

Jury Trials in Family Law

Jake: Alright, for this week we have a big topic. We'll be talking in broad strokes about family law jury trials. In other episodes this topic gets weaved in and out of it, and it's probably something that we could talk hours about. What a jury trial looks like, strategically when you use a jury trial, what's the best way to try it, how to approach the various components of it, and of course the cost of it all, but for this episode we wanted to talk in broad strokes about the topic of jury trials. Then obviously we can delve into it in more detail in other episodes or as it comes up when we address other topics.

So first off, the question that we get a lot, and I'm always surprised when practitioners don't know the answer to this, but Brian, what issues can a jury determine in a family law case?

Brian: Yeah, there's a pretty broad number of them. In a divorce a jury can decide fault.

Whether it's just in supportability or if it's something more specific like cruelty or adultery, that's one area. It can determine the value of particular items, it can determine the character of particular pieces of property, so separate or community or whatnot. It can determine attorney fees. And then if we get into the child issues, then it can determine what laymen call custody, which is who has the primary residence.

It can also determine where that primary residence can be established. There are some others here and there, but those are the big ones. Those are the most important ones, unless I've skipped over anything you want to add in Jake?

Jake: No, I think that's right. Those are the broad issues we think about when deciding "Why I would make a jury demand."

There's nuances, like a jury deciding sole managing conservatorship versus joint managing conservatorship. If you delve into some of the reimbursement claims that are in the family code, things like fraud or reconstituting the community estate. Those are things that you can throw at a jury.

Those are big issues for a jury. It's things like what's the character of property? What's the value? Those are probably the biggest ones that go in front of a jury on the property side. Of course there's custody. Who has the right to determine the primary residence? So who "has custody" and then move cases, which is what the geographic restrictions are going to be. There's other issues that come up that could be brought for a jury. If there's torts brought within the divorce that could go to a jury, all sorts of issues.

It's important to point out what a jury can't decide. A jury cannot decide, for example, possession access schedule. The judge sets a possession access schedule for the kids. So if the jury comes back and says "This parent, the father, has the right to determine the primary residence or "Mother gets to move to Florida." The jury gets to decide those types of issues and the judge comes in and goes "Okay, given the jury's decision, this is what the possession access schedule is gonna look like for the kids." The judge

sets child support. A jury doesn't determine child support. That's what the judge does.

Then on property issues, the jury doesn't divide up properties. So they may say "Wife's business is worth X dollars" then it's up to the court to put that number on the spreadsheet and then divide the property. Or the jury may say that this is the husband's separate property, so then the jury can divide that property, but the court divides up the other property that's been determined to be community property. So I look at it as, a lot of big questions the jury decides, and then the judge takes those questions and applies it to the case.

Then, with attorney's fees for example, the juries determine what's reasonable. Then the judge can decide whether or not to award the attorney's fees. They don't decide everything. It's not like you take a divorce and just toss the whole thing to twelve jurors, or six jurors if it's county court, twelve jurors in district court. It's not like some jurors are at the back of the jury room figuring out a possession and access schedule for the kids and what guideline child support is. They don't have to do those questions, but they do get these big questions.

So next question, talking strategically, why make it jury demand and case? Most people will say that most divorce cases, even most child custody cases, go to what we call a bench trial, where a judge decides everything. When you're watching TV and you see the criminal cases, they're almost all in front of juries, but divorces and custody cases for most people a judge primarily decides everything in a bench trial.

Brian, I think you and I probably ended up pushing cases to a jury more than probably a lot of our peers. Some of that's based on experience, some of that's I think just the way we see cases strategically, talk to me about what you're thinking when you decide to make a jury demand in a case. What type of things do you take into consideration?

Brian: There's a couple of things. One is the judge versus jury. Of course a jury is going to be, as you said, six or twelve people randomly selected from the community. So you can maybe get a sense of what the community people would likely rule versus the particular judge that you have. That's a complicated question because in some areas like San Antonio and Austin for example, you have a central docket, so you don't really know which judge you're going to get. Until the last second we're in motion.

The rest of the state, pretty much when you file you know which judge you're going to get. So for example, if you had a custody hearing early in the case, let's say it was temporary orders that your client lost and we didn't think it was a good reason they lost it. The judge for some reason took a disliking to our client then. And now you might say to yourself "Okay. When we go to finalize this, I think we're going to get a fairer or a new review of this from a jury." So that would be the first reason why you think a jury would give you or your client a better outcome than the existing judge would be again complicated by the question, if you know which judge that's going to be.

Secondly, there's I think a preference among judges to be predictable, which makes a lot of sense, right? They want to be predictable so that lawyers know what they're going to do and are likely to do and then therefore cases settle. That's the basis of our legal system. Very few cases actually go to a final trial, whether it's a bench or jury.

Our core system would be overwhelmed if that happens. Judges tend to, for example, not allow moves in move cases. Both parents are in Houston; they're unlikely to allow the parents to move to Florida. But juries we generally think are a little more flexible about that and might take into consideration the broader scope of things we're doing.

