Family Law Troubles

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The future of family law is not in the Superior Court of the State of California. At least when it comes to family law cases, our judicial system no longer works satisfactorily. The result is widespread frustration with the process and dissatisfaction with the outcome. As Commissioner Robert A. Schnider of the Los Angeles Superior Court has recently remarked, the job of a family law judicial officer is to mete out equal measures of unfairness and impossibility to both parties.

This bleak characterization permeates every aspect of family law. The parties are overwhelmed by their own emotional and financial tragedies. The lawyers who represent them are overwhelmed by the dilemmas inherent in delivering a "service" that is widely regarded as not worth its cost. Judicial officers and clerical staff are overwhelmed by the sheer volume of cases that must be processed.

When it is all over, the parties are invariably unhappy, often embittered, and occasionally homicidal. Given the constraints imposed by their clients' limited financial resources, attorneys try to broker the best deal possible under the circumstances, but are vulnerable to the accusation that they accomplish too little and charge too much. Family law judicial officers are forced to decide more and more issues in less and less time, with severe limitations on their ability to read briefs, receive and review evidence, or reflect.

In an effort to streamline the family law courts, the California legislature has mostly succeeded in routinizing the system and rationing the administration of justice. In this respect, the legislature has been aided and abetted by the judiciary. The end result has been the transformation of the proceedings in family law cases from legal to administrative.

The great innovation of the 90's has been the determination of child support based on a mathematical formula. So-called guideline child support is mandatory. The Court has virtually no discretion. Intended to bring California's child support standards in line with those of other states, to comply with federal requirements and, incidentally, to eliminate disputes between the parties that must be resolved by the Court, the child support guidelines result in fixing only one component of the total demand on the parties' combined financial resources. Other components include spousal support, attorneys' fees, and in more affluent families, "extras" such as private school, orthodontia, summer camp, and so forth. These components of the total demand must still be determined by the Court on a case-by-case basis. Because one component of the equation has been fixed, the bickering between the parties over the other components has intensified.

This is not perceived as a significant institutional problem, primarily because, in the vast majority of cases, child support is the only financial issue. The parties both work, one or both are unrepresented by counsel, and the combined income is woefully insufficient to support two households. It barely enables the

parties to cover the cost of necessities (food, shelter, and clothing), let alone the cost of extras (private school, orthodontia, summer camp).

As a result of the volume of cases that fall into this category, the courts have adopted rules to conserve judicial resources. One of the most dramatic is the rule – more or less inflexible in many courts – that Orders to Show Cause will be determined based on the declarations of the parties and other witnesses and accompanying memoranda of points and authorities by counsel; there is no direct testimony, no cross-examination, and minimal argument.

Among their many needs, divorcing spouses feel the need to be heard as one of the strongest. A judicial system that permitted (even required) live testimony responded to this need. No more. The resolution of initial Orders to Show Cause (often the only "hearing" that takes place in the case) on the basis of declarations prepared by the attorneys, the conduct of mandatory settlement conferences only through counsel, and the pervasive use of meetings in chambers in which issues are resolved behind closed doors while the parties wait to learn their fate make a party's right to his or her "day in court" mostly illusory. Ironically, it is only those parties representing themselves who may reasonably expect to be heard by a judicial officer in the course of a family law proceeding.

The limitations on judicial discretion imposed by the legislature and the limitations on the Court's time imposed by busy calendars combine to ensure that the parties receive only rough justice at best. The imperative is to process an overwhelming number of cases. The price society pays in order to achieve that goal is the degradation of its judicial system, which already serves the needs of those who have no alternative poorly, and the needs of those with options virtually not at all.

The tragedy is not just that middle-class Californians no longer have access to the judicial system and must make other arrangements. The tragedy is that when an institution ceases to meet the needs of the people who pay for it, they will no longer support it, and the degradation of the institution will be accelerated.

Confronted with a court system that no longer works for them, it is not surprising that the affluent and, increasingly, the middle class opt for alternative forms of dispute resolution. Private judging and mediation are on the increase. As consumer dissatisfaction with the legal system increases, demand for ADR increases; as the dissatisfaction of practitioners (judges and lawyers) increases, the supply of private judges and mediators also increases to meet – and indeed create – the demand.

Judges and lawyers exhibit high levels of dissatisfaction. Judges understandably resent being called upon to referee endless family squabbles; lawyers suffer from an inability to comply with their professional obligations and the Court's procedural requirements, and still charge fees that are affordable by their clients. Since compliance with the Court's procedural requirements is mandatory, the attorney's choice becomes cutting corners when it comes to the discharge of his professional obligations or going largely unpaid.

