

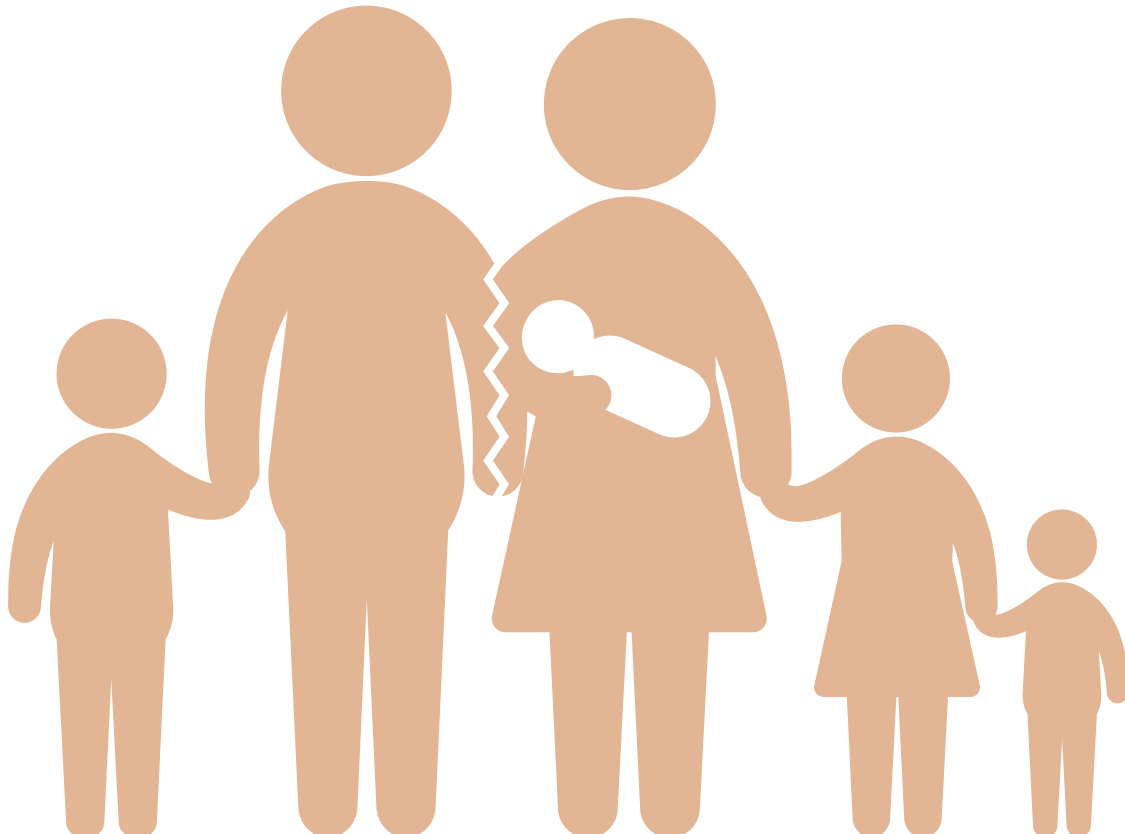


FAMILY LAW CORNER

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Ten Years After the Elkins Family Law Task Force, Judicial Openings Remain

In 2008, the Chief Justice of the California Supreme Court, Justice Ronald M. George, directed the Judicial Counsel of California to create the Elkins Family Law Task Force to increase access to justice, ensure due process, and provide for more effective and consistent rules, policies, and procedures in family court. The task force was comprised of justices, judges, family law attorneys, court CEOs, and others who met in San Francisco for several years to study, analyze and debate family law issues. In 2013, the task force issued its final report which included specific recommendations, most of which have not been implemented.



One of the main reasons for this failure of implementation has been the lack of judicial resources. Certainly, the significant number of unfilled authorized OCSC judicial positions and specifically the shortage of family law judicial officers has contributed to the inability of the OC family law court to adopt many of the task force's recommendations. The task force recommended that 19% of each county's judges be assigned to family court. In Orange County this would equal 27 of the authorized judicial positions. Currently, the family law panel has 16.5 family law judicial officers, which is four fewer judicial officers than it had three years ago. This number excludes 2.5 of the current judicial officers because their work is restricted to the Department of Child Support Services cases since they are funded by the federal government.

