

Solutions for a broken family law system

By Mark E. Minyard

In previous articles I discussed the many problems within the current family law system. Are there solutions to these problems? Yes, the system can be materially improved if there is the motivation to do so.

Filling the authorized judicial positions should be given priority by Gov. Gavin Newsom. The funds for these judges are in the budget, and the unfilled judicial positions are not about money.

The Judicial Council's workload metrics must be updated to address the additional work performed by the family law judicial officers, relative to pre-judgment litigation and post-judgment filings and litigation, and relative to the legislatively mandated findings that are required today but were not required when the metric methodology was created. The working group must also include family law judicial officers.

Judicial officers assigned to family law must also be in numbers that are consistent with the study of dozens of professionals who served on the Elkins Family Law Task Force (EFLTF) for over four years, and consistent with the realities of the workload of family law judicial officers.

Assignment to a family law panel should be for a three-to-five-year term, and judges assigned to family law should have a minimum of two years of judicial experience unless they have a family law background.

Judges sitting in other departments could also be assigned to domestic violence and long-cause family law matters when their calendars allow, and/or assign them to the family law panel one week per year. In Orange County, 20 judges who previously served on the family law panel now sit in other departments. Orange County family law judicial officers would share the responsibility of serving on the week-long magistrate duty, which is a criminal law responsibility. The sharing of the burden of the impacted calendars in family court would make a significant difference and is equitable.

Chief Justice of the California



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Supreme Court, Justice Patricia Guerrero, (formerly the Supervising Family Law Judge in San Diego County) could change the rule or grant a waiver to allow retired family law judicial officers who are serving as privately compensated judges to return to the Superior Court to sit on assignment to assist in managing the impacted calendars, at least until the family law panels are staffed at EFLTF levels.

Judge Francisco F. Firmat (Ret.) recently wrote: "I am satisfied that if we rely on evolution, we will not, in our lifetime, achieve parity with the other departments. We need one major revolutionary structural change, and this is what I think would do it. Next time you have a case where the judge tells you he is going to bifurcate the trial into multiple afternoons, you say the following: 'Your Honor, I object to that schedule, the civil departments give continuous trials to matters. This family case

is entitled to the same treatment as the civil cases. It is a violation of due process and a violation of equal protection to give family law litigants an inferior, more costly, more delayed time-fractured quality of justice.' And, (if the facts allow), 'Your Honor, if I were called as a witness, I would testify that each additional bifurcated afternoon will cost my client anywhere from five to twenty additional hours of billed time; I can represent that my client has communicated to me that he/she suffers emotional distress that will not be reduced until the conclusion of this hearing, etc.' or 'Your Honor, this case involves custody issues and custody is entitled to priority over other matters and that priority is being denied.' My sense is that the Court of Appeals is tired of Alan S.-type cases and would find that family law cases have a constitutional right to continuous trials the same as the civil cases. I think they would tell our courts to make a

correction 'with all deliberate haste.' At that point, the presiding judges would tell the civil and criminal bars that they will be losing judges. The DAs, the corporate interests, and the presiding judges could urge the governor to appoint more judges because they can no longer give family law the meager leftovers. That would bring about the change we need in family law."

In *Alan S. v. Superior Court*, 172 Cal. App.4th 238 (2009), the Fourth Circuit referred to a 2009 Daily Journal article, written by Judge Francisco F. Firmat (Ret.), who was the supervising judge of the family law panel at the time, and described the article as "courageous." In the article, Judge Firmat wrote about how people needlessly spend thousands of dollars due to delays; a well-known problem of judges rotating out of family law; the failure of lawyers to complain loudly about the system's problems; the failure

of presiding judges allocating the needed judges to family law; the failure of governors to appoint family law attorneys to the bench, and the failure of judicial leadership to solve the problems.

There are those who think that the family court does not need more judicial officers and believe it simply needs to be more efficient. It is fair to say that all areas of government and business can be more efficient. The people who think that efficiency alone will solve the problems are the same people who do not fully understand family law or the family court. Any family law judicial officer who has managed a "full" caseload for an extended period knows that increasing efficiency to the level of perfection will not solve the existing problems. If the topic is efficiency, then efficiency should also be carefully examined in both the criminal and civil courts. A comparison of the efficiencies in the various depart-

ments of the courts would likely be enlightening.

