and substantive due process, the suggested rule amendments contained in this report support the expediency of summary proceedings while ensuring a more comprehensive approach for more complex questions presented to the court."*[3]

It is acknowledged that the vast majority of the cases that fall within the scope of the FD docket involve self-represented litigants who are unfamiliar with not only the law but the procedural mechanisms of the legal process. In an effort to ensure that these self-represented litigants were given open access to a judicial system which they could effectively navigate, a separate set of streamlined rules, procedures and forms were created, (i.e. the FD Docket). These streamlined procedures sought to benefit self-represented litigants by proactively limiting procedural roadblocks or anticipated impediments to their access to the courts. The objective of the FD Docket was noble. Unfortunately, this streamlined FD process has, in practice, often resulted in more harm than help to these self-represented litigants.

At the root of this evil is the fundamental misconception that just because a population of litigants may benefit logistically from a less complicated route to the judicial system that their legal issues are therefore necessarily less complicated. We as practitioners, know that this is not true. The legal issues regularly litigated within the FD docket are just as complex, if not sometimes more complex, than those presented within the FM docket. In fact, many of the most complex, fact-sensitive and diverse

case types, such as paternity establishment, psychological parentage, Special Immigrant Juvenile (SIJ), and grandparent cases, which may necessitate extensive discovery, expert evaluations, and complex tracking, arise more frequently under the FD docket than the FM docket simply because the matter does not involve the simultaneous dissolution of a marriage.

Why, then, do we have a legal system which permits one set of rules for the FD docket and another set of rules for the FM docket if the issues before both dockets are substantially the same? There is no logical or rational basis why the issue of custody or child support should be approached differently in an FD matter than an FM matter. The net effect of the FD streamlined process is the assumption that every matter than comes before the court should be handled summarily without the need for the "additional" steps and procedures which take place regularly in the FM Docket. However, if these "additional" steps and procedure did not have a value or a purpose, they would not exist in the first place. For example, the Court rules require updated Case Information Statements for child support modification applications in all FM matters. This requirement exists not because we believe that married litigants need to do more work, but rather, because the information in the statement aids the Court in making a proper and just determination which ensures the child of the marriage is adequately supported. When we eliminate this "additional" step in FD matters so that we can make the litigation process easier for self-represented litigants, we simultaneously deprive the court of all the information needed to make a proper and just decision. Who is harmed in this scenario…the FD child who, because they had the "misfortune" of being born of two unmarried parents, may now not benefit from a proper support order all in the name of an easier process.

Again, while noble in its intent, the FD docket has created a dual system of justice which not only affords self-represented litigants (ironically, the population of litigants in intended to protect) with a lesser system of due process but a functionally more confusing system, especially where lawyers are involved. [4]

While it is acknowledged that the Court rules do allow for deviations from the FD summary process for "good cause is shown," we must remember, that these self-represented litigants, for whom the streamlined process was created, are likely not aware of these Court rules. They do not know they have the ability to request discovery in a support application beyond the mandatory last three paystubs. They do not know they can ask for guardian ad litem or a best interest evaluation in a custody dispute. The resulting evil is two very separate and very unequal systems of justice which disproportionately effects self-represented litigants, most of which are minorities or those of lower economic means. Rather than assume that FD matters are simple matters than can be afforded the additional legal procedures and measure if it is warranted, the Court should assume that FD matters are deserving of and require the same due process procedural safeguards afforded to FM matter.

It is acknowledged that some cases are truly summary and should be resolved expeditiously. However, the goal of "expediency" in FD matters is no lesser or greater than those presented in the FM docket. That reason, assuming it is a valid one, should not be basis to continue with a flawed system. Ease of access to the courts should not be at the expense of people's constitutional rights to due process. Further, it must be acknowledged that that the entire process is antiquated. It's not just economically challenged people who fall into FD type cases. The FD process also disproportionately impacts the LGBTQ community, and quite frankly, more and more people are growing their families (having children) and not getting married. Most significantly, while the courts and Legislature have made it clear that children of unwed parents are not to be treated differently than those born into marriages, the FD docket continues to treat children of unwed parents disparately in this flawed legal process. The report makes recommendations, which for the most part, seek to modify the FD practice to recognize the due process and other considerations that are already reflected in the FM procedures. However, instead of taking a flawed system and trying to tinker with it to make it consistent with a system that works better in terms of procedural due process, why not simply apply the FM rules to FD matters or, better yet, eliminate the dual docket altogether? Matters such as custody disputes between parents and child support establishment and modification, should be treated in a similar manner to those issues that arise in the FM docket. The unique aspects of the FD docket, those that are truly summary in nature could be maintained there. These include name changes for minors, SIJ custody cases, transfer of custody on consent and establishment of paternity. Those cases currently handled in the FD docket that are considered "complex" and which have been traditionally given short shrift could be moved to the FM docket to allow for the due process often lacking under the long history of the FD

docket. Grandparent visitation disputes and psychological parent claims are also among those cases that deserve the time, structure, and attention the FM docket affords to married parties. The docketing system also needs revision. At present, if a matter is filed concerning a particular child, it appears that *any* future application must be filed under that same docket number, whether the parties or issues differ. This can lead to case initiations being rejected, as there may not be knowledge of the prior filings by a new party seeking relief in respect to a child.

It should also be noted that some of the recommendations would also benefit cases in the FM docket. However, there are no mirror provisions that these writers are aware of. Instead of trying to modify two dueling systems, why not create a truly summary docket under the FD and combine all contested FD cases with the FM docket and apply the best recommendations to the combined docket?

Conclusion

Therefore, it is the authors' view that the disparate and separate FD procedures should be eliminated for all but summary and consent matters. The FD part arose when this aspect of our society was substantially different than it is today. The number of unwed couples and parents in our society has grown exponentially since the FD part was created. It is no longer a small minority of our society. Many of the contested issues currently relegated to the FD docket, other than the dissolution of a marriage, are identical. The procedures, rules, forms, and other aspects of FD practice should be identical to the FM practice and procedures and only modified where necessary to address the specific issues before the court. This can be done most efficiently at a Case Management Conference, not by having a wholly separate set of rules and procedures, which to a large degree deprive litigants of basic due process rights.

The FD part should be eliminated for all but summary and consent proceedings currently docketed there and disputed cases combined with the FM docket. The authors are in favor of overhauling the entire FM and FD system and creating a system – like in other states – where all litigants are afforded the same process, time, and consideration of the court. Indeed, there are FM cases that are much simpler than FDs. If a total restructuring of the FD and FM dockets is not practical, then, at the very least, FD matters should follow the same rules, procedures and forms as the FM docket except where some modification is required due to the limited issues involved in a particular case. ■

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Endnotes

1. See Notice to the Bar issued by Hon. Glen A. Grant, Administrator Director of the Courts dated September 30, 2022 at https://www.njcourts.gov/notices/notice-family-report-and-recommendations-judiciary-special-committee-non-dissolution-fd
2. See https://www.njcourts.gov/notices/notice-family-report-and-recommendations-judiciary-special-committee-non-dissolution-fd
3. Ibid.
4. Lawyers are made to file additional forms in FD matters simply because they are representing a client. For example, rather than allow the caption and an attorney's certification of the pleading being filed to report an attorney involvement in a matter, a separate appearance is required, generating a fee, while the actual filing is at no charge to the litigant. Additionally, as the form complaint or request for modification of an order often does not have sufficient space or format to allow for a serious and detailed complaint, lawyers often draft their own complaint. When this is done, the form complaint is still required to be filed, creating a duplication of effort. Another issue is that the fields in the forms are too small. It is impossible to name more than one plaintiff or defendant on the form complaints and other captioned document. There is also an issue for Hispanic litigants whose full legal names often exceed the letter count in the fields allowed. This often result in additional filings or materials to advise the court of the actual legal names of the parties. Further, these forms do not allow for addresses of persons in other countries, again causing additional documents to be submitted to supplement the record.

