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# In *Elkins v. Superior Court*, the California Supreme Court Demands Due Process and Justice, Not Just Expediency, in the Family Law Courts

*by Gregory W. Herring*

The superior courts face a heavy volume of family law matters, and the case load is made all the more difficult because 80% of the cases have at least one unrepresented party by the time of disposition. (The Judicial Council of California's Report on Statewide Action Plan for Serving Self-represented Litigants (2004).) Although family and juvenile cases represent 7.5 percent of the total filings, they account for nearly *one-third* of the trial courts' judicial workload. (The Judicial Council of California's Annual Report for 2006) (emphasis in original).)

Visit Ventura Superior Court Family Law courtrooms 32, 33 or S-2 on a law and motion calendar morning and one will find them substantially more crowded and stressed than their counterparts in the Civil Department. The judicial officers of our Family Law Department routinely struggle to find dates months into the future for evidentiary hearings and short-cause (two days or less) trials. Non-custody issues, which lack the statutory preference of custody disputes, have to wait even longer. Long-cause trials (of three days or more), are sent to the Civil Department for adjudication before judges who, while certainly competent, are not family law specialists.

This is not to fault the administration of the Ventura County system. Rather, resources are limited; for instance, some jurisdictions, including Santa Barbara County, lack even a separate family law department.

Especially due to the vicissitudes of the family law practice, the lack of resources takes a toll on litigants, counsel, judicial officers and, not least, the general public's perception of the judicial system.

In response, some judicial officers, and even some entire jurisdictions (through local rules), have cut corners by ignoring the rules of evidence and creating their own rules of evidence and procedure. This has had the effect of eroding the general standards such that, as just one local example, Judge Walsh recently felt it necessary to post notices in Department 32, *reminding* counsel that the Evidence Code still applies there!

In its recently released (on August 6) opinion in *Elkins v. Superior Court (Elkins)*, the California Supreme Court denounces this trend in striking down a Contra Costa Superior Court "local rule" that, among other things, required family law litigants to present their cases at trial through written declarations. *Elkins* prohibits the courts from allowing family law to slip into an administrative style of practice. It insists that family law cases and lawyers be treated the same as any others in the courthouse. It also requires family law litigants to be provided their day in court.

In reaching its decision, the Court emphasized that ". . . a fair and full adjudication on the merits is at least as important in family law trials as in other civil matters, in light of the importance of the issues presented such as the custody and well-being of children and the disposition of a family's entire net worth."

The Court stated that this means that, "[a]lthough some informality and flexibility have been accepted in marital dissolution proceedings, such proceedings are governed by the same statutory rules of evidence and procedure that apply in other civil actions . . . ."

An extraordinary aspect of the *Elkins* opinion is the Court's direction to the trial courts to refrain from obscuring the source of their difficulties by devoting efforts to " . . . allocating or securing the necessary resources." In doing so, it quoted an advisory committee comment to the California Standards for Judicial Administration, calling for the family law trial courts to constantly exert pressure to maintain resources so as to fight the "historic trend" to give less priority and provide fewer resources to the family courts. It called for the Judicial Council to establish a task force to assist family law trial courts to achieve fairness and efficiency, and to ensure access to justice. The Court even suggested that such a task force might wish to consider proposals for the adoption of new rules of court in specified areas ". . . from the initiation of a family law action to postjudgment motions."

In demanding due process and justice, not just expediency, in the family law trial courts, *Elkins* is a tonic for the family law practice. Especially if the bench and bar take up the challenge of fighting for resources and considering new rules for fairness and efficiency, the opinion will inure to the benefit of all family law litigants, counsel and judicial officers.