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Philip Trompeter

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Gender Bias Task Force: Comments on Family Law Issues

Philip Trompeter*

I have been a Juvenile and Domestic Relations District Court Judge for almost sixteen years. I will proudly admit that I get to serve in, what I believe to be, the most important court in Virginia. Despite the diversity that we have on the bench,¹ the Task Force study found that the respondents perceived gender bias to play the most significant role in family law cases.² I will address the following three major study areas of the Family Law Subcommittee: domestic violence;³ divorce, custody and visitation, and child support;⁴ and equitable distribution.⁵

Let me begin with the area of domestic violence. These matters include criminal cases of assault and battery against family or household members, as well as civil cases involving the issuance of family protective orders.⁶ Virginia defines family abuse as any act that involves violence, force, or threat of violence, including any forceful detention that results in physical injury or places one in reasonable apprehension of harm.⁷ To give you a perspective, 37,000 adult victims of family abuse were known to social service agencies in Virginia about three years ago.⁸ We found, as our Task Force studied this, that most of these victims were women;⁹ therefore, we made the conscious decision to discuss this issue solely in the context of the female victim.

* Judge, Juvenile and Domestic Relations District Court, 23rd District of Virginia, and Chair of the Family Law Subcommittee of Virginia's Gender Bias Task Force.

1. See GENDER BIAS IN THE COURTS TASK FORCE, GENDER BIAS IN THE COURTS OF THE COMMONWEALTH – FINAL REPORT 14 (2000) [hereinafter FINAL REPORT] (listing categories of survey respondents).

2. See *id.* at 31 (analyzing family law matters).

3. See *infra* notes 6-24 and accompanying text (discussing domestic violence).

4. See *infra* notes 25-43 and accompanying text (discussing divorce, custody and visitation, and child support).

5. See *infra* notes 44-46 and accompanying text (discussing equitable distribution).

6. See FINAL REPORT, *supra* note 1, at 33 (detailing legal action available to victims).

7. See *id.* at 32 (quoting VA. CODE ANN. § 16.1-228 (Michie 1999)).

8. See *id.* (citing letter from Nechama Masliansky, Staff Attorney for Family Law and Family Violence, Virginia Poverty Law Center, to Gender Bias in the Courts Task Force (June 29, 1999)).

9. *Id.* at 34.

What I found to be the most alarming result from the data that we collected was what many felt to be Virginia judges' lack of knowledge about the issues and dynamics of domestic abuse. The Task Force was aware that myths surround domestic violence and that these myths can effect judicial decision making. These myths include the ideas that domestic violence is a private family matter; that it is an unusual occurrence in the life of a couple; that abuse is only a momentary loss of temper; that domestic violence only occurs in poor, urban areas; that it never produces serious injuries; and that the victim can leave the relationship easily.¹⁰ We know that none of these myths are true. However, our data revealed that almost seven in ten service providers to family abuse victims, more than seven in ten female family law attorneys, and more than seven in ten female prosecutors believed that judges who handle family abuse cases in Virginia are almost never, rarely, or only sometimes knowledgeable about the dynamics of family abuse.¹¹ It was a painful finding for me.

The issuance of protective orders in family abuse also appeared to be problematic, especially with judges who issue mutual protective orders in cases where the male did not make such a request. More than half of the family law attorneys report that courts issue mutual protective orders where allegations do not warrant their issuance.¹²

Another area of concern revolves around the prosecution of domestic abuse cases. Prosecutors reported problems in the handling of family abuse cases because victims often will recant or are reluctant to testify as witnesses.¹³ Some courts have "no drop" policies,¹⁴ but in Virginia that varies widely because prosecutors are not mandated statutorily to prosecute misdemeanor domestic assault and battery cases. In the court in which I sit, a female victim is clearly disadvantaged in confronting her abuser, especially where she may have a financial dependence on that abuser, a fear of retaliation, or a belief that the court really is not going to be able to protect her. These fears are com-

10. *Id.* See generally Pamela M. Jablow, Note, *Victims of Abuse and Discrimination: Protecting Battered Homosexuals Under Domestic Violence Legislation*, 28 HOFSTRA L. REV. 1095 (2000) (discussing same-sex domestic violence); Melissa A. Trepiccione, Note, *At the Crossroads of Law and Social Science: Is Charging a Battered Mother with Failure to Protect her Child An Acceptable Solution When Her Child Witnesses Domestic Violence?*, 69 FORDHAM L. REV. 1487 (2001) (discussing removing children from homes in which they witness domestic violence); and Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 FORDHAM L. REV. 593 (2000) (examining "Hague Convention on the Civil Aspects of International Child Abduction" in context of situations involving escape from domestic violence) for definitions and expanding conceptions of domestic violence.