In Memoriam: *Jeffrey P. Weinstein*, 1945-2022 Family Lawyer Extraordinaire

By Mark Sobel

Jeffrey P. Weinstein spent most of his professional career as a well-respected family lawyer. He earned that respect. He worked every day… even during the most difficult last five years of his life when he refused to compromise living life to its fullest. To Jeff, his diagnosis was an annoyance. He never complained.

Jeff served as a matrimonial lawyer for more than 50 years and was a principal at Weinstein Family Law, a practice engaged in complex family matters. Jeff not only served his clients well, he served our profession well. He enhanced the practice of family law through his generous devotion of time and effort. Among a few of Jeff's volunteering efforts were his decades of memberships in the Essex County Bar Association, the New Jersey Bar Association and the American Bar Association. Given his particular focus, Jeff was a member for many years of the New Jersey State Bar Association Family Law Section and, in fact, served as the Chair of that Section. He also was one of only two lawyers in New Jersey who provided guidance to the New Jersey Supreme Court Committee establishing the family part within the New Jersey Court system. Jeff was a fellow of both the American Academy of Matrimonial Lawyers and the International Academy of Family Lawyers.

Jeff believed in the principle that everyone was entitled to advance themselves to their full potential. Long before it was common, his law firm's counsel included women, minorities, and staff from all different walks of life. They were all an integral part of his firm. Visits to Jeff's office would often remind me of what it might be like to be in the U.N. with so many different people in a mosaic of complete acceptance based upon only two attributes: integrity and a commitment to hard work.

Unlike many of us, Jeff never sought self-promotion. In fact, he was reluctant to talk about his many successes, zealously guarding his clients' privacy. Thus, many of you may not know, that Jeff was the lawyer who represented Peter O'Toole in an international custody case. That case in Monmouth County occurred at a time when sexual stereotypes may not have allowed for a father's equal legal rights regarding custody of children. It certainly was a time when removing a child from the United States to live in England was not an easily accomplished task. Jeff won that case but he never bragged about it. He just indicated that the real benefactor was Mr. O'Toole's son, who got the opportunity to live a life that allowed him to accomplish whatever his God-given talents were. Similarly, Jeff was, I believe, the first lawyer in New Jersey to obtain alimony for a husband. Again, not an easy accomplishment back in the day. However, Jeff's body of work is not about his many legal accomplishments nor about his legal acumen, but rather his undying devotion to the practice of law in New Jersey. His true legacy is about teaching the lawyers of the next generation. As a result, I was privileged for over 25 years to work with Jeff on our annual two-day emersion in family law attended by hundreds of lawyers throughout the state.

Our ICLE Family Law program certainly was one of Jeff's finest accomplishments. As a result of that program, I had the profound opportunity to work many days and nights with Jeff for over a quarter of a century. Yes, we discussed the evolution of family law and bringing in experts to assist in the analysis of the ever-evolving aspects of our practice. Our topics ranged from business valuations, removal issues (pre- and post-*Baures*) as well as the practical needs of starting your own practice, building your own client base, and dealing with the variety of personalities one often finds within the rubric of family law. While it is true that many of our lunch sessions at Neros discussed outlines for that year's topics we would digress into an elaborate discussion of the Yankees starting lineup or the Giants beating the Patriots. It was a time for me to learn. It was a time I will never forget.

When we were informed of Jeff's tragic passing and, given the upcoming Jewish high holidays and the necessity for an immediate service, I wondered if in fact many of his family, friends and colleagues would be able to attend on such short notice. I should not have been

surprised in seeing the entire chapel full, the entire parking lot full and hundreds of people in attendance on literally no notice. That perhaps is the best illustration of Jeff's legacy. He touched all of us and did so in a way that we all dropped everything to be there to celebrate his tremendous accomplishments with his family. When I got there, both his son, Evan, and his wife, Ronnie, whispered to me that I guess now I will have to do it alone. In truth, I will never be doing the Institute alone, as Jeff will be on my shoulder every moment of that program, often telling me to stop talking and let the speakers get a word in. I will miss him every day but especially on those summer days. For years, after the passing of one of my other mentors, Barry Croland, I refused and still refuse to take his number off my speed dial. Just seeing his name there puts a smile on my face. Unfortunately, now I have two names on that speed dial list, Barry's and Jeff's. Perhaps the greatest lesson Jeff taught me was that if you are true to your profession, you will not need to send, nor will you need to receive, a confirming letter regarding the conversation you just had with an adversary. I never did with Jeff. I never needed one. What a legacy.

The Importance of Cultural Competence in Family Law Matters

By Jhanice V. Domingo, Valerie Jules McCarthy and Amanda Yu

On Oct. 20, 2020, the New Jersey Supreme Court amended Rule 1:42-1 regarding Continuing Legal Education requirements for attorneys licensed in this state. The amendment to Rule 1:42-1, effective Jan. 1, 2021,[1] included in part a requirement that all New Jersey attorneys must complete at least two credit hours of qualifying coursework on diversity, inclusion, and elimination of bias. In the accompanying Notice to the Bar, the Honorable Glenn A. Grant, stated that the requirement of these credit hours is "one of many ways that the Court is seeking to remedy individual and institutional barriers to justice and enhance equity in the courts."[2]

In the practice of family law, cultural competency, broadly defined as the ability to accurately understand and adapt behavior to cultural difference and commonality, is crucial for effective representation and unbiased adjudication.[3] This is especially important in New Jersey, which is one of the most diverse states in this country.[4] According to the 2020 Census, 38.4% of New Jersey residents are Black, Hispanic, Asian, American Indian or Alaska Native, Native Hawaiian or Other Pacific Islander, some other race, or multi-racial.[5] This was an increase of 7% from 31.4% in 2010.[6]

Growing in cultural competence not only will minimize the instances of ignorance of practitioners, experts, and judges, but also will bring more awareness to the problem of implicit biases within the Court system. As is commonly said: "You don't know what you don't know." Until the bench, the bar, and experts are educated in cultural competence, there will be limited and insufficient protections for litigants from ignorance and implicit biases in family law.

Becoming more adept at navigating cross-cultural issues and achieving a higher level of cultural competency should be the goal of every individual within the New Jersey court system. This includes family law practitioners, experts who litigants employ, and judges who make legal determinations about families. Family law attorneys, experts, and judges each play a role in determining the outcome of a family law case – whether it be advocating for a client, evaluating a family, or making the ultimate decisions about custody, domestic violence, and the involvement of the Division of Child Protection and Permanency – therefore, they all must be appropriately educated in cultural competency to adequately perform their jobs.

Attorneys

To effectively communicate, interact, negotiate, and intervene on behalf of a client, an attorney must understand that client's background. This is especially important in a practice area that is as personal as family law as these cases involve the most private of relationships. Family structures and how a family operates are inextricably linked to the family's cultural norms and values. For example, even though the Court's "standard" holiday schedule only includes Christian religious holidays (e.g., Christmas, Easter, etc.), a culturally competent family law practitioner should be able to address any client's religious and cultural observances in their representation and not simply default to what is established as "standard" by the Court. Furthermore, certain religious holidays have special significance, which should be understood by the practitioner and communicated to the Court and experts involved in the matter.

A culturally competent family law attorney will be mindful of a client's cultural background and take proactive steps to be as informed as possible before and during the client's representation. Ethnocentrism, or the evaluation of other cultures according to preconceptions originating in the standards and customs of one's own culture, must be considered when advocating for one's client.[7] Attorneys not only must be cognizant of their own ethnocentrism, but also that of the Court. A family law attorney must be careful not to sterilize a client's culturally sensitive narrative and leave it devoid of the client's cultural lens. Sometimes, the facts themselves may be the same in two different stories, but the meaning behind

those facts can hold great significance which must be artfully communicated and presented to the Court.[8]

Family law attorneys also bear the burden of being prepared for issues that may not be relevant in their own personal lives. For example, in New Jersey, the Courts will typically not impose upon the non-custodial parent the burden or authority to police the religious instructions of the custodial parent.[9] However, New Jersey Courts will enforce language agreed upon by the parties regarding religious instruction of their children. Therefore, it is the responsibility of family law attorneys to advise their clients about issues such as regulating the conduct of children, religious observances, or dietary restrictions. Family law attorneys must evaluate whether the parents can come to an agreement about these issues, even if these issues would never arise in their own lives.

