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The Importance of Cultural Competence in Family Law Matters

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On Oct. 20, 2020, the New Jersey Supreme Court amended Rule 1:42-1 regarding Continuing Legal Education requirements for attorneys licensed in this state. The amendment to Rule 1:42-1, effective Jan. 1, 2021,¹ included in part a requirement that all New Jersey attorneys must complete at least two credit hours of qualifying coursework on diversity, inclusion, and elimination of bias. In the accompanying Notice to the Bar, the Honorable Glenn A. Grant, stated that the requirement of these credit hours is “one of many ways that the Court is seeking to remedy individual and institutional barriers to justice and enhance equity in the courts.”²

In the practice of family law, cultural competency, broadly defined as the ability to accurately understand and adapt behavior to cultural difference and commonality, is crucial for effective representation and unbiased adjudication.³ This is especially important in New Jersey, which is one of the most diverse states in this country.⁴ According to the 2020 Census, 38.4% of New Jersey residents are Black, Hispanic, Asian, American Indian or Alaska Native, Native Hawaiian or Other Pacific Islander, some other race, or multi-racial.⁵ This was an increase of 7% from 31.4% in 2010.⁶

Growing in cultural competence not only will minimize the instances of ignorance of practitioners, experts, and judges, but also will bring more awareness to the problem of implicit biases within the Court system. As is commonly said: “You don’t know what you don’t know.” Until the bench, the bar, and experts are educated in cultural competence, there will be limited and insufficient protections for litigants from ignorance and implicit biases in family law.

Becoming more adept at navigating cross-cultural issues and achieving a higher level of cultural competency should be the goal of every individual within the New Jersey court system. This includes family law practitioners, experts who litigants employ, and judges who make legal determinations about families. Family law attorneys, experts, and judges each play a role in deter-

mining the outcome of a family law case – whether it be advocating for a client, evaluating a family, or making the ultimate decisions about custody, domestic violence, and the involvement of the Division of Child Protection and Permanency – therefore, they all must be appropriately educated in cultural competency to adequately perform their jobs.

Attorneys

To effectively communicate, interact, negotiate, and intervene on behalf of a client, an attorney must understand that client’s background. This is especially important in a practice area that is as personal as family law as these cases involve the most private of relationships. Family structures and how a family operates are inextricably linked to the family’s cultural norms and values. For example, even though the Court’s “standard” holiday schedule only includes Christian religious holidays (e.g., Christmas, Easter, etc.), a culturally competent family law practitioner should be able to address any client’s religious and cultural observances in their representation and not simply default to what is established as “standard” by the Court. Furthermore, certain religious holidays have special significance, which should be understood by the practitioner and communicated to the Court and experts involved in the matter.

A culturally competent family law attorney will be mindful of a client’s cultural background and take proactive steps to be as informed as possible before and during the client’s representation. Ethnocentrism, or the evaluation of other cultures according to preconceptions originating in the standards and customs of one’s own culture, must be considered when advocating for one’s client.⁷ Attorneys not only must be cognizant of their own ethnocentrism, but also that of the Court. A family law attorney must be careful not to sterilize a client’s culturally sensitive narrative and leave it devoid of the client’s cultural lens. Sometimes, the facts themselves may be the same in two different stories, but the meaning behind

those facts can hold great significance which must be artfully communicated and presented to the Court.⁸

Family law attorneys also bear the burden of being prepared for issues that may not be relevant in their own personal lives. For example, in New Jersey, the Courts will typically not impose upon the non-custodial parent the burden or authority to police the religious instructions of the custodial parent.⁹ However, New Jersey Courts will enforce language agreed upon by the parties regarding religious instruction of their children. Therefore, it is the responsibility of family law attorneys to advise their clients about issues such as regulating the conduct of children, religious observances, or dietary restrictions. Family law attorneys must evaluate whether the parents can come to an agreement about these issues, even if these issues would never arise in their own lives.

Without adequate consideration and understanding of cultural norms and practices, relevant facts may not be properly elicited, and important issues may be overlooked and ignored. For example, a litigant who has been a life-long Muslim raised and living in a Muslim sub-community may not, at the outset, explain the intricacies of their religion and the cultural implications of same to their attorney in a divorce or custody matter. If such information is not elicited from a client, an attorney will not be able to successfully “issue-spot” what is important to their client or provide the appropriate context for a Court to properly evaluate and decide pertinent issues.

