GENDER BIAS IN LAWYERS’ AFFIDAVITS TO THE FAMILY COURT OF AUSTRALIA

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This study investigated the content of lawyers’ affidavit material presented to the court in a small sample of custody and visitation cases. The aim was to identify factors lawyers perceived as significant to the judicial decision-making process. Results revealed that solicitors focussed primarily on the interparental conflict. Descriptions of children, feelings, behaviours, and attachments formed a minor part of their argument. A more detailed analysis revealed that the gender of the solicitor defined the nature, length, and emotional content of the argument to the court. This was especially true in cases involving domestic violence. Implications for the education of lawyers were considered.

Keywords: family lawyers; domestic violence; interparental conflict; affidavit; gender of lawyer; custody

Judicial decisions in family law matters have a major effect on children whose parents need such decisions to determine with whom the children will live and how they will have contact with the other parent. In Australia, the Family Law Act provides guidance about what components are deemed important in the decision-making process. The “best interests of the child” has been the paramount principle for many years. The factors which give effect to this principle in Australian judicial decisions include the wishes of the child; the nature of the relationship of the child with each of the parents; the physical, social, and emotional environment provided; and the capacity of each parent to fulfill the responsibilities of parenthood and other factors set out in S68F(2) of the Act. The significance of each factor in any matter is subject to judicial discretion.

Information contributing to the judge’s decision about what is in the best interests of the children is derived initially from affidavit material compiled by solicitors from information given by their clients, oral evidence from witnesses, and in some cases, custody evaluation data written from a social science perspective. The lawyer in the case is required to advocate for his/her client and is influential in the decision-making process.

Lawyers’ perceptions of the significance of the factors the court must consider in their presentations to the court in disputes over custody and visitation have not been investigated. It is not known whether the gender of the lawyer (or the client) has an effect on the nature of the material that contributes to the decision-making process.

The affidavit referred to is a sworn statement and is the primary source of information presented to the court. This study investigated the content of the affidavit material presented in custody and visitation cases. It was assumed that the affidavits would indicate lawyers’ perceptions of the significance of the relevant factors. Our major area of interest was the effects in the data being associated with the gender of the lawyer and/or the client.

LITERATURE REVIEW: FACTORS CONTRIBUTING TO CHILDREN’S WELL-BEING

The selection of factors for consideration in this research focused on historical viewpoints, empirical studies that reviewed postdivorce outcomes for children, opinions
on information that influences judges, and the legal guidelines on standards set for the “best interests of children.” As little information could be found about how the gender of solicitors affected how they conducted cases in family law proceedings, the literature on gender issues associated with negotiators was consulted for guidance in this area.

Historically, the law made assumptions that it was the sex of the parent that was significant in a child-custody decision. The focus was on the perceived ability of a father to protect and provide for the children or a mother’s suitability to meet the needs of young children (Warshak, 1996). Fathers’ responsibilities included leisure activities, discipline, moral guidance, and encouragement with studies. Mothers’ tasks were to provide primary care and foster a sense of emotional security. Mothers’ tasks were perceived as the most important determinants of healthy child development (Chodorow & Contralto, 1982).

Later, critics argued it was the meaning and significance of the parent’s relationship with the child (e.g., love, respect, encouragement of autonomy, and absence of abusive interactions) that were significant in children’s well-being (e.g., Gardner, 1992; Kelly, 1994; Thompson, 1994). Other writers hypothesized that parental adjustment, for example, how the parent handles conflict and the parent’s availability for the children, was most important in making decisions about where the children will live (Bricklin, 1995).

Amato (1993) tested hypotheses that investigated children’s well-being in terms of parental adjustment after divorce, parent’s relationship with the children, and interparental conflict. He concluded that the well-being of children was positively associated with postdivorce psychological adjustment of the custodial parent, but due to methodological complication, the status of the support was still somewhat ambiguous.

For perceptions on the priority of importance, Hall, Pulver, and Cooley (1996) reviewed the history of the best interests standard and developed a ranking of items considered important by U.S. legislators as contributors to that standard. Moderate endorsement was given to the following factors: a consideration of the child’s wishes; an evaluation of the interaction and interrelationship of the child with the parents; a determination of whether a history of child abuse existed; an evaluation of the child’s future environment and the parent’s fitness (including mental and physical health) to care for the child; the parent’s ability to share the love of the child with the other parent; and the child’s adjustment to school, home, and community.

