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FAMILY LAW DISPATCH: *ELKINS REDUX*

By: Gregory W. Herring; 2009

Parents in Family Court, attorneys, judicial officers and a number of other thoughtful folks have questioned the distribution of court resources, whereby mere “fender-bender” auto accidents can be tried without delay in the civil courts, while acute child custody issues can languish for months before finding an available courtroom for a live hearing. In the mid-2000’s the Contra Costa County Superior Court “solved” the problem by instituting “local rules” that essentially terminated “live” family law hearings and trials and otherwise limited due process.

That may have superficially “solved” the Court’s problems, and it could have paved the way for other counties to similarly relegate their family law cases to near-“administrative law” status had not the California Supreme Court repudiated the scheme in its 2007 Opinion in *Elkins v. Superior Court*. Rather, the Court held that family court trials should “proceed under the same general rules of procedure that govern other civil trials.”

In *dicta*, the Court made an extraordinary call for the Judicial Council to establish a task force, including members of the family law bench and bar and others to study and propose measures to assist the family law courts in achieving efficiency and fairness and to ensure access to justice for litigants, many of whom are self-represented. While simpler avenues would be to add family law courtrooms and to retain judicial officers with adequate patience and understanding for the difficult assignment (during his brief tenure in the family courts, one Ventura judge infamously called it the “get a life” court), the call for a task force at least created some momentum for improvement.

A statewide Task Force was thus created. This, based on its Report of December 2008 and my recent communications with lead counsel in *Elkins*, Garrett Dailey, and an attorney member of the Task Force, provides an update.

Since mid-2008 the Task Force has defined its values and principles, identifying areas of focus for developing recommendations and collecting information through a variety of avenues. The following four working groups, and respective areas of inquiry, were created:

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- Research and Best Practices Group:
 - What are the best and most promising practices statewide, nationally and internationally?
 - What has been done in *functional* areas (e.g. spousal support, child support, custody and visitation)?
 - What research has been done on the *general topics*, such as how family law is handled in other states and countries?
 - How can parts of the system be made less adversarial?

- Process Improvements Group:
 - How can Court Rules be improved?
 - Can differentiated case management plans determine, in the manner of “triage,” appropriate levels of service for different types of cases? (The Ventura Family Courts have recently begun doing this.)
 - Can processes and forms be simplified?

- Representation Group:
 - In which cases, issues or phases are litigants most able to effectively self-represent and, conversely, where is attorney input most needed?
 - What services can courts offer to simplify processes or procedures?
 - What are the barriers to securing and maintaining attorney assistance – particularly, why is “unbundled” representation, which was highly touted in the early 2000’s, not more common?
 - What are the demographics and economics of family law practice that may impact the available attorney pool?

- Improving the Status of, and Respect for, Family Law Litigants and Family Law Group:
 - What are the needs for leadership, education, support and resources?

The Task Force promises openness and accessibility in its information gathering and analysis. It broadly disseminated a survey for all family law attorneys, the results of which are currently being analyzed. It set up an interactive website (elkinstaskforce@jud.ca.gov). It has been conducting focus groups of represented and self-represented litigants, judicial officers, attorneys and court staff and other professionals like family court services staff. It promises to hold open regional meetings with ample time for public comments following the anticipated issuance of its Recommendations in October 2009.

Finally, the Task Force anticipates submitting its recommendations to the Judicial Council in Spring 2010.

This is not a cheerleading piece – rather, what this will all amount to remains unclear. Family law is rife with often-competing interests, including the multitudes of self-represented litigants (especially in the current economy), whose numbers dominate the system, courthouse staff, overburdened judicial officers and attorneys who were taught concepts of due process in law



school and are trying to exercise them. One thing we do know is that *Elkins* requires that Due Process is now paramount.