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PERSPECTIVE

The public family law system deserves equal treatment

By Lorie S. Nachlis

The Final Report and Recommendations of the Elkins Family Law Task Force, dated April 2010, begins with a quote from *Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1368 [163 P.3d 160]:

“In light of the volume of cases faced by trial courts, we understand their efforts to streamline family law procedures. But family law litigants should not be subjected to second-class status or deprived of access to justice. Litigants with other civil claims are entitled to resolve their disputes in the usual adversary trial proceeding governed by the rules of evidence established by statute. 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.*” [emphasis added].

In 2008, I had the honor of being appointed to the Elkins Task Force. I recall saying, at the first meeting, that I had concerns about the development of a two-tier system of justice. By two-tier system, I was referring to the burgeoning business of private judges. The power of private judges to hear a matter is granted pursuant to the California Constitution, Article VI, Section 21. The parties stipulate to the ap-



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pointment of a private judge and provide for the compensation of the judge who will hear their matter. I acknowledged then, and I acknowledge now, that my clients and I have benefitted from the use of private judges.

Based upon my observations in various courtrooms throughout the

Bay Area, and my understanding of the continued underfunding of family law courtrooms throughout the state, it is likely that the removal of complex financial cases from the public courtroom provides a benefit to those remaining in the public system; i.e., there is less drain on the limited resources available. On

the other hand, the detriment is enormous.

Litigants without the resources to hire skilled private judges are entitled to skilled public judges who not only understand family law, but also have the time and resources necessary to do their job. Family law addresses issues in-

volving spousal support, child support, child custody, characterization and division of assets, domestic violence, and awards of attorneys' fees and costs. Each of those categories has the potential to involve complex considerations with consequences that may last for generations. Our courtrooms are filled with self-represented litigants seeking to tell their stories to someone who will listen and make decisions to help them move forward in their lives and the lives of their children.

Our family law courtrooms are frequently staffed by judges who don't want to be there and are counting the days until they are free to leave. Rarely do those assigned to family law departments have any experience with family law. By the time they gain some understanding of the assignment, they are gone. This phenomenon is known as the revolving door of appointees to the family law bench.

Given that family law departments remain under-resourced, the removal of complex, time-consuming cases to the private judge system likely provides a benefit to those unable to afford to leave the public system. The wait time in public court on matters of consequence seems to grow longer and longer. If the cases being handled outside of the system were to be addressed within the system, the overload would likely result in utter chaos and disaster.

The use of private judges unquestionably provides benefits to those who can pay. Judges with knowledge and experience in family law are available to provide attention to the issues and will work with the parties and counsel to develop a case management plan that will lead to a resolution in a reasonable period of time. Counsel is not sitting in a courtroom for hours waiting for their case to be called. The parties can schedule a multi-day trial to be heard on consecutive days, while those in the public court often get a day here and a day there. (I recently had a six-day trial that was heard over three months.)

The public system does, in fact, have judges who knew family law when they arrived at the assignment, and some continue to stay. Some didn't know family law when they arrived but chose to remain. The family law bar is grateful and, based on my experience, is a group that is generous with their time by volunteering hours to assist the court and the self-represented litigants. Repeatedly, we are told that the system would not be able to function without us.

We have been experiencing an exodus of the best judges to the private system. It's not hard to understand the motivation: More money; less work; better offices; better administrative support. It is likely that some even appreciate the challenge provided by more

complex cases and the ability to devote the amount of attention needed for resolution. Just as it makes sense for me to take many of my cases to the private system; it makes sense for many of the judges to leave the public system.

Yet, I remain troubled. I remember watching my elders argue cases in court and be challenged by the judges hearing those cases. I learned from them. The judges learned from them. Cases went up on appeal and new laws were made and debated. I remember asking the more experienced attorneys appearing on the same calendar, to provide me with feedback on my presentation. Those days are gone.

Understandably, Covid has had an impact. The use of mediation and collaborative practice has had an impact. But for the litigated cases, the gap between those who can afford a better system of justice versus those left in an overburdened public court system remains due in large part to the failure to provide the family court the resources needed to provide the public with the level of attention that it deserves.

When I accepted my appointment to the Elkins Task Force, I was excited because I believed that family law was being given the recognition that it deserves as an important part of the legal system. When we finished our work, I believed that our recommendations would change the practice of fam-

ily law and improve the outcome and experiences of those needing the assistance of the court at difficult times in their lives. We noted on page 75 of our 2010 report that "without significant additions of judicial officers and staff resources, courts will be unable to meet the crushing workload in family courts." We made recommendations for the creation of desperately needed new judgeships to meet the needs of the family law departments. Unfortunately, many of our recommendations have not been followed.

It is beyond time to address those recommendations and staff the Family Court as recommended by the Elkins Task Force.

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