Judicious Intervention

What one California judge has done to expedite settlement

BY DONALD B. KING

For six years, I was the presiding judge of the Family Law Department of the San Francisco Superior Court. In that role I handled all of the court's custody and visitation disputes, domestic relations law and motion matters, whether pre- or posttrial, settlement conferences, and 25 to 50 percent of the marital dissolution trials. A few years after my elevation to the California Court of Appeal, the chief justice gave me a blanket assignment to the superior court: I could handle family law cases at the trial level as my duties on the appellate court permitted.

At first, I went back to the superior court to try family law cases for two weeks every other month. In a short time it became clear to me that something was terribly wrong. Almost all of the cases before me should never have gotten to trial. Without exception, these cases should have settled earlier in the process at considerable savings to the parties. The system was not only failing to help people end their marriages, it was actually prolonging their agony and increasing their expense.

I decided to try a new system of early judicial intervention and case management. Although attorneys often can efficiently and effectively resolve their cases without judicial involvement, I felt that by getting involved at the beginning of cases, rather than at the end, I could help achieve settlement—especially early settlement.

Instead of getting family law cases at the time of trial, I picked up a group of them when they first came to court seeking temporary orders for support and attorney's fees. I offered to act as case manager and provide judicial oversight with a focus on early settlement. I made it clear, however, that I would try any issues that could not be settled. Ten to 15-percent of the cases settled all issues the first day and placed the settlement on the record. This could never have happened in the traditional system. Almost all of the remaining cases settled, although a few required trial of an issue. Because I was in my appellate court chambers during these cases, most of my oversight was provided by telephone. Thus was born case management by telephone.

After the initial cases were concluded, I continued to accept cases by stipulation of counsel and the parties. Stipulation was necessary because I was being given greater authority than a traditional judge. Parties and counsel had to waive all procedural statutes and agree to provide the other side with whatever they needed to develop their settlement position. I also asked the parties to direct their attorneys to cooperate with one another. This greatly reduced the pressure on counsel to posture for the client.

If experts were needed, I asked the parties jointly to select one or I would appoint the expert. If an issue could not be resolved by the expert's report, the parties would be free to hire their own experts. This, however, never happened because the issue always got resolved.

No motions or other papers could be filed without my prior approval. Thus, motions were rarely filed, and paperwork was limited to confirmations of what counsel had agreed to by conference call. Most surprising to me was that nearly every issue was settled over the telephone, and I rarely had to make a decision.

Almost all discovery was done informally. At the time of my initial meeting, the parties and counsel agreed to provide whatever information or documentation the other side wanted. If a deposition was required, I would put it on my calendar and be available for ruling by telephone. Because I was always available, objections were rare. If one arose, the attorneys would state their objections on the speakerphone, and I would rule. A deposition reporter recorded everything.

In a traditional process, the lawyer posing the objection would have had the deposition reporter certify the question, would have waited a week

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or more to get a copy of the transcript, then have filed a motion to compel an answer, have gone to a hearing, and, if the motion were granted, have reconvened the deposition two or three months later.

Thus, I was able to guarantee the parties that this process would be faster and cost them less.

Judicial case management requires lawyers and judge to act as a team in planning the case. The judge serves as captain, and the team is responsible for expediting the exchange of information. The entire focus is on settlement, not on trial. The expectation is that the case will settle, and the expectation is usually met. Only after settlement fails does trial preparation begin.

One mysterious dynamic of the judicial case management process is that by virtue of keeping the parties focused on cooperation and settlement, cases proceed in a much less adversarial atmosphere. Settlement is not only more likely, but each side understands and respects the legitimacy of the other's position—even though they disagree with it. Thus, even a contested trial is not a negative, destructive experience for the parties.

A divorce that is less expensive, quicker, and leaves the parties feeling better about themselves is clearly a better option for everyone. From the judge's perspective, case management is much more enjoyable than hearing motions, attending to trials, and imposing decisions. The judge is a player, not just a referee waiting to blow a whistle when a foul is committed. The judge serves as mediator, at times, as arbitrator by agreement of the parties, and sometimes as a trial judge.

For the lawyers, this is a more civilized way to practice law. Indeed, it is law practice as it was meant to be: vigorous representation of a client, which produces a sense of professionalism and cooperation between opposing counsel for the benefit of both clients. The lawyer might make less money on a particular case, because time is not wasted and only necessary work is performed. However, he or she will find the work more satisfying and the process less damaging to the client. For the parties, this process also adds an important element: flexibility. The case gets judicial attention when it needs it, not when the system has time to provide it.

