

Parties in Divorce, Custody Cases Crave Perception of Fairness

By Frank Garfield

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It is widely believed that justice or even fairness is not available in the Los Angeles Superior Court – at least not in family law cases. One judicial officer has famously remarked: “My job is to dispense equal measures of injustice and unfairness to both parties.”

Frustration with the legal system’s failures is understandable. Justice is an elusive goal. Each party typically has a very different notion of fairness. The judge does not know or care what the parties think is fair. If the parties end up in Court, the judge’s sense of fairness is the only one that matters.

The parties already know that their marriage wasn’t fair in all respects. On some level, they understand that their divorce will not be fair in all respects either. They nonetheless yearn for a process they perceive to be fair.

Indeed, the perceived fairness of the process is critical. As a party’s confidence in the fairness of a process declines, his or her willingness to participate declines as well. Recent research suggests that adverse reactions to unfair processes that produce inequitable results may be biological; that inequity aversion has evolutionary origins.

In a study published in the September, 2003 issue of *Nature*, primatologists Sarah F. Brosnan and Frans B. M. deWaal demonstrated that female capuchin monkeys are offended by an unfair process.

The monkeys were trained to give the researchers a token in exchange for a slice of cucumber. The monkeys worked in pairs, and when they both received cucumber slices, they exchanged their tokens 95% of the time.

Then the scientists gave the first monkey a grape and the second a cucumber slice. Confronted with this injustice, the second monkey exchanged her token only 40% of the time, and often refused to eat her cucumber slice.

Then the scientists gave the first monkey a grape in exchange for doing nothing. In that case, the second monkey exchanged her token only 10% of the time.

When both monkeys received a cucumber slice, each monkey was willing to make the deal. It seemed fair to both of them. When one got a grape for her token instead of a cucumber slice, the other resented it. When one didn’t even have to exchange her token and still got a grape, the other was enraged. Refusals to exchange the token and to accept or eat the cucumber slice escalated dramatically.

What are the lessons of this study for the mediation of a marital breakup? There are several:

First, participants in a process of give and take demand parity between what is received and what is given.

Second, when the process favors one party over the other for no apparent reason, there is resentment.

Third, if the process is perceived to be unfair, the willingness of the parties to participate is jeopardized.

When couples divorce, the concept of fairness is embedded in the parties' perspectives. But almost 35 years after the no-fault divorce law was enacted, it is clear that the system is incapable of delivering that commodity. This should come as no surprise. Many of the issues that arise in family law cases are not amenable to solutions that seem fair to both parties.

Consider two issues that commonly arise upon divorce: How does a custodial parent manage on a fraction of the income that used to support the family? The Court can only divide the available income between two households; it cannot ensure that either party will be able to maintain the marital lifestyle.

How does a noncustodial parent play a meaningful role in raising the children when he or she is no longer a presence in the children's daily lives? The Court can only order a custody schedule that may not work very well for either party or serve the children's best interests.

In litigated cases, fairness is rarely a consideration for the Court or counsel. The lawyers' job is to present the evidence necessary to establish their client's rights and the other party's responsibilities. Their goal is to obtain the best possible result on every issue for their client. An outcome that is fair to both parties is not on either lawyer's agenda.

The judge is sworn to apply the laws of the State of California to the facts. The judge's findings of fact are based on the evidence admitted at trial. Regardless of the judge's sense of fairness, the Court is bound to administer the law uniformly. All efforts to import fault back into the equation have been rejected by the courts. For example, drug abuse and adultery are irrelevant to the division of community property, and even agreements between the parties based on such considerations are unenforceable in the context of a marital dissolution.

The rigidity of the legal process and its considerable cost inclines many divorcing couples to mediate their cases instead of going the litigation route. The task of a family mediator may be broadly stated as helping the parties reach agreement. At a minimum, both parties must be able to live with that agreement. If not, one or both parties will not sign it. The prospects for reaching an agreement are enhanced if the parties perceive that the process is fair, even if the result may reflect compromises and concessions.

When the law is clear, it is easier for a mediator to promote the perception that the law is fair. With some exceptions, the law of the State of California that requires an equal division of the parties' community property generally seems fair to both parties. This perception is reinforced by the common belief that marriage is an equal partnership.

When the law is unclear, what the parties perceive to be fair diverges. Thus, for example, where one party has been the primary homemaker and the other party the primary breadwinner during the marriage, the idea that both parties should assume equal responsibilities as breadwinners and homemakers after the divorce almost never seems fair to both parties.

The concept of an equal partnership works during the marriage because the parties agree to value

their different contributions equally. This is rarely the case upon divorce. The breadwinner often expects the homemaker to get back into the workforce. When money is in short supply, it seems only fair to the breadwinner that the homemaker share the burden of supporting the family. The breadwinner devalues the homemaker's role, and is unwilling to subsidize it. In many cases, the breadwinner may offer to share the responsibility for raising the children as part of the deal.

In contrast, the homemaker sees her role as even more valuable. Already traumatized by the divorce, the children should not be further traumatized by losing their primary caretaker. The breadwinner's offer to share parenting responsibilities is often regarded as insincere or even punitive. Besides, there are strings attached. Many homemakers bristle at the idea of abandoning their children to go to work, only to receive even less support from the breadwinner as a result.

In virtually no case is it possible to achieve an equal allocation of those responsibilities that the spouses formerly divided unequally but valued equally.

Given that equality is no longer the governing principle – either in theory or as a practical matter – both parties resort to the concept of fairness. This is especially true when it comes to the contours of those legal rights and responsibilities as to which divorcing spouses may disagree. But the concept of fairness does not work for the same reason the notion of equality no longer applies. Each party will always feel that he or she is getting a cucumber slice and the other is getting a grape.

In the final analysis, equality is unattainable, and the parties must settle for an outcome they can live with even if it isn't entirely fair. The mediator's contribution is to ensure the fairness of the process. It is the fairness of the process that helps both parties accept an inequitable result.

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