Low endorsement was given to considerations of the parents’ past conduct or moral fitness, their willingness to abide by the court’s decision of visitation, the parent’s attachment to the child, and promotion of the wellness of the child. Very low endorsement was given to evaluations of the disposition of the parent to provide food, shelter, and other material needs; the evaluation of the child’s school and community records; and the willingness of the parent to provide an environment that is consistent with the child’s cultural background.

A further consideration in relation to the content of affidavit material is information known by the solicitor to influence judges. For example, Settle and Lowery (1982) investigated factors that influence judges’ custody decisions in divorce proceedings. The results indicated that judges were most concerned that the custodial parent was mentally stable, responsible, and had conventional values. The latter themes considered such factors as: the mental stability of each parent, the parent’s sense of responsibility to the child, the parent’s moral character and ability to provide stable involvement in the community, his/her affection for the child, etc. Such issues as the child’s wishes received lower endorsement and became more important when the child was 12 years or older.
In summary, the review presents a variety of factors endorsed as more important from both the legal and the social science perspective in custody decision making. Priority is given to the parents’ relationship with the child, the parents’ psychological adjustment, and the child’s wishes.

**EFFECTS OF GENDER OF SOLICITOR**

A further consideration in this study was the effect of the gender of the solicitor on the choice of content of the material presented to the court. No empirical research could be located which focused explicitly on gender effects in presentations to the court although a number of authors have suggested that such bias exists in the form of personal stereotypes, discriminatory issues, and concepts of appropriate parental behavior.

For example, Kennedy (1992, p. 602) claimed that women were at a disadvantage in the court system because they were still being perceived as “arch deceivers” despite claims that “Family Laws are theoretically capable of reflecting role reversal, role sharing, and other diverse forms of intimate relationship.” Czapanskiy (1993) proposed that judges often failed to listen to or believe women lawyers. She also proposed that female lawyers represented battered women more frequently than male lawyers.

Gilligan (1993) argued from the feminist viewpoint that women argue their case on the basis that they were driven by the ethics of care and therefore, were better at relationships, as opposed to males who argued on the basis of the male ethic of “rights.” McGlynn (1998) proposed that tests of the latter hypothesis on gender differences in judgments in the United States have found no significant differences among judges based on gender.

Research that analyzed the content of mediation sessions suggested that the sex of the mediator created expectations about the style and content of mediation. For example, Sims (1998) suggested that in commercial disputes women mediators used a more conciliatory approach while males negotiated more competitively. Musolino (1998) found that in similar situations, both genders were likely to switch to “emotional arguments” when the opponent’s commercial bargaining power appeared to be stronger. However, Boardman and Beach (1998) suggested that there was no absolute stereotype of the male or female negotiator and that it was the negotiator’s power and personality that played a more important role in the development of the team’s position.

Dingwall, Greatbatch, and Ruggerone (1998) analyzed the conversation of mediators of psychosocial background in custody and visitation conflicts. They found no link between the sex of the mediator and the disputant that compromised their professional neutrality on gender-related considerations. However, the authors noted that the parents commonly referenced gender issues. For instance, fathers were more likely to link emotional dimensions of events and experiences, for example, children would be happier if they had additional contact with them. Mothers were more likely to be nonspecific, for example, taking the position that something needed to be done to avoid the children becoming upset in the future.

The research of Brems, Cassow, Sturgill, and Cannava (1995) on professionals’ (e.g., solicitors, child advocates, and therapists) fairness in child custody decisions revealed that decisions were not affected by sex role stereotypes and gender bias. The latter research was based on ratings of traits as described in a vignette that varied only as to whether the mother or father was described as incompetent to parent.

