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Jennifer Adams

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ADR AND DIVORCE IN LIGHT OF THE ELKINS LEGISLATION

By
Jennifer Adams *

As California courts and legislatures struggle to balance judicial efficiency and access to the courts with the due process rights of family litigants, many legal practitioners are calling for a move towards alternative dispute resolution, as the only effective compromise between the two needs.

I. ELKINS V. SUPERIOR COURT, 163 P.3D 160 (CAL. 2007).

The competing concerns came to a head initially in August of 2007, when, in *Elkins v. Superior Court*, a California Superior Court chose between a manageable case load and the importance of testimony in a court room.¹ At that time, “local superior court rule[s] and a trial scheduling order in the family law court[,] . . . [meant that] in dissolution trials[,] parties [could only] present their cases by means of written declarations.”² In other words, testimony under direct examination was only allowed in “unusual circumstances.”³ Moreover, “parties were required to establish in their pretrial declarations the admissibility of all exhibits,” including declarations, before they could be used in court.⁴ These requirements could substantially disadvantage a party less knowledgeable in favor of a more experienced opponent.

In *Elkins v. Superior Court*, Petitioner Jeffrey Elkins was involved in a divorce proceeding instituted by his wife, Marilyn.⁵ Elkins was unable to establish the “evidentiary foundation” for the majority of his exhibits by reason of a misunderstanding; therefore, though, the court suggested he retain legal counsel,

* Jennifer Adams is a 2012 Juris Doctor candidate of the Pennsylvania State University, the Dickinson School of Law.

¹Elkins v. Superior Court, 163 P.3d 160 (Cal. 2007).

²*Id.* at 161.

³*Id.*

⁴*Id.*

⁵*Id.*

he was unable to establish his case beyond the misunderstandings inherent in his pre-court documents.⁶ And so, “the court divided the marital property substantially” in favor of his wife.⁷

Elkins challenged this division on due process grounds, arguing that the local rules “conflict[ed] with various provisions in the Evidence Code and the Code of Civil Procedure.”⁸ The Elkins court did not address Elkin’s constitutional claims but decided the case on statutory grounds.⁹ The court held “that except as otherwise provided by statute or rule adopted by the Judicial Council of California, the rules of practice and procedure applicable to civil actions generally apply to, and constitute the rules of practice and procedure in, proceedings under the Family Code.”¹⁰ The court emphasized the importance of a litigant’s “opportunity to present all relevant, competent evidence on material issues, ordinarily through the oral testimony of witnesses testifying [in] the presence of the trier of fact.”¹¹

However, while this holding seemed inherently logical on its face, the court was faced with a difficult decision. The local and court rules had not been enacted to deny litigants their rights in court, but to attempt to lessen the work load of the overburdened family courts and allow those very litigants their day in court.¹² The Elkins court, though sympathetic to this view, nevertheless, ruled in favor of “a fair and full adjudication on the merits.”¹³

II. THE ELKIN’S TASKFORCE

⁶ *Elkins*, 163 P.3d at 161.

⁷ *Id.* at 162-65.

⁸ *Id.* at 161-62.

⁹ *Id.* at 162.

¹⁰ *Id.*

¹¹ *Elkins*, 163 P.3d at 162.

¹² *Id.*

¹³ *Id.*

Not long after the Elkins case was decided, the Elkin's Taskforce was created following the recommendation of the court in Elkins.¹⁴ As a footnote to the Elkins Case, California Chief Justice Ronald M. George

recommend[ed] to the Judicial Council that it establish a task force ... to study and propose measures to assist trial courts in achieving efficiency and fairness in marital dissolution proceedings and to ensure access to justice for litigants, many of whom are self-represented. [He further recommended that s]uch a task force might wish to consider proposals for adoption of new rules of court establishing statewide rules of practice and procedure for fair and expeditious proceedings in family law, from the initiation of an action to postjudgment motions. [And that] special care might be taken to accommodate self-represented litigants. Proposed rules could be written in a manner easy for laypersons to follow, be economical to comply with, and ensure that a litigant be afforded a satisfactory opportunity to present his or her case to the court.¹⁵

The appointed taskforce was to take the Chief's Justice's admonitions (above) into account and "conduct a comprehensive review of family law proceedings[,] recommend[ing] changes to increase access to justice, ensure due process, and provide for more effective and consistent rules, policies, and procedures."¹⁶ The

¹⁴ *Efficiency in California Family Law Cases*, DIVORCELAWFIRMS.COM (June 24, 2008) <http://www.divorcelawfirms.com/regional-content.cfm/state/ca/Article/115866/Efficiency-in-California-Family-Law.html> (last visited April 1, 2011).

