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EXPERT OPINION

Is It Ethical for a Family Court Judge To Make Decisions After a Custody Trial?

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In most civil cases and in all criminal cases, a jury hears testimony, reviews evidence, determines the facts and renders a final decision. While a judge tells the jury the principles of the law it must follow in rendering its decision, the jury decision is usually final.

The legal principles that are given to the jury at the end of trial, before the jury deliberates, is referred to as the “charge” to a jury, which becomes the law of the case. Evidence issues that may arise during a trial are determined by the judge, frequently out of the hearing of the jury.

A jury is supposed to be an impartial group of people who are questioned by counsel and the court before a matter is commenced and who swear to uphold the law and render an impartial decision.

In both civil and criminal cases judges must uphold their ethical canons. While these canons can vary from state to state, the American Bar Association (ABA) has a “Model Code of Judicial Conduct.” Canon 1 of the ABA Model Code says that, “[a] judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.”

An appearance of impropriety “...occurs when reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge’s honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired.” Critical to this definition is the ability for a judge to remain impartial.

“Impartiality (also called evenhandedness or fair-mindedness) is a principle of justice holding that decisions should be based on objective criteria, rather than on the basis of bias, prejudice, or preferring the benefit to one person over another for improper reasons.”

Under the Sixth Amendment, impartial jury trials are mandated in all criminal matters. Under the Seventh Amendment, jury trials are mandated in certain federal civil cases. Other than those specific

circumstances, the state gets to choose procedures regarding how civil cases are tried. In most states, family court custody cases have no juries. Therefore, a judge hears the case, weighs the evidence, and makes a final decision.

Where a judge, absent a jury has listened to the testimony, heard the evidence, determined the credibility of parties and witnesses, and made a determination in a child custody case, one may wonder if continuing on a case thereafter dealing with similar issues, opens the door for a reasonable person to question a judge's ability to remain impartial. If so, would staying on the case violate Canon 1?

In child custody cases, judges make decisions about the best interests of children. In doing so, they evaluate the credibility and parenting skills of each parent. They formulate opinions about the parents.

Where issues of child abuse are raised by a parent, a judge may make decide whether a child has been abused by the other parent or whether a child is at risk in the care of the other parent ("accused parent").

The judge may also decide whether the protective parent who reported the child's outcry of abuse was credible in doing so. The court may decide that the protective parent is not actually protective and may, instead, find the protective parent angry and vindictive in reporting a child's outcry of abuse, which the court may find incredible.

After a negative finding by a judge, would a reasonable person believe that judge could set aside that belief if a child made a later outcry, which was reported to the court by the same protective parent?

Every day protective parents lose custody of their children after reporting abuse to the court. According to Joan Meier, clinical professor at George Washington Law School:

We found that courts generally believed abuse claims a little over one-third of the time, 36 percent across the board. More specifically, they believed child abuse claims 20 percent or less of the time. When the mother alleged abuse by the father and the father cross-claimed alienation as a defense, courts' rejection of such claims increased significantly.

Specifically, in alienation cases, courts only believed mothers' partner abuse claims 37 percent of the time and child abuse claims only 2 percent (child sexual abuse) and 18 percent (child physical abuse) of the time. Child sexual abuse was only believed in one out of 51 cases where the mother reported the abuse and the father cross-claimed alienation. Also, when fathers claim alienation, the rate at which mothers lost custody after alleging any type of abuse shot up from 26 percent to 44 percent.

In light of these statistics, could a reasonable person wonder whether the objectivity of the judge who made the determination be affected in the future if a question arises regarding the danger to the child? One might ask whether a judge should therefore be automatically recused from hearing any future custody issues where the judge has made prior credibility findings.

The implications of this query are multifold and complex. There may be a clear benefit to a judge getting to know a family and having one family/one judge. But, in doing so, is there a bias in someone who has

heard evidence and made a determination? Can that bias truly be avoided if the case comes back to court on custody issues? Or will the bias become confirmed if, thereafter, another allegation of abuse is made?

One might argue that if someone disagrees with a court's ruling the procedural next step is appeal. Appellate courts generally avoid altering credibility decisions made by trial judges, and an issue of abuse may arise again after the time for an appeal may have run.

Is it correct to assume that when that new issue arises that anyone can become completely neutral as if they had never heard evidence or made a prior decision? Does it matter? Does returning to the same judge merely give that judge additional information to increase their disbelief in a parent's concerns about a child where they have been ruled against before? These are particularly difficult questions for child safety.

Currently a litigant may be required to rely upon the same judge "as if" they are impartial, even where there have been strongly negative findings made about them by the court.

Where a judge has made negative credibility findings or concluded a child is not at risk with a parent, will a judge be able to fairly hear that new information or will they be biased? If a litigant believes the judge may be biased, they may file a recusal motion. But motions are costly and may also risk a judge being annoyed at a litigant whose credibility has previously been questioned. Which is the better risk?

No one would ever have an identical jury hear a second case after they had made a determination in one case already. Is that the appropriate

standard for impartiality? While a judge may believe they can be fair and impartial, it does not remove the stigma of the appearance of impropriety which appearance is critical to adherence to the Canons.

While Canons are not laws, they are critical guidelines. The Legislature has options that can help to avoid bias and the appearance of impropriety in these circumstances. There could be an automatic change of judge after a judge has ruled. However, that is not as simple as it sounds, as batterers often use litigation to continue to abuse. Therefore, especially where there has been domestic violence, a perpetrator may use that system to forum shop for a preferred judge to continue to control their victim through litigation.

Another possibility is that jury trials be mandated in contested custody matters that have previously gone to judge trial and where another custodial issue is going to be tried. Jury trials could assure litigants that there is no appearance of impropriety by a judge.

While the judge still makes evidentiary rulings and there may be issues such as whether certain evidence meets scientific standards, those issues will be known at the time of hearing and will be appealable.

Appellate courts do reverse decisions on bad evidentiary decisions as opposed to overturning credibility decisions, which are seldom reversed on appeal.

Where child safety is a concern and the need to balance parental rights versus safety is an issue, it is critical to try to assure there is no bias on the decision-maker.

Having a jury on any second trial would eliminate the potential for the judge to have bias in decision-making as it would remove their decision-making power as to custody and abuse.

As we have suggested in previous articles there are numerous ways to try to assure victim safety. In conjunction with jury trials, legislatures could create special domestic violence courts similar to mental health courts, and have properly trained domestic violence personnel hear any interim matter that comes back to court on issues of child safety, in addition to the ability to hear interim appellate issues.

They could also conduct de novo review of any interim hearing upon express concern of a child's welfare. The Legislature could establish rules eliminating appointments of others who are beholden to courts, such as GAL's or custody evaluators. A department such as a public defender's can represent the child in question as their actual attorney. To assure children their rights as citizens, the Legislature can grant the child all the civil procedural rights and privileges of adult citizens to assure that judges are unbiased and that only qualified personnel represent children when violence or potential violence to them is, or has been, an issue. We must continuously demand that judges remain impartial and ensure that appearance in the discharge of all their judicial functions.

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