Custody Evaluators

It is crucial for custody evaluators to be understanding of the cultural norms and values of families they are evaluating to adequately opine about what custody arrangement would be in the child’s best interests.¹⁰

At a recent meeting of the Family Law Executive Committee, the December 2021 Report of the Blue-Ribbon Commission on Forensic Custody Evaluations in New York was circulated to all members.¹¹ The commission found that there were systemic biases and inequities that render some individuals at a certain disadvantage either in the retention of a custody evaluator or in the results of a custody evaluation due to cultural factors. The commission unanimously recommended that forensic custody evaluators undergo at least 36 hours of mandatory trainings covering topics related to “the history of forensic evaluations, best practices in forensic evaluations, implicit and explicit bias, domestic violence and intimate partner violence, child abuse, child sexual

abuse, substance abuse, coercive control, and trauma.”¹²

In addition to these trainings, it is important that evaluators be familiar with and sensitive to the culturally specific practices of raising a child to which the parents being evaluated subscribe.¹³ Values which align or are similar to that of “traditional American values” may be highly favored over dissimilar values of other cultures.

Cultures which value the group over the individual often do not align with what is widely promoted by U.S.-educated and U.S.-raised experts. For example, one parent coming from a culture that values the active involvement of grandparents and other extended family members may not be appropriately considered by an evaluator who has no experience with this style of parenting. That could result in the evaluator deeming that parent as “hands-off” and uninvolved, as opposed to enriching the child’s life with the involvement of these important third parties. A lack of awareness of these differences, which may substantially impact the way a parent chooses to raise a child, can lead to an expert valuing one parent’s childrearing over the other.

Family structure varies within different cultures. Thus, in developing custody and parenting time plans for clients, it is often problematic to simply apply the same family structure of the western world. Many cultures share child-rearing responsibilities with extended family – aunts, uncles, siblings, grandparents – who sometimes live in the same household. As such, it is important to be culturally sensitive to the roles that extended family plays in child-rearing. Developing a plan that properly considers the intended upbringing of children of clients and familiarizing clients of the rights of grandparents in applicable cases are paramount.

Typically, in custody evaluations, psychological testing will be employed. However, these tests may not measure cultural-specific factors that may affect their results. The Minnesota Multiphasic Personality Inventory-2 (MMPI-2), one of the most widely used objective tests in custody evaluations, specifically does not include any culture-specific normative data.¹⁴ Despite being translated into other languages for implementation, there have not been any studies done as to the veracity of the results when applied in languages other than English.

Judiciary and Court System

The New Jersey Court system generally, and the judiciary specifically, must properly consider cultural differences in Court proceedings.

While English is the predominant language spoken by the responding population according to census data, approximately 12.1% of those individuals (over one million people) have limited English proficiency and characterize themselves as speaking English “less than ‘very well.’”¹⁵ The New Jersey Department of Health gathered data showing that over 800,000 individuals whose primary language is not English reported that they are not proficient in the English language. Their primary language was Spanish (42.9%), Arabic (32.0%), Chinese (41.0%), Gujarathi (36.4%), Haitian (40.3%), Korean (55.1%), Polish (36.0%), and Portuguese (46.3%).¹⁶ Yet, the New Jersey Courts website is not fully translated into most of these languages. In fact, many sub-pages of the website are not translated at all from English, a few translated only into Spanish; the “Interpreting Services” page is only translated into Spanish, Haitian-Creole, Korean, Polish, and Portuguese. No webpages are translated into Arabic, Chinese (either Mandarin, Cantonese, or any other dialect), or Gujarati.

Although the use of interpreters in Court proceedings addresses language barriers, interpreters are expensive and in high demand. The interpreters used by the Court are often overworked – tasked to handle several cases from one lengthy court appearance to the next. Furthermore, the availability of interpreters for specific languages varies from county to county. Insufficient resources are available to judges and litigants, alike, for interpreting services.

Judicial training in cultural competency would be beneficial to judges and allow them to effectively serve New Jersey’s diverse residents. Litigants come to Family Court for assistance when they cannot solve difficult and oftentimes devastating problems within their families. Their circumstances are difficult as it is; having the added burden of educating decision-makers about their important cultural norms and practices can prove to be overwhelming. Having a culturally competent judge alleviates one burden.

When evaluating custody applications, judges must have some baseline knowledge about the individuals over which they preside. While it is the main responsibility

of litigants and their respective counsel to provide the Courts with the relevant facts/circumstances specific to their cases, the Court also bears responsibility to do the proper evaluation and address the culture or religion of the parents to determine what is in a child’s best interests. If these important considerations are not volunteered by the parties or their respective counsel, then the Court must know to ask the right questions to elicit relevant information necessary to adjudicate a matter.

Conclusion

The changing landscape of our state requires practitioners, experts, and judges to respond to the needs of clients of all backgrounds. Cultural competence and sensitivity are paramount for effective representation of diverse clients in legal matters and for fair and equal access to justice. Family law cases are no exception. While New Jersey has started to address the importance of cultural competency in the practice of law, there is still much work to be done to ensure that individuals and families are effectively represented, properly evaluated, and adequately protected. ■

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