Without adequate consideration and understanding of cultural norms and practices, relevant facts may not be properly elicited, and important issues may be overlooked and ignored. For example, a litigant who has been a life-long Muslim raised and living in a Muslim subcommunity may not, at the outset, explain the intricacies of their religion and the cultural implications of same to their attorney in a divorce or custody matter. If such information is not elicited from a client, an attorney will not be able to successfully "issue-spot" what is important to their client or provide the appropriate context for a Court to property evaluate and decide pertinent issues.

Custody Evaluators

It is crucial for custody evaluators to be understanding of the cultural norms and values of families they are evaluating to adequately opine about what custody arrangement would be in the child's best interests.[10]

At a recent meeting of the Family Law Executive Committee, the December 2021 Report of the Blue-Ribbon Commission on Forensic Custody Evaluations in New York was circulated to all members.[11] The commission found that there were systemic biases and inequities that render some individuals at a certain disadvantage either in the retention of a custody evaluator or in the results of a custody evaluation due to cultural factors. The commission unanimously recommended that forensic custody evaluators undergo at least 36 hours of mandatory trainings covering topics related to "the history of forensic evaluations, best practices in forensic evaluations, implicit and explicit bias, domestic violence and intimate partner violence, child abuse, child sexual abuse, substance abuse, coercive control, and trauma."[12]

In addition to these trainings, it is important that evaluators be familiar with and sensitive to the culturally specific practices of raising a child to which the parents being evaluated subscribe.[13] Values which align or are similar to that of "traditional American values" may be highly favored over dissimilar values of other cultures.

Cultures which value the group over the individual often do not align with what is widely promoted by U.S.-educated and U.S.-raised experts. For example, one parent coming from a culture that values the active involvement of grandparents and other extended family members may not be appropriately considered by an evaluator who has no experience with this style of parenting. That could result in the evaluator deeming that parent as "hands-off" and uninvolved, as opposed to enriching the child's life with the involvement of these important third parties. A lack of awareness of these differences, which may substantially impact the way a parent chooses to raise a child, can lead to an expert valuing one parent's childrearing over the other.

Family structure varies within different cultures. Thus, in developing custody and parenting time plans for clients, it is often problematic to simply apply the same family structure of the western world. Many cultures share child-rearing responsibilities with extended family – aunts, uncles, siblings, grandparents – who sometimes live in the same household. As such, it is important to be culturally sensitive to the roles that extended family plays in child-rearing. Developing a plan that properly considers the intended upbringing of children of clients and familiarizing clients of the rights of grandparents in applicable cases are paramount.

Typically, in custody evaluations, psychological testing will be employed. However, these tests may not measure cultural-specific factors that may affect their results. The Minnesota Multiphasic Personality Inventory-2 (MMPI-2), one of the most widely used objective tests in custody evaluations, specifically does not include any culture-specific normative data.[14] Despite being translated into other languages for implementation, there have not been any studies done as to the veracity of the results when applied in languages other than English.

Judiciary and Court System

The New Jersey Court system generally, and the judiciary specifically, must properly consider cultural differences in Court proceedings.

While English is the predominant language spoken by the responding population according to census data, approximately 12.1% of those individuals (over one million people) have limited English proficiency and characterize themselves as speaking English "less than 'very well.'"[15] The New Jersey Department of Health gathered data showing that over 800,000 individuals whose primary language is not English reported that they are not proficient in the English language. Their primary language was Spanish (42.9%), Arabic (32.0%), Chinese (41.0%), Gujarathi (36.4%), Haitian (40.3%), Korean (55.1%), Polish (36.0%), and Portuguese (46.3%).[16] Yet, the New Jersey Courts website is not fully translated into most of these languages. In fact, many sub-pages of the website are not translated at all from English, a few translated only into Spanish; the "Interpreting Services" page is only translated into Spanish, Haitian-Creole, Korean, Polish, and Portuguese. No webpages are translated into Arabic, Chinese (either Mandarin, Cantonese, or any other dialect), or Gujarati.

Although the use of interpreters in Court proceedings addresses language barriers, interpreters are expensive and in high demand. The interpreters used by the Court are often overworked – tasked to handle several cases from one lengthy court appearance to the next. Furthermore, the availability of interpreters for specific languages varies from county to county. Insufficient resources are available to judges and litigants, alike, for interpreting services.

Judicial training in cultural competency would be beneficial to judges and allow them to effectively serve New Jersey's diverse residents. Litigants come to Family Court for assistance when they cannot solve difficult and oftentimes devastating problems within their families. Their circumstances are difficult as it is; having the added burden of educating decision-makers about their important cultural norms and practices can prove to be overwhelming. Having a culturally competent judge alleviates one burden.

When evaluating custody applications, judges must have some baseline knowledge about the individuals over which they preside. While it is the main responsibility of litigants and their respective counsel to provide the Courts with the relevant facts/circumstances specific to their cases, the Court also bears responsibility to do the proper evaluation and address the culture or religion of the parents to determine what is in a child's best interests. If these important considerations are not volunteered by the parties or their respective counsel, then the Court must know to ask the right questions to elicit relevant information necessary to adjudicate a matter.

Conclusion

The changing landscape of our state requires practitioners, experts, and judges to respond to the needs of clients of all backgrounds. Cultural competence and sensitivity are paramount for effective representation of diverse clients in legal matters and for fair and equal access to justice. Family law cases are no exception. While New Jersey has started to address the importance of cultural competency in the practice of law, there is still much work to be done to ensure that individuals and families are effectively represented, properly evaluated, and adequately protected. ■

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Who, What, Where, When? Figuring out what rights, benefits and obligations apply to marriage, civil union and domestic partnership

By Debra E. Guston and Thomas A. Roberto

Relationship status in New Jersey can seriously complicate an analysis of the rights, benefits and obligations that are attached to each status. This problem compounds when same-sex couples have multiple relationship statuses, and now, with New Jersey's marriage equality statute creating a gender-neutral application of the civil union law, different-sex couples are able to enter into civil unions.[1]

This article presents a chart that compares these basic rights, benefits and obligations of couples in these various relationship statuses. Some of these are fixed by federal or state statute and cannot be altered by equitable factors. Some are common *law* rights or obligations where creative lawyering may extend common law application previously found to cover married different-sex couples to same-sex couples. Still further, some are state-specific rights that may complicate the analysis of the intersection between state and federal law.

One of the most striking aspects of this comparison is the disparate number of rights afforded to married couples, despite the prevalence and promise of civil unions and domestic partnerships. It seems that societal trends appear to favor an equal apportionment of rights to same-sex couples, but only marriage has begun to fulfill that promise, with alternate relationship statuses continuing to be "inferior" statuses, as illustrated below. Still, what many would consider to be "basic" partnership rights are made available only to married couples on a state and/or federal level, as illustrated below.

This also illustrates the importance of knowing the specific facts of your case. If you represent one partner in a civil union or domestic partnership, the specifics of each case – and each individual – are key. Further, for a same-sex married couple, many rights and obligations may have accrued with marriage well after the parties commenced their relationship. The manner in which property is titled, the existence of agreements pertaining to payment of support or property distribution, the various jurisdictions where legal relationships may have been formed and the length of the relationship are just a few of the critical factors that could have an immediate and direct impact on your client's entitlement and obligations and the overall outcome of a case. Know your client, know the facts and, of course, know the law; the chart below is intended to be of assistance regarding all of the above.