Access to Justice

Although the unfilled authorized judicial positions present challenges to every department, a strong case can be made that the burden on the parties and children in family law court is more problematic than in other departments. The lack of judicial resources in family law directly translates into problematic long-term effects on the health and safety of the most vulnerable segment of our society—children.

This shortage results in a family law judicial system that is unable to provide access to justice to people who are in dire need of the assistance of the family law court to solve their critical and urgent problems. The extended delays in having even short simple matters heard are unreasonably long. As recognized by the Judicial Council, in their 2022 report, "The public's right to timely access to justice is contingent on having adequate judicial resources in every jurisdiction." As Governor Gavin Newsom often says, "justice delayed is justice denied." The average first setting of an Orange County family law matter occurs more than seventy days after the request. Added to these delays are the multiple continuances that are frequently longer than five months in duration.

People with economic means have the option to go outside the system and retain a private judge, which allows them to avoid

the delays resulting from the impacted court calendars. Many of these people would remain in the public court system if it was practical.

When the Elkins Family Law Task Force was researching and debating the issues and making its recommendations, many of the sitting family law judges were less than thrilled with the large number of interesting and sophisticated cases leaving the system for the private judge option. Today, however, most judges welcome the departure of lengthy cases from their case inventory because of their severely impacted calendars. The net effect of this trend is for family law judges to have less interesting and sophisticated cases and, thus, often less job satisfaction. Less job satisfaction is one more reason that judges request to rotate out of family law at their earliest opportunity (one to three years), which, in turn, means

judicial positions. Thereafter, in 2022, the Judicial Council stated in its report that Orange County had a need of only 145.37 authorized judicial positions, a decrease of 10 judicial positions from the 2014 assessment.

The Judicial Council bases its needs assessment on an archaic time study conducted in 2001 that resulted in the development of a set of case weights that quantify the amount of case processing time needed for different types of cases, taking into account the range of possible case processing outcomes and their related probability of occurrences. The study was updated in 2018 but remains flawed and antiquated. The needs assessment is not based on population, but rather on filings. However, it is interesting that between 2014 and 2022 their metrics showed needs for judicial positions in Orange County

decreased 10 positions, approximately seven percent (7%), while the population of Orange County *increased* from 3,080,936 to 3,240,017, an increase of approximately five percent (5%). Clearly, the workload metrics were not designed by a panel familiar with the nuances of family law cases and specifically the workload associated with family law post-judgment matters or the post-conviction workload associated with criminal matters.

The increasing shortage of family law judicial officers is made crystal clear in a report issued by the Judicial

Council in 2023. The report measured the caseload clearance rates for family law cases from 2013 to 2022:

- 2013 92% clearance rate
- 2022 59% clearance rate
- 2013 dispositions 360,000
- 2022 dispositions 181,000

In other words, the clearance rate for family law cases decreased by 33% and the dispositions decreased by 50% during this period. The conclusion is that between 2013 and 2022 there were far fewer judicial officers in California addressing family law matters.

The Judicial Council's workload metrics are used to determine the needs for judicial positions in the various counties and are used by each county's courts to allocate judges within the various departments. These metrics count the number of initial complaints filed.

[O]f the 144 authorized judicial positions in Orange County, 17 to 19 will be unfilled by January 2024 (unless we receive more judicial appointments), an almost 13% deficiency

that parties have less experienced judicial officers making decisions regarding their cases and their lives.

Currently, our system fails those without the economic means or option to retain a private judge, and who often do not have the resources to even hire an attorney. For the underserved, their access to justice is questionable at best.

Judicial Needs Assessment: 2014 Versus 2022

In 2014, nine years ago, the Judicial Council of California issued its Judicial Needs Assessment Report and reported the authorized number of judicial positions for Orange County as 144 (127 judges and 17 commissioners) and stated that Orange County had an assessed "need" of 155.6

In family law, the metrics count only the number of divorce petitions filed. This means that post-judgment family law filings are not counted as new matters and are ignored by the metrics. In other words, if a dissolution was filed in 2017, it was counted as a filing in 2017. If, in future years, the parties filed nine post-judgment matters, those nine matters are not reflected in the metrics. If each of the nine post-judgment actions consumed just one full day of trial each, those nine days are not captured in the metrics.