Under these circumstances, the pressure for mediation comes not only from the parties, but also from family law practitioners. The parties want to be heard; they also want to control the process whereby

the issues that affect their lives will be determined. Family law attorneys are looking for ways to play a constructive role in the lives of their clients by facilitating agreements that will stand the test of time instead of coercing more or less unsatisfactory deals. Unlike judges, mediators have the satisfaction of orchestrating the healing process, rather than presiding over the destruction of the American family.

To be sure, both methods of dispute resolution – the traditional and the alternative – are in transition. But the traditional method is preoccupied with technology (computerization, fax filing, etc.) and other innovations designed to improve the efficiency of the system. In contrast, innovations in the mediation process have to do with enhancing client satisfaction. Alternative dispute resolution – particularly mediation – will eventually become the method of choice precisely because of this difference in emphasis.

Without exception, the mediation process ameliorates the deficiencies of the litigation format.

- Mediation is efficient and economical. There is no waiting. In contrast to a court appearance that might require the parties and their attorneys to be in court all morning in order to get a few minutes of attention from a judicial officer, mediation sessions are scheduled at mutually agreeable times, and the parties get the mediator's undivided attention for the duration of each and every session.
- Instead of being adversarial, mediation is collaborative. The focus is not so much on the parties' rights and duties, typically reduced to "positions" advocated by their attorneys in Court; rather, it is on their interests and concerns.
- The parties are in complete control of the process. Nothing is resolved without their knowledge and consent. No one has the power to impose a decision on them.
- To the extent substantive law – including support guidelines – is of predictive value to the parties, it is as helpful in the mediation context as it is in court. In many respects, the supervised negotiations of a mediation are not unlike a settlement conference, except that the parties speak for themselves instead of through counsel.
- Counsel are not excluded from the process. While negotiations ordinarily take place between the parties with counsel advising their clients behind the scenes, mediation is not inconsistent with the direct participation of counsel in the sessions. The same goes for the participation of forensic accountants, child custody evaluators, and other professionals.
- The parties are heard. They are heard by the mediator, and most importantly, they are heard by each other.

Some cases are intractable. However, cases wholly unsuited to mediation are few and far between. It would be fairer to say that certain cases are more difficult to mediate because they present unusual challenges, which could range from the complexity of the issues to the level of hostility between the parties.

One of the primary advantages of mediation is its infinite flexibility: Since the parties control the process, it can be adapted as required by the circumstances of their particular case.

To be sure, there will always be cases that are not amenable to any form of dispute resolution except the enforceable fiat of a judge (and sometimes not even then). Mediation, too, is not for everyone. When there is a history of physical or emotional abuse, there may be an inequality of bargaining power that cannot be redressed easily, even with the participation of consulting attorneys. There are cases in which one or both parties are irrational if not deranged. Sometimes, the level of hostility precludes civil conversation on any subject, let alone a collaborative approach to the resolution of disputed issues. There are also those for whom acting out through counsel in the context of a legal proceeding is cathartic. In all of these instances, mediation is unlikely to be chosen by the parties. Still, to say that mediation would not work well in every case is not much of a criticism; no method of dispute resolution would work well in every case.

Mediation will eventually become the preferred method of resolving family law cases because judicial officers can no longer do their jobs. Family law departments are inhospitable; the parties are not wanted, and they do not want to be there. Family law attorneys cannot do enough for their clients to justify their fees; with some justification, they are regarded as a necessary evil.

In contrast, mediators are eager to do their job. The mediation process depends for its efficacy on the voluntary participation of the parties. Consulting attorneys tap their knowledge and experience to empower the parties and to ensure that the final agreement covers all issues and complies with legal requirements.

In the litigation model, the parties have no control over the process. Their participation is minimal. Their presence is irrelevant. From the parties' perspectives, litigation involves the exclusion of the parties from the processes that will ultimately affect their lives forever.

What people are looking for is flexibility and control in all aspects of their lives – witness developments in the schools and the work place. The mediation model provides it. The litigation model does not.

In mediation, the presence of the parties, albeit voluntary, is required. Their participation is essential. They are not only included in the process, they are completely in control of that process.

What assures the eventual triumph of mediation as the preferred form of dispute resolution is that the parties are free to choose. One choice is an adversarial system that costs too much and takes too long and produces more or less unsatisfactory results in the context of a forum that is hostile to the parties. The mediation alternative is user-friendly, gets the parties through the process faster and cheaper, and delivers results that the parties believe to be fair. Which option would you choose?