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The Elkins Task Force: Meeting the Challenges of Family Law in California's Courts

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In 2007, the California Supreme Court faced a difficult question: were procedures used in a family law court, intended to make the process easier for the litigants, in fact violating their rights to due process? Deciding that they were, the Court declared

[t]hat a procedure is efficient and moves cases through the system is admirable, but even more important is for the courts to provide fair and accessible justice. In the absence of a legislative decision to create a system by which a judgment may be rendered in a contested marital dissolution case without a trial conducted pursuant to the usual rules of evidence, we do not view respondent's curtailment of the rights of family law litigants as justified by the goal of efficiency.¹

The Court concluded that more needed to be done to ensure due process, and to earn the faith of litigants in the family law process. It issued a call for action:

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1. *Elkins v. Superior Court*, 163 P.3d 160, 176 (Cal. 2007) (quoting *In re Marriage of Brantner*, 136 Cal. Rptr. 635, 638–39 (Ct. App. 1977)).

We recommend 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. . . . 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.²

In response, the Judicial Council appointed the Elkins Family Law Task Force in 2008. It chose the Task Force's thirty-eight members after a detailed review of nearly two hundred applications. The Council ultimately chose a diverse group of judicial officers and court staff, advocates who represent litigants in family law and domestic violence cases, self-help center attorneys, and legislative staff members. The Council charged the Task Force with two duties: (1) to conduct a comprehensive review of family law proceedings; and (2) to make recommendations to the Judicial Council designed both to ensure due process, and to provide more effective and consistent rules, policies and procedures in family law matters.³

I

VALUES, PRINCIPLES, AND FOCUS

Early in its process, the Task Force delineated the values and principles that would guide its work. Because family law is an area of critical importance, in which the courts resolve issues important to the futures of our children, our families, and our communities, its reform is complex. Moreover, it is emotionally charged, and raises fundamental questions about long-term relationships between adults, and between those adults and their children. Family law litigants come to court from a variety of backgrounds and educational levels; many must represent themselves. The litigants, their lawyers, and the courts must navigate an intricate system that has not kept pace with changing needs. To ensure that its recommendations adequately addressed the complex needs and expectations of all of the participants, the Task Force decided to engage in a collaborative process, which would include patient listening and inclusivity. It also vowed to seriously examine the family law procedures currently in use in California and in other jurisdictions to identify effective procedures and practices.

2. *Id.* at 505 n.20.

3. *See* Letter from William C. Vickery, Administrative Director of the Courts and Secretary of the Judicial Council to Laurie D. Zelon, Chair, Task Force (May 20, 2008) (on file with author).

A. Core Values

The Task Force defined core values to guide its work, and to focus and prioritize the identification of issues and solutions:⁴

- Ensuring justice, fairness and due process in family law;
- Providing meaningful access to justice for all litigants;
- Using innovative techniques to promote effectiveness and efficiency;
- Improving the status of and respect for family law litigants and the family law process; and
- Securing adequate resources for the family law process.

To ensure compliance with these values, the Task Force has collected data from a variety of sources, including:

- Focus groups conducted with litigants, court staff, attorneys, and judicial officers;
- In-person testimony at Task Force meetings;
- Public hearings
- A survey of attorneys;
- Comments received through a user-friendly website;
- Key informant interviews; and
- Analysis of available court data.

In addition, the Task Force convened a litigant-input group to solicit the views of court users on the proposed focus areas for potential recommendations.

This iterative methodology has numerous benefits. It allows the Task Force to identify priority concerns from diverse perspectives to determine the most pressing needs for improvement, and to discern and define priority issues for recommendations. The final recommendations, which the Task Force will design to increase efficiency and ensure due process, will address the common concerns of diverse groups. Because the Task Force will have solicited input at each stage from interested stakeholders, and refined its work product based on the affected groups' responses, it has confidence that the final recommendations will respond to identified needs.

4. Fact Sheet: Elkins Family Law Task Force, www.courtinfo.ca.gov/jc/tflists/documents/elkins-fact.pdf.

B. Guiding Principles

The Task Force adopted the following guiding principles to define criteria for the evaluation of proposed recommendations and to ensure that its work reflects its values.⁵ These are the ideas that manifest, in the view of the Task Force, a fair, just, and effective system that deserves the trust and confidence of those who use it.

1. Courts will ensure consistent and timely access to equal justice for all individuals, families, and children in family law proceedings.
2. Statutes, rules, procedures, and practices will protect procedural fairness and the due process rights of parties as well as seek to increase efficiency, effectiveness, consistency, and understandability. Simplification must not diminish due process rights. Task force recommendations will be evaluated for their potential impact on due process, fairness, and effective and timely access.
3. Court services, procedures, and calendaring should address the needs of parties— whether attorney-represented or self-represented. They should also be adapted to the complex and diverse needs of individuals, families and children in court. In making its recommendations, the task force will be cognizant of the various challenges litigants may have accessing the courts, including language barriers, cultural barriers, and disabilities.
4. The task force will identify the resources courts require to handle increasingly complex and demanding family law caseloads. Investing in the modernization of family law courts will improve the quality of outcomes for Californians and enhance the priority given to and status of family law proceedings.
5. The task force is aware of the unique opportunity to make far-reaching, positive changes in family law. The task force is mindful of the long-term impact of family law on individuals, families, children, and society.
6. The task force will develop its recommendations through an inclusive process that relies on consultation with interested stakeholders and the public, as well as coordination and collaboration with ongoing related projects and efforts to improve family law.⁶

5. *Id.*

6. *Id.*

C. Focal Areas

In developing its recommendations, the Task Force focused its investigation and analysis in four key areas:⁷

1. Research to develop best practices;
2. Identifying and overcoming barriers to obtaining and maintaining representation, as well as issues relating to self-representation;
3. Improvements in process and procedures; and
4. Enhancing the status of, and respect for, family law litigants and the family law process.