An example of the failure of the needs assessment metrics is a case currently in superior court that was filed in 2011. The parties have filed 37 post-judgment requests for orders (RFOs). There have been 3 Evidence Code section 730 custody evaluations, 10 motions, 3 contempt filings, 2 domestic violence filings, and 74 hearings. Three of the RFOs were filed in 2023 and the case lives on because the child is not yet 18 years of age. The needs assessment report counts all the above as one case. The activity in this case has not been captured by the needs assessment metrics since 2011. Eleven different judicial officers have presided over this case in addition to the Department of Child Support Services judicial officers.

Authorized but Unfilled Judicial Positions

While the Judicial Council's reduced needs assessment for Orange County is an issue, clearly, the more urgent issue is the fact that, as of August 1, 2023, of the 144 authorized judicial positions in Orange County, 17 to 19 will be unfilled by January 2024 (unless we receive more judicial appointments), an almost 13% deficiency, which is a historically high percentage. This historically high number of vacancies is due in part to the fact that there have been 44 judicial retirements or deaths in the last four years. The retirements have been related to COVID-19, the aging of the sitting judges, and a retirement system formula which does not incentivize judges to work past a specific age or length of service.

Most counties have challenges with judicial resources, but it is difficult to understand why Orange County is not receiving its authorized judicial appointments. For example, in the three groups of judicial appointments prior to August 1, 2023, the governor appointed only three new judges for Orange County while appointing 13 new judges for Los Angeles County—despite the fact that the 2022 Judicial Council's report stated that Los Angeles County had an *excess* of 73 judicial officers over its needs assessment.

The economic resources necessary to pay for all the authorized judicial positions is included in the state's budget. In other words, money is not the issue. Many judicial candidates have been reviewed by the Commission on Judicial Nominees Evaluation (JNE), the Orange County Judicial Selection Application Committee (JSAC), and the OCBA's Judiciary Committee and are in the queue waiting for an appointment to serve the public.

Providing access to justice is further complicated by the fact that certain cases are mandated to receive priority, requiring that judicial officers must be assigned to these cases. This creates allocation and staffing problems for the overall court system. If a criminal department does not have sufficient judicial resources to address its cases in a timely manner, cases must be dismissed.

Because of the many unfilled judicial positions, many court services cannot be offered to the public and/or cannot be expanded, for instance:

1. The CARE Act is designed to address the homelessness problem in California as it relates to a segment of people with mental illness. Orange County is cohort number one of six counties selected to implement this program. The program, as designed, needs a full-time judge, which cannot be provided because of deficient resources. Currently, the program is being presided over by Judge Ebrahim Baytieh who has been borrowed from the probate department on a part-time basis.

2. Presiding Judges generally do not preside over calendars. Orange County Presiding Judge Maria Hernandez is presiding over the Young Adult Court because there is no other judge available to do so. With additional resources, this program could be expanded to further our efforts relative to social justice reform.

3. The superior court has multiple programs that assist our veterans. These programs are very resource-intensive because of the vetting process needed before accepting a person into the programs. These programs are designed to assist with homelessness and further social justice reform, and could be expanded with additional judicial resources.

4. The Whatever It Takes (WIT) program serves persons diagnosed with mental illness who are referred by the Collaborative Court. It allows the individuals to receive services in the community as opposed to in jail and provides the support to meet the requirements set by the court. WIT utilizes a multi-disciplinary team to complete an extensive vetting process required before accepting a person into the program. This program could

also be expanded with more resources.

5. In 2022, there were two courtrooms dedicated to domestic violence cases. The occurrence of domestic violence in family law cases has not decreased. It has increased. Today, Orange County has only one dedicated family law domestic violence courtroom due to a lack of judicial resources.

The shortage of judicial officers in Domestic Violence (DV) is exacerbated by the fact that these matters are more time-consuming than they were previously because of the new and more complex required judicial findings. There are two full-time courtrooms (not part of the family panel) dedicated to hearing civil harassment cases who handled approximately 400 cases in the first half of 2023, while there were approximately 3,000 domestic violence cases handled by the family law panel in the same period. DV trials are often tried in half-day segments over many weeks or months. During the pendency of a domestic violence trial, other issues, like custody, support, and other financial matters, are trailed until the DV trial is completed. In effect, this means that there may not be any custody orders and a child may not see one parent until the DV trial is completed. If there is a time when a child needs to feel the love and caring of their parents, it is while the family is breaking apart. And it is likely not beneficial to the family for litigants to live in the same residence for years while they await resolution.

