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Family law crisis: Why divorce cases now take years and cost more

Once-simple divorces now take years to resolve, cost tens of thousands in legal fees, and leave families in limbo. Is there a better way?

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When it comes to resolving family law disputes, the "good old days" weren't all that bad. I began practicing family law some four decades ago, when we all clunked through cases with no computers, no AI, no word processors and no concept of time-saving technologies of the future. We had no mandatory child support guidelines, no domestic violence agendas, and no thought about the larger repercussions of small decisions. Most family law matters generally managed to get resolved without undue drama or expense.

Family law is very different today. Clients who once would have handled their own matters now have little hope of resolving their outstanding issues expeditiously. Detailed Declarations of Disclosure have resulted in regular document production requests, discovery and sanction motions. Once the tools of attorneys handling high asset matters, these are now standard parts of the process. Reforms that were intended to simplify and improve the family court process have instead inserted multiple layers of complexity, often ratcheting up attorney fees and costs while substantially impacting court calendars - not for the better.

The new family law paradigm has spawned a raft of cottage industries that were unheard of when I began my career. Claims of domestic violence and breach of fiduciary duty have become so commonplace that few cases are resolved without some kind of expert opinion - forensic accounting, business or real property valuation, psychological evaluation, childhood trauma analysis. The process - with declarations, documents, investigations, and so much more - seems to have become more important than the parties at the heart of these cases.

For family law attorneys, the challenges can be daunting. New practitioners cut their teeth on the chaos of fractured lower-and middle-class families. Those with experience and skill negotiate settlements on behalf of well-heeled clients with substantial portfolios. Unfortunately, family law judging has become a short-term vocation; few serve more than three years on the bench, leaving a sorry dearth of knowledge and experience in family law courts. Having served three decades as a family law judge, I am an outlier.

Domestic violence: A loaded weapon

Back in the day, domestic violence allegations were generally made to accomplish a single outcome: keep warring parties apart. Minimal declarations were required and the CLETS (California Law Enforcement Telecommunications System) did not exist. Little thought was given to child custody, child/spousal support, guns, or significant employment ramifications. Mutual domestic restraining orders were usually stipulated to without detailed findings, and children did not petition for restraining orders against their parents as part of highly contested custody battles. The process was simple, straightforward, and largely effective.

Today, almost every claim of domestic violence comes loaded with chaos and significant allegations. Domestic violence is unquestionably a serious matter that warrants serious consideration, but it has also become a commonplace tactical weapon in the divorce arsenal. When domestic violence is alleged, it takes precedence over everything else. A hearing is scheduled within 28 days, expediting the process for one party while delaying temporary orders for all other issues in the queue. With regular continuances, domestic violence cases significantly clog up family court calendars.

Detailed declarations are now mandatory and law enforcement is commonly a part of the equation. The evidentiary burden - a preponderance of the evidence - is minimal, but the repercussions are huge. Temporary restraining orders are routinely granted on an ex-parte basis. Without an opportunity to provide input, alleged perpetrators may be ordered to pay support while having their custody and visitation rights significantly affected or suspended. During this process, they get black marks on their credit histories, are denied the right to keep or own guns, and generally face challenges getting or even keeping employment.

Process improvements: Things have gotten worse

In 2007, in *Elkins v. Superior Court* ((2007) 41 Cal.4th 1337, 1368 [163 P.3d 160]), the California Supreme Court wrote as follows: "It is at least as important that courts employ fair proceedings when the stakes involve a judgment providing for custody in the best interest of a child and governing a parent's future involvement in his or her child's life, dividing all of a family's assets, or determining levels of spousal and child support. The same judicial resources and safeguards should be committed to a family law trial as are committed to other civil proceedings."

The Elkins Family Law Task Force was a direct consequence of that decision. Tasked with identifying ways to improve family court processes, the task force presented its final recommendations to the Judicial Council of California on April 23, 2010. The Judicial Council accepted the report and recommendations. The proposed changes were intended to streamline dissolutions and help self-represented litigants get through a difficult and complex process. Few, if any, of the task force's recommendations have ever been implemented or appropriately funded.