In summary, it could be said that there is divergence of opinion on the neutrality of professionals in conflict situations. Lawyers may be influenced by the gender of their client in
This study investigated the main themes presented by lawyers to the courts concerning the well-being of the children in contested cases. It also considered the influence of the gender of the solicitor on the content of the material presented to the court. The following hypotheses were tested: (1) There would be no significant differences in the number of expressions by solicitors of either gender stating or suggesting that the mother is the better primary parent. (2a) Descriptions of the parent’s relationship with the child would be given priority along with a consideration of the child’s wishes and feelings. Endorsement of the latter descriptions would be significantly higher than descriptions of parental conduct or past moral fitness. There would be no significant differences between the numbers of descriptions favoring either parent. (2b) Descriptions of parental adjustment (the interparental conflict perspective) would be included. Descriptions of parental character (describing psychological and social adjustment) and relationship with the child (affection vs. abuse) would be significantly higher than descriptions of the interparental conflict. (3) There would be no significant differences on the amount of information presented between mothers and fathers in descriptions of parental adjustment and in descriptions of interparental conflict. (4) The gender of the lawyer may have an effect on the nature and content of affidavit material presented to the court.

METHOD

A content analysis was conducted of affidavits written in contested children’s cases in the Family Court in North Queensland to give an insight into the manner in which the legal profession was handling cases in the court. Twenty-eight cases listed for final hearing in the Family Court of Australia in one of the three hearing centers administered from Townsville, were involved in the present study. The cases comprised a series of matters involving children, were filed consecutively, and derived from a list of cases scheduled to be heard in late 1995 and early 1996. The final affidavit filed on behalf of each parent was selected for analysis.

The techniques of content analysis were applied to the documents. Each document was considered in terms of its constituent paragraphs, each paragraph being considered as a “text unit” for the purposes of analysis. The paragraph was selected largely for ease of analysis, and because the authors’ previous work on reports prepared by Court Counsellors had indicated that it should be possible to code the paragraph in a meaningful way.

A series of research concepts was derived, based on the authors’ knowledge of the field, preliminary analysis of affidavits, and also their previous work on family reports (Bradshaw & Hinds, 1997). The researchers scanned every document jointly, paragraph by paragraph. The coding process was conducted blind, that is, the authors were not aware of the name of the solicitor or the solicitor’s gender while coding. The content of each text unit was coded according to which of the research concepts it met. A code was not associated with a paragraph unless the authors agreed on the coding. A paragraph could be coded as satisfying the requirements for belonging to more than one of the research concepts. Indexing and analysis of data was assisted by the use of the NUD.IST computer program.

Direct descriptions of children included information about their attachments and also about their expressions of emotion. Parents’ abilities to care for their children were examined in terms of the quality of basic care, educational assistance, appropriate health care, leisure activities, etc. Allegations made about each parent were divided into allegations...
about spouse abuse, child abuse, deceitfulness, drug (including alcohol) abuse, suicide attempts, etc. In order to provide comparability with previous work, the parents’ coping abilities were considered in terms of their expression of emotions, their ability to make decisions, and control material resources. Statements about each parent’s contributions to the family and marital interactions were also examined.

RESULTS

The literature review has suggested that historical factors and the emotional states of clients and their families, will possibly influence solicitors’ presentations to the court, the intensity of the parental conflict, and other factors which are believed to influence the judge. It was surmised that the gender of the solicitor would possibly influence his or her perceptions of what information would form the strongest case.

A review of the demographic data indicated that 15 of the 26 families had children school-age or younger who were living with their mother. The majority of parents were aged 30 years or older. Most (39%) were unemployed or engaged in home duties. Thirty-seven percent were engaged in blue-collar occupations. Twenty-three percent came from professional or clerical occupations. Fathers formed the majority of applicants (79%). Seven percent of the sample was self-represented.

SOLICITORS PRESENTATIONS: MAIN FOCUS OF ARGUMENT TO THE COURT

Table 1 shows the amount of text devoted to the research concepts. The bulk of the text (73%) referred to descriptions of the parents by way of their allegations and defenses. Sixteen percent of the latter paragraphs described the relationship conflict. Twenty-seven percent related to descriptions of the parent’s character and 29% described the parent’s feelings and capacity for problem solving.