Right/Obligation	Marriage	Domestic Partnership	Civil Union
Alimony/Support	*N.J.S.A.* 2A:34-23 Remember same-sex married couples may have had other pre-marital legal status that needs to be evaluated.	*N.J.S.A.* 25:1-5(h) Evaluate possible pendente lite claims	*N.J.S.A.* 2A:34-23 Remember to evaluate all periods prior to CU or marriage where parties could not enter a legal status. Equitable claims should be considered.

Title to Real Estate	Ownership of property as tenants by the entirety *N.J.S.A.* 46:3-17.2, which would allow for both automatic transfer of ownership on death, *N.J.S.A.* 46:3-17.5, and protection against severance and alienation, *N.J.S.A.* 46:3-17.4	Can own as joint tenants with right of survivorship or tenants in common, but not tenants by the entirety	Ownership of property as tenants by the entirety *N.J.S.A.* 46:3-17.2, which would allow for both automatic transfer of ownership on death, *N.J.S.A.* 46:3-17.5, and protection against severance and alienation, *N.J.S.A.* 46:3-17.4
N.J. tax deductions	*N.J.S.A.* 54A:3-1 through *N.J.S.A.* 54A:3-14 Taxpayer may be eligible to deduct certain expenses for a spouse and dependents, such as medical expenses and health insurance costs for self-employed taxpayers	*N.J.S.A.* 54A:3-3(a) Does not apply to DPs, but a DP could be a legal dependent	*N.J.S.A.* 54A:3-1 through 14 Taxpayer may be eligible to deduct certain expenses such as medical expenses and health insurance costs for self-employed taxpayers for a CU partner (where statute permits spousal deduction) and dependents
Taxes/Filing tax returns (Federal)	May file Joint or Married Filing Separate (26 *U.S.C.* 6013); Innocent Spouse protection (26 *U.S.C.* 6015)	Must file Single, no federal recognition	Must file Single, no federal recognition
Taxes/Filing tax returns (State)	May file Joint or Married Filing Separate	May file Joint or Married Filing Separate See N.J.S.A. 54:8A-44	Must file Joint or Married Filing Separate See *N.J.S.A.* 54:8A-44[1]
Social Security (Survivor Benefits)	Survivor benefits when married for more than 9 months prior to death (20 *CFR* 404. 336); For those married less than 9 months, see *Ely v. Saul*[2] and *Thornton v. Commissioner of Social Security*[3]	Survivor benefits when in DP for more than 9 months prior to death; For those in DP less than 9 months, see *Ely v. Saul*[4] and *Thornton v. Commissioner of Social Security*[5]	Survivor benefits when in CU for more than 9 months prior to death; For those in CUs less than 9 months, see *Ely v. Saul*[6] and *Thornton v. Commissioner of Social Security*[7]
Social Security (Step-Up Benefit After Divorce	Yes 20 *CFR* § 404.331	No	No
Equitable Distribution	*N.J.S.A.* 2A:34-23.1	*Miken v. Hind*[8] Consider equitable claims. Consider whether property was acquired during the DP in the name of one partner but was paid for by joint funds. Consider partition.	*N.J.S.A.* 2A:34-23.1 applies Remember to consider pre-legal relationship assets for equitable claims
Estate Tax (Federal)	Unlimited Spousal Gifting/ Exempt from federal Estate Tax on Spousal Gifts at death (26 *CFR* 20.2056(b)-2)	No spousal exemption	No spousal exemption
Inheritance Tax (State)	Exempt from NJ Inheritance Tax – Class A Beneficiary *N.J.S.A.* 54:34-2 and 4	Exempt from NJ Inheritance Tax – Class A Beneficiary *N.J.S.A.* 54:34-2 and 4	Exempt from NJ Inheritance Tax – Class A Beneficiary *N.J.S.A.* 54:34-2 and 4 was never amended to include CU partner, but applies as spousal equivalent

Intestate Inheritance	Intestate inheritance rights *N.J.S.A.*3B:5-1 et seq.	Intestate inheritance rights *N.J.S.A.* 3B:5-1 et seq.	Intestate inheritance rights *N.J.S.A.* 3B:5-1 et seq. was never amended to include CU partner, but applies as spousal equivalent
Healthcare	Common law obligation to pay reasonable medical expenses of spouse	Expenses where partner unable	Common law obligation to pay reasonable medical expenses of spouse
Spousal Privilege (Federal)	Yes *F.R.E.* 501	No	Open question whether state law governs the relationship that gives rise to the privilege
Spousal Privilege (State)	Yes *N.J.R.E.* 509	Open Question	Yes *N.J.R.E.* 509
Qualified Domestic Relations Orders	Yes	No	No
Workers' Comp Survivor benefits	New Jersey's Workers' Compensation Act, *N.J.S.A.* 34:15-13	*N.J.S.A.* 34:15-13 not amended to include domestic partners in list of qualified dependents	Yes, as spousal equivalent
Name Change (without petitioning the Court)	*In re Application for Change of Name by Bacharach*;[9] Post-divorce name change under *N.J.S.A.* 2A:34-21, Administrative name changes incident to marriage permitted and authorized under various statutes/code provisions/policy (motor vehicle, voter registration, etc.)	No apparent right to assume domestic partner's last name without judgment for change of name	Post-dissolution name change under *N.J.S.A.* 2A:34-21 Administrative name changes incident to civil union permitted and authorized under various statutes/code provisions/policy (motor vehicle, voter registration, etc.)
Per Quod Claims	Yes, in all states	Open question	Yes, in NJ. Question as to other states that recognize CU -Illinois and Hawaii and California which has CU-like Registered Domestic Partnership
Guardianship Preference in Appointment	Yes *N.J.S.A.* 3B:12-25	Yes *N.J.S.A.* 26:8A-3; But see: *In re P.R.G.*[10]	Yes Note *N.J.S.A.* 3B:12-25 does not reference civil union partner, but CU partner included in term "spouse" under N.J.S.A. 37:1-31(4)(a)

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Endnotes

1. N.J.S.A. 54:8A-44 governs who must file a tax return and defines husband and wife as spouses, regardless of gender, civil union couples as well. The issue here is that New Jersey uses the federal adjusted gross as the starting point for a state income tax evaluation. Civil Union couples cannot file their federal returns jointly. Accountants have to prepare a "dummy" federal return as if the partners were married under federal law, and then use that number as the New Jersey adjusted gross income.
2. No. CV-18-0557-TUC-BGM (D. Ariz.) (this class action settled claims for people in same-sex marriages whose spouses died before the required 9 months of marriage for survivor benefits to vest).
3. 2:18-CV-01409-JLR (W.D. Wash.) (this class action settled claims for people in same-sex relationships who had not married because they lived in states where they were prohibited from marrying when their partner died. This allows new claims for survivor benefits and re-opening of denied claims under these circumstances).
4. No. CV-18-0557-TUC-BGM (D. Ariz.).
5. 2:18-CV-01409-JLR (W.D. Wash.).
6. No. CV-18-0557-TUC-BGM (D. Ariz.).
7. 2:18-CV-01409-JLR (W.D. Wash.).
8. No. A-2768-07T2 (N.J. Super. App. Div., June 18, 2009).
9. 344 N.J. Super. 126, 130-31, 136 (App. Div. 2001).
10. No. A-0340-19T4 (App. Div. Jan. 13, 2021).