¹⁵ *Elkins*, 163 P.3d at 178 n.10 (Cal. 2007).

¹⁶ *Efficiency*, *supra* note 14.

Chief Justice stated that he hoped “the courts and public ... [would] greatly benefit from improvements to the administration of justice in this important area.”¹⁷

The taskforce presented its final recommendations in April 2010; after which, Chief Justice George appointed the Elkins Family Law Implemental Taskforce, effective July 1, 2010 through June 30, 2013.¹⁸ This new taskforce was charged with implementing the former taskforce’s recommendations and proposing new rules of court, new judicial sponsored legislation and coordinating implementation efforts.¹⁹

III. New Legislation

A. *California Family Code Section 217*

As of January 1, 2011, pursuant to recommendations from the taskforces, California has made a significant change to its Family Code Section 217. The relevant section of the code reads:

(a) At a hearing on any order to show cause or notice of motion brought pursuant to this code, absent a stipulation of the parties or a finding of good cause pursuant to subdivision (b), the court shall receive any live, competent testimony that is relevant and within the scope of the hearing and the court may ask questions of the parties.

(b) In appropriate cases, a court may make a finding of good cause to refuse to receive live testimony and shall state its reasons for the finding on the record or in writing. The

¹⁷ *Id.*

¹⁸ *Elkins Family Law Implementation Task Force*, CALIFORNIA COURTS (2010) <http://www.courts.ca.gov/4042.htm> (last visited April 1, 2011).

¹⁹ *Id.*

Judicial Council shall, by January 1, 2012, adopt a statewide rule of court regarding the factors a court shall consider in making a finding of good cause.

(c) A party seeking to present live testimony from witnesses other than the parties shall, prior to the hearing, file and serve a witness list with a brief description of the anticipated testimony.

If the witness list is not served prior to the hearing, the court may, on request, grant a brief continuance and may make appropriate temporary orders pending the continued hearing.²⁰

Although the changes in the code are an obvious attempt to balance the conflicting interests of judicial efficiency and fairness, the revised code leaves a lot of issues for the courts to work out.

B. California Family Law Practitioners' Predictions

Family law practitioners across California are worried about the future. One law firm believes that the new legislation “will likely have immense financial and resources consequences upon not only the courts but upon parties to family court proceedings.”²¹ This firm predicts that “the costs of adversary litigation [in the family law courts] are about to sky-rocket.”²² Other lawyers predict that the

²⁰ CAL. FAM. CODE § 217 (West 2011).

²¹ T. W. Arnold, III, *ELKINS and New FAMILY CODE SECTION 217: How It AFFECTS YOU!*, LAW FIRM OF THURMAN W ARNOLD III (Dec. 3, 2010), <http://www.thurmanarnold.com/Blog2/2010/December/ELKINS-and-New-FAMILY-CODE-SECTION-217-How-It-AF.aspx> (last visited April 1, 2011).

²² *Id.*

new legislation will have both positive and negative consequences. Myra Chack Fleischer of Fleischer & Associates has stated that:

[s]ometimes people need to have their voices heard by the system, and their credibility during testimony needs to be observed and judged. . . . But our courts are already bogged down and we cannot get hearings for months. Oral testimony takes time and this will only serve to cause more delays.²³

No matter the consequences to the court system, numerous practitioners seem to agree that this new legislation serves to make alternative dispute resolution in family law an even more desirable substitute to the traditional adversarial, court-based approach. Fleischer recommended that parties "Get [them]sel[ves] out of the court system if [they] can... [and] find alternatives."²⁴

IV. ALTERNATIVE DISPUTE RESOLUTION AS AN ALTERNATIVE

For all of its benefits, the American Court system is, by definition, adversarial in nature. The nature of the system encourages parties to pit themselves against each other; after all, ultimately one side will lose and the other will win. For this reason, parties who do not intend to or cannot entirely part ways after the resolution of their dispute recognize Alternative Dispute Resolution or ADR as an important tool. ADR in family law is not a new concept. Particularly in situations where there are children involved, ADR may present solutions that do not further tear a family to pieces.