Impacted Calendars

It is common for trial to be continued multiple times over many months, resulting in situations where one parent prevents the other parent from seeing a child who is in crisis, or one party not receiving child support or spousal support while having no resources to pay for basic living expenses. Often, the most impacted are those in our community with the greatest needs. During the divorce process, parties are often forced, because of a lack of economic alternatives, to continue to live in the same residence with their estranged spouse. Living in the same residence in a high-conflict relationship enhances the potential for domestic violence and may be emotionally unhealthy for the children. The lack of judicial resources often results in divorces taking years to complete, which prevents the participants and their children from closing a stressful and unhappy chapter and moving on with their lives.

A trial may be tried in half-day segments spread over many weeks, months, or even a year. Because of the lack of judicial resources,

our judicial officers do not really have an option other than to continue matters. Judicial officers do not have the option to simply spend more hours on the bench as they are required to end testimony at 4:30 p.m. A recent OC workflow study showed that judicial officers on the family law panel work an average of fifteen hours per week outside normal business hours. The total number of additional hours worked by the family law judicial officers is staggering and equals the workload of many additional full time judicial officers. No one can question the work ethic of the family law panel and, in fact, the family law supervising judge, Judge Julie Palafox, has a full calendar unlike most family law supervising judges.

Adverse Health Effects of Toxic Stress on Children

Lengthy divorces often result in children living in high-conflict stressful circumstances that can adversely impact their health in significant and harmful ways for many years. The harmful health impact of toxic stress on children whose parents are divorcing was well documented in the 2020 California Surgeon General's 438-page report on adverse childhood experiences (ACES), toxic stress, and health, titled *Roadmap to Resilience*. The research demonstrates that ACES causes many children to suffer severely during high-conflict divorces. The longer the divorce, the greater the toxic stress, and the more harm caused. Experiencing parents' conflicts can have a significant and harmful effect on a child's brain, especially in children ages five to seven, a critical development stage.

Toxic stress can disrupt the development of brain architecture and other organ systems, increase the risk of many stress-related diseases, and can result in cognitive impairment well into the adult years. Dr. Kimberly Lake, from the UCI School of Pediatrics, reported that young children have not developed coping skills necessary to deal with a high-conflict environment. A young child's emotional reaction to a high-conflict environment can alter genes and literally change the biology of the brain. Dr. Lake further reported that executive function can be severely inhibited and this can cause ADHD-like symptoms, problems with the inhibitions of self-control, working memory, emotional security, aggressive expressions, and impairments in social and academic functioning.

OC Family Law Judicial Officers: A Day in the Life

Of course, there isn't a family court without family law judicial officers. We are fortunate that so many judicial officers are willing to accept this challenging assignment. Most people do not have any idea what family law judicial officers really do all day—or more accurately, all day, all night, and on their weekends. They work many extra hours because they are committed, and because the children and the families that appear in their courtrooms need their issues resolved sooner rather than later. There is a true sense of urgency in the matters over which they preside.

Senior family law attorneys often comment on how different family law is today than it was thirty or forty years ago, and how practicing family law is different from what many lawyers and non-family law judges think. However, two things have not changed over the years: the dedication of the judicial officers who accept family law assignments and the "reward" bestowed upon them for accepting the assignment—a heavier workload. In addition, family law judicial officers now have the additional duty of serving as an "On-Call Magistrate" which requires availability when on duty, twenty-four-hours per day and seven days a week, to address, among other things, search warrants, setting bail, and assessment of probable cause regarding all arrests pertaining to the OC jail. This assignment further decreases the ability of the family law court to serve the needs of the people in a timely manner. Most people are not aware of the challenges that family law judicial officers deal with day in and day out. The learning curve in family law is not just steep. It has been said that the learning curve is like drinking water from a fire hydrant.

