

Are Men Treated Differently In Child Custody Cases?

Jake: This week, we want to talk about a common question that we get: are men treated equally in child custody cases? I get it all the time. I know Brian, you get it all the time and I get it from both men and women, dads and moms, because it's, I think it's a fair discussion topic on, kind of both sides of a case.

So we thought we'd address that this week and sort of talk through it. It's obviously jurisdiction dependent, but we can talk about broad things that we can talk about.

I wouldn't say our practice has a tilt one way or the other way. We represent moms. We represent dads. We've been on both sides of custody cases. Obviously we represent the same sex couples that are going through child custody, dispute or divorces. But when you have your mom on one side or the other side, I do think it's a fair discussion regardless of who you represent, whether or not they're going to be treated equally regardless of gender.

So Brian, can you start off by talking to us about what the law is first, and then let's talk about the practicalities of it. So what's the law on how gender and sex is treated in a child custody cases in Texas.

Brian: Yeah, it's real clear that there's to be no preference given both because there is no part of it where preference is given and in fact, there's a specific statement that no preference is to be given.

So the laws are officially blind to, to that issue. And it has been for quite a while.

Jake: Yeah. And it's mentioned both in the conservatorship section of the Texas family code and chapter one 53 and then the child support section and chapter one 55 saying there's no discrimination. I think that the actual verbiage is based on gender or marital status.

On determining conservatorship, if you remember from our other content really is when we're talking about custody rights and making decisions for a kid conservatorship possession, in child support, support. And I think to remind clients, if this can be a jury trial, the jury is actually to be instructed on that law. The judges know the law and they know that.

I think it's fair to say that every single judge in the state of Texas knows that the family code directs him or her to be gender neutral when making a determination. So that's what the law is. I think they probably have a general idea. That's what the law is. They're actually instructed when they get a jury charge to say, that there is no discrimination based on gender or marital status and state of Texas.

Let's talk about it practically though. Brian, do you have different takes on jurisdiction to jurisdiction or do you think we're at the point where it doesn't matter? That there's no "advantages" for a mom or dad when it comes to conservatorship and possession access, do you think we're totally neutral like the family code tells us to be, or do you have a different experience? on the practical level or practical level?

Brian: One is that it's changed and gotten much more equal over the years. I'm old enough to have been practicing for a couple of decades. I recall when, especially in certain jurisdictions, typically more rural or less populated ones, you would see a definite preference for the model mom's in custody in some of the courts. Not all of them, but some of them.

I think that's largely not the case anymore. I think it's largely very even handed and that's particularly true in the larger urban counties as a broad statement. On the other hand, you look at the statistics and the overwhelming number of people paying child support are dads and the overwhelming number of parents that have what we call primary custody or custody or tenant, tend to be moms. There's obviously some situations where you've got two dads or two moms or something, but yeah, when you have one of each that's the overwhelming outcomes.

Which, you know, raises the question of why. That's an interesting question, but generally I think if you take a case to trial in most of the places where you're going to have a hearing, our trial, you're going to get fair treatment based on whether you're a man or a woman.

Jake: Yeah. I agree with that too. I mean it's and the same analysis definitely in the urban areas. I think it's generally the case that if you go to trial everybody is given a fair shake and it's like you said, the more rural counties particularly there's kind of the default. In a more rural County near Austin we're in a judge's chambers, back in his office, and we had a dad and a really legitimate child custody case over, over a two year old.

The mom had some mental health issues and the dad was a super good dad from home but we're back in the chambers and sort of explained to the judge, the case without knowing any of it. The judge sort of looked at me and said "how are you going to convince me to take this baby away from mama?"

That was the exact quote. We need a parent at that time, had the right and determined the primary residence. And even then he sort of framed it as you're going to be taking this baby away from mama and that's yeah. You see that some still, you know, frankly, that we can, we can sort of talk about this next, frankly, in that case we made a jury demand.

If you remember from our other podcasts and content on our website, A jury can actually make the rights determined. The price of the term of the primary residence is actually a jury question. And, you know, frankly, if you've got a judge that's sitting there going, you can't take baby from their mama or a child away from mama or whatever and that's just the default. then yeah.

Thinking about making a jury demand for that particular judge I think that's the exception. You said Brian overall our judges do do a good, fair shake. I think it's important for practitioners to remember, you know, at the exit go to the courtroom.

I think you had the experience that you and I have Brian, that the judges will actually get a fair shake to both sides. I think some people that don't go to court a lot of times will be sort of scared off on either side.

You have your mom or dad who was sort of scared off because, you know, they think that the judge isn't going to give her a fair shake because they don't practice in front of that judge a lot and they get intimidated by court. And they ended up sort of pushing for settlement, just because it's trials and unknown for that lawyer because he or she doesn't go to court that much.

Or does it go to court in that jurisdiction or in front of that particular judge? She/he doesn't know that judge, and then they're pushing clients to settlements just because they really can't analyze what's going to happen at court. So it's important to, you know, be able to take that custody case to court.

You know that other practitioners may be intimidated by it or think that it's a long shot or, you know, have all these stereotypes and in their minds that just frankly aren't true anymore. I think once you get to court too, it's important if you represent the mom's side.