Affirmation is Essential for LGBTQ+ Youth in Family Court

By Jodi Argentino

Statistics reveal that LGBTQ+ youth are at risk of depression, suicidal ideation and death by suicide at far higher rates than their cisgender and heterosexual peers given the societal, peer, and familial difficulties they face when realizing and expressing their own gender identity and/or sexual orientation.[1] The risks for LGBTQ+ to experience compounded trauma are increased in environments where their identities are not affirmed.[2]

In attempts to avert more LGBTQ+ children from becoming statistics, some states (like New Jersey) have laws protecting children's privacy in schools and increases in resources available for schools, families, and mental health professionals so that they can better provide affirming environments.[3] However, parents are not always on the same page regarding their children's care and there is nowhere that discord is more prominent than in the family court when custody is at issue, particularly when one parent is affirming and one is not affirming of their child's sexual orientation or gender identity.[4]

There are many factors to consider in any custody matter. For cases involving LGBTQ+ children, there are additional elements for legal and psychological professionals including ensuring that their parents are affirming, dealing with non-affirming parents, educating unknowledgeable courts, considering affirming school environments, and contesting non-affirming treatment.[5] LGBTQ+ children who are not supported by their families are at a greater risk for a variety of emotional and psychological issues.[6] As an attorney, expert, parent coordinator or guardian ad litem, striving for a custody arrangement that facilitates a supportive environment for an LGBTQ+ child is a way to ensure children know that respect of their identities is being prioritized. It is essential to LGBTQ+ youth that they are supported and validated, and legal and mental health professionals must keep this priority as a center of focus throughout custody proceedings. Further, qualified mental health professionals play an indispensable role in supporting LGBTQ+ children within the context of custody proceedings and various possible levels of family support as to their LGBTQ+ identities.[7]

Overview of Gender Identity and Sexual Orientation Basics

Though often conflated, sexual orientation and gender identity are independent concepts. Sexual orientation is about who someone is romantically or physically attracted to while gender identity is about who someone is by way of their own internal sense of self. The terms regarding sexual orientation which are most frequently used in this article are those which correspond with the letters LGB in the acronym LGBTQ+. "L" refers to "Lesbian," which is defined as a woman who has as romantic and/or sexual attraction toward women. "G" refers to "Gay," which is defined as a person who is attracted to other people of the same gender. It is also used to refer specifically to men who are attracted to other men. "B" refers to "Bisexual," which is a person who experiences romantic and/or sexual attraction toward people of more than one gender (not necessarily at the same time, in the same way, or to the same degree.). There are a variety of other sexual orientations by which people may identify (including, but not limited to, pansexual, asexual, omnisexual, etc.).[8]

Gender identity, on the other hand, reflects who a person is by way of their own sense of self. Gender is not the same as sex. A given person's gender identity is fully determined by that person's own sense of their gender. Gender does not have to match sex assigned at birth. "T" within the acronym of LGBTQ+ stands for "transgender" and is an adjective which describes a person whose gender does not match their sex assigned at birth. "Cisgender" is a term that describes a person whose gender matches their sex assigned a birth. "Non-binary" is someone who does not identify within the

gender binary of man or woman but rather somewhere within the spectrum spanning between man or woman. A person who is non-binary may represent that they are both male and female or neither male nor female. Someone who does not identify with a fixed gender may refer to themselves as "gender fluid."[9]

Another concept relative to gender that is addressed or referred to within this article is that of "gender roles," the socially-constructed expectations which are subjective and not fixed, regarding behaviors and attributes that a society, culture, group typically attributes to people based on their perceived gender. Both gender and sex are social constructs. Gender expression refers to an individual's external presentation of gender.[10]

It is not uncommon for people to question a child expressing their gender identity in a way that does not conform to their sex assigned at birth and the argument is, all to often, that a child is too young to understand. However, the concept of gender identity develops between ages 1.5 years and 3 years of age. Therefore, it is reasonable for a young child to express themselves in a way that does not conform with stereotypical gender constructs for their sex assigned at birth at that age and/or to tell their caregivers that they are a gender other than their sex assigned at birth.[11] Similarly, adults will often question whether a teen really understands their sexual orientation at such a "young" age. Sexual orientation develops as early as age 8. Therefore, generally, all expressions of someone being "too young" to recognize and/or express their true gender identity or sexual orientations are misinformed.[12]

To address another common misconception, transgender individuals do not have a specific set of steps or requirements to transition. Social transitioning involves whatever amount of change an individual prefers. A common change is adapting one's presentation to reflect their gender identity. For example, having gender affirming hairstyles, clothing, name, gender pronouns, and restrooms and other facilities is considered a part of social transitioning.[13] Medical Affirmation is the process of taking medical measures to assist with physical presentation in line with one's gender identity (allows one to develop secondary sex characteristics of another biological sex). For example, hormone blockers, cross-sex hormones/hormone replacement therapies (HRT), and gender affirming surgeries (there are many) are ways one can undergo medical affirmation. Finally, changing one's name and/or gender marker on identity documents (birth certificate, passport, driver's license, etc.) is part and parcel of legally affirming one's identity. However, transitioning can involve any, none, or all of these types of affirming actions.[14]

Mental Health of LGBTQ+ Youth

Transgender and gender expansive youth (TGE youth) are often exposed to a lifetime of psychological abuse and rejection all because of their gender identity, which is an immutable core aspect of their very personhood.[15] Failure to examine the background trauma may result in inappropriate treatment and medication associated with a diagnosis that is based exclusively upon the most obvious symptoms, not the unique root cause. This is especially at issue for LGBTQ+ children. For example, a child staring out a window in school "daydreaming" could be assessed as that child exhibiting a symptom of ADHD inattentive type, while really, the child could be disassociating due to the painful peer environment. Similarly, a child who is acting out and getting detention could be labeled with oppositional defiant disorder, while they are actually reacting to, and trying to avoid, a bullying situation or misgendering that happens in a particular class or space at school.

Because of the prevalence and depth of adverse childhood experience for transgender and gender expansive people, they exhibit ultimate implication of developmental trauma given that they are subject to long-term mental health and physical health struggles. This is not because of their gender identity, or even gender dysphoria, *per se*, but rather because of pervasive trauma that they are prone to experience throughout childhood within a transphobic context that can disrupt appropriate development. They experience attachment disruptions, isolation, low self-esteem, persecution, bullying, parental rejection, other mental health challenges.[16]

Adults experiencing trauma have had the ability to develop fully and have secure relationships before trauma and therefore have developed coping skills and mechanisms to cope with the trauma. On the other hand, children experiencing trauma sustain pervasive developmental effects that do not occur with trauma experienced in adulthood. Childhood trauma often starts in family, basic trust violation, and there is not the ability to develop within an atmosphere of safety, attachment, support, etc. Seven areas of risk for children who experience complex trauma include impairments in attachment, neurobiological impacts hindering emotional regulation, affect regula-

tion, dissociation, behavioral regulation, cognition, and self-concept.[17]

School/Peer Roles in Development of Gender Identity and Sexual Orientation

There are laws in some states protecting children's privacy in schools and increases in resources available for schools, families, and mental health professionals so that they can better provide affirming environments.[18] For young adolescents, peer relationships are important for social development and that frequently occurs in schools. In a study regarding peer identity effects, Kornienko et al, found that comfortableness with one's gender identity is an attractive cue for friendship. Further, Kornienko shows that peers influence one another in various dimensions of their gender identity. Extrapolating therefrom, discomfort with one's gender identity breeds isolation and dissociation from peer group acceptance.[19]

It is important for transgender students to see themselves reflected in their staff, their lessons, their heroes, and to feel the support of their school and peers. Research associated with relational-cultural identity development show that supportive environments with peers and role models that reflect students' own identities is necessary for positive minority youth development. This is especially true for LGBTQ youth, who have a pervasive environment of heterosexism and transphobia which create the necessity to overcome negative messages even more than for cisgender students.[20] This can be accomplished through the implementation and follow through of the policies and programs such as GSA groups, appropriate academic and athletic policies, diverse staffing in schools, and educated staff and, particularly, experienced and trained mental health professionals in the school system who are accessible and relatable to the students.[21]

