Immigration Bias in Family Law Practice

BY THE HON. GEORGE PHELAN, ANNELISE ARAUJO, AND DONALD G. TYE

Lawyers and judges who identify as white, cisgender, heterosexual men have long been overrepresented in the family law bar. Meanwhile, immigrants, first-generation Americans, and LGBTQ+ people are appearing before the court more often. As these demographic shifts continue, family law practitioners are more likely than ever to encounter parties whose values, experiences, and cultural assumptions are far different from their own.

This variety of perspectives bodes well for our future as a vibrant and inclusive country, but it also creates the potential for miscommunication, ineffective legal assistance, and judicial resolutions that do not adequately address the issues litigants see as paramount.

The widening cultural gap increases the risk of biases that disadvantage immigrant litigants in court. How can we avoid such inequities? This question is rarely discussed; when we do talk about bias against immigrants in family court, it is most often in the narrow context of a litigant's legal status. For instance, a lawyer or judge may conclude that a mother without legal residency in the United States cannot be a custodial parent, due to the possibility of deportation, and instead award custody to a U.S. citizen father whose job demands or temperament make him ill-suited for such responsibility.

Avoiding bias predicated on immigration status is critical, but our discussion here will focus on a more insidious type of prejudice, which arises from a lack of familiarity with and understanding of the immigrant litigants the court is designed to serve. This disconnect manifests itself not only in the professional guidance of lawyers and the rulings handed down by judges, but also in the administrative operations and attitudes of the court itself—the provision of translation services and documents in litigants' native languages and the assumption that litigants understand the mechanisms of the court and regard systems of justice as inherently trustworthy, as examples.

To consider the potential sites of anti-immigrant bias, and how we can eliminate these responses, we share the following case example—a composite of multiple clients whom we have represented or who have come before our court. After introducing this immigrant family, the lawyers will share their thoughts on potential pitfalls, and strategies to approach the matter with sensitivity and equitability. The judge will follow to explain the perspective from the bench.

The Parties

A husband and wife, both practicing Muslims originally from Iran, are seeking a divorce after three years of marriage. The relationship has produced two-year-old twins. Both spouses were educated as doctors in Iran, where they owned a home together before emigrating to the United States. The husband is employed stateside as a physician and pays for all the family's expenses. The wife, who speaks only Persian, is no longer employed outside of the home but serves as primary caretaker to their children. The couple's marriage contract, a feature of many such unions in the Middle East, calls for the husband to pay the wife 300 gold coins.

The husband filed the petition for divorce. The wife,

drawing on traditional Muslim views of marriage and the role of women, does not want the relationship to end. She is so invested in the marriage, she wears her wedding dress to every court hearing, hoping to remind her husband why he chose her.

After separating, the husband continued to live at the family's four-bedroom home, in a high-income suburb with excellent public schools. The wife moved to a two-bedroom apartment in a less affluent community. The husband has extended family in the United States, while the wife's relatives remain in Iran. The wife has conditional permanent residency valid for two years.

The wife alleged verbal abuse by the husband, though police have never been called to the home and she denies wanting a divorce. At issue before the court is the husband's desire to take primary custody of the children, who would remain in America. The wife is seeking custody, alimony, and child support, along with the option to travel with the children to Iran and potentially return there to live. The husband contends the wife is able to work as a doctor in the United States, eliminating the need for alimony or travel provisions.

The Lawyer's View

To avoid unintentional bias, a lawyer acting as advocate, or attorney, for the children, or as an investigator (such as a *guardian ad litem* (GAL)) must seek to understand their client's needs, experiences, and cultural background without making visceral assumptions or judgments. They should develop a tailored approach for each client to account for these crucial variables.

One common way advocates can fail their clients is by not considering the full scope of their lives. Often, an immigrant litigant's ties to America are only a small part of their story: Many have spouses, children, or other close family members back in their home country; they travel home regularly; or they own property abroad. Proceedings that focus predominantly on an immigrant's circumstances in the United States—and do not consider the depth and complexity of their continuing links to their home country—often will not serve the best interests of the litigant, his or her family, or the family law system.

Take another look at our case example. The initial presumption may be that the couple's U.S. citizen children should remain in America with their father, who can easily provide the necessary economic and educational resources. But there's more to the story. The wife's family support in Iran, plus her ability to leverage her medical training to secure a well-compensated job there, must be weighed heavily. The picture is more complex than the first analysis would suggest.

