



Gender Bias in Family Law

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Gender bias can be implicit or explicit and occurs in our daily lives whether we are privy to it or not. We continue to see gender bias in our day-to-day lives, and family law is no exception. The question becomes, how do we identify gender bias, and what can we do to mitigate or overcome it? While this article is not exhaustive, it is intended to provide fellow family law attorneys and litigants with tips to navigate gender biases in divorce.

Gender bias occurs when we treat people differently for their perceived gender identity. A common gender bias is that women are more “nurturing” and men are naturally “better leaders” or “bread-winners.” These biases are dangerous in the sense that they sometimes lead peers, judges, neutrals, and attorneys to improperly believe that women should have greater parenting time than men, especially with younger children. Oftentimes, people, including judges, do not realize that they have a bias, much less realize that their biases often play a role in the decisions that they make. Even the law is inherently biased. The Tender Years doctrine was a presumption in common law that mothers should have custody of children in their “tender” years. However, despite the fact that the doctrine has been abolished, we continue to encounter this bias in cases.

A common gender bias that impacts financial matters is that males are the “breadwinners” and females are “home-

makers.” How does one detect this bias? Perhaps the judge or other decider of fact will be uninterested in providing for childcare expenses as they attribute that “role” to a “mother’s duty.” This type of gender bias leads to a litany of consequences such as mothers not receiving adequate financial support for childcare expenses. Conversely, fathers who performed greater care-taking functions may not be recognized for their contribution to the marital estate in child-rearing.

A good long-term first step in eliminating bias is to legislate against it. Some states, such as California, have specific laws that prohibit taking gender into account when weighing what is in the best interest of a child. However, not all states have statutes that expressly prohibit gender discrimination. Creating more procedural requirements for the court-appointed “neutrals” in a case, such as a guardian ad litem (GAL) or parenting coordinator, will act to promote accountability and transparency. For example, some jurisdictions require a written report from their “neutrals,” and some make the written report discretionary. Because courts often place a lot of weight on recommendations of their “neutral,” requiring written reports and monthly time-keeping records can be a helpful check against bias as they promote transparency and accountability.

The actions one can take to mitigate or eliminate gender bias depend on who is biased and in what context it occurs.

The following are tools to assist in combating gender bias:

Try to Get Away from the Biased Person

If the gender bias you discover applies to the decision-maker of the case, whether it be a judge, mediator, or the like, consider swapping that person out as soon as possible. If your judge has a gender bias, perhaps a substitution of judge (whether as a matter of right or for cause) is available. If you are appointing a third-party neutral such as a mediator, a possible solution may be to work with the opposing counsel to appoint someone you both agree upon rather than allowing the court to decide on the mediator.

Another tool to assist in combating a gender bias is the appointment of a third party such as a GAL or attorney for the children. Third parties can be the “eyes and ears” of the court. While it varies jurisdictionally, some courts put a lot of weight on reports of the third party. Work with your opposing counsel to come up with a list of agreed-upon GALs that you can present to the court for proposed appointment to avoid appointment of a biased party by the court.

Obtain the File and Billing Records of the Biased Third Party

If the appointed neutral such as a GAL, custody evaluator, or the like is holding gender biases, bring it to the attention of the court in a succinct and detailed motion to disqualify that individual. Be sure to continually make your record. Sometimes the information of the biased party may be discoverable. Provide the “neutral” with all the information they need about the case, in writing. Before trial, consider subpoenaing the neutral’s files, including, but not limited to, their email communications, call logs, documents reviewed in preparation of their report, billing records, transcripts, and written communications, and review the records for any evidence of bias. Use their writing, communications, and report in cross examination to highlight the bias and undercut their credibility to the court. If an inherent bias is discovered later in the case, seek to bar or exclude the neutral’s testimony via a Motion to Exclude or a Motion *in Limine*.

Create Data Points and Demonstratives to Highlight the Bias

If you have a report in the case, take a look at how the neutral or other potentially biased person describes your client compared to how they describe the opposing client on the same topic. Demonstratives are advantageous to call out and show the bias. One could create a table or PowerPoint comparing the language used in the report that illustrates the bias. Cite the precise language and location in the report so there is no question about where the information can be found. Cite any rules, standards, or regulations, if any, that govern how the report should be written, and detail where the report did not adhere to the rules or regulations. Review their billing statements and point out any imbalance in their work such as communications to each party.

Create data points to use during your case, and keep your eye on the big picture. For example, if your client is not awarded all of the parenting time they seek due to the court’s or mediator’s potential gender bias, it is beneficial to set up opportunities to dispel the bias. Frequent interactions between the parent and child are helpful to disprove gender bias, as opposed to showing large chunks of parenting time. Perhaps the attorney seeks a “right of first refusal” so any time the opposing parent cannot care for the child, the time must be offered first to your client. Strive for frequent parent-child interaction because, again, the more parent-child contact there is, the more data you will eventually compile and be able to use as demonstrative evidence of that parent’s ability to nurture, and have the court’s GAL (or neutral) witness and report on those interactions.