Family Acceptance and Family Systems Impact

LGBTQ+ youth are at risk of depression, suicidal ideation and death by suicide at far higher rates than their cisgender and heterosexual peers given the societal, peer, and familial difficulties they face when realizing and expressing their own gender identity and/or sexual orientation. Pursuant to the Trevor Project 2022 Survey, which captured the responses of roughly 34,000 youths in the United States, 45% of LGBTQ+ responding youth seriously considered attempting suicide in the past 12 months and 14% have attempted suicide, while more than half of transgender and non-binary youth have seriously considered suicide and 20% have attempted suicide.[22]

The risks for LGBTQ+ youth to experience compounded trauma are increased in environments where their identities are not affirmed.[23] Parental acceptance has been defined as "the warmth, affection, care, comfort, concern, nurturance, support or simply love that children can experience from their parents" and is important to the development, wellbeing, and health of children." Contrarily, parental rejection has been defined as "the absence or significant withdrawal of these feelings and behaviors and…the presence of a variety of physically and psychologically hurtful behaviors and emotions." Parental rejection has deleterious effects on a child's functioning and growth.[24]

Pursuant to the 2015 Transgender Survey, the statistics surrounding the deleterious effects of parental rejects are astounding: 26% of youth have had an immediate family member cut them out entirely after they have shared that they are transgender; 45% of youth with unsupportive families have experienced homelessness; 54% of youth with unsupportive families have attempted suicide; and 1 in 10 transgender youth has experienced family violence simply due to them being transgender.[25] This has only increased in the past seven years. Now, 73% of LGBTQ+ youth have experienced anxiety and 58% depression; 82% of LGBTQ+ have wanted mental health care, but 60% of them were not able to access it.[26]

There is a clear and undeniable reason why having children in the custody of affirming parents is essential to the children's long-term health and wellbeing. For mental health professionals and court-involved professionals, fostering parental acceptance in cases where there are LGBTQ+ youth has to become a primary therapeutic goal. Part of accomplishing this goal is to assess the cultural background of the parents, including religious values and beliefs, when assessing the child's environment. The therapeutic goal must be to work toward cognitive flexibility and emotional regulation so that their deeply set beliefs and emotions can be explored in a way that allows them to be supportive of their LGBTQ+ child.[27]

A family systems approach specifically recognizes the effect of the LGBTQ+ child's identity can ripple through a family and the divorce can further ripple the other direction to the child and contribute to already exacerbated emotions. You cannot just treat "the child" but any treatment for a child must include a mindset shift for family. Evidenced-based family interventions like family therapy,

parent training, education and supports are helpful for a child with mental health challenges (anxiety, depression, ADHD, among others).[28]

LGBTQ+ Issues in Family Court

Divorce, in most cases, is an adverse childhood experience (ACE). It can cause a child to develop transitory adjustment problems which include situationally-based symptoms that go away. The symptoms would include excessive worrying, sadness, anger, oppositional behavior, impaired social skills, and poor school performance. When children experience external stressors (like high conflict and extended conflict divorce situations), it can become internalized and develop into more serious mental health conditions (anxiety disorder, a depressive disorder or a somatic symptom disorder). Likewise, if a child is constantly forced to choose sides, as is common in divorce, they experience loyalty conflict which, if intense, leads to cognitive dissonance and an uncomfortable mental state.[29]

In a 2019 study by Kuvalanka, Bellis, Goldberg, & McGuire, participants expressed that they were constantly walking a tightrope of trying to appease their co-parent (and trying not to alienate them, fearing losing their child, etc.) while supporting their child. In the background, was the acknowledgment that if they did not fight for their child, their child would continue to be forced to live disingenuously (and therefore be more subject to the emotional repercussions). As parental mental health directly affects a child's mental health (internalizing stress, anxiety, etc.), these supportive parents are often lost and without recourse and without a system that has any knowledge or understanding as to the struggle. Affirming parents in custody battles withstand an extreme emotional and financial toll simply due to their efforts in supporting their children.[30]

There are nearly 2 million LGBTQ+ youth in the United States, meaning nearly 10% of all youth ages 13-17 are LGBTQ+.[31] Pursuant to the American Psychological Association, 40-50% of marriages end in divorce.[32] It would make sense, then, that many of the divorcing families have LGBTQ+ children. Likewise, it would make sense that there are also other parents who are not married and have LGBTQ+ children involved in custody disagreements. However, despite these statistics and despite the early development of gender identity and sexual orientation, there are only a handful of reported cases in the United States with custody issues involving LGBTQ+ children. Those cases are largely focused on issues of gender identity and have been handled in a way that is largely misunderstood or dismissed by the Court (and others involved in the court processes).[33]

Even when in in-tact relationships, parents are often not on the same page regarding their LGBTQ+ children's care. Despite the lack of reported cases, that discord between parents is even more prominent in family court, where there is pre-existing discord or where custody is at issue. If one parent is affirming of their child's sexual orientation or gender identity and the other is not affirming, then that discord is further confounded by confusion, grief, and ignorance.

Kuvalanka, Bellis, Goldberg, & McGuire (2019) conducted a study of 10 mothers who had custody matters associated with gender diverse children (in unpublished cases) in the United States. The majority of those affirming parents either lost custody entirely or are forced to share custody with a non-affirming parent, which is absurd given the statistics regarding the effect of parental acceptance and rejection upon children (more on this below). Likewise, the handful of reported cases across the United States from 1998 through 2019 resulted mostly in losses for affirming parents or in a joint custodial situation. In the event of an affirming parent "win," it was for reasons not associated with affirmation.[34]

In the case of *Smith v. Smith,* the judge actually disregarded the child's Diagnostic and Statistical Manual (DSM) diagnosis of gender dysphoria in childhood (a different DSM category than currently exists) stating that it was not the right diagnosis based upon his (the judge's) own observations.[35] The judge, conflating gender identity with sexual orientation, ruled that the child should not have been diagnosed with GDIC because child was not attracted to males. He also found that child's mannerisms were not feminine "enough" and that the child did not show a preference for "girly things." The Court ordered the non-affirming parent to have full legal and physical custody of the child, a decision that was upheld on appeal.

While *Smith v. Smith* was in 2007 and one might assume that, in general, the courts in the United States would have become more informed since that time, 2019 brought about a case in Arizona, *Paul E. v. Courtney F.,*[36] which had not-dissimilar results and similar antiquated tactics during the pendency of the action. In that case, the court, just like in *Smith v. Smith*, ordered the affirming parent to stop calling the child by the child's chosen name and pronouns and, despite the child's severe nega-

tive reaction to not being affirmed, awarded sole-decision making authority to the non-affirming parent.

In *T.L.H. v. J.G.*, a Pennsylvania unreported decision of similar timing, the court recognized a child's own mature view of their needs and the harm associated with the non-affirming parent's care. This was not, however, until after the child began failing school and threated suicide. In this case, the court award primary custody to the affirming parent.[37] That case, though unreported, suggests a hint of hope in a sea of misinformation. Also creating a space for hope, the New Jersey Appellate Court have recognized the struggles of the transgender community and the need for privacy and protection, albeit in a name change context rather than in a family court context.[38]

Those struggles having been acknowledged, one cannot help but wonder how the courts (nationally) can so often rule in favor of a non-affirming parent or allow for non-affirming parents to continually negatively impact a child's mental health without serious intervention. A non-affirming environment inhibits a child from developing in a healthy manner and increases the chances of mental health issues and other emotional and social challenges. However, the "best interests" standard utilized universally in determining custody is subjective.[39] While the subjective concepts should be balanced with children's rights to be free of discrimination, judges (experts, or other involved professionals) have their own emotions, beliefs, cultural experiences, and knowledge base that can allow for misunderstandings of an LGBTQ+ child's specific needs. Therefore, those who are charged with protecting a child's best interests may end up harmfully placing an LGBTQ child with an unsupportive parent and subject the child to neglect or mistreatment.[40]

LGBTQ+ children who are in a supportive community and family are significantly less likely to attempt suicide as compared with those who have non-affirming surroundings.[41] However, the court (and various professionals) do not always promote true affirmation or protect children from non-affirming surroundings. Studies shows that for transgender youth who use a chosen name, referring to them appropriately by that chosen name affirms their identity and therefore reduces mental health risks, which is extremely valuable considering the already high levels of mental health risks for LGBTQ+ youth.[42]

According to The Trevor Project 2022 Survey, the five most common ways for parents to affirm their LGBTQ+ children are:

1. Be welcoming to LGBTQ+ friends and partners
2. Talk to them respectfully about their LGBTQ+ identity
3. Use name and pronouns correctly
4. Support their gender expression
5. Educate themselves about LGBTQ+ people and issues

With high family support, the suicide attempt rate among LGBTQ+ youth decreases to 6%.[43] This is a drastic difference. Affirmation as simple as calling a child by a chosen name can reduce the risks to their very life, yet this is, somehow, not universally required (and sometimes, as noted above, even ordered in the opposite by courts). When put that simply, it's impossible to understand why these are not universally supported principles.

