Expert OPINION

No Justice in Family Court

BY JUSTICE DONALD B. KING

Wednesday is pro per day for Alameda County Superior Court Judge Roderic Duncan. His family court is packed with bickering spouses and their children, relatives, and friends—everyone but lawyers. Duncan commonly hears 30 cases in three hours, issuing stay-away, wage-assignment, and custody orders to people who barely understand what is happening to them. A team of volunteer law students, looking like short-order cooks in a busy diner, stand by to handwrite the orders on stacks of forms.

In one of every two sessions, Duncan says, deputies are called in to break up fights in court or in the hallways. He invariably has a headache by 10:30. And he estimates that each week 10 people kick the courtroom door in frustration on their way out—a practice, he says, that would upset a more finicky judge.

The number of pro pers in Alameda County family court has doubled in the last five years, accounting for 60 percent of the cases in Judge Duncan's department. In San Bernardino County the judges tell me that 70 to 75 percent of the cases on their domestic relations law-and-motion calendar involve pro per litigants. Statewide, I estimate that in at least 100,000 of the 170,000 marital dissolutions filed each year, one or both parties are not represented by a lawyer.

This is not justice. Despite the increasing complexity of family law, it is financially impossible for the average Californian to afford legal representation in the largest single category of civil cases in superior court. At the same time, the parties cannot take advantage of less expensive alternatives, such as mediation and arbitration, to finalize their divorce. To end marriages in California, they must go through the public courts.

Beyond any doubt, the system is broken—but the Legislature doesn't seem to care. Every year it passes bills that add complexity to family law—only compounding the problem. For instance, the new Statewide Uniform Guidelines (see Fam C § 4050 et seq.) are the result of an unprecedented effort to micromanage child-support hearings in a manner neither contemplated nor required by federal law. Instead of enacting simple rules, the Legislature adopted an algebraic formula for determining support payments that usually requires use of a computer and a software program. Fam C § 4055. There is no way the parties can understand how the court determines the amount ordered. In proceedings in which the level of conflict already is running high, a bad situation often becomes worse.

In past years, I have testified frequently before legislative committees. In 1992, however, an incident occurred that convinced me my efforts were futile. I was appearing before the Assembly Judiciary Committee on behalf of the California Judges Association to oppose a poorly written bill redefining the fiduciary duties of divorcing spouses. When I told the committee that the family law and estate, trust, and probate sections of the State Bar also opposed the measure, one member responded, "Oh, we haven't voted with those people in years." Many committee members laughed. I haven't been back.

The Judicial Council could have adopted guidelines for temporary spousal and child support years ago, but it did nothing. The only improvements in our process during the last 10 years have been made by individual judges. These changes, although important, have been modest: more specialized judicial education, longer family court assignments in our largest superior courts, and conversion to a direct calendaring system.

Much more action is needed, primarily from the Legislature. Just as we have different processes for civil cases of different amounts (small-claims court, municipal court, and superior court), I believe we should adopt similar categories for marital dissolution cases. They could be separated simply into three groups based on the amount of assets and income involved, such as under $50,000, $50,000 to $200,000, and

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above $200,000. In each category, the amounts would exclude the family home and any interest in pension plans, since those figures can be evaluated by a neutral expert.

For cases with minimum income and assets, there is no need for either party to employ a lawyer. The most serious disputes in these cases are usually over furniture and furnishings, payment of debts, or child support. Streamlined procedures, such as a simplified child-support statute and court-connected mediation for resolving custody and visitation disputes, would help immensely. Equitable, rather than equal, division of community property might also be appropriate.

For these minimum-asset cases, the Legislature should fund court-appointed family law advisers—they could be attorneys, law students, or paralegals. They would not represent the parties but, rather, would assist them and the court in preparing paperwork and explaining how to proceed at hearings.

This is an old but still controversial idea. In addition to Judge Duncan's student volunteer program, pilot programs in San Mateo and Santa Clara counties employ lawyers and trained paralegals as advisers. They were authorized by the Legislature, but only after years of opposition from elected officials and county bar associations.

Assemblywoman Gwen Moore (D-Los Angeles) has twice tried to pass legislation that would permit legal advisers to handle the paperwork for pro pers in simple divorces and landlord-tenant disputes. Each time it has been opposed by the State Bar board of governors. In August, Moore's modest bill (AB 1287) directing the state Department of Consumer Affairs to study and report on appropriate training, performance standards, and licensing procedures for legal technicians was amended to death on the Assembly floor. Moore abandoned it at the request of the bill's sponsor, the American Association of Retired Persons, because it had lost its original intent.

Nothing is to be gained by continuing to deny pro pers any legal assistance. The vast majority enter court without representation precisely because they cannot afford it. The bar's instinct for self-protection is inappropriate under these circumstances.

In cases with medium assets and income, court proceedings could be streamlined by limiting extensive formal discovery. Each party would have an affirmative duty to make a detailed disclosure of assets, liabilities, income, and expenses, and to produce relevant documents. The court would impose automatic sanctions for failing to provide this information or for failing to make timely responses to reasonable requests from the other side. Full discovery could be achieved using judicial oversight to compel the exchange of all necessary information.

To curtail defensive discovery—conducted by lawyers primarily to protect themselves against malpractice claims—the process would be limited to the mandatory production of documents and form interrogatories, except upon a showing of good cause. Lawyers representing the parties would be presumed by statute to have fulfilled their duty of care. The parties also would be limited to using joint or neutral experts. Finally, judicial oversight would make it much more likely that the conduct of each party and attorney would be consistent with our public policy of promoting cooperation and settlement.

In cases involving large incomes and assets, the present system works well, although it could be improved by judicial case management and telephone conferencing to speed the process and encourage cooperation.

I challenge the Legislature, the family law section of the State Bar, family law specialists, and the family law committee of the California Judges Association to assume leadership in creating a better system. Californians who are divorcing will not obtain justice until our court procedures allow basic legal assistance to those who cannot afford it and a simplified system for those who can. ❖

Associate Justice Donald B. King of the First District Court of Appeal in San Francisco writes frequently on family law matters.

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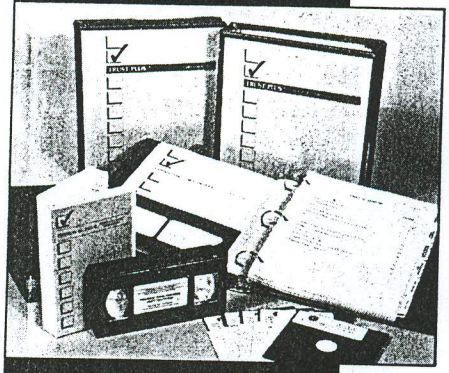

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