The things which we do quite often, I think it's important to not overplay things and assume that you walk in there with an advantage if you're representing mom. Cause I do think that is a good way to kind of frankly put it a good way to kick off a judge. If you walk in there with just this attitude of, well, I've got the mom, so I win.

If you don't take the custody case seriously because you've got mom, again that you see practitioners do that who don't practice a lot in court, if they don't or in front of a particular judge and that gets you I think a considerable disadvantage. If you walk in they're either unprepared or cocky, because you've got the mom's side thing.

So I give the speech just like I give the speech to my dad clients. 1.) You're going to get a fair shake. 2.) we're going to make sure to explain to the judge the situation so we make sure to keep it fair shake.

Presuming that you're just going to win just because you have the mom, I mean, that's the last thing you want me to do as a practitioner. You can't not take your case seriously. The judge is going to be looking at the best interest of the child regardless of gender.

Let's talk about jury cases. Brian, have you ever taken custody cases for a dad to trial and how do you deal with gender issues in front of a jury?

Brian: Yes and you're right. You need to be a little bit more careful with the jury.

Initially when you're picking the jury you're going to try to make sure that that gets placed in there is full of people who are either neutral, or if you if you've got a mom you might pick people that you think are gonna lean toward a mom, just because she's a mom, you're going to probably want those on the jury.

If you're representing the dad you start by trying to get your jury pool as favorable as possible to you. I think most people accept the concept that there shouldn't be a preference, but I do think there are people who have, I'm not going to say in views, but maybe some preferences you know, maybe if it's a really young girl that's the child and maybe they're

going to think that's maybe a better match to be with mom than with dad where if it was a, you know, a 13 year old boy.

Those are the kinds of more subtle things you want to explore and for dire. And then, like you said, in the jury charge, it needs to say very clearly you're not to give preference to either one.

And I think most jurors are going to try to do their duty and follow the law and actually apply that to it. And then if you do think this is an issue, then you need to make that argument and give those facts in as evidence in the jury trial to shoot down anything that's harmful to you.

So there's a couple of different ways to go at it that, much more complex than just trying it to a judge.

Jake: Yeah, I definitely agree with that. It's sort of fascinating to me on both sides, you know, cause we've done custody cases. I would say probably our firm tries more jury trials than the top one or two, as far as the number of jury trials that would try both for moms and for dads and it's, you know, kind of fascinating watch.

I don't know if I'm prepared for the right word, but just kind of not finding those subtleties that you were talking about and they're vore dire.

I had somebody that represented the dad and I had the mom. And the dad was asking for custody, the modification, and the dad's lawyer just sort of stood up and said "Anybody here have a bias against men having custody?" Well, nobody was going to raise their hand to that. I mean if you ask it like that, nobody's going to sit there and go "Oh yeah, I do."

You gotta be, I think more subtle in your questioning. We have a sort of specific line of question that we ask when we represent dads and a specific line of question that we ask if we represent moms. If you ask it right people will be honest, it's you sort of drill down.

particularly if you've got the dad, to really start drill down though, don't put them on the spot and make the potential juror feel, like he, or she's doing things wrong, but just sort of say, look, you know, we all have our dreams for an upbringing. and you know, I always get myself into the example.

I mean, I was raised by a stay at home mom. My dad worked 60, 70 hours a week running his own business as a veterinarian. And my mom stayed at home and raised seven kids. Seven kids was certainly enough to keep her as busy, probably busier, than my dad. I just tell people like, look, you know, it would be reasonable to think that me coming into her as a potential juror could have a bias. Y'all think that, but who here kind of has that upbringing feels that way.

And you know, you have to be able to sort of make them feel comfortable to share and then do really clear up the judge when you didn't strike. Cause the flip side, when you've got the mom, you have to be able to. You know, if there's good jurors out there for you that may have said or indicated some bias, but you want to keep them on the panel. You have to be

able to make sure you sort of gently bring them back on the reservation, through what we call rehab questions.

And. Telling them that, you know, look regardless of background and upbringing, the judge is going to know, instruct you to be neutral and, you know, start tingling. You can follow judge so-and-so's instructions and do that. And you know, it's, it's a, it's a subtle art and it's, it's rare to see lawyers that can actually do it.

There's some really good lawyers that can do it. I mean, we've had cases. With and against, some really good lawyers that know how to do it, but I've also seen it done really, really poorly. and that makes a difference. It's really like, it makes a big difference how you handle that voir dire in a custody case.

Well, I think that's kind of the obviously case specific, you know, facts specific saying, how this is going to affect, kind of affect the case and your particular judge. But I think that's about a broad overview that we can, obviously you can talk about this for hours and sometimes we do initial consults or are over, as a case progresses, but did you have anything to add to that topic, Brian?

Brian: I agree. I was, I have gone on about another hour then on, I mean, I think the child support issue is one we ought to explore in another podcast. And just what does custody mean? is a really, I think, interesting, discussion as well. So let's, let's plan on covering those in future episodes and, and we'll go from there.

Jake: Sounds good. All right. We'll talk to you next time.