The Importance of LGBTQ+ Education for Court-Involved Professionals to Decrease Compounding Trauma for LGBTQ+ Children

American Academy of Pediatrics published in 2018 guidance "Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents." Guidance was issued for pediatricians, recognizing that they are the first line of responders for transgender and non-binary children and the most accessible provider. This, again, enforces the importance of education and affirmation.[44] It is essential to use neutral and inclusive language when working with the LGBTQ+ community so that the language itself does not assume cisgender heteronormativity and immediately isolate or exclude LGBTQ+ persons. In practice, this can be simply achieved by asking all people how they identify and/or what pronouns they use rather than just assuming based upon physical presentation or voice. It is helpful to introduce oneself first with pronouns, so as to set a precedent that normalizes the inquiry and does not further isolate someone. Also, verbiage should be adjusted to use gender neutral terms such as spouse (in lieu of assuming a differently gendered spouse by stating husband or wife). With children, this same neutrality can be established by referring to a parent instead of "mom" or "dad." All language on forms should be adjusted to include those gender-neutral terms as well as providing additional identity information such as a space for identifying pronouns or giving and "X," "other," "prefer not to say" or blank fill-in option as to gender identity.[45]

A study that measured the effectiveness of LGBTQ training for mental health providers shows that a full-day training on LGBTQ issues resulted in a reduction in trans-negativity and homo-negativity. One of the limita-

tions of this research is the same limitation that is faced with regard to LGBTQ+ issues within the court system and community: the individuals who showed up for the training were those who already had a desire to learn and were open-minded to the topic.[46]

Conclusion

LGBTQ+ persons experience discrimination and hardship not only in family court, but in many other areas of the law including but not limited to: legal name changes, identity documents, housing discrimination, employment discrimination, public benefits discrimination, school bullying and administrative, college and housing discrimination, health care (coverage and misgendering), out of home (foster care or homelessness) issues, and juvenile justice.[47] Pursuant to the Trevor Project Survey 2022, 71% of transgender or non-binary youth have experienced discrimination due to their gender identity and 73% of LGBTQ+ youth have experienced discrimination due to their sexual orientation.

At this time, 93% of transgender and non-binary youth are concerned about not being able to have access to gender-affirming health care due to anti-transgender legislation. 91% are concerned about not being able to use the restroom associated with their gender identity, and 83% are concerned about not being able to continue to play sports due to anti-transgender laws.[48] These are children, aged 13-17 years old and they are afraid of what their lives will look like, if they survive at all. The least that can be done for them is for their parents to support them and for the court to ensure their safety within their community and family system.

Programming surrounding the family dynamic specific to families with LGBTQ individuals is not particularly common or accessible. Examining issues such as mental health and custody proceedings and the intersection of both with specific attention to the particular intricacies involved with LGBTQ identities and the challenges faced by families with LGBTQ members is extremely important because the challenges therein will differ from those posed by another custody matter.

There is significant, universal need for widespread training and the implementation of therapeutic jurisprudence. The court has proven to, in general, be uneducated and uniformed (or, perhaps, unconvinced) regarding the importance of affirmation for LGBTQ+ children. The compounding trauma that persists for children, already rejected, being further subjected to rejection through the court and court professionals, is a systemic issue in need of repair. Various informed organizations and professionals provide guidance on a piecemeal basis. However, same must be more universally disseminated in order to make a positive impact on the lives of the millions of LGBTQ+ youth who are part of the legal system. Qualified mental health professionals and legal educators play an indispensable role in supporting LGBTQ+ children within the context of custody proceedings and various possible levels of family support as to their LGBTQ+ identities.[49]

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Maintaining a Lack of Bias While Representing a Bisexual Client or Their Spouse

By Alison C. Leslie, Mackenzie DeLeon, and Lauren Sullivan

The number of individuals identifying as being within the LBGTQ+ community continues to increase in our country. Generally, people feel more comfortable giving themselves labels, especially later in life, which may result in individuals leaving their heterosexual marriages in pursuit of a new, same-sex relationship. It is crucial that attorneys, especially those who identify as heterosexual, are aware of internal biases they may possess when dealing with divorce cases arising out of circumstances in which a person leaves a heterosexual marriage to engage in a same-sex relationship. This article addresses the biases that may exist when representing clients and spouses who identify as bisexual, and the implications biases may have on an attorney's professional relationship with these clients.

Background

Sexual orientation scales have been created to develop an assessment of individuals' identities. A commonly known scale is the Kinsey scale, which was introduced by Alfred Kinsey. Kinsey's scale is known as one of the first attempts to "acknowledge the diversity and fluidity of human sexual orientation."[1] It identifies individuals on a spectrum of zero to six, with a score of zero representing exclusive opposite sex attraction and six representing exclusive same sex attraction. Individuals can fall on the scale between that, scoring a one to a five if they have variation of desires and attraction for both sexes. An individual also had the opportunity to be rated an "X," which correlates to what we today know as asexuality. Kinsey's goal with this scale was to show that sexuality does not fit into two categories: heterosexual and same-sex attraction. In his book *Sexual Behavior in the Human Male,* Kinsey noted that "the heterosexuality or homosexuality of many individuals is not an all-or-none proposition."[2] Rather, he emphasized that people could fall on continuum and their sexuality can be fluid over time.

The lesser known, but equally critical scale is the Klein Sexual Orientation Grid, which was introduced by Dr. Fritz Klein in his 1978 book *The Bisexual Option.* The Klein Sexual Orientation Grid describes sexuality in a more detailed form than the Kinsey scale. Individuals are assessed on seven different aspects of their sexual orientation: sexual attraction, sexual behavior, sexual fantasies, emotional preference, social preference, sexual lifestyle, and self-identification. Each component is rated on a scale from one to seven for three different parts of their life. The first part is their past, which is everything they've both felt and experienced up until the past year. Their present life is representative of experiences and feelings from the past year of their life; ideal future lifestyle is anything that a person wants to see happen later in their life. A rating of a one indicates exclusive opposite sex desires and attractions, whereas a seven indicates exclusive same-sex desires and attractions, and a two through six indicates a variation of the two.

The Klein Sexual Orientation Grid has a variety of factors that make it more comprehensive than the Kinsey scale. For one, it considers an individual's past, present, and future lifestyle(s), which further indicates the idea that sexuality can be fluid over a person's life. The Klein Sexual Orientation Grid also takes into account seven different components of an individual's sexuality. Someone could be rated high on sexual attraction, indicating mostly same-sex attraction, but could be rated low on their self-identification. To whom someone is attracted may differ from how they identify themselves because of factors such as internal and external biases. The Klein Sexual Orientation Grid, therefore, demonstrates the complexity of sexual orientation.