Detailed factual and demonstrative information is persuasive. For example, if you need to show the value of your client’s contribution to child-rearing, try creating a calendar with every doctor’s appointment, school functions, and child-related events that your client attended in the past 12 months. If you need to overcome the gender bias that is resulting in a lack of credit for childcare needs, be prepared to monetize the precise cost of reasonably necessary childcare that enables a mother to work for a calendar year. Use the child’s academic calendar to include holidays, breaks, and school institute days, even adding sick days (from the child’s attendance in the year prior). Once you have a cost of childcare, compare it to the net income or cash flow of both parents to demonstrate the prejudice that a failure to account for childcare may have on your client. Go a step further and demonstrate how that may impact the day-to-day lives of the children.

Keep a Record of Communications with the Biased Party

Unfortunately, gender bias sometimes comes from our opposing counsels in the case. When that occurs, examine the local rules and rules of professional ethics in your jurisdiction. Contemplate bringing the biased behavior to the attention of the court via a motion for sanctions. Alternatively, report the biased person to the body that governs the professional ethics in your jurisdiction. Try to keep correspondence with that person in writing, if necessary, to be able to demonstrate their bias to the court or other governing body. If you have a call and something sexist or biased is stated, perhaps memorialize it via a written communication or memorandum.

Point Out the Bias

Vocalize the bias you are witnessing. People often are unaware of their own biases as they can be subconscious or implicit. Thus, it is important to vocalize the bias in a tactful way. The goal is simply to bring it to the speaker’s attention. For example, if you sense that an opposing counsel, judge, or mediator is unwilling to give a father parenting time because of a perceived bias against males—that they are less nurturing

to young children—vocalize the bias. It can be as simple as saying, “I understand there is a misconception that males are not as nurturing as women. But given your knowledge and experience with a wide range of litigants, we all know that not to be the case.”

Use Facts and Data to Dispel the Bias

After identifying and vocalizing the bias, pivot to the facts and data to further dispel the bias. When a household with young children is separating, sometimes there is little historical data to demonstrate that both parents nurtured their child beyond a “he-said she-said.” If you have created data points throughout your case, you will have the opportunity to point to specific examples that contradict the bias. Being able to put a face to a name helps humanize cases. Describe your client, their children, and their specific needs. Use their names; do not simply refer to the child as “the minor child.”

Don't Be Afraid to Present the Evidence at Hearing

One of the best ways to overcome biases is to put on an evidentiary hearing. Be willing to present the evidence to the trier of fact. Gender bias rooted in false perception is sometimes overcome by the reality of live testimony and evidence. Allow the court to hear the evidence and testimony. Allow the court to hear examples of how a litigant may treat their daughter differently than their son. Often a litigant's own testimony can be the most damning to their case. This is where you will have the opportunity to swiftly use the data points and facts to dispel the gender bias.

Mitigate Bias by Reframing Issues

Trials and hearings are costly, and one cannot always remove the biased party from the case. If you encounter a trier of fact or neutral that harbors gender biases that are negatively impacting the outcome of your case, consider reframing the issue by discussing the impact the biases will have on the children. For example, if a judge or attorney thinks that a homemaker's contribution to the marital estate is worthless and it is negatively impacting support awards in your case, try to reframe the issue by discussing how a failure to provide adequate support for the homemaker negatively impacts the children. Focus not on the parent but on describing the same issue through the lens of the children. Similarly, if a judge, for example, is not willing to order retroactive support as a result of a gender bias, perhaps focus on seeking a larger contribution to attorney fees or a disproportionate contribution to child-related expenses for your client. If a judge is unwilling to make a spouse obtain meaningful employment and it is inflating maintenance or alimony figures due to gender bias, perhaps you should seek a shorter review period for maintenance or a greater contribution to extracurricular expenses, or offer to have your client's childcare expenses paid for a period of time to assist the nonworking parent in

obtaining meaningful gainful employment in consideration for a shorter review period.

Overall, legislating and getting away from biased parties are great ways to help eradicate bias in family law. However, we cannot always easily escape bias. When we do encounter bias, it is important to think holistically and long term. If your trier of fact or opposing attorney shows indications that they have a gender bias, and your efforts to get away from that person are not possible, work to try to ameliorate bias or take decisions out of their hands. If the judge expresses gender bias, perhaps seek mediation as a tool sooner than you normally would in a case and work together with your opposing counsel to select a neutral mediator or parenting coordinator. If you cannot get away from the biased third party, then create data points, reframe the issues to work around the bias, and do not be afraid to put on a hearing or trial in order to present the evidence to the trier of fact, which identifies and dispels the bias.

The negative impact of gender bias in family law, directly or indirectly, often impacts children financially and emotionally for years to come. If one parent is desperately treating children according to their sex or taking other actions that could potentially instill gender bias in a child, seek to ameliorate it as best you can. Bring it to the GAL's and the court's attention. We must continually remind each other of the long-term detrimental impact gender bias may have on a child. Ultimately, family law practitioners must work with the judiciary and their opposing counsels to continue to form a culture where we acknowledge that gender bias has a deep-seated negative impact on families and work together to eliminate it. **FA**



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