Procedural and substantive law

In 1995, as a result of my judicial case management experiment, I wrote an article recommending an overhaul of the family court system. I recommended a process akin to how we differentiate among civil cases based on the amount in controversy, i.e., small claims court, municipal court, and superior court.

Divorcing parties with minimal assets and income who could not afford an attorney or whose cases and issues did not justify the expense of legal representation, would go through a simple small claims-type process designed for parties representing themselves. For middle-income and moderate-asset cases, judicial case management would be an option. For upper-middle-income (or higher) and substantial asset cases, the present adversarial system would be modified to include judicial case management. I challenged the state family law bench and bar to create a system that would more adequately

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meet the needs of its users.

Upon reading my article, State Senator Quentin Kopp introduced Senate Bill 389 incorporating my suggestions for change. The bill triggered a heated discussion about procedural changes in family law cases. The debate attracted the attention of the Judicial Council of California, which recognized that it was the best place to develop consensus for change. The council embarked on "Family Law Court 2000," a study of the legal system that would conclude with a proposal to restructure California's forums for resolving family-related conflicts. With my concurrence, Sen. Kopp dropped the proposed structural changes from his bill, leaving it as statutory authority for judicial case management in family law cases. It became law in 1996.

Judicial case management

Although restructuring the family court process must be the ultimate goal, legislation authorizing judicial case management is an important step in bringing order to cases that are out of control. Before discussing the case management provisions of S. B. 389, two other related and important provisions merit mention. Although most large counties in California have shifted to the direct calendaring of family law cases, which began in Alameda County more than 15 years ago, many counties have not. The process by which a case is assigned to the same judicial department from beginning to end is clearly superior to one in which a case may be heard by a different judge every time it comes to court.

S. B. 389 enacted Family Code § 2330.3(a) to provide:

> All dissolution actions, to the greatest extent possible, shall be assigned to the same superior court department for all purposes, in order that all decisions in a case through final judgment shall be made by the same judicial officer.

One problem with the current system is the judge's limited term of assignment. Usually a judge with limited knowledge or family law experience is thrust into the practice for a year and pulled out just when he or she is knowledgeable enough to do some real good. S. B. 389 seeks to correct this problem by directing the Judicial Court to provide a minimum term for the family law assignment.

Family Code § 2450 states that the purpose of case management is to provide judicial assistance and management to the parties for purposes of expediting the case, reducing the expense, and focusing on early settlement.

This section also provides for a preliminary status conference, by motion of a party or the court, to consider ordering a case management plan pursuant to stipulation. To ensure judicial knowledge, ability, skill, and interest in case management, every jurisdiction should require a judicial education program plus on-the-job training.

In California, Family Code § 2451 sets forth what may be included in a case management plan:

A court-ordered case management plan, as stipulated by the parties, may include all of the following:

(A) Early neutral case evaluation.

(B) Alternative dispute resolution.

(C) Limitations on discovery, including temporary suspension pending exploration of settlement. There is a rebuttable presumption that an attorney who carries out discovery as provided in a case management plan has fulfilled his or her

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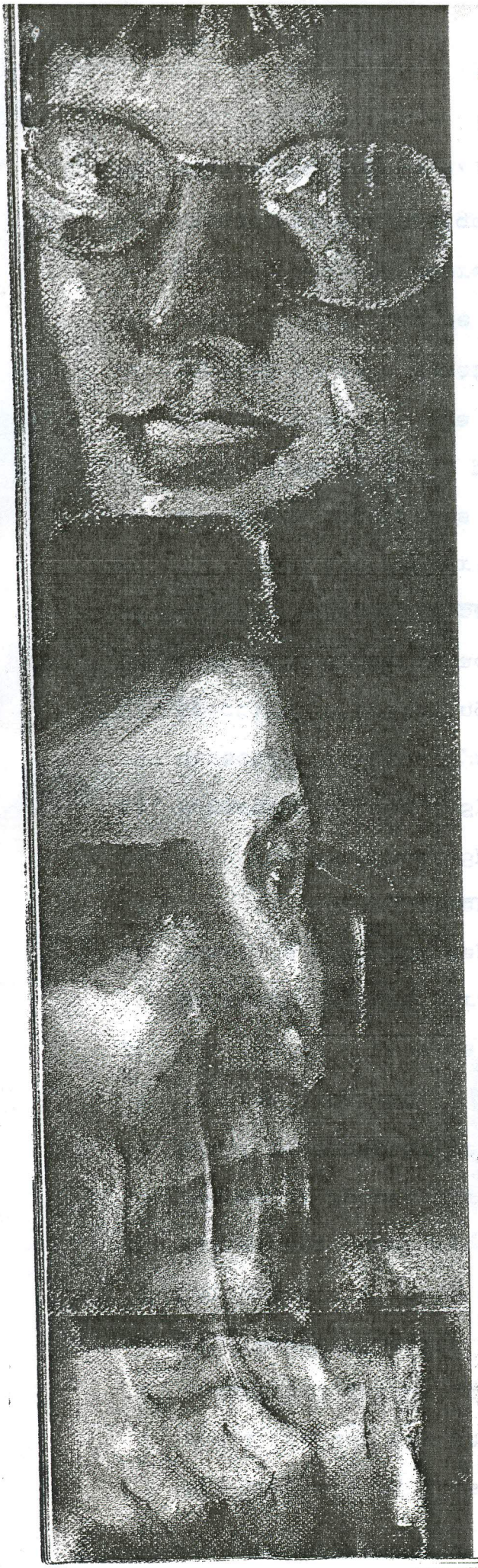