Coming Out as Bisexual in a Same-Orientation Marriage

There are various reasons why one might wait to identify as bisexual and enter into a heterosexual relationship, despite other desires. For one, the individual

might not be aware of their bisexuality. Even if they are aware of their bisexuality, if they are happy in a heterosexual or same-sex relationship, they may not feel the need to disclose their sexuality to their partner. It may also be a strategy to protect themselves. Specifically, by hiding their identity, one might be shielding themselves "from the pain of being misunderstood, hurt, or rejected by loved ones."[3] Also, they may also be attempting to avoid bisexual stereotypes[4] that come along with coming out. Recent work which looks at bisexual individuals' feelings on coming out has found that it is common for people to not want to come out because they don't want to make a "big deal" about their sexuality.[5] It also puts these individuals in a vulnerable position because they are revealing their sexual desires, as well as their love and sex life, to their friends and family, which is something not typically expected of heterosexual individuals.

For those who do begin to explore their own sexuality, there are six stages of coming out, as identified by Vivian Cass in 1979,[6] that they will most likely go through. The first stage is *identity confusion*, in which one begins to wonder about their sexuality. Stage two is *identity comparison*, which is when one becomes accepting of the possibility of being bisexual and begin to face the social isolation that can come along with that. The third stage, *identity tolerance*, is when the individual becomes more accepting of their new identity and "tolerates" this identity. This is where one would likely begin to engage with other members of the community. The next stage is *identity acceptance,* where one has come to terms with their new identity. The fifth stage, *identity pride*, is beyond acceptance, one begins to feel proud of their identity. The final stage is *identity synthesis*, where your sexuality begins to integrate with other aspects of yourself and your life.

Throughout the process of coming out, the bisexual partner may feel the desire to reveal their sexuality to their partner. One's sexual orientation is a big factor in who they are and with many people valuing trust in a relationship, it may be important for them to be honest. In the scenario that one's identity is revealed within a relationship, multiple responses may surface. Some couples may attempt to stay in their marriage and navigate through a mixed-orientation marriage, or one where the partners are of differing sexual orientations. In other instances, the person who is bisexual may want to terminate the current relationship in pursuit of a same-sex relationship. Either way, the other partner will be impacted.

Emotional Issues for Spouses of the Bisexual Client

The spouse of the bisexual client may experience betrayal trauma, which occurs when someone on whom a person depends, such as a romantic partner, violates their trust.[7] Finding out that one's partner has a different sexuality than previously understood may make the heterosexual partner feel like they've been lied to, and that the relationship wasn't "real." The partner receiving this information may feel as though they can no longer connect with their partner, who came out. This could lead to the termination of the relationship completely. It may also be the case that despite the newfound information and the bisexual partner's desires, the heterosexual partner would like to continue the relationship, even if that relationship has now become strained. This is especially prevalent if the couple had children or other important shared experiences and/or economic considerations. In this scenario, the two partners may work together to reconcile their relationship.

Representing Clients

In the case of a divorce, it is crucial for the representing attorney to be aware of any internal or explicit biases they may possess. Previous stories of former clients, friends, family members, or anyone in the attorney's life could be a contributing factor. Therefore, it is important for attorneys to consider biases they may possess and find ways to isolate them. It may be helpful for attorneys dealing with this kind of divorce to make themself familiar of common myths about bisexual individuals. One specific bias that would be prevalent in a divorce case would be the use of the term "gay marriage." When handling clients who may be transitioning from a heterosexual relationship into a same-sex relationship, the use of the term "marriage equality" would be more appropriate. Becoming familiar with different terminology associated with the LBGTQ+ community could also be useful for the attorney. Using respectful and appropriate terminology, such as the client's preferred pronouns and sexual orientation, will allow the client to build a relationship of trust with their representing attorney.

Attorneys have an obligation to treat their clients in a respectful manner. *RPC* 8.4 states that it "is considered professional misconduct for a lawyer to engage, in a professional capacity, in conduct involving discrimination (except employment discrimination unless resulting

in a final agency or judicial determination) because of race, color, religion, age, sex, sexual orientation, national origin, language, etc." Lawyers have the duty to serve their clients and address any needs they may have despite how a client identifies. Additionally, *RPC* 2.1 states that when representing clients, "a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations, such as moral, economic, social and political facts, that may be relevant to the client's situation." Though the attorney is thoroughly educated in the law and can offer important legal advice, it is also critical for the attorney to be aware that some aspects of their case may be outside the scope of their knowledge and experience. This could be the case when representing an LBGTQ+ client without having previous experience in doing so. Further, many bisexual clients may view bisexuality not as their identity, *per se*, but as a private choice they do not want to share with their lawyer. They are not in the closet but are not open to discussing their sex life with their attorney. They may view this as the reason for the breakdown of the marriage. In this instance, the attorney may be more likely to hear this from the spouse's attorney, who may view this as the reason for the breakdown of the marriage.

The Initial Consultation and Potential Questions to Ask

The initial client consultation is a good opportunity for an attorney representing an LGBTQ+ client to learn about their client, their unique circumstances, and to establish for themselves and the client what information is (a) relevant to the divorce proceedings and (b) appropriate to be discussed in the divorce process. The following is a list of initial consultation questions and how to address a client who may be providing detail that is beyond the scope of the attorney's knowledge and experience in response.

"What brings you here? What is going on?" An open-ended initial question such as this allows the client to voice to the attorney what has occurred from their perspective, and gives the attorney a sense of what is most important to the client. Some clients will provide limited detail into the breakdown of the marriage, while others will focus *only* on the details of the breakdown of the marriage. This is the perfect opportunity for the practitioner to set informational boundaries with a client who may be delving deeply into intimate, personal information, in this instance, regarding sexual preferences and relations. From a statutory perspective, there are limited circumstances in which this type of intimate personal information would be relevant to a divorce proceeding in New Jersey. While it is important to provide a listening ear to a client to develop a connection and a level of trust, it is also important to consider redirecting a client who is providing too much of this type of information.

"What assets do you and your spouse have together and separately?" This question is a great transition to a discussion on topics which, for the most part in New Jersey, are neutral as to why there was a breakdown in the marriage. There are limited circumstances, such as the now-rare cause of action of extreme cruelty, in which the emotional aspect of the marriage comes into play when it comes to finances and the division of assets/debts. The attorney can explain to the client the statutory factors on topics such as alimony and equitable distribution, and how the Court evaluates these factors. The attorney can let the client know that many judges explain the divorce process as one that is akin to the dissolution of a business, i.e., that assets and debts must be identified and split up equitably. The attorney can then explain to the client how the Court is likely to make a fact-based analysis when it comes to the financial aspect of the marriage dissolution.

"Are there any immediate financial concerns we need to address?" This question will assist to determine what level of Court intervention may be necessary in the matter, especially if the client feels very strongly that the matter should remain as private as possible. There may be emotions that arise in these types of divorces that may lead to a client wanting less or more Court intervention than is necessary. This is a good time to set realistic expectations about the Court process and again, what is relevant and appropriate.

"What are you doing for you?" This is a question to help guide a client to resources to assist with the emotional aspects of the breakdown of the marriage. Again, it is important for the attorney to recognize in discussions that their expertise is with the law, and that a medical professional or known support groups are the more appropriate resources for clients who need guidance above and beyond the listening ear of their attorney. The attorney should reassure the client that they will get through the divorce process together, but actively encourage clients to seek help when needed. This will also help redirect clients and focus on the legal issues, not the potentially private facts.

"What are your strengths as a parent?" By focusing on the client's parenting skills, the attorney is able to maximize their client's ability to focus on the best interests of their children. From this vantage point, the attorney is able to assess and review the statutory custody factors and determine whether a professional evaluation is required.

Conclusion

Representing a client who is bisexual, or their spouse, requires attorneys to put aside their implicit biases. By the time a client walks into a matrimonial attorney's office for a consultation, they have gone through a lengthy emotional process, which is different from both LGBTQ and heterosexual identifying clients. By focusing on the law, the remedies, and reaching a workable solution, matrimonial attorneys can more effectively represent our clients.

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