II

RECOMMENDATIONS

In October 2009, the Task Force released more than one hundred detailed, proposed recommendations for review and public comment. The Task Force grounded those recommendations in its guiding principles, core values, and focal areas, as outlined above. The recommendations address twenty-one topics, including expansion of legal representation, presentation of live testimony, and simplification of procedures. No one of these issues stands alone, or can be addressed in isolation. The Task Force intends that its recommendations be analyzed as an integrated outline for reform.

The Task Force's proposed recommendations first look at the impact of the problem, and then offer a solution benefiting all litigants. It has presumed that procedures for both represented parties and self-represented parties should be the same. The Task Force will only require consideration of representation status if a proposed solution mandates different steps for these different types of parties. For example, overly complex processes can present a barrier to effective and timely resolution of critical issues, whether a party has the assistance of counsel or not. Simplifying and clarifying rules and procedures should therefore benefit all litigants, not just subgroups of them. Similarly, a lack of adequate resources can lead to delays in scheduling and completing proceedings. These delays can cause significant personal and financial hardship to the parties, and can make it more difficult for the bench officer to complete the case in an effective manner.

The comment period on the proposed recommendations closed in early December 2009. The Task Force will now consider the written comments and public testimony, and use that information to draft its final recommendations.

7. Elkins Family Law Task Force Update, January 2009, www.courtinfo.ca.gov/jc/tflists/documents/elkins-update-jan.pdf.

III CHALLENGES AND OPPORTUNITIES

The Elkins Family Law Task Force is one example of the various, self-initiated improvement efforts that California's court system has undertaken to increase access to justice and improve services in the judicial branch. These include efforts to address bias based on gender and race, as well as efforts to meet the challenging demands of self-represented litigants.⁸

The trial courts handle a heavy volume of family law matters, which often outstrips the resources available.⁹ Sometimes issues arise—including diverse cultural practices and language barriers that make it difficult for litigants to understand the proceedings and to feel confidence in the outcome—that transcend the legal questions raised. The Task Force must also address the challenge that, in a large majority of family law proceedings statewide, one or more of the litigants is self-represented.¹⁰ Indeed, the appellant in *Elkins* was self-represented at the trial court. This reality is complicated by serious systemic issues that affect both litigants represented by counsel and those who appear without counsel.

Where there are barriers that prevent the participants from understanding and fully participating in the proceedings in which they must engage, those litigants lack confidence in the outcome that those proceedings yield. Public confidence is, however, essential to the viability of the legal process; courts must earn the public's trust, and the procedures they employ must deserve it. The Task Force has used, and will continue to use, its values and principles as guideposts on the path to this goal. It believes that its recommendations, if adopted, will create the changes in family law that will merit public confidence.

8. See, e.g., TASK FORCE ON SELF-REPRESENTED LITIGANTS, JUDICIAL COUNCIL OF CALIFORNIA, STATEWIDE ACTION PLAN FOR SERVING SELF-REPRESENTED LITIGANTS (2004), available at http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/Full_Report_comment_chart.pdf; SEXUAL ORIENTATION SUBCOMMITTEE, ACCESS AND FAIRNESS ADVISORY COMMITTEE, JUDICIAL COUNCIL OF CALIFORNIA, SEXUAL ORIENTATION FAIRNESS IN THE CALIFORNIA COURTS (2001), available at <http://www.courtinfo.ca.gov/programs/access/documents/report.pdf>; ADVISORY COMMITTEE ON RACIAL AND ETHNIC BIAS IN THE COURTS, JUDICIAL COUNCIL OF CALIFORNIA, REPORT ON RACIAL AND ETHNIC BIAS IN THE COURTS (1997); GENDER FAIRNESS SUBCOMMITTEE, ADVISORY COMMITTEE ON ACCESS AND FAIRNESS, JUDICIAL COUNCIL OF CALIFORNIA, GENDER AND JUSTICE: IMPLEMENTING GENDER FAIRNESS IN THE COURTS (1996), available at http://www.courtinfo.ca.gov/programs/access/documents/imp_rept.pdf; ADVISORY COMMITTEE ON GENDER BIAS IN THE COURTS, JUDICIAL COUNCIL OF CALIFORNIA, ACHIEVING EQUAL JUSTICE FOR WOMEN AND MEN IN THE CALIFORNIA COURTS (1996), available at <http://www.courtinfo.ca.gov/programs/access/documents/f-report.pdf>.

9. Family and juvenile cases represent 7.5 percent of total filings in the trial courts, but represent nearly one-third of the judicial workload. See JUDICIAL COUNCIL OF CALIFORNIA, ANNUAL REPORT 26 (2006).

10. A recent report indicates that eighty percent of family law cases have at least one unrepresented party by the time of disposition. See TASK FORCE ON SELF-REPRESENTED LITIGANTS, *supra* note 8, at 2.

The mission of our justice system is to provide timely access to fair and consistent justice. The true message of *Elkins* is that, to do so, the participants in the justice system must evaluate it in a thoughtful and critical manner to identify what works well and where the system is falling short.

[F]amily 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.¹¹

The Task Force hopes to satisfy those goals through a process that identifies best practices, reflects and relies on the enduring values and principles on which our system is built, and meets the changing demands of delivering justice in our complex society.

11. *Elkins v. Superior Court*, 163 P.3d 160, 177 (Cal. 2007).