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(Continued from page 25)

duty of care to the client as to the existence of community property.

(D) Use of telephone conference calls to ascertain the status of the case, encourage cooperation, and assist counsel in reaching agreement. However, if the court is required to issue an order other than by stipulation, a hearing shall be held.

(E) Use of telephone conference calls for hearing contested motions. These conference-call hearings shall be recorded by a court reporter.

(F) Modification or waiver of the requirements of procedural statutes.

(G) The powers of the judicial officer who is managing the case under the case management plan.

(H) A requirement that any expert witness be selected by the parties jointly or be appointed by the court. However, if at any time the court determines that the issues for which experts are required cannot be settled under these conditions, the court shall permit each party to employ his or her own expert.

(I) Bifurcation of issues for trial.

(J) A case management plan pursuant to subdivision (d) of Section 2032 or subdivision (b) of Section 2034 (attorney fees and costs).

(K) Any other matters.

Early neutral evaluation of divorce cases could result in early settlement of at least 25 percent of all filings and probably more. Although mediation, arbitration, mini-trial, or other ADR processes are not the answer in every case, ADR will not be used to its full potential until the judiciary accepts it as an adjunct to the court system.

Likewise, ADR is more likely to be successful if the judge recommends it to the parties when appropriate.

In the traditional divorce proce lawyers undertake considerable di covery in an effort to protect then selves from potential malpractic claims. The rebuttable presumptio created by § 2451(c) provides a wa to avoid the needless expense an delay of excessive and unnecessar discovery.

Section 2457(f), perhaps the mo important section of the case man agement statute, permits the partie and counsel to design the divorc process themselves. This flexibilit makes the process fit the case, not th case fit the process. Flexibility doe work. I asked and regularly receive the approval of the parties and coun sel to authorize ex-parte communi cations with lawyers to expedite the case, remove roadblocks to frank conversations with one side that could not take place in the presence of the other, and avoid unnecessary paperwork and hearings.

Likewise, I find that parties and counsel often are willing to stipulate that I can decide an issue as an arbitrator, rather than through a formal judicial hearing. This flexibility enhances the outcome and expedites settlement.

In my nine years as a judicial case manager in family law cases, it had become clear to me that statutory authority is not essential, but a stipulation by the parties is. After all, if a defendant facing the death penalty for murder can waive constitutional rights, parties to a marital dissolution can waive statutory rights and stipulate to judicial powers not provided

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(Continued from page 28)
by statute. I believe judicial case management can help in all divorce cases, even those marked by exceptionally cooperative and highly competent lawyers.

Involved clients

Judges must always keep in mind that it is the parties' case and that they must always be included in status conferences. The parties must participate and have confidence in the process and in the judge who will manage their case.

Family law courts are woefully understaffed, and the caseloads far too heavy. Each family law judge should have at least one full-time staff lawyer to assist in case management, or at the very least, one full-time paralegal. This assistance and the satisfaction that comes with case management will make family law judicial assignments more attractive to judges.

Although we must simplify the legal process of divorce and make it less expensive, we can only accomplish this by achieving a consensus among the family law bar, the bench, and legislatures. Together we must find a better way for parties to get through this most difficult time of their lives.

Until we reach that consensus, judicial case management is the best hope for bringing order out of chaos and allowing the parties and counsel to participate in a process that meets their needs, reduces their emotional and financial expense, and provides greater simplicity. With minor modifications, California's judicial case management system should be national model for civil case management. It can provide all civil litigants with a better way to resolve disputes through cooperation at settlement. ■

Postscript

Perhaps the greatest proof of th value of case management is th since I retired June 30, 1996, an began private dispute resolutio most of my time has been spe doing case management in famil law cases. Clients and their lawye find it less expensive and more exp ditious to pay me to manage (an settle) cases than to go through th "free" public system.