PARENT’S PREFERENCE: SELECTION OF SOLICITOR

Of the 25 fathers in the sample, 17 were represented by male solicitors and 8 by females. Of the 27 mothers, 15 were represented by male solicitors and 12 by females.
LENGTH OF DOCUMENT

The documents varied in the total amount of communication. It was found that female lawyers wrote significantly longer documents than did male lawyers, $X^2 = 6.49$ ($p < .02$). There was a significant overall trend for solicitors to write more about their female clients, $X^2 = 7.82$ ($p < .001$). The major component of this result was that female solicitors wrote significantly more about their female clients than about their male clients, $X^2 = 19.91$ ($p < .001$).

EMOTIONAL CONTENT

When it came to the emotional plea to the court, it was seen that female solicitors wrote more about their clients’ feelings than the male solicitors did, $X^2 = 22.11$ ($p < .001$). However, the difference consisted of the female solicitors writing more than expected about the emotions of male clients, $X^2 = 9.2$ ($p < .003$), and children, $X^2 = 19$ ($p < .001$), than the male solicitors did.

When the analysis was directed toward expressions of sadness, anger, and other “negative” emotions, male solicitors wrote significantly more about their female clients and less about their male clients, $X^2 = 13.5$ ($p < .001$), with no significant differences emerging in the case of female solicitors.

THE BETTER PRIMARY PARENT

Results revealed that, considered as a single group, solicitors devoted significantly more space to descriptions of mothers’ parenting than of fathers’, $X^2 = 4.49$ ($p < .05$). They made significantly more positive comments about mothers, $X^2 = 6.66$ ($p < .01$).

When the data were analyzed by the gender of the solicitor, it was found that female solicitors wrote significantly more paragraphs of a positive nature about the mothers’ caring behaviors in relation to children than about the corresponding behaviors of fathers, $X^2 = 26.34$ ($p < .001$). Male solicitors provided more information on the positive child-care capacities of their male clients than on those of their female clients, $X^2 = 7.97$ ($p < .01$). Female solicitors made significantly more references to the quality of parenting provided by their female clients than male solicitors did in relation to their male clients, $X^2 = 6.49$ ($p < .02$).

ALLEGATIONS ABOUT PARENTS

When the total number of paragraphs containing allegations were considered, female solicitors made significantly more allegations on behalf of their female clients, $X^2 = 24.37$ ($p < .001$). However, a more complex picture emerged after controlling for the proportion of the allegations relating to domestic violence (177 paragraphs out of 527). When allegations not involving domestic violence were considered, male solicitors made significantly more allegations on behalf of their male clients and fewer allegations on behalf of their female clients than expected, $X^2 = 12.78$ ($p < .001$), while no such pattern emerged for the allegations made by female solicitors.
DOMESTIC VIOLENCE

There was a nonsignificant trend for female solicitors to allege domestic violence in a higher percentage of their cases than for male solicitors (75% compared with 58.3%). Overall, female solicitors made significantly more allegations that their female clients were victims of domestic violence than male solicitors did about their female clients, $X^2 = 11.96$ ($p < .001$). There were so few allegations made by solicitors of either gender about male clients as victims of domestic violence that further analysis was not warranted.

PARENT’S RELATIONSHIP WITH CHILDREN AND PAST PARENTAL CONDUCT

Descriptions of the parent’s allegations and defenses were presented to the court significantly more often than descriptions of the parent’s relationship with the child (e.g., attachments and feelings), $X^2 = 21.07$ ($p < .001$). Both male and female solicitors wrote significantly more paragraphs on parenting behaviors and the parent’s relationship with their children for clients of the same sex as the solicitor. Specifically, male solicitors with female clients wrote significantly fewer paragraphs on this subject than they did in cases involving their male clients, $X^2 = 9.39$ ($p < .002$). Female solicitors wrote significantly fewer paragraphs about this aspect of the behavior of their male clients than would have been expected, $X^2 = 31.29$ ($p < .001$).

PARENTAL COPING BEHAVIORS

There was a significant tendency for solicitors to write more about the coping styles (derived by summing references to emotions, cognitive strategies, and actions) of their female clients and less about their male clients. This was most pronounced in the case of male solicitors, $X^2 = 13.94$ ($p < .001$), but also occurred in the case of female solicitors, $X^2 = 5.51$ ($p < .02$). Male solicitors wrote significantly less than the female solicitors when describing marital and family conflicts, $X^2 = 12.07$ ($p < .001$).

