

LESLIE O

There are instances of heartbreak where persons in positions of power and trust abuse such position and cause severe harm, whether physical, emotional, financial, or otherwise. Child abuse by Clergy, corruption of politicians, Madoff-like fraud by financial advisers, allegations against a public figure like Bill Cosby; the list could, unfortunately, be extended.

Bias, favoritism and lack of neutrality by a child custody evaluator ranks high on such a tainted list. Appointment of a child custody evaluator, whether by Stipulation or Court Order, is a relatively common occurrence in our family courts. What is not so common is an awareness and knowledge of California Rules of Court, rule 5.220 *et. seq.*, which establish the rules for child custody investigations and evaluations. Rule 5. 220, and its subparts, read in context with Family Code sections 3011 and 3018, establish the mandatory guidelines for the conduct an evaluator must follow. The rules are clear; case law interpretation is somewhat sparse. Thus, *Leslie O.* deserves careful attention. The lengthy opinion is, necessarily, heavily fact-intensive. The facts are summarized in the foregoing case summary.

There are a number of pertinent cases, canons and rules not cited in the *Leslie O.* opinion. As a quasi-judicial officer [see *Howard v. Drapkin* (1990) 222 Cal.App.3d 843], a child custody evaluator acts in a quasi-judicial capacity. As such, the evaluator is subject to the canons of the Code of Judicial Ethics. Canon 3.E [Disqualification] expressly cross-references to Code of Civil Procedure section 170.1 which, in section (6)(D)(iii), requires disqualification if a person aware of the facts might reasonably have doubts that the bench officer would be impartial. The statutes, rules and canons are mandatory. This is made clear in *Marriage of Seagondollar* (2006) 139 Cal.App.4th 1116, at 1120. In that case, the Court reversed a trial court decision involving a move away when it failed to comply with court rules and procedures, including the evaluator's actions: "The rules of procedure for reaching family law decisions – contained in the ... California Rules of Court ... are not mere suggestions ... (but) are commands which ensure fairness by their enforcement." (Emphasis added).

The necessity for objective neutrality extends, of course, beyond child custody evaluators. We need to be confident in the absence of bias and presence of neutrality of bench officers [CCP section 170.6]. As crowded courtrooms divert clients to private judging and arbitration, ethical guidelines are equally essential [CCP section 1281.9; Ethics Standards for Neutral Arbitrators; *Haworth v. Superior Court* (2012) 50 Cal.4th 372; *Mt. Holyoke v. Jeffer Mangels* (2013) 219 Cal.App. 4th 1299].

Now that our attention has been focused on neutrality and bias guidelines by this recent case, family law practitioners are pointedly reminded that protection of clients in this emotionally fraught context requires careful review of proposed stipulations and court orders appointing child custody evaluators. Do not sign form stipulations without careful review. Don't

stipulate in advance to admit the report in evidence. Don't waive the right to depose the expert or require foundational testimony at trial. Don't waive protective privileges where not appropriate [Physician-patient, Evid. Code section 992; Clergy-penitent, Evid. Code, section 1030, *et seq.*]. Craft your Stipulations and approve court orders carefully, depending on the particular circumstances. These are not boilerplate documents. Note the appellate court's admonition that "We recognize that evaluation is an art rather than a science, and that different approaches may be required in different cases." Our clients and their children are not vanilla, one-size-fits-all.

Please re-read the *Leslie O.* opinion and note well its lessons. You will be a better lawyer for having done so. You will also, hopefully, be a better person for having done so.

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