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Change – But Is It Good for the Family Law Bar?

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Lawyers are notorious for being creatures of habit, and family law attorneys have perfected that art. Suggest a procedural change to them, and the handwringing, tsk-tsk-ing, and series of seminars created to inform of the slightest change proliferates the various bar organizations' family-law listservs *ad nauseum*. There is, of course, good reason for this, as the job of family law attorneys is already overwhelmed by the requirement to not only have an in-depth knowledge of the entire Family Code, and hundreds of cases touching on areas of property characterization and division, spousal and child support, child custody, and attorney fees, but also to have some working knowledge of every other areas of the law, including intellectual property, probate and estate planning, criminal law, real property, corporate and partnership law, and bankruptcy, just to mention a few. Finally, family law attorneys must deal with incredible amounts of psychological angst between the warring parties that is usually not present in any other area of litigation.

It is, thus, not surprising that the overwhelmed family law attorney is very resistant to change in procedure and in law. When the family law department in Los Angeles switched from a master calendar system to direct courtroom assignments, the predictions of doom proliferated for years. With every semi-annual change in the proliferating family law forms, the outcries against their mandatory use reaches ear-splitting decibel levels. No minor or major change in procedure went unnoticed, nor did it fail to bring about its myriad conscientious objectors. It wasn't only the perception that any change is likely to be no good (a prediction that did sometime ring true - just as a broken clock can tell the correct time twice a day), but the reality was that overwhelming amounts of study, analysis, change in habits, and requirement for the switch in practice and procedure too often meant loss of billable (not to mention collectible) time.

Notwithstanding such standard oppositional behavior, *change* is precisely what family law attorneys have been bombarded with in the last few years. This is especially true in Los Angeles County, where the game of musical benches has reached comical proportions. One of many missives this year from the supervising judge informed family law attorneys that Judge A was moving from one department to another courthouse, while Judge B in the other courthouse went to a third courthouse, while Judge D went to replace Judge A in central, while Judge E was removed from still another district to replace Judge B, and so on - you get the picture. And if this occurred once every three years or so, there wouldn't be much grumbling, but when this type of judicial reshuffling announcement is made several times a year, it understandably creates havoc and major uproar in the family law bar.

Family law attorneys have also had to contend with a unique practice of trying their cases piecemeal via declarations instead of oral testimony. That is because of a creative fiction claiming that temporary orders on such vital issues as custody, support, and control over funds, are merely "temporary" and should be handled like law and motion, without oral testimony. Thus, mounds of paperwork including declaration of key witnesses, written explanations of financial and accounting experts, including hundreds of exhibits, had to be submitted, responded to, replied to, objected to, etc. within the same limited time frame the Code of Civil Procedure allows for ordinary motions (the 16-9-5-2 court day rules for filing, response, reply, and objections). This likely contributes to the strong aversion to family law exhibited by other attorneys.

It is, therefore, no wonder that changes in procedure, changes in law, and changes of judges, create frightening, overwhelming experiences for the family law bar. Well, lo and behold, the family law bar is about to be subjected to a brand new set of rules, *grÃ¢*

ce Ã the Elkins Task Force and the resultant hastily created piece of legislature that has turned the family law practice on its ear. This year's new legislation brings about a brand new set of procedural changes in family law that would make a law professor's hair stand on edge - and enough to make many family law attorneys throw up their hands in consternation and change to a workers' compensation practice. (I once even threatened to specialize in civil trial setting conferences.)

Of course, there have already been a proliferation of seminars explaining the unexplainable about this new legislation (AB939), but the bottom line is that the family law departments are not set up to deal with the new instructions, judges don't understand how they are to handle new cases beginning Jan. 3, and attorneys have no clue how they are to advise their clients, witnesses, and experts about whether to put evidence in writing, whether to wait until the day of hearing to present testimony, whether to pay experts in advance to be available for a hearing date that may be postponed numerous times because of court time shortages, whether to advise clients that their expectations of a decision for temporary orders may not be obtained for many months, etc.

The key parts of the new legislation involves mandatory allowance of oral testimony in temporary hearings, reinvention of the role of minors' counsel, and beginning 2012, mandatory allowance of testimony of children of a certain age.

However, the new law failed to deal with two major issues necessary to implement such a piece of legislation: the lack of funds needed to add at least 25 to 35 percent more courtrooms and judges to the family law bench to allow judges to listen to oral testimony in every case, and the lack of guidelines for attorneys on when and how to present testimony in written and/or oral form. These are two key factors that are likely to create major wreckage for the bench and bar, and are likely to bring family law justice to a screeching halt. It is a mere few weeks before the new law goes into effect and it is safe to say that no one knows what is to be done with it, how it will operate, how many judges will simply quit the department in exasperation, and how many family law litigants will throw out their own attorneys in aggravation.

The only benefit to all this change is for those attorneys and retired judicial officers who handle mediations and settlement conferences, parenting plan coordinations, arbitrations and private judging. Not only should this new law be entitled the "Private Adjudicators' Full Employment Act," but it should also be a fair warning to family law practitioners that failure to provide clients with options for private resolution may loosen a barrage of invectives, not to mention lawsuits, against them by disgruntled clients.

As a result of the expectant breakdown of the public court family law justice system, a private dispute resolution system looks ever-more appealing. It promises to provide a quick, and now, much less expensive and more litigant-controlled system, to achieve justice for the parties. And, except for "private judging," all other forms of private dispute resolution systems are private. "Private judging" must, by law, be open to the public - including all pleadings, all hearings, and all decisions. In contrast, arbitrations and mediations are private - including all pleadings and all hearings. Even the arbitrator's decisions or mediator's settlements can remain private under certain circumstances. It is, indeed, puzzling that the McCourts chose to litigate their divorce in the highly public arena of the courtroom instead of opting for a family law arbitration, whereby they could have chosen not only to keep all of their financial affairs, and those of the Dodgers, in strict privacy, but could have assured themselves of the right to appeal or review in the event the arbitrator failed to follow the law. But this option is available to every litigant in California. Private solutions to divorce cases are no longer only for the rich and famous. It is a standard option to all litigants who vainly seek swift justice in the public arena - the justice that litigants are likely to now receive in public courtrooms will most certainly be public, but it will not be swift, and, as a result, will probably not do justice.

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