I just might be leaning toward. "Okay. Nobody's going to get to move." is the policy that's out there, for example, and in that case the judge might feel pressure to rule that way to just be consistent with the other judges and have that rule out there. So that would be the second reason for it.

The third reason is that a jury trial typically makes the case last longer and is more expensive. And for certain litigants they either don't want the case to be over with quickly or they're able to outspend or willing to outspend the other side on the case. Therefore requesting a jury or demanding a jury is going to be an advantage because it's going to put the other side under pressure since they want the case over with quickly, or they don't want to spend a lot of money. So, it increases the leverage that you would have in a case.

Those are the three most common reasons why someone would ask for a jury. At least as I've seen it.

Jake: Yeah, I think that's right and I think there's a different analysis for every single case. You have to make a jury demand at least 30 days out from trial. I know in all of our offices, the associates are trained to be thinking about that throughout the case and to have the discussion with the partner "On this case, do we make a jury demand and why?"

Adding to what you said, I think the way I see our cases in our office making a jury demand, I think it gives us a strategic advantage in some instances. Frankly, we do them more. I'm shocked when I hear other people talk about jury trials, and I think a lot of other practitioners talk to their clients about how difficult they are and how rare they are and how hard it is to do and adds this big level of complexity to the case. That's actually how I was trained as a young associate, is that a jury trial just makes the case just so much more difficult.

Certainly we'll talk about this in a second. There's more parts to a jury trial, but we've done those. When, practitioners and think about, for example voir dire, when you pick a jury, a lot of them go and hire experts and hire consultants and bring people in to practice to do this. And then they haven't done a voir dire in 10 years, so they're just nervous.

Frankly, before COVID, I think last year, Brian, we would probably try between seven and ten jury trials last year combined between the two offices. It's just not the end of the world for us now.

It's something to be taken very seriously, but if you've done it time in and time out then I think it gives us an advantage over other practitioners just because we've done it. So if I've got a case that's on the line and I'm not quite sure if we want to do a jury trial or not, then I factor that into what my decision or whether or not I make the demand, or sometimes make the demand to reserve the right.

If you haven't made the decision, deadlines are approaching and you make the jury demand and then, you can always decide or talk to the other side and decide to try to have a bench trial. Some cases are so obvious you just don't really have a choice but to make a jury demand.

For example, if your client went in front of a judge on temporary orders, and it's a case like in Harris County or Williamson County or Dallas County where you're in front of one judge. And that judge is also going to be your judge for the final trial. Your client goes in front of temporary orders and the judge just pours them out and clearly doesn't buy anything. They don't like them, they're prejudiced. That's one where it's pretty obvious that she had to make a jury demand.

I think on move cases, like you were saying Brian, a lot of judges don't let people move. I have the position, and I can always be talked out of it, but I'm in the position of if you're asking to move, it's almost always always a jury issue. Judges, I think they, like you said, have a blanket rule of people don't move outside the geographic area. I don't care what the reasons are. We're just not going to let people move. If we all say people can't move, maybe they'll all stop asking me.

Jurors, I think, actually give you a much more of a fair shake on whether or not there's going to be a move. I know we've been successful having juries let clients move when we knew there was no way a judge won't let them move.

I think the last thing I would say, I tend to tell them, I think jurors tend to be more skeptical of mental health professionals and really experts in general, more so than judges. We talked about this in our blogging, but if you have an Guardian ad Litem that our custody evaluator that is just completely against us, just totally missed the ball and against the client, and didn't do a good job, and is biased against your client or, for whatever reason, just got it wrong.

It's hard, they'll do it, but it's hard for a judge to sit there and look at that mental health professional that she appointed to the case and then say "But I'm not going to listen to the guardian, or the custody evaluator, even though I appointed him or her." Jurors, I think are a lot more skeptical about what mental health professionals have to say. I think a lot of times for good reasons, but jurors would be a lot more skeptical.

So we talk about that whenever we make the decision, but it really is sort of a case by case situation. Last year, we tried everything from move cases to custody cases, to some property issues. I think it was last year. You and I even tried a fault to a jury. I think that was last year, wasn't it? And that had some interesting torts mixed in with it. So it's a discussion that needs to be had

On a different subject, anytime I talk about jury trials bring this point up, which is that sometimes I've noticed that some judges, not a lot, but some judges I think push

back on jury demands. They have to let you have it. You have a constitutional right to it, but you get it this deal of “Why do you need a jury trial? These poor people are going to sit here and sit through a divorce case. Who wants to sit through a divorce case, who wants to sit through our custody case? These poor citizens are here.”

As somebody who's tried a bunch of jury trials, what's always fascinating to me is I think most jurors when they start out the case have that attitude. It's “I can't believe I'm here. And I'm going to have to listen to a divorce jury trial all week, which I get, who's, who wants to do that?”

I've yet to have a jury, a single member of any of my jurors, have anything but just wonderful things to say about what an amazing experience it is. Now I think it's hard sometimes. There's cases where it's been really emotional for them, really difficult for the members of the jury to figure out and decide. But I think it's almost like this weird thing that clicks on day two or three, where they really figure out we really are making a difference in this family's life and they really do need our help. This is a solemn duty that's in our constitution.