11. See Final REPORT, *supra* note 1, at 216, app. D. (detailing perceptions of judicial handling of family abuse cases).

12. See *id.* at 35 (discussing attorneys' perceptions).

13. See *id.* at 36 (noting problems associated with prosecuting abuse cases).

14. *Id.*

pounded by such issues as embarrassment or a lack of information about what her legal options may be.¹⁵ For that reason, family abuse victims service providers whom we surveyed overwhelmingly felt that courts do not treat these cases seriously.¹⁶

Complicating matters is the current bifurcated structure of our court system. The Juvenile and Domestic Relations District Court often will hear the domestic violence case, while perhaps custody and visitation matters would be heard in the Circuit Court.¹⁷ This often impedes the efficient consideration of all elements of family abuse.¹⁸ For this reason, groups including the Commission on Family Violence Prevention, the Committee on District Courts, and the Judicial Council favored the creation of a family court system in Virginia.¹⁹ Despite this support, the General Assembly failed to enact such a system when it was last recommended several years ago.

In the meantime, the Task Force has made several meaningful recommendations in this area. First, judges should consider substantiated reports of family abuse in making custody and visitation decisions.²⁰ Second, judges should provide for supervised visitation in cases where there have been substantiated reports of family abuse.²¹ Third, judges should receive ongoing education about the dynamics of family abuse, including information regarding the psychological impacts and effects of domestic violence on women and their children, the potential influence of stereotypes in these cases, and the impact that family abuse has on family law matters.²² Fourth, courts should establish scheduling procedures to facilitate optimal participation by prosecutors in Virginia in domestic violence cases and should expedite hearings on protective order violations.²³ I know from my work in this Task Force that in Roanoke we are exploring protocols for beginning Virginia's first Domestic Violence Court to address this last issue. Of particular interest is our fifth recommendation that law schools and law professors include in every seminar, course, and clinical program information on the effects of gender bias in areas of laws effecting domestic abuse.²⁴

The next set of issues concerns divorce, custody and visitation, and child support, which comprise the second major category in family law cases that the

15. See *id.* at 37 (listing reasons for victims not to pursue prosecution of abuse cases).

16. See *id.* at 36 (noting observances of service providers).

17. See *id.* at 38 (describing court system).

18. *Id.*

19. See *id.* at 38-39 (detailing efforts to create family court).

20. See *id.* at 39 (listing recommendations).

21. *Id.*

22. *Id.* at 39-40.

23. *Id.* at 40.

24. *Id.*

Task Force studied. I will first address the issue of divorce. In Virginia in 1999, over 35,000 suits for divorce were filed.²⁵ Sadly, in Virginia, more than one in two couples who marry eventually decide to divorce. Although men traditionally have had greater resources and greater control of family assets in family law disputes, the study found that women do have equal access to legal services in divorce actions. In the sample of final divorce decrees reviewed, females were slightly more likely than males to have attorneys in their original divorce suit.²⁶ However, the study data did indicate that women may lack access to legal services for hearings that occur after the divorce hearings, such as hearings for custody or visitation modifications.²⁷ Our findings revealed no difference in the use of marital assets by males or females to pay for attorneys in divorce cases.²⁸

I perceive child custody and visitation issues to be the hotbed of the Family Law Subcommittee. I believe the statistical data may have been of limited applicability in instances where alleged bias in the judicial context really does reflect societal norms because women have traditionally been the primary caretakers of children.²⁹ There was a time, not so many years ago, that Virginia had a tender years presumption in favor of women. Now, by statute, there is no longer a presumption in favor of either parent, and Virginia law requires judges to consider several factors in making these decisions.³⁰ These factors include the child's age, the physical and mental condition of the children and parents, the child's changing developmental needs and the parents' ability to meet those needs, the past role of parents in regard to how they have dealt with a child, and the ability of parents to resolve disputes that the child may have.³¹

Data gathered from a sample of divorce statistics from 1992-1995 that we used in our study revealed that half of all Virginia divorce cases involved children under the age of eighteen.³² The statistics from 1995 showed that courts granted physical custody, whether contested or uncontested by the parties, to fathers in eight percent of the cases and to mothers in fifty-nine percent of the cases.³³ That trend remained constant throughout that four year period.³⁴ It is interesting that Task Force survey responses from family law attorneys offered similar impressions about today's world in Virginia. Family

25. *See id.* at 41 (stating divorce statistics).

26. *Id.*

27. *Id.*

28. *Id.* at 42.

29. *See id.* at 45 (noting traditions regarding child custody).

30. *See id.* at 46 (listing factors).