²³ *New California Laws Could Make Divorce Longer, Cost More*, BEVERLY HILLS COURIER (Jan. 3, 2011), http://www.bhcourier.com/article/Local_News/Local_News/New_California_Laws_Could_Make_Divorce_Longer_Cost_More/73702 (last visited April 1, 2011).

²⁴ *Id.*

A. *Mediation and the Conciliation Courts*

One of the first alternative options available to Californians seeking a divorce is Family Court Services Mediation, through the Conciliation Courts.²⁵ California's Conciliation Courts "mediate disagreements between divorcing and/or separating parents regarding the care of their children."²⁶ Mediation is mandatory for divorce cases involving custody battles, but parties may petition the Courts for help resolving other matters as well.²⁷

Mediation of this type is often a first step in divorce cases. The mediator will "meet with the parties together and/or individually" in order to determine the issues that exist between the parties and to help the parties discuss those issues by "temporarily set[ting] aside their adult disputes and focus on developing arrangements that are in the best interests of their children."²⁸ Mediation is confidential and parties may have legal counsel for mediation proceedings though lawyers are not necessary.²⁹ Ultimately, however, there is no guarantee that parties will resolve all of their issues and some parties do not resolve any.³⁰

²⁵ *Family Law – Custody And Visitation*, LASUPERIORCOURT.ORG (2011).
http://www.lasuperiorcourt.org/familylaw/cv-custody_mediation.htm (last visited April 1, 2011).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Family Law*, *supra* note 25.

B. Collaborative Law

Another option for those seeking a divorce is collaborative law, a relatively new type of alternative dispute resolution. The idea of collaborative law was first imagined in the 1980s as a way to resolve disputes outside of the courtroom.³¹ The guiding principles for being a practicing collaborative lawyer are that the lawyer will never go to court and what happens between collaborative lawyers, their clients, and any other parties will never be used in the court room.³² Collaborative clients sign contracts to this effect with their collaborative lawyers before initiating proceeding.³³

Accordingly, one of the biggest benefits that collaborative law offers the discipline of family law is that it does not encourage parties to keep lists of every negative situation or negotiation offer in order to use these incidences against the other party in court. Collaborative lawyers in an area will work closely with one another and with other professionals such as “child and financial specialists, divorce coaches” and therapists.³⁴ For a divorce proceeding, each party will have their own collaborative lawyer and meetings will happen with both parties and both lawyers present.³⁵ This arrangement gives parties the benefit of legal representation and the feeling of having someone on their side, but allows all parties to talk freely without worrying that what is said will later come up in court.³⁶

³¹ International Academy of Collaborative Professionals, *Questions and Facts (FAQs)*, COLLABORATIVEPRACTICE.COM (2011), http://www.collaborativepractice.com/_T.asp?T=FAQs&M=1&MS=4 (last visited April 1, 2011).

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ Collaborative Professionals, *supra* note 31.

If an issue arises that ultimately must be litigated, the collaborative lawyers will recommend other lawyers to represent their clients in court. Afterwards, the parties will often return to the collaborative lawyers to finish the remainder of the negotiations.³⁷

V. CONCLUSION

Neither mediation nor collaborative law is an end all procedure designed to completely remove the court from family law matters. Certainly there are some issues and some situations where the court as an outside decision maker remains necessary. Californians, both parties in family law proceedings and legal practitioners, should be aware of the uncertainty and fluctuation in California's family court system due to the Elkin's legislation. The Elkins legislation seeks to give a voice to parties who, like Jeffery Elkin, get lost or buried in legalese and complicated court rules. But will the legislation make courts less available as costs rise and waiting times increase? The new laws may be "well-intentioned" but "unintended consequences," may soon follow their passing.³⁸

Nevertheless, one consequence is clear; the Elkin legislation encourages even greater use of alternative dispute resolution in family law matters. Californians and anyone seeking a divorce should weigh the costs, monetary and otherwise, of using the court system with the advantages of mediation and collaborative law. Because, as Myra Chack Fleischer stated: "If the effect of Elkins legislation in the long run is to keep more divorces cases out of the court and settled amicably among the parties without a long, drawn-out fight, it's better for everyone involved on so many levels."³⁹

³⁷ *Id.*

³⁸ *New California Laws, supra* note 23.

³⁹ *Id.*