Advocates can further reduce inequities in family law practice by identifying their own implicit cultural biases, calling out examples of bias when they observe them, and learning how to assess individuals by their own strengths and struggles, apart from their racial and ethnic differences and countries of origin.

In addition to confronting our own assumptions, we must also advocate for immigrant clients by developing an awareness of the potential for negative inferences drawn by judges and court staff. Conclusions based on how a person is dressed, their English fluency, or their interactions with their children can easily mislead.

There are some common stereotypes that surface in family court, despite dogged efforts to create an environment free of discrimination and prejudice. One example is the assumption that immigrant parties lack education, income, and/or the ability to work; in our case, the nonworking wife has higher educational attainment than almost everyone with a professional involvement in her case. Another example is the tendency to assume that prior immigration violations, in the absence of violations of court orders, suggest a litigant is an unfit parent.

Of course, these generalizations are nonsensical. Immigrant communities have long been celebrated for their work ethic and commitment to family. Though the wife in our case example drew many puzzled looks for her choice of courtroom attire, the wedding dress is a reminder that some cultures venerate the institution of marriage in a way that is increasingly out of fashion in the United States.

Occasionally, these improper assumptions may come from one of the parties in a case—especially when a difference in immigration status or cultural background creates an imbalance of power among litigants. For instance, a litigant who is a U.S. citizen or permanent resident may try to use the opposing party's less secure immigration status against them in a custody dispute, depicting them as less suitable.

Attorneys must ensure the court is able to discern an opposing party's bias from a legitimate consideration. Are the party's statements designed to invoke animosity or weaponize the opposing litigant's background, or are they relevant and material to the issue in dispute? Attorneys must be prepared to introduce evidence to debunk such discriminatory allegations.

A litigant's undocumented status is often a flashpoint in such cases. To discern whether a claim is legitimate or biased, family law attorneys should consult an immigration lawyer able to accurately describe the litigant's circumstances and the likelihood of imminent deportation.

Attorneys can also seek the testimony of experts with knowledge and experience within the culture involved in cases where such information is relevant. Hearing from such experts may enable the attorney to dismantle narrow views of other societies and cultures. A family law practitioner cannot be afraid to challenge biased statements and should seek to exclude irrelevant evidence that is not probative but is designed to promote or activate nascent bias and anti-immigrant feelings.

Lawyer-advocates also must be cognizant of what an

immigrant party expects from the family court system. Many people come to the United States from countries where due process is routinely denied, and legal protections are dependent on a person's gender, wealth, or social status. It is incumbent upon us to educate our clients on their rights, the court's processes, and expectations, and to develop a strategy for obtaining a favorable result.

We must also ensure that GALs are well-prepared and thorough in order to serve these populations. GALs are regularly appointed by courts in high-conflict custody cases and often have little experience working with immigrant families. But the work they do demands deep cultural sensitivity and an appreciation of different family models.

Whether the GAL is a lawyer appointed to find facts or a mental health professional assigned to conduct a clinical evaluation, it is essential that the investigation be complete, comprehensive, and free of cultural bias. Good test providers should develop their psychometric tools to be fair and valid across cultures. Test items should be written by experts from a broad range of cultural backgrounds and of various nationalities. It isn't enough to simply translate assessments into different languages because direct translations can miss important cultural nuances.

Again, we turn to our case example to illustrate the importance of removing language barriers. A factfinder who is not culturally sensitive may entertain the bias that an English-speaking household is preferable for the children of the divorcing couple. This is a direct disadvantage to the wife, an unquestionably intelligent and capable person who lacks fluency in English. Failure to provide properly translated documents or court instructions creates an additional hurdle.

Clearly, a decision as consequential as awarding custody of two toddlers cannot be made on the basis of superficial concerns such as language proficiency, especially when the children are bilingual and the English-limited parent is fluent in the dominant language in the country where she plans to live.

In situations like these, the lawyers and the GAL must work together closely to acquire a deep understanding of a litigant's perspective and experience, introducing culturally competent evidence to assist the court in understanding the proper context. To represent our client effectively, and to provide the judge with the information necessary to render a fair and thorough decision, we must develop in-depth knowledge on the client's country of origin; the family's religious customs; the parents' education, vocational skills, and employability in their American community; their financial resources available; and their culturally mediated approach to parenting.

Because we practice in the U.S. court system, there is a systemic (and understandable) tendency to evaluate cases through the prism of so-called American values. Concepts we claim to value highly in our society, such as gender equality, can be used to make unfavorable comparisons between Americans and those from other cultures.