Many judges "do their time" on the family law panel and seek to be transferred out of family law at the earliest opportunity. As stated in the Judicial Council's 2022 report, "Reducing the workload could make the assignment more attractive." If fewer of the more interesting and sophisticated cases left the public system in favor of a private judge, judicial officers would have more interesting caseloads and likely more job satisfaction. The public would be well-served if the judges who accepted family law assignments were motivated to sit in that assignment long enough to become true experts in the field. There is no real substitute for experience in this area. In the last four years, fifteen judicial officers have left the family law panel. Over two-thirds of the current panel have less than two years of experience.

Family law judicial officers preside over

trials with as many as ten or more issues, which can be essentially separate mini-trials. The issues have different presumptions, different burdens of proof, and are often intertwined. Family law judicial officers characterize, value, and divide assets of every type that exist in incredibly complex fact patterns. They deal with complex and sophisticated financial, property, and business issues that may involve tens of millions of dollars. It is frustrating how a family law trial involving millions of dollars is tried in half-day increments over months, while a fender bender involving relatively small dollars gets a full trial tried over consecutive days. Family law judges preside over business valuations, tax issues, nuanced real estate issues, deferred compensation, stock options, tracing of separate property, and on and on. Financial concepts are a significant part of their daily activity. They make orders regarding support that often require a determination of controllable cash flow, which often addresses complex issues regarding income versus distributions. But most importantly, they deal with families and children during the most challenging times of their lives. What could be more important than dealing with the lives of children when they are experiencing their families breaking apart? We owe much appreciation and respect to those who serve and have served on the family law panel.

Solutions

Our Presiding Judge, Maria Hernandez, and Family Law Supervising Judge, Julie Palafox, have generously given much of their time to help me understand these issues. From my interaction with them, I have concluded several things. Both of these gifted leaders see their positions as callings and passions, not jobs. They are committed. They did not create the problems that exist, and they are doing everything reasonably possible to make the meaningful changes that are necessary. Orange County is fortunate to have their commitment to our courts and our community.

There are several things that could be helpful in addressing these complex issues. However, simply filling the unfilled authorized judicial positions would make the most significant difference and would do so in an expedited manner. Filling the positions would make some of the actions unnecessary and make others easier to implement.

Judge Francisco F. Fimat's (Ret.) Proposal

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, that it described as “courageous.” In the article, Judge Firmat wrote about how people needlessly spend thousands of dollars due to the delays, the well-known problem with judges rotating out of family law, the failure of lawyers to complain loudly about the system’s problems, the failure of presiding judges to allocate 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.

This year, Judge Firmat wrote:

I am satisfied that if we rely on evolution, we will not, in our lifetimes, 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 bifurcating 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 law case is entitled to the same treatments 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, this case involves custody issues and custody is entitled to priority over the 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 will urge the governor to appoint more judges because they can no longer give family law just the meager leftovers. That would bring about the change we need in family law.

Other Things That Could Assist With Court Efficiency and Workload

Lengthy trials: Establish at least one courtroom to handle lengthy family law trials.

Family Law Assignments: Reduce the workload of the family law judicial officers and designate the assignment as having a five-year term.

Judicial Council’s Workload Metrics: The judicial council should update their workload metrics analysis to address the increased workload attributed to the legislation requiring more detailed findings and capture the time and work required to handle post-judgment filings. The committee creating the metrics should include family law supervising judges.

Non-Family Law Judges: Some family law domestic violence trials could be assigned to judges handling civil harassment. Longer family law trials could be assigned to judges sitting in other departments who have open courtrooms—especially to those judges who have family law panel experience.

Retired Judges: Many retired family law judges have said that they would return to the bench periodically to assist with the case backlog or longer trials, but are not allowed to do so if they are providing private judge services, according to the rules established by the Chief Justice. This rule could be changed if the Chief Justice of the California Supreme Court, Justice Patricia Guerrero (who is the former supervising judge of the family law panel in San Diego County), chooses

to. Retired judges could be allowed to sign waivers and/or the Chief Justice could grant a variance to the rules as was done during covid for retired judges presiding over criminal matters.

Contact Governor Newsom: To solve this crisis, our governor needs to make access to justice and our children priorities and take the necessary action to appoint the judges that have been reviewed and qualified by three different committees. Governor Newsom has the authority to address this increasingly critical problem by appointing the judicial officers that have been authorized.

This is a problem with an easy solution. This is one of those rare, bi-partisan win-win issues that everyone can and should support.

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