DISCUSSION

One factor limiting the general applicability of these results was the nature of the sample. It consisted of a small number of cases from the North Queensland region of Australia. Within these limitations, it is clear that the solicitors’ presentations to the court focused primarily on the interparental conflict and descriptions of parental adjustment. Descriptions of children, their feelings, behaviors, and attachments formed a minor part of the argument in the affidavit material.

An analysis of our data suggests that both emotional and cognitive (perceptions of parental capacities) factors influenced solicitors’ arguments to the court. However, the nature of the data presented was affected by the gender of the solicitor writing the affidavit.

Persuasive comments about parental adjustment formed the major part of the argument to the court. This behavior mirrored the attack-defense behavior associated with conflict in general and marital disputes in particular. Consistent with this pattern, the allegations were
enhanced with negative emotional overtones. The latter results suggest that solicitors may be presenting arguments that are designed to influence the judge, as suggested by Settle and Lowery (1982).

The results also indicate that descriptions of parent–child relationships and information describing the wishes and feelings of the children formed a minor part of the content in the affidavit material to the court. Children did not have a voice in what was “in their best interests.” It seems that the significance and meaning of the parent’s relationship with the child was confined to descriptions of negative emotional states and appeared to be an instrument used in the persuasive process. The latter presentations may be interpreted as “lawyers advocating for their clients.” However, a closer examination of the data suggested that the gender of the solicitor (and the client) influenced the content and the nature of the advocacy.

Solicitors of both genders appeared to set about persuading the judge that the client of the same gender as the solicitor is the better primary parent. The reasons for the latter findings are cause for conjecture. It appears that solicitors’ arguments may be influenced by factors similar to those occurring in our study of the content of custody evaluations (Bradshaw & Hinds, 1997). For instance, it is suggested that solicitors supported the client of the same gender as is found in the “in-group/out-group” phenomenon. Alternatively, it may have been that the solicitor experienced empathic identification with the client of the same gender.

Female solicitors argued the case for the mother by writing significantly more information about her to the court. It can be suggested that they wrote significantly longer documents because they needed to “overcompensate” in their arguments due to a perceived disadvantage in the court system as suggested by Czapanskiy (1993) and Kennedy (1992).

Presentations of domestic violence to the court differed by the gender of the solicitor. We suggest the following explanations. It may be that the (predominantly male) perpetrators of domestic violence sought out male solicitors, with the reverse occurring in the case of female victims. It could also be surmised that the mother’s emotionally aroused state motivated the female solicitor, who empathized with the same-sex client, and depicted the distress at length to the court. The solicitor may also perceive that the client is in a weaker position and an emotional argument becomes a bargaining tool aiding the “victimized” parent. The lengthier presentation about the domestic violence may be the result of a female tendency to “exaggerate perceptions of events” in order to bolster her case as suggested by Austin (2000). Another component of the outcome may involve male lawyers minimizing the effects of violence in a similar psychological process to that found in male perpetrators of domestic violence.

However, both male and female solicitors used emotional arguments for the benefit of the clients of the opposite gender, which was a finding contradictory to the general result that lawyers tended to relate more positively to the client of the same gender. This latter finding was especially strong in the case of domestic violence. On the other hand, the findings that an opposite-sex coalition arose in the presentation of emotional arguments are consistent with traditional assertions that both males and females are disposed to protect and nurture the opposite gender. Further research is needed to clarify this rather confusing situation.

Overall, our findings suggest implications for the education of lawyers, during both their initial vocational education and their continuing legal education, in a direction not traditionally associated with the legal profession. To be precise, exposure to a social science perspective, including an understanding of the issues of domestic violence and the psychological and emotional issues associated with separation, would assist them to represent their
clients in ways not affected by personal and gender-related bias. We support the assertion that professionals must be willing to question their theories, experiences, values, and attitudes that they bring to their work and the ways in which these shape their responses to children (Atwool, 2001). There may also be implications for clients in choosing a solicitor to represent them in family law matters, especially where domestic violence is an issue. To ensure the general applicability of these findings, it would be appropriate to replicate the study with a much larger sample of affidavits.

REFERENCES


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