This tendency may predispose advocates and judges to make assumptions about a litigant's own values based on an inaccurate or incomplete understanding of their culture. A litigant's conduct and values must always be evaluated on an individual level; a litigant is never an avatar for presumed cultural differences. This cultural lens must be reserved for cases where such differences may have a direct adverse effect on a child. For instance, if a cultural expert were to testify that children of divorce face regular discrimination in Iran, the lawyers and judge in our example would be right to consider whether returning them to their parents' home country would be in the children's best interest. On the other hand, if the Iranian view of divorce is negative but does not present a difficulty for the children, we must not penalize the litigant merely because their cultural background is at odds with our own.

By setting aside our own implicit judgments about the "right" or "wrong" approach to these specific and highly personal subjects, we can learn about our clients, open our own minds, and lay the groundwork for a result that embodies the highest ideals of the family court system.

The Judge's View

Like our attorney colleagues, judges and court staff must leave our own preconceptions at the courtroom door, evaluating each case through the prism of an immigrant litigant's circumstances and experience and avoiding errant conclusions based on their background and country of origin. Bias also must be addressed in court-provided services, dispute resolutions, determination of critical factors in a case, drafting of agreements, narrowing of issues, and even how we treat and speak to the litigant.

Family court judges bear the responsibility to evaluate a case in a fair-minded way, without considering a litigant's immigration background as a negative. Typically, judges are presented with immigration status as a factor in custody determinations and in cases where violence is present. In many other situations, the judge does not know and is even procedurally constrained from inquiring about immigration status.

Bias is insidious but not always obvious. Such as with the use, or absence, of language explaining procedures to the non-English-proficient immigrant, bias can be a formidable barrier to justice access.

That is a consequence of the systemic failure to identify an immigrant litigant who comes before the court. Often cloaked in privacy arguments, this failure is unfortunate for court and litigant alike. Immigration status and country of origin are important considerations when a litigant's cultural norms are critical to understanding behavior that may differ from statutory expectations.

It is impossible for judges or counsel to be able to discern every instance of bias, whether from judges, counsel, parties, or court staff. To root out and correct immigrant bias, family court judges should champion systemic changes. When an

TIPS

- Use a professional translator if your client does not speak English. Make sure the professional translator speaks your client's language dialect and does not carry their own bias.
- Include the translator's name in any agreements signed and have the translator sign the agreements.
- When drafting an agreement, consider how and if the agreement is enforceable in the foreign country.
- Consult with a lawyer in your client's country who can advise about property and custody laws in that particular country.
- Consult with an immigration attorney so that you understand your client's immigration status and the consequences of a divorce and custody agreement. Even the timing of divorce can affect a person's immigration process.
- Use an immigration lawyer and/or country conditions expert as witnesses if immigration status, travel, and relocation are issues.
- At the onset of the representation, explain to your client what they can expect of the court system, the types of hearings, and what steps need to be taken.
- Present briefs and exhibits to the court that neutralize potential bias and address any information that could be used against your client.
- Reach out to the International Academy of Family Lawyers (IAFL) website and directory, and related ABA websites, for names of lawyers who specialize in international family law issues and resources useful in this area of practice.
- Judges should be encouraged to allow motions to appoint cultural experts to testify, and each court should develop a roster of all available country experts. Legal experts, in addition to cultural ones, may be needed to inform family court judges how certain distinctions not beset by statutory difference, such as gender, fare in the country of origin.
- Use the Privacy Act to protect your client immigration information. *See* U.S. Citizenship & Immigration Serv., *Policy Manual*, ch. 7, https://www.uscis.gov/policy-manual/volume-1-part-a-chapter-7 for details.
- Be aware of the Violence Against Women Act and the heightened protections it affords victims of violence from disclosure of information about them. *See* https://www.congress.gov/103/bills/hr3355/BILLS-103HR3355ENR.pdf.
- Object to the introduction of evidence that is not probative to the best interest of the child and is being used to incite bias.
- Review the U.S. Department of State Country Reports on Human Rights Practices for your client's country, which presents an unbiased analysis of judicial systems, treatment of women, education, and threats of violence, among other important information, at https://www.state.gov/reports-bureau-of-democracy-human-rights-and-labor/country-reports-on-human-rights-practices.
- Read and understand the Hague Abduction Convention so that, if necessary, you can effectively rebut accusations that your immigrant client will abduct the children to their country of origin. *See* Child Abduction Section, HCCH, https://www.hcch.net/en/instruments/conventions/specialised-sections/child-abduction.
- *See also* Important Features of the Hague Abduction Convention—Why the Hague Convention Matters, U.S. Department of State, https://travel.state.gov/content/travel/en/International-Parental-Child-Abduction/abductions/legain-info-for-parents/why-the-hague-convention-matters.html
- Review the National Center for Missing and Exploited Children (NCMEC) risk factors for family abduction.
- Acknowledge that your client may have different needs because of their immigrant status, and when they tell you about those needs, accept their differences and be prepared to argue for what they need.
- Removal/deportation of an immigrant takes a really long time—sometimes decades. Therefore, be prepared to argue the fact that your client is undocumented should not be considered in family proceedings. Use experts to support this assertion and to eliminate any imbalance that derives from your client's undocumented status.

