

Trial by Jury in Family Law Court Would Benefit Everybody

By Fred Silberberg

Our system of justice is founded, in large part, on the premise that a cause brought before the courts of this country should be decided by a jury of one's peers. The right to trial by jury was one of those rights which our fore fathers fought for in the War of Independence.

The Framers of the Constitution held to the belief that the right to trial by jury was essential to our system of justice. As Thomas Jefferson once said, "I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution."

In fact, the right to trial by jury in a civil case is guaranteed to all citizens by the Bill of Rights, particularly the Seventh Amendment, which states, "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

In family law cases, many times the amount in controversy exceeds \$20. Yet we have no right to trial by jury in family law court. Something seems awry here.

Long ago, the concept of judicial expediency somehow trumped the absolute right to trial by jury envisioned by the Framers of the Constitution. After all, if a jury were required to be empanelled for every family law dispute, one can only imagine how our overcrowded court systems would come to a nearly complete standstill.

The process of jury selection in and itself could take more time and cost more money than the actual trial. If the proceeding before the court were an order show cause instead of a trial, that most certainly would be true. But in the final analysis, perhaps judicial expediency shouldn't be the benchmark. Perhaps the Framers of the Constitution were on to something. And perhaps we ought to listen to them.

As it now stands, individual judicial officers assigned to family law courts have an awful lot of power. The power that these individuals hold is significantly more than that which is held by a civil trial judge or even a criminal court judge. The reason is simple. In the latter two examples, checks and balances are built into the system. While the court undoubt-



edly will control how the proceedings unfold and will address the pretrial issues, the court does not have the power to make the ultimate decision. The jury does.

In family law court, the judge controls the entire process and decides everything. The single individual, called on to be as wise as king Solomon, may or may not be. Yet this single individual will decide who owes what to whom, who will control assets, what the assets are worth, who will pay the debts and in what amount, whether one party will have to work or not, how much support will be paid and, most significant, with whom the children will live and what rights the parties have concerning their children.

That is an awful lot of decision making to vest in the hands of one person. The impact of these decisions, while they may appear to affect only one individual family, is significant. After all, whether the children turn out OK will have ramifications for many other members of society. The

financial decisions also will affect other members of society, such as the people with whom the parties conduct business and the creditors of the family.

Family law lawyers are way too familiar with a client telling them "the judge doesn't like me." Family law litigants unhappy with the outcome of all or part of a case frequently blame the judge. Sometimes, they even blame the lawyer. When the lawyer demands payment of his or her bill, an often-used justification for not paying or requesting a reduction is "You should have kept me away from that judge. She hated me" or "If you had kept me away from that judge, the outcome would have been different."

While it is easy to say that these statements are the ill-founded whinings of a malcontent, maybe there is some truth to them. The direct calendaring system sometimes shows this to be the case, and family law lawyers know that. One judge is assigned the case for its duration. Mid-way through, that judge gets transferred

to another assignment and someone new takes over.

That person sometimes rehears issues and comes out with a completely different result. Family law lawyers know full well that certain judges have certain biases. It is not uncommon at all for a lawyer to try to manipulate or change the case assignment.

If we granted family law litigants the right to trial by jury, these maneuverings would not be commonplace, and litigants might believe that a fair decision would be made by a "jury of one's peers." And if eight, 10 or 12 people make a decision, it is certainly easier to accept than a decision rendered by one person. It usually is hard to argue that the entire panel "hated" a particular litigant.

The institution of the right to trial by jury not only would make the system appear more equitable but also probably would be more equitable in its decision making. After all, judges are human like the rest of us. They do have prejudices, whether they admit to them or not. They do make mistakes. They also get tired from sitting on the bench day in and day out, hearing the same sordid tales over and over again.

If the right to trial by jury were available in the family law system, then perhaps we'd have a built-in insurance policy, and fewer errors would be made. If the right to trial by jury existed in divorce court, perhaps we'd also have a lot fewer family law appeals.

As for the problem imposed by jury selection for shorter trials, that could be addressed, as well. We could empanel a jury to sit for a specified time and hear multiple cases in a single day or a set of days. While this might get the dander up of those who would want the absolute right to conduct voir dire, it seems that there is no right to trial by jury in family law cases anyway.

That being the case, we could implement a hybrid system. You don't get to voir dire the jurors, just like you don't get to voir dire the judge. At least with this system in place, you have the other safeguards built in that you don't have within. Those are some of the very safeguards that the Founders wanted to institute, which is the reason that the right to trial by jury was included in the Bill of Rights.

After all, letting a single judge make all of the decisions in a family law case today isn't all that different from what the king used to do.

Fred Silberberg is a certified specialist in family law and a partner in Silberberg & Ross in Brentwood. The firm specializes in family law.

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