I've had great feedback from the jurors. When I talk to judges about jury trials and stuff like that, I always bring that up. That I just, every single juror member I've had has always just taken their oath so seriously and really took something from the experience.

We tried a fault last and had a few other issues, and I think even the judge a little bit was like “Yeah, why are you really going to try this to a jury? And these people are going to listen to this divorce for all week.”

If you remember, we tried it and we got a verdict, I think at eight o'clock at night. It was Harris County. Got it at eight o'clock at night. The jury gave us all the grounds that we asked for and it's pouring down rain. It was really coming down and you would think all the jurors would want to go home, but they all stuck around and talked to us. One of them said “We figured out day two or three, that this family really needed our help moving forward and so we took it really seriously. That's why they took til eight o'clock at night to the side. We gave him the charge at 11, I think, maybe noon or right after lunch, but they stayed all the way to eight O'clock deciding those issues.” They really took it seriously.

But back to our clients. So Brian, talk to me about cost. That is something that needs to be understood when you decide about whether or not to make that demand or not. What is the, what does it have to do with the cost whenever you make that decision? What effect does it have when you make that decision ?

Brian: Yeah, it's going to be made clear that if it does actually go to a trial it's going to be more expensive than a bench trial. There are two reasons for that one is that it takes longer. If you file your jury demand 35 days before it's set for trial, that's going to bump it three or four months or more out into the future. Actually these days, it's bumped it to an uncertain date into the future but I'm sure they will happen again. So anytime a case goes longer, that's more expensive, but it's just also more expensive to try a case to a jury for two reasons.

One is that you have to do a lot more preparation. With a bench trial in front of a judge, the judge can sort things out. If something is said by somebody that's inappropriate, the judge would just say, I'm gonna forget about that. I'm not sure if that's always true, but they're going to say that. And they're going to try that, try to do that. Whereas with a jury trial, you have to be much more careful about what you say in front of a jury.

And so there's a process involved with that. There's a process involved with picking the jury. Typically you bring in 40 to 50 people and it gets narrowed down to 12 or so that are actually going to sit on the jury.

That's a process. I would say that a three day trial for a judge is probably going to take closer to five days to try with a jury. That is probably a pretty good ratio. And so just, it's more time. More lawyer time is more expensive. I have seen people use the jury demand as an intimidation tactic to the other side, or that they think they're not willing or able to pay for those additional fees.

It can be effective. It's a dirty little secret of our legal system that the side willing to pay more to good lawyers often gets more of what they want than the side who's not as willing. You look at that a lot of different ways, but it's just the reality. And yeah, they expect to pay more with a jury trial and that may increase the pressure on both sides to settle and maybe it'll settle, but it also may increase the pressure on just one side.

So it can be a tactic that you can use as well In addition to the extra trial itself.

Jake: Yeah, I think that's right. What you're saying about the time period is exactly right. In Travis County the way they do it is Judge Livingston's typically the one that is calling the jury docket, and she says "I want to hear your time announcement. When you announce a time, you need to include a day for a pretrial." because in Travis County they actually don't have pretrial conferences the week before like Harris County, they do pretrial the day of. So half a day for pretrial, affidavit, picking the jury. So that's one day of your time announcement and then a day at the end for deliberations, for the jury deciding.

Yeah, I think adding to two days two is a good estimate. Travis County, for example, has specific local rules for jury trials. Harris County, if you try a case, and I think in every single district court, they have local rules about the exchange of exhibits, exchanging witness lists, exchanging objections before final trial. Travis County actually doesn't have, or at least pre-COVID didn't have a lot of those rules except for jury trials. Kind of thing I used to complain about a lot was that you would show up at trial and nobody exchanged exhibits, nobody's exchanged witness lists.

But you'd have to do that in a jury trial and bench trials. Everybody was fumbling all over themselves. We would show up with an exhibit list, pre-marked exhibits, and nobody else would which is just maddening. I don't know why they had the rules like that. Actually COVID has made them change the rules now, where they have to show up with pre-marked exhibits and everything, but it's tighter rules. It's like you were saying, it's just because there's so there's different nuances, with a jury trial then

it's much tighter rules. I think it's a good thing about them that people just show up a lot more prepared than they would for a bench trial.

So it does cause an expense and of course that's something that we talk about whenever we consider making the demand. So that I think is a really broad overview of family law jury trials.

We could probably spend an hour or two talking about how they actually work. From point A to point Z on trying to jury trial. I know there's a YouTube video that we have on it. And then I know we have content too about the anatomy of a jury trial, all good stuff. I find that fascinating, at least, in, of course it's something that we talk about with our clients, pretty much throughout the case.

So I think that's a pretty good overview though. Don't you Brian?

Brian: Yep. I think it does. And we can certainly dive into more of the details in the future. Yeah,

Jake: I think so. All right. that'll wrap up this week and I'll see you next time.

Brian: Sounds good.

Jake: Alright, bye.