immigrant's counsel finds it appropriate and relevant, counsel may *sua sponte* identify cultural markers that are relevant to the proceeding and request that this information be impounded.

Any temporary protective orders granted should be referred for default review by a country expert, payable by taxpayer funds, who should interview the complaining immigrant litigant as to any cultural or contextual factors bearing upon why an immigrant victim did or did not behave in a way perhaps expectable as a result of the violence. The results of such review should be available to the family court judge for further hearing within seven days of initial temporary protective order, and any appropriate amendments to the initial order can then be considered. Whether in the context of a domestic violence protection case or a custody dispute, the country experts should inform the family court judge of critical information such as marriage rights and obligations in the country of origin. Are women

regarded as property, and are their movements controlled? How much does religion intersect with or inform the judicial process and outcomes in the country of origin? Are there other extrajudicial or tribal courts who can overturn or ignore U.S. court custody orders? Is rape only a civil offense for which state actor law enforcement will not get involved unless the victim's family requests? Is the country of origin a signatory to the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)? Has the country become a signatory to the United Nations Security Council resolution number 1325 (pronounced on October 31, 2000) denouncing gender-based violence and requiring accountability? Does the country of origin have police and civil society connectivity to refer and support domestic violence cases? Does the civil law of the country of origin have a divorce rights gender preference? Are there alimony limitations and inheritance advantage based on gender?

When the court is not aware of this important context, judges, attorneys, and the immigrant litigant may be deprived of the opportunity to explore nuances inherent in parenting norms, spousal relationships, and other factors essential to appropriate custody, visitation, support, and asset division outcomes. The court has a responsibility to educate itself about the myriad cultural complexities beyond immigration status, but we must consider these crucial factors without allowing bias in the court. Judges must develop a deeper understanding of immigrant experiences and expectations, drawn by immigrants skeptical of the judicial process because they have had their legal protections denied in their home countries. Additionally, courts must be open to the notion that, despite its resources and safety nets, America might not be the best destination for a custody dispute involving immigrant parents. Judges must recognize that even countries with ideologies and social structures that run counter to our democratic sensibilities might afford a better life in other ways.

We return to the case example above, in which our two Muslim physician-émigrés from Iran are locked in a contentious U.S. divorce. The wife, a renowned specialist in her country of origin, does not practice here due to a lack of English language proficiency. Instead, she inhabits the quieter role of primary caretaker to young children, a role perhaps marginalized in less progressive jurisdictions in our country. Is that heavy parental lifting more recognized, respected, and expected in Iran? Should her request to remove the children with her to Iran be permitted, given her extended family and better employment prospects there? What should a judge think about why she wears her wedding dress to each court appearance—is she eccentric or relying on a treasured custom? The judge should encourage and allow motions to appoint cultural experts to testify, and each court should develop a roster of available country experts. In our particular hypothetical, and given the mother's desire to relocate to Iran, the family court judge will want to know: What is their patriarchy index? How will a divorced woman be treated by Iranian courts if the parties' custody battle were to continue in Iran subsequent to an American court order? Will the husband's in-court testimony be worth more, per civil code or religious practice, than the mother's? Are there any Iranian family code provisions or presumptions about custody and parenting time? Are protective orders statutorily available and, if granted, reliably enforced? Legal experts, in addition to cultural ones, may be needed to inform family court judges how certain distinctions not beset by statutory difference, such as gender, fare in the country of origin.