31. *Id.*

32. *See id.* at 47 (stating custody statistics in divorce cases).

33. *Id.*

34. *Id.*

law attorneys believed that courts almost always or often award custody primarily to mothers on the theory that children belong with their mothers.³⁵ Therefore, the Task Force concluded that decisions in custody matters may reflect gender bias. We recommended that judicial education programs inform and remind decisionmakers about gender stereotypes prevalent in child custody decisions and the need to fully evaluate both parents' capacity as parents, as well as when to apply the best interest of the child standard.³⁶ The Task Force also recommended that judges should be more careful to articulate to the parties the reasons why custody and visitation rulings are made to avoid any perception of gender bias in their decisions.³⁷

Interestingly, the Task Force survey data showed that a majority of both male and female family law attorneys found no difference in how courts treat males and females in permanent visitation orders.³⁸ There was little difference in conditions imposed on male and female custodial parents.³⁹ Also, the courts limited few social relationships or activities in custody and visitation orders.⁴⁰

In the area of child support awards and enforcement there were, generally speaking, no major concerns regarding gender bias. However, two items bear noting. First, although we heard much from members of the fathers' rights movement, our data showed that the courts granted requests for child support reductions seventy-five percent of the time when a father asked that the court modify an award because of a negative change of circumstances in his employment.⁴¹ Second, testimony in public hearings, as well as responses from family law attorneys, suggest that child support orders are not enforced as consistently against women as they are against men.⁴²

The last area under the purview of the Family Law Subcommittee was equitable distribution. Equitable distribution is the scheme by which property is divided when couples divorce.⁴³ We found and acknowledged that the research over the past twenty years indicates that the standard of living declines for women and children following separation and divorce, while it increases for men.⁴⁴ More than half of the female family law attorneys and a third of the male family law attorneys believed that mothers in a divorce

35. See *id.* at 49 (describing perceptions of family law attorneys).

36. See *id.* at 51 (listing recommendations).

37. *Id.* at 52.

38. See *id.* at 273, app. D (detailing perceptions regarding visitation).

39. *Id.*

40. *Id.*

41. See *id.* at 53 (discussing reasons for deviation from child support guidelines).

42. See *id.* at 54 (discussing testimony of non-custodial fathers).

43. *Id.* at 56; see also VA. CODE ANN. § 20-107.3 (Michie 2000) (setting forth Virginia's marital property division scheme).

44. See FINAL REPORT, *supra* note 1, at 57 (outlining conclusions regarding equitable distribution).

accept less favorable monetary terms in settlement agreements in order to avoid legal battles over custody and visitation matters.⁴⁵ However, there was no evidence that the statutes themselves promoted gender bias decisions, nor is there anything on the face of the equitable distribution statute that reflects a bias based on gender.⁴⁶

Let me conclude by addressing some of the human dynamics that I believe played a role in the work of the Task Force. I was particularly struck by the aspect of data collection in domestic violence issues and custody and visitation matters when it came to public hearings. I attended public hearings as the only member of the Task Force who is a judge of the Juvenile and Domestic Relations District Court. From my experience of doing this work for sixteen years, I am struck every day by how personal and gut-wrenching these cases are for the litigants. In my opinion, matters that concern children, families, and the issues that threaten them cut to the heart of what is held most important to humankind. That is why proceedings in this area are usually confidential. For that reason, as a Task Force member, I did not expect that anyone who has experienced a process that challenges access to a child or dissolves a marriage would be courageous enough to feel comfortable sharing that experience at a public hearing.

I recall a woman who was scheduled to speak at the public hearing in Roanoke, but because she was so intimidated by the tone of the participants, mostly fathers who were very strident at that hearing, she did not testify. She testified a few days later, traveling a good distance to a hearing in Abingdon, in which I participated. She delayed her testimony because she just did not feel comfortable. I simply do not feel that any adult should be expected to bear his or her soul or suffer embarrassment by speaking about a highly personal and possibly traumatic life experience in front of a group of strangers, including the press.

With all due respect, although I support the methodology and I would not have changed it, I did not feel that the public hearings were that beneficial in this area. However, those persons who did testify at public hearings agreed that the adversarial process is not the best process for resolving visitation and custody matters and may, in fact, impede resolution. This is consistent with my experience as a judge. No matter how much I welcome these cases, I know the court process is going to leave these litigants struggling for days or weeks to come. I have also come to feel that mediation is really the best process for resolving visitation and custody matters. This is a specific Task Force recommendation.⁴⁷

45. See *id.* (discussing attorney perceptions regarding equitable distribution).

46. See *id.* (discussing analysis of statute in light of attorney perception).

47. See *id.* at 43 (discussing General Assembly's approval of funding for mediation services).