According to a 2023 Judicial Council report, things have gone from bad to worse since the Elkins recommendations were approved. Between 2013 and 2022, the caseload clearance rate for family law cases decreased by 33%, from 92% to 59%; dispositions decreased by 50% during that period. The primary reason cited for the decrease was a serious shortage of experienced judicial officers primarily handling family law matters.

Instead of streamlining the process, some changes have had the opposite effect. Mandatory compliance timeframes have imposed additional burdens on litigants and in order to comply with the new requirements, many will end up hiring attorneys at yet more cost.

Because Elkins was never properly funded, resources for self-represented litigants are very limited. Family law facilitators across the state do provide valuable assistance to those who want to go it alone, but their numbers are few and the demand for their help is huge. Litigants will line up at 5 or 6 a.m. in front of courthouses hoping to see a facilitator, but with 150 people in line and few facilitators on site, most will be turned away.

What does it all mean?

Of all legal matters that come before courts, family law matters should be among the most time critical. The sooner these matters can be heard and orders issued, the better the chances will be for minimizing any chaos that might otherwise occur. Think of it: A young child will spend significant time without a parent whose custody or visitation rights have been revoked or suspended for a significant period of time.

When parties and their attorneys cannot obtain reasonable hearing or trial dates, wounds will fester and lives will be derailed. For litigants who cannot afford representation, the outcome may be unfathomable. Forced to navigate a legal minefield without a map, self-represented litigants may lose all hope of ever putting difficult relationships behind them. Their cases become their lives and jobs.

Most family law judges are in a kind of purgatory. New judges are appointed to the family bench and find themselves dealing with extremely difficult, soul-rending matters. They work long hours, skip lunches, take work home, and cannot wait to be moved to an easier assignment. Most new family law attorneys can be flummoxed and overwhelmed by the demands of an unnecessarily complicated process. They may find themselves continuing hearings so that they can buy time to satisfy process requirements.

What's the solution?

The Elkins report provided meaningful and appropriate recommendations for improvement of the family court process, but without funding those were simply nice ideas. The state should, finally, put its money where its mouth is and fully fund those reforms. Far more family law judges and support staff are required to handle the ever-increasing numbers of cases/motions being filed, far more facilitators should be assigned to help litigants manage their own cases, and adequate resources should be provided to help make judges' assignments more manageable.

But this is probably wishful thinking. If Elkins has not been funded for more than a decade, what we have now is likely to remain the state of family law in the state. A much better solution lies outside the courts. We already know that there are not enough family law judges, their calendars are overbooked, and their level of subject matter knowledge is subject to question.

Mediation was not common when I first practiced family law. It was generally conducted in high-asset cases, for parties who wanted privacy due to their public profile. Now, given the many obstacles confronting litigants, I regularly see "middle class" cases seeking to avoid a burdened family court process.

Mediating family law matters bypasses the most significant challenges presented by family courts. Instead of waiting an unreasonable period of time for a trial date to finally open up, parties can schedule mediation with a knowledgeable and experienced family law neutral within weeks. The process is less rule-bound, it is completely confidential, and it can be completed in a single day. Instead of paying attorneys over the months or years it may take to divide a rapidly dwindling financial pool, litigants stop paying when their matters are finally resolved.

Conclusion

The current family law process clearly does not meet the needs of the public, and we are seeing a major shift in the way many of these cases are managed. Parties do not want to wait untenable lengths of time and spend inordinate amounts of money to conclude matters that family courts should be able expeditiously to resolve. Many litigants are opting to mediate their cases with a skilled neutral who can help them work through even the most difficult issues.

But we are now living with a two-tier justice system in which mediation is available only to those who can afford it; all others are still left to the cruel whims of the family court system. If we truly want to make justice available to everyone with a family law matter, it is time to invest in more judges, more facilitators and more resources that can help self-represented litigants finally have their day in court.

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