What that family court judge does *not* know is critical to the equitable resolution of this dispute. But judges cannot *sua sponte* troll the internet or excavate extrajudicial resources to get informed. GALs and individual attorney advocates are critical to a judge's knowledge base. Contested divorce and custody proceedings are replete with evidence of purported parental fitness markers, measured by legislatively mandated standards to which judges must adhere in finding facts and making legal decisions. While existing law and established fact-finding protocol may indeed dilute or even prevent the weight of such particularized facts, family court judges must use their latitude to explore discretionary factors such as cultural norms in the immigrant's country of origin.

Given that an immigrant's first exposure to the courts may be domestic violence, family court judges should insist that restraining order applications be the language access starting point for educating immigrants about the corollary issues to violence such as custody and support. Specific language translations of these corollary rights should be attached to the restraining order application. As importantly, the attachment should make clear that coming out of the shadows is not grounds for deportation.

These issues often must be decided under serious time constraints and amid high-volume caseloads. There are also multiple layers and intersections with court and state actors such as probation officers, appointed custody evaluators, child protective workers, police, GALs, and attorneys for children. Judges and the court staff who support them must develop the cultural competency to dispense with Americanized thinking about parenting norms when such perspective will lead to a fairer decision. Add to these challenges another layer: certified interpreters who may be language wise but not streetwise in the cultural ways of Iran. In cases of self-represented immigrant litigants, family court judges should appoint a GAL to inform them of cultural issues relative to divorce, custody, and domestic violence. If the immigrant litigant is represented by counsel, then the judge should order the attorney to present such issues to the court. The court should, *sua sponte*, if necessary, order any attorneys representing immigrant litigants to inform the court of any cultural experts reasonably available to testify in person as to cultural nuances in the country of origin that contravene any applicable family court statutes or traditional American values.

Lawyers cannot wait until the midnight hour to collect culture-derived evidence in family litigation that has such high stakes results. This evidence must be designated, exchanged in advance, and often premarked, and must be admissible and available to educate judges. Judges cannot assume anything culturally without competent evidence if the parties' behavior is culturally inconsistent with American mores.

Judges must commit to considering this evidence in good faith, understanding that while American mores may traditionally govern spousal relationships, parenting norms do not exclude other ways of caring for families and children. Judges may not be cognizant that other cultures do not have remedies such as domestic violence protection orders. Judges need to be made aware of any significant differences or limitations in the country of origin as to family court staple issues: the right to separation, financial support, a portion of the marital estate, and the right to argue for custody.

Individual judges who feel strongly about immigrant litigants' access to justice should not be inhibited by local ethical rules from interacting with the media; the airing of judicial concerns should not always be left to government information officials. Nor should judicial outreach be ethically confined to its customary haunts such as bar associations. It is an access to justice issue to exclude nonlawyer organizations and specialty lawyer affinity groups from meeting up close and personal with family court judges. These outreach efforts have been officially encouraged with the advanced-age population (for example, National Elder Law Month) and should be expanded so that judges may encourage and nurture linkages between local police departments, immigration organizations, and domestic violence protection organizations. Family court judges should not be hunkered down in their cloistered lobbies, bubbled from the people they are entrusted to judge.

By taking these time-intensive but necessary steps, lawyer-advocates, judges and staff, and court-appointed investigators and clinicians can be allies in the effort to create family courts that are fair and free of anti-immigrant bias. FA

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THE HON. GEORGE PHELAN has been a trial judge in the Massachusetts Probate and Family Court since 2010. Prior, he was in private practice for two decades and served as a special assistant U.S. Attorney. He is a retired Army JAG Colonel who received two Bronze Stars and served in Iraq with the U.S. Army 82nd Airborne Division. Originally a non-English–speaking immigrant, he received the State Department's annual award for empowering women.

ANNELISE ARAUJO (annelise@araujofisher.com) is a founding partner at Araujo & Fisher, LLC, in Boston. She has fourteen years of practice in family and immigration law, including family-based, employment-based and humanitarian applications. She is the chair of the New England chapter of the American Immigration Lawyers Association (AILA).

DONALD G. TYE, JD, MSW (dtye@princelobel.com), is co-chair of the Domestic Relations Group at Prince Lobel Tye LLP, in Boston. He has more than forty years' experience as guardian ad litem investigator, master, mediator, conciliator, and attorney for children and has extensive litigation and out-of-court settlement experience. He is a frequent lecturer on divorce and child-related issues and is a fellow of the American and International Academies of Family.

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