Consideration should be given to a systemic change, not a change which would only last while the current judges are in leadership roles. This would mean looking for legislative solutions instead of judicial branch solutions. A separate, independent family law court funded and resourced separately from the rest of the court should also be explored. This change could eliminate the ongoing conflict between departments that arises from the criminal/civil side viewing family law from the perspective of a criminal/civil model, which fails to understand the actual needs and dynamics of the family court. This change would allow people who understand family law to run the family law courts.

Conclusion

Those who are truly familiar with the challenges plaguing the family courts know that the courts need a holistic and enduring solution. Will Gov. Newsom, the legislature, and court leadership ever fully understand the importance and significance of the family courts, and the impact they have on our children? Such a vision can only be achieved if the family law courts are treated with parity to other departments, rather than as an afterthought.

This article is part four of a four-part series about recommendations for change to family law courts.

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Guide to Family Court "Buzzwords" (Part 1)

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step-kids).

31. CS – Health Insurance: § 3750 et seq. If health insurance is available at reasonable cost, it must be kept in effect. The cost of health insurance is in addition to CS, but it is deductible in computing gross or net income. Reasonable cost is defined by § 3751.

32. CS – Registration: § 5600. Inter-county orders may be registered in a county and enforced as if it were a regular filing.

33. CS – Retroactivity: § 4009. CS may be made retroactive to the date of the filing of the petition or filing of the motion.

34. CS – Security: § 4560 et seq. The court may order a security deposit of up to one year's CS as security for the payment of CS, certain criteria being applicable.

35. CS – Wage Assignment: § 5200 et seq. Properly called an Earnings Assignment Order for Support. Required in all cases. Parties by stipulation may agree to stay the wage assignment with findings.

36. CLETS: § 6380. California Law Enforcement Telecommunications System which is administered by the State Department of Justice (DOJ). All CLETS orders are transmitted to the DOJ and are made available to all law enforcement officers throughout the state.

37. COBRA Coverage: Consolidated Omnibus Budget Reconciliation Act. (Pub.L. No. 99-272 (Apr. 7, 1986) 100 Stat. 82). Applies only to employers with over 20 employees. Provides for the continuation of insurance coverage for a period of 36 months at the company's rate. Thereafter for an additional 24 months at retail rates.

38. COLA: Cost of Living Adjustment, usually in the context of

military pay. (See www.dfas.mil.)

39. Commingling: § 852. The act of combining bits and pieces of both separate and community property together so that their "unentanglement" becomes impossible. i.e., they cannot be traced.

40. Contempt: Code of Civil Procedure § 1209 et seq. A quasi-criminal proceeding requiring all the formalities of a criminal proceeding. Four elements: (1) valid, unambiguous order, (2) knowledge of the order, (3) ability to comply, and (4) willful violation of the order. Note that in a CS proceeding, ability is presumed and the burden of proof shifts to the defense. (*Moss v. Superior Court*, 17 Cal.4th 396 (1998).)

41. Contempt – Statute of Limitations: Code of Civil Procedure § 1218.5. Three years from the date that each payment falls due as to both child and spousal support. Two years from the date that the contempt occurred on all other actions.

42. Community Opportunity Doctrine: § 721, Corp. Code § 16404. Pursuant to such a doctrine, a party can be made to disgorge profits made from separate property investments made during marriage when there was community property available with which the investment could have been made, unless the investment was first expressly offered to the other spouse.

43. CP General Presumption: § 760. Property acquired during marriage is presumed to be community. May be rebutted by tracing.

44. CP Title Presumption: § 2581. Property acquired during marriage in joint title is presumed to be community property. May not be rebutted except by clear statement in the deed or other

documentary evidence of title or written agreement of the parties.

45. CS: Child Support. § 3900.

46. CSRS: The Civil Service Retirement System is a defined benefit, contributory retirement system.

47. Custody – Best Interests: § 3011. The initial doctrine in making a custody award.

48. Custody – Frequent & Continuing contact: §§ 3040, 3100. A doctrine affecting the award of custody.

49. Custody – Joint: § 3002. Means both physical and legal custody.

50. Custody – Legal: §§ 3002, 3006. Affects the responsibility to make the decisions relating to the health, education, and welfare of the child. May be joint or sole.

51. Custody – Physical: §§ 3004, 3007. The actual physical care of the child.

52. Custody – Order of Preference: § 3040. 1st is joint, 2nd is to either party, next is to a 3rd party where child has lived, finally to a suitable and able person.

53. Custody – Presumption against joint legal or joint physical custody when there is domestic violence: § 3044. Upon a finding by the court that a party seeking custody of a child has perpetrated domestic violence within the previous five years against the other party seeking custody of the child, or against the child or the child's siblings, or against a person in § 3011(a)(2)(A) with whom the party has a relationship, there is a rebuttable presumption that an award of sole or joint physical or legal custody of a child to a person who has perpetrated domestic violence is detrimental to the best interest of the child.

54. Custody – Visitation Rights: § 3100. The court shall grant visitation, unless it is detrimental to

the best interests of the child.

55. DCSS: § 17000 et seq. Department of Child Support Services.

56. Deferred Comp: Any form of compensation or retirement benefits that is deferred until a later receipt date. Usually involved with a either a tax-deferral or other economic benefit conferred by the employer.

57. Defined Benefit Plan: A retirement plan that is defined in terms of the future retirement payments that will be paid.

58. Defined Contribution Plan: A retirement plan that is defined by the contribution that is made to fund the plan. A pension/profit sharing plan is a DCP.

59. Dependency Exemption: Internal Revenue Code § 151(d). The exemption gives a deduction from taxable income for a dependent child or adult.

60. Disclosure Statutes: PDD (Preliminary Declaration of Disclosure) & FDD (Final Declaration of Disclosure). §§ 2104, 2105.

61. DOS: Date of Separation. Controls the characterization of earnings.

62. DRO: Domestic Relations Order. A family court order for the division of retirement benefits before it has been qualified by the employer or an order to a government agency.

63. Duke Orders: § 3800. Named after an old case from San Diego (*IRMO Duke* (1980) 101 Cal. App.3d 152, 158-159.) The current statute provides for the deferred sale of the family residence if there is a child involved and a variety of other tests are met.

64. DV/TRO – Conduct: § 6320 et seq. The court may issue an ex parte order enjoining a party from, inter alia, attacking, striking, stalking, threatening, sexually assaulting, battering, harassing,

telephoning, destroying personal property, contacting, coming within a specified distance of, or disturbing the peace of the other party, and, in the discretion of the court, on a showing of good cause, of other named family or household members.

65. DV/TRO – EPO's: § 6250. If a person is in immediate and present danger of domestic violence a judge or commissioner may issue an emergency protective order (EPO) over the phone.

66. DV/TRO – Extending the Order: § 6345. A DV/TRO may be issued for up to five years. The orders may be extended for either five years or permanently upon application without a showing of further violence.

67. DV/TRO – Mutual Orders are Prohibited: § 6305. Each party must make the request, personally appear and allege facts that permit the court to conclude that both parties were aggressors and neither were acting in self-defense.

68. DV/TRO – Property: § 6324. The court may determine the temporary use and possession of personal or real property.

69. DV/TRO – Restitution: § 6342. The court may order restitution for loss of earnings and out-of-pocket expenses, including medical expenses, after a noticed hearing.

70. DV/TRO – Guns and Warning: § 6389. After the issuance of a DV/TRO the court shall issue a warning that the person restrained is not permitted to own or possess guns.

71. DV/TRO – Kick outs: § 6321. The court may exclude a person from the family dwelling where there is an assault or threat of assault to the party or anyone under their care.

72. DVRO: Domestic Violence

Restraining Order.

73. Earning Capacity: §§ 4058(b), 4320. A theory proffered by counsel on support issues that the other person has the capacity to earn more income than they are earning. If successful in persuading the court, the court will impute a greater income to that party.

74. Educational Loans: § 2627. The party who gets the education gets the loan that goes with it unless spent on community property living expenses.

75. Elkins: Court may not adopt local rules that conflict with state law; declarations are generally inadmissible hearsay and may not be used as a basis to decide trials (as opposed to motions). Elkins Family Law Task Force identified issues which Family Court must modify, including testimony at RFO; hearing from the child 14 or over; etc.

76. Emancipation: § 7000 et seq. A minor is emancipated under the age of 18 if they entered into a valid marriage, joined the military or received a court-authorized declaration of emancipation (see § 7122).

77. EPO: Emergency Protective Order. § 6250.

78. Epstein Credit. *IRMO Epstein*, 24 Cal.3d 76 (1979). The court has jurisdiction to order reimbursement for debts paid after the date of separation from either a party's separate property or separate earnings.

79. ERISA: Employee Retirement Income Security Act of 1974 (ERISA) 29 U.S.C. § 1003 is a federal law that sets minimum standards for most voluntarily established retirement and health plans in private industry to provide protection for individuals in these plans.